# THE KILBRANDON ETHOS IN PRACTICE: THE ANTINOMY OF CARE AND CONDUCT IN THE CHILDREN'S HEARINGS SYSTEM

*An investigation into the characteristically unitary nature of the Scottish system of children's hearings*

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This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.



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## ABSTRACT

This thesis investigates the characteristically unitary nature of the children's hearings system ("CHS") by reference to legal process and decision-making practice. It argues that it is possible to distil from the system's constitutional document, the Kilbrandon Report, a general philosophy (herein termed the "Kilbrandon ethos") which should, in principle, underlie the current practice of the CHS. Broadly, this ethos rests on the unitary nature of the system, which involves dealing with all children "in trouble" alike, procedurally and philosophically, whether it is their own actions or those of others that bring them to the attention of the system's gatekeepers. The thesis argues that it follows from the Kilbrandon ethos that all children referred to children's reporters ("reporters"), and by reporters to children's hearings, ought to be dealt with in a similar manner, irrespective of the reason for which they are referred, and thereby explores whether differences in process and decision-making practice apply to different "types" of referral. Bringing together juvenile justice theory, original archival research, doctrinal analysis, classification theory, and the findings of an empirical study on reporter decision-making, the thesis contends that, while the Kilbrandon ethos has proved remarkably resilient, there are, nevertheless, indications that grounds of referral are not entirely interchangeable as access points to the CHS. In particular, it finds that referrals based on the offence ground and, more broadly, referrals based on grounds relating to the child's conduct, are dealt with differently from referrals based on care and protection grounds. The thesis considers the implications of such differences in approach and explores possible responses to bolster the Kilbrandon ethos in practice.

# CHAPTER 1: INTRODUCTION: A STUDY ON THE UNITARY NATURE OF THE CHILDREN'S HEARINGS SYSTEM

## 1.1: CONTEXTUALISATION

This thesis investigates adherence to the "Kilbrandon ethos" in the CHS. The CHS is Scotland's integrated juvenile care and justice system. It recognises that children who offend and children who require care and protection often have similar backgrounds and needs and so deals with such children through the same legal process and according to the same principles of welfare. This unified approach towards *all* children "in trouble,"[1] was established by the influential Report on Children and Young Persons[2] ("The Kilbrandon Report") and, so, is understood as constituting the "Kilbrandon ethos" of the CHS.

The thesis conceptualises that ethos as comprising two surviving aspects of the Kilbrandon reform: first, the use of an integrated decision-making forum for all children in need of compulsory measures of supervision, whether they come to the attention of the system's gatekeepers through their own actions or those of others; and, second, the absolute application of welfare principles to all such children.[3] The thesis demonstrates that the Kilbrandon ethos is deeply embedded within the practice of the CHS, in accordance with which it is accepted that the system draws little, or no, distinction between children who offend and children who require care and protection: its primary concern being the needs, rather than the deeds, of any child so referred.[4]

The thesis argues that a consequence arising from the Kilbrandon ethos is that there ought to be unity, in terms of procedure and decision-making, between all referral types in practice. The objective is to examine whether differences in process and decision-making practice apply to different "types" of referral. The role of the

[1] C.J.D. Shaw (1966) "Children in Trouble," *British Journal of Criminology*, Vol.1, pp. 112-122.
[2] C.J.D. Shaw (1964) *Report on Children and Young Persons* (*Scotland),* Cmnd. 2306, (Edinburgh: HMSO); S. Asquith (ed.) (1995) *The Kilbrandon Report: Children and Young Persons Scotland,* Children in Society Series (Edinburgh: HMSO). Hereinafter "The Kilbrandon Report."
[3] See, Children's Hearings (Scotland) Act 2011, ss. 25 & 67(2).
[4] See, K. Norrie (2011) *Children's Hearings: Past Problems and Challenges for the Future*, 25th November 2011, at p. 3. Available from: http://www.gov.scot/Resource/0038/00386948.docx (Accessed on: 17/11/2016): "Children's hearings deal with both children who have been offended against, and children who themselves offend. This was a very deliberate and central feature of the Kilbrandon Report, for their central finding, or their central intellectual judgment, was that the heart of the issue in all cases in which children come before the courts is a breakdown in good parenting. It follows directly from this finding that both sets of childrenshould be treated in exactly the same way, and should be subject to the same legal processes and with the same potential outcomes."

reporter, the gatekeeper to the CHS, is central to the testing of the Kilbrandon ethos. This is because it is the reporter who decides whether a child should be brought within the ambit of the system and, if so, on which basis: that is, on "care and protection,"[5] "offence,"[6] or, as this thesis originally contends, "conduct"[7] grounds.

The Kilbrandon ethos, as conceptualised herein, is essentially concerned with treating children "in trouble" alike. This thesis is concerned with identifying how such children come to be differentiated, and whether that subsequently leads to differences in process and gatekeeping decision-making practice, or is perceived by reporters to lead to differences in dispositive practice, between different types of referrals. In order to do so, it originally schematises the grounds upon which children can be referred to hearings[8] and identifies three major referral types within the current practice of the CHS, namely: "care and protection,"[9] "conduct"[10] and "offence."[11] A major contention is that it is reporters who are responsible for assigning the referral type at the gatekeeping stage, drawing an original distinction, along the lines of choice, between their exercise of discretion and professional judgment. In so doing, the thesis contends that reporters have discretion to choose the most appropriate ground of referral to found upon in referring children to hearings; effectively classifying referrals as belonging to a particular type at the gatekeeping stage.

The thesis examines the ways in which that designation process plays out in practice: particularly, it explores the theoretical and practical implications of classificatory practices performed by reporters in choosing the most appropriate ground of referral. It examines whether, and to what extent, the assigned referral type influences procedures, decision-making practice and disposal practice. The aim is to explore and investigate the Kilbrandon ethos so as to discover whether, in practical terms, all children are subject to a unified approach within the CHS. Procedural and discretionary disparities between different referral types are identified, and contradictions in policy and practice highlighted, which go against the grain of the

[5] See, Children's Hearings (Scotland) Act, ss. 67(2)(a) – (i) & (p) – (q).
[6] Ibid, s. 67(2)(j).
[7] Ibid, ss. 67(2)(k) – (o).
[8] See, Children's Hearings (Scotland) Act 2011, ss. 67(2)(a) – (q).
[9] Based on the "care" grounds contained in ss. 67(2)(a) – (i) & ss. 67(2)(p) – (q) of the 2011 Act.
[10] Based on the "conduct" grounds contained in ss. 67(2)(k) – (o) of the 2011 Act.
[11] Based on the "offence" ground contained in s. 67(2)(j) of the 2011 Act.

Kilbrandon ethos upon which the CHS was founded and its practice, ostensibly, is based.

### 1.2: IDENTIFICATION

The Kilbrandon Report recognises that children who offend and children who require care and protection typically have similar backgrounds and needs: the legal distinction between the groups of children generally being artificial and of limited practical significance.[12] A considerable body of research has engaged with this normative proposition by examining the social backgrounds of children "in trouble" and highlighting circumstantial similarities between them.[13] However, no existing research has questioned whether the groups of similar children are dealt with in a similar manner in practice. This research is the first study of its kind to define and assess the implications of the Kilbrandon ethos to practice. It makes an original contribution to knowledge by exploring – doctrinally, theoretically and empirically – adherence to that ethos.

The specific focus on the role of the reporter in this work makes an additional contribution to knowledge. Just as the CHS is a creature of the Kilbrandon reform so too is the reporter, who has been the central professional decision-maker in the children's hearings process since its inception. Limited research[14] has examined specifically the reporter's role, with very little known about the qualitative nature of reporter decision-making, including the extent of discretion and judgment exercised in deciding whether, and on which basis, children should be referred to hearings.

This gap in the existing body of research was highlighted by Martin and Murray at a relatively early stage of the system's operation. They called for empirical inquiry into all aspects of the CHS, but particularly into "the very considerable discretionary

[12] The Kilbrandon Report, at para.13.

[13] See, L. Waterhouse *et al* (2000) *The Evaluation of Children's Hearings in Scotland, Vol. 3: Children in Focus* (Edinburgh: Scottish Office Central Research Unit); L. Waterhouse & J. McGhee (2002) "Children's Hearings in Scotland: Compulsion and Disadvantage," *Journal of Social Welfare and Family Law,* 24(3): 279 – 296; L. Waterhouse, J. McGhee & N. Loucks (2004) "Disentangling Offenders and Non-Offenders in the Scottish Children's Hearings: A Clear Divide?" *The Howard Journal,* 43(2): 164 – 179; I. Gault (2005) *Study on Youth Offending in Glasgow* (Stirling: SCRA); SCRA (2007) *Children Referred to the Reporter with Low Levels of Offending* (Stirling: SCRA); J. McGhee & L. Waterhouse (2007) "Classification in Youth Justice and Child Welfare: In Search of the Child"*, Youth Justice,* 7(2) 107-120; SCRA (2008) *Children Who Present a Serious Risk of Harm* (Stirling: SCRA); L. McAra & S. McVie (2010) "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime*," Criminology and Criminal Justice,* 10(2) 179-209.

[14] See, F.M. Martin, S.J. Fox & K. Murray (1981) *Children Out of Court* (Scottish Academic Press) Chapter 5: Reporters' Discretion, pp. 64 – 92; C. Hallett *et al*. (1998) *The Evaluation of Children's Hearings in Scotland: Volume 1 Deciding in Children's Interests* (The Scottish Office Central Research Unit); I. Kurlus, L. Hanson & G. Henderson (2014) SCRA Research Report: Children's Reporter Decision Making (SCRA: Stirling).

powers" exercised by reporters in the course of their decision-making.[15] Only three major empirical studies[16] have since examined the reporter's role: the majority were conducted under previous statutory regimes and primarily adopted quantitative methods.[17] Moreover, none of the existing studies have explored any potential differences in gatekeeping decision-making practice based on the type of referral. There is, therefore, a specific need to examine reporter decision-making in its current context; to better understand its qualitative nature; and, to assess whether different decision-making practices and considerations apply to different referral types.

### 1.3: JUSTIFICATION

This thesis draws upon law and social science disciplines. It adopts a mixed methods approach by employing doctrinal, theoretical and empirical means to evaluate the Kilbrandon ethos in practice. A doctrinal approach allows children's hearings law, policy and procedure to be assessed in light of the Kilbrandon ethos, in order to examine whether the governing legislation and associated processes distinguish between children referred to hearings on the basis of different grounds of referral. A theoretical approach allows the gatekeeping functions of reporters to be analysed in light of classification theory so as to posit that, via the exercise of discretion, reporters classify referrals by reference to the type of ground deemed to be most appropriate, and to explore the theoretical consequences of this classification process. An empirical approach allows the qualitative nature of gatekeeping decision-making to be explored, and the influence of the assigned referral type on subsequent gatekeeping and dispositive decision-making practice to be investigated. Particularly, this permits two central hypotheses to be empirically tested: first, that reporters have discretion to choose the single most appropriate ground of referral, effectively classifying referrals as belonging to one of the three major referral types identified; and, second, that there is, or there is perceived to be, an interaction between the assigned referral type and the subsequent decision-making practices adopted by reporters and children's hearings. In this way, a doctrinal, theoretical and

[15] F.M. Martin & K Murray (1976) *Children's Hearings* (Scottish Academic Press) at p. 239.
[16] Martin, Fox & Murray (1981) (n.14); Hallett *et al*. (1998) (n.14); Kurlus, Hanson & Henderson (2014) (n.14).
[17] See, in particular, Martin, Fox & Murray (1981) (n.14); C. Hallett *et al*. (1998) (n.14).

empirical assessment of the Kilbrandon ethos is provided, testing the central claim that all children "in trouble" are subject to a unified approach in practice.

Its unitary and welfarist nature has been a defining characteristic of the CHS since its inception. Whilst no existing research has examined potential differences in process and practice based on referral type, the CHS is (and always has been) structured, organised and theorised on the basis of no such distinctions being drawn. It is, therefore, of crucial importance that the implications of the Kilbrandon ethos in policy and practice are examined. It is hoped that this thesis will serve to highlight the significance of the Kilbrandon ethos to the CHS and strengthen that ethos in practice.

### 1.4: ORIENTATION

The central contention of this thesis is that the CHS is not operating in a strictly unitary manner; its key findings being that procedural differences in practice apply uniquely to offence-type referrals, as compared to care and protection and conduct-type referrals, and that broader discretionary differences in practice apply to both offence and conduct-type referrals. A tension between cases related to the care and/or protection of children and those related to the conduct of children is identified in respect of gatekeeping and dispositive decision-making processes. The thesis contends that this antinomy between care and conduct is rooted in a toughening of approach towards those referrals relating to the behaviour of the child, including, but not limited to, the child's offending behaviour.

Although the CHS is widely recognised as a welfare-based system,[18] this thesis finds that some characteristics of a justice-based approach operate in practice where children are referred to reporters, and by reporters to hearings, on offence grounds and, to a lesser (but nevertheless notable) extent, on conduct grounds. This is found to be inextricably linked to the typical age of such children, and to involve the imputation of responsibility in recognition of their simultaneous autonomy and

[18] S. Asquith & M. Docherty (1999) "Preventing Offending by Children and Young People in Scotland" in P. Duff & N. Hutton (eds.) *Criminal Justice in Scotland* (Ashgate: Aldershot); C. Hallett & N. Hazel (1998) *The Evaluation of Children's Hearings in Scotland, Vol. 2 The International Context: Trends in Juvenile Justice and Welfare* (Edinburgh: Scottish Office Central Research Unit); C. Hallett (2000) "Ahead of the Game or Behind the Times? The Scottish Children's Hearings System in International Context", *International Journal of Law, Policy and the Family,* 14: 31 – 44; J. Muncie & G. Hughes (2002) "Modes of Youth Governance: Political Rationalities, Criminalization and Resistance," in J. Muncie, G. Hughes & E. McLaughlin (eds.) *Youth Justice: Critical Readings* (London: Sage) pp. 1 – 18.

vulnerability. Some departure from a strictly unitary and welfarist approach towards older (particularly teenage) children is identified, as is a typical trajectory from care to conduct-type referrals. The thesis finds that children are perceived to typically enter the system on care and protection grounds, proceed to conduct grounds and graduate to offence grounds. It thus identifies an escalation in referral type over time, as children, remaining within the CHS, get older. This calls into question the capacity of the CHS to respond to referrals and intervene effectively before care issues metamorphose into conduct issues. Overall, the thesis contends that the practice of the CHS is characterised by two related dichotomies, neither of which sit easily with the dominant Kilbrandon ethos: first, between welfare and justice-based philosophies; secondly, between care and conduct-type referrals. The overarching theme of this work is that offence and conduct-type referrals are treated differently to care and protection-type referrals. These ideas, arguments and findings are presented in the following way.

*Chapter 2* explores the relevance of the Kilbrandon Report to the current practice of the CHS. It adopts a predominately doctrinal approach and draws upon juvenile justice theory and original archival research. It begins by briefly discussing welfare and justice-based approaches towards juvenile offending, in order to locate the Scottish model, within a welfare-orientated approach. The Kilbrandon deliberations and recommendations, their subsequent implementation and development, follow. The grounds of referral are classified, rejecting the traditional dualism between "offence" and "care and protection," so as to identify three major referral types in current practice, including conduct-type referrals. The chapter concludes by highlighting the procedural distinctiveness of offence-type referrals due to a number of unique technical features that apply to them.[19] The conclusion, from the outset, is that the current statutory scheme inhibits the taking of a procedurally unitary approach towards all referral types.

Adopting doctrinal methods, *Chapter 3* focuses on the role and gatekeeping functions of the reporter. It discusses the Kilbrandon origins of the reporter's role,

[19] Namely: the age of criminal responsibility; the criminal standard of proof and evidentiary requirements; and, some quasi-punitive disclosure requirements. See, Criminal Procedure (Scotland) Act 1995, s. 41; Rehabilitation of Offenders Act 1974, s. 3; Police Act 1997, ss. 112 – 113, discussed in Chapter 2, at 2.5.B.

taking account of significant developments in policy and practice since, in order to establish that reporters are properly characterised as the "gatekeepers" to the CHS. The reporter's functions[20] are, thereafter, analysed and differences in process for certain referrals are highlighted.[21] The chapter argues that, by and large, these differences in gatekeeping process do not, *per se*, introduce a lack of unity between different referral types in practice. The chapter concludes by exploring the nature of reporter decision-making. The concepts of "discretion" and "professional judgment" are examined: the former being distinguished from the latter along the lines of choice.[22] Reference is made to relevant decision-making guidance in order to introduce the key argument that reporters have discretion to choose the single most appropriate ground of referral.[23] Limitations to the reporter's discretion to do so are explored,[24] and highlighted as being narrow in scope and decisively weak: the conclusion is that such limitations could easily be overcome in practice. As such, the chapter contends that reporters are free to choose the type of ground that they deem to be most appropriate at the gatekeeping stage.

This posited, *Chapter 4* assimilates reporter practice with classificatory practice. It argues that in exercising their discretion, reporters classify referrals as belonging to one of the three major referral types. The chapter explores the theoretical implications arising from the reporter's choice of ground at the gatekeeping stage. It draws on kinds[25] and labelling theory,[26] discrete sub-sets of classification theory, in order to highlight the interactive nature of human classification.[27] In particular, theories of reaction and interaction are explored and applied to referrals in order to theorise about reactions to, and interactions between, the assigned referral type and

[20] See, Children's Hearings (Scotland) Act 2011, ss. 66 – 69, discussed in Chapter 2, at 3.3.A.
[21] See, for example, Criminal Procedure (Scotland) Act 1995, ss. 48 & 49; Antisocial Behaviour Order etc. (Scotland) Act 2004, s. 12(1), discussed in Chapter 3, at 3.3.B.
[22] See, Chapter 3 at 3.4.
[23] See, in particular, SCRA (2013) *Practice Direction 7: Statement of Grounds – Decision Making and Drafting* (Stirling: SCRA) discussed in Chapter 3, at 3.4.B.
[24] See, *Constanda v. M* (1997) S.L.T. 1396, discussed in Chapter 3, at 3.4.B.
[25] See, for example, M.A. Khalidi (2013) "Kinds (Natural Kinds vs. Human Kinds)" in B. Kaldis (ed.) *Encyclopedia of Philosophy and the Social Sciences* (Thousand Oaks: Sage); F. Guala (2014) "On the Nature of Social Kinds" in M. Gallotti & J. Michaels (eds.) *Perspectives on Social Ontology and Social Cognition* (Springer); I. Hacking (1991) "A Tradition of Natural Kinds," *Philosophical Studies,* 61: 109 – 126; M.A. Khalidi (2010) "Interactive Kinds" *British Journal of Philosophy,* 61: 335 – 360, discussed in Chapter 4, at 4.2.
[26] See, for example, F. Tannebaum (1938) *Crime and the Community* (Columbia University Press); E. Lemert (1951) *Social Pathology* (New York: McGraw-Hill); E. Lemert (1967) *Human Deviance, Social Problems and Social Control* (New Jersey: Prentice Hall); H. Becker (1963) *Outsiders: Studies in the Sociology of Deviance* (New York: The Free Press); J. Kitsuse (1962) "Societal Reaction to Deviant Behaviour", *Societal Problems,* 9: 247 – 265; K.T. Erikson (1966) *Wayward Puritans: A Study in the Sociology of Deviance* (New York: Wiley), discussed in Chapter 4, at 4.3.
[27] See, in particular, I. Hacking (1995) *The Looping Effects of Human Kinds* in D. Sperber & A. Premark (eds.) *Causal Cognition: A Multi-Disciplinary Debate* (Oxford: Clarendon Press), discussed in Chapter 4, at 4.2 & 4.3.

the subsequent gatekeeping and dispositive practices adopted by reporters and children's hearings.[28] Not only does this provide a theoretical basis for the designation of referral types by reporters, but it also serves to explain empirical findings, which evidence that different gatekeeping decision-making practices apply, and different dispositive decision-making practices are perceived to apply, to different types of referrals.

*Chapter 5* presents the methodology adopted in respect of an empirical study undertaken on decision-making practice within the CHS, involving qualitative interviews with over 20% of practising reporters. It contextualises the study, outlines its aims and objectives, and reflects on the data collection and analysis processes. The limitations of the study are considered: namely, that it collected data on reporters' perceptions of the decision-making and disposal practices of panel members. As such, it emphasises that findings identifying perceived differences in dispositive practice based on referral type should be treated with caution, and that the direct influence of the assigned referral type on the practices of children's hearings could constitute the focus of a future study.

*Chapter 6* presents original empirical findings on the scheme and nature of reporter decision-making. It explores the structure and content of gatekeeping decision-making under the current statutory framework.[29] A number of general decision-making determinants, applicable to all referral types, are identified.[30] The chapter argues that there is a degree of unity in the way in which reporters make gatekeeping decisions about different types of referrals. Thereafter, it qualitatively explores the nature of reporter decision-making in order to substantiate the claim that reporters exercise discretion to choose the single most appropriate ground of referral.[31] In particular, findings highlight the role and importance of those grounds to reporter practice and confirm that reporters largely follow practice guidance to choose a single ground only at the gatekeeping stage.[32] The findings point to the exercise of

[28] See, Chapter 4, at 4.4.
[29] See, Chapter 6, at 6.1.
[30] See, Chapter 6, at 6.1.E.
[31] See, Chapter 6, at 6.2.
[32] See, Chapter 6, at 6.2.A – C.

discretion by reporters and empirically support the hypothesis that reporters designate referrals as belonging to a particular type at the gatekeeping stage.

*Chapter 7* presents original empirical findings on the influence of the assigned referral type on gatekeeping decision-making practice and the perceived influence of the assigned referral type on dispositive practice. Different gatekeeping considerations are found to apply to offence-type referrals and, to a lesser extent, conduct-type referrals.[33] These differences are found to be characterised by a shift in decision-making focus and emphasis, from parent to child, and involve account being taken of certain justice-orientated considerations by reporters in deciding whether to refer a child to a hearing. Next, findings are presented which are suggestive of a similar shift in decision-making focus and emphasis at the disposal stage, including punitive referral treatment which is perceived by reporters to apply to both offence and conduct-type referrals.[34] Whilst findings are presented to highlight that the assigned referral type is perceived to influence panel members' consideration of the referral, the ultimate disposal of the referral is perceived to be influenced by its gravity, rather than type.[35]

Overall, these findings substantiate the claim that the assigned referral type influences decision-making practice and, further, highlight the tension between care and conduct issues in practice, thereby supporting the central arguments of this thesis. The chapter concludes by presenting original empirical findings on the perceived escalation in referral type, involving a shift from care-type referrals to conduct-type referrals and, ultimately, to offence-type referrals as children get older.[36] It considers the implications of this *vis-à-vis* the capacity of the CHS to respond effectively to referrals and considers possible responses. In so doing, it presents original empirical findings about the potential diversion of children from offence-type referrals via their alternative referral to hearings on the basis of the

[33] See, Chapter 7, at 7.1.A – C.
[34] See, Chapter 7, at 7.2.A – B.
[35] See, Chapter 7, at 7.2.C.
[36] See, Chapter 7, at 7.3.

dedicated conduct ground,[37] so as to avoid the potentially stigmatising and punitive quality of referrals based on the offence ground.[38]

*Chapter 8* presents the conclusions arising from this thesis. It identifies a procedural and discretionary lack of unity between different referral types within the current practice of the CHS, evidencing some departure from key tenets of the Kilbrandon ethos. Proposals to strengthen that ethos and facilitate the adoption of a more robust unitary approach are outlined by way of a final conclusion to this work.

The law in this thesis is up-to-date as of 27th February 2017.

[37] Children's Hearings (Scotland) Act 2011, s. 67(2)(m).
[38] See, Chapter 7, at 7.3.C.

## CHAPTER 2: THE KILBRANDON REPORT: ITS EFFECT, ENDURANCE AND ETHOS

Scotland has long been proud of its unified and welfarist system of juvenile care and justice: namely, the CHS. Founded on the Social Work (Scotland) Act 1968, the CHS was introduced in 1971. It originates from the influential Report of the Kilbrandon Committee, first published in 1964.[39] Although over 50 years have since passed, child welfare policy and practice continues to resonate with the Kilbrandon Report; particularly in light of the passage of the Children's Hearings (Scotland) Act 2011 (the "2011 Act"). This chapter analyses the continued relevance of the Kilbrandon Report to the practice of the CHS. It begins by briefly discussing welfare and justice-based approaches towards juvenile offending in order to locate Scottish juvenile justice policy within a welfare-orientated model. This discussion is necessary as a frame of reference because, despite the widespread recognition that the CHS embodies a welfarist approach,[40] this thesis finds that some elements of a justice-based approach apply to children referred to reporters, and by reporters, to hearings on the basis of their own behaviour.

Thereafter, the chapter focuses on the Kilbrandon reform. Taking into account the Kilbrandon Committee's deliberations, the Report's recommendations, their implementation and subsequent development, the chapter argues that it is possible to extract a unique and enduring ethos which, in principle, underlies the current practice of the CHS. The chapter conceptualises and defines that "Kilbrandon ethos" as necessitating that all children "in trouble"[41] are dealt with in a similar manner, requiring that they be subject to the same legal procedures and the same welfarist quality of decision-making. The chapter concludes by evaluating the procedural limb of the Kilbrandon ethos under the 2011 Act, highlighting the technical distinctiveness of referrals based on the child's offending behaviour and, thus, identifying some departure from the Kilbrandon ethos.

[39] Shaw (1964) (n.2).
[40] Asquith & Docherty (1999) (n.18); C. Hallett & N. Hazel (1998)(n.18); Hallett (2000) (n.18); Muncie & Hughes (2002) (n.18).
[41] Shaw (1966) (n.1).

## 2.1: LOCATING SCOTTISH JUVENILE JUSTICE WITHIN A WELFARE MODEL

The prevention of juvenile offending is a major political and social priority throughout the world.[42] However, conclusive evidence as to the extent to which children engage in offending behaviour, and the efficacy of official responses to it, is difficult to ascertain at both the national and international levels.[43] Where there exists some consensus is in the widespread departure, since the 1960s, from welfare-orientated responses to juvenile offending, based on needs and treatment, towards justice-orientated responses, premised on proportionality and retribution.[44] Accordingly, issues of care and protection and offending are increasingly separated and, particularly in Western Europe and North America, systems of juvenile justice are based primarily on punitive, justice-orientated models.[45] This stands in sharp contrast to Scotland, which has retained a unitary and welfarist system since the introduction of the CHS.

### *2.1.A: WELFARE VS. JUSTICE*

Conceptual frameworks to describe juvenile justice systems have typically been located around a welfare-justice dichotomy.[46] Historically, there has been a tension between approaches that promote welfare principles so as to paternalistically address the needs of children who offend, and those which advocate justice principles in order to protect the rights of children against arbitrary and disproportionate forms of intervention. However, these models are ideal types and it is uncommon for systems to typify either exactly. Indeed, welfare and justice models are rarely found in pure form and it is recognised that most jurisdictions combine elements of both approaches.[47] Many theorists have charted how systems of juvenile justice have

[42] B. Goldson & J. Muncie (eds.) (2006) *Youth Crime and Justice: Critical Issues* (London: Sage) at p. 3.
[43] G. Buckland & A. Stevens (2001) *Review of Effective Practice with Young Offenders in Mainland Europe* (University of Kent: Europe European Institute of Social Services).
[44] N. Bala & R.J. Bromwich (2002) "An International Perspective on Youth Justice" in N. Bala, J.P. Hornick & H.N. Snyder (eds.) *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Toronto: Thompson).
[45] J.A. Winterdyk (ed.) (2014) *Juvenile Justice: International Perspectives, Models and Trends* (Taylor & Francis). See, also, J. Muncie (2008) "The 'Punitive' Turn in Juvenile Justice: Cultures of Control and Rights Compliance in Western European and the USA," *Youth Justice*, 8(2): 107 – 121.
[46] Hallett (2000) (n.18).
[47] L. Waterhouse & J. McGhee (2005) "International Themes in Juvenile Justice Policy" in J. McGhee, M. Mellon & B. Whyte, (eds.) *Meeting Needs, Addressing Deeds - Working with Young People who Offend* (Scotland: NCH)

travelled back and forth between the two poles over time.[48] Moreover, it has been acknowledged that the welfare-justice distinction is diminishing as a clear framework because: "Youth justice has evolved into a complex patchwork of processes and disposals, drawing on welfare, justice, retribution, rehabilitation, treatment, punishment, prevention and diversion."[49] Whilst the division between welfare and justice has become increasingly blurred, it is, nevertheless, the dominant discourse adopted to describe the global development of juvenile justice systems.

Simply put, the welfare model is based on the assumption that compulsory state intervention should be directed towards meeting children's needs, rather than punishing their deeds.[50] Alder and Wundersitz summarise the welfare model thus:

> "The 'welfare model' is associated with paternalistic and protectionist policies, with treatment rather than punishment being the key goal. From this perspective, because of their immaturity, children cannot be regarded as rational or self-determining agents, but rather are subject to and are the product of the environment within which they live. Any criminal action on their part can therefore be attributed to dysfunctional elements in that environment. The task of the justice system then, is to identify, treat and cure the underlying social causes of offending, rather than inflicting punishment for the offence itself."[51]

Above all, welfare-based approaches focus on the underlying causes of the child's offending behaviour and associated needs. Typically welfare-based systems are characterised by informality of procedures, the use of indeterminate interventions and, arguably, a lack of due process protections.[52] The introduction, at the beginning of the 20th Century, of systems of juvenile justice, separate to their adult counter-parts, primarily aligned with the welfare model. Indeed, welfare has been described as the dominant model in most western jurisdictions up until the second half of the

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[48] See, R. Harris (1985) "Towards Just Welfare," *British Journal of Criminology*, 25(1): 31 – 45; J. Wundersitz (1996) *The South Australian Juvenile Justice System: A Review of its Operation* (Adelaide: South Australian Office of Crime Statistics); J. Muncie (2005) "The Globalisation of Crime Control: The Case of Youth and Juvenile Justice," *Theoretical Criminology*, 9(1): 35 – 64.
[49] J. Muncie (2004) *Youth Crime: A Critical Introduction,* 2nd Edition (London: Sage) at p. 266.
[50] Ibid, at p. 257.
[51] C. Alder & J. Wundersitz (1994) "New Directions in Juvenile Justice Reform" in C. Alder & J. Wundersitz (eds.) *Family Conferencing in Juvenile Justice: The Way Forward or Misplaced Optimism* (Canberra: Australian Institute of Criminology) at p. 3.
[52] Bala & Bromwich (2002) (n.44) at p. 13.

20th century.[53] However, thereafter, justice emerged as the dominant approach.

The justice model imposes criminal responsibility in relation to juvenile offending.[54] It assumes that children, above a certain age of criminal responsibility, should be held accountable for their behaviour.[55] There is, therefore, a specific emphasis on the "responsibilization" of children who offend.[56] Justice-based models assess the child's culpability and, thereafter, apportion punishment in relation to the offence committed. It is characterised by formalistic procedures: the child is accorded full rights of due process.[57] Since interventions imposed are fixed and determinate, there is proportionality between the seriousness of the offence committed and the sentence, imposed.[58] Consequently, the justice model focuses narrowly on the offence committed, rather than examining the child's wider circumstances and needs. Alder and Wundersitz summarise it thus:

> "It assumes that all individuals are reasoning agents who are fully responsible for their actions and so should be held accountable before the law. Within this model, the task of the justice system is to assess the degree of culpability of the individual offender and apportion punishment in accordance with the seriousness of the offending behaviour. In so doing, the individual must be accorded full rights to due process, and state powers must be constrained, predictable and determinate."[59]

Key to the justice model is the idea that engaging in offending behaviour is a matter of choice; a rational decision made by the child to perform the criminal act.[60] Proof of the commission of an offence is the sole justification for intervention and punishment. Sanctions and controls, essentially punitive in their nature, are perceived as valid responses to the child's offending behaviour: both as an expression of society's disapproval and as a means to discourage reoccurrence of that behaviour.[61]

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[53] Ibid, at p. 14.
[54] J. Muncie (2015) *Youth and Crime,* 4th Edition (London: Sage) at p. 269.
[55] G. Stewart & N. Tutt (1987) *Children in Custody* (Aldershot: Avebury) at p. 92.
[56] See, B. Goldson (2002) "New Punitiveness: The Politics of Child Incarceration" in J. Muncie, G. Hughes & E. McLaughlin (eds.) *Youth Justice: Critical Readings* (London: Sage).
[57] Muncie (2015) (n.54) at p. 270.
[58] Ibid, at p. 270.
[59] Alder & Wundersitz (1994) (n.51) at p. 3.
[60] Stewart & Tutt (1987) (n.55) at p. 92.
[61] Ibid, at p. 92.

### *2.1.B: A MOVEMENT FROM WELFARE TOWARDS JUSTICE*

As welfare was largely overtaken by justice as the dominant model,[62] many of the fundamental assumptions underpinning welfarism were challenged: the inherent paternalism, tendency to undermine civil rights and latent discriminatory effects of the welfare model were highlighted.[63] There was increasing scepticism about the benefits of the welfare model, not least since it resulted in children receiving disproportionate and indeterminate levels of intervention in relation to the seriousness of offences committed.[64] Critics argued that children's rights were undermined on both theoretical and practical grounds. Theoretically, it was contended that the welfare model adopted the rhetoric of treatment, whilst exercising subtle forms of social control.[65] Practically, it was asserted that important legal safeguards were abandoned, through which juvenile offenders were susceptible to the broad discretionary powers of professionals, potentially forming the basis of arbitrary decision-making.[66] The result of such critiques, coupled with heightened public concern about juvenile offending, was a widespread retreat from welfare and a movement towards justice as the pre-eminent philosophy underpinning responses to juvenile offending in many western jurisdictions.[67] There was a renewed focus on responsibility, accountability and punishment, but also a specific emphasis on legal formalism and due process protections. Indeed, Hallett observes that the retreat from welfare was inextricably linked to demands for due process and access to formal justice in respect of children who offend.[68]

The global dominance of the justice model has been charted to the 1960s[69] and specifically traced to the landmark decision of *In re Gault*,[70] in which the US Supreme Court held that juveniles accused of committing criminal offences must be afforded the same due process protections as adults:

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[62] Bala & Bromwich (2002) (n.44) at p. 14.
[63] Muncie (2015) (n.54) at p. 274; N. Naffine, J. Wundersitz & F. Gale (1990) "Back to Justice for Juveniles: The Rhetoric and Reality of Law Reform," *Australian and New Zealand Journal of Criminology,* 23: 192 – 205, at p. 193.
[64] Muncie (2015) (n.54) at p. 277; See also, H. Geach & E. Szwed (1983) *Providing Civil Justice for Children* (London: Arnold).
[65] S. Asquith (2002) "Justice, Retribution and Children" in J. Muncie, G. Hughes & E. McLaughlin (eds.) *Youth Justice: Critical Readings* (London: Sage) at p. 276.
[66] Ibid*,* at p. 276; Muncie (2015) (n.54) at p. 277.
[67] Bala & Bromwich (2002) (n.44) at p. 18; See also, Naffine, Wundersitz & Gale (1990) (n.63).
[68] Hallett (2000) (n.18) at p. 34.
[69] J. Muncie (2004) "Youth Justice: Globalisation and Multi-Modal Governance" in T. Newburn & R. Sparks (eds.) *Criminal Justice and Political Cultures* (Cullompton: Willan); C. Hallett (2000) (n.18) at pp. 34 – 35.
[70] (1967) 387 U.S. 1.

> "Due process of law is the primary and indispensible foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[71]

This seminal judgment underpinned the rejection of the welfare model[72] and the emergence of a realigned justice model in the US.[73] Meanwhile, the former was similarly being called into question in the UK during the 1960s and 1970s.[74] The broad discretion afforded to professionals, such as social workers, under the welfare model was viewed as an arbitrary power.[75] Furthermore, it was thought that the procedures for dealing with juvenile offenders lacked accountability, leading to unjustified denials of liberty.[76] With a dramatic increase in the number of juveniles in custody in the UK, the pendulum swung towards justice, focussing on due process protections and the notion of "just deserts."[77] A similar approach to that adopted in the US was taken in England and Wales, and the juvenile justice systems in that jurisdiction and Scotland began to diverge substantially.[78]

### *2.1.C: WELFARE PREVAILS*

In Scotland, a radically different outcome was reached to the welfare versus justice debates of the 1960s, with the ultimate creation of the CHS. In significant ways, the introduction of the CHS "bucked" the international trends towards justice.[79] It represented an out-right rejection of the traditional "crime-punishment" concept in favour of an approach dictated by welfare considerations.[80] In rejecting the formal court system as the best placed forum to respond to the needs of children "in trouble" and, instead, instituting an informal lay tribunal system to do so, the CHS can be seen as aligning with the welfare model. In particular, this is because the lay tribunal was accorded the widest discretion to decide upon measures of intervention that

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[71] Ibid, at p. 387 U.S. 20.
[72] See also, *Kent v. United States* (1966) 383 U.S. 451.
[73] See, in particular, A. Von Hirsch (1976) *Doing Justice: The Choice of Punishments* (New York: Hill & Wang).
[74] Muncie (2015) (n.54) at p. 276.
[75] Ibid, at p. 276.
[76] B. Davies (1982) "Juvenile Justice in Confusion," *Youth and Justice*, 1(2): 33 – 36, at p. 33.
[77] Muncie (2015) (n.54) at p. 277.
[78] The welfare approach reached its ascendency in England and Wales in the 1960s: See, Children and Young Persons Act 1963 & Children and Young Persons Act 1969. However, arguably, the welfare model was never fully realised since court-based adversarialism continued to characterise the juvenile justice system in England and Wales and a classic justice model was, thereafter, preserved: See, Criminal Justice Act 1982, Criminal Justice Act 1988 & Children Act 1989.
[79] Hallett (2000) (n.18) at p. 36.
[80] The Kilbrandon Report, at para.80.

would be in the child's best interests,[81] thereby providing a clear contrast to the notions of proportionality and retribution associated with the "back to justice" movement.[82]

The institutional separation of children who offend and children who require care and protection is a corollary of the welfare-justice debate, since the proliferation of the justice model has increasingly led to the two groups of children being dealt with through separate and distinct legal mechanisms.[83] As Murray and Hill note: "If a general trend can be discerned in English-speaking countries it is towards the segregation of the processing of delinquents from that of care and protection cases."[84] Scotland is seen as one of the few jurisdictions opposing this trend, whereby the unitary nature of the CHS dictates that all children "in trouble," whether offending or offended against, are treated in accordance with their needs and in pursuit of their best interests. For these reasons, the CHS is widely regarded as embodying a welfare approach[85] and has been described as "one of the few bastions of a welfare-based youth justice system throughout the world."[86]

The roots of the CHS lie in the Kilbrandon Report, which led directly to its establishment and a radical reorientation of juvenile care and justice law and policy in Scotland. Its antecedent, operating under the terms of the Children and Young Persons (Scotland) Act 1937, was a system of specially constituted juvenile courts, primarily resting on a justice-based model, for children aged between 8 and 21.[87] In rejecting the continued use of these courts, and advocating a novel lay tribunal system based on principles of welfare, and the integration of children who offend and children who require care and protection within that system,[88] the Kilbrandon Report

[81] Ibid, at paras.79 – 80.
[82] Hallett (2000) (n.18) at p. 36; See also, Harris (1985) (n.48); Naffine, Wundersitz & Gale (1990) (n.63).
[83] Hallett (2000) (n.18) at p. 37; See also, B. Whyte (2000) "Youth Justice in Scotland" in J. Pickford (ed.) *Youth Justice: Theory and Practice* (London: Cavendish).
[84] K. Murray & M. Hill (1991) "The Recent History of Scottish Child Welfare," *Children and Society,* 5(3): 166 – 281, at p. 275.
[85] Asquith & Docherty (1999) (n.18); Hallett & Hazel (1998) (n.18); Hallett (2000) (n.18).
[86] Muncie & Hughes (2002) (n.18) at p. 8.
[87] See, Children and Young Persons (Scotland) Act 1937, Part IV.
[88] Interestingly the Children and Young Persons (Scotland) Act 1932 (the predecessor of the 1937 Act) brought the two categories together, and this was continued with the 1937 Act. HC Deb 12 Feb 1932, p. 1180: Under-secretary of State for Home Affairs, Oliver Stanley: "The fact is that the distinction between the two is largely accidental. The neglected child may only just have been lucky enough not to have been caught in any offence. The character of the child who has been suffering from a long period of neglect at home, or a long period of evil surroundings, is much more likely to have been seriously affected than the character of the young offender who is perhaps in the school as a result of one short lapse into crime. We do not believe that either will suffer from being in the same school. We shall adopt – instead of the old classification – a classification by geographical situation, by religious teaching, by the different opportunities of training different types of

was climacteric.

## 2.2: THE KILBRANDON REFORM

In 1961, the Secretary of State for Scotland appointed a working party under the chairmanship of Court of Session judge, Lord Kilbrandon,[89] to "consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers, and procedure of the courts in dealing with such juveniles."[90] The impetus for reform was two-fold: public concern about the post-war rise in juvenile delinquency; and professional concern about the limited development of juvenile courts, operating in only four areas of Scotland.[91] The primary concern of the Kilbrandon Committee was to determine the optimum means of dealing with children "in trouble,"[92] the major categories being identified as: (i) those with delinquent behaviour; (ii) those in need of care or protection; (iii) those beyond parental control; and, (iv) those who persistently truant.[93] The Committee, comprising two sheriffs, three magistrates, a juvenile court clerk, a probation officer, a professor of law, an approved school manager, a secondary school headmaster, a child psychiatrist and a chief constable,[94] was tasked with a broad remit, encompassing a much wider consideration than "simply delinquency."[95]

### *2.2.A: THE KILBRANDON DELIBERATIONS*

In order to address this comprehensive remit, the Kilbrandon Committee, from 1961 to 1964, received written evidence, and subsequently heard oral evidence, from a broad range of sources[96] in law, education, social care, health care and voluntary services.[97] Consulting bodies, working in close connection with the juvenile court structure, such as the Association of County Councils and the Sheriffs-Substitute

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people, and of course by age; only to a lesser extent do we take into account character."

[89] Lord Kilbrandon was elevated to the House of Lords in 1971 where he sat on the Appellate Committee between 1971 and 1976.

[90] The Kilbrandon Report, at para.1.

[91] D.J. Cowperthwaite (1988) *The Emergence of the Scottish Children's Hearings System: An Administrative/Political Study of the Establishment of Novel Arrangements in Scotland for Dealing with Juvenile Offenders* (University of Southampton).

[92] Shaw (1966) (n.1).

[93] The Kilbrandon Report, at para.5.

[94] Shaw(1966) (n.1).

[95] The Kilbrandon Report, "Introduction" at ix.

[96] See, National Archives of Scotland: Committee on Children and Young Persons – Written Evidence (ED11/633); National Archives of Scotland: Committee on Children and Young Persons – Oral Evidence (ED11/633).

[97] For a list of consultees to the Kilbrandon Committee, see Appendix B.

Association, opposed any major alteration to the existing arrangements.[98] Those bodies working directly with children and families, such as the Children's Officers Association[99] and the Association of Approved Schools, adopted an intermediate position, advocating the implementation of a more "child-friendly" court system.[100] However, crucially, a number of health care bodies, including the Scottish Division of the Medical Association and the British Psychological Society, called for the complete removal of children from the criminal justice system ("CJS").[101] Such a view aligned with evidence submitted by various education authorities, which criticised the existing juvenile court structure.[102] These criticisms had purchase with the Committee, which expressed dissatisfaction with the juvenile court system in its deliberations.[103] There was perceived to be a lack of uniformity in the types of court attended; the court procedures were regarded as unintelligible to children and families; and it was conceded that there was little guarantee of the special knowledge and skills required of those presiding.[104] In particular, the Committee considered that the juvenile court system was unsuccessful in compromising between individual responsibility and punishment on the one hand; and the best interests and special legal status of the child on the other.[105]

Original archival research highlights the essential focus of the Kilbrandon Committee's deliberations on matters of principle relating to juvenile offending. Indeed it framed its inquiry, from the outset, in relation to the issue of juvenile delinquency; perhaps unsurprisingly against the backdrop of a marked increase in juvenile delinquency throughout post-war Britain.[106] At its first meeting, the Committee considered that the main questions before it arose directly from the issue of juvenile offending and, in particular, the appropriateness of subjecting children to

[98] N. Bruce (1982) "Historical Background", in F.M. Martin & K. Murray (eds.) *The Scottish Juvenile Justice System* (Scottish Academic Press) at p. 6.
[99] The Association of Child Care Officers was established in 1949, in line with the Child Care Service created in 1948, as a dedicated body for child-care social work provision.
[100] Archive Files: Written Evidence (n.96); See also, Bruce (1982) (n.98) at p. 6.
[101] Ibid.
[102] Archive Files: Written Evidence (n.96): National Archives of Scotland: Committee on Children and Young Persons – Minutes of Fourth Meeting (29th January 1962) (HH60/768) at p. 2.
[103] Ibid.
[104] National Archives of Scotland: Committee on Children and Young Persons – Considerations of principle in relation to methods of dealing with juvenile delinquency, Appendix to CYP(62)7 (HH60/768) at p. 7; See also, Archive Files: Minutes of Fourth Meeting (n.102) at p. 2.
[105] Ibid, at p. 2.
[106] A. Lockyer & F. Stone (1998) "The Kilbrandon Origins" in A. Lockyer & F. Stone (eds.) *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (Edinburgh: T&T Clark) at p. 4; See also, The Kilbrandon Report, Appendix A, at p. 111.

the doctrine of criminal responsibility:

> "There was a field of actions by children, which, if committed by adults, were classed as crimes or offences. At present such acts were regarded as punishable by law, but one had to consider them not simply as transgressions of the legal code, but of the moral law . . . Secondly, the fact that juvenile offenders were recognised as being distinguishable from adult offenders raised the question of how far the concept of criminal responsibility could be applied to juveniles. That in turn raised questions of how far State intervention was justifiable or desirable in relation to the punishment and treatment of juvenile offenders."[107]

The preliminary question to be resolved was whether juvenile offenders ought to be dealt with by means of judicial process, within the framework of criminal justice, or by a different type of panel or committee, principally concerned with disposal and treatment.[108] In so resolving, the Committee observed that the legal issue before the juvenile court, in the vast majority of cases, was not one of determining legal guilt or innocence but simply one of disposal.[109] It acknowledged, early in its deliberations, that there was a "clear and basic distinction" between these functions of proof and disposal.[110] This distinction had been highlighted in evidence and was apparent from systems, particularly in Scandinavian jurisdictions, which had already acknowledged the distinct roles of proof and disposal.[111] The Kilbrandon deliberations challenged the fitness of the existing juvenile court structure for its primary task of disposal and treatment.[112] This led the Committee to consider whether the functions of proof and disposal should be separated.

This raised the question as to whether an entirely new form of machinery for dealing with juvenile offenders was, in fact, required.[113] This fundamental question is of

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[107] National Archives of Scotland: Committee on Children and Young Persons – Minutes of First Meeting (3rd July 1961) (HH60/768) at p. 1.
[108] National Archives Of Scotland: Committee on Children and Young Persons – Minutes of Third Meeting (4th December 1961) (HH60/768) at p. 1.
[109] The evidence revealed that a high proportion of juvenile offenders, at the time, were dealt with by means of admonition and absolute discharge, and that a similarly high proportion of juvenile offenders pled guilty without proceeding to trial. See, Archive Files: Minutes of Third Meeting (n.108) at p. 1. See also, The Kilbrandon Report, at paras.36 – 37 & 73.
[110] Archive Files: Minutes of Third Meeting (n.108) at p. 2.
[111] Ibid, at p. 2.
[112] Ibid, at p. 2.
[113] Archive Files: Minutes of Third Meeting (n.108) at p. 2.

crucial relevance to this thesis in that its resolution motivated the adoption of a unitary, welfarist approach towards all children in need of compulsory measures of supervision: most notably, children who offend. Indeed, the Kilbrandon deliberations had the potential to give rise to a completely different approach to that hitherto operating within the juvenile court structure.[114] The Committee explicitly acknowledged that any such proposal would be a radical one, not least since there could be resistance to the removal of juvenile offenders, as a substantial group, from the ambit of the criminal law.[115]

The first year of deliberations addressed these broad questions of principle, primarily applicable to juvenile offenders. Key to their resolution was the rejection of the doctrine of criminal responsibility and the crime-punishment concept. By the Committee's fifth meeting, oral evidence had been heard and a broad pattern, relating to a tension as to the application of the criminal law to juvenile offenders, was identified as emerging from the evidence-base.[116] The existing juvenile court structure constituted a modification of the adult criminal court structure, incorporating principles of welfare and treatment.[117] However, notwithstanding these modifications, the arrangements rested on the justice model: being essentially concerned with the offence allegedly committed and, if proven, the appropriate punishment. The Kilbrandon Committee challenged the validity of both the criminal responsibility doctrine and the crime-punishment concept, as applied to juvenile offenders.

It regarded the minimum age of criminal responsibility as "something of a red herring," bearing limited relation to reality, and was open to considering whether the concept should be "all together discarded."[118] At that time, the age of criminal responsibility was set at 8 years, by virtue of s. 55 of the Children and Young Persons (Scotland) Act 1937. The Committee observed that a considerable amount of discussion in the written evidence was about the desirability of raising the age of

[114] Ibid, at p. 2.
[115] Ibid, at p. 2-3.
[116] National Archives of Scotland: Committee on Children and Young Persons – Minutes of Fifth Meeting (4th June 1962) (HH60/768) at p. 1.
[117] See, Children and Young Persons (Scotland) Act 1937, s. 49(1).
[118] Archive Files: Minutes of Fifth Meeting (n.116) at p. 1.

criminal responsibility.[119] Additionally, a significant number of witnesses providing oral evidence visualised the Committee's remit in terms of the criminal responsibility of juveniles.[120] Of those who had expressed views on the matter, most (with the notable exceptions of the Sheriffs, Chief Constables and Procurators Fiscals) were in favour of abolishing the concept of criminal responsibility in respect of its application to juveniles.[121] Taking account of this evidence during the Committee's deliberations, Lord Kilbrandon stated:

> "Since there is no precise age at which it can be said that the expressions "criminal responsibility", *capax doli* and *mens rea* begin to have a meaning in relation to human beings generally, the concept behind them, which is a purely legal one without clinical or psychological significance, should be abolished."[122]

The Committee's deliberations reveal that it considered the legal presumption of criminal responsibility to be arbitrary in its application to juveniles.[123] The only profitable approach was one which, discarding entirely a minimum age of criminal responsibility, focussed essentially on treatment in light of the needs of the individual child, regardless of whether that child was classed as an offender or as being in need of care and protection.[124] As such, the Committee proceeded on the assumption that virtually all juvenile offenders would be removed from the criminal jurisdiction.[125]

The Kilbrandon Committee similarly rejected the traditional crime-punishment concept in terms of its application to juvenile offenders. It accepted that education and treatment should be dispensed, rather than punishment.[126] Although the juvenile courts were required to consider the child's welfare,[127] the word "welfare" in that context was taken to have a meaning similar to that used by a father who, "in

[119] *Ibid,* at p. 1.
[120] National Archives of Scotland: Committee on Children and Young Persons – Note by the Secretariat: Issues Arising from Oral evidence, CYP(62)7 (HH60/768) at p. 1.
[121] Ibid, at p. 1.
[122] Archive Files: Minutes of Fifth Meeting (n.116) at p. 1.
[123] Ibid, at p. 2.
[124] Archive Files: Considerations of Principle (n.104) at p. 2.
[125] Ibid, at p. 4.
[126] National Archives of Scotland: Committee on Children and Young Persons – Note of important issues arising from evidence, CYP(62)3 (HH60/768) at p. 1.
[127] See, Children and Young Persons (Scotland) Act 1937, s. 49(1).

punishing his child explains, 'it's for your own good.'"[128] The principle of treatment also featured in the criminal law of the time.[129] However, the Committee acknowledged that this principle was irreconcilable with the criminal justice framework within which it was applied, since "treatment is concerned not with personal responsibility as such at all, but with the prevention of future criminal actions of all the factors – personal or environmental, likely to conduce such actions."[130] Accordingly, the existing arrangements were perceived to represent an uneasy compromise between the crime-punishment concept and the prevention-treatment concept.[131] A holistic approach, unattainable within the criminal justice framework, was perceived to be required. The Committee ultimately rejected the crime-punishment model, in favour of one based on principles of prevention, treatment and education, in its early deliberations.[132]

The key consequence of this was that the "adjudicating agency" for dealing with all children "in trouble" would thereafter cease to be a juvenile court.[133] In order to "spare children from the rigours of the criminal justice system,"[134] the Committee was particularly influenced by developments in the Scandinavian jurisdictions where children had been excluded from the CJS in the early 1950s.[135] A system of child welfare committees had thereafter been introduced.[136] One of the Committee members, Professor Ireland, visited Norway to observe the child welfare committees in practice.[137] He reported back to Committee in July 1962, highlighting the preventative principle underlying that system:

> "In the great majority of cases juvenile delinquency ought to be regarded as merely one aspect of a wider problem, namely the protection of children who are in trouble from any cause."[138]

[128] Archive Files: Considerations of Principle (n.104) at p. 1.
[129] Children and Young Persons (Scotland) Act 1937, s. 49(1).
[130] Archive Files: Note of Important Issues (n.126) at p. 1-2.
[131] Archive Files: Considerations of Principle (n.104) at p. 1.
[132] Ibid, at p. 2.
[133] Archive Files: Note by the Secretariat (n.120) at p. 2.
[134] Lockyer & Stone (1998) (n.106) at p. 3.
[135] Bruce (1982) (n.98) at p. 3.
[136] Ibid, at p. 4.
[137] National Archives of Scotland: Committee on Children and Young Persons – Note by Professor Ireland on Child Welfare Committees in Norway, CYP(62)12 (HH60/768).
[138] Ibid, at p. 1.

This overarching principle resonated with the Committee's deliberations, supporting the development of an integrated system of care and justice, outwith the formal court structure. The remainder of the Committee's deliberations focussed on developing the necessary arrangements for the introduction of such a scheme in Scotland based broadly on that which was operating in Norway.[139] As such, innovations from Scandinavia paved the way for a completely new direction under Scots law.[140]

### *2.2.B: THE KILBRANDON RECOMMENDATIONS*

The Kilbrandon Committee reported on the 22nd April 1964. Far-reaching changes to both the principles and procedures for dealing with children "in trouble" were duly proposed. The existing juvenile court structure was found to be lacking due to its inflexibility, its tendency to inhibit the taking of preventative measures, and its failure to obtain the cooperation of parents.[141] The shortcomings of the existing system were attributed to the merging of the characteristics of a court of law with those of a specialised treatment agency.[142] In light of the tensions inherent within this compromise, the abolition of all existing juvenile courts was recommended.[143] In place of the juvenile court structure, the Report recommended the establishment of a tribunal system of children's hearings throughout Scotland, responsible for deciding whether the needs of any child, up to the age of 16 years, justified the imposition of compulsory measures of supervision.[144] A straightforward process, minimising legal technicalities, was proposed.

The recommended system was both unitary and welfarist in nature, aspiring to close the gap between children who offend and children requiring care and protection. As such, the Report proposed that the same legal process and decision-making principles be applied to both groups.[145] All such children were viewed as suffering from a form of social malaise: the common factor underlying the vast majority of cases being identified as a failure in upbringing.[146] The individual welfare of such children was,

[139] See, in particular, Minutes of 6th – 13th Meetings, National Archives of Scotland: Committee on Children and Young Persons – Minutes of Sixth Meeting (9th July 1962) (HH60/768); National Archives of Scotland: Committee on Children and Young Persons – Minutes of Sixth Meeting (9th July 1962) (HH60/768).
[140] See, The Kilbrandon Report, at paras.4 & 13.
[141] Ibid, at paras.40 – 49; See also, paras.35 – 36.
[142] Ibid, at paras.50-70.
[143] Ibid, at paras.80-100.
[144] Ibid, at paras.100-140.
[145] Ibid, at paras.12- 15.
[146] Ibid, at para.15.

therefore, to be the common focus for decision-making and intervention.[147] The existing procedures for children in need of care and protection allowed for the investigation of background and family circumstances to assess need and inform intervention.[148] This approach was seen as "an implicit recognition of the 'preventative principle'" and, so, the Report recommended that it be extended to juvenile offenders.[149]

The decision to refer a child to a children's hearing, it was proposed, would rest with a newly created official, known as the reporter, to whom all cases concerning children "in trouble" would be directed.[150] The Report specified that the children's hearing itself should consist of three lay panel members, including members of both sexes, who would serve on a voluntary and part-time basis.[151] It was recommended that decisions of children's hearings would be enforceable and made by exclusive reference to the individual child's needs.[152]

The primary consequence flowing from the Committee's proposals would be the virtual removal of children from the court system. Due to the trivial and uncontested nature of the vast majority of cases before the juvenile courts,[153] formal judicial proceedings were considered unnecessary and time-consuming, except in relation to the commission of the most severe offences. For these, the Report recommended that the common law power of the Lord Advocate, to prosecute juvenile offenders in the CJS, be preserved.[154] Whilst this important exception might appear to jar with the Committee's rejection of the criminal responsibility doctrine and crime-punishment concept, it is clear that the vast majority of cases at that time related to minor offences only.[155] As such, the traditional authority of the Lord Advocate, to bring cases in the sheriff court and High Court of Justiciary, for public policy reasons, was duly retained.[156] The Kilbrandon Committee found that, in practice, such cases had almost exclusively been confined to serious violent offences such as murder,

[147] Ibid, at para.15.
[148] See, Children and Young Persons (Scotland) Act 1937, ss. 65 – 66.
[149] The Kilbrandon Report, at para.59.
[150] Ibid, at paras.98 – 104.
[151] Ibid, at para.225.
[152] Ibid, at paras.12, 105 – 109 & 199 – 203.
[153] Ibid, at paras.8 & 37.
[154] Ibid, at para.125.
[155] See, The Kilbrandon Report, Appendix A.
[156] Ibid, at para.124.

culpable homicide and rape.[157] It therefore appears that the expectation was that all juvenile offenders, subject only to very few cases of exceptionality, would be dealt with in the CHS.[158]

This is in keeping with the Report's recommendation that any rule of law or statutory provision establishing a minimum age of criminal responsibility should be repealed.[159] The Report cast serious doubt on the application of the doctrine of criminal responsibility to children, holding that it "enshrines a proposition that is not necessarily true."[160] The Committee reported that the existing minimum age of criminal responsibility[161] was an arbitrary presumption, with no sound basis in "observable fact."[162] Its conclusion was that the doctrine should be abandoned.[163]

The recommendations of the Kilbrandon Report were not insulated entirely from the formal court structure, nor were they without legal safeguards. Based on deliberations about the dual function of the criminal courts,[164] the Report recommended that the functions of proof and disposal be separated.[165] In this way, the CHS would constitute a treatment agency: its authority being restricted to the function of disposal, with no remit to deal with questions of law or disputed issues of fact. Such issues would be heard before a sheriff and, if upheld, referred back to the children's hearing for disposal.[166] Rights of appeal to the sheriff court and to the Court of Session were additionally recommended.[167] In particular, the Report proposed that the child and parents should have a right of appeal against decisions of the children's hearing[168] and a right of regular review of supervision measures duly imposed.[169]

Notwithstanding the continued involvement of the courts in juvenile cases and, in particular, the interaction between the court system and the CHS, the Report laid

[157] Ibid, at para.124.
[158] Ibid, at para.124.
[159] Ibid, at para.139; See also, paras.60 – 67.
[160] Ibid, at para.62.
[161] Children and Young Persons (Scotland) Act 1937, s. 55.
[162] The Kilbrandon Report, at para.65
[163] Ibid, at para.65.
[164] Ibid, at paras.70 – 72.
[165] Ibid, at para.71.
[166] Ibid, at paras.110-117.
[167] Ibid, at paras.112-115.
[168] Ibid, at paras.110 – 117.
[169] Ibid, at para.197 – 198.

down a raft of far-reaching recommendations for the establishment of a welfarist tribunal system to deal with the vast majority of children in need of compulsory measures of supervision. Key to the recommendations was the idea that society should strive to avoid the criminalisation of children. As such, an informal, child-centred and holistic process was advocated; in order to guide children away from offending behaviour and, in so doing, address their unmet needs. This can be seen as a notable departure from justice-based models operating in most other western jurisdictions at the time.

### *2.2.C: THE IMPLEMENTATION OF THE KILBRANDON APPROACH*

The principal recommendations of the Report were enacted by the Social Work (Scotland) Act 1968. However some notable, albeit minor, modifications were made during the consultation process.[170] Crucially, for the purposes of this thesis, the recommendation that the minimum age of criminal responsibility be abolished was not accepted: no effect was given to the Committee's recommendation to remove the rule that children under 8 be deemed incapable of guilt for any offence.[171] This is significant because it introduced a procedural difference between referrals to children's hearings based on the child's offending behaviour and all others based on care and protection concerns.

Whilst the Committee's reasoning for so proposing[172] may have been sound, its ultimate conclusion was not. Arguably, the Committee fell into error here: instead of abolishing the minimum age of criminal responsibility, it should have raised it.[173] This is because the consequence of the Report's proposal was that, in principle, children from birth could be held criminally responsible and, in practice, the courts would determine criminal capacity in respect of children of any age.[174] Thus, in practical terms, the realisation of this proposal could have facilitated the prosecution of children *below* the existing minimum age in the CJS. This seems to be an unintended consequence of the Committee's recommendations, particularly in light

[170] See, White Paper (1966) *Social Work and the Community,* Cmnd.3065.
[171] For discussion see, Scottish Law Commission (2001) *Report on the Age of Criminal Responsibility* (Scot Law Comm. No. 185, 2001) at 2.2 – 2.13.
[172] The Kilbrandon Report, at paras.60 – 65 & 138.
[173] Indeed, such a proposal was mooted by the Kilbrandon Committee in its deliberations; noting that much of the evidence submitted supported the raising of the minimum age of criminal responsibility.
[174] A. Lockyer & F. Stone (1998) "The Kilbrandon Philosophy Revisited" in A. Lockyer & F. Stone (eds.) *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (Edinburgh: T&T Clark) at p. 24.

of its detailed and focussed deliberations on the doctrine of criminal responsibility, but it also highlights a considerable flaw in its conclusions. This flaw is significant to this thesis because it highlights a contradiction as to the reasoning, and a compromise as to the implementation, of the Kilbrandon approach, which served to distinguish the way in which children who offend and children who require care and protection came to be dealt with procedurally.

