Legal Rights in the Children's Hearings System: Evolution or Revolution?

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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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Contents

Abstract

By placing the children's hearings system within its historical context, this thesis shows how the children's hearings system has been able to accommodate an increased focus on the protection and promotion of legal rights in Scots law. By analysing the archived papers from the Kilbrandon Committee and parliamentary debates in relation to the Social Work (Scotland) Act 1968, I argue that legal rights were incorporated into the children's hearings system at the outset, albeit based on an understanding of legal rights that was more limited than we would have today. The inclusion of legal rights within the children's hearings system at the outset has enabled the system to evolve in more recent years to respond to a more expansive understanding and application of the legal rights of children and their families without a fundamental alteration to the Kilbrandon principles on which the children's hearings system is based.

However, this evolution to greater protection and promotion of legal rights means that the modern-day children's hearings system is more legally technical than was constructed by its early architects. While ultimately the technicality does not detract from the principles on which the children's hearings system was based it does call for more attention and skill from both children's panel members and children's reporters in application of the various provisions underpinning the operation of the system to ensure that respect for legal rights is experienced by children and their families involved in the children's hearings system.

The original contribution to knowledge I make in this thesis is the analysis of legal rights within the children's hearings system from a historical perspective. This research adds to the existing body of knowledge by placing the children's hearings system in its historical context and demonstrating that although the greater emphasis on legal rights within Scots law has required the children's hearings system to evolve, the construction of the system at the outset has enabled this evolution to happen whilst retaining the fundamental principles on which it was based.

Chapter One: Introduction

This thesis critically examines the children's hearings system in order to determine how the system has developed in its protection and promotion of the legal rights of the children and adults about whom decisions are made. It will consider how the children's hearings system was conceived and constructed within its time and thereafter how the developments in Scots law related to the legal rights of individuals have been implemented within the system.

The original contribution to knowledge I make within this thesis is to offer an analysis of the domestic legal rights that are written into the children's hearings system from a historical perspective. This research adds to the existing body of knowledge by placing the children's hearings system in its historical context and showing that although the development of a wider conception of legal rights within Scots law has required the system to evolve, the system was in fact designed to accommodate legal rights from the outset. The insight I offer is that this has enabled the children's hearings system to respond to modern imperatives, particularly those driven by the Human Rights Act 1998 and the Scotland Act 1998, whilst retaining the central principles on which the system was based. I will conclude that the development of the children's hearings system with respect to legal rights has been evolutionary rather than revolutionary.

This introduction will set out the principal question that I will address throughout the thesis and the approach that will be taken to analysing and answering it. I will also explain the understanding of legal rights that I adopt throughout this thesis and the terminology I will use in this respect. Thereafter I will discuss the background to, and context of, the development of the children's hearings system and the legal rights of children and adults within Scots law from the time that the system was in its infancy to the present day. Therefore, this introductory chapter will have the following sections

A. The Principal Question

B. Methodology

C. Legal Rights

D. Background and Context

E. Structure

A. The Principal Question

The issues I seek to address in this thesis can be captured in one principal question: how has the children's hearings system developed in response to an increased focus on protecting and promoting legal rights in Scots law, and do the developments represent an evolution of or revolution away from the principles that inspired its original design?

The genesis of this question was from my own practical experience within the children's hearings system[1] where I was exposed to opinions amongst some fellow practitioners that the modern children's hearings system was far away from the 'new alternative'[2] system conceived and constructed in the 1960s. Such a view was especially prominent amongst some practitioners when changes related to improving the protection of the legal rights of parents and carers were introduced: these developments were perceived by those practitioners as somehow antithetical to the principles upon which the children's hearings system was originally based. I was curious about the extent to which such a view was true, and that curiosity grew on discovering that this was not a question that had been explored in depth within the academic literature about the children's hearings system.

This is an important omission in the literature since within the children's hearings system we talk extensively about the origins of the system. Lord Kilbrandon, the Committee he chaired

[1] Between 2005 and 2013 I worked for the Scottish Children's Reporter Administration, the first three years as a researcher and the last 5 years as a children's reporter. I then spent 4 years at the newly constituted Children's Hearings Scotland working in a practice and policy role, which also offered the opportunity to spend some time in Guernsey as it sought to implement its version of the Scottish children's hearings system. As I explore in chapter four the time frame of this experience coincided with a period of intense activity within the children's hearings system, much of it with the purpose of securing better protection and promotion of the legal rights of children and their family members about whom decisions are made.

[2] Scottish Home and Health Department; Scottish Education Department, *Report of the Committee on Children and Young Persons, Scotland* (Cmnd 2306, 1964) 72. Hereinafter 'The Kilbrandon Report'.

and the content of the report the Committee produced in 1964[3] that led to the creation of the children's hearings system through the Social Work (Scotland) Act 1968 are celebrated to the extent that 'the Kilbrandon ethos' is often referred to by policy-makers and retains support in modern Scotland as the way in which the State should respond to children in need of its care and protection.[4] Any new substantive changes to the children's hearings system are often presented in the context of the Kilbrandon Report.[5] Thus, as the children's hearings system develops to accommodate modern legal imperatives it is necessary to understand the extent to which these modern imperatives differ from those considered by the Kilbrandon Committee and any conflict between them. Such an understanding enables consideration of the extent to which the modern children's hearings system is in fact still grounded in the principles set out by the Committee in 1964 as continued modern reference to the principles would suggest.

A feature of the discourse surrounding the children's hearings system is that there is not a large body of secondary academic literature contributing to it. The children's hearings system is not a widely replicated system[6] and therefore there is a lack of international literature from which direct comparisons can be drawn. There are a small number of legal academics within

[3] Ibid.

[4] In February 2020, the Scottish Government commissioned Independent Review of Care reported that there was 'significant support for, and commitment to, the underlying principles of Kilbrandon.' Independent Care Review *The Promise* (2020) 40. The reference to simply 'Kilbrandon' within this text is illustrative of the status the Committee report from 1964 has.

[5] Ibid. See also, for example, Scottish Government, 'The Children's Hearings (Scotland) Bill: Policy Memorandum' (Scottish Parliament, 2010).

[6] The children's hearings system is often described as being 'unique' and while it is true to say that Scotland is an outlier in its approach, especially to children who are accused of criminal offences, it is not the case that the system remains totally 'unique.' In 2010 the Bailiwick of Guernsey modelled its new childcare legal system directly on the Scottish children's hearings system. The Children (Guernsey and Alderney) Law 2008 established the Child Youth and Community Tribunal as well as the office of the Children's Convenor, which are directly comparable to the Scottish national Children's Panel and Principal Reporter. Further information about the system in Guernsey can be found on www.convenor.org.gg

Scotland whose work relates directly or indirectly to the children's hearings system.[7] One interesting observation of the domestic literature is that the period of the children's hearings system's operation under the Social Work (Scotland) Act 1968 through to the Children (Scotland) Act 1995 was a comparatively rich period for research, as I explore in Chapter three. However, gradually over time this early interest lessened as demonstrated by the number of secondary sources included in this thesis, which declines notably over Chapters 3 and 4. Thus, as there is relatively little academic literature on the history of the children's hearings system, and the evolving place that legal rights have within that system, my thesis draws predominantly on primary sources and my own analysis thereof. This strengthens the originality of my thesis and the contribution it makes to the understanding and future development of the children's hearings system.

The discussion of the principal question contributes directly to the academic consideration of the children's hearings system and therefore is of relevance to those with a specific interest in the children's hearings system. In addition, my consideration of the extent to which Scots law has developed in recent years in its response to children in need of care and protection from the State as a result of wider international and legal developments will be of interest to academic Scots family and criminal lawyers more generally. However, as well as an academic contribution, I hope that the overall conclusions from this research can and will make a wider contribution to the work of policy makers and legislators as the future 'redesign' of the children's hearings system is considered in the coming years. As will be discussed further in the conclusion to the thesis within chapter five, following on from the report of the Scottish Government commissioned Independent Review of Care[8] a commitment has been made to

[7] Leading texts related to the children's hearings system are Kenneth McK. Norrie, Children's Hearings in Scotland, now in its fourth edition published in 2022; the work of Sheriff Brian Kearney, particularly the two editions of his text Children's Hearings and the Sheriff Court, has also been influential specifically in relation to the practices of the Sheriff Court in business arising from children's hearings. As will be explored in chapter three, in the initial period of the operation of the children's hearings system the work of John P. Grant, Stewart Asquith, FM Martin and Kathleen Murray provided detailed and helpful insights into the system. More recently, the works of Elaine E. Sutherland, especially in relation to children's rights, and Claire McDiarmid, especially in relation to children accused of criminal offences, have contributed to the discussion surrounding the children's hearings system.

[8] Independent Review of Care (n4).

introduce legislation to the Scottish Parliament during the current parliamentary term with a view to a 'redesign' of the children's hearings system.[9] This 'redesign' is being approached from a perspective of protecting and promoting legal rights, especially of the child.[10] It is therefore essential that legislators understand how the current children's hearings system has developed and evolved as well as how the Kilbrandon principles sit with modern day legal rights imperatives.

B. Methodology[11]

To provide an answer to the principal question in this thesis I seek to analyse the children's hearings system in its historical context by examining the nature of the system as it was conceived and constructed in the 1960s and exploring how it has responded to legal rights-based developments since this time. By using a legal history method[12] to undertake a detailed analysis of the development of the children's hearings system with a specific focus on legal rights, I intend to reveal the extent to which domestic legal rights were built into the system at the outset in order to contextualise how the system has evolved in its application of the legal rights of both children and adults.

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[9] The Promise *Plan 21-24* (31 March 2021) 36 https://thepromise.scot/plan-21-24-pdf-spread.pdf ; The Promise *Change Programme One* (25 June 2021) 64. https://thepromise.scot/change-programme-one-pdf.pdf

[10] The Promise *Plan 21-24* (31 March 2021) 36. https://thepromise.scot/plan-21-24-pdf-spread.pdf

[11] I use the word 'methodology' in the sense described by Watkins and Burton: 'the thinking that takes place *about* methods; or the thinking that takes place *outside* of the practical aspects of a research project and which determines its design.' Dawn Watkins and Mandy Burton, *Research Methods in Law* (2nd edition, Routledge, 2018) 2. A similar description is provided by P. Ishwara Bhat, *Ideas and Methods of Legal Research* (Oxford University Publishing, 2020) 15. The word 'method' is used to describe the practical approach taken, Watkins and Burton, Ibid.

[12] Lina Kestemont summarises such an approach as 'interpret[ing] legal provisions by considering their story of development'. Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Intersentia, 2018) 27. P. Ishwara Bhat sites legal historical research as a form of doctrinal research and describes it as the study of 'the historical evolution of a particular concept, system, institution, or practice in response to social context.' P. Ishwara Bhat (n11) 29. Further discussion of legal history as a method can be found in Jonathan Rose, 'Studying the Past: The Nature and Development of Legal History as an Academic Discipline' (2010) 31 J Legal Hist 101; Jim Philips, 'Why Legal History Matters' Victoria University of Wellington Law Review Vol. 41 No. 3 (Nov. 2010); Andrew Lewis and Michael Lobban, *Law and History: Current Legal Issues 2003 Vol. 6*. (Oxford University Publishing, 2004).

In his comprehensive account of the development of legal history as an academic discipline, Rose identifies that '[s]tudying the legal past has an important function as it produces knowledge and information about legal institutions and concepts.'[13] But beyond the production of knowledge and information about, in this case, the origins and development of the children's hearings system, Handler has described another function of legal history as being 'to challenge the assumptions that inform and underpin modern legal scholarship.'[14] Similarly in his defence of why legal history matters, Philips argues that one reason it matters is because legal history is 'liberating.'[15] He states that 'the legal historian's job … is to discourage blind reliance on the past as justification of current decisions.'[16] This latter frame provided by Phillips relates very strongly to the modern conceptualisation of Kilbrandon and the original contribution I make about the children's hearings system through my choice of method. Without fail, the academic and practitioner literature in relation to the children's hearings system is rooted in the Kilbrandon Report. As discussed in section A above, any substantive change is always referenced with, or compared to, 'Kilbrandon'.[17] Thus, with the Kilbrandon Report having such power in the continued development of the children's hearings system, there is a significant need to understand fully the context of the recommendations and their implementation so that underlying assumptions, such as that the

[13] Jonathan Rose (n12) 110.

[14] Phillip Handler, 'Legal History' in Watkins and Burton (n11) 118.

[15] Phillips (n12) 305.

[16] Ibid 306. See also P. Ishwara Bhat (n11) 207 where the author states 'As Allison points out, legal history seeks to liberate us from the tyranny of the old, from the sway or hold of the past, by explaining the historical context of some legal text or institution and showing how that context has disappeared or otherwise changed, rendering the text or institution obsolete or unsuitable. It also exposes legal cultural prejudices and assumptions.'

[17] Note 5 above. As further examples, as I discuss in chapter four, there were four distinct but inter-related Scottish Government consultations in the lead up to what became the Children's Hearings (Scotland) Act 2011 and 'Kilbrandon' was a feature of each: *Consultation Pack on the Review of the Children's Hearings System* (Scottish Executive, 2004); *Getting it Right for Every Child: Proposals for Action* (Scottish Executive, 2005); *Strengthening for the Future: A consultation on the reform of the children's hearings system* (Scottish Government, 2008); and finally the *Draft Children's Hearings (Scotland) Bill* (Scottish Government, 2009).

protection and promotion of legal rights is something 'new' to the system and potentially inconsistent with the Kilbrandon principles, can be challenged where necessary.[18]

Scrutiny of the papers held by The National Records of Scotland related to the Kilbrandon Committee between the point of the establishment of the Committee and the publication of the report is central to the method I use within this thesis.[19] Primarily the papers consist of notes of the Committee meetings, written and oral evidence provided to the Committee, secretariat papers prepared for the Committee[20] and other associated external papers considered by the Committee in the course of its discussion. The archived papers present a very rich source of the information provided to and gathered by the Committee.

As with any archival research, it is important to note the limitations of the analysis as a basis for understanding the workings of, and discussions within, the Committee and subsequent construction of the children's hearings system. These limitations matter because the content of the archived papers is central to the conclusions I will draw in this thesis.

First, there can be no certainty as to the completeness of the records due to both the initial archive practices as well as knowledge of how the records have survived. Reliance is placed on the secretariat to the Committee and other civil servants to retain and store the complete documentation of the Committee and there is no information to indicate how this was undertaken. The presentation of many of the files would suggest that not much in the way of sorting or cataloguing of individual files was carried out in advance of the files being archived. Also, because there is no inventory of, or within, the files there is no guarantee that there are no missing records since they were initially archived. Second, it is important to note that the

[18] Handler (n14).

[19] The Committee was established in May 1961 and the report published in April 1964. In addition, the Archives contain papers about subsequent Government work to produce the White Paper 'Social Work and the Community' (Cmnd. 3065, 1966) and draft the Social Work (Scotland) Bill that was introduced to the Westminster Parliament in 1968.

[20] It is clear from the number of papers prepared for the consideration of the Committee by the secretariat that the members of the secretariat had a crucial role in assisting the Committee to arrive at and formulate its recommendations. Little is, however, known about the identity or backgrounds of these individuals.

sources were not created for the purpose of future research. They were created for a particular purpose, either to inform the Committee members of the views, opinions and evidence from an interested party, who may or may not have a particular agenda, or to record the discussions taking place at a meeting of the Committee for the Committee's purposes. With specific reference to notes taken at meetings reliance is placed on the note taker, in conjunction with any subsequent approval process, to ensure points of oral evidence, discussion and actions are recorded accurately. The role of human intervention in the preparation of individual sources is therefore an important consideration in the analysis.

In addition to these limitations, two specific considerations related to the analysis and the way it was conducted also inform the parameters of the conclusions. Given the volume of papers available, the analysis was framed by my principal question and thus the papers were examined with a specific emphasis on domestic legal rights and related themes, such as the legal aspects of the proposed new system and discussion of individual rights, including what today we would frame as rights-based concepts. The risks of confirmation bias therefore had to be borne in mind fully at all stages of the analysis. Finally, the principal challenge of any historical research is to avoid projecting current understandings of law, policy and practice onto the words recorded at a time in the past and thus care has been taken throughout to represent the words used by the Committee in their entirety without placing emphasis on those words as being different to the language we may use today.[21]

Alongside the archived papers from the Kilbrandon Committee my research also examines subsequent legislation, case law and Government papers as well as the secondary academic literature available at different times in the history of the children's hearings system. I seek to examine not only how legal rights were protected and promoted through the legislation underpinning the children's hearings system but also to consider how the legal rights set out in the legislation were applied in practice during the course of the half century between the holding of the first children's hearings in 1971 and the submission of this thesis. Therefore,

[21] Handler (n14) 103. See also P. Ishwara Bhat (n11) 211 and Lina Kestemont (n12) 28.

both case law and primary research studies[22] related to the children's hearings system in practice are closely scrutinised as a way of understanding the child and his or her family's lived experience of the system.

A legal history method is not one I planned to rely on so centrally at the outset of this research. Part of my initial curiosity was based on the origins of the children's hearings system but my initial exploration of the Kilbrandon Report, discussions and papers before the Committee was with the aim of providing contextual information to a discussion of the modern system. However, as I explore in depth in chapter two, the extent to which certain legal rights of individuals affected by decisions were explored by the Kilbrandon Committee shed new light on the question I was researching. My practice experience had conditioned me to consider the children's hearings system as rooted in a welfare approach, with legal rights being a somewhat new phenomenon that the system was having to contend with. As I explore in chapter two, while decision-making in the best interests of the child was a central focus of the Kilbrandon Committee, there was a greater emphasis on specific procedural rights of adults and of children accused of a criminal offence than I had expected.

In considering the approach taken to examining the principal question it would be remiss not to mention also the impact that my own practice experience within the children's hearings system has had on this research. In relation to the analysis, at times my practice experience was a benefit in that I was able to draw on my knowledge and experience of how the current law operated in practice and its strengths and weaknesses; while at other times it was important to reflect on whether established practices, particularly those I learned through observation, had any legal foundation, and whether they truly reflected the best application of the legal rights of children and adults. Challenging my understanding of the *status quo* and the practices in which I had been trained was therefore an essential part of the process. This

[22] Three particular studies are examined in this respect within chapter three: Nigel Bruce and John Spencer, *Face to Face with Families: A Report on the Children's Panels in Scotland* (MacDonald Publishers, 1976); FM Martin and Sandford J Fox and Kathleen Murray, *Children Out of Court* (Scottish Academic Press, 1981); Christine Hallett and Cathy Murray, *The Evaluation of Children's Hearings in Scotland Volume 1: Deciding in Children's Interests* (The Scottish Office Central Research Unit) (Edinburgh) (1998).

practice experience has also contributed to the representation of children and young people in this thesis and the reported case law that narrates a snapshot of their lives. For thousands of children and young people in Scotland the children's hearings system is not an abstract concept; it is the reality of their lived experience of frequent visits from social workers in consequence of decisions made by children's hearings, of managed 'contact' with their parents, brothers and sisters, and of sharing the often intimate details of their lives with strangers at children's hearings on at least an annual basis and often multiple times each year. My intention from the outset of this research has been that where analysis and discussion of individual cases is required to support a particular argument, this analysis is presented with the care and sensitivity that recognises and is respectful of the child or young person's individual life.