Interestingly, the Kilbrandon Report implicitly considered the possibility of rejecting entirely the notion of juvenile offending,[175] which could have addressed the highlighted flaw. This idea was toyed with in proposing an alternative recommendation to proceed, in all cases, on care and protection grounds:[176]

> "The basis of action in all cases would be the child's need for protection and training as shown by the facts alleged, irrespective of whether these facts consisted of a delinquent act or acts, or comprised other general facts and circumstances showing a clear need for protective and training measures. On that basis, children below the specified age-limit would be deemed to be incapable of committing crimes or offences."[177]

This alternative proposal is in keeping with the Committee's deliberations on the doctrine of criminal responsibility, and Lockyer and Stone note that such an approach would have allowed the doctrine of criminal responsibility, as applied to children, to have been properly set aside.[178] Under this alternative proposal, acts – which if committed by adults would amount to criminal offences – would be treated as grounds for care and/or protection and thus civil, rather than criminal, issues.[179] This position logically follows from the argument that the age of criminal responsibility should have been raised. The Report recommended that the CHS would have continuing jurisdiction over all children in need, subject to a statutory upper age-limit of 16 years.[180] A concurrent proposal to raise the minimum age of criminal responsibility in line with this upper age-limit, would have been more in keeping with the Committee's deliberations and reasoning. In this way, juvenile

[175] Ibid, at p. 24; See also, The Kilbrandon Report, at paras.66 – 70.
[176] The Kilbrandon Report, at paras.68 – 70.
[177] Ibid, at para.68.
[178] Lockyer & Stone (1998) (n.174) at p. 24
[179] The Kilbrandon Report, at para.68.
[180] Ibid, at para.118.

offending would have been converted into a civil wrong, with no basis in the criminal law.

However, it is clear that the Kilbrandon Committee was unwilling to decriminalise juvenile offending by transferring it from the criminal to the civil sphere. Indeed, the Report naively dismissed its alternative proposal to convert juvenile offending into a civil issue, and, hence, make all children's hearings proceedings civil in nature, as a change that was "little more than one of nomenclature."[181] One reason offered for so rejecting was the belief that proof of juvenile offending should be required on the criminal, rather than the civil, standard so as to protect against unwarranted intervention.[182] The Report regarded the lesser civil standard as "both artificial and inherently unstable."[183] The conclusion was that it would be anomalous and arbitrary to propose that juvenile offending be proven on the balance of probabilities, rather than beyond reasonable doubt.[184] However, in so concluding, the Committee missed an opportunity to reflect its reasoning within its recommendations. Indeed, this aspect of Kilbrandon's reasoning has been subject to criticism insofar as it is inconsistent to argue that juvenile offenders should be dealt with on a welfare basis, whilst, simultaneously, allowing some juvenile offenders to be prosecuted in the criminal courts.[185] Lockyer and Stone observe: "The Kilbrandon Report compromises by not challenging the concept of juvenile crime, but by divorcing it from liability to punishment, except in the 'gravest cases.'"[186] The outcome was that the age of criminal responsibility was maintained at 8 years, the consequence being that, in such cases of gravity, children over that age could be prosecuted in the CJS; a position that was preserved for over 30 years thereafter.[187]

Otherwise, the vast majority[188] of the Report's recommendations were enacted by the

[181] Ibid, at para.69.
[182] Ibid, at para.69.
[183] Ibid, at para.69.
[184] Ibid, at paras.69 -70.
[185] See, A. Morris (1974) "Scottish Juvenile Justice: A Critique" in R. Hood (ed.) *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (New York: The Free Press) at pp. 360-366; G.H. Gordon (1976) "The Role of the Courts" in F.M Martin & K. Murray (eds.) *Children's Hearings* (Scottish Academic Press) at p. 22.
[186] Lockyer & Stone (1998) (n.174) at p. 24.
[187] The Criminal Justice and Licensing (Scotland) Act 2010 eventually introduced a dual standard, whereby the age of criminal capacity is set at 8 years but the age of criminal prosecution is set at 12 years: See, Criminal Procedure (Scotland) Act 1995, ss. 41 – 41A. For a discussion of the age of criminal responsibility, including the Scottish Government's current proposal to raise age of criminal capacity to 12 years, see 2.5 at 2.5.B, below.
[188] It is worth noting that the Committee's recommendations around the concept of "social education" were eroded during the consultation process. In particular, the recommendation to establish a "social education department" to support the CHS became subsumed by the reorganisation of all social services in Scotland. The effect was that the social work department became the

Social Work (Scotland) Act 1968; Part III of which provided the legislative authority for the introduction of the CHS. The Kilbrandon recommendations were accepted in principle and, indeed, in much detail. They survived, with only minor amendments, three changes of government, a reorganisation of local government arrangements and a revision of social service provision during the consultation and implementation periods. In spite of the radical and far-reaching changes in both principle and policy, there was, in fact, very little serious opposition to the introduction of the CHS.[189] The result was that the Committee's proposals became embodied in legislation as a reflection of the original Report.

### 2.3: THE ENDURANCE OF THE KILBRANDON APPROACH

The CHS has, for almost fifty years, been the primary legal forum for the vast majority of Scottish children "in trouble." Referrals are made to the reporter who decides, following investigations, whether a children's hearing requires to be arranged for any child. This decision is founded on the application of a ground of referral and on the perceived need for compulsory measures of supervision.[190] The specified ground of referral must be accepted by the child and family or established by the sheriff before the children's hearing can consider and dispose of the case.[191] The children's hearing, made up of three lay panel members drawn from the local community, considers the child's circumstances and decides whether compulsory measures of supervision are required and, if so, what form those measures should take, by reference to the welfare of the child, which is the paramount consideration of the hearing.[192] Whilst this has been the basic framework of the CHS since its inception, the system has evolved. It was given a new statutory framework, first, by the Children (Scotland) Act 1995 and again, by the 2011 Act. Notwithstanding those changes in statutory scheme, the essential object of the system, its associated structures and underlying principles have remained largely unaltered since its inauguration.

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primary agency for obtaining background information and exercising continuing supervision over children subject to children's hearings intervention, rather than a dedicated department of social education: See, The Kilbrandon Report, at paras.232 – 234; White Paper (1966) (n. 170) at paras.10 & 60 – 63.

[189] Lockyer & Stone (1998) (n.106) at p. 14.

[190] See, 2011 Act, ss. 66(2)(a) – (b).

[191] Ibid, ss. 90 – 94.

[192] Ibid, s. 25.

### *2.3.A: LEGISLATIVE AND POLICY DEVELOPMENTS BEYOND THE KILBRANDON REPORT*

For over twenty-five years, the Social Work (Scotland) Act 1968 governed the CHS.[193] However, during the late 1980s and early 1990s, the system was subject to scrutiny and there was increasing momentum for legislative reform. A number of critical reports about the system's operation were published[194] and additional pressures arose; particularly as a result of heightened public concern about juvenile offending in the United Kingdom and the development of an international human rights agenda, under the auspices of the United Nations and the Council of Europe. Norrie notes that the latter development was enhanced through the ratification, by the United Kingdom, of the United Nations Convention on the Rights of the Child in 1990; thereby affording children's rights a higher political prominence than ever before.[195] These developments resulted in the passage of the Children (Scotland) Act 1995,[196] at which time the Kilbrandon Report was republished on the basis that it "was, and still remains, one of the most influential policy statements on how a society should deal with 'children in trouble.'" [197] Crucially, the changes implemented by the 1995 Act[198] did not fundamentally alter the essential characteristics of the CHS.

Shortly after the passage of the 1995 Act, however, the Human Rights Act 1998 was enacted, incorporating into UK law the European Convention on Human Rights.[199] Norrie observes that this had a "profound effect" on the operation of the CHS; the consequence being that domestic statutory law and practice could, thereafter, be challenged as being incompatible with ECHR law in the domestic courts.[200] This fundamental development, coupled with the introduction of Scottish devolution, via the Scotland Act 1998, significantly modified the constitutional structure of the Scottish legal system and led directly to the alteration of central aspects of the

[193] See, Social Work (Scotland) Act 1968, Part III.
[194] See, for example, J.J. Clyde (1991) *The Report of the Inquiry into the Removal of Children from Orkney in February,* H.C. Papers 1992-1993, No. 195 (Edinburgh: HMSO); B. Kearney (1992) *The Report of the Inquiry into Child Care Policies in Fife,* H.C. Papers 1992-1993: No. 191, (Edinburgh: HMSO); A. Finlayson (1992) *Reporters to the Children's Panel: Their Role, Function and Accountability* (Edinburgh: Scottish Office).
[195] K. Norrie (2013) *Children's Hearings in Scotland,* 3rd Edition (Edinburgh: Sweet and Maxwell) at para.1.01.
[196] Part III of the Social Work (Scotland) Act 1968 was repealed and re-enacted with modifications in Part II of the Children (Scotland) Act 1995.
[197] S. Asquith (1995) (n.2) at vii.
[198] The 1995 Act, for example, substantially revised child protection procedures and introduced powers for the children's hearing to exclude certain relevant persons from the hearing.
[199] Hereinafter the "ECHR".
[200] Norrie (2013) (n.195) at para.1.02; See also, Human Rights Act 1998 ss. 3 & 6.

children's hearings process.

Indeed, the transposition of the ECHR into domestic law had far-reaching ramifications. Thereafter, all public authorities, including local authorities and children's hearings, were required to act in a compatible manner with ECHR rights.[201] Furthermore, alleged breaches of ECHR rights could be considered by the domestic courts and Norrie contends that, in so considering, the Scottish courts have challenged and changed the design of central aspects of the CHS.[202] Specifically, such challenges, primarily based on Articles 6 and 8, ECHR, have served to accommodate the right to legal representation at children's hearings[203] and the right of a range of actors to participate in the children's hearings process.[204]

Additionally, a number of notable policy developments have been determinative to the continuous development of the CHS.[205] In particular, Getting It Right For Every Child ("GIRFEC") is of the utmost importance, since it constitutes the Scottish Government's policy statement on children and young people and has been described as "the bedrock for all children's services."[206] Such policy initiatives have led to an increasing emphasis on: the coordination of children's services and inter-agency working; early intervention and prevention in the provision of such services; and, specifically in relation to juvenile offending, diversion and desistance.[207] These policy objectives do not, however, represent a significant departure from the Kilbrandon approach: the coordination of child welfare services was central to Kilbrandon's proposals,[208] as was early detection of the child's difficulties and, thereafter, prevention of their re-manifestation.[209] Similarly, the CHS was founded upon principles of diversion. Primarily this manifested through the diversion of cases from the formal court system to the informal lay tribunal system, but also in the initial action taken by reporters in response to referrals, including decisions to take

[201] Human Rights Act 1998, s. 6(1).
[202] Norrie (2013) (n.195) at para.1.02.
[203] See, *S v. Miller (No 1)* 2001 S.L.T. 531; *S v. Miller (No 2)* 2001 S.L.T. 1304; *K v. Authority Reporter* (2009) S.L.T. 1019.
[204] See, for example, *Authority Reporter v. S (*2010) S.L.T 765; *M, Appellant* (2010) Fam. L.R. 152; *Principal Reporter v. K* [2010] UKSC 56.
[205] See, Scottish Government (2005) *Getting it Right for Every Child: Proposals for Action* (Edinburgh: Scottish Government); Scottish Government (2008) *The Early Years Framework* (Edinburgh: Scottish Government); Scottish Government (2012) *A Guide to Getting it Right for Every Child* (Edinburgh: Scottish Government).
[206] Scottish Government (2012) (n. 205) at p. 6.
[207] C. Lightowler, D. Orr & N. Vaswani, (2014) *Youth Justice in Scotland: Fixed in the Past or Fit for the Future* (Glasgow: Centre for Youth and Criminal Justice) at p.11.
[208] See, The Kilbrandon Report at paras.91, 104 & 233 – 237.
[209] Ibid, at paras.13, 39 & 53 – 54.

no further action or to refer for voluntary measures of support.[210] In this way, the Scottish Government's policy objectives are very much in keeping with the Kilbrandon approach.

As a result of these significant legal and policy developments, the Scottish Government, in 2008, mounted a second review of the CHS.[211] A lengthy period of consultation followed after the publication of a draft Children's Hearings (Scotland) Bill in 2009[212] and, as a result of the consultation responses,[213] a substantially redrafted Bill was presented to the Scottish Parliament in February 2010,[214] ultimately resulting in the passage of the 2011 Act. Intended to "strengthen and modernise Scotland's unique hearings system,"[215] the 2011 Act retains the philosophy, principles and process established by Kilbrandon. However various changes were made to the law[216] so as to ensure consistency with the ECHR and the objectives of GIRFEC.[217] That being said, the 2011 Act largely upholds the Kilbrandon approach; thereby solidifying its contemporary relevance to the practice of the CHS today. As McDiarmid notes, the Kilbrandon Report has enjoyed "remarkable longevity."[218] Indeed, the ostensible endurance of its approach is noteworthy on (at least) two grounds: first, in contrast to international trends moving increasingly towards justice-based responses to juvenile offending[219]; and, second, in view of the fact that the essential characteristics of the Kilbrandon reform remain fundamentally intact and, so, are reflected by the current legislative framework.[220]

### *2.3.B: BLURRING THE LINES BETWEEN WELFARE AND JUSTICE?*

The Scottish system is generally accepted as conforming to the welfare model.[221] However, not all scholars have accepted the CHS as exemplifying the welfarist

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[210] Hallett (2000) (n.18) at p. 38.
[211] Scottish Government (2008) *Strengthening for the Future: A Consultation on the Reform of the Children's Hearings System* (Edinburgh: Scottish Government).
[212] Scottish Government (2009) *Draft Children's Hearings (Scotland) Bill* (Edinburgh: Scottish Government).
[213] Scottish Government (2009) *Consultation Responses on the Draft Children's Hearings Bill* (Edinburgh: Scottish Government).
[214] Children's Hearings (Scotland) Bill, S.P. Bill 41, February 2010.
[215] Scottish Government (2008) (n.211) at p. 3.
[216] The 2011 Act, for example, substantially revised the grounds upon which a child can be referred to a children's hearing and introduced new procedures that allow a children's hearing, or pre-hearing panel, to deem an individual to be a relevant person: See, 2011 Act, ss. 67 & 81.
[217] Norrie (2013) (n.195) at para.1.02.
[218] C. McDiarmid (2005) "Welfare, Offending and the Scottish Children's Hearings System," *Journal of Social Welfare and Family Law*, 27(1): 31 – 42, at p. 31.
[219] Bala & Bromwich (2002) (n.44).
[220] Discussed at 2.3.C, below.
[221] See, Asquith & Docherty (1999) (n.18); Hallett & Hazel (1998) (n.18); Hallett (2000) (n.18); Muncie & Hughes (2002) (n.18).

ideal.[222] Arguably, it has not been wholly immune to pressures, experienced elsewhere, resulting in justice-orientated reforms.[223] In fact, there are some features of the CHS, derived from the Kilbrandon Report itself, that align with the justice model. It appears that the Committee was, at least implicitly, cognisant of the critiques of welfarism, particularly around due process protections and indeterminate interventions.[224] It retained some aspects of the justice approach, within a broader welfarist framework, by proposing a right of appeal to the sheriff against decisions made, and interventions imposed, by children's hearings,[225] and by recommending a right of regular review of any such measures put in place.[226] Furthermore Kilbrandon's principal institutional innovation, the separation of proof from disposal, was motivated by due process considerations, as was the recommendation that offences be proven on the criminal, rather than the civil, standard of proof.[227] However, crucially, decision-making on disposal was to be unequivocally welfarist in nature.[228] As such, the Kilbrandon Report gave rise to a hybrid system, which afforded a central place to welfarism, whilst, simultaneously, strengthening due process protections. The CHS thus clearly evidences that the justice-welfare dichotomy is not a binary issue but, rather, a question of where the balance is struck between the two imperatives.

However, a number of scholars have attributed an erosion of the welfarist ideal to Scottish devolution.[229] In the years immediately following devolution criminal justice policy was subject to review, resulting in an intense period of legislative and governance changes (involving an inevitable focus on process) which affected the provision of juvenile justice. Despite the ostensible differences in juvenile justice principles and institutional structures in Scotland and England and Wales, it has been

[222] See, for example, J. McGhee & L. Waterhouse (1998) "Justice and Welfare: Has the Children (Scotland) Act 1995 Shifted the Balance?" *Journal of Social Welfare and Family Law,* 20(1): 49 – 63; A. Cleland (2005) "The Antisocial Behaviour etc. (Scotland) Act 2004: Exposing the Punitive Fault Line Below the Children's Hearings System, *Edinburgh Law Review,* 9(3): 439 – 488; L. McAra (2006) "Welfare in Crisis? Key Developments in Scottish Youth Justice" in J. Muncie & B. Goldson (eds.) *Comparative Youth Justice: Critical Issues* (London: Sage); L. Piacentini & R. Walters (2006) "The Politicization of Youth Crime in Scotland and the Rise of the 'Burberry Court,'" *Youth Justice,* 6(1): 43 – 59; M. Nellis, S. Wiltshire & K. Pilkington (2010) "Young People, Youth Justice and Anti-Social Behaviour" in J. Johnstone & M. Burman (eds.) *Youth Justice: Policy and Practice in Health and Social Care* (Edinburgh: Academic Press)*;* See also, McDiarmid (2005) (n.218) at pp. 33 – 36.
[223] McDiarmid (2005) (n.218*)* at p. 33.
[224] See, The Kilbrandon Report at para.5.
[225] Ibid, at paras.110 – 117.
[226] Ibid, at paras.197 – 198.
[227] Ibid, at paras.70 – 76.
[228] Ibid, at para.12.
[229] See, A. Bottoms & J. Dignan (2004) "Youth Justice in Great Britain", *Crime and Justice,* 31(1): 21 – 184; H. Croall (2006) "Criminal Justice in Post Devolutionary Scotland", *Critical Social Policy,* 26(3): 587 – 607.

argued that there is "an increasingly similar set of demands and pressures on those responsible for the formulation of and delivery of youth justice throughout the UK as a result of converging themes."[230] As such, institutional responses to juvenile offending have been regarded as being "segued" between welfare and public interest concerns.[231]

McAra has argued that Scotland's longstanding commitment to welfarism has been steadily eroded and replaced with a more punitive criminal justice agenda, involving a greater emphasis on individual responsibility.[232] A number of initiatives, during the early 2000s, demonstrate this agenda. In particular, the introduction of a youth court pilot for "persistent" young offenders, aged 16 and 17, demonstrates a toughening in ideology towards older, teenage children.[233] Moreover, the adoption of the anti-social behaviour agenda[234] facilitated the introduction of a range of punitive measures, including the use of "electronic tagging" for under 16 year olds.[235] McDiarmid notes this indicates a "hardening in approach" towards juvenile offenders and, consequently, a retreat from welfare.[236] McNeil contends that, as a result, children in need of support are becoming "fast-tracked to punishment, supervision and increased regulation."[237] Furthermore, the perception of juvenile offending as a pervasive problem has contributed to the introduction of justice-orientated strategies. McDiarmid highlights the role of the Scottish media in perpetuating a negative view of juvenile offenders and the CHS itself.[238] Furthermore, Burman and McAra have argued that concerns about crime in Scotland are firmly rooted within a negative

[230] M. Burman (2010) "Introduction" in in J. Johnstone & M. Burman (eds.) *Youth Justice: Policy and Practice in Health and Social Care* (Edinburgh: Academic Press) at xiii – xiv.
[231] M. Burman & S. Batchelor (2009) "Between Two Stools? Responding to Young Women who Offend," *Youth Justice,* 9(3): 270 – 285, at p. 272.
[232] L. McAra (2004) "The Cultural and Institutional Dynamics of Transformation: Youth Justice in Scotland and England and Wales," *Cambrian Law Review,* 35(1): 23 – 54; L. McAra (2008) "Crime, Criminology and Criminal Justice in Scotland," *European Journal of Criminology,* 5(4): 481 – 504.
[233] See, Scottish Justice Department (2002) *Youth Court Feasibility Group Report* (Edinburgh: Scottish Government). For discussion, see, Piacentini & Walters (2006) (n.222) An evaluation of the youth court pilot found that it encouraged prosecution in cases that might have previously attracted an alternative intervention, thereby leading the Scottish Government to abandon the initiative: see, G. McIvor *et al* (2006) *Evaluation of the Airdrie and Hamilton Youth Court Pilots* (Edinburgh: Scottish Government).
[234] Under the Anti-Social Behaviour Etc. (Scotland) Act 2004 which, amongst other things, allows 12 – 15 year olds to be made subject to an anti-social behavior order: see, ss. 4(2)(a) & 9(1).
[235] Ibid, s. 135. For discussion, see, Cleland (2005) (n.222).
[236] McDiarmid (2005) (n.218) at p. 34.
[237] F. McNeil (2009) "Supervising Young Offenders: What Works and What's Right?" in M. Barry and F. McNeill (eds.) *Youth Offending and Youth Justice* (London: Jessica Kingsley) at p. 140.
[238] McDiarmid (2005) (n.218) at pp. 33 – 34.

discourse of youth.[239] All of this suggests that, despite the CHS, the welfare model is increasingly challenged by discourses of responsibility, accountability and retribution.[240]

### *2.3.C: THE PERPETUATION OF THE ESSENTIAL CHARACTERISTICS OF THE KILBRANDON REFORM*

Against this backdrop, there was significant concern that the children's hearings process would be modified to reflect the prevailing criminal justice agenda in the Scottish Government's most recent review of the CHS.[241] In particular, there was concern that an altogether different means of dealing with juvenile offenders may have been pursued, resulting in the institutional separation of offence and care and protection cases.[242] Indeed, it was reported in the media that the Scottish Government had plans to separate children referred to a hearing on offence grounds from children referred on care and protection grounds.[243] Such an approach would be in keeping with the punitive turn in Scottish criminal justice policy; resulting in a retreat from the welfare model and a departure from the Kilbrandon approach. However, such a movement towards justice did not materialise in practice and, arguably, the outcome of the review, the 2011 Act, restored the balance to welfare. Crucially, the 2011 Act retained an integrated approach towards offence and care and protection cases, and maintained the welfare principle as the paramount decision-making criterion.[244]

The preservation of a unitary and welfarist approach, under the 2011 Act, highlights the second ground upon which the endurance of the Kilbrandon approach is noteworthy. That is, the longstanding commitment to the essential characteristics of the Kilbrandon reform: these being the use of an integrated tribunal and the application of welfare principles to all children "in trouble" deal with through that unitary forum. Not only has this basic framework been retained since the

[239] M. Burman, P. Bradshaw, N. Hutton, F. McNeil & M. Munro (2006) "The End of an Era? Youth Justice in Scotland," in J. Junger-Tas & S.H. Decker (eds.) *International Handbook of Juvenile Justice* (Netherlands: Springer) pp. 435 – 468; McAra (2006) (n.222).
[240] J. Muncie (2006) "Repenalisation and Rights: Explorations in Comparative Youth Criminology," *The Howard Journal of Criminal Justice*, 45(1): 47 – 70, at p. 53.
[241] See, R. Stevenson & R. Brotchie (2004) *Getting it Right for Every Child: A Report on the Responses to the Consultation on the Review of the Children's Hearings System* (Edinburgh: Scottish Government).
[242] See, McDiarmid (2005) (n.218) at p. 35.
[243] See, The Sunday Herald, 18th April 2004, at p. 5; The Herald, 14th May 2004, at p. 1.
[244] See, 2011 Act, s. 25(2).

introduction of the CHS but relatively few changes have been made, in the years that have since passed, to the way in which the process operates.[245]

In this way, the continued relevance of the Kilbrandon Report to the contemporary practice of the CHS should not be understated since it "continues to act as a touchstone for practitioners, policymakers, researchers and politicians." [246] In particular, Norrie highlights the enduring commitment to the vital features of the CHS across the political gamut, noting: "The 1968 Act was passed by a UK Labour Government; the 1995 Act by a UK Conservative Government; and the 2011 Act by a Scottish Nationalist Government."[247] As such, the essential characteristics of the Kilbrandon reform have persisted without serious political opposition for almost half a century.[248] The CHS has evolved during this period, particularly in light of legislative reform, human rights norms, and the shifting tides of criminal justice policy, but the Kilbrandon philosophy and principles have proved to be "remarkably robust,"[249] with a lasting legacy in the provision of juvenile care and justice in Scotland.

## 2.4: CONCEPTUALISING THE KILBRANDON ETHOS

The Kilbrandon recommendations are premised on a humane philosophy and associated principles of welfare, which merit fuller discussion: not least due to their central relevance to this thesis *vis-à-vis* the Kilbrandon ethos. The remainder of this chapter originally conceptualises the Kilbrandon ethos before evaluating procedural observance to that ethos under the current statutory framework.

### *2.4.A: THE KILBRANDON PHILOSOPHY*

A key finding of the Kilbrandon Committee was that the legal distinction between children who offend and children who require care and protection was largely artificial when the underlying circumstances and needs of such children were examined.[250] Based on a "consensus of experienced opinion," the Committee found that the basic underlying similarities between the groups of children under inquiry

[245] S. Asquith (1998) *"Children's Hearings in an International Context"* in A. Lockyer & F.H. Stone (eds.) *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (Edinburgh: T&T Clark) at p. 238.
[246] Lightlowler, Orr & Vaswani (2014) (n.207) at p. 2.
[247] Norrie (2013) (n.195) at para.1.03.
[248] Ibid, at para.1.03.
[249] Ibid, at para.1.03.
[250] The Kilbrandon Report, at para.13.

"far outweighed" any relevant differences between them.[251] This involves a key recognition that, more often than not, children who offend and children who require care and protection are one and the same. And because such children typically have similar backgrounds and needs, there is more to unite them than to distinguish them, thereby justifying the adoption of a unified legal approach towards them.

In particular, the Kilbrandon Committee believed that, in terms of the child's actual needs, the legal distinction between children who offend and children who require care and protection was often of limited practical significance: offending behaviour being generally indicative of a failure in upbringing.[252] The Committee argued that, more often than not, the problems of all children "in trouble" could be traced to shortcomings in the home, family or school environment.[253] Such children, whether offenders or non-offenders, were described as "hostages to fortune"[254] and the Committee concluded that measures to address their needs should be taken within a unified system of welfare.

Lockyer and Stone refer to this philosophy as the "general aetiological proposition,"[255] involving a central assumption that children who offend are equally in need of protection, guidance, treatment and control as children who have been abused or neglected.[256] Norrie considers that the "unusual feature lies in the fact that it is the same tribunal, operating under the same procedural rules and having the same available disposals, that deals with all children identified as being in need of help."[257] The use of a single, unitary forum for all children "in trouble" is a direct reflection of the Kilbrandon philosophy, even though this approach built upon antecedents in the 1932 and 1937 Acts. The 2011 Act preserved such an integrated approach, retaining the children's hearing as the primary decision-making forum for children referred on both offence and care and protection grounds. Moreover, the current Youth Justice Strategy for Scotland reiterates the political commitment to the

[251] Ibid, at para.15.
[252] Ibid, at para.13.
[253] Ibid, at para.13.
[254] Ibid, at para.251.
[255] Lockyer & Stone (1998) (n.174) at p. 18.
[256] Norrie (2013) (n.195) at para.1.04.
[257] Ibid, at para.1.04.

Kilbrandon philosophy specifically in relation to children who offend.[258] In these ways, the Kilbrandon philosophy is given effect by the current statutory and policy scheme.

### *2.4.B: THE WELFARE CRITERION*

Key to the realisation of the Kilbrandon philosophy was the Committee's adoption of the welfare criterion and the accordance to it of primacy amongst the considerations informing the decision-making process. Lockyer and Stone assert that the prominence afforded to the welfare principle gives rise to a normative proposition, dictating that all children "in trouble" ought to be treated according to their best interests.[259] Indeed, the Kilbrandon Committee's vision for the CHS was that decision-making within it would be entirely welfarist in nature:

> "The object must be to effect, so far as this can be achieved by public action, the reduction, and ideally the elimination, of delinquency. If public concern must always be for the effective treatment of delinquency, the appropriate treatment measures in any individual case can be decided only on an informed assessment of the individual child's actual needs."[260]

McDiarmid notes that this statement constitutes a clear endorsement of the welfare principle, recognising "that meeting the child's needs will, in itself, lead to the reduction or, ideally, the elimination of his/her criminality."[261] Indeed, the Kilbrandon recommendations have a clear welfare orientation, with needs, rather than deeds, founding the basis for decision-making and intervention. Accordingly, the decision as to whether, and in what manner, to intervene should be taken entirely by reference to the individual child's needs.

Today, that principle is given effect by section 25(2) of the 2011 Act, which stipulates that: "The children's hearing . . . or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration." This applies in respect of both children who offend and

[258] Scottish Government (2015) *Preventing Offending: Getting it Right for Children and Young People* (Edinburgh: Scottish Government) at pp. 1 – 2.
[259] Lockyer & Stone (1998) (n.174) at p. 17.
[260] The Kilbrandon Report, at para.12.
[261] McDiarmid (2005) (n.2128) at p. 33.

children who require care and protection. It should, however, be acknowledged that the 2011 Act's predecessor, the Children (Scotland) Act 1995, introduced an important proviso to the welfare principle,[262] which was, to some extent, replicated by the 2011 Act.[263]

Notably, under the 1995 Act, children's hearings and courts were empowered to depart from the welfare principle if this was considered necessary to protect members of the public from serious harm.[264] Unlike the Social Work (Scotland) Act 1968,[265] the 1995 scheme introduced public interest considerations into the children's hearings process.[266] Bruce and Spencer consider that the relationship between children's hearings and the public "is one of the most puzzling aspects of the entire system."[267] They suggest that it is unclear who represents the public interest in the CHS since panel members appear to be "defenders" of the child's interests, even when those interests are in conflict with the public interest.[268] The 1995 Act compromised this position since it required, in some cases, children's hearings to balance the interests of the child with those of the public, thereby exerting a justice-based influence on decision-making practice.

However the 2011 Act improved this position, re-aligning decision-making with the welfare criterion. This is because the 2011 Act allows for a qualification of, rather than departure from, the welfare principle.[269] This qualification involves a dilution of the welfare criterion where the child is at risk of causing serious harm to members of the public.[270] Under such circumstances, the child's welfare remains relevant, though it becomes the *primary*, rather than the paramount, consideration for dispositive decision-making.[271] Whilst this relaxation in standard arguably represents a notable erosion of the guiding principle, welfare remains the central decision-making criterion in respect of any decision concerning the necessity and extent of

[262] See, Children (Scotland) Act 1995, s. 16(5).
[263] See, 2011 Act, s. 26.
[264] Children (Scotland) Act 1995, s. 16(5).
[265] See, Social Work (Scotland) Act 1968, s. 43(1).
[266] Although public interest has, since the introduction of the CHS, motivated decisions to prosecute children in the criminal justice system for the commission of grave offences, this was the first time that the children's hearing was required to consider issues of public protection, which could justify a departure from the welfare criterion within the children's hearings process.
[267] N. Bruce & J. Spencer (1976) *Face to Face with Families: A Report on the Children's Panels in Scotland* (Loanhead: MacDonald) at p. 138.
[268] Ibid, at p. 138.
[269] 2011 Act, s. 26.
[270] 2011 Act, ss. 26(1) – (2).
[271] 2011 Act, s. 26(2).

compulsory measures of supervision. Whilst the 1995 Act eroded the welfare principle, the 2011 Act went some way to restore its position of primacy in all cases, thereby realigning decision-making within the CHS with the welfare model and the Kilbrandon approach.

### *2.4.C: DEFINING THE "KILBRANDON ETHOS"*

The "Kilbrandon ethos" of the CHS is a concept that is frequently cited but rarely has been defined.[272] This work attempts to do so. For the purposes of absolute clarity the "Kilbrandon ethos" is here defined as: first, the use of a unified decision-making forum for all children "in trouble"; and, secondly, the absolute application of welfare principles to all such children dealt with thereunder. It is, therefore, concerned with the commonalities between children who offend and children who require care and protection since, as a result, the CHS claims not to distinguish between the groups. These ideas were explained by the Kilbrandon Committee in the following terms:

> "… These various classifications [of children] could not in practice be usefully considered as presenting a series of distinct and separately definable problems, calling in turn for distinct and separate principles of treatment. The basic similarity of underlying situation far outweighs the differences, and from the point of view of treatment measures the true distinguishing factor, common to all the children concerned, is their need for special measures of education and training, the normal up-bringing processes having, for whatever reason, fallen short."[273]

The contention that there are more similarities than differences in the lives of children facing difficulty was the major justification for following a unitary approach. However, the Report provided no empirical basis to support its claims or to justify its decision. Kilbrandon's reasoning in this regard has, however, since been comprehensively confirmed by over fifty years of international criminological research,[274] whereby a wealth of data on the personal and social experiences of

[272] The terms "Kilbrandon philosophy" and "Kilbrandon ethos" seem to be adopted interchangeably within the literature to refer to the Kilbrandon Committee's central normative proposition, that any legal distinction between children who offend and children who require care and protection is artificial in light of their common experiences, backgrounds and needs. By contrast, this thesis conceptualises and defines the Kilbrandon ethos by reference to the adoption of a unitary, welfarist approach towards all referrals within the CHS.
[273] The Kilbrandon Report, at para.15.
[274] R. Arthur (2004) "Young Offenders: Children in Need of Protection," *Law & Policy,* 26(3): 209 – 237, at p. 311.

juvenile offenders has revealed the abuse, neglect, victimisation and social adversities that they commonly endure.[275] In the Scottish context, a small-scale study on Youth Offending in Glasgow examined the care histories of a sample of persistent juvenile offenders.[276] It provides evidence that the two groups of children are often one and the same; its main finding being that a large proportion of the persistent offenders were first referred to the CHS on care and protection grounds.[277] Without exception, these children had experienced unstable or volatile familial relations, characterised by violence, conflict, alcohol or drug abuse.[278]

More comprehensively, using data collected from the first major empirical evaluation of the CHS,[279] McGhee and Waterhouse undertook a case study involving a sub-sample of 482 children, with a history of prior involvement in the system, referred on offence and non-offence grounds.[280] Analysis of these referrals revealed that over 30% of offenders first entered the CHS on care and protection grounds and over 20% of non-offenders entered on offence grounds.[281] Using the same data, Waterhouse, McGhee and Loucks, found similarities in the children's social circumstances, irrespective of the grounds upon which they had been referred, as well as a commonality in respect of thier needs.[282] An additional key finding was that the grounds of referral changed over time, with the majority of children referred on offence and non-offence, or both, grounds at different points in their contact with the CHS.[283] This finding is supported by current statistics, which reveal that children are often referred on the basis of both offence and care and protection issues. For example, in 2014/2015[284], 1,174 children were referred on both types of grounds,[285] representing 7.4% of all referrals during that period, and indicating that commonly

[275] See, for example, J. Newson & E. Newson (1989) *The Extent of Parental Physical Punishment in the UK* (London: Approach); D. Utting, J. Bright & C. Henricson (1993) *Crime and the Family: Improving Child-Rearing and Preventing Delinquency* (London: Family Policy Studies Centre); H. Yoshikawa (1994) "Prevention as Cumulative Protection: Effects of Early Family Support and Education on Delinquency," *Psychological Bulletin*, 115: 28 – 54; J. Graham & B. Bowling (1995) *Young People and Crime* (London: Home Office); D.P. Farrington (1996) *Understanding and Preventing Youth Crime* (York: Joseph Rowntree Foundation); J.H. Laub & R.J. Sampson (2003) *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (Harvard University Press).
[276] Gault (2005) (n.13).
[277] Ibid, at p. 4.
[278] Ibid, at p. 3.
[279] Waterhouse *et al* (2000) (n.13)
[280] McGhee & Waterhouse (2007) (n.13); See also, Waterhouse, McGhee & Loucks (2004) (n.13).
[281] McGhee &Waterhouse (2007) (n.13) at p. 113.
[282] Waterhouse, McGhee & Loucks (2004) (n.13) at p. 165.
[283] Ibid, at pp. 170 – 171.
[284] A decision was taken to refer to the 2014/15 statistics throughout this thesis since they coincide the period during which the empirical study, presented in Chapters 6 & 7, was undertaken and there are no significant statistical differences between periods 2014/15 and 2015/16.
[285] SCRA (2015) *Statistical Analysis 2014-15* (Stirling: SCRA) at p. 3.

children who offend and children who require care and protection are, in fact, exactly the same children.

Furthermore, a principal finding from a study of 1,115 children referred to the hearings system was that the majority came from socio-economically deprived families, often facing multiple adversities.[286] In particular, the study found that those children who were subject to compulsory measures of supervision were especially likely to have backgrounds characterised by factors associated with social disadvantage, such as increased levels of lone parenting, greater likelihood of living in local authority accommodation, greater household reliance on state benefits, lower levels of employment amongst parents and greater likelihood of public care experience amongst children.[287] As such, there was found to be a direct correlation between compulsory intervention and disadvantage. Similarly, a key finding from the longitudinal Edinburgh study of Youth Transitions and Crime, involving a cohort of 4,300 children and young people, is that involvement in serious offending is strongly linked to their prior experience of multiple aspects of vulnerability and social adversity.[288]

These findings illustrate starkly that there is little to distinguish the child who offends from the child who requires care and protection. There is, therefore, robust empirical support for the adoption of a unitary, welfarist approach, which serves to highlight the continued relevance of the Kilbrandon ethos to the practice of the CHS. In accordance with that ethos, the CHS claims to draw little distinction between children who offend and children who require care and protection: its primary concern being the needs, rather than the deeds, of any child so referred. This implies that there ought to be unity, in terms of both procedure and decision-making, between all referral-types in practice. In this way, the Kilbrandon ethos is best understood as the structural and philosophical consequences arising from the reasoning of the Kilbrandon Committee. This equates to a unified approach towards all children "in trouble" and suggests that the procedures and decision-making processes adopted in practice ought to be exactly the same for children referred on

[286] Waterhouse & McGhee (2002) (n.13).
[287] Ibid, at pp. 282 – 287.
[288] McAra & McVie (2010) (n.13) at p. 180.

offence and care and protection grounds. Whilst the Kilbrandon ethos is deeply embedded within the CHS, whereby the process is structured on the basis of no such distinctions being drawn, this thesis, nevertheless, finds that differences in process and decision-making practice apply to different referral types.

## 2.5: A UNITARY APPROACH TOWARDS ALL REFERRALS UNDER THE 2011 ACT?

This chapter concludes by evaluating the procedural limb of the Kilbrandon ethos under the 2011 Act. In so doing, it originally schematises the grounds upon which children can be referred to hearings, rejecting the traditional offence-care and protection binary, and identifying three major referral types within the current practice of the CHS: namely, "care and protection"; "conduct"; and, "offence."[289] The chapter then identifies a number of notable procedural differences that apply uniquely to offence referrals: specifically, the criminal standard of proof and evidentiary requirements; the age of criminal responsibility; and punitive disclosure consequences. [290] In so identifying, the chapter highlights the procedural distinctiveness of referrals based on the child's offending behaviour, and argues that this give rise to a procedural dichotomy between offence-type referrals and all other referral types in practice.

### *2.5.A: CLASSIFYING THE S. 67 GROUNDS: THE "TYPES" OF REFERRAL*

The grounds upon which a child can be referred to a children's hearing for consideration of the imposition of compulsory measures of supervision are diverse. There are seventeen such "s. 67 grounds,"[291] which broadly relate to the standard of care afforded to the child, the risks posed to the child, or the behaviours exhibited by the child.[292] 15,858 children were referred to the reporter in 2014/2015.[293] Within that, 14,141 children were referred on care and protection grounds and 2,891[294] on offence grounds,[295] the most common s. 67 grounds being[296]: that the child was suffering from a lack of parental care[297]; that the child had committed a criminal

[289] Discussed at 2.5.A, below.
[290] Discussed at 2.5.B, below.
[291] 2011 Act, ss. 67(2)(a) – (q).
[292] See, Appendix C, which sets out the s. 67 grounds.
[293] SCRA (2015) (n.285) at p. 3.
[294] These figures include the 1, 174 children who were referred on both offence and care and protection grounds.
[295] SCRA (2015) (n.285) at p. 3.
[296] Ibid, at p. 2.
[297] 2011 Act, s. 67(2)(a).

offence[298]; and, that the child had a close connection with a person who had carried out domestic abuse.[299]

Technically there is one "offence"[300] and sixteen "care and protection"[301] grounds. However the designation of the various grounds of referral is a matter of debate. A distinction is commonly drawn between "offence" and "non-offence" referrals, for example in the official statistics.[302] However, Kearney has observed that the terms "offence" and "care and protection" are also widely deployed: albeit that they have no statutory basis or legal definition.[303] In light of the diversity of the s. 67 grounds, the offence-care and protection binary is over simplistic and, thus, is rejected by this thesis.

Furthermore, there appears to be a natural division within the s. 67 grounds between those which relate to the care of the child,[304] and those which relate to the conduct of the child.[305] Indeed, it is possible to identify a discrete category of "conduct" grounds, specifically those contained in ss. 67(2)(j) – (o) of the 2011 Act, all of which directly refer to the behaviour of the child. Note that, in general, the locus of the care grounds is the relevant person[306] or some other adult, whereas the locus of the conduct grounds is the child. Compare, for example, the ground that the child has a close connection with a person who has committed a Schedule 1 offence,[307] with the ground that the child has misused alcohol.[308] Whilst it follows that the offence ground be included within the broader category of conduct grounds (since its locus is the child and it refers to his or her behaviour) the offence ground stands alone as a distinct type, due to a number of unique procedural differences in approach that

[298] Ibid, s. 67(2)(j).
[299] Ibid, s. 67(2)(f).
[300] Ibid, s. 67(2)(j).
[301] Ibid, ss. 67(2)(a) – (i) & ss. 67(2)(k) – (q).
[302] See, for example, SCRA (2013) *Official Statistics 2012-13: Full Statistical Analysis* (Stirling: SCRA); SCRA (2014) *Official Statistics 2013-14: Full Statistical Analysis* (Stirling: SCRA); SCRA (2015) (n.285).
[303] B. Kearney (1987) *Children's Hearings and the Sheriff Court* (London: Butterworths) at p. 17.
[304] See, 2011 Act, ss. 67(2)(a) – (i) & ss. 67(2)(p) – (q).
[305] Ibid, ss. 67(2)(j) – (o).
[306] Generally this is will be the child's parents or carers. Section 200(1)(a) – (g) of the 2011 Act defines "relevant person" as an individual who falls into one of the following categories: a parent or guardian having parental responsibilities or parental rights in relation to the child under Part I of the Children (Scotland) Act 1995; a person in whom parental responsibilities or parental rights are vested by virtue of s. 11(2)(b) of the Children (Scotland) Act 1995; a person who has parental responsibilities or parental rights by virtue of s. 11(12) of the Children (Scotland) Act 1995; a parent having parental responsibility for the child under Part I of the Children Act 1989; a person having parental responsibility for the child by virtue of various provisions of English legislation; a person in whom parental responsibilities or parental rights are vested by virtue of a permanence order under the Adoption and Children (Scotland) Act 2007.
[307] 2011 Act, s. 67(2)(c).
[308] Ibid, s. 67(2)(k).

apply to it.[309] It is, therefore, more appropriate to class the conduct grounds as a sub-set of the care grounds, since, procedurally, their application and operation is identical. Empirical findings are later presented, which confirm the existence of a discrete category of "conduct" grounds.[310]

In light of this analysis, this thesis originally contends that there are three major referral types in the practice of the CHS: "care and protection" referrals;[311] "conduct" referrals[312]; and, "offence" referrals.[313] The Kilbrandon ethos dictates a unitary approach towards all referrals, and implies that the referral type ought not to result in differences in process and decision-making practice. The essential object of this thesis is to explore potential differences in process and decision-making practice based directly on the referral types here identified. The central argument is that the CHS is not operating in a strictly unitary manner and findings are presented to demonstrate that differences in process,[314] gatekeeping decision-making[315] and dispositive decision-making[316] apply, ore perceived to apply, to offence-type referrals, and that differences in gatekeeping[317] and dispositive[318] decision-making apply, or are perceived to apply, to conduct-type referrals, as compared to the procedural and discretionary approach adopted in respect of care and protection-type referrals.

In addition to the care-conduct divide identified within the s. 67 grounds, there is an interesting correlation between the age of the child and the major referral categories so identified. That correlation is that younger children are typically referred on care grounds, older children are typically referred on conduct grounds, and teenage children are typically referred on offence grounds. This general analysis is supported by reference to statistical trends.[319] For example, the statistics reveal that, in 2014/2015, care and protection grounds were more commonly applicable to children

[309] Discussed at 2.5.B, below.
[310] See, Chapter 7, at 7.1.D.
[311] Based on the care grounds contained in ss. 67(2)(a) – (i) & ss. 67(2)(p) – (q) of the 2011 Act.
[312] Based on the conduct grounds contained in ss. 67(2)(k) – (o) of the 2011 Act.
[313] Based on the offence ground contained in s. 67(2)(j) of the 2011 Act.
[314] See, Chapter 2, at 2.5.B & Chapter 3, at 3.3.B.
[315] See, Chapter 7, at 7.1.A – C.
[316] See, Chapter 7, at 7.2.
[317] See, Chapter 7, at 7.1.D.
[318] See, Chapter 7, at 7.2
[319] See, SCRA (2013) (n.302); SCRA (2014) (n.302); SCRA (2015) (n.285).

from birth to 8 years,[320] conduct grounds were more commonly applicable to children from 8 to 14 years,[321] and offence grounds were more commonly applicable to children from 13 to 17 years.[322] It should, however, be noted that there is considerable overlap, with many teenage children being referred on conduct grounds, particularly those relating to alcohol[323] and drug[324] misuse, and the ground about the child's conduct having a serious adverse effect on the health, safety or development of the child or another.[325] These broad, generalised[326] statistical trends are nevertheless noteworthy. In particular, they support Waterhouse, McGhee and Louck's finding that the ground of referral changes over time[327] and, further, raise the potential that children move through the s. 67 grounds as they get older: entering the system on care grounds, moving through conduct grounds, and, potentially, "graduating" to offence grounds. Crucially, the ideas here presented about an escalation in referral type over time are substantiated by empirical findings presented in Chapter 7.[328]

Whilst the designation of the various grounds of referral and, by extension the categories of referral type, may be a matter of debate, offence referrals stand alone in a legally distinct category due to the unique procedural distinctions that apply to them.[329] However, it is questionable whether this should be so. It follows from a strict interpretation of the Kilbrandon ethos that, both procedurally and philosophically, the approach towards all referral types should be exactly the same. The CHS is not concerned with the child's guilt or culpability, nor should it be interested in punishing the child, in relation to any offence committed. Moreover, the children's hearing is largely indifferent towards public interest considerations and the protection of society against children who offend.[330] Rather, the CHS is primarily concerned with whether it is in the child's best interests to impose compulsory

[320] SCRA (2015) (n.285) Summary table 1f, at p. 11.
[321] Ibid, at p. 11.
[322] Ibid, at p. 11.
[323] 2011 Act, s. 67(2)(k).
[324] Ibid, s. 67(2)(l).
[325] Ibid, s. 67(2)(m).
[326] It should be emhasised that this general observational trend, based on the statistics, does not take into account the significant cohort of children referred on both offence and care and protection grounds.
[327] See, Waterhouse, McGhee & Loucks (2004) (n.13).
[328] See, Chapter 7, at 7.3.A.
[329] Discussed, below, at 2.5.B.
[330] Although, as noted above, the welfare principle can be qualified to protect members of the public from serious harm: See, 2011 Act, ss. 26(1) - (2).

measures of supervision, be that child an "offender" or one who has been abused or neglected.

Specifically, the role of the children's hearing is to: (i) consider whether it is necessary, for the child's protection, guidance, treatment or control, to make a compulsory supervision order ("CSO"); and, if so (ii) decide what measures that order should contain so as to meet the child's needs and serve the child's interests.[331] In so considering, the children's hearing has three options open to it: (i) to make a CSO; (ii) to discharge the referral; or (iii) to defer making a decision about the need for a CSO until a later children's hearing.[332] The children's hearing's power to decide what measures of supervision are appropriate, and attach conditions to any CSO that it considers necessary to make, is wide.[333] Although CSOs are directed towards satisfying the child's needs and interests, some of the possible conditions attached could be perceived as punitive.[334] However, such measures are for control, rather than punishment, and all measures available to children's hearings are essentially welfarist in nature.[335]

Whilst the behaviour that founds the offence ground might be considered "criminal," children's hearing proceedings and their outcome are not. As Kearney observes: "The hearing cannot impose a fine, disqualification from driving or the like: its sole concern is to decide what is 'in the best interests of the child' and not to consider directly any wider public interest."[336] Furthermore, children's hearing proceedings have regularly been categorised by the courts as civil *sui generis* in nature.[337] In *McGregor v. T*[338] and *Kennedy v. O,*[339] the Court of Session unequivocally rejected the notion that children's hearings proceedings are criminal in nature. Lord President Emslie later referred to those earlier authorities, in *McGregor v. D,* and observed: "In

[331] Norrie (2013) (n.195) at para.9.01.
[332] See, 2011 Act, ss. 91(3)(a) – (b), 119(2) – (3)(b) & 138(2).
[333] Ibid*,* ss. 83(2)(a) – (i).
[334] For example, the children's hearings can decide that the child should be removed from the family home and live somewhere else or, under specified conditions, decide that the child should be 'locked up' in secure accommodation or decide, under specified conditions, that the child's movement should be restricted by means of 'electronic tagging': See, 2011 Act, ss. 83(2)(a), (d), (e) & 83(4) – (6).
[335] The welfare of the child is the hearing's paramount consideration and, further, the hearing must be satisfied that it would be better for the child that any order be made than not: 2011 Act, ss. 25(1) – (2) & 28(1) – (2).
[336] B. Kearney (1985) "Children's Hearings in Scotland: Justice, Discretion and "Civil Procedure Sui Generis", *Civil Justice Quarterly,* pp. 137 – 149, at p. 140.
[337] See, for example, *McGregor v. T* (1975) S.L.T. 76; *Kennedy v. O* (1975) S.L.T. 235; *McGregor v. D* (1977) S.L.T. 182*; W v. Kennedy* (1988) S.L.T. 583; *S v. Miller* (2001) S.L.T. 531.
[338] (1975) S.L.T. 76.
[339] (1975) S.L.T. 235.

no sense are proceedings under Part III of the Social Work (Scotland) Act 1968 criminal proceedings. They are, on the contrary, civil proceedings *sui generis*."[340]

It seems that the civil character of children's hearings proceedings, whether at a hearing or related court proceedings, flows from the principal purpose of those proceedings: that is, to determine what measures of compulsory supervision are necessary in the best interests of the child. This follows directly from the statement of the Court of Session, in *W v. Kennedy*, that even:

> "Proceedings in front of the sheriff on referral are self contained civil proceedings sui generis in which it must be borne in mind at all times that the principal purpose is to ascertain what is necessary to be done in the interests of the child."[341]

The nature of children's hearings proceedings was considered more recently by the Court of Session in *S v. Miller.*[342] Notwithstanding that Lord President Rodger accepted that proceedings based on the offence ground "display certain features of our criminal procedure,"[343] he distinguished those proceedings from traditional criminal proceedings in three key respects:

> "Their civil nature is indeed clear from the fact that they are instigated by the reporter, whereas the prosecution of a child can take place only on the instruction of the Lord Advocate: s 42 (1) of the Criminal Procedure Act. An equally clear sign is the fact that the ultimate appeal is to the Court of Session and not to the High Court of Justiciary . . . if one asks why, ultimately, Parliament has provided for civil rather than criminal proceedings, then the answer must be that, even though they may involve establishing that the child has committed an offence, there is no possibility of the child being punished, having a penalty imposed."[344]

[340] (1977) S.L.T. 182, per Lord President Emslie, at 185.
[341] (1988) S.L.T. 583, per Lord Sutherland, at p. 585.
[342] (2001) S.L.T. 531.
[343] Ibid, per Lord President Rodger, at para.19
[344] Ibid, per Lord President Rodger, at paras.19 – 20.

Nevertheless, there are notable differences that apply to the operation of the offence ground, which set it apart from all other care and protection and conduct grounds in three key respects.

### *2.5.B: Procedural Differences Applicable To Offence-Type Referrals*

First, proof of the offence ground is required on the criminal, rather than the civil, standard, and the criminal rules of evidence additionally apply.[345] This involves a requirement for corroborated evidence. By contrast, the more relaxed civil standard of proof and evidentiary requirements are applicable to all other care and protection and conduct-type grounds.[346] By elevating the standard of proof from the balance of probabilities to beyond reasonable doubt, offence referrals are subject to certain due process protections, intended to promote the civil rights of the criminal accused. However, children referred to hearings on offence grounds are not criminal accused. Furthermore, given that, ostensibly, the proceedings and outcome of children's hearings are not criminal, it is arguably unnecessary that proceedings at proof for offence referrals be any different from those proceedings for care and protection and conduct referrals.

The separation of adjudication of proof and disposal was a vital institutional innovation arising from the Kilbrandon Report. As Norrie observes:

> "One of the defining characteristics of the children's hearings system is the clear separation of roles between the body that determines whether, and in what terms, a compulsory supervision order should be made, and the body that determines whether, if the matter is disputed, any one or more of the grounds in respect to which the child has been referred to the hearing actually apply in relation to that child."[347]

Since the introduction of the CHS, the sheriff court has been the dedicated forum for resolving factual disputes about the application of s. 67 grounds, whereas the children's hearing has been the dedicated forum for determining whether compulsory

[345] 2011 Act, s. 102(3).
[346] See, *B v. Kennedy* (1987) S.L.T. 765; *Harris v. F* (1991) S.L.T. 242; *B. v. Authority Reporter* (2011) S.L.T. (Sh. Ct.) 55, per Sheriff Principal Taylor, at para.38.
[347] Norrie (2013) (n.195) at para.8.01.

measures of supervision should be applied. This institutional separation of proof from disposal has been described as the "genius" of the Kilbrandon reform:

> "It was this separation between the issues of adjudication of the allegations in the grounds for the referral and the consideration of the measures to be applied which lay at the heart of the recommendations of the Kilbrandon *Report on Children and Young Persons, Scotland* (Cmnd. 2306) of April 1964 which were in due course implemented by the Social Work (Scotland) Act 1968. The genius of this reform, ...was that the responsibility for the consideration of measures to be applied was to lie with what was essentially a lay body while disputed questions of fact as to the allegations made were to be resolved by the sheriff sitting in chambers as a court of law."[348]

The Kilbrandon Committee's recommendations in this regard were motivated by a requirement of formality in relation to the function of proof and a requirement of informality in relation to the function of disposal. Whilst the Committee's proposal to institutionally separate these functions in order to strike a balance between legal formalism for proof and welfarist decision-making for disposal, has been regarded as genius, its subsequent proposal, to apply a different evidentiary standard and rules exclusively to the offence ground, is not. Arguably it is unnecessary, particularly in light of Kilbrandon's explicit contention that the commission of a criminal offence by the child "has significance only as a pointer to the need for intervention."[349] This is reflected by the fact that the sheriff does not make a finding of guilt or innocence in respect of any offence allegedly committed.[350] Rather, the role of the sheriff is to determine whether or not the offence ground is factually established.[351] In this way, the only difference between the offence ground and all others is that the sheriff must be satisfied, to a higher degree of certainty, that the ground is established.[352] However, in view of the fact that neither the proceedings nor the outcome of any subsequent children's hearing are criminal, it is questionable that this higher standard of certainty is, in fact, required. At the very least, this unique procedural feature of

[348] *Sloan v. B* (1991) S.L.T. 530, per Lord President Hope, at p. 548.
[349] The Kilbrandon Report, at para.71.
[350] Norrie (2013) (n.195) at para.8.17.
[351] Ibid, at para.8.17.
[352] Ibid, at para.8.17.

offence referrals goes against the logic of the Kilbrandon ethos whilst, simultaneously, extending additional due process protections to offence referrals that do not apply to any other referral type.

Secondly, the offence ground is applicable only to children who are over 8 years and thus have reached the age of criminal responsibility.[353] Only those children who have attained that age can be subject to an offence referral. By contrast, children of all ages can be referred on care and protection and conduct grounds, with the single exception of the truancy ground which is limited to children of school age.[354] The age of criminal responsibility, where appropriately drawn, also constitutes a procedural safeguard for children accused of committing criminal offences. Whilst it is right and proper that Scots law recognises an age below which the child is incapable of committing an offence, it is unfortunate that that age is currently set so low. Indeed the age of criminal responsibility in Scotland is amongst the lowest in the world[355] and this aspect of the Scottish juvenile justice system has been subject to recent criticism by the United Nations Human Rights Committee,[356] and repeated criticism by the United Nations Committee on the Rights of the Child.[357]

The age of criminal responsibility has been fixed at 8 years in Scotland, ever since it was raised from 7 years based on the Morton Committee's recommendation in 1928.[358] Over 70 years later, the Advisory Group on Youth Crime recommended raising the age of criminal responsibility to 12 years.[359] This proposal was never implemented but the matter was referred to the Scottish Law Commission for further consideration.[360] Thereafter, a dual standard was established under Scots law, whereby the age of criminal responsibility is set at 8 years but the age of criminal prosecution is set at 12 years,[361] regarded by some as an untidy and confusing legal

[353] Criminal Procedure (Scotland) Act 1995, s. 41.
[354] 2011 Act, s. 67(2)(o).
[355] See, D. Cipriani (2009) *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Farnham: Ashgate).
[356] United Nations Human Rights Committee (2015) *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland,* advanced version, adopted by the Committee at its 14th session, 29th June 2014 – 24th July 2015, at para.23.
[357] See, most recently, United Nations Committee on the Rights of the Child (2008) *Concluding Observations of the Committee on the Rights of the Child on the United Kingdom of Great Britain and Northern Ireland,* CCR/C/GBR/CO/4, at para.77.
[358] G. Morton (1928) *Report of the Departmental Committee on Protection and Training* (Edinburgh: HMSO) at p. 48.
[359] Scottish Government (2000) *Report of the Advisory Group on Youth Crime*: *It's a Criminal Waste: Stop Youth Crime Now* (Edinburgh: Scottish Government).
[360] See, Scottish Law Commission (2001) (n.171).
[361] As a result of the Scottish Law Commission's recommendations, s. 52 of the Criminal Justice and Licensing (Scotland) Act 2010, amended the law so as set the age of criminal prosecution at 12 years, by inserting s. 41A into the Criminal Procedure

position.[362] The consequence is that no child under 12 can be prosecuted in the criminal courts, but that children over 8 can be referred to a children's hearing on offence grounds. Indeed the vast majority of children who offend, aged between 8 and 16, are dealt with in the CHS, rather than the CJS. Although the statutory framework permits the formal prosecution of children aged 12 or over, this can occur only at the instance of the Lord Advocate[363] and McDiarmid notes that it rarely happens in practice.[364]

The CHS is thus the primary decision-making forum for the overwhelming majority of children who offend in Scotland. Indeed, an argument made in support of the low age of criminal responsibility is that it ensures that those children between the ages of 8 and 12, who engage in offending behaviour and require compulsory supervision, can be provided with it by being referred to a hearing on offence grounds.[365] However, where a child under 8 years appears to have committed a criminal offence, then the circumstances of the case may justify their referral to a children's hearing on one of the other care and protection or conduct grounds – for example, that the child is beyond parental control.[366] To some extent, the use of alternative grounds for children under 8 years suggests that the dual standard is unnecessary and raises the question as to why such an approach could not be extended to children between 8 and 12 years: or, even, older.[367] Indeed this very proposal is currently being considered by the Scottish Government, which is expected to raise the age of criminal responsibility to 12 years within the current Parliament.[368]

While this may be a positive, and long overdue, development in Scottish juvenile justice policy it arguably does not go far enough. The Kilbrandon Committee, long

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(Scotland) Act 1995, but retaining 8 years as the age of criminal responsibility under s. 41 of the Criminal Procedure (Scotland) Act 1995.

[362] See, E.E. Sutherland (2015) "Time to Raise the Age of Criminal Responsibility," *Journal of the Law Society of Scotland,* 60(9): September 2015.

[363] Criminal Procedure (Scotland) Act 1995, ss. 41A & 42(1).

[364] C. McDiarmid (2013) "An Age of Complexity: Children and Criminal Responsibility in Law," *Youth Justice,* 13(2): 145 – 160, at p. 147. See also, F. Dyer (2016) *Young People at Court in Scotland* (Glasgow: Centre for Youth & Criminal Justice) discussed in Chapter 3, at 3.3.B.

[365] M. Schaffer (2015) *Minimum Age of Criminal Responsibility: A Legislative Opportunity?* Scottish Child Law Centre Annual Conference, Youth Justice Conference, 11th September 2015.

[366] 2011 Act, s. 67(2)(n).

[367] Such practice is, however, currently subject to *Constanda v. M* (1997) S.L.T. 1396, in which the Court of Session held that facts founding the offence ground cannot be used to found an another care and protection ground so as to avoid the higher standard of proof. See, Chapter 3 at 3.4.B for further discussion.

[368] Scottish Government (2016) *The Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (Edinburgh: The Scottish Government); Scottish Government (2016) *Minimum Age of Criminal Responsibility: Analysis of Consultation Responses and Engagement with Children and Young People.*

ago, identified the artificial and arbitrary nature of a minimum age of criminal responsibility.[369] Although this thesis contends that Kilbrandon erred by proposing that the age of criminal responsibility be removed, rather than raised, the Committee clearly had the will to dispense with an approach towards determining criminal capacity that it regarded as empty and meaningless. Simply recasting the age from 8 to 12 years does little to address these valid concerns. For the minimum age of criminal responsibility is a mere cut-off point, reflected in terms of a specified age below which children are deemed incapable of committing criminal offences.

McDiarmid highlights the complexity of the doctrine of criminal responsibility, arguing that its fair reflection in law involves myriad factors; including knowledge of wrongfulness, understanding of criminality and its consequences, internalised moral appreciation of the quality of the conduct, psychological development and life experience. [370] Drawing upon neuroscientific research and international law, specifically the "Beijing Rules,"[371] McDiarmid makes the case for raising the minimum age to the cusp of adulthood, thereby excluding criminal responsibility for all those under 18.[372] Such an approach reflects the Kilbrandon Committee's reasoning (if not its ultimate proposal) on the doctrine of criminal responsibility and suggests that the Scottish Government should be bolder in its on-going review.

Thirdly, and most significantly, children referred to hearings on offence grounds are subject to punitive disclosure consequences under the Rehabilitation of Offenders Act 1974 and the Police Act 1997. Under such circumstances, the child acquires a criminal record. Section 3 of the 1974 Act, provides that where a child is referred to a hearing on offence grounds, "the acceptance, or establishment . . . of that ground shall be treated for the purposes of this Act... as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence". As such, children as young as 8 years can obtain a conviction if they are referred to a hearing on offence grounds. This meaning of conviction is used in the Police Act 1997 and, because of that, disposals from children's hearings fall within

[369] See, The Kilbrandon Report, at paras.60 – 65.
[370] See, McDiarmid (2013) (N.364) at p. 145.
[371] See, United Nations (1985) Standard Minimum Rules for the Administration of Juvenile Justice, Rule 4.
[372] McDiarmid (2013) (n.364) at pp. 154 – 159.

the scope of Disclosure Scotland.[373]

Whilst there are clear public policy reasons for requiring the disclosure of criminal convictions, this should be necessary only in a minority of exceptional cases arising from children's hearings proceedings. However, the CHS adopts a blanket approach: the implications are the same regardless of the seriousness of the offence. Disclosure consequences are particularly relevant to employment opportunities and therefore can have a serious impact on the child's future. In this way, an offence referral may follow a child into adulthood with stigmatising consequences. This situation is unacceptable and goes entirely against the Kilbrandon ethos, as well as the repeated assertions of the Court of Session that children's hearings proceedings are not criminal in nature.[374]

The 2011 Act improved the position, *vis-à-vis* disclosure, slightly but the impact of this reform remains to be seen. Subsections 187 and 188 of that Act relate to the "rehabilitation" of a child referred on offence grounds. The effect of these provisions is that an offence referral no longer gives rise to a "conviction" but an "alternative to prosecution,"[375] which becomes "spent," and no longer shows up on a basic or standard disclosure check, three months after the referral is disposed of by the children's hearing.[376] However these provisions have not yet been brought into force more than 3 years following the implementation of the 2011 Act.

When, and if,[377] these provisions eventually come into force, they will amend both the Rehabilitation of Offenders Act and, crucially, the Police Act. Whilst the 2011 Act amends the Police Act to reflect the change in terminology (conviction to alternative to prosecution) it makes no change to the relevant disclosure periods for higher level disclosure checks, such as enhanced disclosure or disclosure under the Protection of Vulnerable Groups scheme. As such, these disclosure checks will continue to reveal the child's offence referral for a significantly longer period than

[373] See, The Police Act 1997, ss. 112 – 113.
[374] See, *McGregor v. D* (1977) S.L.T. 182*; W v. Kennedy* (1988) S.L.T. 583; *S v. Miller* (2001) S.L.T. 531.
[375] 2011 Act, s. 187(2): Amends Rehabilitation of Offenders Act 1974, by inserting s. 8B.
[376] See, 2011 Act, s. 187(3): Amends Rehabilitation of Offenders Act 1974, by inserting para.1(aa) into Schedule 3.
[377] There has since been some indication that these provisions are unlikely to be brought into force at all: See, The Children's Rights and Wellbeing Impact Assessment (2016) accompanying *The Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (Edinburgh: Scottish Government) at pp. 32 – 34. Available from: https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility/supporting_documents/CRWIA.pdf (Accessed on: 14/11/2016).

that laid down by s. 187(3) of the 2011 Act.[378] In this way, the only change (if it even materialises) will be one of simple terminology. Higher-level disclosure checks have broad application. They are required for any jobs involving children or vulnerable adults, jobs in health and social care, a number of professions (including medical practitioners, vets, and accountants), certain regulated professions (such as taxi drivers) and, crucially, jobs involving law and order and national security, including police officers, prison officers and military personnel.[379] The implications are therefore far-reaching.

Whilst the 2011 Act might relax the application of the 1974 and 1997 Acts in relation to offence referrals, this thesis contends that the preferable solution would be to repeal s. 3 of the Rehabilitation of Offenders Act 1974 so that it simply does not apply to children's hearing proceedings.[380] This is in line with the consistent assertions of the Court of Session that children's hearings proceedings are not criminal proceedings. In that case, the child would not acquire a criminal record and the outcome and consequences of the children's hearing would be entirely welfarist, with neither a "conviction" nor an "alternative to prosecution" to disclose. Until such changes are made, the 1974 and 1997 Acts give rise to an anomalous punitive consequence that is fundamentally at odds with the Kilbrandon ethos.

### *2.5.C: A Procedural Dichotomy Between Offence And All Other Referral Types*

The foregoing procedural distinctions, applying uniquely to offence referrals, introduce a salient tension to the children's hearings process. Where a child is referred to a hearing on offence grounds the standard of proof, the treatment of evidence, the age of criminal responsibility and, the disclosure consequences are the

[378] Previously this was for 25 years or until the age of 40. However recent changes to legislation, via the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015/423 (Scottish SI), has reduced the length of time that *some* offences appear on higher-level disclosure certificates. This follows the judgment of *R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35, in which the Supreme Court held that indiscriminate disclosure of offences on such checks is contrary to Article 8, ECHR. Whilst the judgment applies to England and Wales, the Scottish Government took measures to ensure that Scots law did not similarly fall foul to the ECHR through the implementation of the 2015 Remedial Order. Its effect is that some offences are removed from disclosure certificates 7 ½ years after the offence ground was accepted, established or found to apply. However, other more serious offences remain *indefinitely*. Whilst 7 ½ years is a significant reduction in the required disclosure period, it still represents a considerable period of time, coinciding with the transition from childhood into adulthood and thus constituting a significant barrier to education, training and employment for children subject to offence-type referrals.

[379] https://www.mygov.scot/disclosure-types/?via=https://www.disclosurescotland.co.uk/ (Accessed on: 07/11/2016).

[380] It is, however, acknowledged that some exceptions may have to be made in practice, requiring, exceptionally, the disclosure of serious violent offences committed by children such as murder and rape. The key point, however, is the rejection of a blanket approach and this thesis contends that the disclosure of offence referrals should be the exception, rather than the rule.

same as those found in criminal proceedings.[381] An important thing to note is that these procedural features are not mutually exclusive: for it is *because* the child acquires a criminal record that the criminal standard of proof and rules of evidence are necessary, and it is *because* of the disclosure consequences that it is of utmost importance that the age of criminal responsibility be appropriately drawn. Whilst, as things stand, the procedural features are necessary in order to safeguard the rights of the "criminal accused," they nevertheless serve to distinguish the process applied to offence referrals considerably from that applied to all other referral types, and, as such, subvert the unitary approach promoted by the Kilbrandon ethos. Furthermore, the procedural distinctiveness of offence referrals is characterised by the "responsibilization"[382] of children who offend in the context of a welfarist system. Each of the procedural features are directed towards making children criminally responsible for their offending behaviour and therefore suggests that the proceedings for offence referrals are criminal, rather than *sui generis* or civil. Moreover, the imputation of responsibility on children referred to hearings on offence grounds aligns the process adopted with a justice-orientated model towards juvenile offending.[383]

As a result of the striking differences in approach towards offence referrals, this thesis contends that the statutory framework is somewhat at odds with the Kilbrandon ethos. Moreover, the extent to which the "type" of referral influences decision-making and disposal practice within the CHS is currently unknown and is the major question to be explored by this thesis. The role of the reporter is central to the testing of the Kilbrandon ethos, in that it is the reporter who determines whether a child requires to be referred to a children's hearing and, if so, on the basis of which ground of referral. Having established that the referral type directly influences the legal procedures followed, the remainder of this thesis is concerned with exploring

[381] S v. Miller (No. 1) 2001 S.L.T. 531, Per Lord Rodger, at paras.16-19.
[382] "Responsibilization" was first introduced by Garland to indicate that responsibility for crime control is increasingly shared amongst Governments, non-state actors and organisations, as well as members of civil society: See, D. Garland (2001) *The Culture of Control* (Oxford University Press). The concept is adopted within this thesis not in Garland's technical sense but simply to describe the act or process of making an individual responsible. Muncie and Hughes similarly deploy the concept in relation to youth justice policy in England and Wales, arguing that it is closely associated with neo-liberal governance and seeks to make young offenders 'face up' to their responsibilities: J. Muncie, G. Hughes & E. McLaughlin (eds.) (2002) *Youth Justice: Critical Readings* (London: Sage) at p. 3. See also, J. Muncie (2006) "Governing Young People: Coherence and Contradiction in Contemporary Youth Justice, *Critical Social Policy*, 26(4): 770 – 793.
[383] Whilst it is conceivable that, under the welfare model, children should take on some responsibility for their offending behaviour, insofar as they are able to do so, this position nevertheless departs from the Kilbrandon ethos and contradicts the reasoning and central normative contention of the Kilbrandon Report.

the extent to which the referral type, assigned by the reporter, influences gatekeeping and dispositive decision-making practice. In particular, the following chapter examines the gatekeeping functions of the reporter in order to construct the key argument that, via the exercise of discretion, reporters choose the type of s. 67 ground upon which to refer children to hearings and thus are responsible for designating referral types.

# CHAPTER 3: THE SYSTEM'S GATEKEEPERS

The reporter is the central professional decision-maker in the children's hearings process. It is through the exclusive instance of the reporter that cases are referred to children's hearings for consideration and disposal.[384] As such, the reporter is the single access point to the CHS. The role of the reporter is vital to the testing of the Kilbrandon ethos, since it is the reporter who decides whether a children's hearing requires to be arranged in respect of a child and, if so, on the basis of which "type" of s. 67 ground(s). These crucial gatekeeping decision-making functions constitute the focus of the empirical study presented in Chapters 6 and 7. This chapter examines the role of reporters, with a particular focus on their gatekeeping decision-making functions in light of the Kilbrandon ethos.

The chapter begins by discussing the Kilbrandon origins of the reporter role and the subsequent development of the reporter service. It then analyses the reporter's gatekeeping decision-making functions under the 2011 Act. The chapter concludes by exploring the nature of reporter decision-making, particularly in relation to the reporter's consideration and application of the s. 67 grounds. In so doing, a distinction is drawn, along the lines of choice, between the concepts of "discretion" and "professional judgment." By reference to decision-making guidance implemented by the Scottish Children's Reporters Administration ("SCRA") it is argued that reporter's have discretion to choose the *single* s. 67 ground that they deem to be most appropriate and relevant.[385] Whilst this thesis acknowledges that considering whether a s. 67 ground applies is a matter for the reporter's judgment, it contends that the reporter has discretion to choose which s. 67 ground to found upon in referring children to hearings. This contributes to a central argument of this thesis, namely: that reporters designate referral types via the exercise of discretion. The theoretical and practical implications of this designation process are later explored by this thesis in order to assess whether differences in decision-making process and practice arise directly from the referral type assigned by the reporter at the gatekeeping stage.

[384] Although there are some limited circumstances, discussed at 3.3.B, below, under which a court can oblige the reporter to arrange a children's hearing or remit a case directly to a children's hearing, effectively bypassing the discretion of the reporter, there powers are very rarely used. See, Antisocial Behaviour Order etc. (Scotland) Act 2004, s. 12(1), substituted by 2011 Act, Schedule 5, para.3; Criminal Procedure (Scotland) Act 1995, s. 49.

[385] See, SCRA (2013) (n.23); SCRA (2013) *Practice Direction 5: Receipt and Registration of Referrals* (Stirling: SCRA).

## 2.1: THE KILBRANDON ORIGINS OF THE REPORTER

The reporter's role originates directly from the Kilbrandon Report[386] and, unlike the hearing itself, which replaced the juvenile court, has no predecessor. The Kilbrandon Committee recognised the need to establish machinery to facilitate the referral of children to hearings, and considered that this would comprise "independent intake officials," afforded the widest possible discretion in deciding whether children should be brought within the ambit of the CHS.[387] An independent official, known as the "reporter," was tasked with assessing whether "compulsory measures of care" were required in each case.[388] The Kilbrandon Report envisaged that reporters would be legally qualified, with additional administrative experience relating to child welfare and education.[389] The recommendation that reporters be dual qualified reflected a requirement of competency to assess the legal issues arising from referrals, as well as wider questions regarding child welfare, education and treatment.[390] Four principal responsibilities were ascribed: first, to decide whether or not to refer a child to a children's hearing;[391] second, to provide legal advice to the lay tribunal, wherever necessary;[392] third, to present evidence in the sheriff court relating to the grounds of referral or reasons underlying decisions of children's hearings, in the event of disputed issues of fact or appeals;[393] and, fourth, to maintain and distribute formal records of children's hearings' decisions, as well as arranging timeous review of cases under its jurisdiction.[394]

The decision as to whether or not to refer individual cases to hearings was the principal duty assigned to reporters; any such decision to refer being at their exclusive instance.[395] It was recommended that all reports concerning children "in trouble," should be made to the office of the reporter, without distinction as to whether the basis of the referral was care or conduct related.[396] The consequence of this proposal was that the existing powers of various public agencies to instigate care

[386] See, in particular, The Kilbrandon Report at paras.98 – 102.
[387] Archive Files: Minutes of Meeting 7 (n.139) at p. 3.
[388] The Kilbrandon Report, at para.98.
[389] Ibid, at paras.98 & 102.
[390] Ibid, at para.98.
[391] Ibid, at para.98.
[392] Ibid, at paras.100 – 101.
[393] Ibid, at para.100.
[394] Ibid, at para.100.
[395] Ibid, at para.98.
[396] Ibid, at para.98.

and protection proceedings would be abolished,[397] and the reporter would overtake the procurator fiscal in respect of deciding what course of action to take in relation to juvenile offenders,[398] except in respect of the potential prosecution of grave offences in the criminal courts.[399] However, specific details about *how* gatekeeping decisions should be made were scant. Indeed, the Kilbrandon Report is silent on the explicit content of gatekeeping decision-making. However, the Report was clear on the quality of reporter decision-making: that is, that it was to be autonomous in nature. The Committee considered that reporters would work in close partnership with relevant statutory and voluntary agencies but recommended that they be independent from those agencies.[400]

Although brief,[401] the Kilbrandon Report's recommendations on the role of the reporter laid the foundations for the creation of a new professional, with the dual responsibility of decision-making and safeguarding procedure at different stages of the children's hearings process. As such, the reporter was the central professional actor of the Kilbrandon reform.

### *3.1.A: THE "PARADOX" OF THE REPORTER'S OFFICE*

In 1971, the office of the reporter was created, in line with the Kilbrandon recommendations, under Part III of the Social Work (Scotland) Act 1968.[402] Every early examination of the CHS recognises the significant role that the reporter occupied in terms of the system's operation. The limited number of such early published works, including *Face to Face with Families*,[403] *The Scottish Juvenile Justice System*,[404] *Children Out of Court*,[405] and, *Juvenile Justice? The Practice of Social Welfare*[406] all directly acknowledge the centrality of the reporter to the

[397] Ibid, at para.98.
[398] Ibid, at para.98.
[399] The Report preserved the discretion of the Lord Advocate to direct the prosecution of particularly grave cases before the criminal courts: See, The Kilbrandon Report at paras.124 – 126.
[400] Ibid, at para.98.
[401] Only five paragraphs of the Kilbrandon Report are dedicated to the role of the reporter: See, The Kilbrandon Report, at paras.98 – 101.
[402] See, in particular, s. 36(1).
[403] Bruce & Spencer (1976) (n.207).
[404] F.M Martin & K. Murray (1976) *Children's Hearings* (Scottish Academic Press).
[405] Martin, Fox & Murray (1981) (n.14).
[406] A. Morris & M. McIsaac (1978) *Juvenile Justice? The Practice of Social Welfare* (London: Heinemann).

children's hearings process. The latter of these publications succinctly summarised the matter thus: "The key figure in the new system was to be the reporter."[407]

Undoubtedly, the most important duty of reporters was, and indeed remains, their gatekeeping decision-making functions. The basis of reporter decision-making was simply stated by the Social Work (Scotland) Act 1968: to decide whether any child referred was "in need of compulsory measures of care."[408] The Act defined a child as being so in need if one of the grounds of referral, set out in section 32(2)(a) – (h), were satisfied in respect of that child.[409] Reporters had two basic questions to consider under the original statutory scheme, which remained broadly similar under the 1995 and 2011 Acts:

1. Is there sufficient evidence to satisfy one or more of the grounds of referral?[410]
2. Is the child in need of compulsory measures of intervention?[411]

In seeking to answer these questions, the reporter was entitled to carry out broad investigations: [412] autonomy and discretion were thus key in exercising their gatekeeping functions. However what was missing, it has been argued, was the level of clarity of detail required to guide reporters in performing those functions: in particular, there was little direction and few mechanisms for ensuring consistency or accountability provided by the original statutory scheme.[413]

It has, in fact, been argued that the introduction of the reporter's office was paradoxical in a number of its essential aspects.[414] This "paradox" was rooted in contradictions about the nature of the reporter role, the quasi-independent status of the reporter's office, and the lack of guidance directed towards the achievement of its policy aims. For example, it is unclear why the Kilbrandon Committee considered

[407] Ibid, at p. 27.
[408] Social Work (Scotland) Act 1968, s. 39(3).
[409] Ibid, s. 32(1).
[410] Ibid, s. 32(2).
[411] Ibid, s. 39(1)-(3).
[412] Ibid, s. 38(1).
[413] S. Kuenssberg & A.D. Miller (1998) "Towards a National Reporter Service" in A. Lockyer and F. Stone (eds.) *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (Edinburgh: T&T Clark) at p. 173.
[414] Ibid, at p. 172.

that the "ideal" reporter ought to have legal qualifications.[415] Morris and McIsaac observe that this requirement seems at odds with a welfare approach, and suggest that it may have been an attempt to introduce justice-orientated considerations into a predominantly welfarist system.[416] In any case, the majority of reporters first appointed were either lawyers or social workers,[417] and the professional diversity of reporters has remained similar throughout the lifespan of the CHS.[418]

This conflation of welfare and justice was further exacerbated by the analogy, explicitly drawn in the Kilbrandon Report, between the reporter and the public prosecutor.[419] Prior to the creation of the CHS, the decision as to whether a child should appear before a juvenile court rested with the latter. The Committee considered that reporters would, on analogy, exercise similar functions to prosecutors.[420] However, that analogy cannot be taken too far, not least since the decision-making criteria applied by prosecutors and reporters are fundamentally different. Whilst prosecutors are principally concerned with the public interest and establishing guilt, reporters are concerned with the needs and best interests of children and apply specific criteria to determine whether they need to be referred to hearings.[421] In this way, reporters (and indeed the CHS as a whole) are largely unconcerned by public interest considerations.[422] Moreover, Norrie distinguishes reporters from prosecutors on the basis that, whilst they share a similar discretion to decide whether to bring cases to hearings, the former does not possess the same discretion as the latter to abandon the proceedings thereafter: the subsequent progression of the case resting with the children's hearing, rather than the reporter.[423] In fact, the analogy was explicitly rejected by the Inner House of the Court of Session in *C v. Miller*,[424] in which it was emphasised that children's hearings proceedings are civil in nature and do not involve any penal element,

[415] The Kilbrandon Report, at para.98.
[416] Morris & McIsaac (1978) (n.406) at p. 96.
[417] Ibid, at p. 96.
[418] Although some reporters have a background in education and health, for example, the vast majority of reporters have been found to have backgrounds in law or social work: See, Kuenssberg & Miller (n.413) at p. 174.
[419] The Kilbrandon Report, at para.98.
[420] Ibid, at para.98.
[421] See, 2011 Act, ss. 66(2)(a) – (b), discussed at 3.3, below.
[422] The only public interest consideration relates to a qualification of welfare criterion, which becomes the primary (rather than the paramount) consideration of the children's hearing for the purpose of protecting members of the public from serious harm: See, 2011 Act, s. 26.
[423] Norrie (2013) (n.195) at para.2.08.
[424] (2003) SLT 1379, at 1396.

notwithstanding that certain grounds of referral may involve the allegation of criminal activity.[425] Due to the distinct contexts occupied by prosecutors and reporters, the Inner House held that it was inappropriate to assimilate the position of the reporter in children's hearing proceedings with that of the procurator fiscal in criminal proceedings.[426]

The reporter's independence is an important feature of the CHS. It allows reporters to be detached, to a certain extent, from those children referred and to objectively interpret information about such children in exercising their decision-making functions. However, Kuenssberg and Miller point out that this independence was undermined by the fact that it was initially the reporter's employer, namely the same local authority, which also provided background information, reports, recommendations and services in relation to those children referred.[427] This concern was aggravated by the fact that, originally, and until relatively recently, reporters acted as quasi-legal advisors to children's hearings, discussed below. Such a role further undermined the reporter's independence and seems unnecessary in light of the separation of proof from disposal, which meant that the sheriff court was designated as the best placed forum to deal with disputed issues of fact and questions of law.

Most importantly, little guidance was provided as to how the expectations of the Kilbrandon Committee, to reduce juvenile delinquency through the assessment and satisfaction of children's needs,[428] would, in practical terms, be met.[429] Despite the importance of the reporter's role, the Kilbrandon Report made limited provision for the functioning of that role, with only five paragraphs dedicated to the reporter.[430] Arguably, a number of developments in policy and practice have since addressed these contradictions related to the reporter's role and office, particularly in light of the creation of SCRA.

[425] See also, *S v. Miller* (2001) SLT 531, at paras.19-20.
[426] *C v. Miller* (2003) SLT 1379, at p. 1396.
[427] Kuenssberg & Miller (1998) (n.413) at p. 173.
[428] The Kilbrandon Report, at para.12.
[429] Kuenssberg & Miller (1998) (n.413) at p. 173.
[430] See, The Kilbrandon Report, at paras.98 – 102.

## 3.2: THE DEVELOPMENT OF THE REPORTER SERVICE AND ROLE

Reporters were initially appointed as officers of local authorities,[431] at which time there were over 50 in Scotland, each with their own policies and practices. [432] This structure was, thereafter, reorganised via the Local Government (Scotland) Act 1973, within which there was a separate reporter's department in each of the then 12 regional and island councils.[433] However there was limited provision for consistency and accountability of reporter practice within the local authority structure.[434] Ultimately, the reporter service was regrouped within a national organisation, known as SCRA, following the passage of the Local Government Etc. (Scotland) Act 1994.[435]

### *3.2.A: THE NATIONALISATION OF THE REPORTER SERVICE*

Prior to the passage of the 1994 Act, the Finlayson Report[436] had been commissioned to provide an assessment of the reporter's role and office.[437] This was the first, and since only, Government-initiated review to focus exclusively on the reporter's role. Among the Report's important recommendations was the creation of a national training programme for reporters and support staff, and the development of a Code of Practice for reporters.[438] The Finlayson Report accepted that: "a national service would result in a uniform system of juvenile justice while preserving autonomy of decision-making," and that: "accountability to a central department would lead to consistency of decision-making based on experience and expertise."[439] In this way, the nationalisation of the service was presented as capable of addressing some of the concerns about the paradoxical nature of the reporter's office.[440] The principal reasons for reform included the need to ensure greater consistency in reporter training, policy and practice across Scotland, and to guarantee sufficient independence between the reporter's office and the local authority.[441]

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[431] Social Work (Scotland) Act 1968, s. 36.
[432] M. Schaffer (2013) "Kilbrandon Then, Now and in the Future," *Scottish Journal of Residential Child Care*, 13(3): 1 – 14, at p. 4.
[433] See, Local Government (Scotland) Act 1973, s. 1.
[434] Kuenssberg & Miller (1998) (n.413) at p. 173.
[435] See, Local Government Etc. (Scotland) Act 1994, Part III.
[436] Finlayson (1992) (n.194).
[437] Ibid, at viii.
[438] Ibid, at paras.5.12. – 5.44.
[439] Ibid, at para.9.26.
[440] Kuenssberg & Miller (1998) (n.413) at p. 174.
[441] Schaffer (2013) (n.432) at p. 4.

Part III of the Local Government Etc. (Scotland) Act 1994 duly established SCRA under the leadership of the "Principal Reporter,"[442] responsible for the "efficient running and management of the reporter service."[443] SCRA became operational on 1st April 1996, and its principal responsibilities are now reflected by the 2011 Act:[444] namely, to facilitate the work of reporters[445]; to deploy and manage staff to carry out that work[446]; and, to provide suitable accommodation for children's hearings.[447] In this way, SCRA is the operational setting within which the CHS and associated partner agencies work. Under the national structure, SCRA has 9 administrative territories, known as "localities," supported by a head office in Stirling.[448]

It is reasonable to conclude that a number of advantages have followed from the nationalisation of the reporter service. For example, in the pursuit of consistent reporter decision-making, detailed practice guidance and accredited training have flowed from the creation of SCRA.[449] Furthermore, as an executive non-departmental public body, SCRA can be seen, at least in principle, as being sufficiently independent from the local authority. As such, the restructuring of the service appears largely to have achieved its stated policy aims of consistency and independence, whilst simultaneously addressing concerns about its paradoxical nature.

### *3.2.B: The Revision Of The Reporter's Legal Advisory Role*

Beyond the structural changes, associated with the reorganisation of local government and the establishment of SCRA, the reporter's role has largely been unaltered since the inception of the CHS. In particular, the gatekeeping functions of the reporter have remained sufficiently similar under the 1968, 1995 and 2011

[442] Local Government Etc. (Scotland) Act 1994, ss. 127 – 128.
[443] White Paper (1993) *Scotland's Children: Proposals for Child Care Policy and Law,* Cm. 2286 (Edinburgh: HMSO) at para.6.13.
[444] See, 2011 Act, ss. 14 – 24.
[445] 2011 Act, ss. 20(a) – (b).
[446] 2011 Act, Schedule 3, paragraph 11.
[447] 2011 Act, ss. 21(1) – (3).
[448] The SCRA localities are: Highlands & Islands; Grampian; North Strathclyde; Glasgow; Tayside & Fife; South East; Central; Lanarkshire/Dumfries & Galloway; and, Ayrshire. See, "About SCRA": Available from: http://www.scra.gov.uk/about-scra/ (Accessed on 26/06/2016).
[449] See, for example, SCRA (2013) *Framework for Decision Making By Reporters: Changing for Children and Young People* (Stirling: SCRA).

Acts.[450] That being said, a number of significant practice developments have directly and indirectly affected the reporter's role.

The most significant change to reporters' functions relates to their role at children's hearings. A traditional duty of the reporter was to act as a legal advisor to the lay members of the hearing; a role which was exercised before, during and after proceedings under the 1968 and 1995 Acts.[451] However, following an internal review by SCRA in 2009, this legal advisory role was revised, in order to ensure independence between the reporter and the hearing. Schaffer explains that this change was primarily implemented to ensure that the fair process of the children's hearing was adequately protected.[452]

Accordingly, the reporter is no longer present before or after the hearing, other than to address strictly health and safety or administrative issues.[453] During the children's hearing itself, the role of the reporter has been substantially limited and reporters are entitled only to support the process through the expression of views, particularly in relation to procedural issues.[454] Reporters do not, however, have any capacity, or statutory authority, to act as a legal advisor to the children's hearing. This modification bolsters independence between the key constitutional agents of the CHS; namely, the reporter and the children's hearing. In addition, it serves to diminish the legal or formalistic nature of the reporter's role, regarded as a somewhat contradictory aspect of the Kilbrandon recommendations in light of the welfarist nature of the children's hearings process as a whole. The contemporary revisions to the reporter's role thus suggest that it is now primarily restricted to gatekeeping decision-making, which is the major issue to be investigated by the remainder of this thesis.

### *3.2.C: The Transformation In Referral Patterns To The Reporter*

Another development that has had a direct impact on reporter practice is the radical transformation in referral patterns, including the volume, type and severity of

[450] See, Social Work (Scotland) Act 1968, ss. 32 & 38 - 39; Children (Scotland) Act 1995, ss. 52, 56 & 65; 2011 Act, ss. 66 – 69.
[451] Schaffer (2013) (n.432) at p. 4.
[452] Ibid, at p. 4.
[453] Ibid, at p. 4.
[454] Ibid, at p. 4.

referrals to the reporter. As has been established, the Kilbrandon Committee was primarily concerned with children who offend: the essential object of the Kilbrandon reform being to reduce the incidence of juvenile delinquency.[455] However, the nature of referrals has since changed radically; characterised by a fluctuating overall referral rate to the reporter, and an overwhelming shift from referrals based on the offence ground to referrals based on care and protection grounds, including the discrete category of conduct-type grounds. Indeed, the shifting referral patterns are illuminating.

In 1972, the first full year of the CHS's operation, a total of 24,656 referrals were received: approximately 87.6% of those referrals related to offences allegedly committed by children, whereas only 12.4% related to alleged care and protection issues in respect of children.[456] The overall referral rate to the reporter reached a historical peak in 2007/2008, during which period the highest ever number of referrals were made to the reporter.[457] A total of 102,759 referrals were received: approximately 84% of which were care and protection-related, whereas only 16% were offence-related.[458] However, thereafter, the overall referral rate began to fall and has been in constant decline ever since.[459] In 2013/14, a considerably lower total of 36,298 referrals were received: approximately 76.1% of which were care and protection-related and 23.9% of which were offence-related.[460]

Figure 1 illustrates the changing referral patters and trends within the CHS over the past 43 years.[461]

[455] The Kilbrandon Report, at para.12.
[456] Adapted from: Schaffer (2013) (n.432) at p. 6.
[457] See, SCRA (2007) *Official Statistics 2006-07: Full Statistical Analysis* (Stirling: SCRA) at pp. 3 – 4.
[458] Adapted from: Schaffer (2013) (n.432) at p. 6.
[459] See, SCRA (2015) (n.285) at p. 3.
[460] Adapted from: Schaffer (2013) (n.432) at p. 6.
[461] It should, however, be emphasised that statistical methodologies have changed throughout this period so current and historical statistical counts are not strictly comparable.

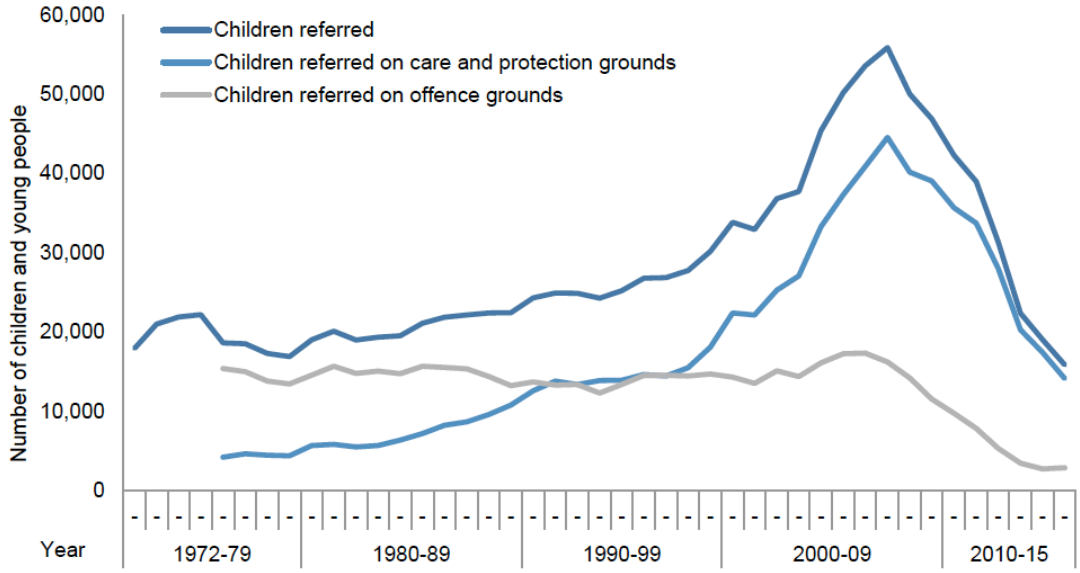


Figure 1: Children and Young People Referred by Year[462]

Throughout the lifespan of the CHS, care and protection, including conduct, referrals have dramatically overtaken offence referrals as the dominant type. At the same time, there has been a steady incline in the overall referral rate, reaching a peak in the late 2000s, and subsequently declining from 2008 onwards. Recent statistics align with these overall trends. In 2014/2015, fewer referrals were made to the reporter, the overall referral rate having decreased for the 8th consecutive year.[463] A total of 27,538 referrals were received: approximately 74.8% of which were care and protection-related and 25.2% of which were offence-related.[464]

Although care and protection referrals have clearly overtaken offence referrals as the dominant type, the latter remain common. Indeed, the offence ground[465] was the second most common s. 67 ground in 2014/15, and the number of children referred on offence grounds increased by 4.6% during that period.[466] Another notable change is the perceptible decline in the proportion of referrals that reporters subsequently

[462] Source: SCRA (2015) (n.285) at p. 3.
[463] Adapted from: SCRA (2015) (n.285) at p. 3.
[464] Ibid, at pp. 3 – 5.
[465] 2011 Act, s. 67(2)(j).
[466] Adapted from: SCRA (2015) (n.285) at pp. 2 – 3.

refer on to children's hearings. This "conversion rate" has consistently fallen from 53% in 1978, to 32% in 1995, to 23% in 2014.[467]

The identified fluctuations in referral rate, referral type and conversion rate can be explained by reference to certain policy developments applicable to the practice of the CHS in recent years. In particular, there has been an increasing emphasis on effective multi-agency working, a focus on early intervention, and diversion from the CHS through the prism of the GIRFEC framework[468] and the Whole Systems Approach ("WSA").[469] These initiatives are designed to provide relevant professionals, such as social workers and police officers, with a range of options to deal with children "in trouble" *without* referral to the reporter unless compulsory measures of supervision are required.[470] This is because, in the years leading up to 2007, ever-increasing numbers of children were being referred but many of those children did not require compulsory measures of supervision, with only 12% being referred by the reporter to a hearing during that period.[471] As such, referral to the reporter was shown to be an inappropriate response to the needs of many such children.[472] SCRA also reported that the sheer volume of referrals created considerable challenges within the practice of the CHS.[473] This led to concerted efforts to reduce the overall referral rate to the reporter and to ensure that only those children who really need compulsory measures of supervision are taken through the CHS.[474]

A key way in which the principles of GIRFEC and the WSA have been converted into practical action is the introduction of pre-referral screening; now a separate facet of gatekeeping decision-making which, notably, takes place outwith the CHS. Pre-referral screening, primarily co-ordinated and led by the police,[475] involves potential

[467] Martin, Fox & Murray (1981) (n.14) at p. 39; Statistical Bulletin (1997) *Social Work Series - Referrals of Children to Reporters and Children's Hearings 1995-96* (Edinburgh: Scottish Office Government Statistical Service) at p.13; SCRA (2015) (n.285) at p. 14.
[468] See, Scottish Government (2005) (n.205); Scottish Government (2012) (n.205).
[469] See, Scottish Government (2014) *Getting it Right for Young People who Offend: Multi-Agency Early and Effective Intervention Implementation Guidance* (Edinburgh: Scottish Government); Scottish Government (2015) (n.258).
[470] Scottish Government (2014) (n.469) at p. 6.
[471] SCRA (2008) *Research Report: Monitoring of Non-Offence Pre-Referral Screening* (Stirling: SCRA) at pp. 1 – 2; SCRA (2009) *Research Report: Early and Effective Action Screening Groups* (Stirling: SCRA) at p. 4; SCRA (2007) *Annual Report 2006-07* (Stirling: SCRA).
[472] Ibid.
[473] SCRA (2015) (n.285) at p. 3.
[474] K. Murray, P. McGuinness, M. Burman & S. McVie (2015) "Evaluation of the Whole System Approach to Young People who Offend in Scotland," (Scottish Government/Scottish Centre for Crime and Justice Research) at p. 6.
[475] Ibid, at p. 10.

referrals to the reporter. It comprises multi-agency decision-making groups which decide whether a child should be referred to the reporter. Essentially, the screening group intercepts the referral and decides whether it warrants the attention of the reporter. Notwithstanding that it is the subsequent responsibility of the reporter to decide whether a referral should then made to a children's hearing, the implementation of pre-referral screening has resulted in some aspects of gatekeeping decision-making taking place outwith the ambit of reporter practice and, indeed, the CHS itself. As such, the gatekeeping functions of reporters have arguably been limited or curtailed by the advancement of contemporary policy initiatives.

Pre-referral screening is now operating, to some extent, in all SCRA locality areas.[476] As early as 2008, SCRA found that it was having an impact on reducing referrals to the reporter.[477] However, the research found that a consequence was that, proportionately, more of the children thereafter referred to the reporter required compulsory measures of supervision.[478] A major evaluation of the WSA was published in 2015,[479] which found that there had been a "significant reduction" in referral rates to the reporter, in respect of both offence and care and protection-type referrals[480] but that those children who continue to be referred to the reporter are at the "most serious end of the spectrum," and thus more likely to be in need of a CSO.[481] The introduction of pre-referral screening therefore explains the reduction in the overall referral rate to the reporter and fluctuations in "conversion" rate, from referrals to the reporter to referrals to hearings, in recent years.

Whilst the success or otherwise, of the early intervention and diversionary approaches underpinning GIRFEC and the WSA will not meaningfully be known for a number of years, early signs reveal a notable practical impact. It seems that reporters are now faced with fewer referrals. However, it follows that those referrals are more targeted in nature, with a higher proportion of them requiring the arrangement of a children's hearing. On one view, pre-referral screening ensures that no child is referred inappropriately to the reporter: that is, unless likely that a hearing

[476] SCRA (2009) *Research Report: Early and Effective Action Screening Groups* (Stirling: SCRA) at p. 3.
[477] Ibid, at p. 2.
[478] Ibid, at p. 2.
[479] Murray, McGuinness, Burman & McVie (2015) (n.474).
[480] Ibid, at pp. 18 – 20.
[481] Ibid, at p. 20.

will be required to address their needs. In this way, where voluntary, rather than compulsory, measures of supervision are perceived to be sufficient, then the child can be made subject to such measures in a timely manner without recourse to the reporter. However the reference to *perception* is key here as it the reporter who is qualified and, indeed, empowered by the statute to form a view as to whether compulsory measures are necessary or voluntary measures are sufficient.[482] Pre-referral screening involves a loss of control on the part of the reporter. This is concerning, not least since research has identified a lack of protocols and processes around how screening groups operate and make decisions.[483] The use of such screening groups, of which the reporter is not part, arguably dilutes the reporter's gatekeeping functions. Notwithstanding that dilution, the reporter remains the dedicated professional responsible for deciding which children enter the CHS.

## 3.3: GATEKEEPING UNDER THE 2011 ACT

This thesis argues that reporters are the "gatekeepers" to the CHS, due to their critical involvement in the referral process. Accordingly, reporters are responsible for deciding which children will be brought within the ambit of the CHS and on what basis. Their gatekeeping functions are significant to this thesis because it is principally concerned with differences in process and decision-making practice arising from the type of ground assigned to the referral by the reporter at the gatekeeping stage.

### *3.3.A: THE GENERAL SCHEME OF REPORTER DECISION-MAKING*

Under the 2011 Act, much like its predecessor,[484] reporters are employed by SCRA[485] and their functions are those delegated to them by the Principal Reporter.[486] It is the primary responsibility of the reporter to investigate the circumstances of the child and the associated referral,[487] and to consider whether one or more of the s. 67 grounds apply in relation to that child.[488] In light of the applicability of a s. 67 ground, it is then the responsibility of the reporter to consider whether it is necessary,

[482] See, 2011 Act, ss. 66 – 69.
[483] SCRA (2009) (n.476) at p. 2.
[484] See, Children (Scotland) Act 1995, s. 40.
[485] 2011 Act, Sch.3 para.11.
[486] Ibid, Sch.3 para.10.
[487] Ibid, ss. 66(1) & (3).
[488] Ibid, s. 66(2)(a).

for the child's protection, guidance, treatment or control, to make a CSO.[489] If so, the reporter is obliged to arrange a children's hearing in respect of that child.[490] It is the subsequent duty of the reporter to draft the "statement of grounds,"[491] upon which any referral to a children's hearing is based, setting out which of the s. 67 grounds he or she believes to apply[492] and the facts upon which that belief is founded.[493] Where the stated grounds are not accepted[494] or understood[495] by the child or any relevant person, it is the reporter who seeks to have them established by way of proof in the sheriff court.[496]

Once a hearing has been arranged, the role of the reporter almost immediately diminishes. The reporter's only formal function during the hearing is to keep a record of proceedings.[497] The reporter can express views on relevant procedural matters but that function has no statutory basis.[498] Notwithstanding the limited capacity of the reporter during the children's hearing, the 2011 Act retains the reporter as the crucial and primary decision-maker during the referral process. During the hearing itself, however, the lay panel members are the crucial and primary decision-makers in relation to the disposal of the child's case. And the sheriff is the crucial and primary decision maker in relation to disputed s. 67 grounds.

- **The Statutory Tests**

The key task of the reporter is to determine what course of action to take upon receipt of referrals. There are three such courses of action open to reporters under the 2011 Act:

1. To take no further action;[499]
2. To refer the child to the local authority for the provision of advice, guidance and assistance on a voluntary basis;[500] or,

[489] Ibid, s. 66(2)(b).
[490] Ibid, ss. 69(1)-(2).
[491] Ibid, ss. 89(1)-(2).
[492] Ibid, s. 89(3)(a).
[493] Ibid, s. 89(3)(b).
[494] Ibid, ss. 93(1)(a) – (b).
[495] Ibid, ss. 94(1)(a) – (b).
[496] Ibid, ss. 93(2)(a) & 94(2)(a).
[497] The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, r.13.
[498] Schaffer (2013) (n.432) at p. 4.
[499] Here, the reporter effectively abandons the referral either because none of the s. 67 grounds are considered to apply and/or because the reporter does not consider that the making of a CSO is necessary in respect of the child: 2011 Act, ss. 68(1)(a) – (b).

3. To arrange a children's hearing.[501]

The decision as to what course of action to take rests entirely on the reporter's application of two statutory tests.[502] First, the reporter must consider whether one or more of the s. 67 grounds apply in relation to the child.[503] Second, the reporter must consider whether a CSO is necessary in respect of the child.[504] If both of these statutory tests are perceived by the reporter to apply, then he or she is statutorily obliged to arrange a children's hearing for the child.[505] The consideration of the first statutory test requires the reporter to evaluate facts, assess evidence and make judgments about the perceived application of the s. 67 grounds. The reporter's determination of the second statutory test involves the making of two inter-related judgments: first, an assessment as to whether the child requires protection, guidance, treatment or control; and, second, an assessment as to the perceived necessity for such measures of supervision to be provided on a *compulsory* basis.[506] SCRA describe the statutory tests applied by reporters as "threshold criteria."[507] This term indicates the level at which concerns about a child are sufficient to justify the imposition of compulsory measures of state intervention.[508] The statutory tests, or threshold criteria, must be satisfied before a child can be referred to a hearing, so as to provide adequate justification for any compulsory measures imposed.

- **The Source of Referrals to the Reporter**

Reporters require sufficient information about any referral they receive, as well as the child's wider circumstances, in considering the application of the statutory tests. The reporter is wholly dependent on receiving information from, and working in partnership with, other agencies to determine whether the statutory tests are met.

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[500] Here, the reporter elects for voluntary, rather than compulsory, measures of supervision either because none of the s. 67 grounds are considered to apply but the provision of some measures of supervision are considered necessary, albeit on a voluntary basis, or because a s. 67 ground is considered to apply but the making of a CSO is not deemed to be necessary. The basis of the reporter's decision to opt for voluntary measures is less clear from the statute: 2011 Act, s. 68(5)(a).
[501] Here, the reporter is duty bound to arrange a children's hearing if it is considered that a s. 67 ground applies and a CSO is necessary: 2011 Act, ss. 66(2)(a) – (b) & 69(1) – (2).
[502] 2011 Act, ss. 66(2)(a) – (b).
[503] Ibid, s. 66(2)(a).
[504] Ibid, s. 66(2)(b).
[505] Ibid, ss. 69(1) – (2).
[506] Ibid, s. 66(1)(b).
[507] Kurlus, Hanson & Henderson (2014) (n.14) at pp. 34 – 35.
[508] See, K. Norrie (2016) "Appellate Deference in Scottish Child Protection Cases, *Edinburgh Law Review,* Vol. 20, No. 2, pp. 149 – 177; D. Platt & D. Turney (2013) 'Making Threshold Decisions in Child Protection: A Conceptual Analysis,' *British Journal of Social Work,* pp.1-19.

Referrals to the reporter may come from anyone: the child and relevant persons; local authorities (including social work, education and health departments); the police; the courts; and, although vanishingly rare, the general public.

The referral itself is an important basis of information for the reporter and, depending on its source, it may contain varying degrees of information about the child's circumstances. Different statutory provisions apply in respect of the transmission of information to the reporter, depending on the source of that information. For example, local authorities and the police are duty bound to pass information to the reporter[509] and, indeed, much of the information relied upon by reporters originates from these sources.[510] In 2014/2015, the police were the dominant source, with 71.5% of all referrals to the reporter originating from this source.[511] 24.7% of the remaining referrals originated from the local authority. Any other individual may provide the reporter with relevant information about a child but, unlike the local authority and the police, they are under no statutory duty to do so. Notwithstanding the source of referrals, the consideration of the statutory tests is reserved for the reporter.

- **The Reporter's Investigations**

The reporter has wide powers to investigate the circumstances of a child about whom information is received. These investigatory powers, which are critical to the reporter's gatekeeping role, are governed by section 66 of the 2011 Act. Having received information from any source, or if it otherwise appears to the reporter that any child might be in need of protection, guidance, treatment or control,[512] an investigation into the child's circumstances can be embarked upon.[513] One of the first decisions that the reporter must make in practice is whether to undertake such an investigation.[514] The purpose of any investigation is to equip the reporter with sufficient information to consider the application of the statutory tests.[515] In other words, to furnish the reporter with enough information to form a view as to whether a s. 67 ground applies and, if so, whether a CSO is considered necessary. In some

[509] See, 2011 Act, ss. 60 – 61.
[510] See, Kurlus, Hanson & Henderson (2014) (n.14) at pp. 12 – 13.
[511] SCRA (2015) (n.285) at p. 8.
[512] 2011 Act, s. 66(1)(b).
[513] Ibid, s. 66(3).
[514] This is described by SCRA as the "initial decision" of the reporter: SCRA (2013) (n.449) at p. 6.
[515] This is described by SCRA as the "final decision" of the reporter: Ibid, at p. 8.

situations an investigation might not be required because the local authority, for example, may have previously shared information that is sufficient to allow the reporter to consider the application of the statutory tests in the first instance.[516] Indeed, Norrie observes that reporters are required to undertake investigations only where they are not yet in possession of sufficient information to pass judgment on the referral.[517] As such, the reporter's need for sufficient information must be balanced with the principle of minimum intervention.[518] A study published by SCRA in 2014, which collected quantitative data on reporter decision-making in respect of 200 referrals, found that further information was requested by the reporter in relation to the majority[519] of those referrals sampled.[520] The study thus suggests that it is the norm for reporters to undertake further investigations into the child's circumstances upon receipt of a referral.

If an initial investigation is required, the reporter is entitled to dictate its form. Usually, it will involve obtaining a social background report from the local authority about the circumstances of the child and family.[521] The reporter might require the local authority to report on the child generally, or on any particular matter that the reporter specifies,[522] and the local authority is under a statutory obligation to do so.[523] Notably, the SCRA decision-making study found that where additional information was requested in respect of the 200 referrals sampled, almost all[524] of those referrals involved requests for further information from the social work department.[525] Thus, investigations by the reporter are ordinarily made by obtaining further information, in the form of a report, from the social work department.[526]

It is open to the reporter to seek additional reports from, for example, the police, education or health departments. The SCRA decision-making study found that the

[516] 2011 Act, s. 66(1).
[517] Norrie (2013) (n.195) at para.4.17.
[518] SCRA (2013) (n.449) at p. 1.
[519] Defined as 50-74% of the 200 referrals sampled: Kurlus, Hanson & Henderson (2014) (n.14) at p.12.
[520] Ibid, at p.19.
[521] Norrie (2013) (n.195) at para.4.17.
[522] 2011 Act, s. 66(4).
[523] Ibid, ss. 66(5) & 66(6).
[524] Defined as 90% or more of the 200 referrals sampled: Kurlus, Hanson & Henderson (2014) (n.14) at p. 12.
[525] Ibid, at p. 19.
[526] The research found that the next most common agency from which information was requested was education, with less than half (defined as 35-49%) of referrals recorded as seeking information from this source, followed by health with few (defined as 14% or less) seeking information from this source. The referral sample revealed that other agencies such as the police, residential units and other support projects were, on occasion, asked for information by the reporter, although this was found to be the case in relation to very few referrals sampled: Kurlus, Hanson & Henderson (2014) (n.14) at p. 19.

education department was the next most common agency from which information was requested in respect of the 200 referrals sampled.[527] However information from this source was requested in a comparatively more limited manner than social work, with reporters seeking information from the education in respect of less than half[528] of those referrals sampled.[529] This was followed by the health department, from which information was requested in only a few[530] of those referrals sampled.[531] The study suggested that other agencies such as the police, residential units and voluntary support projects are, on occasion, asked for information by the reporter, although this was found to be the case in relation to very few referrals sampled.[532] Since reporters are free to dictate the scope and form of any investigations undertaken, they may informally consult with any individuals that they deem relevant, such as social workers, health visitors or teachers, and may invite for interview any individual who can assist their decision-making. The SCRA study provides some support for this view since it found that information was requested by means of a verbal or email update from social work and other relevant agencies in relation to some of those referrals sampled.[533]

Having gathered sufficient information, the decision as to whether or not to refer the child to a hearing ordinarily rests with the reporter. The reporter's powers of investigation and determination, under s. 66 of the 2011 Act, are exactly the same in regard to all s. 67 grounds. In this way, the reporter's decision-making process should be identical for care and protection, conduct and offence-type referrals. Whilst the discretion to consider the application of the statutory tests usually rests with the reporter, there are, nevertheless, some limited circumstances whereby this is not strictly so. Different decision-making processes apply to certain referrals made by the courts or jointly reported to the procurator fiscal and the reporter. The most notable of these apply to children who have engaged in offending behaviour, indicating a further lack of procedural unity between offence and care and protection and conduct referrals in practice. As such, they contribute to the central argument of

[527] Ibid, at p. 19.
[528] Defined as 35 – 49%: Ibid, at p.12.
[529] Ibid, at p. 19
[530] Defined as 14% or less: Ibid, at p. 12.
[531] Ibid, at p. 19.
[532] Ibid, at p. 19.
[533] Ibid, at p. 19.

this thesis: that different procedures and decision-making practices apply to different referral types, most notably offence-type referrals.

### *3.3.B: DIFFERENCES IN DECISION-MAKING PROCESS FOR CERTAIN REFERRALS*

There are some circumstances under which the consideration of the statutory tests is not entirely reserved for the reporter. Both the civil and criminal courts have the power to refer a child to the reporter and, in fact, may oblige the reporter to arrange a hearing in respect of a child, under specified circumstances. Moreover, criminal courts are able to remit a child's case directly to a children's hearing for consideration and disposal, completely bypassing the gatekeeping functions of the reporter. However, the courts, like the local authority and the police force, are well placed to acquire information about children and pass it on to the reporter. Frequently, in the course of civil or criminal proceedings, information comes to light, suggesting to the court that s. 67 grounds apply in relation to a child. As a result, provision is made under a number of Acts to allow such a court to refer the case to the reporter or to remit it directly a children's hearing.[534]

- **Referral by the Civil Court**

Under section 62 of the 2011 Act, a civil court is entitled to refer a child to the reporter if, during the course of "relevant proceedings,"[535] it considers that any of the s. 67 grounds, other than the offence ground, *might* apply in respect of that child.[536] A "section 62 statement,"[537] specifying which of the s. 67 grounds the court considers might apply, must be provided to the reporter.[538] However, importantly, that statement does not establish the specified s. 67 ground, it merely suggests that the ground might apply: the ultimate judgment that a s. 67 ground *does* apply and compulsory measures of supervision are necessary being reserved for the reporter. Since this power of referral arises in the civil courts, those courts have no statutory authority to suggest that the offence ground might apply in relation to a child.[539]

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[534] See, 2011 Act, s. 62; Criminal Procedure (Scotland) Act 1995, ss. 48 & 49; Antisocial Behaviour Etc. (Scotland) Act 2004, s. 12.
[535] Section 62(5)(a) – (m) of the 2011 Act provides an exhaustive list of such relevant proceedings, all of which are civil in nature and relate to a range of family law actions, such as those for divorce; dissolution; separation; declarator of parentage; parental responsibilities or rights; adoption; or, permanence.
[536] 2011 Act, ss. 62(1) & (2).
[537] Ibid, s. 62(3).
[538] Ibid, s. 62(4).
[539] Ibid, s. 62(1).

With a case thus referred, it is the reporter's subsequent responsibility to consider the application of the statutory tests. Particularly, consideration of the second statutory test is reserved exclusively for the reporter. The reporter gets no guidance from the civil courts as to whether there is a need for compulsory measures of supervision, but simply an indication that a s. 67 ground might apply. It is open to the reporter to consider that a different s. 67 ground applies to that specified by the court and therefore, having decided that compulsory measures of supervision are necessary, could arrange a children's hearing on the basis of a different s. 67 ground. From this it can be concluded that this referral mechanism, which applies only to care and protection and conduct referrals, does not threaten or undermine the gatekeeping authority of the reporter and gives rise to a sensible interaction between the civil court system and the CHS.

- **Referral by the Criminal Court**

The criminal court also has an express power, stronger than that of the civil court, to refer a child to the reporter. Where such a court convicts an individual of a Schedule 1 offence,[540] it is entitled to refer the victim of that offence[541] to the reporter.[542] This referral mechanism bypasses any later need to establish s. 67 grounds. In convicting the Schedule 1 offender beyond reasonable doubt, the criminal court certifies that the perpetrated offence is a ground established for the purposes of the 2011 Act.[543] However, importantly, certification of the s. 67 ground does not oblige the reporter to arrange a hearing for the child. Rather, the reporter retains the authority to form a judgment about the perceived need for a CSO.[544] Again, consideration of the second statutory test[545] is properly reserved for the reporter. This referral mechanism also represents a sensible approach, directed towards the protection of children who have been victims of schedule 1 offences, whilst not undermining the authority of the reporter to determine whether compulsory measures of supervision are perceived to be required in respect of those children.

[540] Offences mentioned in Schedule 1 of the Criminal Procedure (Scotland) Act 1995, for example rape of a young child.
[541] As well as any child who is, or is likely to become, a member of the same household as the Schedule 1 offender.
[542] Criminal Procedure (Scotland) Act 1995, s. 48.
[543] Criminal Procedure (Scotland) Act 1995, s. 48(1).
[544] Norrie (2013) (n.195) at para.4.13.
[545] 2011 Act, s. 66(2)(b).

- **Referral by the Sheriff Court Making an ASBO**

An additional referral mechanism is available to the sheriff court when making an order under the Antisocial Behaviour Etc. (Scotland) Act 2004. In so ordering, the sheriff is entitled to find that a s. 67 ground (other than the offence ground) *applies*[546] and may further *oblige* the reporter to arrange a children's hearing in respect of a child.[547] This mechanism thus constitutes a direct route of referral to a children's hearing, which completely bypasses the gatekeeping authority of reporters. Under such circumstances, reporters are required to arrange a hearing, irrespective of whether they consider that the statutory tests have been satisfied. Notably, under this referral mechanism, the sheriff is exercised only with the application of a s. 67 ground and does not have to consider the need for a CSO.[548] The application of a s. 67 ground thus constitutes the sole basis of the sheriff's decision, thereby lowering the threshold for compulsory intervention. This is significant because it not only circumvents the decision-making authority of the reporter but it bypasses entirely the second statutory test[549] which, in all other circumstances, must be satisfied before a children's hearing can be arranged. The result is that children can be referred to hearings without any prior consideration of whether they are in need of protection, guidance, treatment or control and, as such, whether this requires to be provided on a compulsory basis. This is regarded as an anomalous referral route, created by the clumsy antisocial behaviour legislation. The children's hearing must, therefore, be mindful of the question of compulsion, in considering and disposing of any such direct referral, so as to ensure that adequate justification exists to support the making of a CSO.

- **Remittal by the Criminal Court**

Finally, the criminal court is entitled to remit a case to a children's hearing for consideration and disposal.[550] Where a child pleads guilty to, or is found guilty of, a criminal offence, the court can remit the child's case directly to a children's hearing on the basis of the offence ground.[551] Under such circumstances, the court provides

[546] Antisocial Behaviour Order etc. (Scotland) Act 2004, s. 12(1), substituted by 2011 Act, Schedule 5, para.3.
[547] Ibid.
[548] Norrie (2013) (n.195) at para.4.14.
[549] 2011 Act, s. 66(2)(b).
[550] Criminal Procedure (Scotland) Act 1995, s. 49.
[551] Ibid, s. 49(1)(a).

evidence of the commission of the offence by way of certification.[552] Again, through this referral mechanism, the reporter is "cut-out" of the decision-making process, and neither the court, nor the reporter, is formally required to consider the perceived need for a CSO.[553] Indeed, this referral mechanism appears to subvert both the statutory tests and the gatekeeping authority of the reporter. However, arguably, the criminal process itself has served that gatekeeping function, at least in part. Whilst it is not in dispute that the offence ground will have been established, beyond reasonable doubt, the question of compulsion again goes unanswered and so the threshold for intervention is similarly lessened. However, here, the alternative to remitting the case directly to a hearing is the prosecution of the child in the criminal court. Norrie observes that direct remittal to a children's hearing is appropriate only where the court is of the view "that the hearings system is more likely to offer something to the child than the criminal process."[554] In this way, the direct remittal of a case to a children's hearing involves an implicit recognition that the children's hearings process is more beneficial to the child than the criminal process.

The introduction of the CHS involved a recognition that an informal, welfare-based system was more appropriate than the CJS to address the needs of children who offend. As such, the remittal mechanism, which is in keeping with the Kilbrandon approach, is regarded as a welcome route of referral to children's hearings. It constitutes an additional safeguard for children who, having had criminal proceedings instigated against them, can escape the adult CJS to address their offending behaviour in a welfare, rather than justice-orientated, forum.

- **Joint Referrals to the Reporter and Procurator Fiscal**

Whilst the referral mechanisms of the criminal and civil courts do not, *per se,* introduce a lack of unity between different referral types in practice, the decision-making procedures adopted in respect of jointly reported referrals to the procurator fiscal and the reporter, undoubtedly do. This unique gatekeeping decision-making process applies only to certain offence-type referrals but, nevertheless, demonstrates a further procedural difference between offence and all other referral types. For

[552] 2011 Act, s. 71(2).
[553] Norrie (2013) (n.195) at para.4.16.
[554] Ibid, at para.4.16.

where an offence referral is jointly reported, a completely different decision-making process applies. It is one in which the discretion to determine the course of action primarily rests with the procurator fiscal, rather than the reporter, and in which that decision is based on public interest considerations associated with the justice model. In these ways the decision-making procedure for jointly reported referrals diverges substantially from that applied to offence referrals reported to the reporter only, and all other care and protection and conduct referrals.

Only a small minority of children are prosecuted in the Scottish criminal courts: the vast majority of children who offend being dealt with through the CHS. Generally, this applies to children up to the age of 16 but the legal status of the child is not straightforward, since it is defined differently by different pieces of legislation. Three relevant definitions are provided by relevant statutes:

1. Those who are under 16 years;
2. Those who are referred to the reporter prior to their 16th birthday but who attain the age of 16 before the reporter has decided what action to take in respect of the referral; and,
3. Those who are 16 and 17 years old and are presently subject to a CSO.[555]

The effect of the third definition is that it extends the period of childhood for those 16 and 17 year olds who have a CSO in place, in recognition of their complex needs.[556] Whilst the vast majority of children up until the age of 16 are dealt with in the CHS, it is, nevertheless, possible for children aged 12 or over to be prosecuted in the criminal courts for offences allegedly committed.[557] Whilst such criminal prosecutions are generally rare, they can be instigated when there are compelling reasons to do so in the public interest, particularly when serious offences, such as murder, culpable homicide and rape, are committed by children.[558]

[555] See, 2011 Act, s. 199; Children (Scotland) Act 1995, s. 93; Criminal Procedure (Scotland) Act, s. 307.
[556] In 2014/2015, over 500 16 and 17-year-olds were subject to a CSO: SCRA (2015) (n.285) at p. 20.
[557] Criminal Procedure (Scotland) Act 1995, s. 41A.
[558] C. Hallett & C. Murray (2000) "Young People Who Sexually Abuse: The Scottish Context," *Journal of Social Welfare and Family Law,* 22(3): 245 – 260, at p. 247.

Children under the age of 16 cannot be prosecuted without the instruction of the Lord Advocate.[559] Both the age of the child and the category (or gravity) of the offence allegedly committed determine whether the case will be referred solely to the procurator fiscal,[560] solely to the reporter,[561] or jointly to the procurator fiscal *and* the reporter.[562] It is the responsibility of the police, following the Lord Advocate's Guidelines,[563] to decide whether a case should be jointly reported.[564] The Lord Advocate's guidelines set out three major categories of offences which require to be jointly reported.[565] In short, cases are jointly reported generally due to their gravity and their ability to lead to a disqualification from driving, but all cases involving offences allegedly committed by 16 and 17 year olds, who are subject to a CSO or are awaiting the decision of the reporter about the outcome of an earlier referral, must be jointly reported. Where a case is jointly reported, a binding agreement between SCRA and the Crown Office and Procurator Fiscal Service applies in respect of the decision-making process thereafter followed.[566]

When a case is jointly reported, it will either be passed to the reporter, who then becomes responsible for dealing with the offence within the CHS,[567] or the procurator fiscal will retain the case and prosecute the offence in the criminal courts. The criteria for decisions regarding jointly reported cases are sufficiently different from the statutory tests applied by reporters for all other referrals. The overriding consideration of the fiscal is whether it is in the public interest to prosecute the child, provided that there is sufficient evidence to do so.[568] However, there is a rebuttable presumption that children under the age of 16 will be referred to the reporter in relation to jointly reported offences.[569] In assessing whether that presumption should be rebutted, the fiscal is directed to consider a number of factors.[570] These factors

[559] Criminal Procedure (Scotland) Act 1995, s. 42(1).
[560] For consideration of processing the case through the criminal justice system.
[561] For consideration of processing the case through the CHS.
[562] For joint consideration of processing the case either through the criminal justice system or the CHS.
[563] Crown Office & Procurator Fiscal Service (2014) *Lord Advocate's Guidelines to the Chief Constable on the Reporting of Offences Alleged to Have Been Committed by Children* (COPFS).
[564] Crown Office & Procurator Fiscal Service and the Scottish Children's Reporter Administration (2015) *Decision Making in Cases of Children Jointly Reported to the Procurator Fiscal and Children's Reporter* (COPFS/SCRA) at p. 3.
[565] See, COPFS (2014) (n.563) at p. 1.
[566] COPFS/SCRA (2015) (n.564).
[567] Presumably it is then open to the reporter to apply the statutory tests. However, it is unclear whether the reporter can, thereafter, decide to discharge the referral or to refer the child to the local authority for voluntary measures of supervision. Whilst the offence ground might apply, the reporter could be of the view that a CSO is not strictly necessary.
[568] COPFS/SCRA (2015) (n.564) at p. 8.
[569] Ibid, at p. 8.
[570] Ibid, at pp. 8 – 10.

include: the gravity of the offence allegedly committed; whether there is a pattern of serious offending by the child; whether the child is currently working with services through the CHS; whether any such services could become involved with the child; whether a disposal through the CHS is likely to address the child's needs and behaviour; and, any health or development issues that might indicate that the child's needs and behaviour would be best addressed within the CHS.[571] In these ways, the fiscal is required to assess, on balance, which is the best-placed forum to deal with the alleged offence. However much of this assessment will depend on the gravity of the offence in the first place, underlining the justice-orientated nature of decision-making for jointly reported referrals.