C. Legal Rights

In this section I will set out the meaning of the term 'legal rights' as it will be used throughout this thesis. This is important to do since in ordinary usage the word 'right' has a number of different meanings. The word can be, and is, used in different contexts and to convey a variety of different entitlements; from a legal entitlement written in a statute or within a contract, to a moral obligation that is owed by one person to another, to behaviour defined by universal convention.[23] In 21st century Scots legal discourse the language of rights is used commonly, both to highlight the entitlements that an individual has in law as well as to convey assertions of entitlement beyond those contained within the law. Against this background it is essential, in a thesis that seeks to explore rights within a particular part of the legal system, to explain precisely the way in which the term 'right' is being used. However, this thesis is not a thesis on the philosophies of rights; it is a thesis about rights operating in the particular legal context of the children's hearings system. So, while I acknowledge the complexities of the philosophical understanding of rights, particularly related to children's rights, it is not my purpose here to resolve the multiplicity of debates in this area. The focus of the principal question is on domestically recognised legal rights by which I mean the precise entitlements that can be traced to particular sources of Scots law. As I explain in section D below, especially

[23] The Oxford English Dictionary definition of 'right' as a noun is 'that which is morally correct, just or honourable' and 'a moral or legal entitlement to have or do something.'

in more recent times these domestically recognised legal rights can be derived from international norms. Thus, it is in that context that I use the term 'legal rights' throughout this thesis.

Rights can be understood as sourced from our moral conscience ('moral rights') or from our law ('legal rights').[24] The distinction between legal and moral rights is explained usefully by Donnelly as 'denying someone something that it would be right for her to enjoy in a just world is very different from denying her something (even the same thing) that she is entitled (has a right) to enjoy.' [25] In other words, moral rights are something an individual *should* have in a moral, just and/or ethical society as opposed to a legal right which is a right that the individual *does* have because it is enshrined in, or recognised by, law and can be enforced through the power of the State. As the source of legal rights is the law, it follows that legal rights are less elusive than moral rights.[26] Although it can be helpful to understand law and morality as distinct sources of rights, it is possible that a right can be both moral and legal. To take a simple example, for most of us our moral conscience would indicate that an individual has a 'right' to live from the moment of his or her birth. The right to life is something that is enshrined in law.[27] So, it follows that the right to life can be considered to be both a moral right and a legal right.

The discussion in this thesis will be confined to the category of legal rights, being those procedural and substantive entitlements that an individual has within our domestic law as opposed to those rights that it is considered a person *should* have. Feinberg defines a right deriving from the law, a 'legal right', as 'a claim to performance, either action or forbearance as the case may be, usually against other private persons. It is also a claim against the state

[24] David Archard, *Children: Rights and Childhood* (3rd ed, Routledge, 2015) chapter 4.

[25] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed, Cornell University Press, 2013) 11.

[26] Ibid. As explored by Cruft *et al* the source of moral and human rights is a contested issue and this will not be explored in this thesis. Rowan Cruft and S. Matthew Liao and Massimo Renzo, *The Philosophical Foundations of Human Rights* (Oxford University Press, 2015).

[27] For example, in Article 2 of the European Convention on Human Rights that states 'Everyone's right to life shall be protected by law' and Article 6(1) of the UN Convention on the Rights of the Child that states 'States Parties recognise that every child has the inherent right to life.'

to recognition and enforcement'.[28] This encapsulates neatly both dimensions of the legal rights discussion in this thesis – the positive and negative claims that individuals have between themselves in domestic law, such as between a parent and a child, as well as the positive and negative claims that either or both may have against the State.

The premise on which the principal question of this thesis is based is that legal rights as a collective have gained a greater prominence in Scots law since the children's hearings system was conceived and constructed in the 1960s. This premise derives principally from three areas. First, an increased emphasis on the protection and promotion of legal rights can be seen in the legislation governing the operation of the children's hearings system, primarily the Children's Hearings (Scotland) Act 2011. The Policy Memorandum which accompanied the Bill on its introduction to the Scottish Parliament in 2010 sets out one of the five policy objectives the Scottish Government was seeking to achieve through the legislation as putting 'children's rights at the heart of the System'.[29] The potential for challenge to the children's hearings system under the European Convention on Human Rights[30] is also cited as a driver for the new legislation.[31] This latter driver links to the second basis for the premise that legal rights have assumed greater prominence since the children's hearings system began operation. Writing in the Preface to the White Paper that preceded the Human Rights Act 1998, the then Prime Minister Tony Blair signalled the Government's intention that the Bill provide something over and above what existed at the time. He wrote 'we believe it is right to *increase* individual rights …' and one way of doing this is to 'introduce *new* rights, based on bringing the European Convention on Human Rights into United Kingdom law'.[32] This modernisation agenda would be completed by giving people 'opportunities to *enforce* their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in

[28] Joel Feinberg, *Social Philosophy* (Prentice-Hall, 1973) 58.

[29] Scottish Government, 'The Children's Hearings (Scotland) Bill: Policy Memorandum' (Scottish Parliament, 2010) 17.

[30] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950. Hereinafter 'ECHR'.

[31] The Children's Hearings (Scotland) Bill: Policy Memorandum (n29) 15.

[32] Home Office, 'Rights Brought Home: The Human Rights Bill' (Cmnd 3782, 1997). Emphasis added.

Strasbourg' as well as enhancing awareness of human rights at home and abroad.[33] The European Convention guarantees entitlements which are given effect to not only in domestic legislation but in practice. The increasing importance of the Convention has driven an increasingly rights-based approach to the children's hearings system, as can be seen in the changes since 1998 to the everyday practices of children's reporters, children's panel members and courts[34] as a result of the enforceability of ECHR rights at domestic level via the Human Rights Act 1998 and the Scotland Act 1998.

The third basis for the premise that legal rights have assumed more prominence since the children's hearings system began operation is the much more explicit recognition that children can be active and not merely passive rights holders. This has led to the development of specific children's rights, as will be discussed further in the next section. The subsequent ratification of the United Nations Convention on the Rights of the Child[35] by the United Kingdom almost two decades after the children's hearings system began operation led to an increased awareness of children's rights in particular. As noted above, this is demonstrated by the policy objectives of the 2011 Act to put children's rights at the centre of the children's hearings system and is an area that is likely to continue to gather pace with the Scottish Government's intention to incorporate the UNCRC into Scots domestic law.[36]

Despite these developments in the prominence of legal rights, all of which were a quarter of a century or more after the children's hearings system came into operation, the fundamental point that I seek to make throughout this thesis is that legal rights are not a recent addition

[33] Ibid. Emphasis added.

[34] For example, decisions of the courts at all levels: *S v* Miller *(No. 1)* 2001 SC 977; 2001 SLT 743; [2001] UKHRR 514; *Principal Reporter v K* [2010] UKSC 56; [2011] 1 WLR 18; 2011 SC (UKSC) 91; *S v Authority Reporter* 2010 SLT 765; *J v Proudfoot* 2010 Fam LR 140; *K v Paterson* 2009 SLT 1019; *ABC v Principal Reporter and another*; *In the matter of XY* [2020] UKSC 26. For the practice of children's panel members in children's hearings: Children's Hearings Scotland, *Practice and Procedure Manual* (2nd ed, 2019).

[35] UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74. The UN Convention on the Rights of the Child is hereinafter referred to as the 'UNCRC'.

[36] The UNCRC (Incorporation) (Scotland) Bill seeks to incorporate directly the Articles of the UNCRC into Scots law. Discussed further at pages 200-201.

to the children's hearings system. The children's hearings system as constructed at its very outset accommodated certain procedural legal rights, such as the right to representation and to appeal the decision of a children's hearing to the sheriff and beyond. As will be set out in chapter two, these legal rights were especially prominent in relation to adults and those children whose own behaviour was the initial reason for referral to a children's hearing.[37] As I will also show, some limited substantive rights were present within the children's hearings system from the outset although in a much less explicit way than the procedural rights. Therefore, while it is true that awareness of, and attention on, legal rights is more central today than it was earlier in the history of the children's hearings system, it is not true that this represents any radical new innovation to the system.

D. Background and Context

Since the first children's hearings took place in 1971, the children's hearings system has operated throughout a period of social and legal change. As a legal process considering a variety of social issues for children and their families the children's hearings system has not been immune to these changes. However, as I will set out throughout this thesis, despite these changes the children's hearings system continues to operate based on the broad principles set out by its architects in the 1960s. To contextualise the developments within the children's hearings system that I discuss in this thesis, in this section I will highlight three areas of change which have specific relevance to the protection and promotion of legal rights within the system.

The first matter of change that I will consider by way of background relates to the incorporation of the ECHR into domestic law by the Human Rights Act 1998 and the Scotland Act 1998, which led to a substantially increased focus on the legally enforceable rights of both children and adults within Scots law and therefore within the children's hearings system. This brought with it, in particular, an expanded understanding and prominence of procedural legal rights.

[37] Social Work (Scotland) Act 1968, ss49 and 50.

The second area of change I will explore in this section relates to an increased acceptance that children are rights holders since this has led to more emphasis on children as participants in decision-making with their own legal rights. As a concept participation has grown in prominence judicially, academically and practically within the legal system throughout the 1990s and 2000s in particular.[38] In relation to children, participation is set out explicitly within the UNCRC, although the European Court has also given some attention to the participation of the child in legal proceedings as implicit within the ECHR as will be discussed further below.[39] The participation of adults in decisions about their child has also grown in prominence, with the legal basis for this deriving principally from the ECHR[40] and the interpretative approaches of the European Court. Therefore, the participation of children and those significant adults in their lives will be a key theme throughout this thesis.

The third change I will examine is a social change rather than a legal one. This is the increased recognition and reporting of child abuse and neglect in the 1970s and 1980s, which led to a very noticeable shift in the nature of the issues in children's lives that the legal system had to consider.[41] This is an important shift in the context of considering how the legal rights of children and their parents interact with each other and the extent to which the legal rights of the child are consistent with those of his or her parent in the way that the Kilbrandon Committee envisaged. When the issue at hand relates to behaviour towards the child, the legal rights of the parent and the child may not be consistent in the way they can be when

[38] The discussion here is centred on the legal system, however it should be noted that participation, particularly of children and young people, is a key concept in other disciplines, for example education and social work. It has been argued that a theoretical framework for participation is necessary to truly reflect the complexities of the concept. Karen A. Malone and Catherine Hartung, 'Challenges of participatory practice with children' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2010).

[39] At p22.

[40] The reasons why this may be the case for adults in particular are explored further below at pages 21 -22.

[41] As will be explored in chapter three, the Association of Children's Reporters described the 'mushrooming of child protection cases' in its evidence to the Orkney Inquiry. It was reported that 'care and protection' cases had grown from around 5% of referrals in the initial years to 32% in 1990. Similarly, referrals where a Schedule One offence was alleged to have been committed against a child had grown from 0.4% in 1972 to 15.4% in 1990. Association of Reporters to Children's Panels Submission to the Orkney Inquiry (Unpublished, 17 March 1992).

the issue before the children's hearing relates to the child's behaviour. A parent may also seek to exercise their own legal rights more powerfully than perhaps they would have done if the issue at hand was viewed solely as one related to their child's behaviour, especially if the issue relates to the behaviour of the parent themselves.

i. The European Convention on Human Rights

The first development that is relevant by way of contextualising this thesis is that the prominence of the ECHR on the European and domestic stage has increased incrementally, but substantially, over the time the children's hearings system has been in operation. As well as an increase in prominence, the European Court has also driven a more expansive understanding of procedural legal rights within Article 8 that has influenced the modern judicial interpretation of the children's hearings system.

The prominence of the ECHR

The UK ratified the ECHR more than a decade before the Kilbrandon Committee reported and 20 years before the children's hearings system began operation.[42] Thereafter the prominence of the rights contained within the ECHR increased over time with the pace quickening in the period towards and, especially, after the enactment of the Human Rights Act 1998 and the Scotland Act 1998. Therefore, we might expect to see some influence of the Convention on both the policy developments leading to legislative change and in judicial interpretation across the entire lifecycle of the children's hearings system. However, I will argue in this thesis that while the influence of the ECHR on the children's hearings system since 1998 has been readily apparent its influence before then was more nuanced; there is some evidence of legal rights and legal rights-based concepts in the conception and construction of the children's hearings system but not to the extent of the influence that more recent developments have had on the system and there is no evidence that the inclusion of these rights was driven in any way by the ECHR despite it having been signed some 20 years before the system began operation. To understand why this might be the case it is necessary to consider how the ECHR itself has developed over time both internationally and domestically.

[42] The UK signed the Convention 4 November 1950 and ratified it on 8 March 1951.

There is 'a historical patchwork' of human rights instruments, both at European and international levels.[43] Particularly since 1945 there has been a gradual development in international laws which require a State to respect and uphold the individual rights of those within its jurisdiction, and in the extent to which regulation is purely a matter of domestic law. As the best developed and the most observed,[44] together with its incorporated status in domestic law, the ECHR is the international instrument that has had the most profound effect on our domestic law.[45] However, by modern standards the Convention had 'a remarkably low profile' in the initial years after it entered into force and thus enjoyed 'a lowly status'.[46] This may go some way to explaining its lack of influence on the early construction of the children's hearings system. To attempt to explain why that was, in his detailed and systematic analysis of the development of the ECHR, Bates has argued that at the time the ECHR was drafted the intention was that it would be a Convention to regulate disputes between States, and not between the State and individuals.[47] Similarly a former secretary to the European Commission on Human Rights has stated 'What was initially established as an international system for the collective enforcement of fundamental rights and freedoms in western Europe has developed over the last fifty years into a constitutional bill of rights for the entire continent.'[48] That said, Bates suggests with reference to the *Travaux Preparatoires* and the speeches of Pierre-Henri

[43] JG Merills and AH Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th ed, Manchester University Press, 2001) 326.

[44] Ibid.

[45] This is not to fail to recognise the developments which occurred prior to the late 1940s and by other organisations, which contribute hugely to the 'historical patchwork'. For example, the United Nations Declaration on Human Rights, 1948, is specifically referenced at the outset of the Preamble to the ECHR.

[46] Ed Bates, 'The Birth of the European Convention on Human Rights – and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between law and politics* (Oxford University Press, 2011) 31-32.

[47] Ed Bates, *The Evolution of the European Convention on Human Rights: From its inception to the creation of a permanent court of human rights* (Oxford University Press, 2010) chapter 1. The author makes a similar argument in Christoffersen and Madsen (eds) (n46).

[48] H-C Kruger, 'European Convention on Human Rights: 50 years of growth' in *Council of Europe Information Bulletin No. 50* (2000) 4. That the ECHR evolved is unsurprising given one of the purposes of the Council of Europe, as set out in its Statute, of the '*further realisation* of human rights and fundamental freedoms.' Statute of the Council of Europe, 1949, Article 1. Emphasis added.

Teigen who was one of the architects of the Convention, that there was a minority of actors involved in the drafting and early development of the Convention who had more ambitious plans, akin to how we would view the purpose of the Convention from a modern perspective.[49]

Several attempts have been made to classify the stages of evolution of human rights and the ECHR in particular. Bates suggests that there are four stages to the genesis of the Convention – the genesis of the Convention between 1948 and 1950; the 'formative phase' between 1950 and 1974; the 'judicial phase' between 1975 and 1998; and finally the phase of the new permanent court from 1998 onwards.[50] Looking specifically at the European Court of Human Rights, Christoffersen and Madsen suggest four somewhat different phases of its development – initial development from 1959 to the mid-late 1970s; a second phase of more progressive jurisprudence from the mid-late 1970s to the early 1990s to coincide with the end of the Cold War; a third phase involving the post-Cold War transition to democracy and the Rule of Law in Eastern Europe from the early 1990s to the early 2000s; and finally an increased focus of the court at domestic level from 2004 onwards.[51] In a broader consideration of the development of human rights, Sir Stephen Sedley advances the argument that human rights have developed (at least in the United Kingdom) in three phases over time – the 'declaratory phase' from the 16th Century when concerns about slavery were first considered by the courts to the aftermath of the Second World War and the drafting of the Universal Declaration on Human Rights, adopted by the UN in 1948; the 'propagandist phase' from the mid-1970s onwards, when rights began to be enforced; and the 'institutional phase' from the mid-1990s as a result of constitutional changes in the United Kingdom.[52] Although each with slightly different contexts and emphases, what these classifications all have in common is the identification of the mid-late 1970s as something of a watershed period for the ECHR and the rights contained within it. This is important when considered against the timeframe of the children's hearings system, which would have been in its initial years of operation in the mid-

[49] Bates (n47) 7-8.

[50] Ibid chapter 1.

[51] Christoffersen and Madsen (n46) 2-3.

[52] Stephen Sedley, 'Human Rights and the Whirligig of Time' 2016 Edinburgh Law Review 1.

late 1970s and, as will be explored in chapter two, the ability of the system to protect and promote individual legal rights was already being questioned around that time.

Several reasons can be identified why the mid-late 1970s was a watershed period for the ECHR. As originally designed by the Council of Europe, the creation of the European Court of Human Rights and the right of petition to the European Commission by individuals were included in two Optional Protocols. There was, at the time, little appetite amongst member States for either a court or the right of individuals to petition the Commission: when the Convention entered into force in 1953 only Ireland, Denmark and Sweden accepted the right of individual petition to the European Commission and only Ireland and Denmark accepted the jurisdiction of a European Court. However, the late 1960s and 1970s then saw an increase in the number of States which agreed to accept the jurisdiction of the court and the right of individual petition to the Commission, particularly from larger States such as the United Kingdom and France. The acceptance of the jurisdiction of the court and the right of individual petition moved the rights contained within the ECHR from being matters of politics[53] into matters of law and the ECHR from being an instrument of primary relevance to State-to-State disputes to an instrument of practical import to the individual. Therefore, the potential for the Convention to impact directly on domestic law was becoming clear.[54]

The second justification for seeing the 1970s as something of a watershed moment for the Convention is the decision-making of the court. In this period the court moved its aspirations to practicality, given effect by its now oft reported statements that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical

[53] Merrills and Robertson (n43) have suggested that the Preamble to the Convention demonstrates the political motivations of the Convention.