By contrast, there is a presumption that the procurator fiscal will deal with jointly reported offences committed by children over the age of 16.[572] It bears emphasising that all offences allegedly committed by 16 and 17 year olds, who fall within the definition of a child,[573] are jointly reported, irrespective of their gravity. Therefore, the starting point in relation to this group is a presumption in favour of prosecution. This seems counter intuitive since such young people are expressly prescribed by statute an extended period of protection, due to the complexity of their backgrounds and needs.[574] However, the fiscal can rebut this presumption when he or she considers that it is not in the public interest to prosecute the child. In so assessing, the fiscal is directed to consider the gravity and frequency of offending and any "significant" health or development issues that indicate that the child's needs and behaviour would be best addressed within the CHS.[575]

Whilst the name perhaps suggests that jointly reported cases involve a joint decision, made by both the fiscal and reporter, it is clear from the decision-making agreement that the fiscal is the ultimate decision-maker.[576] However the fiscal *must* discuss the case with the reporter before any decision is taken,[577] in order to enable the reporter to provide the fiscal with relevant information about the child's background and family circumstances, the child's history within the CHS, and the details of any

[571] Ibid, at p. 9.
[572] Ibid, at p. 9.
[573] 2011 Act, s. 199.
[574] Ibid, ss. 199(7) – (9).
[575] COPFS/SCRA (2015) (n. 564) at p. 9.
[576] Ibid, at p. 5.
[577] Ibid, at p. 5.

measures of supervision currently in place.[578] Another purpose of the discussion is to allow the reporter to express views regarding the most appropriate course of action to take.[579] One would, therefore, assume that the role of the reporter here is to persuade the fiscal that the case should be dealt with in the CHS, thereby promoting a unitary, welfarist approach.

In 2014/2015, 3,087 cases were jointly reported to the procurator fiscal and the reporter.[580] This equates to 11.2% of all referrals made to the reporter during that period, and so supports the view the children who are potentially dealt with in the CJS are in the minority.[581] This is further supported by the fact that 55.7% of those jointly reported cases were retained by the reporter and dealt with through the CHS,[582] albeit by a slim majority. However, the number of children and young people who were jointly reported increased for the second consecutive year in 2014/15,[583] indicating a worrying trend. Moreover, half of those children with joint reports were already subject to a CSO,[584] supporting the view that children who engage in offending behaviour have complex backgrounds and needs.

Using data collected from a six-month period in 2014, Dyer demonstrates that 55% of all jointly reported cases for 16 and 17 year olds, who were subject to CSOs, were retained by the procurator fiscal and, thus, dealt with in the CJS.[585] As such, the majority of such young people were prosecuted in adult criminal courts. Perhaps more concerning is Dyer's finding that 35% of all jointly reported cases for 12 – 15 year olds were also dealt with by the fiscal, during the same period.[586] This stands in contrast to the presumption against the prosecution of such cases in the criminal courts. Dyer's conclusion, with which this thesis agrees, is that the vast majority of those children prosecuted in the criminal courts could, and indeed should, have been dealt with in the CHS.

[578] Ibid, at p. 7.
[579] Ibid, p. 5.
[580] SCRA (2015) (n.285) at p. 5.
[581] Adapted from: SCRA (2015) (n.285) at p. 5.
[582] Ibid, at p. 5.
[583] Ibid, at p. 5.
[584] Ibid, at p. 5.
[585] Dyer (2016) (n.364) at p. 5.
[586] Ibid, at p. 5.

Whilst the Kilbrandon Report retained the common law power of the Lord Advocate to prosecute certain children in the criminal courts, it is clear that the expectation of the Committee was that this authority would be relied upon for a minority of exceptional cases only.[587] Statistics reveal that there is an increasing trend in children referred to the reporter on offence grounds and an increasing trend in children jointly reported to the reporter and fiscal.[588] The use of the criminal courts to deal with such children is concerning and contrary to the Kilbrandon ethos and the United Nations Convention on the Rights of the Child.[589] Moreover, the gatekeeping decision-making process adopted in respect of jointly reported referrals is notably distinct from that adopted in respect of all other referral types. The key distinguishing factors are that it is the procurator fiscal with whom the discretion rests and the key decision-making determinant is whether it is in the public interest to prosecute. In these ways, the joint referral process significantly undermines a unitary approach towards all children "in trouble." As such, it highlights another important way in which the groups of similar children are dealt with in a dissimilar manner, underlining a lack of unity between different referral types in practice.

### 3.4: EXPLORING THE NATURE OF REPORTER DECISION-MAKING

It has been demonstrated that the routes of referral to reporters and children's hearings are diverse. However, notwithstanding the power of the courts and the fiscal to intervene in the referral process, at times undermining the exclusive decision-making authority of the reporter, reporters are properly characterised as "gatekeepers" to the CHS. For the reporter is the principal decision-maker in relation to the vast majority of referrals: a view which is reinforced by reference to the statistics. In 2014/2015, 255 referrals came from the courts and 3,087 cases were jointly reported to the procurator fiscal and the reporter.[590] Taken together, this represents 12.1% of all referrals made during that period.[591] As such, the reporter was, unequivocally, the sole decision-maker, with whom the discretion rested, in

[587] See, The Kilbrandon Report at paras.124 – 126.
[588] See, SCRA (2015) (n.285) at pp. 3 & 5.
[589] United Nations Convention on the Rights of the Child, Art. 40.
[590] SCRA (2015) (n.285) at pp. 5 & 8.
[591] Adapted from: SCRA (2015) (n.285) at pp. 5, 7 & 8.

relation to 87.9% of all referrals concerning children "in trouble" within that period.[592]

In practice, reporters exercise their discretion in line with decision-making guidance implemented by SCRA. The Framework for Decision Making by Reporters ("DMF") is the principal source.[593] However, in addition and of particular relevance to this thesis, is the detailed practice direction which reporters are subject to in relation to drafting the statement of grounds.[594] This chapter concludes by exploring the activities of reporters by reference to these decision-making aids. In so doing, it argues that there is a distinction to be made between the exercise of discretion and the making of judgments in that the former involves choice, whereas the latter does not. This argument is thereafter relied upon in support of a major contention of this thesis: that reporters have discretion to choose which type of s. 67 ground to found upon in referring children to hearings and, in so doing, designate referrals as being associated with a particular type.

### *3.4.A: PRACTICE GUIDANCE RELEVANT TO REPORTER DECISION-MAKING*

The consideration of the statutory tests is a complex and multi-faceted task, involving the exercise of discretion, the making of judgments, the evaluation of facts, and the assessment of evidence. These key skills are central to the gatekeeping functions of the reporter. However the legislative scheme offers limited guidance as to how, in practical terms, the statutory tests should be considered and applied. The legislation provides no indication as to what factors the reporter might consider in applying the statutory tests. SCRA's practice guidance, to some extent, fills this gap.[595]

This guidance has no statutory basis and, as such, is not legally binding. However, there is a statutory basis for the relationship between the Principal Reporter, SCRA, and individual practicing reporters,[596] making the status of the practice guidance somewhat ambiguous. Individual reporters act as delegates of the Principal

[592] Ibid, at pp. 5, 7 & 8.
[593] SCRA (2013) (n.449).
[594] SCRA (2013) (n.23).
[595] See, in particular, SCRA (2013) (n.449).
[596] 2011 Act, Sch.3 para.10.

Reporter[597] and it is SCRA, under the auspices of the Principal Reporter, that issues practice guidance to reporters. However it is unclear if reporters are acting unlawfully, or, at the very least, outwith the power delegated to them by the Principal Reporter, if they do not adhere to such guidance. Presumably, given the aim of consistency, the expectation of SCRA is that individual reporters *will* follow it, however the extent to which reporters do so in practice remains unclear. The status of SCRA's practice guidance was explored by the empirical study on decision-making. Findings on adherence to decision-making aids, which, by and large, suggest that reporters comply with their terms, are presented in Chapter 6.[598]

Notwithstanding the status of SCRA's practice guidance, the main form that it takes is the DMF. The purpose of the DMF is two-fold: first, to assist reporters in making initial decisions regarding the level of investigation required in relation to referrals; and secondly, to assist reporters in making final decisions regarding the applicability of the statutory tests and, thus, the ultimate determination as to whether a children's hearing requires to be arranged.[599] It sets down "principal factors," to be taken into account by reporters in making these initial and final decisions, namely: the extent of concern regarding the child's welfare; the nature and gravity of the referral incident; and, the level of co-operation and impact of any previous intervention in relation to the child and relevant persons.[600] However these guidelines say little about how reporters specifically apply the s. 67 grounds and assess the necessity for a CSO. Whilst the principal factors specified in the DMF are influential they do not appear to be strictly determinative, particularly in light of empirical findings presented in Chapter 6.[601]

What is clear, however, is that the reporter's assessment about whether, and which, s. 67 ground applies in relation to a child is an evidential one.[602] The reporter must determine whether there is sufficient *prima facie* evidence to support the application of at least one of the s. 67 grounds.[603] In so doing, the reporter applies different standards of proof and rules of evidence to different types of referrals at the

[597] Ibid, Sch.3 para.10.
[598] See, Chapter 6, at 6.2.E.
[599] SCRA (2013) (n.449) at pp. 4 – 5.
[600] Ibid, at p. 5.
[601] See, in particular, Chapter 6, at 6.1.E.
[602] SCRA (2013) (n.23) at p. 3; See also, COPFS/SCRA (2015) (n.564) at p. 15.
[603] SCRA (2013) (n.23) at p. 3.

gatekeeping stage.[604] It follows that one purpose of the reporter's investigations is to gather sufficient evidence to support the application of a s. 67 ground. Insufficient evidence to support at least one s. 67 ground means that reporters cannot take any further action.[605] The reporter's assessment of evidence involves the evaluation of facts and the making of judgments. Often, referrals do not involve questions of fact. Rather the application of most s. 67 grounds are evaluative, centrally involving the making of judgments by reporters.

Compare for example, the s. 67 ground that "the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care,"[606] with the ground that "a schedule 1 offence has been committed in respect of the child."[607] Whilst the latter may well be regarded as a question of fact, particularly if the Schedule 1 offence has been successfully prosecuted in the CJS, the former requires the reporter to form a number of subjective judgments. What amounts to "suffering"? What factors define "unnecessary"? And, what amounts to a "serious impairment" of the child's health and development? Indeed, the vast majority of the s. 67 grounds display, to some extent, this evaluative quality, requiring the reporter to form a judgment about their perceived application.[608]

It therefore appears that the factors specified in the DMF are likely to be applied by reporters in relation to the second statutory test,[609] informing their view about whether compulsory measures of supervision are necessary. The reporter's assessment involves consideration of the key factors specified in the DMF, including: levels of concern about the child's welfare; the severity of the referral incident; previous levels of cooperation with, and impact of, previous interventions. However, these principal factors say little about the specific content of the reporter's assessment. A number of specific decision-making determinants that contribute

[604] The criminal standard of proof and rules of evidence being applied to offence referrals and the civil standard of proof and rules of evidence being applied to care and protection, including conduct, referrals.
[605] 2011 Act, ss. 66(1)(a) – (b) & 66(3)(a) – (b).
[606] Ibid, s. 67(2)(a).
[607] Ibid, s. 67(2)(b).
[608] Ibid, ss. 67(2)(a), (c), (e), (f) (g), (h), (i), (m) & (n).
[609] Ibid, s. 66(2)(b).

directly to the reporter's assessment of the perceived need for a CSO were identified by the empirical study and are presented in Chapter 6.[610]

The foregoing analysis suggests that the application of the second statutory test[611] also principally involves the making of judgments by reporters. Reporter decision-making has historically been viewed as discretionary in nature.[612] However, an examination of the statute and SCRA's DMF suggests that reporter decision-making is not strictly discretionary: they are not making decisions *per se* but, rather, forming judgments about the perceived application of the statutory tests. For there is no discretion open to the reporter once he or she concludes that the statutory tests have been satisfied: a hearing *must* be arranged.[613] Moreover, once the reporter refers a child to a hearing, he or she has no power or authority to abandon the case; its progress thereafter rests with the hearing, which is empowered to decide whether compulsory measures of supervision are, in fact, required.[614] For these reasons, it is more appropriate to characterise reporter decision-making as involving the making of judgments, rather than the exercise of discretion.

#### *3.4.B: CHOOSING THE MOST APPROPRIATE S. 67 GROUND*

Where, however, the reporter does exercise an important discretion is in *choosing* the s. 67 ground(s) to found upon in referring children to hearings. In so referring, reporters must draft a "statement of grounds,"[615] setting out which of the s. 67 grounds they believe to apply, and the supporting facts upon which that belief is based.[616] At least one of the stated s. 67 grounds must be accepted,[617] established,[618] or found to apply[619] before the children's hearing can determine whether to make a CSO.[620] Usually this will arise through the acceptance of the stated s. 67 ground(s) by the child and relevant persons, or through the determination of the sheriff that those stated s. 67 grounds are, in fact, established. If the stated s. 67 grounds are

[610] See, Chapter 6, at 6.1.E & Chapter 7, at 7.1.C.
[611] 2011 Act, s. 66(2)(b).
[612] See, Martin & Murray (1976) (n.404) at p. 239; Martin, Fox & Murray (1981) (n.14) at p. 64; Hallett *et al*. (1998) (n.14) at p. 14.
[613] 2011 Act, ss. 69(1)-(2).
[614] Norrie (2013) (n.195) at para.4.23.
[615] 2011 Act, s. 89(2).
[616] Ibid, ss. 89(3)(a) – (b).
[617] Ibid, s. 91(1)(a).
[618] Ibid, ss. 108 & 107.
[619] Criminal Procedure (Scotland) Act 1995, ss. 48 – 49.
[620] Norrie (2013) (n.195) at para.3.01.

neither accepted nor established then the referral *must* be discharged:[621] the children's hearing having no authority to consider the case and impose a CSO under such circumstances. Norrie describes the effect of the s. 67 grounds being accepted, established or found to apply as two-fold: first, by raising the question reserved for the hearing as to whether it is necessary to make a CSO; and, second, by establishing the jurisdiction of the hearing.[622] Given this confirmation of jurisdiction, the statement of grounds is a document of crucial importance to the children's hearings process. The reporter is obliged by s. 89(2) of the 2011 Act to prepare the statement of grounds, communicating to the child and relevant persons *why* a hearing has been arranged. Whilst section 89 of the 2011 Act provides some statutory guidance, the reporter enjoys a wide discretion in relation to his or her drafting of the statement of grounds and is subject to detailed practice guidance in so doing.[623]

This guidance, termed "practice direction,"[624] is more prescriptive than the general scheme of the DMF.[625] The practice direction on the statement of grounds supplements the DMF, the cumulative effect being that individual reporters are, at this stage, subject to considerable institutional practice guidance, beyond and outwith the statutory scheme. Indeed, the use of the term "practice direction" is notable, in that it implies something stronger than guidance: reporters are *directed* to follow its terms. According to the practice direction, the statement of grounds is the "principal legal basis for decision-making" by a children's hearing.[626] However, it is not the sole basis. The hearing is entitled to take into account wider information about the child and family. This principle was established in the case of *O v. Rae*,[627] in which a hearing had relied upon information about an allegation of sexual abuse by the child's father, which had been deleted from the statement of grounds but had been referred to indirectly in a social work report. The Court of Session held that hearings are entitled to take account of information beyond that specified in the statement of grounds:

[621] Either by the children's hearing or the sheriff: 2011 Act, ss. 93(2)(b) & 108(3).
[622] Norrie (2013) (n.195) at para.3.02.
[623] SCRA (2013) (n.23).
[624] Ibid.
[625] SCRA (2013) (n.449).
[626] SCRA (2013) (n.23) at p. 4.
[627] Ibid.

> "Counsel for the appellant said that this information must be confined to information which was relevant to the grounds for the referral but . . . once the decision has been taken that he is in need of compulsory measures of care, any information which is relevant to the making of a supervision requirement … will be relevant information to which the children's hearing may have regard."[628]

Norrie explains the effect and rationale of this important principle in the following terms:

> "It is one of the strengths of the system that the existence of a ground of referral merely raises the question of whether compulsory measures of supervision are necessary but does not determine their nature; it is that question that must be considered and answered by the children's hearing, and they are permitted to do so by having regard to any relevant matter that comes to their attention. The policy of the Act is clearly to leave the children's hearing free from artificial restraint in their exploration of what may be in the interests of the child."[629]

However, arguably, the *O v. Rae* principle is susceptible to challenge following the passage of the Human Rights Act 1998. The more recent case of *M v. Authority Reporter*,[630] in which a hearing had relied upon information about the child's sexualised behaviour and historical allegations about sexual abuse of another child by the child's father, not included in the statement of grounds, demonstrates such a challenge, based on Article 6, ECHR. Whilst Sheriff Principal Taylor was of the view that it is "entirely appropriate" for hearings to take into account material beyond the statement of grounds,[631] he affirmed that there are limits to the information which may be so considered:

> "Parents and other relevant persons have rights which require to be protected as well as the interests of the child . . . when considering other relevant

[628] Ibid, per Lord President Hope, at p. 574.
[629] K. Norrie (2005) *Children's Hearings in Scotland,* 2nd Edition (Edinburgh: W. Green) at p. 117; See also, K. Norrie (1995) "In Deference of O v. Rae," *Scots Law Times (News)* 39: 353 – 356.
[630] (2014) S.L.T. (Sh. Ct.) 57.
[631] Effectively preserving the *O v. Rae* principle.

> information put before it . . . a children's hearing must consider whether in looking at this material they are being fair to, for example, the parents. If the information put before the children's hearing is disputed by the parents and it is information upon which the decision of the children's hearing will turn, then in such circumstances in order to comply with their obligations under Art.6 the hearing may require to refer the issue to the sheriff in order that the facts can be determined."[632]

In this light, the statement of grounds must be of sufficient relevance and depth as to enable informed decision-making by the hearing, whilst preserving the ECHR rights of children and relevant persons. The children's hearing is an independent tribunal for the purposes of Article 6(1), ECHR[633] and so must protect the rights of such individuals to a fair hearing, whilst, simultaneously, considering the best interests of the child. This balancing of the rights of individuals with the interests of the child led SCRA to conclude that: "the principle in *O v. Rae* is no substitute for the proper drafting and establishment of a relevant statement of grounds."[634]

In so drafting, the reporter must determine which one or more of the s. 67 grounds apply[635] based on sufficient evidence.[636] Crucially, reporters are directed by SCRA to specify the s. 67 ground or, *exceptionally*, grounds that "relevantly reflect the principal concerns regarding the child's welfare and which support constructive and appropriate consideration and decision-making by the children's hearing."[637] In determining which s. 67 ground or grounds to state, reporters are directed to consider: (i) the key issues identified in the child's care plan or other relevant reports; (ii) the reason(s) that motivated the reporter's decision to refer the child to a hearing[638]; and, (iii) the factors that are likely to be relevant to consideration and decision-making by that hearing.[639] Furthermore, reporters are directed to state more than one s. 67 ground only where: (i) there is distinguishable information to support the application of multiple s. 67 grounds; (ii) a single s. 67 ground does not

[632] (2014) S.L.T. (Sh. Ct.) 57, per Sheriff Principal Taylor, at para.34.
[633] *S v. Miller* (2001) S.L.T. 531.
[634] SCRA (2013) (n.23) at p. 3.
[635] 2011 Act, s. 66(2)(a).
[636] SCRA (2013) (n.23) at p. 3.
[637] Ibid, at p. 4.
[638] Presumably the application of the statutory tests as their application should be the sole basis of any "decision" to refer: if those tests are considered to apply, the reporter is under a statutory obligation to arrange a children's hearing.
[639] SCRA (2013) (n.23) at p. 4.

appropriately reflect the concerns;[640] and, (iii) each stated s. 67 ground reflects significant concerns that are likely to assist the decision-making of the hearing.[641]

The wording adopted by the practice direction is noteworthy because it suggests that the reporter should *choose* the s. 67 ground that is most relevant to the principal concerns about the child's welfare, stating additional s. 67 grounds only where some additional criteria are perceived to apply. As such, the practice direction involves an implicit presumption in favour of the *single most appropriate and relevant s. 67 ground*. Whilst it is open to the reporter, under the statute, to consider that more than one s. 67 ground applies, SCRA's guidance directs reporters to ordinarily identify and found upon a single ground only, pointing to a discretion, or a choice, to determine which type of s. 67 ground is most appropriate. This raises interesting ideas about the nature of reporter decision-making in applying the first statutory test, pointing to the exercise of discretion on the part of the reporter as to the selection or choice of what he or she believes to be the most appropriate and relevant s. 67 ground.

It is unclear from the practice direction *why* SCRA considers it preferable that, ordinarily, children be referred to hearings on the basis of a single s. 67 ground only. And, given that SCRA's practice guidance, *directing* reporters to do so, has no statutory basis, it is necessary to consider the possible underlying purpose of, or motivation for, this position. Indeed, the position diverges from that of the statute, which empowers reporters to conclude that multiple s. 67 grounds apply.[642] As has been demonstrated, children referred to hearings typically have complex needs, and empirical research has shown that children are often referred on offence and care and protection grounds, or indeed on both types, at different points in their contact with the system.[643]

A key strength of the CHS is its aspiration, and ostensible ability, to take into account the child's whole circumstances, adopting a holistic approach towards decision-making. The realisation of this approach would suggest that if multiple s. 67

[640] Presumably about the child's welfare but this could also refer to any wider concerns held by the reporter about, for example, the relevant persons.
[641] SCRA (2013) (n.23) at p. 4.
[642] 2011 Act, s. 66(2)(a).
[643] Waterhouse, McGhee & Loucks (2004) (n.13) at pp. 170 – 171.

grounds are considered to apply, and can be supported by sufficient evidence, then they should all be stated by the reporter. Such would be in the interests of clarity, potentially procedural fairness,[644] and in pursuance of providing the hearing with a comprehensive account of the potential range of the child's needs. Arguably, the absolute need to state every s. 67 ground that applies is diminished in light of the *O v. Rae*[645] principle but, as has been established, there are limits to this principle in terms of ECHR law.[646] However, the concerns about that precedent can be diminished by the reporter's stating of multiple s. 67 grounds.

It appears that the motivation of SCRA, in directing reporters to ordinarily state a single ground is one of simplicity: clarity about the principal concerns about the child's welfare, reflected succinctly by reference to the most appropriate s. 67 ground. The grounds of referral were revised by the 2011 Act in part to make them easier for children, relevant persons and panel members to understand. Indeed, the Policy Memorandum on the Children's Hearings (Scotland) Bill made explicit that one aim of the 2011 Act was to restate the grounds of referral in a manner that simplified the language.[647] It is doubtful if this policy aim was achieved: the s. 67 grounds remain diverse, verbose and extremely complex. It is, therefore, submitted that the likely motivation of SCRA's direction is, indeed, simplicity in light of this policy aim. If the purpose of the statement of grounds is to provide a legal basis for decision-making[648] then that purpose is arguably fulfilled through specification of the single most appropriate ground. It follows that multiple s. 67 grounds should be specified only where a single s. 67 ground is incapable of fulfilling that purpose. All of this suggests that reporters enjoy a discretion to choose and state the single s. 67 ground that they deem to be most appropriate in performing their gatekeeping functions. These assertions are substantiated by empirical findings presented in Chapter 6.[649]

It has been emphasised that the reporter must be satisfied that there is sufficient evidence to support the application of a s. 67 ground, applying the appropriate

[644] Particularly in light of Sheriff Principal Taylor's comments in *M v. Authority Reporter* (2014) S.L.T. (Sh. Ct.) 57.
[645] (1993) S.L.T. 570.
[646] See, in particular, *M v. Authority Reporter* (2014) S.L.T. (Sh. Ct.) 57, at para.34.
[647] Scottish Government (2010) Policy Memorandum on the Children's Hearings (Scotland) Bill (Edinburgh: Scottish Government) at paras.196-205.
[648] SCRA (2013) (n.23) at p. 3.
[649] See, Chapter 6, at 6.2.B.

evidentiary standard depending on the type of that ground. However, it is open to the reporter to determine that there is insufficient evidence to support the application of the offence ground but sufficient evidence to support another care and protection or conduct-type ground. Furthermore, in light of SCRA's practice direction, the reporter can conclude that a care and protection or conduct ground is more appropriate than the offence ground, irrespective of the sufficiency of evidence.[650] In this way, it is possible for an offence-type referral to the reporter to be "converted" into a conduct-type referral to the children's hearing. Given that a consequence of the offence-type referral is that the child acquires a criminal record, the conversion of offence-type referrals to the reporter into care and protection or conduct-type referrals to the hearing could be deemed to be the most appropriate course of action in relation to many referrals.[651]

The reporter's discretion to do so is, however, limited by the judgment of the Court of Session in *Constanda v. M.*[652] The case involved two brothers who had been referred to a hearing on the basis of the ground, under the 1968 Act, that the child was falling into bad associations or was exposed to moral danger: a care and protection-type ground.[653] However, the supporting facts in the statement of grounds specified a number of uncorroborated instances of lewd, libidinous and indecent practices committed by one of the children in relation to his female cousin. A dispute arose as to whether the moral danger ground applied and, in particular, whether the commission of an offence by the child entitled the reporter and court to infer that the child was exposed to moral danger. The Court of Session considered that no such inference could be drawn and held that where the "whole substratum" of the statement of grounds is that the child has committed a criminal offence, then an alternative care and protection ground cannot be relied upon by the reporter.[654] As such, reporters cannot circumvent the requisite standard of proof and rules of evidence by drawing up alternative care and protection grounds, if the factual basis

[650] So long as there is sufficient evidence to support the application of a care and protection ground on the civil standard.
[651] However, it should be acknowledged that the practice direction expressly stipulates that the consequences of an offence referral, under the Rehabilitation of Offenders Act 1974, are not a relevant factor for the purposes of reporter decision-making: SCRA (2013) (n.23) at p. 6.
[652] (1997) S.L.T. 1396.
[653] Social Work (Scotland) Act 1968, s. 32(2)(b).
[654] (1997) S.L.T. 1396, per Lord Coulsfield, at pp. 1400 & 1401.

of the referral is that the child has committed an offence. Such an approach, according to Lord Coulsfield, would frustrate the will of Parliament:

> "Parliament has made a clear distinction between the situation in which the commission of an offence by the child is the basis of the referral, in which case the standard of proof applicable in criminal proceedings is required, and referrals under other [care and protection] grounds."[655]

However the Court of Session's decision was rooted in its finding that the reporter had relied exclusively upon facts that related to the commission of a criminal offence by the child.[656] It appears that the Court of Session would have adopted a different view had the facts relied upon indicated wider concerns, beyond those stated about lewd, libidinous and indecent practices. Indeed, Lord President Rodger qualified the court's judgment in the following terms:

> "I should wish to emphasise that the circumstances of this case are special since the only facts which the reporter is seeking to prove . . . relate to the commission of an offence. The position will be different where the reporter seeks to prove facts which show that the child committed an offence, but simply as one element in a wider picture on which the reporter relies to establish that one of the conditions applies to the child. So for instance in the present case the position would have been different if the reporter had sought to prove not only the commission of the offence but other facts from all of which the sheriff would have been entitled to find it established that the child was, and continued to be, exposed to moral danger. Similarly a reporter might seek to show that a child is beyond the control of his parent by proving that he refuses to do what he is told, absents himself from home, sniffs glue, steals cars and drives at excessive speeds. These facts, including those relating to the commission of offences, would all be relevant . . . Such allegations could therefore properly be included in the relevant statement of facts and the sheriff would be entitled to hold the ground established if he were satisfied that the facts had been proved on the balance of probabilities and on the basis

[655] Ibid, per Lord Coulsfield, at p. 1399.
[656] Ibid, per Lord Coulsfield, at pp. 1401.

of uncorroborated evidence."

The *Constanda* limitation to the reporter's discretion to select the most appropriate s. 67 ground is therefore narrow in scope. It can be overcome if the reporter is able to establish facts, including, but not limited to, the commission of an offence by the child, which indicate wider concerns about that child's welfare. In this way, the *Constanda* limitation applies only where the facts relied upon by the reporter *exclusively* relate to the commission of an offence by a child.

In light of the complex needs of children referred to the reporter on offence grounds, typically involving backgrounds of victimisation and social adversity,[657] it is likely that the reporter is able to overcome the *Constanda* limitation in relation to many referrals. Since all that is required to do so is the inclusion of factual evidence of some wider welfare concern surpassing the commission of an offence, the reporter can arguably distinguish referrals from the *Constanda* precedent without difficulty. In this way, reporters can effectively circumvent the criminal standard of proof, rules of evidence and, crucially, the punitive disclosure consequences, by referring a child who has committed an offence, but who has broader welfare needs, on an alternative s. 67 ground. This would likely be done by reporters applying conduct grounds, such as the ground that the child is beyond the control of the relevant person[658] or the ground that the child's conduct has had a serious adverse effect on his or her health, safety or development.[659] Thus, in spite of *Constanda*, it is open to the reporter to "convert" an offence-type referral into a care and protection or conduct-type referral, so long as the facts allow. As such, the reporter enjoys a wide discretion to select and state the single s. 67 ground that he or she deems most appropriate on the facts. Empirical findings presented in Chapter 6 suggest that reporters do "convert" offence-type referrals into care and protection and conduct-type referrals in practice, verifying the reporter's discretion to choose the appropriate s. 67 ground and underlining the weakness of the *Constanda* limitation to that discretion.[660]

[657] See, in particular, Waterhouse *et al* (2000) (n.13)*;* Waterhouse & McGhee (2002) (n.13); Waterhouse, McGhee & Loucks (2004) (n.13); Gault (2005) (n.13); McAra & McVie (2010) (n.13).
[658] 2011 Act, s. 67(2)(n)
[659] Ibid, s. 67(2)(m).
[660] See, Chapter 6, at 6.2.B & 6.2.C.

### *3.4.C: RE-EVALUATING REPORTER DECISION-MAKING: THE EXERCISE OF DISCRETION OR MAKING OF JUDGMENTS?*

It has been argued that reporters exercise *both* discretion and professional judgment in performing their gatekeeping functions. In particular, reporters exercise discretion in applying the first statutory test[661]; whereas they make a judgment in applying the second statutory test[662] in the terms already elucidated. Whilst the concepts of discretion and judgment are not mutually exclusive, there is, it is submitted, a nuanced difference.

The concept of discretion implies that the decision-maker has the freedom to choose one or more of a number of potential options and is, thereafter, entitled to determine the course of action to take, as in the reporter's application of the first statutory test. In applying the first statutory test, the reporter has the freedom to choose the single most appropriate s. 67 ground, out of 17 potential options, based on the facts and evidence available to him or her. And, having selected that s. 67 ground deemed most appropriate, is entitled to state it in the statement of grounds.

By contrast, the concept of judgment implies that the decision-maker forms an objective and authoritative opinion about a matter, as in the application of the second statutory test, but has no choice or freedom to dictate the subsequent course of action. Indeed it is the notion of *choice* that is key here and that which, this thesis contends, distinguishes discretion from judgment. In applying the second statutory test, the reporter forms an authoritative opinion about the perceived need for compulsory measures of supervision, based on his or her professional experience and the available facts and evidence. However, in so doing, reporters have no freedom or choice to dictate the subsequent course of action: if a s. 67 ground applies and compulsory measures are deemed necessary then they are obliged by statute to arrange a hearing.[663] And if compulsory measures of supervision are deemed unnecessary then reporters have no authority to proceed and must take no further

[661] 2011 Act, s. 66(2)(b).
[662] Ibid, s. 66(2)(b).
[663] Ibid, 68(1) – (2).

action.[664] This distinction between discretion and judgment, drawn along the lines of choice, conforms to Lord Bingham's definition of judicial discretion:

> "According to my definition, an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion."[665]

Lord Bingham's definition highlights the salient feature of discretion: that is, choice. It is clear from SCRA's practice direction that in selecting the most appropriate s. 67 ground, reporters are making a choice and, hence, exercising a discretion. Lord Bingham subsequently discusses the appropriate limits of legal discretion, arguing that questions of legal right and liability should be governed by law and not by the arbitrary whim of an official:

> "This does not mean that every decision affecting the rights or liabilities of the citizen should be made by a court or tribunal, or that the criteria governing administrative discretion should be prescribed in statute . . . What matters is that decisions should be based on stated criteria and they should be amenable to challenge."[666]

Following this view, the limits of the reporter's discretion are appropriately drawn. Not only are the statutory tests applied by reporters set out in the 2011 Act, and hence prescribed by statute, but they are based on clearly stated criteria and are subject to challenge in both the sheriff court and Court of Session.

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[664] Ibid, s. 68 (1)(a) – (b).
[665] T. Bingham (1990) "The Discretion of a Judge," *Denning Law Journal,* 5(1): 27 – 43 at p. 28.
[666] T. Bingham (2010) *The Rule of Law* (London: Penguin Books) at p. 50.

The discretion of the reporter to choose the *single* most appropriate s. 67 ground is of crucial relevance to this thesis. In so choosing, reporters exercise their discretion by direct reference to the s. 67 grounds, which belong to a wider category, a broader group or "type." Since reporters are directed ordinarily to choose a single ground only, the practice guidance suggests that they designate referrals as belonging to one or other of those types. Thus, reporters are responsible for designating referrals as being either care and protection, conduct or offence-type. This classification process is central to the testing of the Kilbrandon ethos, since the designation of a type of ground to a referral, namely the offence ground, can influence the procedures and decision-making process thereafter adopted. This has been demonstrated in relation to offence referrals whereby different procedural features, consequences and decision-making processes apply when a child is subject to an offence-type or jointly reported offence-type referral. This evidences a direct correlation, or interaction, between the type of referral assigned by the reporter, the procedures thereafter followed and the decision-making processes subsequently adopted. By reference to classification theory, the following chapter theoretically explores the consequences of the designation of referral types by reporters.

# CHAPTER 4: THE DESIGNATION OF REFERRAL TYPES BY REPORTERS: EXPLORING THE CONSEQUENCES OF CLASSIFICATION

Having posited that, through the exercise of discretion, reporters tacitly classify referrals, this chapter theoretically explores the implications of such classificatory practice. The chapter examines classification theory and relates it directly to the designation of referral types by reporters via the exercise of discretion to choose the single most appropriate s. 67 ground. In so doing, the chapter aims to provide a theoretical basis for the assertion that reporters classify referrals by direct reference to the s. 67 grounds, which concurrently (and, indeed, intrinsically) fall within the broader scheme of referral types laid out in Chapter 2[667] and supported by empirical findings presented in Chapter 6.[668]

This chapter begins by introducing classification theory and locating, within it, the reporter's discretion to choose the single most appropriate s. 67 ground at the gatekeeping stage. Thereafter, the chapter draws upon kinds and labelling theory, discrete sub-sets of classification theory, in order to explore the consequences of classifying human subjects. In doing so, it highlights the socially constructed and interactive nature of human classification. In particular, theories of reaction and interaction are explored in order to demonstrate a symbiosis between human classification schemes, people who are classified by reference to those schemes, individuals who are responsible for classifying others under those schemes and wider groups of people who come into contact with those who have been so classified.

The chapter concludes by applying these theories to referrals within the CHS. It theorises about interactions between, and reactions to, the referral type assigned by the reporter in respect of the subsequent gatekeeping practices of reporters and dispositive practices of children's hearings. In particular, it argues that this results in different types of referrals being treated differently by reporters at the gatekeeping stage, and by hearings at the disposal stage, which conflicts with the adoption of a unitary approach towards all referral types. Crucially, these claims around the

[667] See, Chapter 2, at 2.5.A.
[668] See, Chapter 6, at 6.2.

interactivity of the assigned referral type are substantiated by empirical findings,[669] contributing to the over-arching argument of this thesis: that differences in process and decision-making practice arise directly from the referral type, which stands in conflict with the Kilbrandon ethos.

## 4.1: THE CLASSIFICATION OF REFERRALS

An essential part of an individual's mental apparatus, used to order, interpret and make sense of the world is classification. Classification is thus at the core of human engagement with, and understanding of, nature and society.[670] Classification systems are adopted to impose order on the natural and social world: to extract and group together common qualities and characteristics of things, in order to achieve a simplified, yet comprehensible, understanding of those types of things as a whole. Essentially, systems of classification are social constructions, both reflective and descriptive of the way things *are*.[671] Though ordinarily undetectable, systems of classification shape the world by creating natural, social and moral orders (or conventions). As such, Foucault argued that the significance of classification schemes is both unavoidable and undeniable.[672] This section introduces classification theory before locating, within it, classificatory practices performed by reporters.

### *4.1.A: INTRODUCING CLASSIFICATION THEORY*

Bowker and Star contend: "to classify is human".[673] This suggests that humans classify objects instinctively, without much conscious effort. Indeed, Donohue observes that "long before people were writing about classification, or listing classes, they were *doing* it."[674] Classification has been defined as the "spatial, temporal or spatiotemporal segmentation of the world."[675] A system of classification can be understood as a set of boxes, into which similar objects or subjects are sorted in order to do some kind of work, or affect some kind of change.[676] Almost anything can be classified according to such a taxonomic scheme. Classification systems might refer to objects, concepts, places or, crucially for the purpose of this thesis, people.

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[669] See, Chapter 7, at 7.1 & 7.2.
[670] G.C. Bowker & S.L. Star (2000) *Sorting Things Out: Classification and its Consequences* (The MIT Press) at p. 1.
[671] M. Douglas (1986) *How Institutions Think* (New York: Syracuse University Press).
[672] M. Foucault (1970) *The Order of Things: An Archaeology of the Human Sciences* (London: Routledge).
[673] Bowker & Star (2000) (n.670) at p. 1.
[674] M. Donohue (2006) "Classification and Human Language," *Theory, Culture and Society,* 23(2): 40 – 48 at p. 40.
[675] Bowker & Star (2000) (n.670) at p.10
[676] Ibid, at p. 10.

Human systems of classification group together people who share characteristics, traits or behaviours in order to compile a certain "type" and locate those individuals within a category that exemplifies that type. However, in so categorising, individuality is necessarily obscured: the process involves an inherent, and unavoidable, forfeiture of the uniqueness of each member belonging to that type. Furthermore, usually such categories reflect some judgment about the group of individuals so classified: that they are the same, or alike, or should be treated in a similar manner.[677] This process can be related directly to reporter decision-making. Since classification theory explains human behaviour in any context, where there are a number of examples of certain types of people, it can be seen as a theoretical context into which reporter practice fits. This thesis has distilled from the major class of children "in trouble," three categories of referral type,[678]and by extension three types of children who can be referred by reporters to children's hearings. A major concern of this thesis is the implications arising from the adoption, whether conscious or subconscious, of this classification scheme by reporters.

### *4.1.B: The Effect Of The Reporter's Discretion To Choose The Most Appropriate s. 67 Ground*

When reporters exercise their discretion to choose the single most appropriate s. 67 ground they perform a classificatory function. They consider the circumstances of the child and the associated referral, they gather evidence, and then sort or filter that referral by reference to what they consider to be the most appropriate ground. This thesis argues that the ground so chosen belongs to a wider group of grounds that are associated with a particular type, either: care and protection, conduct or offence.[679] In so sorting, the reporter classifies or labels the referral, and by extension, the child, as belonging to one of those types. In this way, the exercise of discretion by reporters is such that it involves the designation of types to referrals, and, by extension, the classification of children within the CHS. This argument is of great significance to this thesis since, on the face of it, the very practice of classification appears to conflict with the Kilbrandon ethos. This is particularly true since the Kilbrandon

[677] Ibid, at p.10
[678] Namely, "care and protection," "offence" and "conduct." See, Chapter 2, at 2.5.A.
[679] See, Chapter 2, at 2.5.A.

Report was clear that no distinction should be drawn as to the basis of referrals to children's hearings.[680]

The reporter alone is responsible for the classification or designation process. For the children's hearing has no authority to change the stated s. 67 ground or influence the reporter's choice: that matter is closed by the time the referral reaches the hearing.[681] Whilst it would be open to the sheriff to determine that the stated ground was not established, if the grounds were disputed or not understood by the child and/or relevant persons,[682] the role of the sheriff at proof is not to challenge or influence the reporter's choice. For these reasons, it is appropriate to describe reporters as "classifiers" in exercising their discretion. The impact of this classification process on offence referrals is clear. Designating a referral as being offence-type [683] directly affects the requisite standard of proof and rules of evidence, applied by the reporter and, where appropriate, the sheriff.[684] It also influences the consequences of the referral, resulting in the child acquiring a criminal record that he or she may be required to disclose.[685] Furthermore, it can directly affect the gatekeeping decision-making process and principles.[686] If it is a jointly reported offence-type referral, the procurator fiscal decides whether the case will be dealt with in the CHS or the CJS, a decision based primarily on justice-orientated considerations.[687]

In these ways, classifying a referral as being offence-type has a direct impact on the legal procedures and decision-making processes thereafter followed. However, a major question for this thesis is whether the designation of referral types by reporters has a wider impact, capable of influencing subsequent gatekeeping[688] and dispositive decision-making practice. Kinds and labelling theory, discrete sub-sets of classification theory, provide a theoretical lens through which to explore the broader consequences of classifying referrals within the CHS.

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[680] The Kilbrandon Report, at para.98.
[681] 2013 Rules, r. 59(4).
[682] 2011 Act, ss. 93(1) – (2) & 94(1) – (2).
[683] Ibid, s. 67(2)(j).
[684] See, discussion at Chapter 2, at 2.5.B.
[685] See, discussion at Chapter 2, at 2.5.B.
[686] See, discussion at Chapter 3, at 3.3.B.
[687] Notwithstanding that the reporter has no discretion to decide that a case will be jointly reported: that authority lies with the police. Although in exceptional circumstances the reporter may be of the opinion that a case that has *not* be jointly reported should have been, if the offence allegedly committed falls within the terms of the Lord Advocate's Guidelines. Under such circumstances, the reporter can ask the police to jointly report the case but the responsibility to decide whether to do so rests with the police: COPFS/SCRA (2015) (n.564) at p. 4.
[688] Specifically, the reporter's application of the second statutory test about the perceived need for a CSO: 2011 Act, s. 66(2)(b).

## 4.2: HUMAN KINDS

Both the natural and social sciences posit classification schemes that divide their objects of study into various categories.[689] Classification is an ancient exercise, whereby such objects have been described as "kinds." According to Aristotle, a kind is what makes an individual entity be what it is[690]: "I am what I am by virtue of belonging to the kind "human being," and of having essential properties like the capacity to think and talk to other members of my species."[691] These properties, according to Aristotle, are assigned by nature, not human beings.[692] Scientific knowledge is knowledge of these essential properties. In this way, science aims to discover the nature of things and nature must be "carved at its joints,"[693] to promote the acquisition of scientific knowledge. Thus, the idea of natural kinds is not timeless but, rather, has evolved through the development of Western science.[694] Different theories have been posited about such "universals" in the non-human world by Aristotle (natural kinds)[695], Locke (sorts and real essences)[696], Mill (real kinds)[697] and Putnam (kind terms),[698] all of which share an essentialist[699] understanding of kinds.

This conception of kinds is held only by a minority of contemporary philosophers, however the term "kinds" is still widely used in metaphysics and the philosophy of science.[700] Guala explains that the language of kinds is "associated with the idea that the world comes already structured before we look at it: there are natural ways of classifying things, classifications that are independent of our theories."[701] Some philosophers exclusively associate natural kinds with categories from scientific

[689] Khalidi (2013) (n.25) at p. 1.
[690] R.B. Jones (ed.) *The Organon: The Works of Aristotle on Logic* (2012) Volume 1: Categories (translated by E.M. Edgehill).
[691] Guala (2014) (n.25) at p. 57.
[692] Ibid, at p. 57.
[693] Plato (265e) *Phaedrus* (2005: Penguin Classics).
[694] Hacking (1995) (n.27) at p. 363.
[695] R.B. Jones (ed.) *The Organon: The Works of Aristotle on Logic* (2012: Create Space Publishing), Volume 1: Categories.
[696] J. Locke (1698) "An Essay Concerning Human Understanding" in P.H. Nidditch (ed.) *The Clarendon Edition of the Works of John Locke* (1998: Oxford University Press).
[697] J.S. Mill (1843) *A System of Logic Ratiocinative and Inductive* (2011: Cambridge University Press).
[698] H. Putnam (1973) "Meaning and Reference" *Journal of Philosophy,* 70: 699 – 711.
[699] Essentialism is understood as the doctrine that it is correct to distinguish between those properties of a thing, or a kind of thing, that are essential to it and those that are merely accidental: S. Blackburn (2005) *Oxford Dictionary of Philosophy,* 2nd Edition, (Oxford University Press).
[700] Guala (2014) (n.25) at p. 57.
[701] Ibid, p. 57.

disciplines since they support robust and reliable inductive inferences.[702] By contrast, other philosophers stress the essential properties of natural kinds; the idea being that they provide a fundamental and timeless classification of entities.[703] These philosophers associate natural kinds with objective and universal order, thereby emphasising the metaphysical, rather than pragmatic, function of natural kinds.[704] Beyond these nuanced disagreements, most natural kind theorists share a realist orientation; that is, they affirm the real existence of natural kinds, which exist independently of human beings and are not product of their minds, language or conceptual scheme.[705]

To summarise, scientific disciplines frequently divide their particulars of study into kinds in order to acquire knowledge about them. A kind is "natural" when it corresponds to a grouping that reflects the structure of nature, rather than the interests and actions of humans.[706] It is generally accepted that science is able to reveal the true nature, or essence, of these kinds since it is a corollary of scientific realism that the taxonomies employed correspond to real kinds in nature.[707] Thus, the existence of these real and independent kinds of things is held to justify scientific inferences and practices. Khalidi provides a realist account of classificatory practices in the following terms:

> "First, we observe that certain properties occur in individual entities, we then identify these particularly salient clusters of properties as kinds (or 'natural kinds'). After that, we associate these kinds with certain labels or predicates, and we classify entities and phenomena in accordance with those labels. We go on to refer to these kinds in explanations and inductive inferences while discovering further things about them and acquiring new beliefs about them."[708]

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[702] The use of the term "scientific kind" rather than "natural kind" has been advocated by a number of philosophers since the implication is that anything not so classified as a natural kind must be unnatural in its nature. See, Hacking (1991) (n.25); R. Boyd (1991) "Realism, Anti-Foundationalism and the Enthusiasm for Natural Kinds," *Philosophical Studies,* 61: 127 - 148; J. Dupre (1993) *The Disorder of Things* (Harvard University Press).
[703] Guala (2014) (n.25) at p. 57.
[704] J. La Porte (2004) *Natural Kinds and Conceptual Change* (Cambridge University Press); B. Ellis (2001) *Scientific Essentialism* (Cambridge University Press).
[705] Blackburn (2005) (n.699).
[706] A. Bird & E. Tobin (2016) "Natural Kinds" *The Stanford Encyclopaedia of Philosophy* (Spring 2016 Edition). Available from: http://plato.stanford.edu/archives/spr2016/entries/natural-kinds/ (Accessed on: 17/06/2016).
[707] Ibid.
[708] Khalidi (2010) (n.25) at p. 335.

Examples of such kinds are found in all scientific disciplines. Chemistry is accepted as providing the paradigm examples of kinds: chemical elements, for example, are natural kinds.[709] However classificatory practices are also widely adopted in social and human scientific disciplines. The language of natural kinds is, however, used in opposition to the language of human kinds; that is, classifications that are "human-made, artificial, invented, conventional or socially constructed."[710] This has been regarded as deeply problematic by many philosophers, since these human kinds[711] are dependent on human classificatory practices and thus reject the dominant realist understanding of kinds.[712]

### *4.2.A: NATURAL VS. HUMAN KINDS*

Adopting a realist perspective, some philosophers argue that certain classification schemes are more legitimate than others because they correspond to existing divisions in nature.[713] By contrast, human classification schemes are seen as less legitimate, "merely arbitrary or gerrymandered,"[714] since they involve "non-natural" kinds, which conflict with the realist perspective. However, the idea of human or social kinds has a long history. Sociologists such as Durkheim argued that there is empirical support for the autonomy of social facts.[715] Durkheim used statistical analysis to show that suicide rates differed radically depending on social factors, such as religious background, gender, marital status etc.[716] This raised the possibility of taking social science in a quantitative direction: the statistical facts identified being distinctly social, rather than natural. Indeed a number of fundamental differences between natural and human kinds can be identified from the literature, which challenge a realist understanding of kinds.

Some philosophers argue that human kinds are different from natural kinds because they are interactive and thus can change in response to classificatory practices applied to them, and in response to attitudes held towards them.[717] Others claim that human kinds are ontologically subjective since they depend on human mental

[709] Bird & Tobin (2016) (n.706).
[710] Guala (2014) (n.25) at p. 57.
[711] The terms "human kinds" and "social kinds" are used interchangeably in the literature.
[712] Guala (2014) (n.25) at p. 57.
[713] Khalidi (2013) (n.25) at p. 1.
[714] Ibid, at p. 1.
[715] E. Durkheim (1897) *Suicide: A Study in Sociology* (2002: Routledge).
[716] Ibid.
[717] I. Hacking (1999) *The Social Construction of What?* (Harvard University Press); See also, Hacking (1995) (n.27).

attitudes for their very existence.[718] Others hold that the key difference is that human kinds are fundamentally evaluative or normative in nature.[719] These ideas draw attention to another key feature of classification systems, emphasised by Douglas: that they grow out of, and are maintained by, social institutions.[720] Indeed, Guala stresses that the existence of such "institutional kinds" has important philosophical consequences since they bring realism into question.[721] This is because some human kinds can only be invented and not discovered (in the scientific sense) and so suggests that the social sciences have a different role and status to the natural sciences.[722] The role of classification in the social sciences is thus not to discover but to describe and organise,[723] thereby suggesting that human kinds are not real (in an essentialist sense) but, rather, are socially constructed. These salient differences render human kinds distinct from natural kinds.[724] Of particular relevance to this thesis is the socially constructed and interactive nature of human kinds. These issues will therefore be explored in turn in order to construct the argument that "care and protection," "conduct" and "offence" referrals are socially constructed, interactive human kinds.

### *4.2.B: Challenging Realism: "Making People Up" and The Socially Constructed Nature of Human Kinds*

The identified differences between natural and human kinds challenge the dominant realist understanding of kinds in general. Rather, the literature points to a social constructionist understanding of human kinds.[725] In contemporary philosophy, the orthodox opposition to realism has been posited by philosophers such as Goodman, who was interested in the extent to which humans perceive the world through conceptual and linguistic lenses of their own making.[726] Indeed, realism is irreconcilable with the dynamic nature of social facts, since they relate to human

[718] J. Searle (1995) *The Construction of Social Reality* (New York: Free Press).
[719] P.E. Griffiths (2004) "Emotions as Natural and Normative Kinds" *Philosophy of Science,* 71: 901 – 911.
[720] Douglas (1986) (n.671) at p. 46.
[721] Guala (2014) (n.25) at p. 58.
[722] Ibid, at p. 58.
[723] Ibid, at p. 58.
[724] However it should be noted that some philosophers have assimilated natural kinds to human kinds: See, for example, M. Ereshefsky (2002) "Bridging the Gap Between Human Kinds and Biological Kinds," *Philosophy of Science,* 71(5): 912 – 921.
[725] See, in particular, S. Haslanger (1995) "Ontology and Social Construction", *Philosophical Topics,* 23:95 -125; S. Haslanger (2003) "Social Construction: The 'Debunking' Project" in F. Schmitt (ed.) *Socializing Metaphysics* (Lanham: Rowman & Littlefield); A.K. Sveinsdottir (2013) "The Social Construction of Human Kinds," *Hypatia,* 28(4): 716 – 732; Guala (2014) (n.25).
[726] N. Goodman (1978) *Ways of Worldmaking* (Hassocks: Harvester Press); See also, Blackburn (2005) (n.699).

beings engaged in social interactions.[727] Since human kinds are distinctly "anthropocentric," some theorists claim that the only valid perspective to hold in relation to them is constructionism.[728] Drawing on Goodman's orthodox position to realism,[729] Hacking argues that human kinds are both (socially) constructed and interactive.[730] Hacking's work on human kinds has been particularly influential[731] and so merits fuller discussion.

The term "human kind" was first introduced by Hacking to refer to the kinds of people classified and studied in the social sciences:[732] that is, "the behaviours, conditions, experiences, actions, temperaments or tendencies that may be said to characterise certain types of people."[733] In general terms, a human kind is a type of person, peculiar to social settings, that relies on human action and language to exist. However, Hacking's concept of human kinds is more specific; it does not refer to *any* kinds of people but certain kinds that are studied by social scientists.[734] Hacking defines human kinds in the following terms:

> "By human kinds I mean kinds about which we would like to have systematic, general, and accurate knowledge; classifications that could be used to formulate general truths about people; generalizations sufficiently strong that they seem like laws about people, their actions, or their sentiments. We want laws precise enough to predict what individuals will do, or how they will respond to attempts to help them or to modify their behaviour. The model is that of the natural sciences."[735]

Just as natural kinds emerged in order to promote the acquisition of scientific knowledge and support inductive inferences, so too did human kinds in order to promote the acquisition of social knowledge and predict human behaviour. For

[727] Bird & Tobin (2016) (n.706) at 2.4.
[728] Ibid, at 2.4.
[729] Namely, that of "irrealism," which corresponds to the claim that the world dissolves into versions: See, Goodman (1978) (n.726); D. Cohnitz & M. Rossberg (2016) "Nelson Goodman", *The Stanford Encyclopaedia of Philosophy* (Spring: 2016). Available from: http://plato.stanford.edu/entries/goodman/ (Accessed on: 17/05/2016).
[730] See, See, Hacking (1999) (n.717); Hacking (1995) (n.27).
[731] A.J. Bird (2014) "Human Kinds, Interactive Kinds and Realism About Kinds," *Working Paper*, at p. 1. Available from: http://eis.bris.ac.uk/~plajb/research/papers/Human_Kinds_Interactive_Kinds_and_Realism.pdf (Accessed on 22/05/2016).
[732] See, I. Hacking (1986) "Making People Up," in T. Heller, M. Sosna & D. Wellberry (eds.) *Reconstructing Individualism* (Stanford University Press) pp. 222 -236; I. Hacking (1988) "The Sociology of Knowledge About Child Abuse," *Nous,* 22: 53 – 63; I. Hacking (1992) "World-Making by Kind-Making: Child Abuse, For Example," in M. Douglas & D. Hull (eds.) *How Classification Works* (Edinburgh University Press) pp. 180 – 238.
[733] Hacking (1995) (n.27) at pp. 351 – 352.
[734] Ibid, at p. 352.
[735] Ibid, at p. 352.

classification always involves knowledge of, or belief in, regularities about a category of entities.[736] Hacking argues that the search for human kinds is inextricably linked to processes of prediction and reform.[737] Accordingly, Hacking assigns a number of salient characteristics to human kinds:

> "When I speak of human kinds, I mean (i) kinds that are relevant to some of us, (ii) kinds that primarily sort people, their actions, and behaviour, and (iii) kinds that are studied in the human and social sciences, i.e. kinds about which we hope to have knowledge. I add (iv) that kinds of people are paramount; I want to include kinds of human behaviour, action, tendency, etc. only when they are projected to form the idea of a kind of person."[738]

Hacking proposes four criteria for human kinds, emphasising that human kinds are objects of enquiry, and that knowledge is acquired about them in order to interfere, intervene, offer assistance, exert control or punishment in a predictable manner.[739] Children classified by the reporter, by reference to the three major types of s. 67 grounds, appear to satisfy these criteria. First, they are related, and peculiar, to people: namely, children "in trouble." Second, the referral type, or, more specifically, the chosen type of s. 67 ground, is applied by the reporter to sort the actions or behaviours of children, or the actions or behaviours of others in relation to children. Third, children who have been abused or neglected, or who are beyond parental control, or who engage in offending behaviour are studied, extensively, in the social sciences. In particular, knowledge is sought about those kinds of children in order to inform interventions and address their behaviours and needs. The tendency of decision-makers, reporters and panel members, to project behaviours associated with the referral type onto the child when making gatekeeping and dispositive decisions was explored by the empirical study. Findings presented in Chapter 7, highlight differences in decision-making and disposal practice in respect of offence and conduct-type referrals characterised by a hardening in approach and some departure from the welfare model.[740] This suggests that there is some

[736] I. Hacking (2001) "Criminal Behaviour, Degeneracy and Looping" in D.T. Wasserman & R.T. Wachbroit (eds.) *Genetics and Criminal Behaviour* (Cambridge University Press) at pp. 155 -156.
[737] Hacking (1995) (n.27) at p. 360.
[738] Ibid, at p. 354.
[739] Ibid, at p. 360.
[740] See, Chapter 7, at 7.1 & 7.2.

inclination to project the kinds of behaviours associated with the referral-type onto the child. Since the criteria are largely satisfied, it is reasonable to conclude that "care and protection," "conduct," and "offence" referrals are human kinds in accordance with Hacking's conceptualisation. It therefore follows that the three major referral types will share the characteristics, qualities and traits of human kinds: in particular, their interactive nature.

A number of examples of human kinds have been explored by Hacking, including child abuse, [741] teenage pregnancy, [742] drunkards, [743] homosexuals, [744] multiple personality disorder,[745] schizophrenics,[746] and criminal behaviour[747]. However, his most discussed example is child abuse.[748] It examines the evolving conception of child abuse, and responses to it, in the United States over the past 150 years. Hacking contends that "child abuse," as a term used to classify and describe actions and behaviours, came into being in the United States around 1960.[749] He traces the emergence of this "new" social phenomenon, to Denver, Colorado, where "battered child syndrome" was first identified by a group of paediatricians.[750] Hacking demonstrates that the publication of "The Battered Child Syndrome"[751] gave rise to intense media and academic interest in child abuse.[752] He highlights an "explosion" of scientific and scholarly concern, whereby child abuse was taken up as a key social issue by physicians, social scientists, lawmakers, publicists, and professionals in social work and the police.[753] In so doing, Hacking argues that the contemporary idea of child abuse is highly "medicalized," with a distinct scientific character, so as to suggest that child abuse emerged as a new human kind that was the object of knowledge and discovery.[754]

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[741] See, Hacking (1992) (n.732); Hacking (1999) (n.717); Hacking (1995) (n.27) at p. 357.
[742] Ibid, at p. 365.
[743] Ibid, at p. 353.
[744] Ibid, at p. 354.
[745] See, I. Hacking (1996) *Rewriting the Soul: Multiple Personality and the Science of Memory* (Princeton University Press); Hacking (1995) (n.27) at pp. 357 – 359.
[746] See, Hacking (1999) (n.717) Chapter 4: Madness: Biological or Constructed?
[747] See, Hacking (2001) (n.736).
[748] See, in particular, I. Hacking (1991) "The Making and Molding of Child Abuse," *Critical Inquiry,* 17 (Winter: 1991) 253 – 288; Hacking (1992) (n.732); Hacking (1999) (n.717) Chapter 5: "Kind Making: The Case of Child Abuse," pp. 135 – 162.
[749] Hacking (1999) (n.717) at p. 133.
[750] See, H.C. Kempe *et al*. (1962) "The Battered Child Syndrome*," Journal of the American Medical Association,* 181(1): 17 - 24.
[751] Ibid.
[752] Hacking (1991) (n.748) at pp. 267 – 269.
[753] Ibid, at pp. 269.
[754] Ibid, at p. 265.

According to Hacking, child abuse emerged in the United States during the 1960s, as a new kind or conception, which replaced the concept of child cruelty.[755] While recognising that the concepts of child cruelty and child abuse are analogous, he argues that the idea of child abuse constituted a new social phenomenon and the introduction of this human kind resulted in a consequential shift in both individual and public consciousness.[756] In this way, his analysis suggests that the change in terminology, from cruelty to abuse, gave rise to a far-reaching change in concept and, hence, the creation of a new human kind.[757]

Hacking's theories on human kinds have been widely cited and adopted.[758] Although not without his critics,[759] such critiques have tended to focus on the ontological status of human kinds. Indeed, there is a lively debate in the philosophical literature, largely beyond the scope of this thesis, about the true existence or reality of human kinds.[760] The notable exception to this is Hacking's work, which provides both a metaphysical and epistemological account,[761] with interesting ideas about where human kinds come from, what it means to be a kind and how people take on the characteristics associated with kinds. His work, therefore, closely relates to labelling theory.[762]

Hacking describes his work as a study of "making people up," pointing directly to the socially constructed nature of human kinds.[763] By this he means that types of people, identities and personalities are constructed through classification processes, as well as styles of behaviours, actions, emotions and experiences that relate to those types.[764] Hacking is interested in how such human kinds come into being. Making a kind of person up involves developing "systematic, general and accurate knowledge" from which to "formulate general truths about people" that are precise enough to

[755] Hacking (1999) (n.717) at pp.134 – 135.
[756] Ibid, at p. 135.
[757] It is interesting to note that similar linguistic developments can be traced in relevant Scottish legislation: from the Prevention of Cruelty to, and Protection of, Children Act of 1889 which talked of "cruelty" and "child life protection," to the Social Work (Scotland) Act 1968 and beyond where the terms "neglect" and "failure to fulfil responsibilities" were introduced.
[758] See, E. Lambert (2006) "Hacking and Human Kinds," *Aporia,* 16(1) 49 – 71; Sveinsdottir (2013) (n.725); Bird (2014) (n.731).
[759] See, in particular, R. Cooper (2004) "Why Hacking Is Wrong About Human Kinds," *British Journal for the Philosophy of Science,* 55: 73 – 85.
[760] See, Haslanger (1995) (n.725); A.L. Thomasson (2003) "Realism and Human Kinds", *Philosophy and Phenomenological Research,* 67(3): 580 – 609; Haslanger (2003) (n.725)*;* Cooper (2004) (n.759); Khalidi (2013) (n.25); Sveinsdottir (2013) (n.725); Guala (2014) (n.25); A.J. Bird (2014) (n.731).
[761] Sveinsdottir (2013) (n.725) at p. 717.
[762] Discussed at 4.3, below.
[763] I. Hacking (2004) "Between Michael Foucault and Erving Goffman: between discourse in the abstract and face-to-face interaction," *Economy and Society,* 33(3), 277 – 302, at p. 279.
[764] Lambert (2006) (n.758) at p. 51.

predict behaviour and facilitate intervention.[765] As such, the process of making people up "changes the space of possibilities for personhood," since those possibilities are determined by what is imaginable and articulable, that which is named and described.[766] These ideas demonstrate the normative or loaded nature of human kinds and the labels associated with them. For example, describing a person as being "depressed," inevitably carries with it certain associations or expectations; for example, that the person is upset and in need of medical intervention. Similarly, describing a child as one who is "beyond parental control,"[767] carries certain connotations, for example, that the child is unruly and in need of boundaries. Arguably then, making people up is about imposing onto a person a particular "way of being":

> "Inventing or moulding a new kind, a new classification, of people or of behaviour may create new ways to be a person, new choices to make, for good or evil. There are new descriptions, and hence new actions under a description."[768]

The expectations and connotations, associated with a "way of being," whether positive or negative, arise as a direct consequence of the description of certain behaviours within a scheme of classification. The "way of being" associated with a particular human kind may therefore evoke a particular response or reaction from those said to belong to that kind or, indeed, others who come into contact with them. These crucial reactions and responses to classificatory practices serve to highlight the interactivity of human kinds.

### 4.3: THE INTERACTIVITY OF HUMAN CLASSIFICATION

The interactive nature of human classification is of central importance to this thesis since it provides a theoretical basis to support empirical findings, which evidence an interaction between the assigned referral type and the subsequent gate-keeping and dispositive decision-making practices adopted in respect of those types of

[765] Hacking (1995) (n.27) at p. 352.
[766] Hacking (1986) (n.732) at p. 165.
[767] A "conduct" ground under s. 67(2)(n) of the 2011 Act.
[768] Hacking (1995) (n.27) at p. 239.

referrals.[769] Theories of interaction and reaction, deriving from kinds and labelling theory, will therefore be explored before those theories are applied to referrals within the CHS.