[54] AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001) 7, where it is suggested that the acceptance of the right of individual petition and the jurisdiction of the court 'dramatically increased the impact of the Convention' and further that 'the effects on British domestic law have been very considerable.'

and effective' [55] and that the Convention is 'a living Instrument'.[56] Bates has suggested that a number of cases decided in the mid to late 1970s led directly to legislative change within States, showing that the ECHR was beginning to add an extra layer of protection for individuals at domestic level.[57]

A final reason why the 1970s can be identified as representing a step change in the operation of the ECHR relates to the political conditions existing at the time. In the context of the development of the court in the 1970s Madsen argues that 'geopolitical changes and the new social politics' [58] of the late 1960s and early 1970s created the conditions required for the emergence of the Convention as a bill of rights for the individual rather that the intra-State instrument many of the drafters had intended it to be. He argues:

> *if European human rights had originally been envisaged and legitimized in terms of a collective guarantee against any forms of totalitarianism, in the 1970s human rights were also legitimised as a tool for social emancipation in a more permissive society.*[59]

Alongside these developments related to the Convention as a whole, the 1970s also saw the beginning of a more expansive understanding of some legal rights contained within the Convention, which would subsequently have a direct impact on the operation of the children's hearings system.

A more expansive understanding of legal rights

While the ECHR as a whole was becoming more prominent and influential on domestic decision making, the scope of what the very concept of 'legal rights' encompasses was also

[55] *Airey v Ireland* (1979-80) 2 EHRR 305 [24].

[56] For example, *Golder v United Kingdom* (1979-80) 1 EHRR 524; *Engel v Netherlands* (1979 – 80) 1 EHRR 647; *Tyrer v United Kingdom* (1979 -80) 2 EHRR 1; *Marckx v Belgium* (1979-80) 2 EHRR 330; *Sunday Times v United Kingdom* (1979 – 80) 2 EHRR 245; *Winterwerp v Netherlands* (1979 -80) 2 EHRR 387.

[57] Bates (n47).

[58] Mikael Rask Madsen 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Christoffersen and Madsen (n46) 44 – 45.

[59] Ibid 59.

developing. The case law related to Article 8 of the Convention in particular has advanced since the children's hearings system came into being in 1971 and has had a significant impact on the development of the system.[60] The more developed understanding of participation in decision-making[61] is one such example of the interpretation of Article 8 which has necessitated a move away from the limited understanding of procedural rights at the time the children's hearings system was being conceived. The evolutive interpretation of the ECHR, in that it is viewed as a living instrument by the European Court,[62] means that while the concept of 'participation' is not found within the words of the Convention itself it has been held to be a right integral to both Article 6 and Article 8 by the European Court. For example, in July 1987 deciding the case of *W v United Kingdom*[63] the Court held that there was a violation of Article 8 when the parents of the child were not involved in the decision-making about contact with their child 'to a degree sufficient to provide them with the requisite protection of their interests'.[64]

Despite a general reluctance to intervene in decisions, seen by virtue of the wide margin of appreciation afforded to member States,[65] the European Court has recognised that given the irreversible nature of these decisions in relation to children, it is all the more important to offer protection against arbitrary interference.[66] The European Court has stated that fairness is central to assessing whether an interference is necessary in a democratic society alongside

[60] Article 8 provides:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

[61] Explored in chapter four at p150.

[62] See, for example, *Tyrer v United Kingdom* (1979 -80) 2 EHRR 1 [31]; *Marckx v Belgium* (1979-80) 2 EHRR 330 [41].

[63] (1988) 10 EHRR 29.

[64] Ibid [64].

[65] See, for example, *Eriksson v Sweden* (1990) 12 EHRR 183 [62]; *Olsson v Sweden (No.2)* (1994) 17 EHRR 134 [120] [122]; *Johansen v Norway* (1997) 23 EHRR 33 [64].

[66] *W v United Kingdom* (1988) 10 EHRR 29 [62]; *McMichael v United Kingdom* (1995) 20 EHRR 205 [102].

whether the reasons given for the interference with the right are both 'relevant and sufficient'.[67] A crucial element of fairness, according to the court, is whether the applicant, usually a parent,[68] has been involved in the decision-making process as a whole in a manner sufficient to allow the requisite protection of his or her interests and to be able to fully present his or her case to the decision maker. The European Court has emphasised the procedural protection required to advance the substantive right within Article 8 and it is this element of the decision making of a children's hearing which has been exposed to most scrutiny in recent years.[69] In sum, since the children's hearings system was conceived and constructed, due process and the perception of respect for legal rights has become much more significant.

While the case law is dominated by the legal rights of adults, this is not to say that the European Court jurisprudence has been silent on the issue of the participation of the child. In the Convention itself, mention of children is made in only two of its 59 Articles – Article 5(1)(d) and Article 6(1) – and only then in marginal references. Despite this omission from the text, the European Court has not been inhibited in considering 'effective participation' in the context of children who were alleged to have committed a criminal offence and the relevance of this to the application of Article 6.[70] The Court has also considered the child's participation in cases brought by parents, principally unmarried fathers.[71] Through these cases the court

[67] *TP and KM v UK* (2002) 34 EHRR 2 [70], [71] and [72]; *RK and TK v UK* (2009) 48 EHRR 29 [34]; *AD and OD v UK* (2010) 51 EHRR 8 [82].

[68] The vast majority of the applicants in child protection cases are one or both of the child's parents. Even where the case is ostensibly made by the child, the application has been made on their behalf by a parent. One exception to this is *Z and others v UK* (2002) 34 EHRR 3 where four siblings complained about their inability to sue a Local Authority for damages for its failure to intervene in their chronically neglectful upbringing.

[69] It is the issue of openness which was one of the central issues in the only case from the children's hearings system that has been considered by the European Court. In *McMichael v UK* (1995) 20 EHRR 205 the inability of the applicant parents to have sight of the papers submitted to the panel members in advance of the children's hearing was held to be a violation of both Articles 6(1) and 8 ([80], [84] and [92]). However, the court has recognised that the duty of openness is not absolute since there may be occasions where disclosure of information may place the child at risk. *TP and KM v UK* (2002) 34 EHRR 2.

[70] *T v UK; V v UK* (2000) 30 EHRR 121; *SC v UK* (2005) 40 EHRR 10; [2005] Crim LR 130.

[71] *Elsholz v Germany* (2002) 34 EHRR 58; *Sahin v Germany* [2003] 2 FLR 671; 15 BHRC 84; [2003] Fam LR 727; *Sommerfeld v Germany* (2004) 38 EHRR 35.

has stated consistently that the child's views must be sought albeit the assessment of the child's views, and the manner in which they should be communicated to the Court, is within the margin of appreciation afforded to member States.

All of this shows that during the period the children's hearings system has been in operation both the domestic prominence of the ECHR and the interpretation of the Article 8 protection of family life have evolved. The impact this has had on the children's hearings system will be core to the discussion in later chapters.

ii. Children's Rights[72]

The second area of change since the children's hearings system was conceived and constructed that is relevant to contextualising this thesis is the increasing recognition in law, policy and practice of children's rights.[73] While not as prominent or recognised as extensively in the way that they are today, children's rights had been developing in an 'uneven and haphazard'[74] way on the international stage since before the children's hearings system was being constructed in the 1960s.

[72] Despite most modern writers accepting that at least some children are capable of holding some rights this is by no means a universally settled debate. Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009) provides a comprehensive discussion of the theoretical aspects of children's rights. See also, for example, MDA Freeman, *The Rights and Wrongs of Children (*Frances Pinter, 1983); John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 Ox J Leg Stud 161. As this is a thesis about legal rights I will proceed on the basis that children are capable of holding rights, since this is recognised in law and resolving the theoretical debate is outside the scope of this thesis. On the downside of not resolving the theoretical debate, see for example Lucinda Ferguson, 'Not merely rights for children but children's rights: the theory gap and the assumption of the importance of children's rights' (2013) 21 Int' J.Children's Rts 177, 182 and MDA Freeman, 'Taking children's rights seriously' (1987-1988) 4 Children & Society 299.

[73] The ratification of the UNCRC by the United Kingdom in 1991 provided much of the impetus for this increased attention but it was not the sole driver. As was explored in the previous section, the incorporation of the ECHR into domestic law has also impacted on children's legal rights since they have the rights set out in the Convention as well as adults.

[74] John P Grant and Elaine E Sutherland, 'International Standards and Scots Law' in Alison Cleland and Elaine E Sutherland, *Children's Rights in Scotland* (3rd ed, W. Green, 2009) 49.

The starting point in the consideration of the evolution of children's rights from an international perspective is the adoption, in 1924, of the Geneva Declaration on the Rights of the Child by the League of Nations. Using language reflective of the time, and coming from a very paternalistic standpoint, this Declaration contained five Articles based on recognition 'that mankind owes to the child the best that it has to give.'[75] These five points were the child must be given the means for normal material and spiritual development;[76] the child must have sufficient food, medical treatment and 'the child that is backward must be helped, the delinquent child must be reclaimed and the orphan and the waif must be sheltered and succoured';[77] the child must be the first to receive relief in times of distress;[78] the child must be put in a position to earn a livelihood while being protected from exploitation[79] and finally 'the child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.'[80] Collectively these five points concentrate mainly on the physical aspects of child development, and what a child needs rather than is entitled to. The Articles also have their emphasis on the child as becoming an adult rather than on the importance of childhood as a period in its own right.[81]

This Declaration was restated in 1948 by the United Nations, with amendment following the experiences of the Second World War. While the new Declaration was largely a restatement of the 1924 Declaration, it represents some early emphasis being placed on the importance of the family, with the main addition to the Declaration being that 'the child must be cared for with due respect for the family as an entity.'[82] A further Declaration was made by the United Nations in 1959 which although more detailed, was still overtly paternalistic in its terms and assumptions, and had no binding force given its status as a Declaration rather than

[75] Geneva Declaration of the Rights of the Child, adopted 26th September 1924, Preamble.

[76] Article 1.

[77] Article 2.

[78] Article 3.

[79] Article 4.

[80] Article 5.

[81] For the importance of childhood as a period, see, for example, Allison James and Alan Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge, 2015).

[82] Declaration of the Rights of the Child (1948), Article 2.

a Convention.[83] Fortin argues that, despite many of its terms being vague and/or outdated, it is still an important document as it represents the first systematic attempt to provide, in detail, for children's rights at international level.[84] Therefore by the time that the Kilbrandon Committee was beginning its deliberations in 1961 the concept of children's rights had been considered on the international stage for in excess of 30 years. However, as will be explored in chapter two, there is no evidence that these international developments had any influence on the deliberations of the Kilbrandon Committee or the politicians who passed the subsequent legislation enacting the new children's hearings system. This is likely to be because while prior to 1989 children's rights had been discussed on the international stage and statements of intent had been given by States, alongside guidelines and rules which specifically addressed the position of children in certain circumstances,[85] these were not binding on member States unless voluntarily adopted directly into domestic legislation.[86] It was not until the UNCRC was opened for signature in 1989 that this changed.

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[83] Kenneth McK. Norrie *A History of Scottish Child Protection Law* (Edinburgh University Press, 2020) 40-41.

[84] Fortin (n72) 35.

[85] For example, The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules'), adopted by the General Assembly on the 29th November 1985.

[86] Although as human beings children are entitled to the protection of the generic human rights Conventions, the weakness of this approach alone is that it does not pay sufficient attention to the needs of children over and above those of adults. Therefore, although there were further additions to the United Nations Framework in 1966 with the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as generic documents the impact of these instruments on children's rights was more limited. This is not to say, however, that none of the Articles are particularly relevant to children. For example, Articles 10, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights emphasise that 'the widest possible protection and assistance should be accorded to the family' and 'Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation', promotion of the healthy development of the child and primary education is to be compulsory and free to all. Articles 6 (those under 18 should not be sentenced to death), 10 (juvenile and adult offenders should be kept separately), 14 (public and private legal proceedings involving juveniles should be in private and should take account of their age and 'desirability of promoting their rehabilitation'), 23 (importance of the family), 24 (right to measures of protection without discrimination, to have their birth registered, to have a name and a nationality) of the International Covenant on Civil and Political Rights are particularly relevant to children.

On the face of it the number of States who are signatories to the UNCRC seems to demonstrate international governmental acceptance of children's rights.[87] However, the inherent debates which underpin children's rights are reflected in the preamble to the Convention,[88] and even in some of the Articles themselves,[89] as well as the fact that it took 10 years for the UN to complete the draft Convention. The Convention contains 54 articles, 40 of which may be described as containing substantive rights. Most significantly for this thesis is that the Convention represents a defined shift away from protective rights, or more accurately needs, and the focus primarily on the physical vulnerability of children that can be seen in the Declarations of 1924 and 1959, towards children as actors in society with requisite rights of involvement in decision making. As my thesis will explore, this shift towards participation rights in the Convention is the area where the greatest impact can be seen on the children's hearings system.

The most significant feature of the UNCRC is that it gives children 'the right to have rights', which as Freeman has suggested is the most important right that any individual can have.[90] As well as recognising that children have the capacity to hold rights, the UNCRC also recognises that children have capacity to exercise those rights. This recognition of children as active players in matters that affect them, rather than purely as passive recipients in need of the protection of others, is significant for the development of the children's hearings system. However, the Articles in the Convention have been described as 'a strange mixture of idealism

[87] All UN member states have ratified or acceded to the Convention with the exception of the United States of America.

[88] For example, the preamble refers to the family, in particular the children of the family, needing 'protection and assistance' and the child being in need of 'special safeguards and care'.

[89] For example, Article 12 provides that 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' Thus, while the participation of the child in the proceedings is ensured, the view they express does not need to be followed by the decision maker, thereby offering a level of protection.

[90] Freeman (n72).

and practical realism'[91] and not all the 'rights' in the UNCRC are specific rights, with some still representing a remnant of children's needs seen in the previous Declarations. Freeman argues in general terms that 'many references to children's rights turn out on inspection to be aspirations for the accomplishment of particular social or moral goals.'[92] For example, Article 24(1) sets out an aspiration that:

> *'States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.'*

This Article does not guarantee a child's legal right to access to healthcare. Instead, it sets out that member States 'recognise' the existence of a right (which in the context can mean only a moral right) and should 'strive to ensure' access to healthcare services. In addition, the insufficient attention to the circumstances of some groups of children is a further weakness of the Convention. For example, in relation to disabled children, although they come within the scope of the non-discrimination provision in Article 2, there is no promotion of inclusion which does not prevent segregation;[93] there is no mention of LGBTQI+ children at all within the Convention; and children who are without a family are given little or no attention, such as street children or unaccompanied asylum seekers. Nevertheless, the rights contained in the UNCRC go beyond those typically found in human rights documents.

Since the United Kingdom signed and ratified the Convention its influence can be seen on the development of the children's hearings system.[94] The White Paper published in 1993 as the

[91] Fortin (n72) 37.

[92] Freeman (n72) 37.

[93] MDA Freeman, 'The Future of Children's Rights' (2000) 14 Children & Society 277.

[94] It should be noted that there was a reservation to the original ratification of the UNCRC related to the operation of the children's hearings system and Article 37(d), which was subsequently removed when the Children (Scotland) Act 1995 came into force. The reservation related to the ability to detain a child in a place of safety for up to 7 days prior to attendance at a children's hearing. Kenneth McK. Norrie, *Legislative Background*

precursor to the first significant legislative change to the children's hearings system through the Children (Scotland) Act 1995,[95] set out principles to incorporate 'the philosophy of the United Nations Convention on the Rights of the Child.'[96] In chapter four I will discuss the influence of the UNCRC on the next substantial legislative change to the children's hearings system through the Children's Hearings (Scotland) Act 2011, the legislation that governs the operation of the children's hearings system today.[97] The Policy Memorandum on introduction of the Bill to the Scottish Parliament stated that 'The Scottish Government is committed to the United Nations Convention on the Rights of the Child (UNCRC) and to promoting and supporting the rights of children in Scotland.'[98] And further 'children and young people in Scotland need a system which … reflects Scotland's commitment to the UNCRC.'[99]

Children's participation rights

The centrality of the participation of children within the UNCRC has led to participation gaining greater prominence judicially, academically and practically within the legal system throughout the 1990s and 2000s in particular.[100] Sutherland points out that, in the immediate

to the Treatment of Children and Young People Living Apart from their Parents (Scottish Child Abuse Inquiry, 2017) 370 – 371.

[95] Scottish Office Social Work Services Group, *Scotland's Children: Proposals for Child Care Policy and Law* (Cmnd 2286, 1993).

[96] Susan Elsley, *Review of Societal Attitudes of Children for the Scottish Child Abuse Inquiry* (Scottish Child Abuse Inquiry, 2017) 44.

[97] At p161.

[98] Scottish Government, *Children's Hearings (Scotland) Bill Policy Memorandum* (Scottish Parliament, 23 February 2010) 11.

[99] Ibid, 16. The recently passed UNCRC (Incorporation) (Scotland) Bill seeks to make the terms of the UNCRC directly enforceable in Scottish courts.

[100] As noted above (n37), participation, particularly of children and young people, is a key concept in other disciplines as well as law for example, education and social work. Gerison Lansdown, 'International Developments in Children's Participation: Lessons and Challenges' in Kay Tisdall et al, *Children, young people and social inclusion: Participation for what?* (Policy Press, 2006) 139; Gerison Lansdown, 'The realisation of children's participation rights: Critical reflections' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009); Elaine E Sutherland, 'Listening to the Voice of the Child: The evolution of participation rights' NZLR 2013(3) 335-355; The UN Committee on the Rights of the Child 'General Comment No. 12: The Right of the Child to be heard' (2009)

years after the UNCRC entered into force, participation was not one of the first priorities in implementing the rights set out within the Convention.[101] However, by the beginning of the 21st century just over a decade later participation had become much more significant and by 2002, Sutherland states, 'participation rights, it seems, had finally found a place at the top table.'[102]

The concept of participation, its theoretical basis and what it encompasses in practice lacks a settled definition that crosses the variety of disciplines in which the term is used. In 2009 Nigel Thomas and Barry Percy-Smith wrote in the introduction to their 'Handbook' on children and young people's participation that:

> *we think the time is right for such a book, not only because of the wealth and variety of activity that now takes place under the umbrella of children and young people's participation, but also because it is a field, to use a resonant phrase 'in search of definition'.* [103]

The absence of a settled definition can present a challenge in discussions about participation and thus at the outset it is necessary to set out the meaning of the term in the context in which it is being used. In this thesis I will adopt the description of the term 'participation' given by the UN Committee on the Rights of the Child in its General Comment No.12 published in 2009 where it stated that the term participation:

CRC/C/GC/12 1 July 2009, 3. Hereinafter 'General Comment No. 12'. It has been argued that a theoretical framework for participation is necessary to truly reflect the complexities of the concept. Karen A Malone and Catherine Hartung, 'Challenges of participatory practice with children' in Percy-Smith and Thomas (eds) (above).

[101] Elaine E Sutherland (n100) 349.

[102] Ibid, 350. While the discussion in this section focuses on participation rights within the UNCRC, as I discussed in part i of this section above (at p22), although the ECHR itself contains few references to children, this has not prevented the European Court from also developing its jurisprudence in relation to children's participation in matters that affect them.

[103] Nigel Thomas and Barry Percy-Smith, 'Introduction' in Percy-Smith and Thomas (eds) (n100) 1.

is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.[104]

Therefore, on this basis I use the term 'participation' to describe a process of ongoing involvement with reference to three specific areas: information sharing with the person to inform their involvement; the opportunity the person has to give views on the decision to be made, with representation if required; and finally the person understanding how their views have been considered by the decision-maker and how the decision has been made.

The starting point for any consideration of children's participation in terms of the UNCRC is Article 12, which states:

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Despite the special status afforded to it by the UN Committee, in that it is one of the four general principles that underpin the operation of the Convention as a whole,[105] Article 12 is not the only provision that has driven the growth in participatory approaches. In considering the description given of participation by the UN Committee in its General Comment, Article 12 does not encompass the full range of the definition.[106] The Article requires that a child,

[104] UN General Comment No 12 (n100) 3.

[105] The other 'general principles' are Article 2 (freedom from discrimination), Article 3 (best interests of the child shall be a primary consideration) and Article 6 (right to life, survival and development).

[106] UN General Comment No 12 (n100).

who is capable of forming views, be permitted to express those views freely and that those views be given due weight by the decision maker in accordance with the age and maturity of the child. It does not, on its face, extend to the other elements of participation such as the access to information on which to base views or an understanding of how their views have been taken into account and the decision reached by the decision-maker. Nor does it convey an ongoing nature to participation. Given the breadth of the concept of participation the danger of deriving participation solely from Article 12 is that 'children's participation continues to be dominated by one-off processes, rather than by a clear set of commitments and actions of children's civil rights.'[107] To mitigate this danger, as Lansdown has suggested, I argue that participation must be seen as resulting from a group of rights within the UNCRC rather than simply an enactment of Article 12.[108] Other rights enshrined in the UNCRC that contribute to participation would be Article 13, which provides for a right to freedom of expression; Article 23, which states that mentally or physically disabled children should be able to actively participate in the community; Article 37(d), requiring that children deprived of their liberty shall have the right to legal assistance and to challenge their detention promptly; Article 40(2)(b)(ii), which states that every child accused of a criminal offence shall have the right to be informed of the charges and to have legal representation and interpretation services. Further, since the UNCRC is drafted broadly, Articles with a more general scope such as the right to education in Article 28 and the right to freedom of thought, conscience and religion in Article 14 would have relevance to rights of participation understood in the widest sense.

The UNCRC is a Convention on the rights of the child, however its reach also extends to those adults who are significant in the child's life. In the context of the children's hearings system Article 9(2), which states that 'In any proceedings [in connection with separation of a child from her parents] … all interested parties shall be given an opportunity to participate in the proceedings and make their views known', is central since this right extends to 'all interested parties', which would encompass the child and those with a role in the child's care. Two things

[107] Save the Children, 'Children as Active Citizens: A Policy Programme Guide' (Bangkok: Interagency Working Group on Children's Participation, 2008) as quoted in Malone and Hartung (n100) 27.

[108] Lansdown (n100).

are of particular note about this Article, that its reach extends to adults as well as to children and the use of the word 'participate.'

From this discussion related to children's rights, it can be seen that during the period that the children's hearings system has been in operation the children's rights landscape has also been evolving, both in terms of the recognition of children's rights as a group and in relation to specific rights, especially the right to participation of the child in matters that affect them. How this has impacted on the children's hearings system will be explored in subsequent chapters.

iii. Child Abuse and Neglect

Alongside the specific legal developments related to legal rights a third change which I suggest in this thesis is relevant to the application of legal rights in the children's hearings system relates to our understanding of child abuse and neglect and the role of the State in preventing and responding to it.

As I will explore in chapter three the children's hearings system has seen a fundamental shift in the issues that are being brought to its attention, from a predominant focus on children who were alleged to have committed criminal offences in the early years to a now central focus on children and young people who have experienced, or are at risk of experiencing, abuse and neglect.[109] This shift in focus is notable since neither the Kilbrandon Report nor the

[109] As discussed in chapter three, statistics were not systematically collected in the early years of the operation of the children's hearings system, but figures from different individual studies can be collated to provide a picture of the types of issues that were identified as the primary reason for a child to be referred to the Children's Reporter. For example, in 1972 offence referrals made up 92% of all referrals to the Children's Reporter (Stewart Asquith, *Children and Justice* (Edinburgh University Press, 1983) 130). By 1974 this was 85% (Joe H Curran, *The Children's Hearings System: A Review of Research* (Scottish Office – Central Research Unit, 1977) 5). In 1993 the White Paper that preceded the Children (Scotland) Act 1995 reported a fivefold increase in 'care and protection' grounds between 1980 and 1990 (The Scottish Office Social Work Services Group 'Scotland's Children: Proposals for Child Care Policy and Law' (Cmnd 2285, 1993) 5.2). Referral statistics became more systematically reported by the Scottish Children's Reporter Administration from 2003/2004 onwards and are now available for each year since that time via an online dashboard on www.scra.gov.uk. These statistics show that in 2003/2004 32% of

subsequent White Paper setting out the Government's proposals for what became the children's hearings system placed much emphasis on children who had experienced abuse and neglect. As the Kilbrandon Committee itself pointed out, it is often the same children who have experienced, or are at risk of experiencing, abuse and neglect and who are accused of criminal offences but nonetheless the shift in focus is, I argue, significant to the protection and promotion of legal rights.

I will argue in this thesis that this shift is important when viewed through a legal rights lens. In situations of child abuse and neglect there are three sets of interest at play: those of the child in being protected from the abuse and neglect, those of the parent or carer whose interest in relation to the exercise of their responsibilities and rights related to the child may be qualified by the law's response to abuse and neglect, and those of the State in terms of discharging its obligations to the child and to wider society.[110] Therefore, decision-making in this area often requires a balance to be struck between potentially competing legal rights of children and adults, and between adults, more so than in relation to children and young people whose behaviour is the predominant cause for concern and where the legal rights of the child and their parent are less likely to be out of line with each other.

What constitutes child abuse in the eyes of the law is not a straightforward matter.[111] As Radford *et al* set out, historically our understanding of child abuse, neglect and the need for the protection of the child by the State has changed and therefore comparisons, trends and prevalence rates over time are necessarily challenging to provide robustly.[112] However, with that caveat it is possible to identify a general trend towards an increase in reported cases to

children referred were referred on offence grounds. By 2010/11 this dropped to 19% of children referred to the Children's Reporter and for the last decade the figure has hovered between 14% and 21%.

[110] The State has a positive obligation under the ECHR to protect the child from abuse and neglect. See, for example, *A v UK* (1998) 27 EHRR 611, *Osman v UK* (2000) 29 EHRR 245, and, especially, *E v UK* (2003) 36 EHRR 31.

[111] Malcolm Hill and Kathleen Murray and Kay Tisdall, 'Children and their Families' in John English (ed), *Social Services in Scotland* (4th ed, Mercat Press, 1998) 102.

[112] Lorraine Radford et al, *The Abuse of Children in Care in Scotland: A Research Review* (Scottish Child Abuse Inquiry, 2017) 57.

statutory authorities but alongside a decline in the actual prevalence of certain types of abusive behaviour towards children.[113] This would suggest that, in very general terms, society has become more aware of child abuse and more willing to act in relation to it, rather than child abuse happening more frequently to children now than in the past.

Concern about the welfare of children and their experience of abuse and neglect is not something that coincided with the creation of the children's hearings system in the 1960s. From as far back as the mid-nineteenth century concerns were being acted upon in relation to the welfare of children[114] and towards the end of that century there was a rise in non-State actors such as, what came to be known as, the Royal Scottish Society for the Prevention of Cruelty to Children (RSSPCC)[115] taking an active role in seeking to protect children. In the first half of the twentieth century the law was taking increasing cognisance of the welfare of children and the State became gradually more involved in working with the non-State actors, eventually taking more direct and wide-ranging responsibility following the enactment of the Social Work (Scotland) Act 1968. [116] Crucially, however, prior to the 1968 Act the legislation permitted the State to act when matters were brought to its attention rather than setting out a preventative duty that characterises modern legislation in this area. While the Children Act 1908 did little more than consolidate much of the existing law and practice that was in place at that time, nonetheless it was celebrated as 'the Children's Charter' due to its symbolism. A significant shift towards public authorities offering protection rather than charitable bodies was effected by the Children Act 1948, which introduced a duty on the part of local authorities 'to receive into their care' a child who has been abandoned by his or her parent or guardian,

[113] Ibid.

[114] Kelly has traced this interest to mid-nineteenth century philanthropy. Christine Kelly, 'Continuity and Change in the History of Scottish Juvenile Justice' Law Crime and History (2016) 1.

[115] The RSSPCC in Scotland was formed by an amalgamation of the Glasgow Society for the Prevention of Cruelty to Children (est. 1884) and the Edinburgh and Leith Children's Aid Refuge Society in 1889, before a further merge with its English counterpart in 1895. It received a Royal Charter to become the RSSPCC in 1922. Gary Clapton, ''Yesterday's Men': The Inspectors of the Royal Society for the Prevention of Cruelty to Children, 1888 – 1968' Br J Soc Work (2009) 39, 1043-1062.

[116] For a comprehensive account of the legal history of child protection in Scotland see Norrie (n83). See also John Pierson, *Understanding Social Work: History and Context* (Open University Press, 2011).

or is lost, a child whose parents or guardian is temporarily or permanently prevented 'by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing' where the intervention of the local authority was 'necessary in the interests of the welfare of the child'.[117] s1(3) of the 1948 Act also states that where a child is in the care of a local authority, that authority has a duty to return the child to the care of the parent, or a relative or friend, where it is consistent with the welfare of the child. Parton has argued that with this emphasis on keeping the child and his or her family together the 1948 Act represents a move further away from the child rescue philosophy that predominated amongst charitable institutions in the previous century.[118] Further he argued that the Act:

> *was of significance in giving state recognition to the professionalised model of social work which replaced the administratively patterned approach that had been the hallmark of the Poor Law and Public Assistance.*[119]

While this is undoubtedly true, the Act remained limited to certain groups of children who were perceived as being 'in need', as evidenced by the preamble that describes the Act as one to:

> *make further provision for the care or welfare … of boys and girls when they are without parents or have been lost or abandoned by, or are living away from, their parents, or when their parents are unfit or unable to take care of them …*[120]

The proactive duty within the Social Work (Scotland) Act 1968 to 'promote social welfare by making available advice, guidance and assistance'[121], alongside the formalisation and development of social work practice would come to influence how the State responded to

[117] Children Act 1948 s1(1).

[118] The child rescue or saving philosophy is discussed by Claire McDiarmid, *Childhood and Crime* (Dundee University Press, 2007) 123.

[119] Nigel Parton, *The Politics of Child Abuse* (MacMillan Education, 1985) 42.

[120] Ibid.

[121] s12(1). This proactive duty was seen for the first time within the Children and Young Persons Act 1963 s1(1).

child abuse and neglect and in turn the underlying nature of referrals to the children's hearings system.

As well as an increased role for the State to act, society gained a better understanding of where and how child abuse and neglect took place throughout the twentieth century. In the late nineteenth and first half of the twentieth century the child protection issues were seen (as indeed crime was) as almost exclusively within the domain of the working class, with matters of physical neglect by parents engaged in alcohol use, criminality and prostitution the dominant welfare concerns. Using an analysis of the RSSPCC archives from 1888 – 1968 Clapton concluded that cleanliness in the home and the physical presentation of children, principally the presence of head lice, were the Society's preoccupation as this Circular to Inspectors from 1909 demonstrates:

> *The following points should be specially noted about the family: – a) state of their health, conditions of their clothing, beds and bedding, their personal cleanliness — state of vermin present and where; b) the appearance and condition of the home — cleanliness, furniture, fire and food; c) the character of the parents or guardians and the earnings of the family should be reported.*[122]

In the 1960s there was a 'rediscovery of child abuse'[123], prompted by Kempe's work related to 'the battered baby'.[124] These matters of physical child abuse were being debated and led by the medical professions, to the extent that Parton suggests that 'increasingly the ideology of social work reflected a medical model with perceptible psychoanalytical influences.'[125] The medicalisation of physical abuse centred on the presenting issues requiring a diagnosis and treatment as opposed to the responsibility attaching to the perpetrator and the underlying

[122] NSPCC Circular, 1909, quoted in Clapton (n115). Clapton's study also demonstrates that children were viewed as the 'objects of concern', rather than individuals in their own right, with rare examples of a child being spoken to by an Inspector. See also Elsley (n96) 23.

[123] Harry Hendrick, *Child Welfare: Historical Dimensions, Contemporary Debate* (Policy Press, 2003) 159.

[124] Work related to what was described as 'battered baby syndrome' began in the US in the mid-1940s. ibid 161 – 162.

[125] Parton (n119) 44.

social factors that are now known to influence the prevalence of child abuse.[126] As will be discussed in chapter two, the medicalisation of the issues is also evident from the Kilbrandon report that espoused the 'treatment' of children and young people.[127]

In the 1970s, 1980s and early 1990s a series of public cases involving child abuse and neglect in the United Kingdom led to increasing political and public focus on how the State kept children safe from harm.[128] The death of Maria Colwell in England in 1973[129] and the subsequent inquiry of 1974[130] followed by the deaths in England of Jasmine Beckford (1984), Tyra Henry (1984), Heidi Koseda (1984), Kimberley Carlisle (1986), Karl McGoldrick (1986), Liam Johnson (1987) and Sukina Hammond (1988) brought matters of physical abuse and neglect to the attention of the public.[131] By the late 1980s it was sexual abuse that was beginning to receive the attention of the public. Events in Cleveland and the subsequent Inquiry in 1987 in England and in Orkney in 1991 and the subsequent Inquiry in 1992 in Scotland brought awareness of child sexual abuse, and the response of the law to it, into sharp focus. As well as the increasing attention to the existence of sexual abuse, Parton has argued that events in Cleveland shifted the existing public perception of child abuse occurring

[126] Harry Hendrick, *Child Welfare: England 1872 – 1989* (Routledge, 1994) 254.

[127] 'Treatment' is also a word still used in the current legislation, for example in the Children's Hearings (Scotland) Act 2011, s91(3) to describe the circumstances in which a children's hearing must make a compulsory supervision order for a child.

[128] Elsley (n96) 41.

[129] Maria was 6 years old when she was killed by her step-father in January 1973. Maria had spent much of her life in the care of her aunt and uncle due to concerns about her mother's ability to look after her but was returned to the care of her mother and step-father three months prior to her death. A critique of the child care issues and questions arising from Maria's short life can be found in John G Howels, *Remember Maria* (Butterworths, 1974).

[130] The Inquiry was chaired by Thomas Gilbert Field Fisher and its *Report of the Committee of Inquiry into the Care and Supervision Provided in Relation to Maria Colwell* was published in 1974. It has been suggested that this report 'has come to symbolize a sea change in British child welfare practice and public attitudes to it.' Olive Stevenson, 'It was more difficult than we thought: a reflection on 50 years of child welfare practice' 1998 Child Fam Soc Work 153-161, 159.

[131] Pierson (n116) 175.

only in 'the marginalised and the disreputable sections of society'[132] to a recognition that abuse can take place in any family in any location; and the same can also be said of the events in Orkney, which did not involve so called 'marginalised and disreputable' families. Since this time our understanding of the nature of child abuse and neglect has continued, and continues, to evolve. Issues such as sexual exploitation, child abuse through online methods and emotional or psychological abuse have all come to the attention of both the practitioner and the public.[133]

There are two particular aspects of this discussion that are of relevance to this thesis; the change in the involvement of the State in matters of child abuse and neglect, which coincided with the early period of establishment and operation of the children's hearings system, and our changing understanding of the types of abuse that a child can experience, an understanding that continues to grow today. Changing societal attitudes and understandings of child abuse and neglect, its forms and enablers undoubtedly had an impact on the nature of issues that the children's hearings system was being asked to deal with. This is an important change when viewed through a legal rights lens as the children's hearings system has moved from a situation where the behaviour of the child, in particular his or her offending, is the dominant concern of the decision-makers, towards a situation where the child's health (emotional as well as physical) and security are the primary issues, and thus away from circumstances in which the legal rights of the child and his or her parents and carers are unlikely to be in conflict. When a child who has received inadequate parenting from their parent or carer, in whatever form or forms, is considered the need for a careful balance to be struck between the legal rights of the child and his or her parent, and potentially between the adults involved in the child's care, is apparent. There is also potential for a higher degree of disagreement and confrontation when a parent is accused of maltreating their child.

To conclude this section, I have set out and discussed three central areas of change relevant to the protection and promotion of legal rights since the children's hearings system was

[132] Nigel Parton, 'Protecting Children: A Socio-historical Analysis' in Kate Wilson and Adrian James, *The Child Protection Handbook* (2nd ed, Bailliere Tindall, 2001) 18.

[133] Elsely (n96).

created: the understanding of and respect for children's rights, the prominence of legal rights set out in the ECHR domestically and finally change related to our understanding of, and State involvement in the protection of children from, abuse and neglect. The fundamental proposition that I seek to establish in this thesis is that the children's hearings system has demonstrated its ability to evolve in its protection and promotion of legal rights in light of these areas of change. How it was able to do this is the issue my principal question seeks to explore.

E. Structure

After this introduction, the thesis is set out in four subsequent chapters. Chapter two will offer a historical perspective on the conception and construction of the children's hearings system during the decade from 1961 - 1971. A detailed analysis of the Kilbrandon report and the enactment of the Social Work (Scotland) Act 1968 will be undertaken with the aim of establishing the principles on which the children's hearings system was originally based. This chapter will establish that legal rights were accommodated within the children's hearings system from the outset, albeit in a more limited way than is required today, and particularly for adults and children accused of criminal offences. This base is what has allowed the children's hearings system to evolve to meet modern demands in this area, as will be explored in subsequent chapters.

Through a lens of legal rights chapter three will consider the development of the children's hearings system from its inception in 1971 to 1997, marking the point at which the first piece of major legislative reform via the Children (Scotland) Act 1995 entered into force. The chapter will consider the areas that attracted academic and judicial scrutiny in relation to legal rights as set out in legislation alongside their application in practice. The purpose of this chapter to the thesis is to consider how legal rights were conceptualised in the early period of the operation of the children's hearings system and the extent to which they were considered to be an integral part of its operation. It will be argued that while a limited form of legal rights was built into the legislation from the early days, this did not fully translate into practice, where a much greater value was placed on making decisions in the best interests of the child or young person and at this time promoting and respecting an individual's legal rights was not viewed as a fundamental part of making decisions in the best interests of the child.

The inconsistency in application of legal rights came into sharp focus during a period of intense scrutiny of the children's hearings system in the early 1990s.

Chapter four will consider the period from the turn of the 21st Century to the present day, which has been a period of intense development for the children's hearings system. The response of the children's hearings system to the coming into force of the Human Rights Act 1998 and the Scotland Act 1998 will be considered, alongside the enactment of the current legislation that underpins the operation of the children's hearings system, the Children's Hearings (Scotland) Act 2011, and the case law that has been reported at shrieval, Court of Session and Supreme Court levels. I will argue that this period demonstrates the ability of the children's hearings system to accommodate the more expansive understanding of legal rights in our law today, an evolution that has strengthened the principles on which the system was based in the 1960s, but that further legal technicality has been introduced to the legislative provisions setting out how the system operates in contrast to previous legislation from 1968 and 1995.