### *4.3.A: THE LOOPING EFFECT AND FEEDBACK*

An essential concern of Hacking's study of "making people up" is the interactions between classification systems and the human beings classified by reference to those systems.[770] Since human kinds can exert "effects on themselves,"[771] Hacking is interested in the ways in which people who are classified react to, and modify their behaviour, in light of that classification.[772] He argues that this interaction arises through a distinctive looping effect that involves a correlation between "culture and cognition."[773] Otherwise stated, the looping effect involves an interaction between everyday, observational practices and classificatory practices.[774] Once a human kind gets classified and becomes an object for knowledge, intervention, assistance, control or punishment, the people associated with that kind tend to react and respond to the classification itself.[775] The reaction could either be positive or negative, in so far as the label imposed could have either a self-fulfilling or self-defeating quality.[776] Whatever the reaction, it is said to create new properties of the kind, which require classification systems to be modified in response: the looping effect is thus initiated in such a way that human kinds and knowledge create each other.[777] Hacking describes this process of looping in the following terms:

> "When we recognise a natural kind, and learn some laws about it, we often interfere with it, using those very laws to guide us. The same is true with human kinds. But simply naming a natural kind makes no difference to it at all. Human beings, in contrast, often get to know when they or their behaviour is classified in a certain way. The sheer classification may influence their behaviour, and their attitudes, as well as that of their

[769] See, Chapter 7, at 7.1. & 7.2.
[770] Hacking (2004) (n.763) at p. 279.
[771] J. Martin & J. Sugarman (2001) "Interpreting Human Kinds: Beginnings of a Hermeneutic Psychology, *Theory and Psychology,* 11, 193 – 207.
[772] Hacking (2004) (n.763) at p. 279.
[773] Hacking (1995) (n.27) at pp. 366 – 370.
[774] See also, Hacking (2004) (n.763).
[775] Lambert (2006) (n.758) at p. 52.
[776] Hacking (1995) (n.27) at p. 367.
[777] Lambert (2006) (n.758) at p. 52.

> neighbours. Labelling theory suggested this a long time ago. But also the class and its properties may change in the light of being classified, creating a feedback effect, or what I call a looping effect, to make clear that this is a two-way process that can go on and on."[778]

This dynamic process highlights a key difference between natural kinds and human kinds; that is, consciousness on the part of people to whom labels are assigned, resulting in an interaction between the classification and the classified.[779] Since Hacking posits that people act, and decide upon possibilities for action, under descriptions, he contends that as new possibilities for description emerge so too do new kinds of action.[780] In order to demonstrate the interaction between description and action, thereby distancing his theory from labelling, Hacking argues that this process is a "two-way street"[781]: because people behave differently in light of how they are classified, the descriptions and classifications employed in relation to them must, in turn, be revised.[782]

A central tenet of Hacking's theory is that classifying people results in feedback.[783] This "feedback" is dependent on the description of a certain type of person entering popular culture and highlights the normative dimension of human kinds. For example, being classified as a "child abuser" necessarily involves the imposition of moral judgments about the type of person that would engage in such behaviour and, further, could carry with it certain institutional consequences. Thus, the labels associated with human kinds evoke certain responses about the people so classified: denoting persons to pity or to punish, to support or to avoid. As a result, individuals may become motivated to break away from or retreat into the classification scheme and the labels assigned to them, and, as their behaviour changes, so too does the human kind under study.[784]

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[778] Hacking (2001) (n.736) at p. 155.
[779] Hacking (1991) (n.748) at p. 254.
[780] Ibid, at p. 255.
[781] Ibid, at p. 255.
[782] Ibid, at p. 255.
[783] See, Hacking (1995) (n.27) at pp. 351 – 383.
[784] Ibid, at p. 352.

### *4.3.B: LABELLING THEORY AND ITS LIMITATIONS*

The foregoing ideas about the interactivity of human kinds are closely related to labelling theory, which also provides a useful theoretical framework through which to explore the designation of referral types by reporters. Labelling is a sociological approach towards crime and deviancy, which primarily refers to the social processes through which the behaviours of certain individuals are classified.[785] Labelled individuals are said to be "stereotyped" to act in certain ways, and are responded to according to those stereotypes.[786] Labelling theory suggests that this reaction tends to reinforce a self-conception of being a "deviant" and has the unintended consequence of promoting, rather than remedying, deviant behaviour.[787] Unlike traditional approaches which assume that the causes of crime are located within the biological or psychological characteristics, or the socio-economic circumstances, of offenders, labelling theory suggests that criminological analysis should be concerned with how people come to be defined as deviant and the implications of such definitions, or labels, in relation to future offending.[788] Definitions of labelling theory vary considerably in the literature; some versions place emphasis on the social and structural effects of how labels affect opportunities in life,[789] whilst other accounts focus primarily on how labels affect the individual's self-concept.[790]

The theoretical origins of labelling lie in the interactionist school of sociology, emphasising the flexibility of individual responses to social situations.[791] From this perspective, Mead argued that "the self" is a social construct and the ways in which individuals see themselves and act is, in part, a consequence of the ways in which others see, and act towards, them.[792] Developing these ideas, Tannebaum posited that deviance is created through processes of social interaction.[793] He considered that a majority of people commit deviant acts but only a minority come to be recognised as deviant and argued that the "known deviant" is regarded thus, even though his or her

[785] E. McLaughlin & J. Muncie (eds.) (2013) *The Sage Dictionary of Criminology,* 3rd Edition, (London: Sage) at p. 250.
[786] Ibid, at p. 250.
[787] Ibid, at p. 246.
[788] J. Muncie (2013) "Labelling, Social Reaction and Social Constructionism" in E. McLaughlin & T. Newburn (eds.) *The Sage Handbook of Criminological Theory* (Sage) at p. 140.
[789] See, Becker (1963) (n.26).
[790] See, Tannebaum (1938) (n.26).
[791] Muncie (2013) (n.788) at p. 140.
[792] G.H. Mead (1934) *Mind, Self and Society* (Chicago University Press).
[793] Tannebaum (1938) (n.26).

behaviour are no different to others who have not been so identified.[794] As such, certain people become "deviant" simply via the imposition of social judgments about their behaviour.[795] It follows that deviance is not something inherent in, or peculiar to, people but, rather, is the outcome of being so labelled:

> "The process of making the criminal, therefore, is a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating suggesting, emphasizing and evoking the very traits that are complained of."[796]

According to Lemert, individuals who engage in criminal behaviour acquire stigmatic labels, which result in them being denied various opportunities such as those related to employment.[797] The result is that desistance from crime is more difficult once criminal activity has been initiated, particularly if the individual acquires a criminal record. Lemert distinguishes between "primary" and "secondary" deviance.[798] He argues that primary deviance involves some act, which the perpetrator does not conceptualise or identify as being "deviant," whereas secondary deviance arises through the reaction of others to the initial act of primary deviance.[799] Society's reaction to deviance may then "amplify" that behaviour.[800] The effect of this "deviancy amplification system," originally proposed by Wilkins, is a spiral of repeated labelling which gives rise to a self-fulfilling prophecy of recidivism.[801] Crucially, Lemert contends that, through official labelling processes, people come to regard the labelled individual differently, who then in turn may become more isolated.[802] In these ways, a deviant identity is established, confirmed and reinforced:

> "We start with the idea that persons and groups are differentiated in various ways, some of which result in social penalties, rejection and segregation. These penalties and segregative reactions of society or the community are

[794] Ibid, at pp. 18 – 19.
[795] Muncie (2013) (n.788) at p. 141.
[796] Tannebaum (1938) (n.26) at p. 19.
[797] See, Lemert (1951) (n.26); Lemert (1967) (n.26).
[798] See, in particular, Lemert (1967) (n.26).
[799] Ibid, at pp. 62 – 63.
[800] Ibid, at p. 64.
[801] L.T. Wilkins (1964) *Social Deviance: Social Policy, Action and Research* (Tavistock Publications). See also, P. Willmott (1966) *Adolescent Boys of East London* (London: Routledge).
[802] E. Lemert (1967) (n.26) at p. 65.

> dynamic factors which increase, decrease, and condition the form in which the initial differentiation or deviation takes place."[803]

Lemert's key conclusion, that social control causes deviance, has been described as a "crucial turning-point in the development of a radical criminological imagination that has flourished since the 1960s."[804] Indeed, the clearest formulation of labelling theory emerged during the 1960s, not only through the work of Becker,[805] but also from a number of studies which examined the role of moral entrepreneurs in constructing social problems.[806] These works explored the process of "becoming" a deviant and suggested that it centrally involves the reactions of a social audience, rather than individuals' behaviours, and that it is the stigma associated with the deviant label imposed by that audience which informs future patterns of behaviour.[807]

Becker's prominent work on labelling centres on the deviant "outsider" and refers to the conflicting social processes through which some individuals come to break rules and others come to enforce them.[808] According to Becker, deviance is simply the performance of some prohibited act, which is labelled "deviant" by persons in power.[809] Powerful groups in society, such as criminal justice agencies, adopt labelling processes to define behaviours as acceptable or unacceptable. To some extent, the grounds upon which children can be referred to hearings can be viewed in this light. The s. 67 grounds, the application of which contribute towards the justification of compulsory state intervention, can be understood as a policy statement on what is regarded as unacceptable in the upbringing and experiences of children.

Becker argues that a consequence of the labelling process is that individuals are publicly placed in an exclusionary social category.[810] Whilst rule-breaking behaviour is accepted by Becker as a universal, rule-making is not. He considers that such rules are merely a reflection of norms held by society at a certain time and are thus

[803] Lemert (1951) (n.26) at p. 29.
[804] McLaughlin & Muncie (2013) (n.785) at pp. 246 – 247.
[805] Becker (1963) (n.26).
[806] See, for example, Kitsuse (1962) (n.26); K.T. Erikson (1966) (n.26).
[807] Muncie (2013) (n.788) at p. 141.
[808] Becker (1963) (n.26).
[809] Ibid, at p. 15.
[810] Ibid, at pp. 25 – 29.

susceptible to change in accordance with societal standards and individual judgments.[811] Importantly, Becker views those individuals who engage in rule-breaking behaviour as essentially different from those who make, and abide by, rules. He posits that rule-breakers see themselves as morally at odds with rule-makers. Defined as "outsiders," such individuals come to epitomise what is considered to be deviant. In these ways, labelling concerns *both* the processes of social interaction and reaction,[812] both directly applicable to this thesis. A key aim of the empirical study was to explore a potential interaction between the referral type assigned by the reporter and the subsequent gatekeeping and dispositive decision-making practices adopted. As such, a central concern of this thesis is the reactions of a particular "social audience," namely reporters and children's hearings, to the referral type assigned by the reporter at the gatekeeping stage.

Since labelling theory constituted a departure from the dominant positivist paradigm, it inevitably became subject to much critique. Labelling theory is contentious and, so, its limitations must be acknowledged. Although a dominant theoretical perspective from the 1960s to the 1980s,[813] it was "pronounced dead"[814] by the mid-1980s. Critics charged that it was too ambiguous and lacked any empirical basis, since it did not permit empirically falsifiable propositions to be tested.[815] Radical theorists argued that labelling lacked analysis of the social and political structures within which labels are constructed and applied and, so, urged that labelling be embedded within a Marxist model.[816] An alternative critique, offered by positivists, focused on the lack of attention afforded to primary deviance,[817] arguing that motivations for this were poorly articulated.[818] Other positivists critiqued labelling theory to the extent that it insufficiently recognises the fundamental deviance

[811] Ibid, at pp. 15 – 18.
[812] Muncie (2013) (n.788) at p. 142.
[813] See, for example, M. Gold & J.R. Williams (1969) "The Effect of 'Getting Caught:' Apprehension of the Juvenile Offender as a Cause of Subsequent Delinquencies," *Prospectus,* 3: 1 – 12; M. Gold (1970) *Delinquent Behaviour in an American City* (California: Brooks and Cole); D. Farrington & D. West (1977) *The Delinquent Way of Life: Report of the Cambridge Study in Delinquent Development* (London: Heineman); L.W. Klemke (1978) "Does Apprehension for Shoplifting Amplify or Terminate Shoplifting Activity?" *Law and Society Review,* 12: 291 – 403; M. Morash (1982) "Juvenile Reaction to Labels: An Experiment and Exploration Study," *Sociology and Social Research,* 67(1): 76 – 88.
[814] W. Gove (1985) "The Effect of Age and Gender on Deviant Behavior: A Biopsychosocial Perspective," in A.S. Rossi (ed.) *Gender and Life Course* (New York: Aldine).
[815] See, R. Paternoster & L. Iovanni (1989) "Labeling Perspective and Delinquency: An Elaboration of the Theory and an Assessment of the Evidence," *Justice Quarterly,* 6(3): 359 – 394; E. Goode (1975) "On Behalf of Labeling Theory," *Social Problems,* 22: 570 – 583; C.R. Tittle (1980) "Labeling and Crime: An Empirical Evaluation" in W.R Gove (ed.) *The Labeling of Deviance: Evaluating a Perspective* (2nd Edition: Sage) pp. 241 – 263.
[816] I. Taylor, P. Walton & J. Young (1973) *The New Criminology* (London: Routledge).
[817] McLaughlin & Muncie (2013) (n.785) at p. 247.
[818] Muncie (2013) (n.788) at p. 145.

associated with the commission of serious violent offences, such as murder and rape, and, accordingly, rejected the central claim that no act is intrinsically deviant.[819] As a result of the foregoing critiques, Beirne and Messerschmidt have rendered labelling merely a criminological approach, rather than a theory.[820]

Nevertheless, attempts continue to be made to quantitatively measure how far criminal intervention curbs or accelerates deviant behaviour.[821] There has been consistent interest in labelling theory, further elaborating and expanding the theory so as to provide empirically testable hypotheses.[822] In a review of the criticisms levelled at labelling, Paternoster and Iovanni present hypotheses from a social and structural perspective demonstrating that "status attributes are influential in determining who is labelled," and arguing that "labelling experiences are instrumental in producing problems of adjustment and in causing subsequent commitment to further deviance."[823] Their conclusion is, therefore, that labelling is not invalid as critics have claimed.[824] As such, labelling theory continues to be adopted to test empirical hypotheses.

For example, Bernburg *et al's* study, involving 870 adolescents, explored the connection between formal CJS intervention and subsequent delinquency.[825] The study found that: "juvenile justice intervention is significantly associated with serious delinquency in a subsequent period."[826] It found that formal intervention *increased* subsequent delinquency, supporting the notion that official labelling "triggers" and, indeed, intensifies "criminal embeddedness."[827] Similarly, Myers

[819] C. Welford (1975) "Labelling Theory and Criminology," *Social Problems,* 22(3): 332 – 345.
[820] P. Beirne & J. Messerschmidt (1991) *Criminology* (Fort Worth: Harcourt Brace Jovanovich).
[821] See, for example, D.L. Myers (2003) "The Recidivism of Violent Youths in Juvenile and Adult Courts," *Youth Violence and Juvenile Justice,* 1(1): 79 – 101; J.G. Bernburg, M.D. Krohn & C.J. Rivera (2006) "Official Labeling, Criminal Embeddedness and Subsequent Delinquency: A Longitudinal Test of Labeling Theory," *Journal of Research in Crime and Delinquency,* 45(3): 67 – 88; T. Chiricos, K. Barrick & W. Belles (2007) "The Labeling of Convicted Felons and Its Consequences for Recidivism," *Criminology,* 45(3): 547 - 581.
[822] See, for example, J. Braithwaite (1989) *Crime, Shame and Reintegration* (Cambridge University Press); Paternoster & Iovanni (1989) (n.815); L.W. Sherman (1993) "Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction," *Journal of Research in Crime and Delinquency,* 30(4): 445 – 473; T.R. Tyler (2006) *Why People Obey the Law* (Princeton University Press); T.R. Tyler (2006) "Legitimacy and Legitimisation," *Annual Review of Psychology,* 57: 375 – 400.
[823] Paternoster & Iovanni (1989) (n.815) at p. 364.
[824] Ibid, at p. 392.
[825] Bernburg, Krohn & Rivera (2006) (n.821).
[826] Ibid, at p. 82.
[827] Ibid, at p. 84.

found, in his study of 494 "violent youths," that those who were judicially waived[828] from juvenile courts to adult criminal courts exhibited higher rates of recidivism.[829]

However, some studies have shown that the relationship between a deviant identity and future deviant behaviour is influenced not only by the imposition of the label, but also shaped by social forces, such as peer association and educational attainment.[830] Indeed, it has been suggested that the origins of a deviant identity do not lie wholly in the process of social (or institutional) reaction but also in local community and neighbourhood settings.[831] Undoubtedly, the multiple sources and differential impacts of stigmatising labels are more complex than that explained by the labelling perspective of the 1960s. Notwithstanding this, and the impact of wider social influences, the empirical evidence seems to support, rather than reject, the major premises of labelling theory.

In particular, empirical studies have tended to focus on the stigmatising effects of labels, as applied to children and young people in juvenile justice interventions. Arguably, the most powerful empirical evidence of the negative consequences of such formal interventions derives from a comparative study undertaken by Huizinga *et al*.[832] Drawing on comparative data from two longitudinal projects, one located in Bremen, Germany and the other located in Denver, USA, the research found that formal interventions, in the form of arrests and sanctions, had only a limited impact on desistance and generally resulted in the maintenance of, or increases in, previous levels of offending.[833] The similarities in the comparative findings were particularly notable because the ethos of the juvenile justice system in Germany, regarded as being less formal, more lenient and focussed on diversion, was very different to that in Colorado, regarded as more punitive, formal and adversarial, with limited use of diversion. The conclusion was, therefore, that it is not the use or severity of formal sanctions that is significant, just the certainty of an official response.[834] These ideas

[828] A judicial waiver occurs when a case is transferred from juvenile to adult court in the United States.
[829] Myers (2003) (n.821) at p. 89.
[830] See, M. Mouttapa *et al* (2010) "I'm Mad, I'm Bad: Links Between Self-Identification as A Gangster, Symptoms of Anger, and Alcohol Use Among Minority Juvenile Offenders," *Youth Violence and Juvenile Justice,* 8(1): 71 -82; Chiricos, Barrick & Belles (2007) (n.821).
[831] McLaughlin & Muncie (2013) (n.785) at p. 247.
[832] D. Huizinga, K. Schumann, B. Ehret & A. Elliot (2003) *The Effects of Juvenile Justice Processing on Subsequent Delinquent and Criminal Behaviour: A Cross- National Study,* Final Report to the National Institute of Justice (Washington, DC).
[833] Ibid, at p. 4.
[834] Ibid, at p. 5.

can be applied directly to the CHS which, as it has been established, is widely regarded as an informal system based on principles of welfare and diversion. Notwithstanding those essential characteristics of the CHS, Huizinga *et al's* study suggests that any official response to juvenile offending, be that justice or welfare-orientated, can have a stigmatising effect on the child.

Labelling remains an influential approach to critical criminology,[835] continuing to challenge traditional approaches by focussing on the reactions to, rather than the causes of, crime and deviance. In particular, by exploring how crime and deviance is conceptualised and defined, labelling theory reveals how these concepts and their associated labels are "socially constructed, contingent and contestable."[836] Crucially, for the purposes of this thesis, labelling highlights the central role of social reaction in creating and compounding deviant identities.

## 4.4: REACTION AND INTERACTION: THE CONSEQUENCES OF CLASSIFICATION

The interactive nature of human kinds can be invoked to explore responses to the referral type assigned by the reporter and its subsequent impact on gatekeeping and dispositive decision-making. It follows from kinds and labelling theory that processes of reaction and interaction may operate when a child's referral is "labelled" as being either care and protection, conduct or offence-related.

### *4.4.A: THE APPLICATION OF KINDS AND LABELLING THEORY TO REFERRALS*

Theories of reaction and interaction can be applied to referrals within the CHS in order to explain differences in approach towards different referral types identified by the empirical study.[837] Whilst the primary focus of both human kinds and labelling theory is an interaction between the classification scheme and the person classified by reference to it, wider interactions and reactions necessarily arise. In fact, Hacking briefly contemplates a wider, unconscious feedback effect in relation to young children who cannot be aware of the labels applied to them.[838] Noting that such children cannot generate self-conscious feedback, Hacking briefly considers that

[835] Muncie (2013) (n.788) at p. 146.
[836] McLaughlin & Muncie (2013) (n.785) at p. 247.
[837] See, Chapter 7, at 7.1 & 7.2.
[838] See, Hacking (1995) (n.27).

"there can be looping that involves a larger human unit, for example, the family."[839] This suggests that a wider feedback effect, or interaction, arises between the classification and classifier, or the classification and others in society, who are then responsible for generating processes of reaction and interaction.[840]

This argument could be dismissed as obvious. Indeed, Khalidi is of the view that it should go without saying since classification is such that some person must devise the scheme and deploy the associated label the first place.[841] Those individuals (often institutions, experts or authority figures) are thus aware of the classification and, either consciously or sub-consciously, react to it. Crucially, this provides a means through which to explore interactions between the referral type and the reporter or, in other words, between the classification and the classifier.

Bird's development of Hacking's work supports the idea of wider interactions between the classification and the classifier and, indeed, others who come into contact with the person so classified.[842] He argues that there are different routes for the "way-of-being" associated with a human kind to affect the subjects of that kind, other than via their own consciousness.[843] In particular, Bird contends that institutions and experts, such as reporters, are likely to think in terms of ways-of-being,[844] not least given their role in classifying the kind. This may cause subjects to change their characteristics independently of whether they see themselves in terms of that way of being.[845] It also may serve to cloud the judgment of those institutions and experts, imposing on them a certain world-view, where they come to see subjects as exemplifying a particular way-of-being, which, in turn, might affect the subsequent course of action to be taken with respect to that particular kind of person.

These ideas demonstrate that the processes of reaction and interaction are not confined to the classification and the classified, or the classification and the classifier, but must involve society as a whole.[846] Common knowledge held about a particular kind of person might cause others, who come into contact with them, to

[839] Ibid, at p. 374.
[840] Khalidi (2010) (n.25) at p. 350.
[841] Ibid, pp. 350 – 351.
[842] Bird (2014) (n.731)
[843] Ibid, at p. 8.
[844] Ibid, at p. 8.
[845] Ibid, at p. 8.
[846] Ibid, at p. 9.

think about and treat those belonging to that kind differently, and so modify their behaviour towards them. It is these interactions that are of crucial relevance to this thesis since they have the potential to impact upon the ways in which the classifier, namely the reporter, and others, such as panel members, think about and respond to referrals.

Kinds and labelling theory provide a theoretical approach to understand the institutional impact of labels, associated with the type of s. 67 ground assigned to referrals by reporters in exercising their discretion. The so-called institutional impact is the potential reaction and response to those labels assigned by reporters, in exercising their subsequent gatekeeping functions, and children's hearings, in exercising their dispositive functions. This follows Lemert's contention that, through formal labelling processes, officials come to regard the labelled individual differently.[847] Consequently, this could result in different types of referrals being dealt with by reporters and panel members in a different manner, challenging, or at least compromising, the Kilbrandon ethos and a unitary approach towards all referral types.

In exercising discretion to found upon a particular "type" of s. 67 ground, the classification process may be said to "loop back" to the reporter: affecting his or her "world view" of the child and influencing his or her subsequent decision-making in relation to the referral. For example, the investigative action undertaken and the decision-making process adopted for a child who is assigned a conduct ground might be quite different from that undertaken and adopted for a child who is assigned a care and protection ground. As such, the reporter's choice of s. 67 ground may be said to "frame" the referral and could affect the investigative and decision-making practices thereafter undertaken. A similar interaction could be said to arise between the assigned referral type and panel members. This could influence the decision-making considerations of the children's hearing and, further, could influence the ultimate disposal of the referral. As such, kinds and labelling theory demonstrate the theoretical implications of the designation of referral types by reporters and serve to explain differences in decision-making process and practice based directly on referral

[847] Lemert (1967) (n.26).

type identified by the empirical study.

### *4.4.B: REFERRALS AS INTERACTIVE HUMAN KINDS*

McGhee and Waterhouse have applied some of these ideas to referrals in the CHS.[848] Exploring the socio-legal classification of children as "offenders" and "non-offenders," they argue that these categories are over simplistic since, in reality, a great many children move between them over time.[849] Moreover, they argue such classification contributes to the dominance of certain aspects of the child's referral, such as the commission of a serious offence, over others, such as the child's background of care needs.[850] Consequently, they assert that the classification of children as "offenders" and "non-offenders" focuses "primarily on immediate behaviour with wider contextual matters often remaining peripheral," serving to artificially emphasise one aspect of the child's circumstances, whilst down-playing others.[851] Their conclusion involves an emphasis on the moral dimension of classificatory practices, whereby some children come to be treated more punitively than others, or even as if they were adults in the CJS.[852]

Whilst McGhee and Waterhouse raise interesting ideas about the classification of children in the CHS, they presuppose that a process of classification is at play; providing no explanation as to how children come to be classified as "offenders" or "non-offenders" in practice. Furthermore, they assume a binary classification between offenders and non-offenders. However, as has been demonstrated, the situation is far more complex since children can be referred to hearings on the basis of seventeen different grounds which relate to the care and/or protection of the child, the conduct of the child, or the offending behaviour of the child. The referral types assigned by reporters are not a duopoly, as McGhee and Waterhouse assume. Furthermore, no argument is made about any potential differences in treatment based on that classification, other than a somewhat vague reference to "the ascendency of certain aspects of children's functioning over others."[853] In this way, the

[848] McGhee & Waterhouse (2007) (n.13).
[849] Ibid, at pp. 107 & 113.
[850] Ibid, at p. 107.
[851] Ibid, at p. 115.
[852] Ibid, at p. 118.
[853] Ibid, at p. 107.

consequences of classification are not demonstrated and the adoption of classificatory practices in the first place are not established.

It appears that McGhee and Waterhouse's analysis is based on the assumption that *all* systems of juvenile care and justice classify and divide children into two distinct camps: "troubled" children who are vulnerable and in need of care and protection; and, "troublesome" children who are dangerous and in need of control and punishment.[854] These ideas are not new. For example, Hendrick argues that labels applied in the context of child welfare interventions tend to engender a view of the child as either a "victim" or a "villain."[855] Burman demonstrates that the twin discourses of vulnerability and risk, and protection and control, are reflected in official responses to young women who offend.[856] Indeed, Kemshall contends that the vulnerability of children known to state authorities is increasingly offset by the risk they pose to others.[857] Or, as Cross *et al.* put it: "Children tend to be constructed either as "objects of concern or a source of fear."[858] However, as McGhee and Waterhouse rightly observe, the sharp divide imposed here carries with it an inherent risk of losing sight of the individual child's needs, and disregards the commonalities, which are often shared between "troubled and troublesome" children.[859] In truth, many, if not most, children referred to hearings are both.

However the CHS should, in principle, be better placed to mitigate such a sharp, artificial and arbitrary divide, particularly in light of its unitary, welfarist nature and, especially, when compared to justice-orientated responses to juvenile offending.[860] Although the Kilbrandon Report does not explicitly discuss any theoretical or empirical basis for its recommendations, it does mention the specific goal of avoiding stigmatisation, pointing to a vestige of labelling theory:

> "Because of the high degree of personal responsibility which it attaches to the

[854] McGhee & Waterhouse (2007) (n.13) at pp. 107 – 108.
[855] H. Hendrick (1990) *Child Welfare in England: 1872 – 1889* (London: Routledge).
[856] M. Burman (2014) "A Problem with Girls? The Influence of Gender Stereotypes and the Iniquities of Moral Regulation," *Sugar and Spice: Are We Morally Policing Girls and Young Women?* Centre for Youth and Criminal Justice Seminar, University of Strathclyde, November 2014.
[857] H. Kemshall (2004) "Risk Assessment and Young People who Offend" in J. McGhee, M. Mellon & B. Whyte (eds.) *Meeting Needs, Addressing Deeds - Working with Young People who Offend* (Scotland: NCH) at p. 105.
[858] N. Cross, J. Evans & J. Minkes (2003) "Still Children First? Developments in Youth Justice in Wales," *Youth Justice,* 2(3): 151-162, at p.152.
[859] McGhee & Waterhouse (2007) (n.13) at p. 108.
[860] See, The Kilbrandon Report, at paras.12 – 15.

> criminal, a stigma is attached in the public eye to conviction of a crime, which bears no necessary relationship to the harm done by the action itself for the actual responsibility of the person who did it."[861]

The characteristically unitary nature of the CHS should serve to diminish some of the negative consequences of classification. However, it has been demonstrated that a "pure" unitary approach is not achieved in practice: offence-type referrals are treated differently, in procedural terms, to care and protection-type and conduct-type referrals. Moreover, classification theory raises the possibility that different types of referrals are treated differently by decision-makers at the gatekeeping and dispositive stage; a claim that is substantiated by empirical findings presented in Chapter 7.

The value of these ideas and theories lie in their practical impact which, thus far, has not been fully realised. However, McAra and McVie have empirically applied labelling theory to the children's hearings process.[862] Drawing upon data from the longitudinal Edinburgh Study of Youth Transitions and Crime, they demonstrate that certain categories of persistent juvenile offenders become subject to repeated referral cycles, whereas other equally serious juvenile offenders evade the system altogether.[863] Crucially, the research finds that the deeper these children "penetrate" the CHS, the more likely their desistance from offending is inhibited.[864] As such, labelling processes are shown to "recycle" certain categories of children within the CHS and exacerbate recidivism.[865] In this way, McAra and McVie demonstrate that a consequence of being classified as a "persistent offender" is repeated contact with the CHS, which was found to impede desistance.

This demonstrates that there are consequences to the classificatory practices employed by reporters beyond those procedural differences in approach that apply uniquely to offence-type referrals. In particular, kinds and labelling theory indicate that the designation of referral types by reporters could have a broader impact on gatekeeping and dispositive decision-making practice. Since this claim is supported

[861] Ibid, at para.54.
[862] See, L. McAra & S. McVie (2007) "The Impact of System Contact on Patterns of Desistance from Offending," *European Journal of Criminology,* 4(3): 315 – 345.
[863] Ibid, at p. 319.
[864] Ibid, at p. 319.
[865] Ibid, at p. 315.

by empirical evidence,[866] this thesis contends that children referred by reporters to hearings are interactive human kinds, and that processes of reaction and interaction operate to evoke different responses to different referral types by decision-makers. The empirical findings of this thesis thus support the hypothesis that referrals within the CHS are interactive kinds. The following chapter presents the methodology adopted in respect of the empirical study and the subsequent chapters present the findings arising from that study.

[866] See, Chapter 7, at 7.1 & 7.2.

# CHAPTER 5: METHODOLOGY

This chapter presents the methodology adopted for the empirical study on decision-making practice, involving twenty-five qualitative interviews with reporters. It contextualises the study, outlines its aims and objectives, reflects on the data collection and analysis processes and considers the study's limitations.

## 5.1: CONTEXTUALISING THE EMPIRICAL STUDY

The terms "research methods" and "research methodology" are related but have distinct meanings. Whilst research methods may be described as the specific procedures adopted in a field of study as a mode of investigation, methodology is a broader concept and has been defined as: "The study of the direction and implications of empirical research, or of the suitability of the techniques employed in it."[867] Research methodology should, therefore, be regarded as a holistic process, and taken to mean more than "what you *actually do* to enhance your knowledge, test your thesis or answer your research questions."[868]

### *5.1.A: A HOLISTIC METHODOLOGICAL APPROACH*

A holistic methodological process was employed in respect of this thesis. At the outset of the Doctoral process, a somewhat linear approach to methodology was adopted. Under this linear model, the "what" determines the "how" of one's research.[869] As such, the researcher began by identifying what she wanted to know and then considered how she might find that out. However, the limitations of such an approach soon became evident, not least because the means by which research is undertaken is constrained by ethical issues arising from the proposed research design, as well as permissions relating to access to research materials and participants. In light of these constraints, a circular approach towards methodology was found to be more appropriate and realistic, whereby the "what" and the "how" fed into each other. In this way, the "how" acted as a lens through which the "what" was refined.

[867] Oxford English Dictionary, cited in D. Watkins & M. Burton (2013) *Research Methods in Law* (London: Routledge) at p. 2.
[868] R. Cryer, T. Hervey & B. Sokhi-Bulley (2011) *Research Methodologies in EU and International Law* (Oxford: Hart) at p. 5.
[869] A. Bryman (2015) *Social Research Methods,* 5th Edition (Oxford University Press).

The unique ethos underpinning the Kilbrandon Report was always the researcher's primary focus. The notion of grouping together all children "in trouble" and treating them alike, on the basis of common underlying needs and circumstances, was regarded as worthy of investigation and scrutiny. An early conceptualisation of how the researcher might proceed involved the potential examination of case files of children referred to hearings. However, in an early meeting with SCRA, access to such documentation was unequivocally ruled out: first, on ethical grounds due to issues around data protection, confidentiality and the vulnerability of children to which the files referred; and secondly, on practical grounds because files held by SCRA are destroyed soon after the child's 18th birthday. Furthermore, it was acknowledged that similar studies have been undertaken by researchers with greater means and experience than the author of this thesis.[870] It was thus recognised that the adoption of such methods lacked originality and would add little to the existing body of research. Few people challenge the central proposition that the social backgrounds of children who come before hearings do not differ significantly depending upon the ground upon which they are referred.

Refining the methodology, the researcher centred on the notion that the Kilbrandon ethos embodies the idea that all children "in trouble" ought to be dealt with in a similar manner *within* the CHS. The methodological focus was therefore inverted, and the researcher decide to explore and examine whether the CHS does, in fact, deal with all children referred to hearings in a similar manner, regardless of the reason for which they are referred. The role of the reporter then emerged as determinative. This is because reporters determine the basis upon which children are referred to hearings, and it was understood that reporters have discretion to choose the appropriate s. 67 ground to found upon in so referring; effectively classify referrals as belonging to a particular "type" at the gatekeeping stage.

The revised aim was to explore the ways in which the designation of referral types by reporters plays out in practice and, consequently, investigate whether children referred on different types of grounds are subject to differences in process and decision-making practice. Some of this could be achieved through the adoption of

[870] See, in particular, Waterhouse *et al* (2000) (n.13); Waterhouse & McGhee (2002) (n.13); Waterhouse, McGhee & Loucks (2004) (n.13); McAra & McVie (2010) (n.13).

traditional doctrinal legal methods; for example, by examining the legislation and literature so as to discover whether any relevant procedural differences apply to different referral types. However, empirical methods were required in order to test the theory that reporters designate referral types in performing their gatekeeping functions, and to examine whether any subsequent differences in decision-making process and practice apply in light of that designation. Qualitative research methods, in the form of interviews with reporters, were adopted in pursuit of these aims. In these important ways, the "how" influenced, and interacted with, the "what" of this thesis.

### *5.1.B: EXISTING STUDIES ON REPORTER DECISION-MAKING*

It has been established that the reporter is the central actor in the referral process. Yet, little is known about the decision-making processes adopted by reporters, including the extent of discretion and professional judgment exercised at the gatekeeping stage. There is a dearth of empirical research about reporter decision-making. Three empirical studies have specifically examined the reporter's role: the first is over 35 years old, adopting quantitative methods;[871] the second is over 17 years old, adopting both quantitative and qualitative methods;[872] and, the third was conducted relatively recently by SCRA, primarily adopting quantitative methods.[873] There is, therefore, a need to examine reporter practice in its current context,[874] independently from SCRA, and, a particular need to better understand, qualitatively, the nature of reporter decision-making.

Of those existing empirical studies, Hallett *et al's*[875] is most relevant to the present study, not least because many of its findings converge with those presented in Chapter 6.[876] It comprised part of a major empirical evaluation of the CHS and identified, for the first time, specific considerations relevant to gatekeeping decision-making, such as: cooperation of the family; school related issues; current social work input; the child's prior record of offending; the seriousness of the child's offence;

[871] Martin, Fox & Murray (1981) (n.14) Chapter 5, pp. 64 – 92.
[872] Hallett *et al.* (1998) (n.14).
[873] Kurlus, Hanson & Henderson (2014) (n.14).
[874] Indeed, this was one of the explicit aims of the more recent SCRA study.
[875] Hallett *et al.* (1998) (n.14) at p. 15.
[876] See, in particular, Chapter 6, at 6.1.E.

evidential issues; and, the attitude of the family.[877] The study identified numerous factors that shaped reporter decision-making in respect of 130 referrals sampled, thereby providing a comprehensive overview of the determinants of reporter decision-making. The more recent SCRA study on reporter decision-making is also of relevance to the present study.[878] It examined reporter decisions in respect of a sample of 200 referrals and focussed on three key stages of the gatekeeping process: the referring agency and information contained in the referral; the reporter's initial decision about the level of investigation required; and, the reporter's final assessment about the perceived application of the statutory tests.[879] The focus of the study is on the process and outcome of reporter decision-making, rather than its content. Findings from Hallett *et al* and SCRA's studies will be drawn upon, as appropriate, in relation to the presentation of qualitative data in the following chapters.

The major differences between the present study and existing ones are: first, it was conducted under the 2011 Act and so provides a current account of reporter practice. By contrast, all earlier studies bar one[880] were conducted under previous statutory schemes, specifically the 1968 Act.[881] Secondly, the present study adopts qualitative research methods so as to comprehensively explore the nature and implications of reporter decision-making. This can be contrasted with previous studies which have, primarily, been based on quantitative data.[882] Thirdly, the present study explicitly explores differences in gatekeeping and perceived differences in dispositive decision-making practice based on referral type. No prior research has explored any such differences in practice arising from the type of referral. This thesis therefore presents original empirical findings on both the nature of reporter decision-making and the influence of the referral type on decision-making within the CHS.

## 5.2: THE STUDY DESIGN

The design of the study is qualitative in nature and based on semi-structured interviews with practising reporters. Qualitative data was collected in order to

[877] Hallett *et al*. (1998) (n.14) at pp. 15 – 32.
[878] Kurlus, Hanson & Henderson (2014) (n.14).
[879] Ibid, at p. 4.
[880] Ibid, at p. 4.
[881] See, Martin, Fox & Murray (1981) (n.14); Hallett *et al.* (1998) (n.14).
[882] See, Martin, Fox & Murray (1981) (n.14); Kurlus, Hanson & Henderson (2014) (n.14).

develop "thick descriptions" of decision-making practice.[883] Interviews were essential to examine the nature of reporter decision-making, with a particular focus on the reporter's discretion to choose the single most appropriate s. 67 ground, and to discover whether differences in decision-making and disposal practice apply, or were perceived to apply, to referrals based on different types of s. 67 grounds.

### *5.2.A: AIMS AND OBJECTIVES*

The broad aim of the study was to examine how reporters exercise discretion and professional judgment at the gatekeeping stage. The specific aims of the study were three-fold:

1. To investigate how reporters perform their gatekeeping decision-making functions;
2. To examine the ways in which reporters apply, and made decisions related to, the s. 67 grounds; and,
3. To discover whether differences in gatekeeping and dispositive decision-making practice apply, or are perceived to apply, to different referral types.[884]

### *5.2.B: ACCESS NEGOTIATIONS*

Negotiations for access to undertake the interviews were entered into with members of SCRA's Senior Management Team, specifically: the Principal Reporter; the Head of Practice and Policy; and, the Head of Information and Research. Permission was granted once the researcher had shared a draft interview schedule with these individuals. The reason for this was, at the time, SCRA's research department was undertaking its own study on reporter decision-making[885] and there was a need, on SCRA's part, to ensure that the present study did not cover the same ground.

However, a consequence of the timescale of the present study converging with SCRA's was that the researcher was advised that she might find it difficult to recruit research participants, given that practising reporters had recently given up their time to participate in SCRA's study. The researcher was advised that she could expect to recruit a sample of around a dozen reporters, rather than the desired sample of

[883] C. Geertz (1973) *The Interpretation of Cultures* (New York: Basic Books) at p. 4.
[884] Originally this was approached in terms of the offence-care and protection binary, however was later revised in light of the conceptualisation and identification of a discrete category of conduct grounds, thereby pointing to the existence of three referral types within the current practice of the CHS.
[885] Kurlus, Hanson & Henderson (2014) (n.14).

around two-dozen. One condition of access was that it would be SCRA, rather than the researcher, that would invite reporters to participate in the study. This was done through the circulation of a message from the researcher, inviting reporters to participate, via SCRA's online portal to which all reporters have access.[886] Whilst this was an effective way to circulate information to all practising reporters, the researcher did not have access to the online portal through which her invitation was circulated and, so, was dependent on reporters getting in touch with her via telephone or email. In this way, the researcher was unable to directly and personally contact reporters in the first instance, which inevitably impeded the initial recruitment of participants.

### *5.2.C: PARTICIPANT SELECTION AND RECRUITMENT*

Research participants were invited to participate on the basis of a single selection criterion: that they were practising reporters. As such, there were no exclusion criteria *per se*. Given that SCRA contacted reporters on the researcher's behalf, a pragmatic approach towards the selection of participants had to be taken. Whilst the present study is qualitative in nature, an effort was nevertheless made to recruit a broadly "representative" sample of reporters, working in different areas throughout Scotland. The aim was to recruit at least one reporter from each of the nine SCRA locality areas.[887] However it was conceded that this would be largely dependent on the response from reporters in the first place, and the coordination of the recruitment process by SCRA.

Given the condition of indirect access, the recruitment process was initially slow. Only six reporters responded to the researcher's invitation to participate in the study. The viability of the study had to be considered; particularly in light of SCRA's view that a sample size of around twelve reporters was a reasonable expectation. The original aim was to recruit around twenty participants, since a sample of that size represented approximately 20% of reporters employed by SCRA at the time of the

[886] See, Appendix D.
[887] Namely: Highlands and Islands; Grampian; North Strathclyde; Glasgow; Tayside and Fife; South East; Central; Lanarkshire/Dumfries and Galloway; and, Ayrshire.

study.[888] This was reviewed in line with SCRA's advice and the researcher decided that the study would be viable if at least twelve reporters agreed to participate.

The researcher's invitation was re-circulated approximately six weeks after communication had been initiated. The second circulation yielded limited results with only an additional two reporters agreeing to participate. The researcher, thereafter, adopted a more direct approach by inviting contacts in SCRA to participate and asking them to encourage their colleagues to do so too. The desired sample of at least twelve reporters was achieved through this more direct method of recruitment. The researcher decided that the study was viable and began arranging interviews in the hope that a "snow-ball effect" would later ensue.[889] Once interviews began at SCRA offices, interest increased and additional participants were recruited. Ultimately, interviews were conducted with twenty-five reporters, with at least two participants from each of the nine SCRA localities, accounting for over 20% of all reporters employed by SCRA at the time.

### 5.3: DATA COLLECTION AND ANALYSIS

Interview data was collected from May to October 2014. All interviews were conducted by the researcher. A draft interview schedule was prepared in advance, which was piloted with an individual who previously practised as a reporter. The pilot interview was not included within the study sample but allowed the researcher to test and, thereafter, refine, the interview structure and questions. The interviews followed a semi-structured plan which was adhered to but not too rigidly, allowing interviewees to elaborate and focus on certain issues considered to be particularly relevant to their decision-making practice. The semi-structured plan was used primarily as an *aide-memoire* in order to ensure that the range of issues under enquiry were covered.

Elements of a "grounded theory" approach were adopted for the collection and analysis of data.[890] Grounded theory was originally developed by Glaser and Strauss

[888] Source: SCRA.
[889] "Snowball sampling" is a recruitment technique whereby existing research participants recommend the recruitment of future participants from among their acquaintances or, in this case, colleagues: see, P. Biernacki & D. Walford (1981) "Snowball Sampling: Problems and Techniques of Chain Referral Sampling," *Sociological Methods and Research,* 10(2): 141 – 163.
[890] B.G. Glaser & A.L. Strauss (1967) *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine).

as a method to move from data to theory, so that new theories can arise "organically" from qualitative data. In this way, theories are said to be "grounded" in the data from which they emerge.[891] This grounded method facilitated an on-going inductive interplay between data collection and theory development. Consequently, the interview structure shifted, or evolved, slightly in order to further explore certain issues as data collection progressed. In particular, a shift in data collection occurred due to a desire to revise, and include more, questions about: the division within the s. 67 grounds between issues relating to the care of the child and issues relating to the conduct of the child; the correlation between the age of the child and the appropriate s. 67 ground; and, potential differences in gatekeeping and dispositive practice based on the discrete category of conduct grounds identified.

The interviews focussed on process, rather than outcome, with a series of questions about the generality of referrals, rather than questions about specific decisions made in respect of individual referrals. The interviews were conducted in three parts. The first part explored the decision-making procedures adopted, and considerations applied, during the referral process, including broad and open-ended questions intended to draw out potential differences in gatekeeping practice based on referral type. The second part explored the scope and application of the s. 67 grounds by reporters. The third part explored the views and perceptions of reporters about the decision-making and disposal practices of panel members, as well as general observance of the Kilbrandon ethos in practice.[892]

### *5.3.A: CONDUCTING THE INTERVIEWS*

The vast majority of interviews were conducted face-to-face, however four telephone interviews were undertaken with those reporters practising in the more remote SCRA localities. Twenty interviews took place at the reporter's place of work. One interview was conducted in the reporter's home, as a matter of convenience for that individual.

[891] Ibid, at pp. 23 – 30.
[892] See, Interview Schedule set out in Appendix E.

At the outset, interviewees were given an information sheet and a consent form pertaining to the study.[893] The aims of the study were explained, and the anonymity of the interviewee assured. Informed consent obtained, the interview was digitally recorded. The interviews ranged from 25 minutes to 1 hour 10 minutes, with the majority lasting for 40 – 45 minutes. All issues set out in the interview schedule were explored with each interviewee.

### *5.3.B: ANALYSING THE DATA*

The digitally recorded interviews were transcribed, *verbatim*. Following a grounded approach the transcribed data was then coded. At first, the data was manually coded using primarily descriptive categories to begin to draw out themes. Thereafter, the data was entered into NVivo, a software package for analysing qualitative data, through which thematic codes were refined and applied. Thematic qualitative analysis[894] was applied to the data, whereby common themes were identified and comments across each interview categorised by reference to those themes. The data was coded in NVivo until no new thematic categories could be identified. In this way, "theoretical saturation" was achieved.[895]

### *5.3.C: LIMITATIONS OF THE STUDY*

A limitation of the study, which must be acknowledged, is that it collected the views of reporters on the decision-making and disposal practices of children's hearings. It is worth emphasising that these findings[896] are based entirely on the views, perceptions, experiences and observations of reporters. As such, they should be treated with caution in that they constitute the opinions of one group about what another group thinks and does. However, reporters are well placed to offer impartial views about the practices of panel members. Reporters attend any hearing that they arrange for a child and occupy an independent position within the CHS. Notwithstanding that they are likely to be influenced by information received from other agencies, such as social work, they are independent from those agencies, as well as the children's hearing itself. In light of their independence, reporters are

[893] See, Appendix F.
[894] See, Glaser & Strauss (1967) (n.890); D. Walker & F. Myrick (2006) "Grounded Theory: An Exploration of Process and Procedures," *Qualitative Health Research,* 16(4): 547 – 559; V. Braun & V. Clarke (2006) "Using Thematic Analysis in Psychology," *Qualitative Research in Psychology,* 3(2): 77 – 101.
[895] Glaser & Strauss (1967) (n.890) at p. 40.
[896] See, Chapter 7, at 7.2

arguably well placed to provide information about the practices of panel members. Given the essential focus of this work on the reporter's gatekeeping role, panel members were not directly consulted. However a future study could directly explore the role and influence of the referral type on the practices of children's hearings.

### *5.3.D: About The Sample*

Six of those reporters within the sample were male, nineteen were female. The interviewees had differing levels of experience in practising as reporters, with most having served between six and fifteen years. The service of interviewees is shown in the table below.

| Duration of service | Number within sample |
|---|---|
| **0 – 5 years** | 2 |
| **6 – 10 years** | 9 |
| **11 – 15 years** | 9 |
| **16 – 20 years** | 2 |
| **20+ years** | 3 |

The interviewees had diverse backgrounds, with experience of a number of disciplines prior to becoming reporters. Although the majority had a background in law, a social work background was also common. Furthermore, two interviewees had previously been employed by SCRA: one in an administrative support role, the other in a research role. Interestingly, six interviewees had additionally served as panel members prior to becoming reporters. The backgrounds of interviewees are set out in the table below.

| Background | Number within sample |
|---|---|
| **Law** | 15 |
| **Social Work** | 6 |
| **Education** | 1 |
| **Health** | 1 |
| **Other (SCRA)** | 2 |

Geographically, the interviewees were reasonably representatively spread, with at least two reporters within the sample practising in each of the nine SCRA localities. The locality areas in which interviewees practiced are detailed in the table below.

| SCRA locality | Number within sample |
|---|---|
| **Highlands and Islands** | 2 |
| **Grampian** | 2 |
| **North Strathclyde** | 3 |
| **Glasgow** | 2 |
| **Tayside and Fife** | 2 |
| **South East** | 4 |
| **Central** | 3 |
| **Lanarkshire/Dumfries and Galloway** | 5 |
| **Ayrshire** | 2 |

# CHAPTER 6: EMPIRICAL FINDINGS ON THE SCHEME AND NATURE OF REPORTER DECISION-MAKING

This chapter presents empirical findings, on the scheme and nature of reporter decision-making, arising from the qualitative study. The following chapter presents findings on the influence of the assigned referral type on decision-making practice. In this way, Chapter 6 addresses the first two aims of the study: exploring reporters' gatekeeping functions and examining how they exercise discretion and judgment during the referral process. In so doing, the chapter substantiates the central argument that reporters have discretion to choose the appropriate s. 67 ground to found upon, thereby designating or classifying referrals as belonging to a particular "type."

## 6.1: THE SCHEME OF REPORTER DECISION-MAKING

The study examined, in some detail, the decision-making processes adopted by reporters upon receipt of referrals. All interviewees characterised their gatekeeping decision-making as being directed towards two key tasks: first, an assessment of the sufficiency of evidence required to support the application of a s. 67 ground in relation to the child; and, secondly, an appraisal as to the perceived need for compulsory measures of supervision to be provided to that child. Although these tasks follow directly from the statutory scheme,[897] the study revealed that there are many relevant processes and considerations within them. Accordingly, this section presents findings on: the registration of referrals; the source of referrals; the reporter's investigations; and, the reporter's application of the statutory tests. It concludes by presenting a number of decision-making determinants, identified as being particularly relevant to the reporter's assessment of the perceived need for compulsion. These were found to apply to all referral types, thereby suggesting that there is a degree of unity, or consensus, in the way in which reporters make gatekeeping decisions about different types of referrals.

### *6.1.A: THE REGISTRATION OF REFERRALS*

The study explored the initial action taken by reporters upon receipt of referrals. It found this initial action is largely administrative in nature, whereby referrals are

[897] 2011 Act, ss. 66(2)(a) – (b).

"processed" by reporters, or, in some cases, administrative support staff. Once processed, the registration phase involves an assessment as to what further action, if any, needs to be taken by the reporter in relation to the referral. The study suggested that, from the outset, reporters are focussed on the perceived application of the statutory tests:

> "What I'm looking at initially is whether or not, on the face of it, there's an indication that the child has needs that are potentially not all being met and obviously that involves . . . looking at the grounds of referral, which one that might be registered under, and also whether or not there's an indication at the early stages that there may be a necessity for a compulsory supervision order."

> "When we receive a referral we're required to register the referral and the first thing we have to do is make a quick assessment to see if there's sufficient evidence to allow us to make any further investigations . . . So we'd register the referral and, at that point, I'd consider what might be the most appropriate ground to register the referral under."

It appears that, at the registration stage, the first task of the reporter is to broadly examine whether the circumstances of the referral fall within one or more of the s. 67 grounds. The vast majority of interviewees discussed a similar initial process, whereby a *prima facie* judgment is made about the perceived application of the statutory tests, with a particular focus on whether the circumstances of the referral might "fit" within a particular (and singular) s. 67 ground.[898] In this way, the administrative procedures followed upon receipt of referrals directs reporters towards identifying the appropriate s. 67 ground at this early stage:

> "You'll read the referral and first of all you're considering whether there's evidence of a ground of referral because you need to register and record it as a particular category within your grounds of the Act. So at the initial stage you'll be looking to see which category would fit."

[898] The reporter's discretion to choose the single most appropriate s. 67 ground is explored in detail at 6.2.B, below.

However, where it is clear on the face of the referral that a s. 67 does not apply, interviewees explained that the referral could be dismissed, at this early stage, without taking any further action:

> "What I tend to do is try and do a quick evidential assessment because ....if there is insufficient evidence for the actual concern or offence, or whatever ground it is, you shouldn't really be progressing with that at all."

This is an interesting finding because it does not quite follow that the *reason* the first statutory test is not met is insufficient evidence: the test might well be met but cannot be proven due to a lack of evidence. The test does not expressly involve a requirement that the ground can be proved but, rather, that the ground applies.[899] Whether the ground can be proved is a separate issue, but the study suggested that reporters conflate these discrete issues in practice.[900]

Some interviewees expressed strong views about the need to think carefully before registering a referral and proceeding to the investigation stage. Adopting a minimal interventionist approach, these interviewees expressed caution about registering referrals, and stressed the need for evidence to suggest that this was appropriate in the first place:

> "I wouldn't create a record on a child unless I needed to . . . In general, you don't want people entering the system because we are based on a notion that we don't intervene where we are not required to and the whole idea of our intervention is that there must be some form of compulsory intervention that's required. If that's not clear then I think we are duty bound to avoid it."

> "Well you have to kind of read the referral first to check what the evidence is for it because without evidence, you can't go anywhere with it no matter what type of referral it is."

However, it appears that a slightly different procedure applies when offence referrals are received. Here, interviewees explained that where a referral is received in the

[899] See, 2011 Act, s. 66(2)(a).
[900] See, 6.1.D, below, for further discussion.

form of a police report, detailing a child's offending behaviour, it is automatically treated and registered as an offence-type referral:

> "If things like police reports come in we automatically treat them as referrals because that's been agreed with the police. If they are offending we would treat that as an offence referral."

This is a valuable finding in that it suggests that offence-type referrals are automatically worthy of the reporter's attention and, furthermore, highlights a clear difference in the way in which offence referrals are dealt with in practice. In fact, some interviewees explained that offence referrals are automatically registered under the s. 67(2)(j) ground by administrative support staff, rather than by reporters:

> "If it's an offence referral then our support staff automatically put it in as a (j) ground."

> "If it's a referral about an offence . . . then the support staff will just put that on because it's kind of obvious that it's that ground of referral."

This administrative approach towards the registration of offence referrals suggests that less discretion is afforded to the reporter in identifying the appropriate s. 67 ground at the point of referral. Whilst reporters are free to register care and protection-type or conduct-type referrals under any s. 67 ground, a more restrictive approach is taken in relation to clearly presenting offence-type referrals. This is emphasised by the fact that it can be administrative support staff, rather than reporters, who process and register those referrals.

However, while most interviewees described their practice as being directed towards the identification of an appropriate s. 67 ground at the registration stage, many explained that they are not bound by the ground under which they register the referral, and emphasised that their choice can change in light of further investigations. This emphasises the importance of the reporter's discretion:

> "At that stage I'm more just getting a feel for the concerns but with an eye to potential grounds right at the early stage but we're always kind of aware that

> although we might register a child under one ground, that it's still a moving feast."
>
> "So we'd register the referral and, at that point, I'd consider what might be the most appropriate ground to register the referral under. At that stage it's not set in stone but it's an indication of where the concerns are."

The study thus suggested that the registration of referrals involves a superficial evaluation of evidence. In so evaluating, the study emphasised that reporters must satisfy themselves that there is enough evidence to proceed in the first instance, before even registering the referral and proceeding to an investigation. However, it seems that much of this early assessment is dependent on information provided in the referral itself.

#### *6.1.B: THE SOURCE OF REFERRALS*

The study suggested that the registration of referrals, and the subsequent action taken by reporters, is largely dependent upon the level of detail and information contained within the initial referral. A majority of interviewees highlighted the varying levels of information that referrals might contain and this was found to be linked closely to the referral source:

> "You get varying degrees, varying amounts of information. Sometimes you get virtually nothing but sometimes social workers, for example, will submit a full social background report as the referral."
>
> "It's the nature of referrals. Sometimes it might just be a couple of paragraphs, sometimes it might be a few A4 sheets – the information varies a great deal, depending on who is referring."

In fact, the detail of the referral itself was found to directly influence the reporter's decision about whether or not further investigations are required:

> "Sometimes referrals come in with a lot of information and, actually, the work that's done at the initial stage is more about coming to a decision because there's already a lot of information. Other times there's very little

information . . . It can leave you in a bit of a dark situation and obviously you then have to investigate."

The study found a clear link between the sources of referral, associated with the level of detail and information contained therein, and the subsequent level of investigation undertaken by reporters:

> "So depending on the referrer and what the content of the referral is . . . say, for example, the referral's come from social work in the form of a full background report, then your investigation beyond that may be fairly minimal because you've got most of the information you need there and then."

All reporters within the sample cited the police and social work departments as the major sources of referral to the reporter. This is in line with the national statistical picture[901] and SCRA's decision-making study.[902] Interviewees explained that where they receive referrals from a common source or referrer, such as the police or social work, they generally find the information provided to be more detailed, sufficient and targeted towards their decision-making:

> "If you have a referral from an organisation which is used to referring, then you are generally given a steer as to where they think you are – whether the child is suffering from some form of neglect, for example."

By contrast, where reporters receive referrals from a source, outwith the major referrers, interviewees explained that they generally find the information contained within the referral to be less targeted and specific. Some interviewees described adopting a more exacting approach here, scrutinising the referral closely before registering it and proceeding to an investigation:

> "A lot depends on where the referral's come from. Normally if it comes from social work or from school we'll immediately activate an investigation into that. We'll request reports from the appropriate agencies – it might be social work or CAMHS[903] or school. From other sources we might be a bit more

[901] SCRA (2015) (n.285) at p. 8
[902] Kurlus, Hanson & Henderson (2014) (n.14) at p. 12 – 13.
[903] Child and Adolescent Mental Health Service for Scotland.

investigative before we ask for any reports. We'd look into things a bit further and try and see if there's at least a basis to proceed."

Some interviewees suggested that a knowledge and understanding of the CHS is key to focussed and targeted referrals, which are perceived to aid the reporter's subsequent decision-making:

"I think a lot of it depends on how much information is given to us by the referrers. Some referrers will understand more about our system than others, and that can be really helpful."

In fact, the study suggested that the referral source itself might give rise to an inference that further investigations are required, indicating that those from certain referring agencies would automatically give rise to an investigation:

"Well it depends on where the referral's come from. Normally if it comes from social work or school, we'll immediately activate an investigation into that."

Furthermore, the study served to emphasise that reporter decision-making is contingent upon receiving referrals, and is, therefore, wholly dependent on the transmission of information from external sources. This was directly addressed by one interviewee who stated:

"The reporter's department is reliant on people referring. People: that comes down to the police, the social work department, schools, very occasionally health and private citizens – its not unheard of but its very rare . . . I think that we are heavily reliant on referral and I'm not sure if we can ever really move away from that."

The study suggested that the referral source has a direct impact upon the decision-making and, in particular, investigative, practices of reporters. For example, those referrals made by social work or police, accustomed to doing so and having a working knowledge of the CHS, were perceived to be more focussed, detailed and

targeted in nature.[904] Thus, they were generally found to require less, or no, further investigation. However, the views of some interviewees indicated that they take referrals from such frequent referrers more seriously, raising a presumption for automatic investigation. Referrals that come from less common referring agencies, or private individuals, were generally perceived to be less detailed and targeted, and generally perceived to require more extensive investigation.

### *6.1.C: THE INITIAL DECISION: THE REPORTER'S INVESTIGATIONS*

Interviewees explained that, once a referral has been registered, the reporter is responsible for making an initial and final decision in relation to it: initially, upon the level of investigation required; finally, upon the application of the statutory tests in light of that investigation. This two-stage decision-making process originates from SCRA's DMF,[905] suggesting that reporters follow the general decision-making structure contained therein. Although reporters appear to view these as distinct stages within their decision-making process, interviewees made clear that both the initial and final decisions are directed towards the formation of a view about the application of the statutory tests:

> "We're basically looking at all the information we have and where that information takes us to before we start looking at the need for an investigation and before we look at the indication of a ground and a need for compulsory measures."

Although it is open to the reporter to make a final decision upon a receipt of a referral, either by deciding to take no further action or by deciding that a children's hearing requires to be arranged from the outset, the vast majority of interviewees discussed the need to undertake investigations by requesting further information in relation to most referrals that they deal with. This follows SCRA's finding that further information was requested in relation to the "majority"[906] of the 200 sampled referrals.[907] In fact, one interviewee in the present study went as far as to say that

[904] The echoes SCRA's findings: Kurlus, Hanson & Henderson (2014) (n.14) at pp. 18 – 19.
[905] SCRA (2013) (n.449).
[906] Defined as 50% - 74%: Kurlus, Hanson & Henderson (2014) (n.14) at p. 12.
[907] Ibid, at p. 19.

measures of supervision, either on a compulsory or voluntary basis, would not be pursued in the absence of some form of investigation.

> "I would never take a decision without investigation to go to a children's hearing. That would be totally inappropriate . . . I would always request reports or ask the allocated social worker for their opinion about whether it's in the child's best interests to come along – that it promotes their welfare to come to a children's hearing. Because no child should be exposed to an unnecessary legal hearing, so I would never take a decision to arrange a hearing, or for that matter refer back to the local authority on a voluntary basis, without investigating."

The study revealed that reporters generally approach their initial decision in simple terms. Interviewees talked about identifying what further information, if any, they required, to assess the referral and make a final decision. Thus, the initial decision is all about determining the scope of necessary investigations:

> "It's a decision about what kind of level of assessment needs to be done. So how much information really I would need to have to be able to make decision about whether to call a hearing or not."

> "Well I suppose the kind of ultimate bit is that you have to have enough information to make an assessment of – does a ground apply and does this child require compulsory measures of care?"

Indeed, a majority of interviewees characterised their initial decision as being directed towards "filling in the gaps" so as to give them sufficient information to rely upon in determining whether the statutory tests are satisfied:

> "Well in investigation it's about what information is missing. So what else do I need to know before I can make a decision? And that decision's going to be two-fold: 1) can I prove that there are grounds of referral? And 2) is the child in need of compulsory measures of care?"

In this regard, a determinative factor emergent from the study was the nature and gravity of the referral, which was found to dictate the intensity of investigations

undertaken. The vast majority of interviewees discussed assessing these factors at the initial decision stage. They suggested that the gravity of the referral, in particular, is central to the scope and focus of subsequent investigations:

> "What goes through my head during my initial assessment? That will obviously be dependent on what level of assessment I choose to take and that will be based on the gravity of the incident."

> "So it would depend maybe on the gravity of the referral. . . Some are obviously, you know, more serious than others and that would kind of dictate how you pitch your investigation and what further information you would ask for."

This suggests that the nature and gravity of the referral feeds into the investigative approach adopted; with referrals of a different nature, or type, resulting in a different investigative responses and pointing towards different information sources to be tapped into by reporters:

> "It might be about asking the police for more information or it might be about asking social services. If the matter is a crime or if the matter relates to a crime against a child then our most obvious source of information will be from the police . . . If it's a more lifestyle type of case then the likelihood is that the information will come from social services."