Finally, the thesis will conclude with a detailed consideration of the principal question that was posed at the outset, namely how has the children's hearings system developed in response to an increased focus on protecting and promoting legal rights in Scots law, and do the developments represent an evolution of or revolution away from the principles that inspired its original design? This will be followed by discussion of the need for the continued evolution of the children's hearings system and how this can be done whilst retaining the Kilbrandon principles as providing the underlying ethos of the children's hearings system.

The law discussed in this thesis is stated as at 31 December 2021.

Chapter Two: The Conception and Construction of the Children's Hearings System 1961 – 1971

This chapter will examine the conception and construction of the children's hearings system during the decade from 1961 - 1971. A detailed analysis of the Kilbrandon Report[1] and the enactment of the Social Work (Scotland) Act 1968 will be undertaken in order to establish the principles on which the children's hearings system was based, and to show the extent to which procedural and substantive legal rights, as understood at the time, were incorporated into the system at its outset. I will argue that the approach to decision-making recommended by the Kilbrandon Committee and implemented by the Westminster Parliament recognised both the welfare of the child as the basis for action and that the children's hearings system was part of the wider legal system that had to protect the child and his or her family from unnecessary interference with their family life by the State. Therefore, what was envisaged was not a purely welfare-based system of decision-making; rather it was a legal decision-making system based on the primacy of the child's welfare[2] and as such the system recognised, in certain respects, the legal rights of individuals from the outset. While this is particularly so in respect of the rights of the adults, the rights of children too were included to a certain extent. It is this base that has allowed the children's hearings system to evolve to meet modern demands in this area, as I will show in subsequent chapters.

A sub-theme to the discussion in this chapter is the extent to which the principles on which the children's hearings system was constructed broke from the past. The Kilbrandon report,

[1] Scottish Home and Health Department; Scottish Education Department, *Report of the Committee on Children and Young Persons, Scotland* (Cmnd 2306, 1964). Hereinafter 'The Kilbrandon Report'.

[2] A decision-making system with the child's welfare as a primary or paramount consideration was not a new advent to Scots law. Private law matters had been decided in this way since the Guardianship of Infants Act 1925 and, as discussed in Section A below, the welfare of the child accused of a criminal offence had been a factor for decision makers for some years prior to the conception of the children's hearings system.

and the proposals it made, are often described with words like 'radical'[3] and 'visionary.'[4] Professor Fred Stone, himself a member of the Committee, stated in 1995 that the report 'gave rise to a new direction.'[5] However, in this chapter I will show that the extent to which the Committee broke from what went before was not as extensive as these claims suggest. Rather the Committee drew from existing elements of what it viewed as desirable practice and combined and enhanced these with some new elements. The difference achieved through the implementation of the proposals of the Kilbrandon Committee was to ensure these principles and practices were implemented with consistency across Scotland. This sub-theme is relevant to the principal question because it establishes the extent to which the Kilbrandon Report itself represented an evolution or revolution in the response of Scots law to children in need of care and protection from the State.

In order to explore these issues, this chapter will be structured in three sections.

A. Children and the Law Before the Kilbrandon Committee
B. The Kilbrandon Committee and its Recommendations
C. Implementation of the Recommendations Within the Social Work (Scotland) Act 1968

A. Children and the Law Before the Kilbrandon Committee

To have a full understanding of the development of the children's hearings system it is important to set its creation within the legal context at the time. Only by examining how the law responded to children in need of an intervention from the State before the changes that would come at the end of the 1960s can we fully understand the context in which submissions to the Committee, and the eventual conclusions arrived at, were made.

The picture in relation to children and the law in 1961 was one of fragmentation and inconsistency across geographical boundaries. In general, children alleged to have committed

[3] Lord Fraser of Carmyllie, 'Foreword' in Stewart Asquith (ed), *The Kilbrandon Report* (Children in Society series, 1995) vii; Kenneth McK. Norrie, *Children's Hearings in Scotland* (3rd ed, Sweet & Maxwell/ Thomson Reuters, 2013) 1-01; Nigel Bruce, 'Historical Background' in FM Martin and Kathleen Murray (eds), *The Scottish Juvenile Justice System* (Scottish Academic Press, 1982) 9.

[4] Christine Kelly, *Juvenile Justice in Victorian Scotland* (Edinburgh University Press, 2019) 170.

[5] FH Stone, 'Introduction' in Asquith (ed) (n3) ix.

offences and children deemed in need of care and protection were treated differently by the law and by different agencies. Children's circumstances were dealt with according to the core issue that had brought the child to the initial attention of the law; as being beyond the control of their parent or guardian,[6] as alleged to have committed offences, as in need of care and protection and finally as persistently truanting from school.[7] This inconsistency and fragmentation also extended to the type of forum in which the child's circumstances were considered. There were a variety of different courts in operation to consider juveniles in Scotland: the most common being Sheriff Courts, Burgh or Police Courts, specially constituted Justice of the Peace Juvenile Courts and Justice of the Peace Courts. The Kilbrandon Committee found that in 1962 32% of court business in this area was dealt with in the Sheriff Court, 45% in the Burgh or Police Courts, 16% in a specially constituted Justice of the Peace Juvenile Court and 7% in other Justice of the Peace Courts.[8] In most areas, in line with long established practice whereby the sheriff had both criminal and civil jurisdiction, the same type of court would deal with children accused of criminal behaviour as well as situations where the child had been abused or neglected and the civil protection of the law was required, save for Glasgow and Edinburgh which had different fora arrangements.[9] Not only, however, were the fora different but the personnel who staffed the different courts were also different between whether they had a legal background, a lay background and any particular expertise in relation to children and their lives.[10] The picture was described by the Approved Schools Association in its written evidence to the Kilbrandon Committee thus:

> *At present there is a large variety of courts, all dealing with juvenile offenders. There are courts where the Bench consists of two Justices of the Peace with an assessor; juvenile courts presided over by a Bailie or Police Judge assisted by an assessor; juvenile*

[6] Referred to as 'refractory' children.

[7] These four categories were identified within the Kilbrandon Report, 6 – 15.

[8] Kilbrandon Report, 45.

[9] Kilbrandon Report, 46.

[10] Kilbrandon Report, 43.

courts consisting of a bench of three, one of whom is a woman; juvenile courts presided over by a Stipendiary Magistrate; and juvenile courts presided over by a Sheriff.[11]

Looking further, a number of differences can be identified between the way in which children whose own behaviour was the presenting issue and children where behaviour towards them was the issue were treated by the law.

i. Children accused of criminal behaviour

Children who came to the attention of authorities being accused of having committed an offence were dealt with at the behest of the public prosecutor, who was also responsible for the prosecution of adults.[12] While the criminal procedure did not distinguish on the basis of age, the age of the child was viewed as a mitigating factor in questions of sentencing.[13] Punishment for wrong-doing was the overriding consideration of the law, although, as Kelly has traced, elements of what we may now view as a welfare based approach can be seen as far back as a century before Kilbrandon, such as a holistic approach to the 'treatment' of children in need with an emphasis on the responsibility and inclusion of families, as well as the involvement of communities in decision-making.[14] In relation to children accused of offences, the Children Act 1908 provided that children should be considered in different courts to adults[15] and set out a range of alternative sentencing options for children and young people by virtue of their age.[16] In relation to children whose behaviour was the presenting issue Kelly has argued that the first half of the twentieth century saw a shift from the institutionalisation of children who had committed offences, removed from their families for their own protection, that characterised the Victorian period to greater use of probation, admonition and fines.[17] After a finding of guilt the court would then make an order or

[11] The National Records of Scotland: ED11/633 'Memorandum by the Approved Schools Association (Scotland) (undated) 26.

[12] Kilbrandon Report, 6.

[13] Kilbrandon Report, 55.

[14] Kelly (n4) 170 - 171.

[15] s111.

[16] s107.

[17] Kelly (n4) chapter 5.

authorisation deemed necessary and that would be the court's involvement at an end, unless of course the child was accused of further criminal behaviour in the future or there was a need for care and protection proceedings. As will be discussed further in section B below, the Kilbrandon Committee recognised that one of the weaknesses of the system in operation at the time was the lack of any mechanism whereby those responsible for discharging the court's decision could report back to advise whether the disposal was having the desired effect.[18] This deprived judicial decision-makers of any knowledge of subsequent outcomes, especially important in relation to children. In contrast to care and protection proceedings, background reports in relation to the child accused of a criminal offence were provided by the probation service as opposed to children's social services.[19] This is an important distinction since it demonstrates a different emphasis for children accused of criminal offences, of taking a more holistic approach to the child's needs as opposed to one of preventing reoffending.

ii. The abuse and neglect of children

At the time of the Kilbrandon Committee, children in need of protection from abuse and neglect had historically received less in the way of legal scrutiny than those children accused of committing criminal offences. As was set out in the introduction to this thesis, the Children Act 1908 brought together into one Act the legal system's response to children and set out various matters that would constitute offences against children. Thereafter, gradually throughout the twentieth century the law increasingly set out provisions designed to ensure the care and protection of children who come to the attention of the law not through their own behaviour, and there was a steady shift of the responsibility for ensuring the law was applied away from non-State actors and towards the State having the lead responsibility. This culminated in the Social Work (Scotland) Act 1968 as will be discussed later in this chapter. In addition, this responsibility on the State moved from a reactive responsibility when matters were brought to the attention of authorities to a preventative duty, first given legal effect by the Children and Young Persons Act 1963.[20] The move away from the institutionalisation of children discussed above in relation to children who had committed offences can also be seen

[18] Kilbrandon Report, 88.

[19] Kilbrandon Report 89.

[20] s1.

in relation to the treatment of children in need of care and protection, with a much stronger emphasis on keeping children together with their family with support being offered by an increasingly organised and professionalised social work service.[21] The Children Act 1948[22] created children's departments within Local Authorities with statutory responsibilities to children within their care and the Children and Young Persons Act 1963[23] obliged local authorities to help families, regardless of whether the child was in their care. In the 1960s non-State actors were still working alongside local authorities in a primary role to ensure a legal response was received by children where one was required. However, the characterisation of children as being 'in need', and to whom therefore local authorities might owe legally enforceable duties, was still confined to a relatively small group prior to the 1968 Act.

Where legal proceedings were required for a child in need of care and protection from the State, these proceedings were always court based though, as I set out above, there was a plethora of courts potentially involved and no uniform practice across Scotland. The agency responsible for the application to court varied on a regional basis with, in some regions, the public prosecutor or probation service presenting applications to the court on behalf of the local authority, even in the absence of any offending behaviour by the child.[24]

iii. The Morton Committee: A forerunner to Kilbrandon?

In 1925 a committee under the chairmanship of Sir George Morton was appointed with a remit:

> *To enquire into the treatment of young offenders and of young people whose character, environment or conduct is such that they require protection and training*

[21] Discussed in the introduction at pages 34 - 36.

[22] This legislation followed from Home Office, *The Report of the Care of Children Committee* (Cmd 6922, 1946) (England) and Home Office, *The Report of the Committee on Homeless Children* (Cmd 6911, 1946) (Scotland).

[23] This legislation resulted from Home Office, *The Report of the Committee on Children and Young Persons* (Cmnd 1191, 1960) (England) and Scottish Education Department; Scottish Advisory Council on Child Care, *Prevention of Neglect of Children* (Cmnd 1966, 1963) (Scotland).

[24] Kilbrandon Report, 59.

and to report what changes, if any, are desirable in the present law or its administration.

The Committee reported three years later[25] and themes of parental responsibility, co-operation, and a greater role for education authorities in the prevention of juvenile delinquency are notable within the report, themes to which Lord Kilbrandon and his Committee would return some forty years later.[26] The Morton Committee proposed the transfer of cases involving children, both criminal cases and welfare cases, from the court responsible in that particular area to specially constituted Justice of the Peace Courts which would have specially adapted procedures capable of explanation to the child and his or her father who would also be in attendance. The Justices, a lay appointment, were to be specially chosen as a result of their 'special qualifications' and 'practical experience'.[27] The Lord Advocate should, however, continue to retain the power to prosecute a child in an adult criminal court. For the purposes of comparing the Morton proposals with those of the later Kilbrandon Committee it is of interest to note that the Justice of the Peace Courts were to be comprised of three Justices, at least one male and one female.

The Justice of the Peace Courts proposed by the Morton Committee were established by the Children and Young Persons (Scotland) Act 1932 and further consolidated by the Children and Young Persons (Scotland) Act 1937. In a stronger commitment to what went before, both Acts specifically stated that 'Every court … shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.'[28] The creation of Justice of the Peace Courts was not nationally mandated, however, and this proved to be a significant weakness in the implementation of the Morton recommendations. It was reported in the Kilbrandon Report in 1964 that only four areas embraced the legislation, Ayr,

[25] 'Protection and Training being the report of the departmental committee appointed to enquire into the treatment of young offenders and to report what changes, if any, are desirable in the present law or its administration.' (Scottish Office, 1928)

[26] Ibid, for example, 162, 165.

[27] Ibid 169.

[28] 1932 Act, s16; 1937 Act, s49(1).

Fife, Renfrew and City of Aberdeen.[29] Therefore, instead of improving the legal landscape for children, the developments resulting from the Morton report contributed further to the regionalised and inconsistent approach to children in contact with the law by introducing another type of court to which children could be referred depending on where they lived and it was an examination of this inconsistent approach that the Kilbrandon committee were faced with in 1961. That said, the Morton proposals around the Juvenile Courts provided a useful template for consideration by the Kilbrandon Committee and I shall now turn to the deliberations of the Kilbrandon Committee and its resulting recommendations.

B. The Kilbrandon Committee and its Recommendations

Drawing on the report itself and the archived papers that document the deliberations of the Committee, this section will explore the discussions and recommendations of the Kilbrandon Committee in depth. The purpose of this section is to provide the background and context for how the children's hearings system as a whole was conceived and the extent to which legal rights were built into the system at the outset as well as whether 'the new alternative'[30] broke with the principles and practices that were in place at the time. The initial section will consider the report and its recommendations, identifying four principles that the Committee suggested underpin the proposed new system and will assess the extent to which they were novel to Scots law. After this overview, the report and recommendations will be analysed through a legal rights lens to identify the extent to which legal rights were integrated within the proposals for what became the children's hearings system.

i. The Committee's report and recommendations

It is against the background of inconsistency and fragmentation in the application of the existing law described in the first part of this chapter that a Committee, under the chairmanship of Lord Kilbrandon, was appointed in May 1961 by the then Secretary of State for Scotland:

[29] Kilbrandon Report, 42.

[30] Kilbrandon Report, 72.

> *to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care and protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles.*[31]

Membership of the Committee comprised 13 individuals, a mix of members of the judiciary, police force, education and psychiatry professionals.[32] A number of methods were employed by the Committee in examining their remit: it received written and oral evidence from a variety of individuals and organisations,[33] examined government documents, visited juvenile courts and residential institutions. The Committee also examined in some detail the Scandinavian model of child welfare committees or boards.

Underlying principles

While not recommending that children should be removed from existing legal procedure altogether, the Committee concluded that the law in relation to children should reject the traditional crime-punishment model and instead the law should embrace 'a new alternative'[34] that took a social-educational approach to address the child's unmet needs. Such an approach should apply across Scotland in order to move away from the inconsistent practices that had developed up to that point.[35] Four closely related principles to underpin this 'new alternative' can be derived from the report and these will be used to analyse the recommendations and commentary in more depth.

[31] Kilbrandon Report, 1.

[32] As will be explored later in this section, in addition to the members of the Committee, the secretariat had a crucial role in gathering information and preparing papers for the discussion of the Committee.

[33] Appendix E to the Committee report provides a full list of contributors.

[34] Kilbrandon Report, 72.

[35] ' … a number of the witnesses who appeared before us urged the adoption of a uniform system or, short of that, a reduction in the number of existing types of juvenile court.' Kilbrandon report, 48.

1. The needs of the individual child should be 'the test for action'[36] and in considering those needs no distinction should be drawn between the four different 'categories' of children earlier identified by the Committee.
2. There should be a social educational approach to 'treatment' within which familial participation and co-operation should be an essential element.
3. Disposals should be made by a system of lay panels that have continual involvement throughout the 'treatment'.
4. The establishment of essential facts should be separate from the responsibility for 'treatment'.[37]

1. The needs of the individual child as 'the test for action'

The Committee identified the essential function of the legal system in the areas under consideration as being 'to effect, so far as this can be achieved by public action, the reduction, and ideally, the elimination, of juvenile delinquency.'[38] This, the Committee argued, could only be done by an informed assessment of the individual child's needs. When the individual child's needs were considered the Committee stated that the vast majority of witnesses who reported to them could see no practical difference between the four 'categories' of children identified by the Committee.[39] Instead all the children in these categories shared a common feature – for whatever reason the process by which they had been raised had failed to meet the expectations of society, to the extent that special measures of education and training were now required.[40] It is this principle that provides the welfare focus of the system.

A striking feature of the report is that it does not provide a definition of 'juvenile delinquency.' The term is used throughout the report, even after the principle of not distinguishing between 'categories' of children has been established. The most obvious interpretation is that it should be understood to relate to the child's behaviour, both criminal and sub-criminal, and some

[36] Kilbrandon Report, 77.

[37] These four principles are hereinafter referred to as 'the Kilbrandon principles'.

[38] Kilbrandon Report, 12.

[39] Kilbrandon Report, 13.

[40] Ibid.

support for this interpretation can be found in the remit of the Committee which mentions both 'juvenile delinquents' and 'juveniles in need of care and protection'. The extensive use of the term throughout the report is demonstrative of the fact that the primary focus in the minds of the Committee was on children whose behaviour was of concern; this is unfortunate given the conclusion of the Committee that there should be no distinction between children whose behaviour is the presenting issue and those where behaviour towards them is the matter of concern. However, that the behaviour of juveniles was the principal concern of the Committee is not surprising given the prevalence of offending in childhood against abuse and neglect of children that was reported at the time. The Kilbrandon Committee provided figures that in 1961 – 62 something in the region of 500 children had come to the attention of the courts for issues related to their care and protection[41] whereas in the same year just short of 22,000 children had criminal charges against them proved in court.[42] As I discussed in the introduction, the respective prominence of the issues at this time is an important factor through which to view the development of the system, particularly when considering the application of legal rights within the children's hearings system.

2. A social educational approach with familial participation

The second of the principles that can be derived from the recommendations of the Committee is that of the need for a social educational approach to effect change on the part of both the child and the parents as necessary. Such an approach allows decision makers to consider the 'treatment' required by the child rather than the sanction most appropriate to a crime committed.[43]

The role of the parents is a crucial theme throughout the Committee's report, in that the child should be viewed as an individual within the context of family relationships,[44] and therefore

[41] Kilbrandon Report, 9.