However one interviewee warned against focussing too narrowly on the nature and gravity of the presenting referral, since an investigation into what may be perceived one type of referral could turn out to be another. Or an investigation following a minor incident could uncover wider and far graver concerns about the child's welfare:

> "But you can equally have a relatively low-level referral which essentially uncovers a far wider problem – it is a symptom of a wider concern."

Moreover, interviewees suggested that the level of concern inherent within the referral involves an assessment about the urgency of the situation, with those

referrals perceived to be more serious in nature taking priority over those perceived to be less serious:

> "Depending on the amount of information you have, the first thing you would do is assess the urgency of the matter because obviously, you know, a child who is at risk is a higher priority than a child who is not attending school."

In fact, one interviewee explained that where the referral itself is such that it includes a recommendation from a professional, such as a social worker, that compulsory measures of supervision are, in his or her view, necessary, then an investigation would be instigated urgently:

> "A lot of times you get a letter from social work – I want to refer this child, to which you think – well, they've done an assessment and they need compulsory measures. So in that case I'd probably request a report straight away."

In relation to urgent referrals, some interviewees described seeking out verbal, rather than written, information to "speed-up" the decision-making process:

> "And I would request reports usually in writing but sometimes, if time is of the essence, I would do it verbally."

Echoing SCRA's finding, the present study found that family history plays an important role in how referrals are taken forward, and investigated, by reporters.[908] At the initial decision stage, it appears that reporters first assess the nature and gravity of the referral and then examine the child's file to see if any previous referrals have been made:

> "The initial decision that we make is whether to investigate further at all and what level of investigation to make and that'll be based on the nature of the referral and what we already know about the child."

The study revealed that reference is ordinarily made to information held by SCRA about any previous involvement with the child and family at the initial decision

[908] See, Kurlus, Hanson & Henderson (2014) (n.14) at p. 11.

stage. A majority of interviewees discussed seeking out such information before proceeding to an investigation:

> "We're normally looking at the history of previous referrals . . . in order to build up a picture chronologically."

It appears that reliance on historical information held by SCRA is not restricted to that relating to the child who is the subject of the referral, with some interviewees explaining that they would take into account information held about the child's wider family, including any prior involvement with the child's parents or siblings:

> "Well I look at it and look at what other information we have because sometimes the child is already known to us or their siblings are known or sometimes their parents will be known."

This is a significant finding as it emphasises the cyclical nature of referral to the reporter, and suggests that not only is the tree known by its fruit but the fruit is known by its tree when it comes to gatekeeping decision-making. Some interviewees explicitly valued a strong working knowledge of their case load and expressed familiarity with many families within their locality, a factor aiding their decision-making at the initial stage:

> "So I am very familiar with my case load and the names would be mostly familiar to me . . . on the whole I've got a good working knowledge of my case load and that helps."

> "I've got quite a heavy workload but the fact I've dealt with them for a long time means that I know a lot of the families that are referred to me because, sadly, it is cyclical and I've known them for a long time."

However, even in cases where there had been significant previous involvement with the child's parents and/or siblings, interviewees described focussing on the child referred and stressed the need to ensure that that child required compulsory measures of supervision:

> "But another thing that's really important and I feel strongly about this. I feel it's important that we're treating each child individually . . . and I think, you know, it's really important that there's focus and scrutiny at that stage."

In terms of the scope of investigations undertaken by reporters, interviewees appeared to value the broad investigatory powers conferred on them by the statute, under which they feel entitled to conduct any investigations that they deem to be appropriate:

> "My understanding in terms of the legislation is . . . to get whatever level of investigation I want and then to decide whether the child needs compulsion or not."

Some interviewees specifically highlighted the breadth of their investigatory powers, indicating that they possess autonomy and considerable power at the investigation stage:

> "If there's sufficient evidence then we have quite a degree of autonomy and statutory authority to make investigations."

> "I don't suppose we think about it much but we exercise a lot of power at that point in terms of whether the child's entering the system or at what level the child's entering the system – what level of intervention and investigation are we employing?"

Interestingly, the study highlighted a difference in approach towards the scope of reporter investigations. Some interviewees described adopting a broad approach to their investigations, seeking out information from a range of sources at the initial stage and, thereafter, refining their focus at the final decision stage:

> "I don't like to hone in too much at the early stages . . . I prefer to be very open minded. So, for me, I'm thinking – what are the key concerns? What are any kind of other wee hidden concerns that are maybe masked slightly in here? And I would hone my investigation to that. So if I'm sensing it's mainly school based then that's where I'll be focussing. If I think there are wider concerns, a number of different concerns potentially, I'd probably go to

> the social work department . . . It's about keeping it wide but trying to say – right, where am I best getting my information from to fill in the gaps?"
>
> "I'd like to keep it as wide as possible, gathering information from the best sources to start with. And then once we get down, I'm starting to focus in. So what are the most appropriate grounds?"

By contrast, other interviewees adopt a narrower approach. Interestingly, many interviewees discussed the need to balance their investigations with the principle of minimum intervention:

> "You can probably see there's loads of things going on in my head when I'm looking at the initial decision of a referral but I always have running through my mind . . . the minimum intervention principle which is absolutely enshrined within the legislation."

It appears that this focus on the principle of minimum intervention is tied closely to the idea that reporters are justified in investigating a referral only where it appears to them that the statutory tests are likely to apply:

> "There's the so-called no order principle . . . and you have to have that in mind because that's the whole point of referrals. If you've got to investigate something, somewhere in your mind there should be a notion or there should be a clear idea that this may require a compulsory supervision order."

The study therefore suggested that reporters largely adopt a minimal interventionist approach towards their investigations, carefully balancing concerns held about the child's welfare with the perceived need to request further information about the child's circumstances. As such, the principle of minimum intervention was found to influence, or "off-set," the intensity of investigations undertaken:

> "Because you'll be familiar with the phrase "minimum intervention" no doubt and so we shouldn't really be intervening and investigating unless it's absolutely necessary."

Indeed, some interviewees felt strongly about the need to avoid "over-investigating" referrals. These interviewees were wary of investigating too intensively at the initial stage and felt bound by the principle of minimum intervention in exercising their investigatory functions:

> "So when I talk about minimum intervention I'm not talking about the fact of referring a child to the children's hearings system, I'm talking about a family having the right for me not to investigate too erroneously – to use a sledgehammer to crack a nut, for example. To request social services, health services and education all to write me reports that I could probably just get from one professional and that's what I mean about minimum intervention in family life and the child's life."

The various references, by interviewees, to the principle of minimum intervention are notable because that principle is *not,* technically, enshrined in the 2011 Act. Whilst the so-called no order principle, reflecting a requirement for minimum and proportionate intervention, appears in subsections 28 and 29 of that Act, it does not apply to reporter decision-making.[909] Rather, it empowers the children's hearing or the sheriff, in making various orders in relation to the child, to do so only if it is considered that it would be better for the child that the order be made than not. It is, therefore, a dispositive principle that has no application in relation to the gatekeeping decisions of reporters. The focus of many interviewees on the principle of minimum intervention is nevertheless noteworthy, indicating an effort on the part of reporters to undertake proportionate investigations. In fact, the need to balance appropriately the principle of minimum intervention with investigating referrals is directly referred to in SCRA's DMF,[910] again suggesting that reporters practice aligns with practice guidance implemented by SCRA.

As to the sources of information relied upon by reporters in exercising their investigatory powers, the study confirmed that reporters can request such

[909] The same applies to each of the three overarching principles laid down in the 2011 Act, namely: the welfare of the child as the paramount decision-making consideration; the need to take into account the child's views and ensure effective participation; and, the need for minimum and proportionate intervention, achieved through the application of the no order principle. These principles apply to the children's hearing and the court in coming to a decision about a child but do not similarly apply to the reporter in exercising his or her gatekeeping functions. See, 2011 Act, ss. 25 – 29.
[910] SCRA (2013) (n.449) at p. 3.

information from a wide range of sources in order to aid their forming of a view about the application of the statutory tests:

> "We are looking at areas of evidence, gaps in information, identifying where we need to see information because as you know we can get information from a wide range of sources and, depending on the nature of the referral, most frequently we will use social work reports and school reports and health visitor reports. Less frequently but still essential sometimes we will have placement information or specialist resources – information from psychologists or information from health professionals, that kind of thing."

The vast majority of interviewees confirmed that, in general, information is sought from the social work, education and health departments,[911] which were indicated as the primary sources of information relied upon by reporters.

> "The investigative tools are hardly tools at all. They are the other agencies and the primary agency is social work."

> "I mean there's a whole pallet of different investigations but they are the common ones: social work, education and health would be the main three."

Unsurprisingly, social work was cited as a particularly invaluable source of information by most interviewees. Some interviewees highlighted the value of information from the education department, particularly reports from schools, given their proximity to, and regular contact with, the child. A majority of interviewees expressed a preference to request school reports for children of school age and nursery and/or health visitor reports for children below school age. In this way, the age of the child referred was found to influence, or correlate to, the sources of information relied upon:

> "For children that are school age we would always ask for a school report as well because . . . the school will have a better idea of the child's social functioning and kind of family function because they're seeing the child hopefully on a regular basis. And other people that we would ask for a report

[911] This also conforms to SCRA's finding in relation to the 200 referrals sampled in its decision-making study: Kurlus, Hanson & Henderson (2014) (n.14) at pp. 19 – 20.

> from is maybe the health visitor or maybe adult health professionals if . . . the issues are around the parents' mental health or alcohol abuse. So it's not just social work that we are asking for reports."

Interestingly, the breadth of potential information sources open to reporters was found to support a shift in investigative focus from the child to the parent. This is a notable finding in the context of a system in which the primary focus is, ostensibly, the child.[912] In particular, some interviewees explained that they might obtain information from relevant adult professional services working with the parents:

> "You may decide based on the information before you that you want to proceed to a full investigation and you would need to request full reports from social work, possibly from any voluntary organisations or any adult service that you think might be involved in the case."

Although requesting written reports from relevant agencies is the primary means through which reporters acquire information, they are able to request interviews with any individual who can aid their decision-making. This may involve the reporter arranging an interview with the child and family at the initial stage. However the study suggested that this is not a common course of action taken, with only one interviewee discussing it. It was suggested by that interviewee that this allows the reporter to assess the "presentation" of the child, as well as wider family dynamics, which was perceived to facilitate decision-making and influence the subsequent action taken in relation to the referral:

> "Sometimes, you know, I can request reporter interviews . . . So say, for example, I get a police subject sheet and it's for a child who's been reported missing or who's caused damage in the family home and the parents have called the police . . . I often find that I'm without wanting to investigate at that stage but I'd probably invite the child in to speak to me with the parents and glean further from their presentation and what they're saying. I think you can quickly work out the family dynamics and you can quickly work out relations, certainly between young people and family members, parents and

[912] See, Chapter 7, at 7.1.B for further discussion.

> caregivers. And I find that it really helps my decision-making and actually . . . I might be satisfied that the interview has done enough for me to negate further investigation."

Overall, the study served to underline the broad investigatory powers of reporters. The study suggested that, at the initial stage, the source and detail of the referral plays an important role in determining the degree of further investigation required. In general, it was found that the initial decision is based on the nature and gravity of the referral and any historical information held about previous referrals or prior involvement with the child and family. The investigations of the reporter can be extremely broad in scope, and reporters enjoy wide discretion as to the form and intensity of any investigation undertaken. Some appear to adopt a broad approach at the investigatory stage, casting the net wide and requesting information from a range of sources, in order to identify clearly the nature of concerns as to the child's welfare. By contrast other reporters observe, and indeed feel bound by, the principle of minimum intervention and so prefer to avoid an overly intrusive and, potentially disproportionate, investigation.

In particular, the study underscored the broad range of potential sources from which reporters can seek information. Commonly, this was found to involve gathering information from primary sources in social work, education and health. To a lesser extent, the police were cited as a valuable source, especially where the referral related to the commission of a crime by or against a child. Reporters can seek information from any source that may aid their decision-making and the study found that this might also include voluntary services or adult professional services associated with the family, particularly the parents. The study found that the practice of reporter interviews is generally uncommon but suggested that it could provide a useful opportunity for the reporter to assess the child and family in person. This is quite distinct from the typical characteristics of reporter decision-making, whereby the reporter is generally removed, or divorced, from the child and family. Furthermore, the study emphasised that the investigatory powers of the reporters are crucially dependent upon information sharing between relevant agencies. There must therefore be co-operation and co-ordination between such agencies in order to ensure

that reporters are both well-placed and well-equipped to make final decisions in relation to referrals.

### *6.1.D: THE FINAL DECISION: THE REPORTER'S APPLICATION OF THE STATUTORY TESTS*

The initial decision of the reporter is directly targeted towards the making of a final decision. The whole point of reporter investigations is to equip them with enough information to form a view about the perceived application of the statutory tests. Without exception, interviewees explained that their final decision involves an assessment of the sufficiency of evidence required to support the application of at least one s. 67 ground, and an evaluation as to whether, in their view, measures of supervision are required on a compulsory basis. This mirror's Hallet *et al*'s findings.[913]

- **Sufficiency of Evidence**

The study served to emphasise that an appraisal of available evidence is a key, if not *the* primary, task of the reporter. Considering whether there is *prima facie* evidence to support a s. 67 ground is one of their core tasks, and is far-reaching, given that it can dictate the focus and scope of subsequent investigations. However, the reporter's evidential assessment was found to be much more focussed at the final decision stage. All interviewees discussed their evaluation of the sufficiency of evidence, clearly an essential facet of reporter decision-making:

> "The highest level of intervention that we have I suppose as a reporter is to bring it to a children's hearing but in doing so we *must* be convinced we've done all our evidence."

In particular, the study suggested that, above all else, reporters are firmly focussed on the evidence available to support the application of a s. 67 ground at the final decision stage:

> "I suppose we are looking at whether or not a ground's met at that stage so quite a lot of our consideration is looking at the s. 67 grounds. Can we meet

[913] Hallett *et al*. (1998) (n.14) at p. 12.

them? Can we draft them? Would we meet the evidential tests which are necessary?"

It appears that, following investigations, a rigorous evidential assessment is undertaken by reporters since they should then be in possession of adequate information to judge the sufficiency of evidence available to them. Some interviewees described a process of balancing the requirements of each of the statutory tests at this stage, underlining the requirement for evidence of *both* a s. 67 ground and a perceived need for compulsion:

> "Following investigations we have to go back to our evidence again remember because the reports might show there's a lack of evidence for taking it any further or that, although there's evidence for taking it further, there's a low concern and no need for compulsory measures."

Interestingly, some interviewees were of the view that their evidential assessment presents them with little challenge since, according to them, the applicability of s. 67 grounds are often clear following investigations or even on the face of the referral itself:

> "If we assume to start with that we have sufficiency of evidence because, actually, very few decisions are based on insufficient evidence. Following a big investigation usually there is sufficiency of evidence. It's very rare not to have enough evidence to support a ground for referral at that stage."

> "Generally most reporters will read the referral and within the space of 5 minutes be able to decide what the ground is so it's just a case of securing evidence to substantiate that ground from the investigation."

However, a few interviewees disagreed, emphasising that clear evidence is not always available to support a s. 67 ground. These interviewees expressed frustration about having, at times, to take no further action in relation to such referrals, especially when compulsory measures are perceived to be necessary. However, those interviewees were cognisant of the fact that the s. 67 grounds are open to challenge

and so must, as a matter of course, be robust enough to stand up to proof in the sheriff court:

> "We have to have evidence in order to proceed but it could be that there are maybe concerns but they're a bit nebulous, a bit vague and there isn't really enough evidence to proceed because we always have to be thinking – if this is disputed, can I prove this?"

These ideas are linked to the sufficiency of information provided to reporters in the course of their investigations. Indeed, a majority of interviewees suggested that there is often a lack of clarity, specificity and focus within information provided to them, making it difficult to undertake a robust evidential assessment:

> "Social services aren't very good actually at calling a spade a spade in terms of their concerns. They're much more likely to say that there are concerns about the nature of the parents' relationship or that observations of the mother demonstrate that she puts her needs before the child's needs. But these are sorts of general statements that cannot be put into grounds of referral because we need sufficiency. What are you talking about? We need dates, places and incidents."

> "I think sometimes it's a challenge getting the detail that you need to be able to assess the evidence efficiently. Sometimes that can be lacking in the reports and referrals that we receive and we have to do a lot of digging for facts and information to get sufficiency."

The study therefore found that the information obtained from other agencies is, at times, perceived to be insufficient. The need for detailed and objective facts, rather than general and subjective statements, from agencies such as social work was highlighted particularly vividly by one interviewee:

> "And I'm not trying to be disparaging about social work but they can maybe write something in a report like – the home conditions are unhygienic. There was a case I had years ago where they were writing repeatedly in the reports that the home conditions were cluttered. Now that's fine but what does that

mean? I can't write that in grounds because what's cluttered to me might not be cluttered to somebody else. And then it transpired that the clutter they were talking about included things like axes on the floor and razor blades in the child's bedroom. Once I finally got behind what the statements were about and got the real facts, I could then establish very clearly the direct risks to the child in that situation. I think one of the key challenges can be getting the detail that we need to be able to assess the evidence."

Indeed, a majority of interviewees discussed facing similar evidential challenges, whereby they often have to seek out additional information, over and above that acquired during an investigation, in order to achieve sufficiency. This process of going back to relevant agencies for more information and evidence appeared to reflect some interviewees' concern for proportionate and evidence-based decision-making so as to justify compulsory intervention:

> "Again it's evidence but not in terms of the tests or meeting the evidence for a ground, it's more to do with gathering the evidence. That is absolutely the biggest hurdle that I quite often meet. I find myself going back two and three times to get more and more information because the information that we're being given in the first instance isn't giving me sufficiency."

> "What I quite often say to social work is that it's not sufficient from them to say they're concerned about a child. A concern isn't a sufficient reason to bring somebody to a hearing, there has to be evidence of it. They're wanting us to intervene in someone's life and they're wanting somebody to have something attached to their name so they need to bring us the evidence to justify that."

Indeed, a few interviewees held strong views about the need to safeguard an evidence-based approach, and appeared to value their independent role in doing so. As such, they regard the role of the reporter as a crucial safeguard to ensure that there is a sound evidential basis for intervention. In this way, the study suggested that reporters see themselves as "guardians of evidence":

> "I think it's important that there's somebody who's watching the evidence because I think it's quite scary how much things can progress based on urban myths and when you actually drill into it, it turns out that really there isn't any evidence of that."

The study highlighted that reporters value their gatekeeping role, which centrally involves ensuring that there is a clear evidential basis to justify intervention in the child's life. The study emphasised that clear, detailed and objective facts are required to provide sufficiency of evidence and support reporter decision-making. However, the study revealed that there is often perceived to be a lack of clarity and specificity within the information acquired during the course of reporter investigations, which can be based on the broad and subjective concerns of professionals such as social workers. In particular, the study underlined the fact that, above all else, reporters are focussed on securing sufficient evidence to support the application of a s. 67 ground, not least since it is open to challenge in the sheriff court.

- **The Perceived Need for Compulsion**

The second part of the reporter's final decision involves an evaluation as to the perceived necessity for compulsory measures of supervision. Interestingly, the views of most interviewees suggested that sufficient evidence is required not only to support the application of a s. 67 ground but also to support the reporter's view that a CSO is necessary:

> "The question again we'd be asking ourselves: is there sufficient evidence really? That would be the main one and the evidence would need to support whether compulsory measures were required and also the ground of referral."

> "You've got to be satisfied that a ground of referral exists and there's sufficient evidence for that but you also have to be satisfied that there's an evidential basis for compulsion."

In this way, the study suggested that sufficient evidence is required to support the application of *both* statutory tests. This is a notable finding since it is generally understood that sufficient evidence is required for a s. 67 ground but not, necessarily, for the reporter's assessment of the need for compulsion. The legislation does not,

for example, require that the reporter prove this judgment in the sheriff court, it merely requires the appropriate s. 67 ground be proven either beyond reasonable doubt or on the balance of probabilities, if the application of that ground is disputed or not understood. It is, therefore, interesting that interviewees talked about gathering sufficient evidence to support the making of their judgment about the need for compulsion. Again, it is likely that this reflects a concern that reporter decision-making is robust, evidence-based and proportionate so as to justify compulsory intervention.

One interviewee explained that at the final stage, reporter decision-making is more focussed in its nature than at the initial stage. It appears that, following their investigations, reporters crystallise their decision-making by reference to a specific need for compulsory measures of supervision in light of the applicable s. 67 ground:

> "It's less focussed at the initial decision stage because at that stage it's just – could there be a need? Whereas at the final decision stage it's quite clearly – is there a need for compulsory measures?"

The assessment as to the perceived need for compulsory measures of supervision was recognised by the vast majority of interviewees as involving a strict test of scrutiny:

> "Really it speaks for itself – compulsory measures of supervision, *compulsory*. And that means we have to intervene when the family aren't willing to engage and the young person's not willing to engage. So, for me, I take great cognisance of that word "compulsion."

Indeed, most interviewees regarded the question of compulsion as imparting a particularly high standard:

> "The question of compulsion is a high tariff. It's a high hurdle to overcome."

> "I think it is a high test and I think it should be. There's lots of factors that play into that but basically the question is – is it going to be better for this child for compulsory measures to be put in place than if there were no measures put into place."

Interestingly, some interviewees viewed the requirement for compulsion as a practical expression of the no-order principle. Again, many interviewees referred to the principle of minimum intervention, which was cited as being particularly relevant to their assessment about the need for compulsion:

> "When you look at the minimum intervention principle and you've identified that the family or the child needs intervention but you realise that you don't need the children's hearings system for that then, great! So whenever I'm taking decisions I absolutely have running through my mind that compulsion element. Is it required? Are the family willing to engage?"

Such ideas were, in particular, highlighted by those interviewees with a legal background and appear to be linked to the suitability of providing measures of supervision on a voluntary basis, as an alternative to compulsory measures. It thus appears that reporters consider the appropriateness and availability of less intrusive measures when assessing the need for compulsion:

> "Well it's about the welfare of the child and obviously we have to apply minimum intervention. So I'm quite assiduous about that and it's probably because I've got a legal background . . . I mean if you've got a granny who's been looking after a child successfully for 9 months and the mum has not interfered with that for 9 months whilst she's sorting out her drug problem, that shouldn't be for me to bring that child in. Minimum intervention applies and there's no need for compulsory measures."

Further to the need for sufficient evidence of, the high standard imposed by, and the relevance of the principle of minimum intervention to, the reporter's evaluation of the perceived need for compulsory measures of intervention, the study suggested that myriad factors are taken into account by the reporter at this stage. As such, the reporter's assessment involves a number of interlinked issues, questions or themes that are crucial to their forming a view as to whether measures of supervision are required on a compulsory basis.

### *6.1.E: General Decision-Making Determinants Applicable To All Referral Types*

The study identified a number of general considerations that were highlighted by interviewees as being particularly relevant to the reporter's assessment of the need for compulsion. Importantly, these decision-making determinants were found to be general in their application: that is, relevant to all referral types. This contributes to the argument that there is a certain degree of unity between all referral types in relation to the ways in which reporters make gatekeeping decisions.[914]

- **The Provision of Voluntary Support**

The provision of voluntary support as an alternative to the provision of compulsory supervision emerged as a clear theme. A potential outcome of the referral process is that the reporter can refer the child to the local authority for advice, guidance and assistance,[915] predominately in the form of social work input. This referral route is voluntary in nature and can be pursued by the reporter where, in his or her view, a referral falls short of requiring intervention on a compulsory basis. The study suggested that such decisions are typically made when the child and family are cooperative, recognise the concerns to be addressed, and accept a care plan, formulated by the social work department, voluntarily. Aptly, one interviewee referred to the provision of voluntary support as the "middle ground" of intervention:

> "We have a kind of middle ground which is to refer to the local authority, commonly referred to as voluntary support. We often have this middle ground where yeah, there's concern but the need for compulsion is absent because the child and family are willing to engage."

It appears that the distinction here lies in the need to compel children and families to cooperate and engage with measures of supervision imposed upon them, in which case a CSO will generally be thought necessary. Some interviewees stressed a distinction between intervention that can be offered on a voluntary basis, and that which *must* be provided on a compulsory basis:

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[914] However, by contrast, the study also identified a number of differences in gatekeeping decision-making based on referral type, which could be interpreted as a departure from the Kilbrandon ethos. See, Chapter 7, at 7.1.
[915] 2011 Act, s. 68(5)(a).

> "There's quite significant focus, particularly in this area recently, about drawing the distinction between the need for intervention and the need for compulsory measures."

Moreover, some interviewees regarded the decision to refer for voluntary intervention as representing an important opportunity to divert children away from the CHS, and hence deal with them outwith the statutory framework. Most interviewees indicated a preference to try voluntary measures in the first instance, with some discussing the notion of giving families an opportunity to address the concerns held about the child. By contrast, the referral of a child to a children's hearing was largely viewed as a measure of last resort:

> "Well if a family had been offered support on a voluntary basis but they weren't engaging or, they were engaging but voluntary support was proving insufficient or ineffective, only then would we look at compulsory measures."

> "It's trying to think about what is needed here either to resolve the problems or to prevent any reoccurrence. And then it's making sure the supports are going to go in and if there's going to be cooperation. And if that can be done voluntarily then, great, that's what we would go for."

The vast majority of interviewees cited the potential for engagement on a voluntary basis as a determinative factor in assessing the need for compulsion:

> "The primary consideration would be, you know, is there a need for compulsion or can any necessary supports be provided on a voluntary basis?"

Furthermore, a majority of interviewees framed this assessment in terms of whether something more, over and above those supports provided on a voluntary basis, is deemed to be required. In this way, the study suggested that part of the reporter's assessment is about identifying what a CSO can offer the child and family, beyond those voluntary measures available or already in place:

> "It's about whether social work's input is needed and once we've ascertained that we think that social work's input is needed, the question then comes to compulsion and the compulsory element of that intervention. So it's about –

> can social work manage this case on a voluntary basis or do we need something additional?"
>
> "If supports are required then can that be done on a voluntary basis? I suppose you're always thinking – what more can supervision offer here? Why is it necessary? Why do we need this to compel people to accept the supports?"

The vast majority of interviewees shared the view that a willingness to cooperate and engage with voluntary measures ordinarily negates the need for compulsion. The study clearly suggested that the dividing line between compulsory and voluntary measures is the cooperativeness, or otherwise, of the child and family; a discrete theme which emerged from the study in its own right.

- **Cooperation and Engagement**

It appears that a reasonable expectation of cooperation is a prerequisite to the provision of voluntary support. Indeed, the study emphasised that the cooperation of families, or lack thereof, is a particularly determinative factor in the reporter's forming of a view about the perceived need for compulsion:

> "The main factor that would influence the final decision is whether or not a family or child are willing to co-operate on a voluntary basis with agencies because if they are willing to co-operate then, in terms of the minimum intervention principle, we ought not to be arranging a hearing unless we absolutely require it, unless a child absolutely needs compulsory measures of supervision . . . I recognise that it's an enormous intervention in a child and family's life to bring them into the statutory framework and we ought not do that unless there is absolutely a need to do so."

Some interviewees stressed the weight that attaches to familial cooperation, negating the need for compulsion even in relation to sufficiently serious referrals:

> "You've got cooperation of the parents. I mean parental cooperation is a very big thing and, indeed, in some really quite serious referrals because of the

way the parents have reacted and subsequently cooperated then no further action might be taken."

The study suggested that it is invariably social workers with whom cooperation is required, and meaningful engagement with supports put in place by such professionals that is necessary. With this in mind, some interviewees emphasised the need to carefully assess the ability of the family to be cooperative. A specific distinction was drawn by some interviewees between tokenistic and meaningful engagement in this context:

> "Obviously you have to be convinced that people aren't just towing the line for the short interim . . . if it was a meaningful engagement and, you know, it wasn't just a tokenistic engagement there would be no need for me to bring them to a hearing."

Closely linked to these ideas is the ability of voluntary measures to positively impact on the child. Some interviewees stressed that any voluntary measures put in place must be capable of improving the child's situation, irrespective of the cooperativeness of the family:

> "For the compulsion side of it we would be looking to see if there's co-operation and not just that, I guess, but it's about – is that cooperation and is that voluntary work actually achieving the outcomes that are actually needed for the child or is something else required?"

The requirement of impact was emphasised particularly by a few interviewees, who explained that voluntary measures must be capable of changing patterns of behaviour so as to improve the child's circumstances. Where voluntary measures are not capable of acting as a catalyst for change and improvement then compulsory measures are thereby likely to be required:

> "If there were appropriate supports in place and the parents, most importantly, were engaging with those supports and they were making a positive impact then compulsion wouldn't be required. Quite often what you find with social work is . . . although mum and dad are letting you in and

> chatting to you and giving you a biscuit and are telling you – yeah, we need to get them to school, yeah, we need to stop using heroin. They don't actually do anything about it and nothing improves. So the fact that they actually let you in and chat to you and are really nice doesn't matter. It's not about being nice; it's about whether they can parent effectively."

Interestingly, the views of interviewees here centred primarily on the ability of *parents* to cooperate and engage with relevant agencies and supports. The study therefore suggested that decision-making in this context is somewhat parent-centred, rather than child-centred, in nature. This is a notable finding, which links to the findings suggesting that, in making initial decisions, reporters look into their records of parents, as well as children.[916] Those interviewees who stressed the need for meaningful engagement and a positive impact on the child appeared to adopt a more focussed and exacting approach. This was highlighted particularly by one interviewee who set these considerations squarely in the context of the child's experience:

> " . . . The key thing is the experience of the child in the midst of all of that because I think you have situations where people are cooperating as best they can but the situations doesn't change for the child and, in that case, I think compulsion is required."

Overall it appears that where there is an ability and willingness to cooperate, the potential for meaningful engagement, and a likelihood of impact in terms of achieving positive outcomes for the child, the requirement of compulsion will be negated and reporters will likely pursue voluntary measures in response to referrals.

- **Acceptance and Resolution of the Problem**

Another related issue is the acceptance of concerns held about the child's welfare by the family. This factor was highlighted by a majority of interviewees as being relevant to their assessment of whether a CSO is deemed necessary:

[916] Arguably this justified by the "whole family" approach that underpins the Kilbrandon Report, whereby the child was not to be viewed in isolation but in the context of a wider family unit. See, The Kilbrandon Report, at paras.35 – 39.

> "A massive part of my assessment will be whether or not the family are accepting of the concern, accepting of the need for support and engaging with any supports that are in place."

It appears that acceptance is key; described by interviewees as a necessary starting point to, and prerequisite for, the provision of voluntary support. In fact, some interviewees believed that it could make matters worse if families who were accepting of their problems were compelled to cooperate. This was regarded as having the potential to upset the status quo if families had established good working relationships with agencies on a voluntary basis. One interviewee, who had served previously as a panel member, addressed this point clearly:

> "I think personally from seeing it from the panel member point of view, parents are absolutely going to be against the system if you're forcing them to be there and they just end up resenting the system as a whole. If they're accepting of the problem and working well on voluntary then there's no need for that. So that's a big consideration for me."

Another interviewee stressed the importance of seeking acceptance and consensus about the nature of the child and family's problems. Getting a family "on board" in this manner was regarded as having a corresponding impact on outcomes for the child, in terms of its potential to build relationships and change patterns of behaviour:

> "In the sort of chronic, long term lack of care type cases it's so much better if you can just get the family to agree what the issue is, even if they don't agree with it to the extent that other people see it. Because so often you can build those relationships and then people come fully on board and they don't see it all as a threat and then they work and the outcomes are so much better."

The study thus found that an acceptance of concerns held about the child's welfare, often stemming from the wider problems of the family, is a significant factor in the reporter's assessment of the need for compulsion. Where the starting point is one of acceptance, then it appears that a number of related considerations flow from it; primarily regarding the appropriateness of pursuing voluntary, rather than

compulsory measures. One interviewee helpfully explained the structure of decision-making here in the following way:

> "In terms of whether you would come to a hearing or not it's only about – is this child in need of compulsory measures of care? And one thing that would influence that is the acceptance by the family of the difficulties, whatever those difficulties are. So if it's a crime – does the child accept that they've committed a crime? Have they shown any remorse? Do they get it? Or if it's a sort of lack of care or something – do the parents accept that there is a need for improvement? And if the answer to those questions is "yes" then that can be very influential because the next question is – is there support that's suitable on offer? And if there is, then can that support be accepted on a voluntary level? And because of the way the law is configured, if the answers to all those questions are "yes", then we would need to make a decision for voluntary measures as opposed to bringing it to a children's hearing. The law is asking us to look at things in that way."

Related to the acceptance of the problem is its potential resolution by the time the reporter is ready to make a final decision about the referral. A majority of interviewees explained that, in some cases, the problem has resolved, and concerns dissipated, when the reporter comes to assess the need for compulsion. Interviewees suggested that this might be due to the interaction of the child and family with agencies responding directly to the referral, or due to action taken independently by the family themselves:

> "We get the referral but sometimes we'll write out for a report and, by the time we do, social workers will be contacting us and saying – we responded at the time of the incident three weeks ago and we've managed to work with this family so there's no need for compulsory measures."

> "Often families manage to sort out their own problems . . . sometimes you find that if a family knows that a referral has been made to the reporter, it's enough to give them a bit of a boost to get their act together, look at their problem seriously and do something about it."

Again it appears that this factor overlaps significantly with the willingness of the family to cooperate with relevant agencies and engage with relevant supports. The study suggested that where the concerns demonstrated by the referral are being addressed and there is cooperation in the course of doing so, then the basis for compulsion is absent:

> "In actual fact, if at the outset there was a serious concern but 2 months later when you're making your decision there's already demonstrably an 8 week period of good cooperation then that makes the reporter's decision easy."

It is notable that the reporter's decision on compulsion is so closely related to cooperation or its absence. One might expect, particularly given the welfare-orientation of the CHS, that the basis of this decision would relate more exclusively to the situation in which the child finds him or herself. However the study identified, quite starkly, the important role that cooperation plays in determining the need for compulsion and, as a result, bringing children within the statutory system.

- **Familial Response to the Referral**

Another closely related factor in assessing the need for a CSO is the familial response or reaction to the referral. Where the reporter's investigations identify an appropriate response to the referral by the child, or more importantly, the parents or caregivers, then it appears to raise an inference that the need for compulsion is less likely:

> "So kind of attitudes and responses are relevant too. Making sure the parents especially are having the appropriate responses. If they're taking appropriate actions in response to the referral and if they're able to discipline the child if need be then that to me says there's maybe not the need for compulsory measures."

Interestingly, the study suggested that the familial response is particularly relevant in relation to offence-type referrals, whereby the perceived need for compulsion can be entirely negated by an appropriate parental reaction. One interviewee explained that this could be the case even where the child had committed a serious offence, but

where appropriate measures had been taken within the family to address the child's behaviour:

> "In terms of offenders, probably most particularly the parental response to the incident is quite important because even sometimes where something relatively serious comes in, if there's been an appropriate parental response and that situation is quite clearly being dealt with by the family then there's no need for us or the other agencies to be involved."

Another interviewee, however, made clear that reactions and responses can be equally important to decision-making for care and protection-type referrals. Interestingly, this interviewee explained that the response of the child could be particularly revealing of what was going on at home, and thus indicative of a need for compulsion:

> "I also look for when a child's not been distressed and I think the child should've been distressed. I look behind that and think perhaps that suggests to me that the child's observed one too many of those arguments and it's almost become second nature. So that alarms me and suggests compulsion might be required."

This suggested that the familial response and reaction to a referral is influential to the reporter's assessment of the need for compulsion. Crucially, where such responses are perceived to be "appropriate" then they can be determinative in negating the need for compulsion, given the capacity of the family to deal with the situation on a personal and private basis. This accords with the minimal interventionist approach of reporters, identified above.[917]

- **Nature and Gravity of the Referral**

The nature and gravity of the referral itself, a factor identified as capable of determining the scope of required investigations, was highlighted by a majority of interviewees as having continued relevance to their assessment of the need for compulsion. A few felt strongly that the gravity of the referral is a particularly determinative factor. They suggested that the more serious the referral, the more

[917] See, 6.1.C, above.

likely that the making of a CSO will be required in order to address the concerns inherent within that referral:

> "Generally it's the gravity of the referral I would say. It's about the concerns for the child and obviously some of them will immediately jump out at you, suggesting that there are serious concerns for this child or children. And if that is reinforced by the reports you get back in then you would go for compulsion."

However not all interviewees agreed and some intimated that the nature and gravity of the referral is a factor that carries less weight at the final decision stage. At this point, some distinguished between two types of referral: those which relate to a specific incident; and, those which relate to patterns of behaviour. Interestingly, the former appears to relate to offence referrals, whether an offence has been committed by or against a child, and the latter to care and protection and conduct-type referrals. Interviewees suggested that the gravity of the referral is more influential in relation to the former type and less so in relation to the latter:

> "Because referrals can take two forms really – sometimes it's somebody reporting one specific incident that's a sort of high-risk thing and sometimes it's someone reporting general concerns or a general pattern of behaviour. So there's no one acute piece of information that's, you know, high-risk today because there's been a horrible incident but there's a general pattern of behaviour."

A few interviewees stressed the importance of identifying such patterns, potentially across a number of "low-tariff" referrals. It follows that the gravity of the individual referral is less important here, but the ability of the reporter to see patterns of behaviour unfolding and intervene before a course of conduct escalates is key:

> "Sometimes it's about identifying a pattern. Is this something that needs something to be put in place? Is it going to just keep escalating if we're not putting the compulsory measures potentially in?"

The study additionally highlighted that the nature and, particularly, gravity of the referral is not viewed in isolation at the final decision stage but, rather, in tandem with the other inter-related factors, discussed above. In particular, the relationship between the gravity of a referral and the need for compulsory measures of supervision might be severed where there is an acceptance of the concerns and an up-taking of supports on a voluntary basis. Surprisingly, the study suggested that the gravity of the referral could be subordinate to other factors, like the cooperation and engagement of the family:

> "You could have a situation where there are serious concerns but all the supports are in place and there's been a recognition from the parents and child . . . that something needs to be done here and they're acknowledging the concerns and the problems and they're willing to accept all the supports. So I suppose that's really what it's about, rather than the gravity of the situation."

Indeed a majority of interviewees agreed that a willingness to engage and cooperate on a voluntary basis could negate the perceived need for measures of supervision on a compulsory basis, irrespective of the gravity of the referral:

> "And so the irony is that the more serious referral can be the one where you opt for either voluntary supervision or no further action and the lesser can go to a hearing because of an inappropriate reaction or a refusal to cooperate."

However, not all interviewees agreed on this. One interviewee considered that, in some cases, an acceptance of the problem and willingness to engage and cooperate voluntarily is irrelevant, particularly where the child requires protection from harm:

> "I actually think . . . that if we don't have acceptance from the family then we're on a bit of a hiding to nothing . . . the exception is obviously the most extreme cases where there is no choice. So if a child has a fractured arm, the family aren't going to agree that any of them caused it and we have to prove it because the panel must act to protect the child and in that case we actually don't care if they're willing to work with us."

In one reporter's view, compulsory measures might be necessary, in some cases, specifically to establish that a serious offence has taken place:

> "We are not in the business of public protection so if you have an offence which is, say a very serious sexual offence perpetrated by the child against another child, the family may be fully co-operative but there has to be a point where you say – given the gravity of the offence, and regardless of there being co-operation, I think some form of compulsion is necessary or it may be necessary to establish that this offence has taken place."

However this was a minority view and, in general, the cooperation of the family and their willingness to engage with voluntary supports appears to be of greater influence than the gravity of the referral when assessing the need for compulsion. Whilst the study found that the nature and gravity of the referral remains relevant to the reporter's assessment, there was some disagreement as to the exact weight to be afforded to this factor when evaluating the need for compulsion.

- **History and Outcome of Previous Referral**

A final factor identified as being relevant to the reporter's assessment of the need for compulsion, is the history and outcome of any previous referrals:

> " . . . A history of concerns being referred to us for a child not subject to compulsory measures is probably going to make it more likely that the child will need compulsory measures put in place."

Whilst family history was identified as a particularly relevant factor at the initial decision stage, it appears that the history and outcome of any prior referrals is more so at the final decision stage. The success, or otherwise, of past interventions is treated as indicative of the need, or lack thereof, for future interventions. In particular, the outcome of any such referral is taken into account so as to inform the reporter of what measures have been tried in the past:

> "And then also for the compulsion side of it we would be looking to see, you know, what's been tried previously. Has it made a difference to the child?"

> "So then I'm looking at things like – what is the knowledge of the family? Have they been involved with services before? If they have, what was the outcome of that? Did it help?"

The study suggested that an evaluation of the history and outcome of previous referrals could either support a decision to refer to the local authority or suggest that compulsory measures are required. A few interviewees discussed the importance of assessing the impact of any such prior measures, in terms of their ability to achieve positive outcomes for the child:

> "Also an assessment of what kinds of supports have been put in place because rarely nowadays are we the catalyst for that support beginning. More often we become involved at the stage where those supports are not achieving the outcomes for the child, so we'll have an eye on those factors too."

Overall, the study highlighted a number of inter-related considerations that are influential to the reporter's assessment of the need for compulsion. Primarily, this assessment appears to be largely based on the reporter's judgment as to whether voluntary measures are deemed to be sufficient or whether compulsory measures are perceived to be required. The suitability of voluntary measures, as an alternative to compulsory measures, lies in the need to *compel* the child and family in the provision of compulsory measures of supervision. A number of connected factors were found to feed into this assessment, which were demonstrated as being capable of negating the need for compulsion, particularly: the cooperation and engagement of the family with relevant agencies and relevant measures put in place. It is interesting to note that these findings are broadly similar to those of Hallett *et al*'s.[918] Arguably, reporter decision-making has become more streamlined in light of SCRA's practice guidance, such as the DMF, but it bears emphasising that there is a great deal of convergence between the decision-making determinants identified by the present study and Halett *et al*'s study. This is the case even though that study was conducted under the 1968 Act.[919] This suggests that, during the intervening period, reporter decision-making has not substantially evolved which, in itself, is an interesting

[918] Hallett *et al*. (1998) (n.14).
[919] Ibid, at pp. 15 – 22.

finding. More importantly to this thesis is the identification of a body of general decision-making determinants, the application of which "cuts across" all referral types. The applicability of these determinants to each of the three major referral types suggests that there is a degree of unity in the gatekeeping decision-making practices of reporters, which conforms to the Kilbrandon ethos.

## 6.2: THE NATURE OF REPORTER DECISION-MAKING

A stated objective of the study, and, indeed, this thesis as a whole, is to explore the extent to which reporters exercise discretion and professional judgment in making gatekeeping decisions. This section presents empirical findings on the nature of reporter decision-making which contribute to this exploration. These findings are directly related to the arguments made in Chapter 3 and theoretical material presented in Chapter 4. As such, they contribute to the key arguments that: in general, reporters exercise both discretion and professional judgment in performing their gatekeeping functions; and, in particular, reporters exercise discretion to choose the single most appropriate s. 67 ground and, in so doing, classify referrals as belonging to one of the three major referral types identified by this thesis. In order to construct these arguments, this section presents findings on: the role and importance of the s. 67 grounds to reporter decision-making; the reporter's practice of choosing the single most appropriate ground; the conversion of referral types by reporters; and, the evaluative nature of the reporter's assessment of the need for compulsion. The section concludes by exploring the independence, autonomy and consistency of reporter decision-making practice.

### *6.2.A: THE ROLE AND IMPORTANCE OF THE S. 67 GROUNDS*

An explicit aim of the study was to explore the ways in which reporters apply, and make decisions related to, the s. 67 grounds. The study explored the role of the s. 67 grounds, and the findings reflect the significance of the grounds to gatekeeping and dispositive decision-making. There was fairly clear consensus amongst the interviewees that these grounds provide the legal basis for intervention in the child's life:

> "A child can only come to a hearing if there's a reason in law for the child to be there, otherwise there's no legal basis. So that's the absolutely crucial role of the grounds."

> "Well I suppose they're the kind of statutory instrument that allows us to do our job. They allow us to investigate and make decisions related to a child and without them we would have no authority or jurisdiction."

Echoing this sentiment, many interviewees described the s. 67 grounds as providing the requisite justification for pursuing compulsory measures of supervision in relation to the child:

> "It's our principal basis in which to start getting involved in a child's life. Everybody's got human rights and the grounds are our justification for legally intervening in family life."

> "We can't interfere unnecessarily in people's lives. There needs to be good justification for the state interfering and the grounds provide that and they kind of focus why you're interfering too."

Interestingly, one interviewee described the s. 67 grounds as a "vehicle," suggesting that they are the mechanism through which reporters are able to bring cases to hearings:

> "My old boss used to describe the grounds as the vehicle for getting the case into the hearing and I always thought that was quite a good description. So it's your way into a hearing – it's your legal basis . . ."

Some interviewees specifically linked their discussion of the s. 67 grounds to issues around procedural fairness and legal formalism. These interviewees were keen to stress the evidence-based approach towards gatekeeping decision-making, underpinned by the s. 67 grounds:

> "The grounds also provide a process for ensuring there's evidence for that concern. I think what sometimes can happen is that people get concerned for a child's welfare and it reaches a sort of fever pitch. So the role of the

> grounds really is to focus on what there is evidence of and, in that sense, it's the whole basis for decision-making in relation to the child. So it gives that formal basis for justifying decision-making and justifying intervention."

Other interviewees raised issues around fair notice and accountability, suggesting that the s. 67 grounds communicate, to the child and family, the concerns about the child and why the child requires to attend a hearing:

> "In terms of the role of the grounds I suppose it's to identify the areas of concern for the child. And it's particularly important that parents and children are clear about why they're going to a hearing. So the grounds of referral, as in the conditions themselves, but then also the statements of fact that we write to support the condition should make it quite clear to people what it is that we are concerned about."

One interviewee in particular regarded the s. 67 grounds as providing accountability for reporter decision-making, by specifically narrating the concerns about the child so that the referral process is transparent and open to challenge:

> "Well I think people have the right to know why they're in the system. I think there's an accountability that we have and other professionals have to say why we are concerned about a child and also so people can rebut that. So I think it's in the interests of fairness and transparency and accuracy as to what the concerns are."

Interestingly, one interviewee highlighted a salient tension here; acknowledging the crucial role of the s. 67 grounds for decision-making and intervention, but also setting this largely formalistic role of the grounds within the broader context of an otherwise informal system:

> "The grounds of referral need to be legally scrutinised and need to be competent for the children's hearing to go on to make decisions about the child. So I think they formalise what we like to think is quite an informal system."

Another interviewee raised interesting ideas about the s. 67 grounds reflecting a form of public interest. In this way, the s. 67 grounds were viewed as providing a benchmark, specifying a set of standards or thresholds which, if they apply, legitimise compulsory state intervention:

> "I think the grounds now quite clearly set out the kind of public concern, the concern that society has, about certain behaviours and certain concerns for children. And what they clearly do is identify what is unacceptable in the upbringing and experiences of a child."

Furthermore, many interviewees regarded the s. 67 grounds as providing a framework for decision-making for both the reporter and the children's hearing:

> "I think it's a framework. I think the grounds are a way to capture the key concerns for a child and their family. And I think the way that they are written allows you to find a key area of concern, which justifies state intervention into family life."

Similarly, some stressed the potential role of the s. 67 grounds in establishing factual consensus. They regarded them as capable of determining the principal issues to be addressed by hearings and establishing the nature of concerns about the child within a clear and focussed framework:

> "To allow an intervention into anyone's life I think you have to have a point of entry, if you like. You have to have an acceptance or an agreement about what the issue is. I think the grounds of referral are important because they establish a set of facts, which act as a springboard from whence we can go forward and focus."

Most interviewees regarded this framework as one which provides clarity and specificity about the nature of concerns about the child, as well as transparency about the need to intervene in the child's life on a compulsory basis.

> "Well there needs to be a kind of framework, if you like, to kind of pin what we're doing upon. So, for me, the reason we need grounds is so that it's clear and transparent as to why we're concerned about a child, why we're bringing

them to a children's hearing. So there needs to be something there to peg it on. To make it clear."

"I think the grounds are there to provide clarity, consistency and a framework to address the main issues which affect children and young people in Scotland."

Given the perceived role of the s. 67 grounds as providing a specific legal basis for intervention and a clear and transparent framework for decision-making, it is unsurprising that all interviewees recognised their inherent prominence within the children's hearings process. Without exception, interviewees acknowledged and, indeed, stressed, the centrality of the s. 67 grounds to decision-making practice:

"The grounds are everything. They are everything really to our job."

"I think that the grounds are crucial. I think they are a key part of the referral process."

"The grounds are the kind of backbone to everything."

"I mean within about 2 minutes of the new Act coming in we were speaking in another language – have you got an (a) or is that a (c)? And that's because it's our bread and butter. That's what we deal with; that section is what we deal with everyday."

Whilst all interviewees acknowledged the importance of the grounds to their own decision-making practice, some interviewees emphasised their importance to *all* decision-making practice within the CHS. In particular, those interviewees highlighted their central role in relation to all decisions made about the child, whether by the reporter or the hearing:

"They are absolutely significant. I think the grounds are absolutely pivotal and the more experience I have, the greater the understanding I have that the grounds are key to all decisions about the child."

The s. 67 grounds were often conceptualised by interviewees as a focal point, in terms of both decision-making and the nature of concerns held about the child:

> "I think they're your focus. To try and focus your thinking as to what is going on for the child. You know, where does this fit?"

> "I think they are very important because the grounds give us that focus right from the off – is there a ground here and is there evidence for that? So I think that the grounds are absolutely crucial."

The study clearly suggested that reporters use the s. 67 grounds as a prism through which to view the referral, refine their decision-making in relation to the referral and, ultimately, frame the principal concerns held about the child's welfare:

> "The grounds are a kind of filter or a focus to decide which children need to come into the hearings system."

> "The grounds are significant because, from the word go, by the time you've assessed the referral you're already thinking of grounds that you would need to meet."

> "In terms of when we are looking at a referral early on, obviously one of the first things is looking to see if there are any indicators of any of the grounds. And quite often it can be the case that a child's circumstances tick about 5 of the s. 67 grounds, so what you're looking for is the principal concern."

These ideas are linked to the shifting nature of the s. 67 grounds, which were found to be especially fluid at the initial decision stage of the referral process:

> "Now what can quite frequently happen is when we undertake an investigation and the information comes back in, we are moving from one ground to another but we've still got the concern, it's just that the information more heavily supports another circumstance, another s. 67 ground."

Crucially, the study suggested that reporters use the s. 67 grounds as a means to process and sort referrals in the course of their gatekeeping decision-making. This accords with the conceptualisation of reporters practice equating to a classificatory practice, introduced in Chapter 4.[920] These ideas are inextricably linked to the

[920] See, Chapter 4, at 4.1.

reporter's discretion to choose the single, most appropriate s. 67 ground, through which they filter, label or classify referrals by direct reference to the sole ground that most appropriately reflects the concerns held by the reporter in relation to the child.

### *6.2.B: CHOOSING THE SINGLE, MOST APPROPRIATE GROUND*

It has been established that a crucial task of the reporter is to identify and consider which one or more of the s. 67 grounds, in his or her view, applies in relation to the child. An implicit aim of the study was to determine whether reporters exercise discretion in choosing the single s. 67 ground that they deem most appropriate, and that they do so in line with SCRA's practice direction.

Whilst reporters initially process and register referrals under a specific s. 67 ground, many interviewees stressed that their choice of ground or grounds frequently changes in light of their investigations:

> "When something's referred in we have to take the primary ground for referral and book the case under that ground. It can become evident during the course of an investigation that, in fact, the issues fit more into another ground of referral."

The study thus highlighted that the reporter's focus, in terms of his or her choice of s. 67 ground or grounds, is inextricably linked to investigations undertaken in relation to the referral. This raised interesting ideas around the reporter's initial choice of ground at the registration stage "framing" the referral, dictating the focus of investigations and, ultimately, influencing the reporter's choice of stated ground.[921] In this way, the identification of s. 67 grounds by reporters was found to have a direct impact on their subsequent decision-making process:

> "And then that lets you work. Once you have identified what those grounds are, that's your basis for your evidence and that's your basis for progressing the case. What's the criteria for that ground? How does the referral fit that criteria? And it all informs your decision-making process: what information do you need to meet that ground for referral; what evidence do you have; and, how can you actually write those grounds?"

[921] See, also, discussion at 6.1.A & 6.1.C, above.

Many interviewees explained that, often, multiple s. 67 grounds appear initially to apply. In such cases, reporters described the nature of concerns inherent within the referral as being varied, typically with multiple s. 67 grounds presenting as applicable from the outset. Interviewees explained that the purpose of their investigation then is to shed further light on the complexity of those concerns and refine their decision-making focus, so as to identify a clear body of evidence to support the application of at least one s. 67 ground:

> "So at the start of your investigation, for example, you might be thinking – oh that's a lack of care, there seems to be evidence to support that but there's also evidence in support of a Schedule 1 offence so maybe, for example, wilful exposure . . . depending on what evidence you get back in, you may find at the end of your investigation that you're proceeding with one and not the other."

The evidence available to the reporters was found to have a direct impact on their choice of s. 67 ground. Some interviewees seemed to adopt a simple approach here, explaining:

> "Normally I would just think – what ground can I prove?"

Other interviewees explained that it isn't always easy to "fit" their concerns about a child within any of the s. 67 grounds,[922] and made clear that the reporter's choice of s. 67 ground is often restricted by the information received from other agencies in the course of their investigations:

> "I've certainly had cases in the past where we've had young people referred and the concerns of the professionals don't easily fit, or don't fit at all, into any of the grounds for referral. And that can cause real problems because we just can't do anything with the referral in those circumstances. And in some ways we are limited by the information that comes into us and in identifying where that information fits."

[922] However, it should be acknowledged that the vast majority of interviewees were of the view that this situation had been improved since the passage of the 2011 Act, section 67(2) of which substantially revised the grounds upon which a child can be referred to a hearing. Indeed there was consensus amongst the interviewees that the grounds contained in s. 67(2) are broad enough to cover most, if not all, referrals for which compulsory measures of supervision are likely to be required.

These ideas, about the process of identifying relevant information and determining where that information "fits," by direct reference to the s. 67 grounds, is fundamentally related to the reporter's discretion to choose the ground or grounds that he or she deems to be most appropriate. Crucially, a majority of interviewees confirmed that they comply with SCRA's practice direction to select the single most appropriate ground:

> "Well the practice is that you always go for the most appropriate ground – the *single* most appropriate ground."

> "You do come to it with an eye that you're looking for *the* most appropriate ground, so the most relevant, and you're looking at all the evidence and saying – is there a single one here that I can pull out as being the most appropriate?"

Indeed, the study detected a clear preference on the part of interviewees to select and state a single s. 67 ground only; with multiple grounds being founded upon only where there is discrete evidence of distinct concerns and the reporter considers it necessary to rely upon more than one ground:

> "Our standing instruction is to pick the most appropriate and only have more than one ground if there are separate statements of fact, you know, where real, distinct concerns apply."

> "In terms of cumulative grounds, normally it will only be where there are clear distinguishable facts that support the separate grounds. So, for example, if there are chronic lack of care concerns and the child's been the victim of an assault. And I'm using victim of an assault, as well as a lack of care, because the set of circumstances in that one incident so clearly distinguishes it from the rest of the concerns we have about the child."

> "Going with more than one ground is dealt with in our practice direction and we've not to do this lightly because our obligation from the start is to select the ground that most accurately reflects the concern for the child. So where that can amount to one ground, we would generally go with one. We don't

> state numerous grounds and kind of stick all our eggs in one basket and hope one of them will stick as there is clear direction to us on what we're supposed to do with that."

The study therefore highlighted a strong conformity to SCRA's practice direction within reporter decision-making practice. Indeed, a majority of interviewees agreed that the practice of stating multiple s. 67 grounds is generally rare:

> "Well we do have quite clear practice guidance regarding multiple grounds and it's not something that we ought to take lightly."

It appears that, although the practice of stating multiple s. 67 grounds is generally rare, one s. 67 ground might be stated in order to evidence a general pattern of behaviour, or course of conduct, whilst another s. 67 ground might be stated in order to evidence a specific, stand-alone incident:

> "It's quite a rare thing to do and you only really see it where something is maybe a pattern of conduct that culminates in an offence. You'd have the pattern of conduct as your lack of care ground and then you would have your offence against the child being a distinct, stand-alone ground."

Interviewees therefore suggested that, on occasion, two s. 67 grounds might be stated but no suggestion was made by any interviewee that more than two s. 67 grounds would be likely to be relied upon in current practice. Rather, reporters appear to be principally concerned with identifying the sole s. 67 ground that is reflective of concerns held about child's welfare, directly in line with SCRA's practice direction. These findings are of crucial relevance to this thesis since they support the argument, introduced in Chapter 3, that reporters have discretion to choose the ground of referral that they consider most appropriate.[923] The findings additionally tap into ideas introduced in Chapter 3, and developed in Chapter 4, that since reporters generally choose one ground to found upon, they effectively classify referrals by reference to the s. 67 grounds and, in so doing, designate those referrals as belonging to one of the three major referral types: that is, care, conduct or offence.[924]

[923] See, Chapter 3, at 3.4.
[924] See, Chapter 4, at 4.1.

However not all interviewees appeared to align their practice so closely with SCRA's direction to state the single most appropriate s. 67 ground. A few interviewees discussed the practice of stating multiple s. 67 grounds, as an "insurance policy," for the purposes of proof. They suggested that they would do so, having decided that compulsory measures of supervision are necessary, in order to ensure that at least one s. 67 would be established through the sheriff's determination:

> "Well quite often we would use quite a few grounds on the basis that . . . I mean it sounds awful but on the basis that, if you didn't get something established you might get the other one established."

> "Generally we are encouraged to bring a child to a hearing on one ground for referral which reflects the overall concerns but sometimes there is an overlap or you might feel that there's a possibility that you might not get one ground for referral established but you may get another one. So in a situation like that we would tend to bring multiple grounds."

Furthermore, the study identified some degree of scepticism about SCRA's policy of stating the single most appropriate s. 67 ground. This was a minority view but one interviewee explained that the position had been challenged by sheriffs, and another said that it had been explicitly rejected by a SCRA manager:

> "I know in my particular sheriff court, the sheriffs have a distinct point and that is that if a child's circumstance fit a condition then that condition should be in. So if a child's circumstances fit two different conditions then they should both be represented. That is not SCRA's general position but I agree and I understand why the sheriffs want that included."

> "One of our managers anyway is of the view that if by applying more than one ground you have a better chance of ultimately getting the child on supervision then there's nothing wrong with it. At the end of the day it's going to be in the child's best interests but I think the current practice guidance is very clear and I would tend to follow that."

The tensions highlighted by the study about the practice of stating a single s. 67 ground only, appear to be related to the fact that this is a relatively new policy. Indeed, some interviewees explained that the stating of multiple grounds was previously a common practice adopted by reporters:

> "We used to do it all the time actually but then the practice guidance came out and said you can't really. I think we previously used it as a bit of negotiating tool in the court. So you would use them both and then you would say – right, we'll just take one ground away. But that all stopped about 4 or 5 years ago."

One reporter elaborated these ideas and suggested that the negotiation of stated grounds was previously used to "get families on side" and facilitate the acceptance of grounds:

> "We always used to do it under the 1995 Act and you would use one almost as a bargaining tool round at court. So that, you know, you accept one and you abandon the other and that way you get a settlement and everybody appears to be happy. It just makes it a lot easier for everyone. I think the family feel like they've had some kind of victory and they are not alienated."

Some interviewees strongly rejected this practice and were supportive of the current emphasis on the single most appropriate s. 67 ground. It appears from these interviewees that the practice of stating a single ground only is one that is motivated by simplicity, a finding that relates to the discussion of the underlying purpose of the policy in Chapter 3[925]:

> "We try to avoid multiple grounds because it just creates confusion for everybody involved and it's much simpler to capture the concerns under one appropriate ground."

Despite the simplicity achieved by focussing on a single s. 67 ground, another interviewee made the valid point that, in relation to complex referrals, it can often be difficult to encapsulate the range of concerns under a single ground:

[925] See, Chapter 3, at 3.4.B.

> "I mean I know from experience that it's sometimes difficult to condense all the concerns about the child into one overall category but, on the whole, that's what we do."

However, this view was countered by another interviewee who explained that the whole point of SCRA's policy is to encourage focussed decision-making. This interviewee was of the view that when the reporter duly focuses on the primary area of concern inherent within the referral, it is often easy to identify the corresponding most appropriate ground:

> "I mean certainly what we're pushed to do is to focus on what is the prevalent area of concern. You know, what's the reason that we're bringing this child to a hearing? When you focus on that then it is quite often just one ground that applies."

The study revealed that most interviewees have adapted their practice in line with SCRA's direction that generally requires them to state the single most appropriate s. 67 ground. This points strongly to the exercise of discretion by reporters in choosing the s. 67 ground that they deem to be most appropriate. By and large, the stating of multiple s. 67 grounds appears to be rare in practice, arising only where distinguishable facts exist to support different s. 67 grounds. Whilst the study highlighted that stating multiple s. 67 grounds is very much the exception rather than the rule, some interviewees expressed the view that multiple s. 67 grounds are sometimes necessary to facilitate proof in the sheriff court; a view that appears to be supported at a managerial and shrieval level. The study highlighted mixed views as to the optimum approach, with some reporters inclined towards the focus and simplicity of a single s. 67 ground only, whilst others appeared to find it difficult, or even superficial, to capture the nature and range of concerns as to the child's welfare within a single s. 67 ground.

These issues are largely dependent on the accepted role that the s. 67 grounds perform within the children's hearings process. If the role of the s. 67 grounds is simply to bring the child within the jurisdiction of the CHS so that they receive intervention and support, then it may be immaterial as to which s. 67 ground is stated

so long as there is sufficient evidence to support its application and it is, thereafter, accepted, established or found to apply. However any such intervention must be focussed, appropriate and capable of having an impact so as to improve outcomes for the child, thereby suggesting that specificity is key. If, on the other hand, the role of the s. 67 grounds is to focus the children's hearing on the nature of concerns as to the child's welfare then a range of s. 67 grounds may well be required. The reporter must highlight to the hearing the nature, and potential range, of concerns about the child. Reporters must therefore strike a delicate balance in exercising their discretion to choose the s. 67 grounds deemed most appropriate, which must be focussed but also sufficient. This view was articulated by some interviewees:

> "We're always encouraged to only use the one that outlines the principal concerns and only use a secondary one if that absolutely becomes necessary and there's been distinguishable facts which lead us to the view that we would actually be ill equipping the hearing to make a decision without outlining both of those circumstances."

> "And again, for me, it's just always about giving the hearing enough information and capability to make the decision that they need to make in a case. So they need to be equipped with as much proven, solid information as possible so that they can make what might be a difficult decision. So yeah, I suppose selecting the grounds is about enabling the hearing."

Since the central argument of this thesis is that the type of s. 67 ground chosen by the reporter influences legal process, gatekeeping and dispositive decision-making, reporters must be mindful of the significance of the stated ground in so choosing. In fact, the empirical findings suggest that reporters actively mitigate the consequences of referring children to hearings on certain types of grounds via an informal practice of "converting" the type of referral received by the reporter into another type of referral made by the reporter to the children's hearing.

#### *6.2.C: The Conversion Of Referral Types*

Irrespective of the purpose of SCRA's policy and the object of selecting a single ground only, reporters exercise discretion in doing so: they are free to choose the

ground considered most appropriate. The study suggested that the investigations of the reporter contribute significantly to this choice. Interestingly, the study indicated that this could result in the "conversion" from one type of referral made to the reporter to another type of referral by the reporter to the hearing. Differences in approach towards the selection of s. 67 grounds were highlighted, with some interviewees appearing to adopt a broad approach and others a narrower one.

For example, some interviewees described casting the net particularly wide at the investigatory stage so as to find out if there are any concerns about the child that are wider than those presented within the referral itself. In this way, these interviewees generally did not restrict their decision-making process to consideration of the s. 67 ground under which the referral had initially been registered; sometimes seeking out evidence to potentially support the application of a different type of ground. This proactive approach towards evidence gathering seems to apply particularly to offence-type referrals. Indeed, in relation to offence referrals, some interviewees described tailoring their investigations specifically to discover whether there are broader concerns about the child, beyond the offence, that could be captured under an alternative s. 67 ground:

> "But you know and I'm being honest with you, say for example, if a child's alleged to have criminally damaged something or caused some vandalism and that's referred to me as an offence . . . is it too much a big leap of faith for me to go to education and say – this boy has been referred to me and I want to know a bit about his education provision. Is it unfair if I categorise that young person at this initial stage, as the chances are that they're probably not doing well at school . . . And lo and behold you get an education report back and attendance might be 70% and there's been disruption in the class. If I feel there's more merit in the investigation then I can convert that offence to a non-attendance or an outwith parental control."

Such an approach involves a recognition that children who offend have complex needs and, typically, a background of care and protection issues and, so, resonates with the Kilbrandon ethos. Adopting a broad approach towards the investigation of such referrals allows for wider issues and needs to be taken into account by the

reporter who may then decide that a care and protection or conduct-type ground is more appropriate than the offence-type ground. As such, the exercise of discretion by reporters was found to support the conversion of referral types, as introduced in Chapter 3.[926]

However some interviewees adopted a much narrower approach towards offence-type referrals and felt bound by the *Constanda* case, which was perceived by them to clearly prohibit the conversion of offence-type referrals to the reporter, into care and protection or conduct-type referrals to the hearing. In particular, such an approach was viewed as one which undermined the requisite standard of proof for offence referrals:

> "You have to be quite clear. You can't sneak stuff in under the radar – they've either committed an offence or they've not. You either think there's sufficiency to prove the offence or not."

> "For us it's quite clear cut. If we receive an offence referral we must apply the higher standard of proof and that's a high test to meet. If we can't meet it, we can't meet it. For an offence referral it's as simple as that."

One interviewee felt strongly that referrals involving criminal offences must accurately reflect the factual commission of those offences and ought, therefore, to be captured by the stated s. 67 ground:

> "I think it's very important if there is a serious offence, whether that's been committed by or against a child, that it is stated. And those are usually the ones that are the most hotly contested in court, so those are usually the ones that it is important for evidence to be heard and for a sheriff to say yes or no."

However not all reporters within the sample adopted such a narrow and strict approach, and some interviewees felt it was within their discretion to convert an offence-type referral into a care and protection or conduct-type referral, where wider concerns could be evidenced:

[926] See, Chapter 3, at 3.4.B.

> "If you've got other matters that you can look at, maybe they're not going to school and they're drinking, then maybe you could look at being outwith control but if it's purely offence grounds then you have to be very clear about what the evidence is."

It appears that the distinction, which follows directly from *Constanda*, lies in whether the facts and evidence relied upon by the reporter relate solely to the commission of an offence by the child or whether additional facts can be used to indicate broader care and protection-type concerns. This was understood by some interviewees who appeared to support the conversion of referral types on such a basis:

> "I suppose quite often though you will find that the child who is offending might have other issues and concerns and so you can bring something else in on the civil standard."

The study identified disagreement amongst interviewees about the legitimacy of converting offence-type referrals into care and protection or conduct-type referrals. Some interviewees felt that they have discretion to choose any s. 67 ground deemed to be appropriate, except in relation to the offence ground. However not all interviewees felt bound by case law to the same extent here. In particular those interviewees with a legal background appeared to appreciate the limitations of the *Constanda* precedent, thereby suggesting that reporters can, and do, get round it in practice:

> "There's the *Constanda* case, which says you shouldn't be bringing in offences on the civil standard, but that can be distinguished if you can find other concerns. So you can even include your offences in your civil grounds and negate that process."

> "I don't actually often bring offence grounds for a child and I think most reporters would agree with that. You would look at all the circumstances and you look at the most appropriate ground. Just because a child has been referred on offence grounds, it may well be that there's a more appropriate

ground and I certainly would bear that in mind before I bring a child in on offences."

Such an approach recognises the "weakness" of the *Constanda* limitation to the reporter's discretion, as laid out in Chapter 3,[927] and accords with the Kilbrandon ethos. Moreover, it relates directly to the theoretical material presented in Chapter 4; specifically, labelling theory, in the sense that reporters can actively mitigate against the stigmatising consequences arising from the referral of children to hearings on offence grounds.[928] These ideas are of central importance to this thesis, which ultimately argues that many, if not all offences committed by children could be referred to hearings on the basis of some other care and protection or conduct-type ground.[929] In this way, the conversion of referral types by reporters could serve to strengthen observance to the Kilbrandon ethos in practice.

### *6.2.D: JUDGING THE NECESSITY FOR A COMPULSORY SUPERVISION ORDER*

The empirical findings substantiate the argument, made in Chapter 3, that reporters form a judgment in applying the second statutory test.[930] A clear theme that emerged was cooperation and coordination between relevant agencies and professionals, and the reporter. Many interviewees emphasised the reliance of reporters on information from agencies, such as social work, in applying the statutory tests, particularly in relation to the reporter's assessment about the perceived need for compulsion.

Interviewees practising in areas where there was perceived to be good coordination between agencies thought that this was beneficial and suggested that it facilitated their decision-making:

> "I think the vast majority of professionals who work in our area are very quick to get involved with a family in a supportive way. There are good communications generally, I would say, between agencies as well and this facilitates our decision-making."

[927] See, Chapter 3, at 3.4.B.
[928] See, Chapter 4, at 4.4.A.
[929] See, Chapter 7, at 7.2.
[930] See, Chapter 3, at 3.4.C.

In particular, where there was perceived to be good organisation and coordination between SCRA and the social work department, decision-making and, ultimately, intervention was thought to be quicker and more effective:

> "In this locality social work are much more organised so reports are coming in on time. Families tend to get a better service from social work too so there's less need to bring things in unnecessarily."

The relationship between reporters and relevant professionals, particularly social workers, was discussed by the vast majority of interviewees. By and large, interviewees described having good working relationships with such professionals and this was perceived to enable their decision-making. Where good relationships existed, interviewees seemed to rely more heavily on the information and opinions provided by such professionals:

> "Personally, although I still rely on the decision-making framework matrix and I still rely on my knowledge and understanding of child development, I also rely quite heavily on the professional relationship I have with, for example, social work colleagues."

Some interviewees highlighted their experience of working with the same professionals over time, which was perceived to engender good working relationships and facilitate effective decision-making:

> "Because I've worked in the same area and I've worked with largely the same social work department, I believe that I have a very good working relationship with them."

> "It keeps coming back to the length of time I've been here and the relationships I've forged because I think I've also got quite good relationships with the guidance staff in schools. I mean I think overall people are very happy to lift the phone to me."

The study suggested that where reporters have good working relationships with other professionals, they have both confidence and trust in the information and

recommendations provided by them. It was suggested that this could have a direct impact on the reporter's assessment about the perceived need for compulsion:

> "I've got quite a lot of confidence in them and so, if I find out a child's already linked into a service, then I would probably be less likely to think that compulsion is required."

Similarly where reporters have a good, trusting, relationship with individual professionals, this appears to make them take more seriously the concerns they hold about a child, which again can impact upon the reporter's assessment about the need for compulsion:

> "I know if I get a call from a health visitor or some of the head teachers in the area who are excellent, then if they're phoning me and saying that they are really worried about this child, then I too would be very worried."

However, some felt that their relationship with other agencies, particularly social work, was not as good as it could be. The variable quality of information from social work was perceived to have a negative impact on decision-making, sometimes causing delays:

> "It becomes quite subjective actually and even within [this locality] depending on what social work office you are dealing with depends on the quality of that report and the information you get from them."

> "In general we have a good relationship with social work but you've got to chase them up at times."

The extent to which reporters take into account recommendations made by professionals, in forming a view about the perceived need for compulsory measures, was explored by the study. Whilst reporters are not bound to follow any recommendations made by other professionals, interviewees appear to take them into consideration, to varying degrees, in applying the second statutory test. Some interviewees explained that, in departing from a recommendation made by a professional like a social worker, they would be conscious of justifying their decision to take a different approach:

> "We would expect to have a recommendation from social work but of course it's entirely up to us whether we follow that recommendation or not but clearly we're dealing with able and skilled colleagues and if we weren't following that recommendation we could have to justify that decision."

Indeed, some interviewees indicated a general preference to follow recommendations made by social workers, particularly where trust and confidence in individuals existed:

> "Probably for the majority of cases I would coincide with the recommendations made by the social work department."

> "I rate them highly and the vast majority of their decisions I would agree with because I feel that I trust their decisions – I trust their recommendations."

These discussions emphasise the fact that the judgment made by the reporter as to whether compulsory measures are necessary, is based primarily on information, observations, opinions and recommendations provided by professionals, particularly social workers, who work more closely with the child and family. This layering of professional judgments, in assessing the perceived need for compulsion, was explicitly highlighted by one interviewee:

> "We're decision-makers but our decision is based on the professional recommendations of other people and I think it's quite rare that we would go against the grain of those professional recommendations."

However not all described relying so heavily on the opinions and recommendations of social workers and other relevant professionals, valuing the independent and autonomous nature of their decision-making. Most thought that it was important that they have the ability to depart from the views of other professionals:

> "While it's very helpful . . . and I think highly of the other agencies in my own particular area and the individual professionals within that, sometimes I still might decide to do something that is different from what they are recommending because I think – this is the right thing to do."

Some interviewees explained that disputes could often arise between professionals as to the best course of action for the child. This seemed to particularly be the case where the social worker thought compulsory measures were necessary, whilst the reporter thought voluntary measures were sufficient. Under such circumstances, their role as the ultimate gatekeeper seemed particularly valued:

> "There's certainly no pressure on us to agree with the recommendations of other agencies or anything. We do genuinely have that discretion to go back to them and say – either come back to me with more information on this or we can't say that there's evidence that we are going to be able to proceed. And I guess sometimes that does result in professional disagreements about what's the right way forward, so in that sense the discretion is quite important I think."

Directly linked to this is consistency in the application of thresholds for intervention, an issue that was discussed by the vast majority of interviewees. The study indicated clearly that reporters view the requirement of compulsion as involving a high standard or threshold. However it also suggested that this view did not necessarily translate across other agencies, and this was found to be a source of frustration for a majority of interviewees:

> "It's about whether there is any real need for compulsory measures. We get quite a lot of those referrals at the moment that say – working well with social work on a voluntary basis. So why are you referring? The family is going to engage better if you are working well together on a voluntary basis. There's no need for them to be forced into compulsory measures if it's all working well. The s. 25 for me is a biggie and that drives me mad. Just what is the need? "

> "The question I say to them is – right, tell me what difference the hearing is going to make. What's the difference to your care plan? Is it your intention to accommodate this child? And normally the reply will be – no, I'm not intending on doing that. So why do you want a hearing? What's going to be different from what you're doing right now?"

Some interviewees felt that other professionals did not fully understand the role of the reporter and lacked specific knowledge on what is required to justify intervention on a compulsory basis. The inconsistent application of thresholds for intervention was perceived to lead to professional disagreements and delays in decision-making, thereby having a largely negative impact on reporter practice. As such, interviewees strongly valued their independence and autonomy from agencies, such as social work, and thought it was important that they are ultimately responsible for assessing whether compulsory measures of supervision are deemed to be necessary.

### *6.2.E: INDEPENDENCE, AUTONOMY AND CONSISTENCY*

The autonomy and independence of reporter decision-making was a clear theme that emerged from the study. The vast majority of interviewees believed that they possess significant discretion, and have considerable freedom in exercising it, when considering and applying the statutory tests. They appeared to identify strongly with a "gatekeeping" role and thought that they exercised substantial authority during the referral process:

> "Well I think we are the kind of gatekeepers, if you like, to the system. We do have the final say."

> "I think we do have a lot of discretion. We have a lot of gatekeeping responsibilities at the referral stage. I don't suppose we think about it much but we exercise a lot of power at that point."

> "Our discretion is hugely significant. I mean as a reporter you've got a huge amount of autonomy in making your decisions."

A few interviewees suggested that their discretion was unfettered. Some interviewees even suggested that their discretion was too broad, and expressed discomfort at the isolated nature of reporter decision-making:

> "There's no real mechanism for objectively checking whether I made the right judgment call but the point being that I had absolute authority to make that judgment call."

> "Sometimes it makes me feel uncomfortable about how isolated reporters can be about their decision-making. Sometimes you can be a little more lenient than others, sometimes you're not totally on form, and I think that can be quite a dangerous thing really."

However, a majority of interviewees were of the view that their discretion is not unfettered. They believed that there are appropriate "checks and balances" in place to regulate their gatekeeping functions, particularly through the provision of training and practice guidance by SCRA:

> "I suppose the first thing I would say is we don't have complete free rein in terms of our discretion because we are subject to the decision-making framework and the kind of practice direction that tells us the way that we are supposed to exercise our discretion. So it's not completely free discretion."

> "We've got our decision-making framework and training and for me, personally, I find that they aid decision-making. Having done the training quite recently to become a reporter, I think that's been really beneficial for me to kind of see how I should be grading things. Thinking of it in line with the decision-making framework actually helps you to put your personal feelings aside and think as a professional. What are the needs of this child? Where do we need to go with this?"

Moreover, many interviewees expressed the view that SCRA, as an organisation, has a strong ethos,[931]:

> "I think we have a lot of training and the ethos within the organisation is really very strong. So whilst we exercise discretion and while we form our own views and judgments, I'm also very aware that we have a strongly embedded ethos."

The study found that the discretion and judgment of reporters is largely guided by practice guidance implemented by SCRA, which the vast majority of interviewees appeared to follow. As to the status of such practice guidance, some interviewees

[931] The ethos of reporter decision-making is discussed further in Chapter 7, at 7.1.E.

explained that they are heavily directed to comply with it, even suggesting that they are under a professional obligation to do so:

> "We've obviously got clear direction from the legislation . . . And we've also got practice guidance, which quite heavily directs us. In fact, it's now practice direction, rather than practice instruction – so it's pretty clear that it's not guidance."

> "I think it's now practice instruction actually . . . It used to be called practice guidance and now it's called practice instruction so that speaks volumes and, yes, we should follow it absolutely."

One interviewee was of the view that SCRA's practice guidance was, in fact, too prescriptive:

> "It is very much about looking at each case on its merits and that's why it can be hard sometimes. I mean our practice direction – before it was practice direction it was practice instruction and before that it was practice guidance. And I think it was quite helpful when it was just practice guidance because I think sometimes you can be too prescriptive about things. We should be entrusted with being able to make the decisions and to decide which grounds best fit the case."

Another interviewee discussed the means through which SCRA monitors compliance with practice guidance, and explained that such processes are intended to identify and address inconsistent areas of reporter decision-making practice:

> "As a senior practitioner part of my responsibility is case sampling. So we've just recently done case sampling and that really informs us about where people aren't following practice instruction and that'll inform training and where we need to look at things."

A clear aim of the training and practice guidance implemented by SCRA is to achieve consistent decision-making and introduce a degree of "standardisation" within reporter practice. Whilst this addresses the paradoxical nature of the

introduction of the reporter's office, discussed in Chapter 3,[932] it is an aim that seems somewhat at odds with a system which seeks to meet the needs of children on an individualised basis. However most interviewees felt that, within that degree of standardisation, they still have freedom to exercise discretion and make judgments on an individualised basis:

> "I mean we do have practice guidance and we've been trained and we're quite aware of things we need to take into consideration. But I suppose not everyone is going to do it exactly the same way. It's just not possible. Some people may have a higher threshold than others about deciding whether or not to bring it to a hearing. But one of the things about that is that very often there is no right or wrong answer but it's about having good, justifiable reasons for doing what you're doing."

In fact, a few interviewees were of the view that standardisation in reporter practice has not yet been achieved. They suggested that there could be significant inconsistencies in individual reporter practice:

> "I think our discretion and professional judgment is extremely significant. I think there is a massive difference in decision-making between different reporters and, indeed, between different managers."

> "You can find big differences between reporters . . . I remember in one team there was somebody who brought in 1% of cases and somebody else brought in 30% of cases, which is a big deviation."

Again, this was found to be linked to consistency in the application of thresholds for intervention. Some interviewees explicitly highlighted the perceived inconsistent application of the statutory tests by individual reporters and by different locality areas:

> "You see a whole range of different tests being applied. Sometimes you hear people saying – well, to reflect the gravity of concerns. Sometimes you hear people saying – well, because the parents are not engaged. Sometimes it's the

[932] See, Chapter 3, at 3.1.A.

> legal necessity of compulsory measures. So there is a great deal of difference."
>
> "Different areas have different thresholds. So when I went to [one locality area], the thresholds there were completely different to [another locality area]. So then I thought – do I have to monitor and adjust my threshold or should it just be uniform within the whole organisation?"

That being said, most interviewees acknowledged directly the potential for inconsistent decision-making practice and seemed conscious to avoid it:

> "I also think it's really important to have consistency across the organisation because you don't want the situation where thresholds are different between individual reporters or their approach to a set of circumstances is different. So we do need consistency and I think that's something that we are all very conscious of."

Interestingly, one interviewee was of the view that there could legitimately be differences in the focus and emphasis of reporter decision-making but thought that, on the whole, this did not lead to the making of inconsistent decisions:

> "I mean to put it in the context, we've done exercises where we've looked at scenarios and reporters have gone off and made a decision and then we all come back together and say – what did you decide? And it's funny because reporters will often look at cases in different ways, we'll pick out certain things. But when it comes to the final decision, we've all come back with exactly the same thing. So we do have a great deal of discretion in terms of investigation and final decision but there's effectively quite a bit of uniformity in the decisions that we do make."

Another interviewee echoed this view and, interestingly, linked differences in focus and emphasis to the different backgrounds of reporters. Importantly, this interviewee did not regard this as giving rise to different outcomes for children referred:

> "Our discretion can place different emphasises in difference areas because we're human beings and we come from different backgrounds. We've got

> reporters who've been social workers and are quite heavily assessment trained and focussed. We've got reporters from a law background, like myself, and we're looking at evidence and can we satisfy tests and can we meet them? But, regardless of what background we've come in with, the organisation's equipped us with another set of skills through training and things like that. So we may come from different angles but, interestingly enough, what we find is that we all kind of come to the same conclusions about these children."

Overall, the study suggested that reporters very much value their autonomy and, in particular, the independent nature of their decision-making. The opinions of most served to augment a view of reporters as "guardians of evidence." They appear to be conscious of ensuring that there is sufficient evidence to support the application of the statutory tests and frequently "test" the thresholds of other professionals, such as social workers, in evaluating the perceived need for compulsion. As such, reporters apparently scrutinise referrals closely, in deciding whether a hearing requires to be arranged in respect of a child, and value the fact that they have the ultimate authority to make that call:

> "We might get referrals from social work who are anxious to bring children into the hearings system but maybe there isn't a real case for compulsion or maybe there isn't proper evidence for the ground and then I guess our discretion is really important as the kind of gatekeeper into the hearings system from that point of view. Because we're the kind of filter that would look at those issues in a lot more detail and certainty."

The findings of the study on the nature of reporter decision-making suggest that reporters exercise discretion *and* professional judgment in applying the statutory tests. Crucially, the study found that reporters have discretion to choose the single s. 67 ground deemed to be most appropriate, and largely follow SCRA's practice guidance which "directs" them to do so. Some interviewees appeared to adopt a narrower approach than others in terms of choosing the appropriate ground where the child was referred to them after having allegedly committed an offence. Some felt bound strictly by the *Constanda* judgment, and therefore believed that they did not

have discretion to choose another care and protection or conduct-type ground to found upon. Others appeared to adopt a broader approach, acknowledging the limitations of the *Constanda* precedent and feeling entitled to "convert" an offence-type referral into a care and protection or conduct-type referral if they had evidence of wider concerns about the child's welfare, beyond the offence.

As a result, some interviewees described adopting a proactive investigatory approach in relation to such referrals: actively seeking out evidence of such wider concerns from agencies such as social work or education, in order to legitimately facilitate the conversion of an offence-type referral into a care and protection or conduct-type referral. This substantiation of the "conversion" of referral types advances the central argument of this thesis in that it confirms that reporters are free to dictate the type of s. 67 ground upon which children are referred to hearings, and that they may actively choose to change the referral type due to the procedural and discretionary implications of referring children to hearings on a certain type of s. 67 ground, most notably the offence ground. These findings are of grave importance since this approach reflects the Kilbrandon ethos, and this thesis ultimately argues that such an approach could, in principle, be adopted as a matter of course in order to strengthen that ethos in practice.

Moreover, the study served to emphasise the evaluative nature of the judgment made by reporters about the perceived necessity for statutory measures. It emphasised the fact that reporters are limited by the information they receive from other agencies and suggested that the judgment of the reporter in applying the second statutory test, is largely based on the judgments of other professionals, such as social workers. As such, good coordination and relationships between the reporter and other relevant agencies and professionals was found to facilitate decision-making. However, the study made clear that reporters value their independent role and believe that the autonomous nature of their decision-making is very important. The study indicated that the ability of reporters to depart from the views and recommendations of other professionals, such as social workers, and, indeed, other reporters, is a crucial feature of reporter decision-making. In this way, a view of reporters as both "gatekeepers" and "guardians of evidence" within the CHS was supported.

# CHAPTER 7: EMPIRICAL FINDINGS ON THE INFLUENCE OF THE REFERRAL TYPE ON DECISION-MAKING PRACTICE

Having explored the scheme and nature of reporter decision-making, this chapter examines differences in decision-making practice based on referral type. In so doing, it contributes to the over-arching argument of this thesis: that there is a lack of unity between different referral types within the practice of the CHS. The preceding chapter provides an empirical basis for central arguments arising from this thesis: that reporters exercise *both* discretion and professional judgment in applying the statutory tests but, crucially, reporters have discretion to choose the most appropriate s. 67 ground to found upon in referring children to hearings, pointing to the designation of referral types by reporters. This chapter explores the practical implications arising from this classification process.

Although the preceding chapter identified a number of general decision-making determinants applicable to all referral-types, this chapter presents findings which suggest that differences in decision-making practice apply to different types of referrals. These crucial findings are presented within this chapter in three parts: differences in gatekeeping decision-making based on referral type; perceived differences in dispositive decision-making based on referral type; and, a perceived escalation in referral type, involving a shift from referrals relating to the care of the child to those relating to the conduct of the child over time. Thus, evidence is provided to suggest that a strictly unitary approach towards all referral types is not achieved in practice. In light of this, the chapter concludes by exploring the implications and possible responses to strengthen the Kilbrandon ethos in practice.

## 7.1: DIFFERENCES IN GATEKEEPING DECISION-MAKING BASED ON REFERRAL TYPE

A major aim of the study was to explore whether any differences in decision-making practice arise from the reporter's choice of s. 67 ground. Most differences in gatekeeping practice were found to emanate directly from the statutory scheme itself: that is, being related to the procedural differences in approach that apply uniquely to offence referrals. This contributes to the argument made in Chapter 2, about the

procedural distinctiveness of offence-type referrals, which render them considerably different from care and protection and conduct-type referrals.[933]

However these significant and original findings also relate directly to the theoretical material, presented in Chapter 4, evidencing a synergy between the referral type assigned by reporters and their subsequent gatekeeping decisions.[934] The study therefore substantiated the theory about an interaction between the assigned referral type, the process thereafter followed and the decision-making practices subsequently adopted by reporters in deciding whether or not to refer children to hearings. The study suggested that the classification of referrals by reporters results in "feedback," through which the assigned referral type "loops back" to influence the reporter's subsequent gatekeeping decision-making.[935] This was found to result in different gatekeeping considerations applying to different types of referral, which can be interpreted as a departure from the Kilbrandon ethos.

Since the interaction between the referral type and gatekeeping decision-making practice was found to relate primarily to the reporter's treatment of offence-type referrals, this section begins by presenting findings that relate exclusively to those referrals. Findings are presented that demonstrate the primary focus of the reporter on evidential issues, a shift in decision-making focus from parent to child, and a number of justice-orientated considerations that contribute to the reporter's assessment of the need for compulsion when making gatekeeping decisions about offence-type referrals. These findings contribute directly to the central argument that such referrals are treated differently to care and protection and conduct referrals, through which responsibility is increasingly located with, and assigned to, the child in practice.

Thereafter, original findings are presented on conduct-type referrals, which confirm a discrete category of "conduct" grounds, and so substantiate the original scheme of referral types set out in Chapter 2.[936] Findings presented indicate some differences in reporter practice in respect of conduct-type referrals, albeit that these were found to

[933] See, Chapter 2, at 2.5.B.
[934] See, Chapter 4, at 4.4.
[935] See, Hacking (1995) (n.27); See also, Chapter 4, at 4.4.B.
[936] See, Chapter 2, at 2.5.A.

be much less pronounced than those which were found to apply to offence-type referrals. This view is augmented by findings which advocate a unitary approach towards all referral types, not least since the study suggested that care issues are perceived by reporters to frequently underlie conduct issues, including offending behaviour. The section concludes by exploring the ethos of reporter decision-making.

### *7.1.A: EVIDENTIAL ISSUES*

The main difference that interviewees discussed between offence-type referrals and care and protection, including conduct-type, referrals was the different standard of proof and rules of evidence that apply:

> "I think the main difference, the biggest kind of preliminary difference or crucial difference, is the evidence standard. There's the standard of evidence which is different and it's a much higher evidential hurdle, it really is."

A majority of interviewees acknowledged that the higher standard of proof could be challenging and, at times, difficult to discharge.

> "The criminal standard can be difficult to discharge because it's more exacting, you know."

However, most interviewees accepted the difference in evidential standard and rules as a necessary aspect of the children's hearings process for offence referrals:

> "I mean it can be difficult but that's just a legal requirement that we have, you know . . . I mean I suppose there is a challenge in that it's a different standard of proof but I think it's right that there's a different standard of proof so it doesn't feel like a challenge. It's something that you just accept as part of the system."

In fact, some were strongly in favour of the requirement that the offence ground be proven beyond reasonable doubt. They regarded it as an appropriate procedural safeguard since offence referrals can result in the child acquiring a criminal record:

> "So it is a hurdle but it's an appropriate hurdle because, again, not only are you bringing children within a statutory system but you're leaving them with

> some kind of criminal record should those grounds be established . . . The evidential standard is very high and I agree with that but it certainly is a challenge."

As a result, a majority of interviewees described having a much sharper focus on evidence when making gatekeeping decisions about offence referrals. Some interviewees suggested they are generally more likely to take no further action with offence referrals, than any other referral type, due to insufficiency of evidence:

> "The only difference being that, obviously with an offence referral, you're looking at the criminal standard of evidence, whereas everything else is on the civil standard. I would say that the evidential assessment is more likely to lead to a "no further action" with an offence referral because obviously the standards are higher."

This view was echoed by some who felt that the evidential requirements could impede their decision-making, resulting in "difficult" decisions, and could, in fact, prevent them from referring children to hearings when they thought this was otherwise required:

> "It's obviously more of a challenge with evidence. That's just in-built and that's quite right that it's built into the system. But often, as we've discussed, that can . . . I don't want to say get in the way . . . but for good reason, yeah, that can result in different decisions than you would perhaps like to make."

> "Yeah there probably are occasions where you're maybe concerned about an offence, about the nature of an offence, particularly maybe with a sexual element, where it is effectively one person's word over another and you're obviously concerned about the children in that situation with that type of allegation. But often in those situations you won't have sufficiency of evidence to proceed, which always leaves a wee bit of a niggle. Those are probably the ones that you're kind of most uncomfortable with."

Others explained that they did not find the criminal standard of proof itself to be a challenge but, rather, the evidential requirements that flow from it, particularly the requirement of corroboration:

> "It's the corroboration hurdle that's the big issue I've got to say. Of course with the civil standard that corroboration element is taken away and your judgment call on the evidential evaluation is the credibility of the witnesses or the credibility of the reports but the criminal law is very strict in relation to corroboration and if it isn't there then we can't and we don't take it any further."

Some saw evidential issues as less challenging for offence-type referrals than for care and protection and conduct-type referrals. They explained that since offence referrals are received in the form of a police report, there is often sufficient evidence to support the application of the offence ground inherent within the referral itself:

> "I mean in some ways it's easier to prove the offence because you'll have a police report."

> "I think that because offences are reported by the police who are used to reporting for the Fiscals, it's normally written in such a way that there's normally a sufficiency from the outset."

However, most interviewees felt that gathering sufficient evidence was less of a challenge in relation to care and protection and conduct-type referrals, given the relaxation in the standard of proof and the rules of civil evidence that apply. One interviewee, in particular, stressed that there is a much greater degree of evidential flexibility for these referral types:

> "For care and protection referrals you've got a lower standard of proof. It's the civil standard and hearsay is permissible so kind of anything goes because it's kiddies' proceedings generally and the sheriffs are fairly open minded about that too."

There was a notable difference of opinion amongst interviewees where there is insufficient evidence to satisfy the offence ground. Some believed that evidential

considerations did not affect their substantive decision-making and were relevant only to their initial processing of an offence-type referral:

> "The criminal standard of proof is relevant to my initial assessment. So yeah, in my initial assessment when I'm first looking at an offence referral, of course, before I can progress that *at all* I have to satisfy myself that there's a sufficiency of evidence to proceed with that."

> "That's an issue right at the start. If we get an offence referral and it's clear that there's no corroboration and we're not going to be able to prove it, we should just be getting rid of it right there and then."

These interviewees felt duty-bound to take no further action with an offence-type referral if there was insufficient evidence on the face of it. However, others adopted a more "relaxed" approach and felt it was within their authority to investigate the referral to determine whether there were wider concerns, beyond the offence, that might justify the referral of the child to a hearing. In this way, these interviewees suggested that they could "convert" an offence-type referral into a care and protection-type referral, if there was sufficient evidence to do so, and they believed that the child was in need of compulsory measures of supervision:

> "If an offence referral comes in and I'm unsure whether there's enough evidence to corroborate the offence, I would probably investigate it if I felt there was more to it than that. Investigate it and then when it comes back I would change the ground for referral as I say."

The study shed light on the evidential requirements of the offence ground as compared to care and protection, including conduct, grounds. It highlighted that, generally, reporters regard the criminal standard of proof as challenging and, at times, difficult to discharge. This was perceived to result in the reporter sometimes taking no further action with offence-type referrals when compulsory supervision was, in fact, perceived to be required. However, since offence-type referrals take the form of police reports, they were regarded as often providing sufficiency of evidence, to the appropriate standard, from the outset.

As with the reporter's discretion to select the single appropriate s. 67 ground, the study revealed a salient tension with respect to interviewees' approaches towards offence-type referrals. Some reporters appear to adopt a stricter approach than others towards them. If there is a lack of evidence to support the application of the offence ground from the outset, then they do not regard themselves as having any authority to proceed. However, other reporters were found to adopt a more flexible approach, feeling entitled to undertake subsequent investigations to determine whether any wider concerns could be evidenced under an alternative care and protection or conduct-type ground. In doing so, some interviewees felt that they had the discretion and authority to "convert" an offence referral-type referral to the reporter into a care and protection or conduct-type referral to the hearing, where compulsory supervision was deemed necessary.

This aspect of the study therefore revealed, and further emphasises, the inconsistent manner in which reporters apply the *Constanda* precedent. The practice of those interviewees who adopt a broader approach, and support the conversion of offence-type referrals into care and protection or conduct-type referrals, follows the argument of this thesis: that *Constanda* presents a "weak" limitation to reporter discretion that could be overcome in an effort to strengthen the Kilbrandon ethos.[937] Crucially, the findings on evidential issues highlight that reporter's generally have a much sharper focus on evidence for offence-type referrals, indicating one clear way in which gatekeeping decision-making differs directly on the basis of referral type, thereby departing from a unitary approach towards all referrals in practice.

### *7.1.B: DECISION-MAKING FOCUS*

Another way in which gatekeeping decision-making was found to differ lies in a shift in focus from parent to child in respect of offence-type referrals. By contrast, the focus for care and protection-type referrals was found to be largely directed towards parents.[938] Whilst reporters are primarily concerned with the needs of children, they appear to be equally concerned with the capacity of parents to satisfy to those needs:

[937] See, Chapter 3, at 3.4.B; See also, Chapter 6, at 6.2.C.
[938] Notably, the gatekeeping decision-making focus was also found to shift from parent to child in relation to conduct-type referrals, discussed in Chapter 7 at 7.1.D.

> "Although we deal with children, we're actually concerned with their parents being able to respond to their needs."
>
> "And sometimes you wonder if the children's hearings system is the appropriate name for it or if that's actually a wee bit of a misnomer because very often it's all about parental behaviour, particularly with care and protection referrals, but even with offence referrals."

In particular, decision-making for care and protection-type referrals was said to generally focus on parental conduct, whereas decision-making for offence-type referrals was said to focus on the child's conduct:

> "I suppose all needs emanate from behaviour . . .Whether it's from the child's behaviour or the parent's behaviour. But maybe in care and protection cases it's more about focussing on the parent's behaviour, whereas with offending it's more about looking at what the child has done."

Many interviewees suggested that care and protection-type referrals typically relate to patterns of parental behaviour and, thus, generally refer to courses of conduct over a period of time.[939] By contrast, offence-type referrals were said to generally relate to a discrete incident, resulting in a narrower decision-making focus on the offence. As such, the study suggested that deeds, as well as needs, are relevant to gatekeeping decision-making:

> "I guess a difficulty is that the hearings system is designed to look at the whole child's circumstances, which I think, generally speaking, it does quite well. But when you're dealing with offences you can't help but look at that individual incident because it's just the nature of it."

The perceptible shift in decision-making focus from parent to child was said to be linked to the age and capacity of children typically referred on offence grounds:

> "The decision-making *ought* to be reached in the same way. I mean I think they are different children often, in the fact that the care and protection cases

[939] A clear exception to this is where the child him or herself has been the victim of an offence, where a similarly narrow decision-making focus was found to apply.

> generally are younger children and the offenders that we deal with are generally older children, and that does change things, but they most likely would have been referred to us earlier when they were younger."

A number of consequences appear to flow from the fact that children referred on offence grounds are generally older than children referred on care and protection grounds, and this was found to affect the focus and emphasis of reporter decision-making. Most interviewees said that they are particularly interested in the reaction of the child to the offence committed, the response of the child to the referral, and the willingness and ability of the child to cooperate and engage with measures of intervention:

> "I suppose there's a greater emphasis in terms of young people who have offended, depending on what age they are, as to what their own response to that behaviour is."

> "And I've been referring to parents there but obviously the older the child gets, the more likely it is that also you're needing to consider what the child's views are . . . Particularly for young offenders and, actually, it's more important to know what their view is. Quite often it's the case that parents are desperate for help and they understand that this isn't good enough but the child doesn't want to take part or engage and then the emphasis changes."

This shift in decision-making emphasis appears to recognise the potential autonomy of children who have the capacity to commit criminal offences, an issue that was raised directly by one interviewee:

> "I wouldn't say that we draw a specific distinction between offending and not but there does come a time where you have to recognise the degree of autonomy with which the child is operating . . ."

Inextricably linked to the age of children who commit criminal offences, the autonomy of those children appears to be a consideration of the reporter that applies to offence-type referrals. Arguably it is an inappropriate consideration since it divorces the child from his or her background circumstances and implies that

offending behaviour is independent from wider influences in the child's home and family. This seems to preclude a holistic approach towards decision-making and, furthermore, appears to subvert the Kilbrandon ethos. Moreover, viewing the child as an autonomous actor assigns responsibility to children who offend and thus suggests that reporters "responsibilize" such children through their decision-making practices. In this way, reporters appear to impute responsibility to children subject to offence-type referrals, whereas responsibility is located with parents in relation to care and protection-type referrals.

These ideas were further developed by some interviewees who suggested that children referred on offence grounds have made a personal choice to engage in offending behaviour. As such, the referral was said to be assessed in light of their the child's autonomy, and the choices they have made:

> "I think the main difference between care and protection and a young person offending is the way in which the young person themselves affects that dynamic. When a young person's offending it's their continued choices that mean they keep getting arrested. A young person who's in a chronic situation of neglect isn't able to make those choices."

The study identified a clear shift in decision-making focus, from parent to child, in relation to offence-type referrals. This was found to give rise to a shift in the emphasis of gatekeeping decision-making, whereby reporters are concerned with the child's reaction to the offence, their response to the referral and their willingness to engage and cooperate with interventions when assessing the perceived need for compulsion. This was found to contrast sharply with care and protection-type referrals, for which reporters appear to assess these criteria primarily by reference to the child's parents. Crucially, the shift in decision-making focus and emphasis was said to be directly related to the age, autonomy and capacity for responsibility of children typically referred on offence grounds.

A balance must be struck in relation to offence referrals, whereby the child's age and autonomy is offset against their background and life experiences. Failure to do so undermines the Kilbrandon ethos and defies a unitary approach towards all referral

types. Whilst, arguably, reporters should take the age and autonomy of children who offend into account, this must not preclude the adoption of a holistic approach towards decision-making. By contrast, the child's capacity for responsibility should be irrelevant to reporters in light of the Kilbrandon ethos. The views of some interviewees suggest that they regard children referred on offence grounds as criminally responsible for their behaviour. Not only does this serve to "responsibilize" children who offend within the context of a welfarist system, but it also suggests that there are certain justice-orientated qualities to reporter decision-making that are inconsistent with the Kilbrandon ethos.

### *7.1.C: JUSTICE-ORIENTATED CONSIDERATIONS*

Another clear divergence in the gatekeeping approach towards offence-type referrals, is the consideration of certain justice-orientated factors by reporters. These notable findings evidence an interaction between the referral type assigned and the decision-making considerations subsequently applied by reporters in assessing the need for compulsion. Interviewees consistently said that an assessment of the seriousness of the offence committed and the child's prior record of offending would be undertaken when evaluating the perceived need for compulsion in respect of offence-type referrals. Such factors are more readily associated with a justice-based system than a welfare-based one. Furthermore, it appears that considerations relating to recidivism and public protection are also taken into account. This was discussed by a few interviewees, who explained that their decision-making involves an assessment about the likelihood that the child will reoffend and the likelihood that the child's offending behaviour will escalate:

> "So I'd be looking at – what are the risks to the child in terms of further offending or of the child's offending behaviour getting them into more serious trouble? And, obviously, a wee bit about what the risks would be to the community as well but my focus would be firmly on the child's needs."

The study additionally suggested that the impact of the child's offending behaviour on the public might also be considered. Some interviewees discussed issues around risk management and public protection, but made clear that such considerations are subordinate to the welfare and needs of the child:

> "I mean we do take into account the risk or impact of offending on the wider community or other people. So I suppose that is the difference but the paramount consideration is still the welfare of the child . . ."

The consideration of issues around persistence and public protection by the reporter introduces a further tension in respect of their gatekeeping decision-making for offence referrals. Such considerations are associated with the justice model. Moreover, the consideration of recidivism and public protection arguably serves to further "responsibilize" children who offend, and to further distinguish offence-type referrals from care and protection-type referrals in practice. Notwithstanding that interviewees were quick to point out that the welfare and needs of such children remain their principal focus, these notable justice-style considerations highlight that reporter decision-making takes on a different quality with respect to offence-type referrals. Some interviewees explicitly acknowledged this and discussed the tensions and compromises inherent within their decision-making practice for offence-type referrals:

> "And I think there is a bit of a tension between doing what's right for the child and their whole circumstances and balancing that with perhaps risks to the public . . ."

> "You're left in a very difficult position as a children's reporter dealing with offences because you always, without exception, have the welfare principle before you as the paramount consideration. But, as a human being, it's quite difficult to totally shut off the experiences of a victim and that often plays out. I often play tug of war with myself when I'm considering these things. But always, without exception, I will proceed on what I determine is in the best interests of the child and not to prove a point to the child that their actions are outrageous. Because my role as a reporter is totally holistic and it has to be 100% focussed on the needs of the young person before me."

The tensions are clearly borne out in practice through the punitive disclosure consequences that apply uniquely to offence-type referrals. A majority of interviewees expressed discomfort with the fact that the child acquires a criminal

record, should offence grounds be accepted, established or found to apply. In particular, the punitive consequences of offence referrals were perceived by interviewees to conflict with the welfarist and unitary nature of the CHS, thereby introducing a contradictory approach towards children who offend:

> "And I've always thought that was weird because we're saying, on the one hand, you're not an offender. You're coming in on offences and you've now got a record but you're not an *offender."*

The vast majority of interviewees acknowledged the potentially far-reaching consequences of offence-type referrals. Interviewees demonstrated a particular appreciation that disclosure consequences could have an impact on the child's future career opportunities and, furthermore, that they set offence-type referrals apart from care and protection-type referrals:

> "This is a very real consequence so I never blithely bring a child to a hearing for offence grounds, partly because that's at the back of my head all the time . . . And that does make offence grounds, still to this day, uniquely different from any other ground for referral because they can follow the young person right into their adult life, particularly where it links to employment. So I suppose that's always in my head."

> "If a child accepts an offence ground there are on-going consequences for them beyond the children's hearings system. That has not been removed by the new legislation so we still have to remind young people that the acceptance or establishment of these grounds may form a record which a future employer may be entitled to see."

However, the study suggested that the extent to which reporters take those consequences into account within their decision-making practice varies. Partially, it appears that this is because SCRA's practice direction expressly precludes reporters from doing so.[940] Although the study suggested that, in general, reporters comply with practice guidance implemented by SCRA, interestingly, this was an area wherein levels of compliance were found to vary.

[940] SCRA (2013) (n.23) at p. 6.

A few interviewees appeared to wholly conform to the SCRA's practice direction, suggesting that they do not take into account the punitive consequences of offence referrals within their decision-making practice:

> "The consequences don't come into my decision-making, no."

These interviewees tended to emphasise that their decision-making is characterised by the perceived necessity for compulsory measures of supervision, the wider consequences arising from the referral being an irrelevant consideration:

> "No the consequences are not a relevant consideration. You just have to think – does this child require compulsory measures of care?"

However, not all took such a narrow view, with a majority of interviewees admitting that their decision-making is influenced, to varying degrees, by the punitive consequences of offence referrals. Some adopted an intermediate position, conceding that they do consider the consequences of the referral, but the perceived need to bring the child within the statutory system is the determining factor of their decision-making:

> " . . . In the initial stages to some extent the consequences would be relevant but, for me, the important thing would be – can this matter be dealt with in other ways or is it necessary to bring a child within the children's hearings system? So we do make some difficult choices sometimes . . ."

In this way, interviewees felt that the punitive consequences of an offence referral were relevant when assessing, on balance, whether to arrange a children's hearing or whether the child's needs could be met through the provision of voluntary support:

> "There's lots of different and sometimes competing things to consider and it's always about weighing up on balance sometimes – what's the better thing to do here?"

Although these interviewees did say that they would take into account the fact that the child would acquire a criminal record, they made clear that those consequences would not prevent them from arranging a hearing on offence grounds, if compulsory

measures of supervision were deemed to be required. Moreover they linked these considerations to the no order principle, assessing, on balance, what was perceived to be better for the child:

> "I suppose it's maybe a kind of later thought. Sometimes you do think – what are the consequences of this referral? Because you do think of every aspect and I suppose it is something that I have been mindful of in particular cases. But it wouldn't stop me if I thought it was necessary." "

However, other interviewees suggested that the punitive consequences of offence referrals were more influential and could, in fact, be determinative to their decision-making:

> "I think the disclosure requirements do directly affect decision-making and I think any reporter would be lying if they said it didn't."

> "I do take the consequences into account. I absolutely do, rightly or wrongly. Good question but I would, if I could, avoid bringing a child to a hearing on offence grounds for that reason."

Again, some interviewees suggested that they might use their discretion to "convert" an offence-type referral into a care and protection or conduct-type referral, in light of the punitive consequences. This finding links directly to the theoretical material presented in Chapter 4, specifically, labelling theory, in the sense that the consequences of offence-type referrals were perceived by interviewees to be "stigmatising," and, so, the reporter might work against that stigma in practice by choosing to refer the child to a hearing on the basis of an alternative care and protection or conduct-type ground.[941] These interviewees suggested that, generally, they try to avoid arranging hearings on offence grounds and thus indicated that care and protection and conduct-type grounds are commonly deemed to be more appropriate by reporters:

> "The Rehabilitation of Offenders Act . . . it does affect my decision-making. It absolutely does. If I was being honest, it's very rare that I would bring a

[941] See, Chapter 4, at 4.4.

child on offence grounds solely. Being quite liberal about it and knowing the consequences of being referred on offence grounds, it may very well be that I have the evidence to bring a child for offending but I've also got evidence that the child's not attending school regularly, or is beyond the control of the relevant person, or is abusing alcohol or a controlled substance. So I have no further actioned the offending and brought the child into the system through the civil grounds. So that, for me, plays in my mind when I'm thinking about the benefits to the child."

"Strictly speaking, if I have enough evidence and I know that there's a requirement for compulsion but I can find something else that doesn't have the negative effects on the child then why wouldn't I do that?

"We're always anxious not to bring children in on offences, where possible. And normally when there is offending, we can normally find other concerns to bring it in on – lack of school attendance, beyond control, misuse of alcohol or drugs."

Most interviewees were particularly conscious of the fact the child's future employment opportunities could be limited by acquiring a criminal record. It appears that where the reporter is aware of the child's future plans, and those plans would be compromised by an offence-type referral, then the consequences of that referral are taken into account by the reporter:

"Well I suppose it can influence decision-making. For me it was relevant for a young man, for instance, who wants to get into the army. Because it certainly would really harm his career prospects if he got offences for assault and all the rest of it. So it sometimes does affect our decision-making."

"Not predominately, however I do consider it. And I will consider it to the extent that, for example, if I have a child who's on supervision and there are some offences coming in and they're minor and the social worker's saying to me – yeah, he did this but it's a minor matter and he was drunk at the time, he regrets his actions and he's about to try and join the army. In that situation, I look at that and I go – I hear what you are saying and this might affect his

> ability to get into the army and he's not been in trouble before. So he's going to just come in and I'm going to have a wee word with him, rather than going to a hearing for offences."

However given the limited life opportunities that are typically available to children who engage in offending behaviour, some interviewees suggested that the punitive consequences are both a relevant and common consideration of the reporter:

> "It is a big deal and it rears its head for a lot of children who've got very limited job opportunities and want to join the army."

The study, however, suggested that there is a direct link between the seriousness of the offence committed by the child and the extent to which reporter decision-making is influenced by the punitive consequences of an offence-type referral. It appears the more serious the offence, the less likely the reporter will be influenced by those consequences and the more likely a hearing will be arranged. In fact, a few interviewees regarded some form of disclosure necessary regarding the commission of serious violent offences by the child:

> "But in terms of the higher tariff offences, such as rape or sexual assault and I think wilful fire-raising is another one that's kept on, I don't have a massive difficulty with those being kept on – just in terms of the absolute serious nature of the offence. And I'll give you an example of that. I mean last week we had a joint referral to the fiscal where it was a rape, a 13-year-old raping a 12-year-old. And there's a bit where you're sort of saying – well, the 13-year-old was fully aware of what he was doing. He was fully aware he was committing a serious crime and there has to be some repercussions to that. And, you know, whilst he might not get a custodial sentence, there's still some consequences to that in terms of his future. Because you have to . . . there's a bit where you have to consider public protection and you have to consider the risks, the possible risks that certain folk may pose to others later on."

Under such circumstances, some interviewees felt duty bound to arrange a hearing on offence grounds, simply due to the gravity of the offence committed. A few of

these interviewees talked about "sending a message" to the child, again introducing justice-orientated notions of responsibility and accountability in relation to children who offend:

> "I very rarely bring offences but, on occasions, it is necessary. I think in those isolated occasions, where the event is of such magnitude, then I think it would be more detrimental in the message being sent if I were to no further action the offence and bring it in as something else."

> "I have one case that I'm going to bring offence grounds for because it's a sexual offence and a serious offence. And that really requires to be dealt with by the hearing because the child really needs to be held to account to assist the child not to behave like that again and really to understand the significance of that. But I mean that's a case where the child is actually already subject to supervision for issues of chronic parental neglect and has been in the system for a long time. So that's an example of – he's in the system, he's on care grounds, however he's had several offence referrals and they've not been brought before a hearing but his behaviour is escalating and it's time."

It appears from the study that where children persistently offend or where patterns of offending are perceived, by the reporter, to be escalating then offence-type referrals may be pursued as a measure of last resort. This reluctance, in itself, is a very important finding as it suggests that reporters are aware of, and even, at times, actively work against, the contradictions in approach towards offence referrals that do not align with the Kilbrandon ethos.

In light of the complex needs and typical backgrounds of children who engage in offending behaviour, most interviewees generally regarded care and protection or conduct-type referrals as being more appropriate than offence-type referrals for the vast majority of children referred to them. Indeed, the disclosure consequences of offence referrals are regarded by this thesis as a punitive anomaly within the practice of the CHS: a view which the vast majority of interviewees shared. Whilst a few interviewees said that they did not take into account the punitive consequences of

offence referrals, this was a minority view. The majority admitted that these did affect their decision-making practice, despite SCRA's practice direction explicitly stipulating otherwise. Many described "converting" offence-type referrals into care and protection or conduct-type referrals, attempting to mitigate the adverse consequences of their referral of children to hearings. Exceptions were identified around the commission of serious violent offences, where some reporters felt it was essential to arrange a hearing on offence grounds. However, in so doing, interviewees discussed notions of accountability and responsibility in relation to the offence committed, indicating further tensions and contradictions in practice relating to offence-type referrals.

### *7.1.D: Between Offence And Care And Protection: Conduct Referrals*

In exploring differences in gatekeeping decision-making based on referral type, interviewees confirmed the existence of a discrete sub-category of conduct grounds, within the broader umbrella of care and protection grounds. These findings are of fundamental importance since they provide an evidential basis for the original conceptualisation of the s. 67 grounds, posited in Chapter 2.[942] As such, the study confirmed that there are three major referral types within the current practice of the CHS, namely offence, care and protection and, crucially, conduct:

> "Well we colloquially call some of them the conduct grounds so we already naturally do that. You know, the new (m) ground specifically about the child's conduct, the offence ground would obviously come under conduct and beyond control is in there too. Misuse of alcohol and drugs too – anything that kind of portrays a behaviour pattern."

Some interviewees were of the view that there is a clear divide within the s. 67 grounds between those which relate to the care of the child and those which relate to the conduct of the child:

> "I think that's quite interesting and I think there's definitely a care/conduct divide."

[942] See, Chapter 2, at 2.5.A.

"Yes. I think there is a clear divide between care and conduct within the grounds."

"I think there probably is a divide in the grounds, yeah. There are the ones that more obviously focus on the child's behaviour and the ones that obviously focus on the care of the child and what the child is being exposed to."

However, other interviewees did not think that the issues of care and conduct could be meaningfully separated out and, rather, thought that the divide within the s. 67 grounds more appropriately referred to age:

"Is there a divide? I wouldn't say there's a divide between behaviour and care because it's often the case that what was at 5 years a lack of parental care is now at 14 years an out of control child. So it's all related."

The vast majority of interviewees agreed that care and protection grounds are typically applied to younger children, whereas conduct grounds are typically applied to older children:

" . . . I think the divide is around about age. You're talking about children under the age of 8 say would be more in terms of the care and protection grounds – lack of care, exposure to risk in terms of other people's behaviour. And then beyond that, you're looking at the child's own behaviour – beyond control, school attendance, their own conduct whether they're misusing substances or offending. There is a very clear divide."

"I suppose depending on the age of the child there is perhaps a divide because when you've got smaller children it's clear that a lot of it is a lack of care but when you get them older then the presenting issues are more likely to be that they are beyond control or they are offending or they are taking drink and drugs. And then the focus tends to be on the child and their behaviour."

On analogy with decision-making for offence-type referrals, it appears that a similar shift in gatekeeping decision-making focus and emphasis applies to conduct-type referrals. A few interviewees indicated that, primarily due to the age of the child,

they would be concerned with the child's reaction and response to the referral, and the child's willingness to cooperate and engage with measures of intervention when assessing the perceived need for compulsion. Similarly to offence referrals, conduct-type referrals were found to involve a shift in decision-making focus from parent to child:

> "So we do draw, to some extent, distinctions because normally by the time you're specifically considering which ground to go forward with you've got sufficient information to be directing it. You usually know which way the referral's going and where the emphasis is – is this a shortfall in the parenting or is this perhaps a product of parenting in the past but a conduct issue by the child which needs to be dealt with at the moment? In which case, what's the child's response? Is the child willing to cooperate and engage?"

However, it should be emphasised that the shift in decision-making focus was far less clear regarding conduct-type referrals. Many stressed that care issues typically underlie conduct issues and so regard it as inappropriate to draw any distinction between care-type referrals and conduct-type referrals. In this way, they generally viewed the conduct of the child as a manifestation of underlying issues relating to that child's care. The study therefore suggested that, depending on the age of the child, similar (or even identical) concerns can typically be dealt with under different types of s. 67 grounds:

> "I mean one example would be a child of 6 years old who's referred to you from school for failing to attend school. Now a 6 year old, in most reporters' opinions, will not be brought to a hearing (for this reason) because you would expect a parent to ensure that the child is attending school. But if that child is then 12 years of age and the same thing's happening, you would take that child to a hearing... because they should be able to get themselves to school without their mum and dad. So there is an age division."

In exploring these issues, some interviewees raised very interesting ideas about the location of responsibility or, even an implied placement of blame, within the s. 67 grounds themselves. It appears from the views of some that responsibility for care

and protection-type referrals is regarded as being located with parents, whereas responsibility for conduct and offence-type referrals is regarded as being is located with the child:

> "The ones mainly that I use are lack of care grounds and school attendance grounds. My view is always that if a child is young then it's a lack of care, whereas if the child is older and voting with their feet then it's school attendance. Because it's your responsibility as a parent to get your child to school up to the age of, probably I would say maybe 13 or 14 but thereafter it takes on a different quality."

A few interviewees directly addressed this tension between issues of care and conduct, stressing that the age of the child simply led to a different manifestation of their needs, thereby supporting a unitary approach towards care and conduct-type referrals:

> "That divide is something that comes up quite regularly and I find it as well with outwith parental control. If young people don't come to our attention until they're 14, and by that point they're outwith parental control, four years earlier they could've been a lack of parental care. So sometimes you feel you're playing a bit of a blame-shifting game, which isn't always comfortable."

> "I always struggle with parental control and lack of care. In those cases where a child is demonstrating behaviours which are indicative of a lack of care but you can't get the evidence to link it, I often feel very uncomfortable bringing a child to a hearing for being outwith parental control. It's as though you're blaming the child and you know perfectly well it's not the child's fault."

> "The sad thing is that quite often, by the time you're dealing with a teenager, the need is so entrenched. The behaviour of the child is so extreme that it's completely shadowing the fact that, underneath, this is just a needy child."

Interestingly, one interviewee described conduct issues on the part of the child as simply being a "grown up" lack of parental care:

> "There definitely is a correlation between the age of the child and the grounds. I mean if you're looking at a 14 year old who's told his head teacher to F-off; he's beating up his fellow students; he's vandalising in the community; he's told his mother she's a mad cow, then you're going to be bringing him to a hearing on outwith control or behaviour grounds. Whereas, really, you could look at it all and think – this is a lack of care. But a 14 year old will never be brought on a lack of care, which is sad. But the reporter will normally think – well, this is just a lack of care but a grown up lack of care, that's all."

These ideas are notable because, in principle, children can be brought to hearings on any s. 67 ground;[943] yet the findings of the study indicate that children are defined or "made up"[944] in different ways, through the prism of the age-appropriate referral type. Whilst interviewees indicated that teenage children could be referred to hearings on care and protection grounds, and that care issues generally underlie all referrals to the reporter, conduct-type referrals were perceived to be more common and, indeed, more appropriate due to the age and autonomy of such children:

> "Often a lack of parental care, the kind of causative agent for the child coming to the attention of services, might be more difficult to prove when a child is a teenager because the child at that point has some autonomy – they can vote with their feet or argue back or whatever. And therefore how do you bring that child into the system if they have significant needs and compulsion might be required? And so you're then left looking at beyond control, for example, but you can take that right back to – well, he's beyond control only because he didn't have the appropriate boundaries and provision of care in the early years."

> "I think conduct grounds are in many ways easier for young people and families to understand and deal with positively than care and protection

[943] Except the offence and truancy ground to which an age limit applies: See, 2011 Act, ss. 67(2)(j) & 67(2)(o).
[944] See, Chapter 4, at 4.2.B.

grounds. Lack of care for an adolescent is a really difficult concept but it's also something that can be very, very hard for them to accept. And, given that the grounds would be read to them – sometimes grounds which are about them and their behaviours are easier for them to process and deal with and manage, rather than grounds which really have nothing to do with them at all."

Some interviewees linked these ideas specifically to the "visibility" of concerns about teenage children, supporting the general view that similar needs simply manifest differently as children get older:

> "I think the conduct grounds possibly do become more relevant because that's what children's services are seeing in adolescents who aren't already known to the system. And it may be that the home is something that people haven't had sight of, they haven't been near."

> "I suppose it's different manifestations of probably the same problems and it's to do with the visibility of those problems. So when children are younger it's health visitors and primary schools that are reporting concerns. Once they get a wee bit older, it's the police that are bringing them home every other night but it's the same underlying issues – you're just getting a different manifestation."

The study suggested strongly, that issues of care and conduct cannot, and should not, be separated out within the practice of the CHS. The vast majority of interviewees stressed the striking similarities between children referred on the basis of care and conduct issues. In fact, interviewees indicated that they are exactly the same children, simply at a different stage and of a different age:

> "I think there's a division between older children and younger children but I wouldn't say that necessarily relates to behaviour and care. Because I think that in our work, those things go hand-in-hand – it's the essence of what we do. And quite often beyond parental control and lack of parental care go hand-in-hand. They're the flip side of each other and are mutually causative."

> "Well I suppose a lot of the time I link care to conduct, and know my other colleagues do as well. So the *reason* that the child is behaving in a particular way is because of the lack of care stuff."

Interviewees appeared to adopt a very holistic approach towards conduct-type referrals and highlighted the artificial nature of a care-conduct divide. Such a divide was viewed as arbitrary in light of the child's underlying needs and some referred to the ethos of the system to support the adoption of a unitary approach between care-type referrals and conduct-type referrals:

> "I suppose in one reading there can be a divide in the grounds but I think that the whole ethos of the system is that it's all about addressing the child's needs – whether their needs are being presented because of their own behaviour or because of someone else's behaviour. It's still all about addressing that child's particular needs at the particular time, regardless of the ground."

Whilst the study identified a discrete category of conduct grounds, the majority of interviewees regarded any practical divide or theoretical distinction between care-type referrals and conduct-type referrals as artificial and inappropriate. The vast majority of interviewees acknowledged that there is a divide within the s. 67 grounds relating to age, whereby younger children are typically referred on care and protection grounds and older children are typically referred on conduct grounds. Similar to offence-type referrals, the differences in approach were said to be related to the age and autonomy of children and a slight shift in decision-making focus and emphasis was detected in relation to conduct-type referrals. However, the vast majority of interviewees rejected such an approach, involving a shift in focus and location of responsibility from parent to child, and emphasised the inherent contradictions within it. Interviewees thus advocated a holistic gatekeeping approach and stressed the need for a unitary approach towards care-type referrals and conduct-type referrals in practice. These significant findings suggest that reporters are subservient to the Kilbrandon ethos. However, simultaneously, the findings indicate that reporters struggle to reconcile the autonomy of older children with behavioural issues that are fundamentally rooted in historic, or on-going, care issues. As such,

these findings contribute to the over-arching argument of this thesis: that there is a dichotomy between those referrals that relate to the care of the child and those which relate to the conduct of the child in the practice of the CHS.

### *7.1.E: The Ethos Of Reporter Decision-Making*

Overall, the study detected an extremely strong philosophy underlying the decision-making practices of reporters. Without exception, reporters described their practice as aligning with the Kilbrandon ethos. Indeed, all interviewees presented as being both supportive and mindful of the Kilbrandon ethos in exercising their gatekeeping functions.

> "What we frequently find is that children who are referred to us for offending have been the exact same children who years before have been referred to us for care and protection reasons. And I think we are always quite mindful, therefore, that the needs not deeds approach of the system is entirely appropriate for that very reason."

Moreover, the experience of all interviewees confirmed the basic underlying similarities between all children "in trouble":

> "They're the same kids. They are frequently the same children."

> "Ultimately they're the same children: they *are* the same children."

> "They are both often very vulnerable children. They absolutely can have come from very similar backgrounds where there may have been subject to lack of parental care, abuse, lack of positive role models in the family. So children that are coming to a hearing, no matter what basis they are coming in on, are often very vulnerable children who have either been emotionally damaged or physically or sexually abused over the years."

> "I think the two are inextricably linked. I think it would be rare for us to see a young person who offends out of the blue for no apparent reason, I dare say it happens but it's very unusual. And I think that's one of the strengths of the system that you've got to look at the whole child and their behaviour in context because you just can't justify looking at their actions in isolation."

As a result of the common needs, backgrounds and experiences of children referred to reporters and hearings, none of the interviewees regarded themselves as viewing or dealing with different referral types in a dissimilar manner. In this way, interviewees believed that their decision-making practice reflected a unitary approach towards all children, irrespective of referral type:

> "I would say that my decision-making is the same because I don't view them differently. You only have to look at a child's history to see that very often their early life experiences are what lead to the offending in the long term. So, no, I wouldn't differentiate between them. A child who is offending is every bit as needy as a child who's been neglected."

> "Yes it's the same. I don't really draw any distinction. As far as I'm concerned, if the child is in need of care, protection, guidance or control, it's immaterial if it's offending or care related."

> "I would say my decision-making is pretty much the same, yeah. Because it's really about our ethos, which is about children's needs not deeds and that's certainly what I'm bearing in my mind."

However, the findings of the study demonstrate that reporters *do* in practice treat different types of referral differently, particularly offence-type referrals and, to a lesser, but nevertheless notable, extent, conduct-type referrals. Crucially, this serves to emphasise the over-arching dichotomy between care and conduct issues within the practice of the CHS. To some extent, reporters are aware of the tension between care and conduct in practice. Indeed, this tension was specifically discussed by many interviewees in relation to conduct-type referrals, where a shift in focus and location of responsibility from parent to child was explicitly rejected. However, the study also served to emphasise that significant differences in process and practice apply to different referral types, particularly offence-type referrals. It therefore highlighted contradictions in reporters' views and practices.