[42] Kilbrandon Report, Appendix A. That the statistics appear to be more readily available and robust for children accused of criminal offences as opposed to those in need of care and protection is also indicative of the profile of the respective issues at this time.

[43] Kilbrandon Report, 54.

[44] Kilbrandon Report, 17 and 21.

the whole family must be engaged in order to effect change.[45] The Committee stated that the decisions should 'be arrived at after extensive consideration and discussion with the parents as a result of which it would be apparent to all concerned that the measures applied were determined on the criterion of the child's actual needs.'[46]

The Committee was highly critical of the view that punitive measures, for example supervision or fines, should be applied to parents directly as a result of their children's behaviour, or as a result of the parent's own behaviour which fell short of a criminal offence. Instead the Committee favoured what was referred to as a social education approach for both the parents and the child where they are active participants in the process to bring about change:

> *This* [social education] *can work only on a persuasive and co-operative basis, through which the individual parent and child can be assisted towards a fuller insight and understanding of their situation and problems, and the means of a solution which lie to their hands.*[47]

It was the element of parental involvement and co-operation that the Committee argued was particularly lacking in the existing legal process. The term 'participation' does not appear within the Kilbrandon report, which is not surprising given the sustained development of the concept post-dated the Committee's report by around three decades. However, if the concept of participation is deconstructed there are indications within the Kilbrandon report to indicate that at least some elements of what we would now consider to be rights of participation were set within the foundations of the children's hearings system. The description of participatory practice I set out in the introduction was that it is a process of ongoing involvement that includes information sharing, an opportunity to provide views with representation if required and to understand how those views have been considered by the

[45] This focus upon parental co-operation is something that can be traced back to the Morton Report (n25) discussed above.

[46] Kilbrandon Report, 76.

[47] Kilbrandon Report, 35. The term 'social education' was one coined by the Committee and was an aspect of the report that came in for subsequent criticism.

decision-maker. If this description is applied to the Kilbrandon report there are elements present within the discussion in the report. For example, that it was expected that both the child and at least one parent would be present at a hearing, with representation if required, that the parent would be notified of the hearing and reasons for it and that the child, with his or her parents present, would be asked if they understood and 'admitted' the allegation.[48] However, there is little doubt that the focus of involvement within the report, especially of parents, was primarily related to engagement in order to effect change in the child's upbringing rather than a recognition of their legal rights, with the Committee stating that 'Wherever possible the aim must be to strengthen and develop the natural influences for good within the home and family, and likewise to assist the parents in overcoming factors adverse to the child's sound and normal upbringing.'[49]

The atmosphere in which the involvement took place was something recognised as important by the Committee:

> *we do not consider that it is either necessary or desirable to seek to lay down any rigid framework governing the panel's proceedings. The questions arising are in our view likely to emerge most clearly only in an atmosphere of full, free and unhurried discussion, as a result of which the underlying aim and intention is made apparent to all concerned.*[50]

Reflecting in 1995, Fred Stone, one of the members of the Committee, said that the 'radical proposal' within the report was to remove children from the adult criminal process in favour of having their case heard by a lay panel:

> *This, it was judged, would provide the necessary conditions for satisfactory assessment and appropriate disposal, namely: an informal, relaxed setting, with reasonably skilled interviewers provided with reliable background information, with adequate time to*

[48] Kilbrandon Report, 73 and 107.

[49] Kilbrandon Report, 140.

[50] Kilbrandon Report, 109.

> *promote effective communication between all concerned, and* especially, an atmosphere conducive to the child's participation.[51]

Similarly, when the modern construction of participation is considered there has been much emphasis on not only that opportunities to participate are given, but how these opportunities are given. Thus, this emphasis on the atmosphere in which the panels should operate within the Kilbrandon report can also be considered as establishing a foundation on which more recent legal rights developments could be incorporated within the children's hearings system. So, while our terminology today is different, and the basis on which we understand the necessity for participation has shifted towards a more explicit recognition of the protection and promotion of individual legal rights, the need for the involvement of the family was inherent within the Kilbrandon report. This foundation set by the early architects has allowed the children's hearings system to evolve to accommodate participation of both the child and significant others in the child's life as the wider legal understanding of participation developed subsequently. [52]

Given the strength of the argument proposed by the Committee for the 'new alternative' it is somewhat surprising that they advocated a concession to the punishment model they rejected – that the Lord Advocate should retain the right to prosecute a child alleged to have committed an offence in the criminal courts.[53] The Committee argued that this should be retained for two reasons - to protect the public interest and to ensure the rights of the accused by trying a child for the gravest of crimes according to criminal procedure.[54] This second argument for the retention of this power to prosecute is a difficult one to reconcile

[51] Stone (n5) x. Emphasis added.

[52] In chapter 4 of this thesis I will argue that as our understanding of participation has developed in the years since the children's hearings system began operation this has led to a stronger focus on the involvement of both children and adults.

[53] This was a residual power from the common law where the Lord Advocate retained the power to prosecute in exceptional circumstances where public policy demanded it. See Gerald Gordon 'The Role of the Courts' in FM Martin and Kathleen Murray (eds), *Children's Hearings* (Scottish Academic Press, 1976) 22.

[54]Kilbrandon Report*,* 125. It is also clear that public confidence in the 'new' system was something which the Committee was very aware of, for example at 126.

with the other principles within the report, for it suggests that the Committee was not satisfied that the new system it was proposing would protect the legal rights of the child accused of an offence to a sufficient degree. The rationale for this position potentially lies in some of the statistics about the operation of the law at that time on which the Committee based its proposals: that very few children and young people disputed that they committed the offence they were accused of. In this case the likelihood, as the Committee saw it, was that the evidence for the most serious crimes would never be tested in a traditional court setting since a referral to proof would be a rare event. Since legal representation was not deemed to be necessary at a children's hearing, in contrast to a court where the child receives assistance in relation to his plea, the child would also not receive the benefit of legal advice before pleading to a serious offence. Writing some years later Lord Kilbrandon was critical of the number of children still being prosecuted in the criminal courts.[55] Lord Kilbrandon suggested that this could either be driven by public opinion not being familiar with the operation of the system and its merits or reluctance from lawyers to change.[56]

3. The establishment of lay panels with continued involvement

The recommendation of the Committee to implement the first two principles was to create a system of locally-based panels, staffed by lay individuals with personal qualities either from knowledge or experience, rather than professional qualifications. These panels would decide on the appropriate measures for children brought before them with flexibility in the range of measures available to it.[57]

The lack of the continuing involvement of the court once a disposal had been decided on was a particular criticism of the existing process by the Committee and therefore it was recommended that the locally-based panels should maintain involvement with the child and

[55] Foreword to Martin and Murray (eds) (n53). Interestingly it is not the impact of the trial process on the child per se that Lord Kilbrandon is critical of but the lack of measures then available to the court on disposal, assuming the child is found guilty of the offence.

[56] Ibid.

[57] Kilbrandon Report, 74. The Committee specified that each panel should comprise three people, with at least one female member, and that the appointment should be voluntary and part-time; it was suggested that panel members should be willing to serve regularly and for a continuous period of at least three months per year, 92.

his or her family for as long as considered necessary.[58] For their effective operation the Committee felt it essential that the panels had a single executive agency, based within the existing education authorities but comprised of officers from various disciplines including social work, charged with providing reports to the panels, making recommendations as to the treatment measures required and implementing panel decisions.[59] As part of the principle of continuing involvement this agency should also have the power to report back to the panel at any time. The Committee also recommended that an independent official, called the Reporter, would determine the existence of prima facie evidence to support a referral to the panel and whether special educational measures were required for the individual child.[60] This individual would be the sole person responsible for referrals to the panel, would act as legal advisor to the panel and be responsible for the presentation of evidence to the sheriff in the event of issues of disputed facts being referred or appeals being made.[61] The Reporter would also arrange subsequent panels for reviews and be responsible for notifying the child's parents of their obligation to attend a panel.[62] The Kilbrandon Committee saw merit in situating the panel system within the existing legal framework, and so its Report recommended that the local sheriff be the person responsible for the appointment of panel members, a list of persons suitable having been provided to the sheriff by the proposed new social education authority.[63]

In terms of the operation of the panels the Committee envisaged that:

> *in practice, … the actual handling of cases, as they proceed before the juvenile panels, will rarely raise legal issues, and will for the most part be concerned with the measures to be applied in the children's best interests.*[64]

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[58] Kilbrandon Report, 90.

[59] Kilbrandon Report, 91.

[60] Kilbrandon Report, 98. It was thought that this official would have a background combing a legal qualification with knowledge and experience of child welfare 100.

[61]Kilbrandon Report, 100.

[62] Ibid.

[63] Ibid.

[64] Ibid, 98.

Instead, the panels would be concerned solely with treatment measures which would be practical in application. This is also reflected in the belief that it would be unnecessary and unwise to lay down a rigid procedural framework for panels to follow, beyond ascertaining whether there is a factual dispute surrounding the referral to the panel, in which case this should be resolved by the sheriff. Instead the Committee favoured the creation of an atmosphere of 'full, free and unhurried discussion'[65] which they thought likely to only be achieved by having the panels in private with only the family members and officials directly involved with them present.[66] This is the area where I will argue in chapter four of this thesis that the impact of the developments within Scots law related to legal rights has been the most prominent, in that there is now more of a procedural framework that children's hearings are required to follow to be proactive in upholding individual legal rights.

Although emphasising informality of proceedings the Committee recognised that panels would need powers to make a significant intrusion into family life and there would be cases where this intrusion would not be welcome despite the best efforts of panels to engage with the child and parents.[67] That such an intrusion was recognised to be a significant legal interference in families' rights to operate as they thought fit is shown by the recommendation that there should be an appeal to a sheriff against the panel's decisions. This would provide an important legal safeguard to protect the rights of the parent in relation to the child's upbringing.[68] Thereafter questions of law should be capable of appeal to the Court of Session, as opposed to the High Court of Judiciary as had been the case.[69] This is significant since the Court of Session is for civil matters as opposed to criminal matters, which go to the High Court of Judiciary. A further acknowledgement to the potential for significant interference in family life is the proposal that legal representation should be available in any court proceedings

[65] Kilbrandon Report, 109.

[66] The Committee reported that while it would be advantageous that both parents attend the panel, practical reasons may prevent both from doing so and in these circumstances the panel should not be prevented from consideration of the child's case. Kilbrandon Report, 107.

[67] Kilbrandon Report, 76 and 111.

[68] Ibid.

[69] Ibid 115.

(although not at the panels themselves) and that this should be State funded for those whose financial circumstances require it.[70]

4. Separation of establishing essential facts and disposal

The final, and I argue most significant, proposal for change was that the responsibility for adjudicating upon essential facts should be separate from the responsibility of deciding the treatment measures required for the child as a result of the established facts. This was a significant proposal because it can be properly regarded as an innovative approach for Scots law at the time. The adjudication of essential facts, it was recommended, would best be considered by a sheriff in a traditional court setting with the determination of treatment measures being made by the panel. This was considered to be the best approach since quite different skills are required for each – courts exist to determine disputes, balancing the rights and interests of opposing people, whereas the panels would be free to discuss and determine, together with the child and his or her family, the best way forward to address the matter of concern. As discussed above, the Committee found that in 95% of the cases examined there was no dispute as to the facts of the case and therefore it thought that the involvement of the sheriff in adjudicating the essential facts was unlikely to be common.[71]

[70] Ibid 116. As will be explored in the next section of this chapter the right of appeal and to legal representation were viewed at the time as the principal safeguards required for an individual's legal rights.

[71] Kilbrandon Report, 73. This can be contrasted sharply with the modern position where the majority of referrals to a children's hearing to consider a statement of grounds do result in an application to the sheriff for the grounds to be established. The recorded statistics in this area are complex and a corresponding percentage to the one reported by the Kilbrandon Committee is not readily reportable, but for example in 2019/20 3468 referrals were made to a children's hearing to consider new grounds and from these 2763 applications for proof were determined by the sheriff. SCRA Statistical Analysis 2019/20, available at https://www.scra.gov.uk/wp-content/uploads/2020/10/SCRA-Full-Statistical-Analysis-2019-20.pdf Reference has been made to 2019/20 since although statistics are available for 2020/21 it is likely that the statistics from this year will have been impacted by the global COVID-19 pandemic and will thus demonstrate a lower number of referrals and proofs to children's hearings and courts.

How radical was this 'new alternative'?

The Kilbrandon report has been described variously as being part of an 'evolutionary process' which started principally with the Children Act 1908[72], and as 'an extraordinary and complex blending of innovation and tradition.'[73] In seeking Ministerial approval to publish the report, civil servants as the time described the report as 'a radical one.'[74] To what extent are these descriptions accurate?

None of these descriptions is entirely inaccurate since there are elements of the proposals which adapt and strengthen the existing approach, particularly that developed in the Morton Report,[75] such as the focus on the needs of the child in determining the measures required, the removal of most children from the adult court process and into a separate forum for children, the involvement of lay people in the decision making, and the involvement of the parents in both the process and the outcomes. Added to this, however, there are areas of significant innovation, such as the principle of continuing involvement by the new panel system, the creation of a new official to act as the gatekeeper to the system (the Reporter) and, principally, the separation of disputed fact from disposal. Therefore, my argument is that the correct characterisation of the Kilbrandon proposals would be as developing what went before but with some innovation. The major practical difference effected by the new arrangements was to make them universal across the whole of Scotland. While this was not a new desire, it did become reality and thus it led to the end of the previous inconsistent and fragmented system described in section A of this chapter.[76]

Support for the argument that much of the Kilbrandon proposals were evolutionary can be derived from the Kilbrandon report itself where it is stated:

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[72] John P Grant, 'Juvenile Justice: Part III of the Social Work (Scotland) Act 1968' 1971 JR 149, 149.

[73] Sandford J Fox, *The 1991 Kilbrandon Child Care Lecture: Children's Hearings and the International Community*.

[74] The National Records of Scotland: ED11/632 'Draft Ministerial Submission, 31 January 1964' 5. They went onto say 'it will no doubt be quite unacceptable to some sections of public and parliamentary opinion, but others, possibly the majority, may welcome it.'

[75] Morton Report (n25).

[76] The implementation of the proposals in practice will be considered in detail in the next chapter.

> *If then the existing arrangements are nevertheless unsatisfactory, this does not seem to us to point to some new and totally different basis of approach, but rather to a consideration of the points at which the present machinery fails to give full effect to the educational principle on which the existing treatment measures in general purport to be based.*[77]

As I have discussed in the first section of this chapter, the statutory requirement to have regard to the child's welfare (and thereby to explore the child's needs) was not an alien concept for either the criminal law related to children accused of criminal offences or to the civil law related to children in need of care and protection from the State. Specific legislative commitment to considering the child's welfare can be found prior to the 1960s and even before that to the practices that were operating on a more informal basis during the nineteenth century. Similarly, the concept of a separate legal forum for children from that for adults, usually referred to as 'a Juvenile Court', was reflected in the law if not in national practice at the point the Kilbrandon Committee was convened.

It is not immediately clear why the Kilbrandon Committee favoured lay people to staff the newly created panels and an explanation of why they did so has been described as 'a significant omission.'[78] On a speculative basis it may have been to assist a better level of involvement by the child and his or her family, which, as discussed above, was one of the underlying principles that can be derived from the Committee's recommendations. It may also have been related to the determination of the appropriate treatment measures on disposal, alongside the perception that very few legal issues would be considered by the panel, and a view that people from the child's local community would have a better understanding of local issues and community resources. Community ownership and

[77] Kilbrandon Report, 36.

[78] Andrew Lockyer and Frederick H Stone, *Juvenile Justice in Scotland: Twenty Five Years of the Welfare Approach* (T&T Clark, 1998) 31. As will be discussed in the following section, however, in its discussions the Committee was exercised about the lay composition of the proposed tribunal and whether additional layers of decision-making should be built into the system for the most serious of cases.

perceived independence from other 'official' bodies may also have helped promote more public confidence in the system and in turn aid its success. However, when the arrangements in place at the time are considered the most likely explanation is that it was simply an extension of the lay involvement in decision-making that had been in place in many parts of Scotland for many years through the use of lay Justices of the Peace, and the personnel in police and burgh courts.[79] The overall approach of the Kilbrandon Committee was to examine the systems in place at the time and identify their strengths, weaknesses and gaps and where an issue was deemed to be unsatisfactory proposed changes were made. This approach led to an evolutionary set of proposals, with a smaller element of revolution, rather than an entirely radical legal approach to children in need of intervention from the State.

ii. Legal rights within the Kilbrandon proposals

Following on from the discussion above of the Committee report, its recommendations and the principles underlying the 'new alternative', in this section I will analyse the evidence submitted to the Committee and discussed by it which is retained in the National Archives of Scotland. As far as can be ascertained these papers have never been the subject of the detailed analysis offered in this section previously, and certainly not with a view to establishing the extent to which legal rights were considered by the Committee. Therefore, this section represents a specific original contribution to knowledge and understanding about the children's hearings system in Scotland.

The contribution of this analysis towards the overarching question I seek to answer in this thesis is to consider the extent to which legal rights were incorporated within the children's hearings system from the outset as only thereafter can it be considered how the system has accommodated the increased focus on legal rights in Scots law since that time. From this analysis I will show that the protection of the legal rights of individuals was not something that appears to have been at the forefront of the evidence given to, or the discussion at, the Kilbrandon Committee in the early 1960s. There is an absence of reference to individual rights, whether or not termed in as direct a way, in the evidence where one may expect there

[79] For example, the Morton Committee proposals (n25).

to be such reference, for example in evidence from the legal profession.[80] From a modern perspective this absence is striking but it is not something that we should view as particularly surprising given the absence of prominence of legal rights in a domestic context at that time as I discussed in the introduction. However, it would be a mistake to conclude from this that there was no acknowledgement of legal rights at all, as they were understood at the time, during the Committee discussions. There is a clear recognition within the notes of the meetings and the evidence provided that even if the removal from decision-making in one of the traditional court settings of children accused of criminal offences or who were otherwise in need of care and protection was considered, whatever replaced the courts would still be a legal tribunal operating to a system of legal rules and procedures. Lord Kilbrandon is recorded as having stated, using language of the day:

> *What are they* [i.e. the Boards or any other Juvenile Tribunals] *set up for? The object of all work in this field must be to effect,* so far as this can be achieved by judicial or quasi-judicial action*, the reduction, and ideally the elimination, of delinquency, and the provision of measures which will operate for the protection of the defenceless, no less than for the restraint and reform of the delinquent.*[81]

The fact that whatever forum was proposed by the Committee would be quasi-judicial was plain. In addition, it was explicitly recognised that the forum would amount to a degree of State intervention into family life: the Appendix to one of the early papers prepared by the secretariat for the Committee was entitled 'proposals for dealing with juveniles where State intervention is justified in order to provide necessary training and discipline'.[82]

Two issues that exercised the Committee throughout its deliberations were the composition and powers of the tribunal. In particular, if lay persons were to make up the tribunal and a

[80] As an example, in the evidence from the Association of Sheriffs Principal (The National Records of Scotland: ED11/633 'Written Evidence from the Association of Sheriffs Principal' (undated)).

[81] The National Records of Scotland: ED11/609 'The Constitution, Jurisdiction, Powers and Procedure of the Juvenile Board' (1962) 2. A paper prepared by the secretariat to the Kilbrandon Committee. Emphasis Added.

[82] The National Records of Scotland: ED11/609 'The Family Welfare Committee – a tentative outline of possible procedural arrangements' (1962).

decision was being taken about removal of a child from the family home the Committee considered whether the decision should be confirmed by the sheriff or whether the sheriff should join the tribunal to consider the decision at first instance. Although there is no overt reference to the Committee considering that this extra layer of shrieval involvement would be necessary to protect the legal right of the child and his or her family, I suggest that this consideration underlines the seriousness with which these decisions were viewed. In its oral evidence to the Committee, the Howard League for Penal Reform stated:

> *the rights of the individual apply here just as in the Mental Health Act, where in any decision as regards admission to hospital, for example, the certification of a patient has to be ratified by a Sheriff. We felt that a similar safeguard should be introduced for such a serious decision by juvenile authorities.*[83]

This extract from the evidence of the Howard League for Penal Reform is also illustrative of the language that is used when legal rights related concepts were discussed by the Committee and in the evidence to it. It is the language of 'safeguards' rather than of 'rights' that is peppered throughout. The conflation of rights and interests was also common as can be seen from this written evidence submitted by the Approved Schools Association:

> *While it is recognised that the layman has his place in the dispensing of justice to young people, it is felt that for the protection of the interests of the child, the chairman of such a court should be legally qualified, and should be a sheriff substitute or an honorary sheriff substitute.*[84]

The remainder of this section will consider two aspects of the discussion of legal rights in the Kilbrandon Committee evidence and discussions: what legal rights were viewed as important to protect and whose legal rights required that protection?

[83] The National Records of Scotland: ED11/616 'Oral Evidence from the Howard League for Penal Reform' (1 October 1962) 13.

[84] The National Records of Scotland: ED11/633 'Memorandum by the Approved Schools Association (Scotland) (undated) 27.

What legal rights?

Where matters related to the protection of legal rights were mentioned by the Committee or those submitting evidence these were of a self-contained, procedural nature that could be implemented through specific legislative provisions. As reflected in the extract above from the evidence of the Howard League for Penal Reform, rights were viewed very much in the context of being safeguards for the individual against abuses of process. There is a general absence of discussion of broader, more aspirational rights-based concepts that we see reflected in our modern conceptualisation of legal rights underpinned by the ECHR. The primary legal rights that are mentioned throughout the Committee meetings, the evidence given and papers presented to the Committee are the right of legal representation and the right of appeal against the decision of the tribunal.

The principal way that the Committee and those who gave evidence to it sought to enable protection of individual legal rights at first instance was through the right of appeal against the decision of the tribunal. Several references to rights of appeal can be found[85] although, akin to other aspects of the evidence, often it was noted as a right for the parent to exercise as opposed to the child. For example, a paper prepared by the secretariat in June 1962 states 'The parent should have a right of appeal to the Sheriff against the Board's decision' as well as a limited right of appeal to a higher court with no mention of the position of the child. [86] The apparent prioritisation of the right of a parent to appeal a decision is not surprising given the stage of development of children's rights at this time, as set out in the introduction.[87]

Alongside a right of appeal, the protection of legal rights was closely associated, if not considered directly akin to, an individual having legal representation and this being publicly

[85] Discussions about the mechanisms for appeal can be found in the minutes of meetings 9 (26 November 1962), 10 (17 December 1962) and 13 (25 March 1963) of the Committee. The National Records of Scotland: ED11/653. It is to be noted that the discussions centre around the mechanism for appeal, rather than whether there should be a right of appeal at all.

[86] The National Records of Scotland: ED11/609 'The Family Welfare Committee – a tentative outline of possible procedural arrangements' (undated) 13.

[87] At pages 23 – 25.

funded. Once again, this was usually considered a right for the parents but on occasion it was referenced as a right for the child when he or she was accused of a criminal offence. The more enlightened witnesses before the Committee linked legal representation of the child to ensuring an understanding of the criminal procedure, for example a witness for the Howard League for Penal Reform stated to the Committee that 'we felt very much that young people who were being charged with criminal offences should have legal representation so that they understood exactly what was happening.'[88] The Sheriffs Substitute Association in its oral evidence to the Committee also considered the matter of legal representation, but considered that necessary for parents since, in their submission, it would be the parents who would be placed under State supervision.[89]

However, as well as the right to legal representation and to appeal the decision of the tribunal there were some discussions that in a modern context we may frame using rights-based language but which were contextualised differently in the evidence given to the Committee in the 1960s. Mostly, these discussions were framed around the concept of 'safeguards'[90] for the individual with the child's right to plead not guilty, to a fair trial in criminal proceedings

[88] The National Records of Scotland: ED11/616 'Oral Evidence from the Howard League for Penal Reform' (1 October 1962) 52. On a general point it is unfortunate that the minutes of the meetings do not record which members of the Committee asked particular questions, nor consistently which of the individual witnesses answered the questions posed.

[89] The National Records of Scotland: ED20/355 'Oral Evidence from the Sheriffs Substitute Association' (2 April 1962) 13 and 14. The system as set up eschewed the idea of parents being placed under supervision.

[90] For example, The National Records of Scotland: ED11/633 'Written Evidence from the Association of County Councils in Scotland' (1961) 8. When discussing the application of the existing interim detention order to care and protection cases for a period of up to 28 days, the Association stated 'In practice the young person concerned is brought before the court well within that period but the rights of the individual would be better preserved and any possible abuse prevented if interim detention were to be for a considerably shorter period with provisions for extensions of the period by the Court on cause shown.' Similarly, in its oral evidence to the Committee the Sheriff Substitute Association discussed how to safeguard the child during criminal proceedings, specifically how to avoid the child pleading guilty as a result of undue pressure from his or her parent. The National Records of Scotland: ED20/355 (2 April 1962) 47 – 49. And the City Prosecutor, Edinburgh, in his oral evidence talked about the need to safeguard the child if they were brought to the court or tribunal on a wider statement of fact rather than by complaint of a criminal offence. The National Records of Scotland: ED20/355 (4 March 1962) 46.

and the parent's right to oppose that a child is in need of care and protection in non-criminal cases being mentioned specifically by the Law Society of Scotland in its evidence.[91] Similarly the City Prosecutor for Edinburgh in his evidence talked about the right of the child to know why he was before the court or tribunal.[92]

Whose legal rights?

Where legal rights were discussed, more often than not this was about the legal rights of adults. As may be expected at this time, from the evidence submitted to the Committee, the concept of the child as a rights holder independent of his or her parents was not one that was well embedded in legal thinking. The reasons for few references to children's rights as a concept in any of the evidence presented to the Committee may be best summarised in a paper prepared by the secretariat in late 1962:

> *…it may be said that society has for long taken the view – (a) that adults are in general to be regarded as responsible agents, and that, however limited the practical range of choices open to them, they are in a meaningful sense free agents; (b) that this does not, however, apply universally, and various classes, e.g. children and lunatics, do not enjoy the same rights and privileges nor are they in consequence subject to the same duties; … As so stated, these propositions may seem obvious.*[93]

That said, it was not a completely unknown concept with several witnesses referencing the legal rights of children accused of having committed an offence. For example, the Association of County Councils in their written evidence to the Committee argued that the period for which an interim detention order could be issued for a child be shortened from the maximum period of 28 days since 'the rights of the individual would be better preserved and any possible abuse prevented if interim detention were to be for a considerably shorter period

[91] The National Records of Scotland: ED11/633 'Written evidence from the Law Society of Scotland' (1962) 19.

[92] The National Records of Scotland: ED20/355 'Oral Evidence from the City Prosecutor, Edinburgh' (4 March 1962) 46.

[93] The National Records of Scotland: ED11/609 'The Constitution, Jurisdiction, Powers and Procedure of the Juvenile Board' (1962) 7.

with provision for extension of that period by the court on cause shown.'[94] In its evidence related to recommendations for the procedure to be adopted when a child is accused of a criminal offence the Association of Child Care Officers (Scottish Region) commented on the practicality of the arrangements related to the legal representation for children rather than the question of whether a child in these circumstances should have legal representation:

> *Legal Representation of children appearing before juvenile courts is sometimes overlooked or hastily arranged. Adequate arrangements should be made for this, particularly in the case of children whose removal from their home is under consideration.*[95]

The oral evidence provided to the Kilbrandon Committee by the Law Society of Scotland on 9 July 1962 is instructive in terms of how individual rights holders generally were considered at the time. Discussion of the legal rights of parents was introduced by a member of the Committee, framed around legal representation for the parents they asked 'What about the question of the rights of the parents? Do you envisage that lawyers would appear if necessary on either side?' The response from the Society representatives was recorded as:

> *I do think there should be nothing done without the person being brought before the tribunal having the fullest rights to defend himself and to refute the suggestion that the*

[94] The National Records of Scotland: ED11/633 'Written Evidence from the Association of County Councils in Scotland' (19 October 1961) 13.

[95] The National Records of Scotland: ED11/633 'Written Evidence from the Association of Child Care Officers (Scottish Region) (undated), section 3, 3. The written evidence from the Howard League for Penal Reform also recommends legal representation for children to avoid them being forced to plead guilty by their parents. The National Records of Scotland: ED11/633 'Written Evidence from the Howard League for Penal Reform' (undated) Part C, 1(a). The issue of the accuracy of the child's guilty plea is also identified by the Sheriffs Substitute Association in its oral evidence. The National Records of Scotland: ED20/355 'Oral Evidence from the Sheriffs Substitute Association' (2 April 1962) 53 and 54.

child is in fact requiring care and protection. Rights of representation should always be there.[96]

Following on from the discussion between the Committee and the Law Society of Scotland about the rights of the parent there is a clear divide recorded in the oral exchange between the Committee and the witnesses in relation to the rights of the child. The Committee asked 'And the rights of the parents separately to the child? How do you envisage that would work in practice?'[97] The response from the witness of 'I think it would be just the ordinary evidence that we have in court that would be required'[98] does not demonstrate that those representing the Law Society of Scotland had any recognition of the child as a rights holder, whose rights may require protection in whatever legal forum considers their behaviour, care or protection. This was a point pressed by the Committee that asked:

But is there not a lack here at the moment, in that if a child appears with its parents at the present moment, the child's interests and the parents' interests may be different. This is not at the moment recognised by their being separately represented?[99]

The response from the witness to this was:

[96] The National Records of Scotland: ED20/355 'Oral Evidence from the Law Society of Scotland' (9 July 1962) 53. It is to be noted that the response indicates that it is the parents who are being brought before the Tribunal rather than the child and it is the parents who should therefore be represented. This is confirmed by the description provided by the witnesses at para 58 of how the court operated at that time: 'The parents are called to the court along with the child, and the children's court or tribunal will always hear what the parents have to say, and that is one factor in the matter before the court.'

[97] Ibid, 54.

[98] Ibid.

[99] Ibid, 55.

Yes, the child's interests are the paramount consideration at the moment. Do you mean that the child is being taken away from its parents at, say, the age of 14 or 15 when it begins to become a wage-earning asset?[100]

This exchange not only demonstrates one view at the time about how the child was viewed solely in the context of his or her parents, and as a 'wage-earning asset', but also how the witness could not conceive of there being an issue of distinction between the interests of the parent and of the child.

Similarly, a discussion between the Kilbrandon Committee and the City Prosecutor for Edinburgh also helps to illustrate a divergence in views between the witness and the Committee about there being a distinction between the interests of the parent and of the child.[101] In addition the exchange reveals a lack of respect for what we now refer to as a right to family life. The Committee member introduced a discussion related to the appointment of a *curator ad litem* in care and protection proceedings and asked 'Has it ever occurred to you that there might be a need in care and protection proceedings for the appointment of a *curator ad litem* where the child's interests might be opposed to that of the parents.' [102] The City Prosecutor answered:

I can hardly imagine circumstances in which it would be necessary because the position which you are going to be forced into is that the public prosecutor or the local authority, having considered the whole position, say 'We've got to do something.' It's for the court to decide whether this child is going to remain at home or not and the parents are wholeheartedly behind the child so that you're fighting against the child

[100] Ibid. Continued references throughout the evidence to a child as 'it' is also instructive as to how the child's place in the process was regarded.

[101] As will be explored in subsequent chapters, understanding that the interests of children and their parents are not necessarily equated was an area the children's hearings system has developed in response to the increased number of referrals to the system related to child abuse and neglect, alongside the growth in understanding of legal rights in Scots law.

[102] The National Records of Scotland: ED20/355 'Oral Evidence from the City Prosecutor, Edinburgh' (4 March 1962) 91.

and the parents. When you come to the stage where it's the other way round, where the parents want rid of the child, then surely it's far better that that child should be out of that home. The allegations made by the parent may be true or false, but does it matter? In those home surroundings that child will never make anything of it. That child's far better out of it. Away from those people. Never mind where it goes for the moment. It may be a local authority home, it may be boarded out, anything may happen, but surely you've got to take the child away if the parents are determined to be rid of the child.[103]

The Committee member continued to explore the matter with the City Prosecutor by stating 'I'm thinking of the case, Mr Heatly, where the self-interest of the parents directs them towards resisting the petition. Where an impartial curator, looking only at the best interests of the child, might make different representations to the court.'[104] Still, the City Prosecutor showed no recognition of the differences in the interests of the parents and the child in child protection proceedings when he answered 'But already I'm in the position of trying to demonstrate to the court that the child is in need of care and protection.'[105] The Committee then drew the Prosecutor's attention to the fact that he was not partisan and neither were the parents and asked 'Who in such proceedings represents the best interests of the child? The parents?'[106] The City Prosecutor replied:

Well I accept that that must be one of these cases where the court's simply got to try and hold the scale evenly. But I've always thought that in the other type of case where the parents are bitterly opposed to losing the child – whatever one thinks about that, there is the tie there. I accept that tie. On the other hand, if the parents indicate that they want rid of the child, if they've assaulted the child and neglected it, surely it's far better that it's out of that home and I don't see the need of a curator.[107]

[103] Ibid.

[104] Ibid, 92.

[105] Ibid.

[106] Ibid, 94.

[107] Ibid.

The Committee also asked the Sheriffs Substitute Association who should represent the parents and the child since they may sometimes have competing interests. The response from the Association to the question also highlights both a lack of understanding of the issue of the potential for competing interests as well as the distinction many drew in their evidence between children who would appear before the tribunal as a result of their offending behaviour and those children who are otherwise in need of care and protection, with legal rights not being viewed as important for the latter group:

> *You are not prosecuting and defending in care or protection proceedings, you are trying to get to the root of it. So often there is no representation at all but it would presumably be available or could be made available under legal aid.*[108]

As was discussed in the introduction the legal culture at the time was not one supported by the importance of legal rights to an individual because they are an individual, rather they were viewed very much as part of criminal procedure. What can be derived from this evidence to the Kilbrandon Committee related to legal rights is that although not plentiful in discussion, it would be wrong to conclude that protection for legal rights was not considered as a necessary element of whatever legal system was put in place for State intervention either for children accused of criminal behaviour or for those deemed in need of care and protection for other reasons. Where legal rights were explicitly considered they were generally conceived as being self-contained procedural rights, such as those of legal representation and to appeal decisions made, especially for the parents and those children accused of criminal offences. This is consistent with the use of the language of 'safeguards' rather than that of 'rights', reflective of the intention that these matters came under consideration to prevent abuse of process. It is also notable that the specific legal rights recognised required the child or adult to do something, such as to seek representation or to make an appeal, rather than what the system could offer proactively to protect and promote individual legal rights.

[108] The National Records of Scotland: ED20/355 (2 April 1962) 33.

Having considered in detail the recommendations of the Kilbrandon Committee and their underlying principles, as well as the extent to which legal rights were considered in setting out those principles, the final section of this chapter will consider the implementation of the recommendations through the Social Work (Scotland) Act 1968 and specifically the extent to which legal rights were considered in the debates surrounding the new legislation.

C. Implementation of the Recommendations within the Social Work (Scotland) Act 1968

The Kilbrandon report was published in April 1964.[109] When the Secretary of State invited submissions from interested bodies on the report and its recommendations thereafter, the majority supported the creation of the new panel system,[110] though the responses received did not universally welcome the recommendations in their entirety. In particular, several of the submissions from people with legal backgrounds reveal criticism of the proposals in relation to the proposed establishment of the juvenile panels, some of which were framed around protection of the legal rights, again typically of those children accused of having committed a criminal offence. [111] This was confirmed in 'if asked' questions prepared for the Secretary of State to respond to a parliamentary question from Winnie Ewing in the House of Commons on 27 March 1968.[112] Civil servants prepared the following answer in response to

[109] The Kilbrandon Report (n1).

[110] Scottish Home and Health Department; Scottish Education Department, *Social Work and the Community* (Cmnd 3065,1966) 2.

[111] The proposals related to the 'matching fieldwork organisation' achieved a deal of criticism from those from childcare and social work backgrounds. For example, the Association of Child Care Officers were receptive to the proposals related to lay panels but were deeply critical in their submission of the new 'matching fieldwork organisation' sitting within Education Departments and questioned the need for the new terminology of 'social education'. The National Records of Scotland: ED39/541 'Memorandum on the Report prepared by the Association of Child Care Officers (Scottish Region) and approved by the National Association' (undated). This aspect of the report and its proposals are outside of the scope of this thesis and therefore will not be considered in depth within this section.

[112] The question asked by Mrs Ewing was 'To ask the Secretary of State for Scotland, what representations against the provisions of the Social Work (Scotland) Bill, or against proposals contained in the White Paper, social work, the community, (*sic*) have been received by his department, and from whom.' The answer prepared for the Secretary of State was 'Most of the comments I received on the White Paper gave its proposals general support. There have been numerous criticisms of particular proposals in the Bill, and no doubt these will be

any question around whether there had been objections to the lay panel system from the legal profession: 'The majority of comments made by legal interests on the Kilbrandon Report and on the White Paper opposed children's panels.'[113] Looking behind the reasoning for these criticisms there are some references to protection of legal rights as the basis for the criticism but it cannot be said that this was the driving force behind them. Rather the main criticisms were framed around protection of the community from the effects of juvenile delinquency and the practicalities of recruiting suitable panel members and reporters to fulfil the roles described by the Kilbrandon Committee. Where criticisms were made concerning legal rights they tended to relate to the right to liberty, the procedure by which a child might lose his or her liberty and the resulting impact on the child's rights and those of his or her parents. The Sheriff Substitutes Association stated that the report represents 'a radical departure from the principle that in general the liberty of citizens of any age should not be interfered with except by a court of law.'[114] While the National Association of Probations Officers concurred by saying that the Association 'does not feel that compulsory measures affecting the liberty of any child or young person, or its parents, should rest in the hands of a public authority. These should remain in the hands of a judicial body.'[115]

Despite these objections from those involved in the legal proceedings at the time, the White Paper that followed the publication of the Kilbrandon report contained little substantive discussion about whether the proposals related to the panel system should be implemented.[116] The 'take it or leave it' approach to the proposals in relation to the lay panels is revealed in a draft Ministerial submission from civil servants seeking authority to publish the report:

represented in debate in the usual way.' The National Records of Scotland: ED39/542. The contribution to the debates in relation to the Bill from Mrs Ewing will be considered further below.