These tensions or contradictions are underlined by the general reluctance of reporters to refer children to hearings on offence grounds. A clear discomfort in pursuing offence referrals was demonstrated by the views of many interviewees, who

indicated that, wherever possible, alternative care and protection grounds would be pursued:

> "I'm less likely to bring a child to a hearing for offence grounds than for any other, except where . . . well no, not except anything – that's just a general statement that I would make."

> "We're always anxious not to bring children in on offences, where possible. And normally when there is offending, we can find other concerns to bring it in on – lack of school attendance, beyond control, misuse of alcohol or drugs."

A similar sentiment also appeared to motivate the practice of many interviewees of "converting" offence-type referrals into care and protection or conduct-type referrals. As such, a critical finding is that offence-type referrals are pursued as measure of last resort within the CHS in light of the contradictions in policy and practice that apply to them. Overall, the findings of the study indicate that the referral type assigned by the reporter influences the gatekeeping decision-making practices thereafter adopted. Whilst the interaction between the referral type and decision-making process, focus, considerations and quality was found to be most pronounced in relation to offence-type referrals, the study highlighted similarities in approach towards conduct-type referrals. In this way, the study demonstrated clearly the fundamental tension between referrals relating to the care of children and referrals relating to the conduct of children in practice.

## 7.2: Perceived Differences in Dispositive Practice Based On Referral Type

Having established that the assigned referral type directly influences the gatekeeping decision-making practices of reporters, this section considers whether a similar interaction arises between the referral type and the decision-making and disposal practices of children's hearings. Whilst this section presents important findings on the ultimate consequences of the designation of referral types by reporters, it bears repeating that these findings are based entirely on the views of those reporters interviewed, rather than being based on the views of panel members themselves. It is,

therefore, possible for this thesis to identify only *perceived* differences in dispositive practice based on referral type.

Nevertheless, this section presents findings which suggest that the assigned referral type is perceived to be capable of directly influencing the decision-making and disposal practices of children's hearings. These findings relate directly to the theoretical material presented in Chapter 4, evidencing an observed interaction between the designation of referral types by reporters and the ultimate disposal of those referrals by hearings. Coupled with the findings presented above, on the interaction between the referral type and gatekeeping decision-making practice,[945] this section contributes to the argument that referrals within the CHS are interactive human kinds.[946] In particular, this argument is constructed via the presentation of findings relating to "punitive" referral treatment that is perceived to apply to both offence and, notably, conduct-type referrals, and findings on an observed shift in decision-making focus, from parent to child, in respect of both. The section concludes with findings on the dispositive approach of children's hearings, which suggest that the gravity of the referral, rather than the referral type, is perceived to influence the disposal.

### *7.2.A: "PUNITIVE" REFERRAL TREATMENT*

The views of interviewees indicated that the designation of referral types by reporters has a broad impact, potentially capable of influencing the dispositive decision-making practices of panel members at hearings:

> "I would like to say routinely that the type of referral doesn't make a difference to the hearing but sometimes, I've got to say, it does."

The general treatment of referrals was perceived by interviewees to be largely dependent on individual panel members:

> "It depends very much on your panel members and their kind of quality and experience. You can certainly have panel members that can be quite hectoring but others can be really good."

[945] See, Chapter 7, at 7.1.
[946] See, Chapter 4, at 4.4.

Some interviewees stressed the authority of panel members to conduct hearings as they see fit and, in particular, highlighted the important role of the chairing panel member to conduct the hearing in an appropriate and constructive manner:

> "It totally depends on the panel members. I think panel members (and who am I as a children's reporter to criticise) have been given that authority – it's enshrined in the legislation. The way that Kilbrandon envisaged the system was that it was people from the local community who would make decisions, expressing their own values and their own beliefs.
>
> "A lot of that is to do with the dynamic of how the chair conducts the hearing and how they control the room."

However, a majority of interviewees felt that the type of referral could significantly affect the tone of the hearing. In particular, punitive attitudes were perceived to apply in relation to offence-type referrals:

> "On some occasions – yes, there's a difference in approach towards offence grounds. It would come down to individual panel members but certain panel members will adopt a finger-wagging approach."
>
> "I have seen some panel members be more retributive with older children who are offending."
>
> "Unfortunately, yes, there is a difference in approach towards offence referrals. And I think because we use lay people . . . there's advantages and disadvantages to that. They have to go under apparently quite rigorous training and selection but you do see panel members wanting to chastise children and that's not their role. I think that's really inappropriate because if it was as simple as that then we wouldn't be at a hearing."

Some interviewees suggested that panel members find it difficult to reconcile the welfare-orientation of the CHS with offence-type referrals:

> "I have to say my view and my experience is that they do, sadly, act differently with children who are at a hearing for offence grounds. It's very

difficult for some panel members to remember and recall that they are a welfare-based system at that point."

"I think sometimes it's lost in translation that, regardless if it's offending or care and protection, it's all a welfare-based system and not a punishment-based system."

However, notably, the study found that introduction of punitiveness was not restricted to offence-type referrals, but was also perceived to apply to conduct-type referrals. This was regarded as particularly inappropriate by many interviewees:

"I think there's an unfortunate tendency for panel members to go into what I would call punitive language – not necessarily punitive disposals but certainly punitive language is used more commonly with offence grounds and, in fact, all behaviour grounds.

"Panel members tend to be much harder on children who are acting in defiance of either authority or, particularly, their parents. If you have a young child who is being, for instance, neglected then the panel will try and be in some ways supportive of the parents and try and encourage them to do better. However they tend to go into angry parent mode with children who are offending. And it's not just with offence grounds, it's also with the out-with control grounds, alcohol and drugs grounds and even, I would have to say, the (m) ground children."

Whilst the views of interviewees suggested that most panel members are, at the very least, aware of the Kilbrandon ethos, a majority felt that more training is required in order for offence-type and, in particular, conduct-type referrals to be dealt with in a more appropriate manner at hearings. However, some thought that considerable improvements had been made regarding the training of panel members so as to avoid punitiveness in their approach towards offence-type referrals:

"I would have answered that question differently when I started here. But I think that panel members are very well trained now. I would say that the modern panel member is much more able to acknowledge an offence but deal

with it in the same way they would a lack of care case. So I would say that we've moved quite far away from those uncomfortable hearings, which were about finger-wagging and secure accommodation threats. I do feel that we've moved away from that."

The perception of punitiveness identified by the study is noteworthy, not least since it significantly conflicts with the Kilbrandon ethos. The findings therefore suggest that work must be done to strengthen observance to the Kilbrandon ethos within the CHS, particularly where referrals relate to the child's behaviour.

### *7.2.B: DECISION-MAKING FOCUS*

Echoing the findings on gatekeeping decision-making practice,[947] a shift in decision-making focus, from parent to child, was perceived by interviewees to apply when hearings consider offence-type referrals. A majority of interviewees identified this general shift in decision-making focus:

> "I mean I definitely think it changes depending on the type of referral and it's interesting. Panel members will focus much more on the child where it's offences and not so much on the parents. But, in fact, the ethos of the system means that they should be focussing on the parents as well."

Some interviewees believed that it was legitimate and, indeed, necessary for panel members to alter their decision-making focus on the basis of the stated s. 67 ground. They considered that the referral type determined the starting point of the discussion at hearings but were of the view that, thereafter, panel members focus primarily on the welfare of the child and necessity for compulsory measures of supervision. This seems to reflect the views of interviewees that the s. 67 grounds and, in particular, the statement of grounds provide a framework for decision-making at hearings,[948] and thus guide the decision-making of children's hearings:

> "I think it's necessary for certain grounds to look at what's happening in a different way. But I think all that does is it alters the kind of focus of the starting point for the discussion – the discussion itself becomes the same."

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[947] See, 7.1.B, above.
[948] See, 6.2.A, above.

> "The panel are ultimately there for the child's welfare and they know that. The same criteria apply for compulsory measures being made, no matter what ground the child's come in on. So I think the panel deals with it the same in relation to the criteria that has to be applied. However, of course, they will deal with the child differently perhaps in relation to the type of ground they've come in on. So the dynamic can sometimes be different."

As with the general tone of the hearing, a majority of interviewees believed that the shift in decision-making focus, from parent to child, was not limited to offence-type referrals but was also perceived to apply to conduct-type referrals. In particular, some were of the view that any referral relating to the child's behaviour tends to result in the assignation of responsibility to the child. As such, the study, again, suggested that decision-making practice within the CHS serves to "responsibilize" not only children referred on offence grounds, but also children referred on conduct grounds:

> "I think any grounds which are coming to the hearing about a child's own decision-making can be different in that more responsibility is passed to the child for changing and altering that."

In fact, a few interviewees believed that any referral relating to the conduct of the child tends to result in the child being blamed for their behaviour by panel members:

> "Yes, it often does change things but I wouldn't say that's exclusive to offence grounds and I think it applies to all grounds where there's almost an implied placement of blame on the child. So if you've got a young person who's been brought in on outwith control and you know that they have a horrendous family background, that person can get quite a hard time for their behaviour and that is all quite uncomfortable. The same as the young person who comes in with offences quite often can get a hard time for their behaviours, even when the background circumstances are narrated in the report."

The observed imposition of blame, whether on the child or parents, is particularly noteworthy since it follows from the ethos and reasoning of the Kilbrandon Report

that the hearing should not be imposing blame *per se* on anyone. Indeed, this perception of the imposition of blame on the child was regarded by a few interviewees as particularly inappropriate:

> "From my perspective, the reason that the children are there is largely because of their parents and I mean quite often the parents' behaviour is ignored or tolerated and the children are essentially blamed."

> " . . . Putting blame upon young people and maybe not taking into account their full circumstances just can be a bit uneasy."

Some interviewees highlighted the arbitrary nature of the perceived shift in decision-making focus, from parent to child, in respect of conduct-type referrals, not least because reporters primarily regard conduct referrals as a manifestation of underlying care issues for which responsibility rests with parents:

> "Hearings could maybe, in school attendance cases, put more responsibility with the parents, rather than the child, and recognise that this situation usually comes from the parent. Not always, I mean you can get older children who are voting with their feet but quite often it comes from the parents but because it's truancy grounds there can be too much emphasis on the child. So yeah – the focus can definitely be different."

> "In hearings, if you have school attendance grounds then the discussion is frequently focussed on the child. And we have to remember I suppose that the grounds will direct the discussion in some ways but they'll often go straight to the child – why are you not attending school? Now, for me, that's about identifying where the shortfall is and that's often a parenting issue. So the ground can massively change the dynamic or tone of which way the discussion in the hearing goes."

In fact, due to this perceived shift in decision-making focus and emphasis, some interviewees explained that they expressly avoid referring children to hearings on conduct grounds. It appears that this is because reporters are aware that the referral type can influence the hearing and result in inappropriate focus on the child:

> "I think the younger the child then the more likely we would try care and protection grounds, rather than a behaviour ground. So for example if a child is 5 years old and is not going to school, although we could technically bring that in on a failure to attend school we are conscious that it can be set up to be about – oh, why are you not attending school? And for a 5 year old that's totally inappropriate. So we would be bringing that in as part of a lack of care ground because I do think it can influence the hearing."

The views of some interviewees therefore suggested that a holistic approach towards decision-making is not, in their opinion, taken by panel members. Moreover, the general quality of that decision-making, with repeated references to "blame" and "responsibility" was regarded as punitive in nature, thereby suggesting that the approach of hearings is perceived to be better suited to a justice, than welfare-based approach. Although a minority view, not all interviewees suggested that hearings adopt a retributive style of decision-making:

> "However I think that hearings are very good at putting everything in context. So there's no blame attached to anybody in particular. There's a set of circumstances or facts which are accepted by everybody to be true and the hearing seeks to find a way to move on from that without attaching blame."

Just as the shift in focus and emphasis in reporter decision-making was said to be related to the age and capacity of children typically referred on offence-type and conduct-type grounds, so too was the perceived shift in focus and emphasis of children's hearings. Particularly, interviewees suggested that because children of different ages are typically referred on different types of s. 67 grounds, this could have an impact on the discussion and consideration of the referral by panel members. Some interviewees regarded panel members as adopting a more direct approach towards offence and conduct-type referrals, since children subject to those referrals tend to be older with the capacity to participate in the hearing, and even take on a degree of responsibility for their actions:

> "I think sometimes the questions that are asked of a young person at the older age of the spectrum are more direct. It's less about trying to cajole a

> view out of them and it's more – why are you not? Why do you not? Because the hearing, I think, are responding to the fact that the child's making choices which are having an impact on whether or not the outcomes are being achieved."
>
> "And I would say also that when it is behaviour, the spotlight is very much on the child especially the teenage child. And the hearing will probably expect more responses or perhaps will direct more questions to the child."

A minority of interviewees did not necessarily regard this as inappropriate. One was of the view that a direct and focussed approach towards such referrals may well be required:

> "And I do think there's a place for it because the children's hearings system can't be afraid to tackle these issues head on. If panel members want to speak directly about the incident or victim, then I don't have a problem with that. So the tone can be very different but I think on some occasions, where it's appropriate, the tone quite rightly has to be different. And I think the panel has the right to ask those difficult questions."

By contrast, other interviewees disagreed. Rather than perceiving panel members as adopting a direct approach, some regarded them as lacking in pointedness when dealing with offence referrals. The perception of those interviewees was that panel members can "shy away" from addressing the child's offending behaviour at hearings:

> "I think panel members find hearings on offence grounds more difficult to deal with and I think there's probably a need for more training of panel members. I've particularly found that if a case is remitted for proof on offence grounds, the grounds are then held established and remitted back, the panel members tend to shy away from addressing them."
>
> "Sometimes they're very bad at addressing the offending behaviour. They'll skirt about the issue and ask the child how they're getting on at school, which

is their favourite topic, instead of trying to address what the behaviour is about."

Moreover, some interviewees believed that panel members could be frustrated by children who are persistently referred to hearings on offence grounds, particularly in light of a perceived lack of effectiveness in addressing such children's needs and resolving their behaviour within the CHS:

> "I think it can be really difficult if a young person is persistently offending because finding the reason for that can be very difficult and can take a long time. And people can get very frustrated with that and with those discussions, which appear to them to be the same discussions over and over."

> "It probably does change the hearing because by the time we're flagging a child up with offences, they've probably come through the system for other reasons. And so the child will be known and there will probably be other offences and so, you know, there will be a chronology before a hearing. So I think there is a different flavour."

Some interviewees had an impression that panel members have "given up" on children persistently referred on offence grounds, and believed that there is a view held that the CHS has little to offer such children:

> "It's about understanding a child's needs and about also what we can and can't do for them. It feels as though panel members aren't invested as much in children who are offending but that's just my personal opinion."

These findings illustrate starkly the perception of reporters that offence and conduct-type referrals are dealt with in a different manner to care and protection-type referrals by hearings in practice. Such difference in treatment was perceived to be characterised by a shift in decision-making focus, and location of responsibility, from parent to child. As such, these findings advance the central argument of this thesis: that the CHS is not operating in a unitary manner since differences in practice apply to different referral types.

### *7.2.C: DISPOSITIVE APPROACH*

Although interviewees believed that the tone of the hearing, the focus and quality of decision-making could be influenced by the type of referral, they did not have the impression that the assigned referral type affects the ultimate disposal of the case:

> "Whether it's offence or care and protection changes the dynamic of the discussion but I don't think it changes the disposal or influences whether or not compulsion is then needed. It's kind of like how we go about our investigations as reporters. We might go from two different roads but we'll get to the same end point. I think the hearings do exactly the same."

> "I am not aware of there being a kind of lenient attitude towards any particular set of grounds. So it's not – oh well, if they've been brought on those grounds then they're more likely to be discharged or less likely to make a CSO. I think it's probably more to do with the types of cases we see. I think the lack of care cases that we see these days are far more likely to result in children being removed."

Some interviewees suggested that hearings could be influenced by the gravity of the referral, or by the supporting facts specified in the statements of grounds, rather than the referral type at the disposal stage:

> "I don't think the grounds influence disposal but I think the statements of fact are highly important. Let's assume we've either got grounds accepted or established, then of course what's written in the statements of fact will affect the panel's decision."

> "I think the facts around the matter are of far more importance than the condition itself at the disposal stage."

> "I think more the gravity of referral influences the disposal, rather than the overall ground for referral because panel members are trained to look at the whole child."

As such, serious care and protection-type referrals, involving an allegation of an offence committed against the child, for example, were perceived to be more likely to result in the making of a CSO:

> "You're much less likely to be discharged if the ground is about sexual or physical abuse, that's for sure."

Similarly, referrals relating to commission of serious offences by the child were perceived to be more likely to result in the making of a CSO:

> "The panel are left with the same decision as the reporter. They're left with saying – are compulsory measures necessary? So the panel check and balance that and make their own decision but if it's an offence, depending on the tariff of the offence, it's likely that they'll make a supervision order regardless. So I think it does make a difference to disposal."

Some interviewees explained that different interventions apply to different referral types and, so, considered that panel members might attach different conditions to a CSO, based on the referral type. Thus, the study suggested that the referral type might influence the content of the order made by a hearing at the disposal stage:

> "I think what it might affect is the type of order because in relation to all the grounds, if the behaviours associated with them are serious enough, then they will result in an order. But with a Schedule 1 offence ground, for example, you might get an order with a condition that the child's not to have contact with that specific person. Whereas with offence grounds, you might get an order with some youth justice programme work attached. So, yeah, it probably does affect the type of order, rather than whether or not an order will be made."

> "Yeah, I think the ground probably does influence the disposal. With school attendance cases often what they do is make a CSO and, generally speaking, it would be at home and they will often ask for early review hearings to revisit. So that's usually quite different and unique to that ground. Generally, with more of the care and protection cases children would be accommodated,

whereas with offence cases that would be less common. So, yeah, to that extent I think the disposals are different."

The gravity of certain care and protection-type referrals, was perceived to be such that hearings might be more likely to remove the child from the family:

> "I think there are some circumstances where if we get a ground established, particularly to do with offences which have been committed against a child, the detail of that kind of referral is such that it does make it much more unlikely that a family will ever have that child back but that's clear right from the beginning of the process."

Moreover, in relation to certain offence-type referrals, where the child has committed a serious offence, a few interviewees suggested that hearings might be more likely to consider including a secure accommodation authorisation as a condition of the CSO:

> "Well I suppose if it's offence grounds and they are serious offence grounds then clearly there's different options, secure accommodation for instance. So offence grounds would be more likely to give rise to different disposals around secure criteria . . ."

A few interviewees were of the view that extreme measures, such as the authorisation of secure accommodation or the removal of the child from the family, which are not technically punitive in nature but are likely to be perceived as such by the child and family, can sometimes be used by panel members as a "threat" at hearings:

> "I think panel members talk a lot of punitive terms so I think the language is definitely affected but is the disposal affected? I'll give you one brief example, they'll often talk about secure authorisations in relation to what they perceive as a young offender. They very rarely, in my view, follow through on that but they use it more as a kind of threat."

> "They often talk about removing kids from home generally as a sort of reminder that they have the power to do that but they very rarely actually do it. The better panels and the better chairs (and it's mainly the chair who sets

> the tone) just talk about a range of options. But I'd have to say my anecdotal experience is that there's a lot of hard talking that gets done at hearings, particularly with children who are offending."

Interestingly, one interviewee suggested that some panel members potentially struggle to distinguish between control and punishment in imposing compulsory measures of supervision; the latter ostensibly having no role whatsoever within the CHS:

> "I think the problem is that panel members find it hard to distinguish from the idea that they're not a punitive decision-making group and that securing a child is not a punitive measure – it's a control measure which is given to them. Care and control is part of their remit, not punishment. It's a control, not a punishment, but I think they find it hard to distinguish care and control."

The findings of the study as to the influence of referral type at children's hearings do not paint the perceived practices of panel members in a favourable light. In particular, the study suggested that the assigned referral type could, potentially, have a big impact at hearings. Whilst the general treatment of the referral, and, by extension, the child and relevant persons, was perceived to be largely dependent on individual panel members, most interviewees believed that the referral type could significantly influence the tone of the hearing. Punitive attitudes were perceived to apply, a more direct approach was deemed to be taken, and responsibility and even blame were thought to be imposed on the child by hearings in relation to both offence and conduct-type referrals. Whilst some interviewees were of the view that significant improvements in the training of panel members had been made so as to avoid a punitive, justice-orientated approach, most interviewees believed that more training is required so that offence and, in particular, conduct-type referrals are dealt with more appropriately and in line with the Kilbrandon ethos.

Although the decision-making practices of panel members were thought to be influenced by the referral type, the vast majority of interviewees did not believe that this, in itself, affects the disposal of referrals. Rather, interviewees were of the view

that disposal could be influenced by the supporting facts within the statement of grounds and by the gravity of the referral, irrespective of referral type. Different interventions were perceived by interviewees to be better suited to, or more likely for, different referral types, so different conditions and measures were thought to be attached to CSOs, based on the type of referral.

Overall, the findings suggest that there is a significant divergence in approach that is perceived to apply to different referral types at hearings. This divergence appears to be characterised by the "responsibilization" of children subject to offence-type and, notably, conduct-type referrals within the context of a supposedly welfarist system. The perceived imposition of blame and responsibility on the child is particularly striking. What is most striking is that such an approach was perceived by interviewees to apply, not only to offence-type referrals but also to conduct-type referrals. Not only does this subvert a unitary approach towards all referral types but also seriously undermines the Kilbrandon ethos in practice. Above all, it fails to recognise the care needs that generally underlie conduct-type referrals, and disregards entirely the fact that children referred on care-type grounds and conduct-type grounds are frequently exactly the same children. Overall, the study suggested that older, teenage children are somewhat "demonised" within the practice of the CHS. Furthermore, the findings serve to highlight and emphasise the salient tension between issues relating to the care of the child and issues relating to the conduct of the child in practice.

## 7.3: The Escalation Of Referral Types: A Shift From Care To Conduct

A further key finding relates to the movement of children through the different types of s. 67 grounds over time. This section explores that escalation of referral types, involving a perceived shift from referrals that relate to the care of children to referrals that relate to the conduct children, as such children, remaining within the CHS, get older. These decisive and original findings relate directly to the Kilbrandon ethos, as conceptualised in Chapter 2;[949] serving to underscore the similarities between children referred to hearings on the basis of different types of s. 67 grounds and justifying the adoption of an identical approach towards them. In particular, this

[949] See, Chapter 2, at 2.4.

section presents novel findings on: the typical trajectory identified from care to conduct-type referrals; the capacity of the CHS to respond effectively to offence-type referrals: and, the potential diversion from offence-type referrals via the referral of children to hearings on the specific conduct ground in an effort to strengthen the Kilbrandon ethos in practice.[950]

### *7.3.A: A TYPICAL TRAJECTORY FROM CARE TO CONDUCT-TYPE REFERRALS?*

A strong pattern was identified by interviewees as to a perceived trajectory or referral route, involving an escalation from care-type referrals to conduct-type referrals to offence-type referrals:

> "You can see quite clearly that the parenting hasn't been good, in which case it can go from lack of parental care quite quickly to beyond control and ultimately into offending. Sadly it's a common progression."

> "You see the young person growing up and you see that they've been brought into the system on care and protection grounds and they've progressed to not attending school, which degenerates into outwith control, which degenerates into abusing alcohol or other controlled substances, which degenerates into criminal offences. So I can absolutely see that pattern and it's a crying shame."

A majority of interviewees identified a similar pattern or progression. These interviewees explained that children typically move through the s. 67 grounds and, since different s. 67 grounds are applied by reporters to children of different ages, the appropriate referral type was said to change over time. Typically this was perceived to involve a shift (or escalation) from referrals relating to the care of the child to referrals relating to the conduct of the child:

> "It's very common to see a child who was referred to you in the past for domestic abuse or other parenting concerns who later on is referred for offending. You see an unfortunate pattern where, typically in adolescence, they are referred for offence grounds."

[950] 2011 Act, s. 67(2)(m).

> "I suppose there is a link and quite often what you will find is that the cases that started off as the care and protection ones then become offence ones. But I'm thinking about beyond control as well and non-attendance and misuse of alcohol or drugs – all of these are more likely for older children who have a background of care and protection issues."

The study thus suggested that "troubled" children, initially referred on care-type grounds, metamorphose into "troublesome" children, thereafter referred on conduct-type grounds, during their contact with the CHS. Most interviewees suggested that this mutation of referral type was directly related to the age of the child. In this way, the study found that the referral type generally escalates with age:

> "I think that for the vast majority of children who are offending, the care grounds were there when they were younger, maybe at 2, 3 or 4, and now at 13, 14 or 15 the same young person is breaking into houses or stealing cars."

> "The kids that offend quite often will come from the families that are well known to you and they'll quite often be the same kids who were referred to you five or six years ago on care and protection grounds. And now, here they are as teenagers being referred to you on offence grounds – so it's quite clear that there's a direct correlation between care and protection and offending."

The views of interviewees here served to underscore the similarities between children referred to children's hearings on the basis of different s. 67 grounds. In fact, the study suggested that they are, in fact, exactly the same children who are simply at a different developmental stage and chronological age. As such, interviewees generally regarded the different types of referral as merely indicating different manifestations of the same problems; the only salient difference being that the child's needs present themselves in different ways as the child gets older:

> "When children are older it's more likely that they are presenting as beyond control, or they are failing to attend school or they need extra special measures or they are misusing drink and drugs or they are offending. The unfortunate thing is that if you've got children who've been in the system for a lack of care for ages and then they've morphed into that, you've got to ask yourself – why?"

### *7.3.B: The Capacity Of The System To Respond To The Child's Conduct*

The findings that identify a typical trajectory from care to conduct-type referrals raise fundamental questions about the capacity of the CHS to respond effectively to children "in trouble." The prevailing view, that the same children who were originally referred to hearings on care and protection grounds are later referred to hearings on conduct and offence grounds, indicates that the CHS did not effectively intervene and meet the needs of those children in the first place. The mere fact that children remain in contact with the CHS throughout their childhood, and are subject to repeated referral cycles over time, further calls into question the capacity of the CHS to improve outcomes for such children.

These ideas were directly addressed by some interviewees, who suggested that those children who end up being referred on offence-type grounds are the ones who have been "missed" or for whom prior attempts at intervention have been unsuccessful:

> "I think there are a lot of similarities. I think a lot of children who offend were children who needed care and guidance earlier on and who perhaps were missed or for whom intervention was previously attempted and wasn't successful."

A few interviewees discussed the availability of resources and suggested that the capacity of the CHS to intervene successfully, in order to prevent the perceived escalation, was generally undermined or limited by a lack of resources:

> "I mean I think the frustration is that those of us who work in it are very proud of the system and feel very strongly about it. It is so unique to Scotland and it is one of the few things that we should be able to hold our heads up high about. But I don't think that it's well resourced and I think there's a real problem with that. A lot of things depend upon the integrity of the system and we can't ensure that unless it's properly resourced."

Other interviewees questioned the ability of the CHS to respond effectively to the needs of children, specifically where those needs manifest through conduct or behavioural issues. In particular, a few interviewees were of the view that the CHS is unable to change patterns of behaviour and improve outcomes for children who

offend. In this way, they expressed similar views to those perceived to be held by panel members, who were said to question what the system has to offer children who offend and, in particular, children who persistently offend:

> "I think as a reporter perhaps offence grounds are more pessimistic because, to generalise, they'll normally be older boys and there's normally a string that's just reached a limit. And the difficulty is in knowing what it's achieving because if you keep bringing offence grounds – what change is it making to the child; the service that the child's receiving; to the child's engagement; and, to changing patterns of behaviour?"

Interestingly, a few interviewees linked the perceived trajectory from care to conduct directly to the Kilbrandon ethos:

> "I think there's a very, very strong trajectory. And I think it's all part of the same picture, which I suppose goes right back to Kilbrandon and identifies that nothing has changed. The baby who is born to a chaotic family is so likely to end up the child sitting in a hearing for offences."

> "Oh, there's absolutely a link. I mean I think that's where Kilbrandon is still hugely relevant and I think it's great that this system has stuck with that because there were times we thought things might move away from that. So I think the fact that the new Act still endorses that one process is a good thing and I think it's absolutely right."

The aspiration of the Kilbrandon Committee was to eliminate juvenile offending.[951] It is clear from the study that this is not perceived to be happening in practice. Rather than resolving the child's problems, and addressing his or her needs, the system appears to be perpetuating those problems, resulting in a different manifestation of the same needs, as the child gets older. As such, referral to children's hearings appears to have a largely reinforcing effect, whereby care-type referrals evolve into conduct-type referrals, which, ultimately, escalate into offence-type referrals. Such a reinforcing effect relates to the theoretical material presented in Chapter 4, and supports the argument made therein that children referred to hearings are interactive

[951] The Kilbrandon Report, at para.12.

human kinds.[952] It is, therefore, possible that this reinforcing effect constitutes "feedback," which is facilitated by decision-making practice within, or, at the very least, contact with, the CHS. Arguably, the differences in gatekeeping and dispositive practice identified contribute to a "looping effect," inducing the escalation from care to conduct.[953] At the very least, the differences in practice identified introduce justice-based influences into an ostensibly welfare-orientated system, giving rise to contradictions between care-type referrals and conduct-type referrals in practice. In particular, the correlation between the age of the child and the typical type of s. 67 ground assigned by the reporter was found to be linked to the autonomy of the child and his or her potential capacity for responsibility. As such, the study suggested that offence-type and conduct-type referrals serve to "responsibilize" older (particularly teenage) children within the CHS, indicating a retreat from welfare in relation to such children in practice.

The findings of the study as to the escalation of referral types suggest that it might be better not to formally intervene at all. This reflects McAra and McVie's finding that the key to addressing juvenile offending lies in minimal intervention and maximum diversion from the CHS.[954] Using longitudinal data, McAra and McVie found that certain categories of children who offend, namely those who were classed as "persistent offenders," are "recycled" within the system by being made subject to repeat patterns of referral.[955] The outcome was that desistance from offending was inhibited.[956] In other words, the study found that referral to the CHS perpetuates, rather than resolves, offending behaviour. A similar process of perpetuation was perceived to apply by interviewees in the present study, whereby it was suggested that the same children are typically "recycled" through the CHS over time. Rather than effectively addressing the needs of such children, it was suggested that those needs persist but manifest in different ways as the child as the child gets older. This was found to result in repeat referral cycles characterised by an escalation in referral type and a general shift from care-type referrals to conduct-type referrals. This escalation in referral type and severity suggests that an approach based on minimum

[952] See, Chapter 4, at 4.4.
[953] See, Hacking (1995) (n.27); See also, Chapter 4, at 4.4.B.
[954] McAra & McVie (2007) (n.862) at pp. 338 – 339.
[955] Ibid, at p. 339.
[956] Ibid.

intervention and maximum diversion may well be appropriate to effectively address the needs of such children and prevent the transformation of care needs into conduct needs.

### *7.3.C: Diversion From Offence-Type Referrals: The Conduct Ground*

Another option might be to "divert" children from offence-type referrals *within* the CHS. Whilst the study found significant tensions and, indeed, a general lack of unity between care-type referrals and conduct-type referrals, the tensions, contradictions and differences in decision-making and process and practice were found to be most pronounced in relation to offence-type referrals. One way to address this might be to stop referring children to hearings on offence grounds and, effectively, convert juvenile offending into a civil issue, rather than dealing with it as a criminal issue. There is support for such an approach within the findings of the study. In fact, it appears to be already happening informally through the reporter's practice of "converting" offence-type referrals into care and protection or conduct-type referrals. Some interviewees directly addressed these ideas, contemplating the appropriateness of the offence ground in light of the needs, backgrounds and experiences of children who typically offend. These interviewees stressed that it is important for reporters to remember that the offence ground might not be most appropriate when exercising their discretion to choose the s. 67 ground to found upon:

> "It can be really challenging – the age at which they get involved in offending, the nature of the offending. A lot of children have been the victims of offences themselves and a lot of children have been exposed to domestic violence. It's not rocket science to see where these behaviours come from. So that does make it quite challenging in terms of looking at the offence as being the most appropriate ground and knowing a bit about those other circumstances might lead us to conclude that, actually, there's a more primary concern that is a product of their exposures and experiences and parenting."

> "I don't know if it's a challenge but whether it's the right ground to bring a child in on. Just because a child has been charged with an offence doesn't mean that the child needs to come in on offence grounds – there might be

other grounds. So it's about making sure that reporters are aware that they're not bound by the fact that the child has been charged with an offence, as a reporter you are entitled to make your own assessment and decision about whether the child requires compulsion and, if so, what ground to bring that child in on. So that would be the first challenge, as a senior practitioner, to really impart that to other reporters."

In light of the conversion of referral types by reporters, the study explored the general views of interviewees as to whether offences could, in principle and as a matter of course, be dealt with under alternative s. 67 grounds. In particular, the study explored whether the ground under s. 67(2)(m), introduced by the 2011 Act, that the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person, could be used as an alternative to the offence ground.

The vast majority of interviewees had referred a child to a hearing on the basis of the conduct ground at the time of the study, and all interviewees were positive about its relatively recent introduction:

> "I think it's a very, very helpful ground – very helpful indeed. For me, the key is always about meeting the child's needs and that's why the grounds are so important. Sometimes it might be offending behaviour but to label the child as an "offender" doesn't necessarily meet their needs. So if you can show a link between their behaviour and its adverse effect on themselves or others, then we can address their behaviour and meet their needs."

> "Since the (m) ground has been introduced, I use it all the time. I find it a very helpful ground."

The study suggested that reporters, generally, favour broad grounds that are capable of capturing a range of issues and concerns about the child, underlining the fact that children referred to hearings have complex and multi-faceted needs. The conduct ground was perceived by many interviewees as capable of reflecting a breadth of concerns and promoting a holistic approach towards the child's needs:

> "I think I've used it twice and it was both for teenagers who had a range of behaviours that might have been encapsulated in other grounds – you know, going out and going missing against the instructions of parents, drinking alcohol, committing minor offences – but I thought the (m) ground more accurately encapsulated the whole picture."

Many interviewees believed that the conduct ground was particularly helpful in relation to referrals involving patterns of behaviour by the child, *including* offending behaviour:

> "I used that ground quite early on. It was for a girl who had been moved into secure accommodation on an emergency basis . . . And I suppose lots of the behaviour consisted of offending behaviour. The police were being called on a daily basis and her behaviour was becoming increasingly destructive. I think she had been self-harming as well so it was more than just offending behaviour and that ground seemed like a good reflection to me – it covered the situation well."

> "I used it for a 13-year-old boy who wasn't on supervision but there had been concerns for quite a few years about parental neglect. And he started stealing cars and joy-riding them down the wrong side of the road in the middle of the night at excessive speed and he was charged by the police with road traffic offences. Whereas in the past I might have brought him to a hearing on the offence ground, I used the (m) ground to reflect, not only the fact that he was putting himself and others at serious risk of harm, but also to include some information about his behaviour at school, his behaviour in the community and a wee bit of information about his home circumstances. And I felt that was much more fairer on him – I didn't want to criminalise him because it wouldn't have been right."

Most interviewees were supportive of the potential use of the conduct ground as an alternative to the offence ground where there is a range of concerns about the child's welfare of which offending behaviour is part:

> "Yes and no. I am going to do a *Constanda*-type thing here and say I would be wary of using a ground like the conduct one where there were singular instances of offending that were very clearly offending. It is, as you know, the exception that we are faced with that but it does happen. So I think we need to be clear, in that instance, that if a young person's offending then that's the key problem. But similarly if there is a pattern of behaviour, which includes offending as part of it then I think it's our responsibility to say – look, we should be throwing this wider. Because the grounds must reflect the key concern or concerns. So as inappropriate as it would be to bring an (m) ground in with one offence, I think it's equally inappropriate to bring in three or four offences where that young person has a number of different issues surrounding them."

> "I think it could be used in cases where you have wider concerns. If you only have offending – no, *Constanda's* quite clear. But I think, yeah, where there's wider concerns and I think that is what it will be used for. The will of a lot of reporters is to bring offenders in along with the wider welfare picture."

Most interviewees referred to *Constanda* and considered that it would be inappropriate, and contrary to precedent, to use the conduct ground instead of the offence ground where the referral solely relates to offending behaviour:

> "It can't be used as a straight alternative to the offence ground. If your only concern is about the child offending then case law has come through the courts very clear: we can't avoid using the offence ground to get a lower standard of proof. But where it can be used, because again case law is clear, is if the offending is part of a bigger pattern of behaviour then it can be incorporated in with a broader ground of referral like the (m) ground."

However, there is a certain tension here. First, the study clearly demonstrates that reporters *do* in practice engage in the informal conversion of referral types, albeit where there is evidence of wider concerns beyond the commission of an offence. Secondly, the more notable tension relates to the idea, seemingly held by interviewees, that children come to the attention of the reporter *solely* on the basis of

offending behaviour. This contradicts directly with the views of interviewees elsewhere within the study.[957]

Without exception, interviewees indicated that children who offend and children who require care and protection are *exactly* the same children, just at a different age and stage. It therefore seems false, and contradictory, to assume that the reporter's *sole* concern would be the child's offending behaviour. Indeed, the trajectory from care to conduct suggests that care and protection issues frequently, if not always, underlie behavioural issues on the part of the child. Of course, it is possible that the only *facts* relied upon by the reporter, in relation to an offence-type referral, relate to the commission of an offence, in which case the *Constanda* limitation would apply and the referral must be proven on the criminal standard. However to suggest that the only *concern* held by the reporter relates to offending behaviour seems artificial and suggests that reporters ought to take a more proactive approach towards evidence gathering for offence-type referrals. As one interviewee directly acknowledged, offending behaviour as the reporter's sole concern is very much the exception rather than the rule. It is, therefore, somewhat contradictory that reporters take so seriously the *Constanda* limitation to their discretion to choose the appropriate s. 67 ground, and, further, suggests that perhaps some reporters do not fully understand the "weakness" of that limitation, which can simply be overcome by evidence of broader concerns.

However not all interviewees invoked *Constanda* when discussing the potential use of the conduct ground as an alternative to the offence ground. In fact, some interviewees were supportive of a broader use of the conduct ground, in order to avoid the negative, and potentially stigmatising, consequences of offence-type referrals for the child:

> "I think that, personally, if it's used as an alternative to the offence ground I would support that because you don't want a young person to have baggage. You don't want a young person to have to disclose to future employers that they've committed offences. So if you can avoid that then, absolutely – I would be 100% committed to it being used for that reason."

[957] See, in particular, 7.1.E, above.

> "I would be in favour of using it as an alternative to offence actually. I don't like children being criminalised, especially when it's something that can be on their record for quite some time or may have far-reaching consequences. I do actually think that would be more beneficial to the child in the long run."

Again, the general reluctance on the part of reporters to refer children to hearings on offence grounds shone through from the views of these interviewees. It is extremely notable that some regard referring a child to a hearing on offence grounds as criminalising them. This serves to further emphasise the gulf between care and conduct in practice, and highlights the inappropriateness of the punitive consequences of offence referrals within the context of a supposedly welfarist system.

A few interviewees linked these ideas to the age of criminal responsibility, suggesting that, if it was raised, offending behaviour could be converted into a civil issue and dealt with on the basis of the conduct ground. In particular these interviewees were of the view that such an approach would reflect the Kilbrandon ethos more appropriately in practice:

> "I think, yes, the conduct ground could open the door to an alternative approach to offence referrals but it must open the door in an appropriate way so that the needs not deeds approach of the system actually carries through. And I would agree that the resolution is that the age of criminal responsibility should be formally increased."

The findings of the study serve to highlight the salient tension between care and conduct within the practice of the CHS. The study suggested that, rather than effectively addressing the needs of children, the system may serve to perpetuate and, indeed, exacerbate those needs, through a perceived graduation from care-type referrals to conduct-type referrals, and ultimate escalation to offence-type referrals. Whilst this points to the need for an approach based on minimum intervention and maximum diversion, offending behaviour could be converted into a civil issue if it was dealt with under a care and protection or conduct-type ground, in an effort to avoid stigmatisation. The study revealed widespread support for the introduction of

the specific conduct ground, under s. 67(2)(m) of the 2011 Act, and for its use where there are wider concerns for the child, beyond the offence committed. In particular, some interviewees believed that a broader use of the conduct ground as a general, or even default, alternative to the offence ground offered a means by which the Kilbrandon ethos could be more appropriately and accurately reflected in practice.

## 7.4: SUMMARY OF KEY FINDINGS

The study provided a comprehensive account of reporter decision-making under the 2011 Act. It examined the structure and content of gatekeeping decision-making and explored the nature of that decision-making in light of the Kilbrandon ethos. The study supported the view that reporters exercise discretion and professional judgment in applying the statutory tests. In particular, reporters exercise discretion to choose the s. 67 ground that they deem to be most appropriate to found upon in referring children to hearings and, by and large, follow SCRA's practice direction to select and state a *single* ground only. The study confirmed that there are three major referral types within the practice of the CHS: those relating to the care and protection of the child; those relating to the conduct of the child; and, those relating to the child's offending behaviour. In exercising their discretion, reporters designate referrals as being associated with one of the three major types and might "convert" an offence-type referral into a care and protection or conduct-type referral, if there is evidence of wider concerns beyond the commission of an offence.

The study found that the designation of referral types by reporters directly gives rise to differences in gatekeeping decision-making practice. However there is a degree of unity between different referral types in that a number of general decision-making determinants apply to all referrals when reporters assess the need for compulsion. This assessment involves consideration of whether voluntary, as an alternative to compulsory, measures of supervision are sufficient to meet the child's needs – based primarily on the cooperativeness, or otherwise, of the family and their willingness and ability to meaningfully engage with any such measures put in place. The identified differences in gatekeeping practice are most pronounced in relation to offence-type referrals. Reporter decision-making was found to take on a justice-style

quality in respect of offence-type referrals: considerations around the seriousness of the offence, the child's prior record of offending, the likelihood of reoffending and public protection are uniquely taken into account. There is an additional shift in reporter decision-making focus and emphasis, from parent to child, in relation to offence-type referrals. This shift in focus and emphasis is linked to the age, autonomy and capacity for responsibility of children typically referred on offence grounds, serving to "responsibilize" children who offend via reporter decision-making. There is some indication that there could be similar shift in reporter decision-making focus, from parent to child, in relation to conduct-type referrals but this is not nearly as clear as with offence-type referrals, and is largely dependent on the age of child. Most reporters understand and identify conduct issues as manifestations of underlying care issues at a later stage and older age and, so, consider it largely artificial to separate or distinguish care from conduct.

There is perceived to be a broader tension between care and conduct at children's hearings. A perceived shift in decision-making focus and emphasis, from parent to child, was identified in relation to the treatment of both offence-type and conduct-type referrals by children's hearings. Punitive attitudes are perceived to apply, and responsibility and blame is generally thought to be imposed on the child in relation to both offence-type and conduct-type referrals. Whilst the assigned referral type was perceived to influence the content of CSOs made by hearings, the gravity of the referral (rather than its type) was perceived to be more influential to disposal.

Findings on differences in gatekeeping and dispositive decision-making suggest that there is an interaction between the assigned referral type and decision-makers: reporters and panel members "react" to the referral type assigned at the gatekeeping stage, as reflected by their decision-making practice. Additionally, the study suggested that children move through the s. 67 grounds over time, typically involving shift from care-type referrals to conduct-type referrals. This perceived escalation in referral type is thought to be directly linked to the child's relative age, and suggests that there is a perpetuation, rather than a resolution, of children's problems and associated needs as they get older. There is, therefore, some suggestion

that processes of social reaction and interaction operate in practice and referrals within the CHS can be thought of as interactive human kinds. Most reporters were supportive of the potential diversion of children from offence-type referrals via alternative use of the conduct ground to avoid stigmatisation.

Overall, there is lack of unity between different referral types in practice. The study identified significant differences in decision-making practice applicable to offence-type referrals and considerable differences in decision-making practice applicable to conduct-type referrals. There is a clear, over-arching, tension between care and conduct issues in practice, which defies a unitary approach and subverts the Kilbrandon ethos.

# CHAPTER 8: CONCLUSION: RE-EVALUATING THE KILBRANDON ETHOS IN PRACTICE

This thesis has explored the characteristically unitary nature of the CHS by reference to legal process and decision-making practice. In so doing, it has highlighted contradictions in policy and practice, which arguably subvert the Kilbrandon ethos upon which the system was founded and continues, ostensibly, to be based. The Kilbrandon ethos was conceptualised by reference to the use of an integrated legal forum for issues of juvenile care and justice, and the absolute adoption of a welfare-orientated decision-making approach within that unitary forum. It was thus argued that flowing from the Kilbrandon ethos is an implicit requirement that all children be dealt with in a similar manner, irrespective of the reason for which they are referred to hearings. The primary objective of this thesis was to – doctrinally, theoretically and empirically – test the Kilbrandon ethos: that is, to determine whether children referred to the CHS for different reasons are, in fact, subject to a similar approach in practice. Since the Kilbrandon ethos was conceptualised as being essentially concerned with treating all children "in trouble" alike, the thesis was concerned with identifying how such children come to be differentiated within the CHS and examining whether that leads to differences in process, gatekeeping and dispositive decision-making practice between different types of referrals.

The reporter was primarily focussed on in so testing. As the gatekeeper to the CHS, it is the reporter who decides whether a child requires to be referred to a children's hearing and, if so, on which basis. The bases upon which children can be referred to hearings lie in the reporter's application of the s. 67 grounds and, it was argued, that there are three major types of such grounds: those which relate to the care and protection of the child; those which relate to the conduct of the child; and, that which relates to the offending behaviour of the child. The nature of reporter decision-making was duly explored in order to consider whether reporters exercise discretion and/or make professional judgments in considering and applying the statutory tests that dictate the referral process. It was argued that reporters exercise both. In particular, it was contended that reporters exercise discretion in choosing the s. 67 ground that they deem to be the most appropriate to found upon in referring children to hearings.

Drawing upon classification theory it was argued that, in exercising this discretion, reporters designate referrals as belonging to one of the three major referral types identified. The aim, therefore, was to explore potential differences in process and practice, based directly on the assigned referral type. From the outset, it was acknowledged that a number of unique procedural features apply to offence-type referrals, namely: the age of criminal responsibility; the criminal standard of proof and rules of evidence; and, some punitive disclosure consequences under the Police Act 1997, flowing from the operation of the Rehabilitation of Offenders Act 1974. As such, it was initially acknowledged that the designation of offence-type referrals by reporters has a significant practical impact, capable of affecting the procedures adopted in respect of such referrals and introducing a procedural lack of unity between different referral types in practice. However kinds and labelling theory, furthermore, suggested that the designation of referral types could have a broader impact, capable of affecting gatekeeping and dispositive decision-making practice via processes of interaction and reaction. Kinds and labelling theory offered a theoretical prism through which to understand and explain empirical findings, which suggested differences in gatekeeping and dispositive decision-making practice apply, or are perceived to apply, to different referral types. As such, potential differences in decision-making and disposal practice, based directly on the type of referral, were duly explored.

In order to do so, a qualitative study on decision-making within the CHS was undertaken. That study explored the scheme and nature of reporter decision-making in order to, *inter alia*, test the hypotheses that: reporters have discretion to choose the single most appropriate s. 67 ground to found upon, effectively classifying referrals as belonging to one of three major referral-types; and, there is, or is perceived to be, an interaction between the assigned referral type and the gatekeeping and dispositive practices subsequently adopted. The empirical findings largely support the theory that referrals within the CHS are interactive human kinds. It appears from the study that reporters habitually found upon a single s. 67 ground only, and the referral type interacts with reporters and panel members, resulting in feedback, whereby decision-making and, to a lesser extent, disposal practice is influenced directly by the assigned referral type.

The study drew out nuanced differences in approach towards different types of referrals. In particular, significant differences in approach towards offence-type referrals and conduct-type referrals, as compared to care and protection-type referrals, were identified. Crucially, these differences were found to involve a clear shift in decision-making focus and emphasis, from parent to child. Furthermore, they were found to be characterised by the 'responsibilization' of children referred to reporters, and by reporters to hearings, on the basis of their own behaviour, whether or not that behaviour is "criminal" in nature. Ultimately, the study suggested that the children's hearing process is characterised by two related tensions or dichotomies: one between welfare and justice, the other between care and conduct. Whilst a welfare-based approach seems to apply to care-type referrals, elements of a justice-orientated approach appear to apply to conduct and, particularly, offence-type referrals. This thesis therefore contends that the CHS constitutes an amalgamation of welfare and justice, and identifies an antinomy between care and conduct, in spite of the Kilbrandon ethos.

The aspiration of the Kilbrandon Committee was to eliminate juvenile offending and establish an integrated system of juvenile care and justice that did not differentiate between issues relating to the care of the child and those relating to the conduct of the child. However, this thesis has shown that neither of these aims have been fully realised. In particular, distinctions are frequently drawn in practice along the lines of "care and protection" and "offence," or more broadly, and arbitrarily, "care" and "conduct." If the philosophy of the Kilbrandon Committee is endorsed, as it supposedly has been in both policy and practice for almost 50 years, then it is both artificial and arbitrary to treat in any way differently those children referred on the basis of care issues and those referred on the basis of conduct issues given that they are known to be frequently the very same children, just at a different developmental stage and chronological age. This is particularly true in light of the common trajectory or referral route, involving a perceived escalation in referral types from care to conduct to offence.

A potential means of addressing the contradictions in practice between care and conduct may lie in the Kilbrandon Report itself. Two issues discussed in the Report

could serve to do so: the first relates to the minimum age of criminal responsibility; the second relates to the conversion of juvenile offending into a civil issue. This thesis asserts that a sensible and coherent approach, which accords with the Kilbrandon ethos, involves raising the age of criminal responsibility to 16 years[958] and, thereafter, dealing with so-called offending behaviour under the conduct ground. Whilst the conversion of juvenile offending into a civil issue is not regarded as a panacea, it could go a long way to strengthen the ethos of the CHS and engender a truly welfarist and unified approach towards all referral types in practice.

The Scottish Government's on-going review of the age of criminal responsibility presents a timely opportunity to address the contradictions inherent within the children's hearings process. Moreover, it offers a judicious opportunity to reflect more generally on the role of age within the CHS. What role, if any, should the age of the child play in decision-making practice? How far can, and should, the system attempt to balance the simultaneous vulnerability and autonomy of children referred to hearings on the basis of their own behaviour? And, ought notions of responsibility apply at all within an essentially unitary and welfarist system? This thesis contends, and hopes to have demonstrated, that any such imputation of responsibility is contrary to the Kilbrandon ethos, thereby conflicting with the over-arching normative proposition that all children "in trouble" be recognised as a single class, equally in need. Following Kilbrandon, the conduct of the child should be treated as significant only insofar as it points to the need for welfarist intervention. The adoption of a "pure" unitary and welfarist approach is regarded as the only way to address the false dichotomy between care and conduct within the practice of the CHS:

> "When I came in as a fledgling reporter, I remember distinctly a boy being referred to me on the offence ground for stealing a Mars Bar. And when I looked at it my initial reaction was – oh, for goodness sake! But there is something to be said about gut reaction and I just thought there was something more to it so I asked for a full report on that boy. And when it came back to me it was just horrific – he wasn't being fed, he was getting

[958] In line with the legal definition of "child": See, 2011 Act, s. 199.

beaten and it hadn't been picked up. It was just one of those ones that was under the radar. He ended up on supervision for a lack of parental care but yet he was referred to me on offence grounds. Now I would never have criminalised him in relation to that but he needed to be on supervision and, ultimately, he needed to be removed from the family home. So I think that dichotomy . . . is quite fascinating."

## APPENDIX A: BIBLIOGRAPHY


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The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013.

The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015/423 (Scottish SI).

# APPENDIX B: CONSULTEES TO THE KILBRANDON COMMITTEE

**ORGANISATIONS:**

Aberdeen City and County Society for the Prevention of Cruelty to Children.

Approved Schools Association (Scotland).

Association of Child Care Officers (Scottish Region).

Association of County Councils in Scotland.

Association of Directors of Education in Scotland.

Association of Sheriffs Principal.

British Medical Association (Scottish Council).

British Psychological Society.

British Transport Commission.

Chief Constables' (Scotland) Association.

Chief Constables of Greenock, Coatbridge. Stirlingshire and Clackmannan.

Church of Scotland Committee on Social Service.

Committee of Management, Edinburgh Home for Mothers and Infants.

Counties of Cities Association.

Department of Social Study, Edinburgh University.

Edinburgh Voluntary Youth Welfare Association.

Educational Institute for Scotland.

Episcopal Church in Scotland (Joint Committee of the Board of Education and the Social Services Board).

Howard League for Penal Reform (Scottish Branch).

Institute of Housing (Scottish Branch).

Law Society of Scotland.

National Association of Probation Officers (Scottish Branch).

Procurators Fiscal Society.

Professional Case-workers Working Party.

Royal Medico -Psychological Association (Scottish Division).

Royal Scottish Society for the Prevention of Cruelty to Children.

Salvation Army in Scotland.

Scottish Approved Schools Staff Association.

Scottish Children's Officers' Association.

Scottish Committee of the Catholic Union of Great Britain.

Scottish Education Department.

Scottish Health Visitors' Association.

Scottish Home and Health Department.

Sheriffs- Substitute Association.

Society of Civil Servants (Sheriff Clerks' Branch).

Society of Medical Officers of Health (Scottish Branch).

Society of Town Clerks in Scotland.

**INDIVIDUALS:**

The Hon. Lord Cameron, D.S.C., LL.D.

Mr. Arthur S. Fraser, Headmaster, Fernieside School, Edinburgh.

Mr. Robert Goodburn, Clerk of the Peace for Peeblesshire.

Mr. J. D. Heatly, City Prosecutor, Edinburgh.

Mr. J. C. T. MacRobert, Clerk of the Peace for Renfrewshire.

Mr. Andrew Lawson, J.P, Glasgow.

Town Clerk and the Children's Officer, Motherwell and Wishaw.

Town Clerk, the Children's Officer and the Probation Officer, Kirkcaldy.

## APPENDIX C: THE S. 67 GROUNDS

Children's Hearings (Scotland) Act 2011, s. 67:

(1) In this Act, "section 67 ground," in relation to a child, means any of the grounds mentioned in subsection (2).

(2) Those grounds are that –

a) The child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care;

b) A Schedule 1 offence has been committed in respect of the child;

c) The child has, or is likely to have, a close connection with a person who has committed a Schedule 1 offence;

d) The child is, or is likely to become, a member of the same household as a child in respect of whom a Schedule 1 offence has been committed;

e) The child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that the child will be abused or harmed, or that the child's health, safety or development will be seriously adversely affected;

f) The child has, or is likely to have, a close connection with a person who has carried out domestic abuse;

g) The child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009;

h) The child is being provided with accommodation by a local authority under s. 25 of the Children (Scotland) Act 1995 and special measures are needed to support the child;

i) A permanence order is in force in respect of the child and special measures are needed to support the child;

j) The child has committed an offence;

k) The child has misused alcohol;

l) The child has misused a drug (whether or not a controlled drug);

m) The child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person;

n) The child is beyond the control of a relevant person;

o) The child has failed without reasonable excuse to attend regularly at school;
p) The child has been, is being or is likely to be subject to physical, emotional or other pressure to enter into a civil partnership, or is, or is likely to become, a member of the same household as such a child;
q) The child has been, is being or is likely to be forced into a marriage, or is, or is likely to become, a member of the same household as such a child.

# APPENDIX D: CALL FOR CHILDREN'S REPORTERS

## Call for Children's Reporters

**Title of study: Reporter Decision-Making in the Children's Hearings System**

I am a PhD student at Strathclyde University investigating certain aspects of the Kilbrandon Report in the practice of children's hearings, 50 years on. My study requires me to examine closely the ways in which children's reporters, apply, and make decisions related to, the grounds of referral. With the full support of SCRA (for which I am most grateful), I am hoping to conduct interviews with children's reporters throughout Scotland on their day-to-day practice in these areas.

I am writing to ask if you would be willing to be interviewed. Your views, opinions and experiences of your every-day practice are central to the success of the investigation. The interview will take less than one hour and arrangements for it would, of course, be tailored to fit with your schedule. I assume that this is best done by my attendance at your office but I can conduct the interview at another venue or by telephone if that suits better.

I will use the information I acquire for my PhD thesis. All interview data will be fully anonymised. Full information sheets and consent forms are available. If you would like a copy of these – or any further information whatsoever about my study - please feel free to contact me. I appreciate the competing demands on your time but hope very much that you might be able to participate in the study. If you would like to take part or discuss any aspect of the study please contact me directly on 07921849524, or at michelle.donnelly@strath.ac.uk

Michelle Donnelly

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This investigation was granted ethical approval by the University of Strathclyde Ethics Committee.

# APPENDIX E: INTERVIEW SCHEDULE

IV: R:

Date & Time: Locality:

**Part 1: Referral Process**

1. IV: For how long have you been a Children's Reporter?

2. IV: Can you talk me through the process you adopt when you initially receive a referral?

3. IV: What are your primary considerations when investigating the circumstances of a child referred to the system?

4. IV: What are your primary considerations when deciding whether or not to arrange a hearing for a child?

5. IV: What specific factors influence a decision not to arrange a children's hearing for a child?

6. IV: Are these decision-making processes the same for children who offend and children who require care and protection?

7. To what extent do the procedural differences that apply to the offence ground affect your decision-making?

8. IV: How do your decision-making processes differ in relation to children known to the system and/or subject to a Compulsory Supervision Order?

9. IV: Can you explain the decision-making processes adopted regarding jointly reported cases to the Procurator Fiscal and the Children's Reporter?

10. IV: Overall, how significant is the exercise of your discretion and professional judgment in relation to the referral process?

**Part 2: Grounds**

11. IV: In your opinion what is the role of the s. 67 grounds?

12. IV: How do you use the s. 67 grounds in your decision-making processes?

13. IV: Do you think that the s. 67 grounds are drawn sufficiently clearly under the 2011 Act?

14. IV: Do you think there is a divide between care and conduct within the s. 67 grounds?

15. IV: Do you think that there is any correlation between the age of child and the relevant s. 67 ground(s)?

16. IV: What is the process adopted when multiple s. 67 grounds appear to apply in relation to a child?

17. IV: I am particularly interested in the new s. 67(m) ground [the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person] In what situations might this ground apply in practice?

18. IV: Do you think that the s. 67 grounds are necessary to the practice of the children's hearings system?

**Part 3: Case Disposal**

19. IV: In your experience, does a children's hearing on the basis of the offence ground differ in any way to a children's hearing on the basis of care and protection grounds?

20. IV: Do you have any sense that the ground for referral selected influences the disposal of the case?

21. IV: What are the key challenges in processing offence cases through the children's hearings system?

22. IV: What are the key challenges in processing care and protection cases through the children's hearings system?

23. IV: How are these considerations balanced when dealing with simultaneous referral on both types of s. 67 grounds?

24. IV: In your experience are there similarities between children who offend and children who require care and protection in the children's hearing system?

25. IV: Is there anything else you would like to add regarding your decision-making practice or the role and impact of the grounds of referral in children's hearing cases?

Thank you for your time.

# APPENDIX F: INFORMATION SHEET AND CONSENT FORM

## Participant Information Sheet for Children's Reporters

**Department**: School of Law, University of Strathclyde
**Title of the study**: Reporter Decision-Making in the Children's Hearing System

**Introduction**
My name is Michelle Donnelly. I am a PhD student at the University of Strathclyde, investigating certain aspects of the Kilbrandon Report in the practice of children's hearings, 50 years on. My study requires me to examine closely the ways in which children's reporters, apply, and make decisions related to, the grounds for referral. The views and experiences of children's reporters are thus crucial to my research. I am seeking to interview twenty Children's Reporters throughout Scotland, and incorporate the responses from these interviews into my Doctoral thesis.

**What is the purpose of this investigation?**
The purpose of this research is to investigate the nature of Reporter decision-making. This research will investigate how Children's Reporters make decisions, exercise discretion and use professional judgment when a child is referred to the children's hearings system. My Doctoral research examines the Kilbrandon origins of the children's hearings system. Specifically, it focuses on the central Kilbrandon proposition that *all* children in need of compulsory measures of supervision should be dealt with under a single, unitary forum and treated according to the principle of welfare. My research scrutinises this principle in light of contemporary practice. The interviews will explore the ways in which Children's Reporters apply the grounds of referral and, whether the ground under which a child is referred has any influence on that child's trajectory through the system.

**Why have you been invited to take part?**
This investigation will focus solely on Children's Reporters, currently employed by SCRA. Children's Reporters will constitute the focus of this study given their responsibility for selecting the appropriate ground of referral in relation to a child who has been brought to the system's attention. Children's Reporters throughout Scotland will be interviewed in order to obtain a representative view of Reporter practice and decision-making across the country.

**What will you do in the project?**
I would like to come to your office and ask you a series of questions about your every-day practice. The interview will take an hour to complete. Participants will not be asked to talk about any sensitive issues. All participants will be given the opportunity to discuss the interview process and may raise relevant questions or concerns at any time. Should you decide to take part, the information you provide will be strictly confidential. You will not be identifiable and all information obtained

from this investigation will be fully anonymised. I would like to digitally record the interview for personal use. No one else will have access to the recordings.

**Do you have to take part?**
Participation in this research is voluntary and if you decide to take part you can withdraw at any time, without providing any reason for doing so. Any data collected would be destroyed at the point of withdrawal from the investigation.

**What happens to the information in the project?**
The data from the interviews will be incorporated into my Doctoral thesis and may be used in articles that could be published in academic journals. You will not be identifiable from the investigation and no names or personal details will be used in any such publication. All responses will be treated confidentially and your anonymity will be fully protected. When writing my thesis, or any related publication, I will use pseudonyms when citing any extracts from your interview to protect your identity. A copy of my Doctoral thesis will be made available to all participants, upon request.

All data from this investigation will be securely stored and accessed by the named investigators only. Electronic data will be encrypted and stored in password protected files. Any hard copy data will be stored in a locked cabinet on University premises. The University of Strathclyde is registered with the Information Commissioner's Office who implements the Data Protection Act 1998. All personal data on participants will be processed in accordance with the provisions of the Data Protection Act 1998.

**What happens next?**
Thank you for taking the time to read this information. If you are happy to be involved in this investigation, you will be asked to sign a consent form to confirm this and I will subsequently contact you to arrange an appropriate time for the interview.

**Researcher contact details:**
Please do not hesitate to contact me should you require any additional information about this investigation or your potential participation.

Miss Michelle Donnelly
University of Strathclyde
HASS Graduate School
Lord Hope Building, LH128
141 Saint James Road
Glasgow, G1 0LT

This investigation was granted ethical approval by the University of Strathclyde Ethics Committee.

## Consent Form for Children's Reporters

**Department:** School of Law, University of Strathclyde
**Title of the study:** Reporter Decision-Making in the Children's Hearings System

- I confirm that I have read and understood the information sheet for the above project and the researcher has answered any queries to my satisfaction.
- I understand that my participation is voluntary and that I am free to withdraw from the project at any time, without having to give a reason and without any consequences.
- I understand that I can withdraw my data from the study at any time.
- I understand that any information recorded in the investigation will remain confidential and no information that identifies me will be made publicly available.
- I consent to being a participant in the project.
- I consent to being audio recorded as part of the project.

| | |
|---|---|
| (PRINT NAME) | |
| Signature of Participant: | Date: |