[113] The National Records of Scotland: ED39/542 'House of Commons, 27 March 1968, Notes for Supplementaries' 1.

[114] The National Records of Scotland: ED39/541 'Memorandum by the Council of the Sheriffs Substitute Association' (20 November 1964) 1.

[115] The National Records of Scotland: ED39/541 'National Association of Probation Officers (Scottish Branch) Observations on the Kilbrandon Report' (20 January 1965) 4.

[116] Social Work and the Community (n110).

> *We also think that, as regards the Committee's basic proposal to replace criminal proceedings by juvenile panels, consultations with interested bodies or further enquiries would be of little value in proving or disproving its worth; basically it must be accepted or rejected as it stands.*[117]

This can be contrasted with the approach related to 'the matching fieldwork organisation' proposed by the Committee where it was said in the same submission 'But the detailed organisational proposals in the report will call for a great deal of study, and we should prefer to defer judgment on them at this stage.'[118]

Ultimately this approach was what was reflected in the White Paper, which had its primary focus on the creation of new generic social work departments. With a few minor changes to the terminology used within the Kilbrandon report, the vast majority of the features of the legal process envisaged by the Committee were adopted in the White Paper.[119] The omission of any contrary discussion is further evidence in support of the argument I advance in this thesis that some of the proposals of the Kilbrandon Committee on legal procedure were not perceived to be so radically different from the position which had previously existed that detailed exploration and consultation was necessary. When the proposals related to the reorganisation of social services are compared, there was a significant amount of discussion of this and the proposed social educational approach.[120]

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[117] The National Records of Scotland: ED11/632 'Draft Ministerial Submission, 31 January 1964' 6.

[118] Ibid, 5.

[119] For example some of the key differences included: 'Juvenile Panels' became 'Children's Panels'; the mechanism of appointment of panel members was left for further discussion whereas the Kilbrandon report had proposed this be managed by the local authorities; A broader range of people eligible to be panel members was envisaged; and most notably the White Paper thought the matching fieldwork organisation to give effect to the decision of the children's hearing should not be based in the education departments, as the Kilbrandon Report had suggested, but instead in the newly created social work departments of each local authority.

[120] After initial submissions were invited on the report and following the Government announcement that it intended to bring forward legislation to implement the recommendations, a Working Group was established, and independent advisors appointed, but only to consider the reorganisation of local authority social work services. Social Work and the Community (n110) 2.

Following on from the White Paper, a Bill was introduced to the House of Lords on 6 March 1968 that sought to implement the majority of the recommendations of the Kilbrandon Committee. Following passage in the House of Commons and House of Lords, the Bill received Royal Assent on 26 July 1968. As enacted the Act contained legal rights provisions similar to those that were discussed by the Kilbrandon Committee. A right of representation at children's hearings was provided to both the child and their parent[121] and this extended to legal representation at proof proceedings before the sheriff,[122] for which legal aid was available.[123] Both the child and the parent had a right within the Act to appeal decisions of children's hearings to the sheriff[124] and to appeal to the Court of Session thereafter.[125]

However, beyond these two procedural rights that were features of the development of the new system, the provisions of the Act provide a demonstration of how legal rights were built into the operation of the children's hearings system at its outset. Consistent with how children and their rights were conceptualised at the time, the provisions set out within the Act in relation to attendance at children's hearings were different for the child and for the

[121] The Children's Hearings (Scotland) Rules 1971 SI No. 492. Hereinafter 'the 1971 Rules.' R11(1). Although it should be noted that in practice this right to representation did not usually extend to legal representation due, in part, to the lack of public funding for the representation. Perhaps illustrative of less complexity in family law at the time, there was comparative simplicity in the definition of 'parent.' A 'parent' was defined to include a 'guardian' (s30(2)) and meant 'either or both parents', including adoptive parents to the exclusion of the birth parents, but where the child's parents were not married the child's father was specifically excluded from being a 'parent'. s94(1), as amended by the Law Reform (Parent and Child) (Scotland) Act 1986. This latter exclusion is significant when modern developments in this area are considered. The word 'guardian' was defined in 94(1) and introduced a factual, as well as legal, aspect to the definition. The Act was also silent as to who or what forum made the judgement about parenthood. Again, this is a significant omission when one considers the modern jurisprudence and resulting legislation, both of which approached the issue from a legal rights perspective.

[122] s42(4).

[123] s53.

[124] s49(1).

[125] s50(1).

parent.[126] The 1968 Act provided that the child's parent had a right to attend the children's hearing,[127] as well as an obligation,[128] whereas the child had only an obligation.[129] This position was also reflected in the Rules in relation to notification of the children's hearing where a parent who had been excused from attending the forthcoming hearing was still to receive a notification of their right to attend the hearing if they wished to do so, whereas the child in the same position would receive no such notification.[130] When a child did attend a children's hearing, the practical effect of he or she having no right to attend the hearing was that the child could be asked to leave the hearing if certain criteria were deemed to have been met.[131] Similarly where an application was made to the sheriff for a finding in relation to grounds of referral only the child was under an obligation to attend,[132] with a warrant possible should he or she fail to attend.[133] Disclosure of information to the child and his or her parent was provided for, in that the 1971 Rules required the chairman to inform the child and the parent of 'the substance of any reports, documents and information … if it appears to him that this is material to the manner in which the case of the child should be disposed of and that its disclosure would not be detrimental to the interests of the child.'[134] This disclosure of information by the chairman was provided in the absence of a right to full disclosure of all the papers that were submitted to the children's hearing by the reporter. Copies of the reasons for the decision were not automatically provided to the child or the parent but they could make a request for a copy.[135]

[126] Attendance at children's hearings is one of the areas that will be explored in depth in chapter four such is the impact that legal rights have had on modern provisions in this area.

[127] s41(1).

[128] s41(2).

[129] s40(1).

[130] The 1971 Rules, R8(2).

[131] s40(2). The same was not true of parents since no power to exclude was explicit within the Act.

[132] s42(3).

[133] Ibid.

[134] R17(3).

[135] R18(1).

Beyond the individual provisions of the 1968 Act, an analysis of the parliamentary debates that took place during the passage of the Bill gives a deeper insight into the extent to which the legislation was informed by the notion of legal rights. This analysis enables an understanding of the extent to which legal rights were built into the children's hearings system as it was being constructed, and thereby contributes to the overarching question posed by this thesis.

i. The parliamentary debates

The Social Work (Scotland) Bill was introduced in the House of Lords on 6 March 1968.[136] Any analysis of the Parliamentary debates following the introduction of the Bill must be informed by the clear expressions of dissatisfaction with the timetabling of the Bill in the debates. It is asserted on various occasions during the debates that the timing of the debates, often being very late at night[137] and sometimes with short notice, affected the ability of some Scottish Lords or Members to attend in whole or in part and this affected the quality of the Bill debate.[138] This was not an issue isolated to this particular Bill, for the 1960s was a period

[136] The introduction of the Bill in the House of Lords as opposed to the House of Commons is likely to have been driven by time availability. The Bill was introduced at a time when Parliamentary effectiveness was once again in question since its effectiveness was being impaired by the pressure on availability of parliamentary time due to an increased workload and this in turn impacted on the quality of the scrutiny that Members offered. Alexandra Kelso, *Parliamentary Reform at Westminster* (Manchester University Press, 2009) 91.

[137] This was a particular issue in the House of Lords where, for example, the second reading debate on 21 March 1968 began at 8:40pm and went on until after 11:30pm and the final debate on the 24 July 1968 lasted until 11:08pm.

[138] For example, at Second Reading in the House of Lords, Lord Ferrier stated:

> *My Lords, I should like to begin by protesting at the conditions under which this debate is taking place – not out of spleen or in order to waste your lordships' time, but because I think it absolutely necessary that it should go on record that this debate is taking place under these conditions. At least one noble Lord has had to leave the Chamber early, and I am certain that every noble Lord who has spoken has had to curtail his remarks and been prevented from deploying his full contribution.*

HL Deb 21 March 1968 vol 290 cc 792-849. This sentiment was echoed by Lord Balerno at Third Reading:

> *I feel I must register some form of protest at the way in which a Bill of this magnitude and importance to Scotland has been brought forward. The initial notice that this Bill was to be considered by the House was extremely short… But a Bill which literally covers the whole life, from the cradle to the grave, of any person in Scotland who encounters tribulation is one of considerable importance, and the speed with*

characterised by Member frustration and eventual reflection on how the business of the Houses of Parliament was organised.[139] The analysis must also be informed by the fact that the Bill was viewed by many Lords and MPs as something of an experiment. This is clear from much of the debate in both the House of Lords[140] and the House of Commons.[141]

The two broad purposes of the Bill were outlined at the Second Reading in the House of Lords as being 'to integrate all the existing services of local authorities which are concerned with the social support of individuals and of families' and secondly to 'set up a new kind of body to deal, under some measure of compulsion, with children who, because they are delinquent or for some other reason, are in need of care and protection.'[142] In setting out these aims of

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which it has been put forward, the short period between the Second Reading and the two days when it was considered in Committee, and again the short time from the Report stage to the Third Reading today, seem almost indecent.

HL Deb 25 April 1968 Vol 291 cc764-74. This statement was supported explicitly by Baroness Horsburgh, ibid.

[139] Kelso (n136).

[140] For example, the Marquess of Lothian described the Bill as being in 'somewhat unchartered seas' and Baroness Horsburgh stated 'the whole Bill, it seems to me, is an experiment'. HL deb 1968 vol 290 cc 792-849.

[141] At Second Reading in the House of Commons the Secretary of State for Scotland described the Bill as 'a pioneering measure'. This language was echoed by Mr Noble, member for Argyll, who also referred to the Bill as an 'experiment'. HC Deb 06 May 1968 vol 764 cc49-150.

[142] HL Deb 21 March 1968 vol 290 cc792-849 per Lord Hughes. The first of these broad purposes is outside of the scope of this thesis and therefore will not be explored in depth here, save to highlight that while there was a general consensus on the Bill when it was making its way through both House of Parliament two issues of concern were highlighted in particular related to the first of these broad purposes: the local authority composition of the proposed new social welfare departments and the integration of the probation service into these new departments. The introduction of the Bill coincided with a new Royal Commission on the future of local government and, for example, the Marquess of Lothian speaking for the opposition in response to the introduction of the Bill in the House of Lords stated he was 'worried about the timing of the Bill' in relation to this Royal Commission and the demoralising effect this could have on newly recruited staff. HL Deb. 21 March 1968 vol 290 cc790-849. Similarly, in the House of Commons, Mr Noble, MP for Argyll, for the opposition expressed a wish that the Bill could have been brought in at the start of the following Session as the Royal Commission would have reported by then and it would be 'easier to judge some of the issues'. HC Deb. 06 May 1968 vol 764 cc49-150.

The Royal Commission on Local Government in Scotland ('the Wheatley Commission') was established in 1966 and reported in 1969. Lord Wheatley, *Royal Commission on Local Government in Scotland 1966 – 1969* (HMSO,

the Bill Lord Hughes used a subtle but important shift in language. The Kilbrandon report focused on the language of 'delinquents' and 'delinquency' as the driver of need for the new system. As set out above,[143] although 'delinquency' is not defined within the Kilbrandon report it is clear that the Committee's working assumption was that the new system of children's panels would deal primarily with children and young people whose behaviour was the presenting issue; and that assumption was a valid one at the time given the available court statistics about the number of children coming before the courts having been accused of an offence as opposed to being in need of care and protection as a result of behaviour towards them.[144] However, in introducing the Bill Lord Hughes indicated that the purpose of the Bill was to deal with children who are in need of care and protection whether that be *as a result of* delinquency or for some other reason. The contrast between this subtle shift in language and, for example the original remit set for the Kilbrandon Committee which distinguished between 'juvenile delinquents *and* juveniles in need of care or protection'[145] is some evidence of the basic premise of the Kilbrandon Committee, that the differences drawn by the law between categories of children have little meaning in practice, taking effect.

The Bill's proposals to establish 'a new kind of body' were set out in Part III and these were said to 'follow very closely on the recommendations of the Kilbrandon Committee.'[146] The

1969). The proposals of the Royal Commission led to the Local Government (Scotland) Act 1973 and a move away from the complex system of county councils, large and small burghs and district councils that existed in Local Government at the time of consideration of the Social Work (Scotland) Bill.

[143] At pages 50 -51.

[144] As discussed in section B above, the Kilbrandon Committee provided figures that in 1961 – 62 something in the region of 500 children had come to the attention of the courts for issues related to their care and protection (Kilbrandon Report, 9) whereas in the same year just short of 22,000 children had criminal charges against them proved in court (Kilbrandon Report, Appendix A).

[145] Emphasis added.

[146] HL Deb 21 March 1968 vol 290 cc792-849. There is some uncertainty in the debates as to whether the Bill replicated the entirety of the recommendations of the Committee, with the matter of the social education authority recommended by the Committee being the primary issue in this respect. During the consideration of amendments in the House of Lords Lord Hughes stated that the proposed social work department of the local authority was the social education authority recommended by the Kilbrandon Committee. HL Deb 09 April 1968 vol 291 cc177-321. However, when introducing the second reading of the Bill in the House of Commons the

main points of discussion and debate were about the first purpose of the Bill related to local authority social welfare provision; however particularly in the House of Commons there was debate about Part III of the Bill and elements of that debate related to the protection that the new juvenile panels would offer to an individual's legal rights, either expressly or by implication of the nature of the issue raised during the debates.

The very strong commitment of the Government to ensure that the legal rights of both the child and his or her parent were not diluted by the new legislation was set out by the Under-Secretary of State for Scotland in his response to the House of Commons debate on Second Reading of the Bill:

> *I take the point very seriously, and I emphasise that in making a change of this sort we must not reduce the rights of the child or of his parents. I have personally taken a good deal of care about this matter in the drafting of the Bill. If we have not succeeded in dealing with the point, I shall be willing to listen to amendments in Committee. I think that we have provided very considerable safeguards in the Bill. Certainly it is my intention that they should be provided.*[147]

Further he stated 'I think it very unlikely … that we shall find that the new panels will represent any kind of reduction at all, and I do not intend that they should, in the legal rights of the children who come before them.'[148]

That this is a strong commitment to recognising and preserving the legal rights of both the child and the parents cannot be doubted, and in particular a strong emphasis on the legal rights of the child is notable for the time. However, the overall debates make it clear that the commitment was more to upholding the legal rights of the child accused of a criminal offence

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Secretary of State for Scotland, Mr Ross, stated that 'In June 1964 it was decided to accept the recommendation on juvenile panels. A little later it was accepted that the services for children should be reorganised but it was thought that the Committee's recommendation did not necessarily offer the best way of doing it.' HC Deb 06 May 1968 Vol 764 cc49-150.

[147] HC Deb 06 May 1968 vol 764 cc49 – 150.

[148] Ibid.

but this does not detract from the importance of the recognition that the new system had to follow due process in all cases. There is an underlying assumption across the debates, similar to that of many of the witnesses to the Kilbrandon Committee, that it would be children who were alleged to have committed criminal offences who would be dealt with under Part III of the Bill as opposed to a fundamental recognition of the importance of the legal rights of all children that we see in modern Scots law; a not unreasonable position given the balance of children who were alleged to have committed offences against those in need of care and protection for other reasons who came before the courts at the time. Thus, the points were made through a prism of the system dealing with alleged offenders rather than children and the protection of the legal rights of an accused person was a more established legal concept at the time than the legal rights of all children.[149] Nevertheless, of fundamental importance to this thesis from this discussion is that the conflation of children in need of care and protection to include offenders had the inevitable consequence that a commitment to legal rights was wider than in purely criminal cases.

The nature of the issues explored during the Parliamentary debates, that can be viewed from the standpoint of the legal rights of children and adults involved in the system, are very similar to those that were explored by the Kilbrandon Committee as discussed earlier in this chapter. The legal rights featured in the debates are those of a procedural nature, typically the right to legal representation and the right to appeal in line with the more limited construction of legal rights at the time. There was a degree of scepticism amongst some Peers and MPs about the use of a lay body as the primary decision maker and whether this would offer the protection for the procedural legal rights of the child offender and their parents. Mr Clark Hutchison, MP for Edinburgh South, in raising his objections to a lay body opined:

[149] At Second Reading in the House of Lords, Lord Wells-Pestell opined 'it is desirable that young offenders, if they are offenders, should not be dealt with without the protection afforded by court proceedings. I feel very strongly about this.' HL Deb. 21 March 1968 vol 290 cc792-849. In the House of Commons, Mr Patrick Wolrige-Gordon said that 'the law in Britain is made to protect the guilty or the accused every bit as much and perhaps more than the innocent.' HC Deb. 06 May 1968 vol 764 cc 49-50.

> *The proposed children's panel fills me with alarm and apprehension. It seems to me that we may be letting loose a lot of amateurs in what should be a judicial process. There is a great air of informality about it, with little mention of representation of the child, cautioning or other safeguards.*[150]

The characterisation of the new body as a lay one led some members to question the extent of the powers given to the body within the Bill and how the child would be given the procedural protection the law required when powers involving the restriction of the child's liberty were exercised. The ability of a children's hearing to issue a warrant to secure the attendance of a child at a hearing was one particular area where amendments were proposed in the spirit of offering further protection to the child. Amendments were moved in the House of Lords to enable a warrant to secure the attendance of the child to be issued by a sheriff only, on application by a hearing, as opposed to by the children's hearing itself.[151] The rationale for the amendment was that such a power should not be placed within the decision-making power of a lay body. In responding to the proposal Lord Hughes pointed to the ability of the child and family to appeal the decision of the children's hearing to issue the warrant and that such an appeal would be heard within three days of the hearing decision. He said 'the machinery is, however, geared to bring the sheriff in at the second stage as a safeguard …' and in light of his commitment to carefully monitor the use of this power and for the Secretary of State to make further rules as to its operation if required the amendment was withdrawn by leave.[152] Similar to the submissions to and discussions of the Kilbrandon Committee discussed earlier in this chapter the exchange related to this proposed amendment demonstrates the use of the right of appeal to the sheriff as the central mechanism to offer the protection of legal rights at this time.

[150] HC Deb 06 May 1968 vol 764 cc 49 – 150. However, it should be noted that some presented a defence of the use of a lay body: 'It is more likely that changes of a progressive nature in a community will be brought about by laymen than by specialists. Specialists tend to become too rigid in their approach.' Ibid, per Mr Small.

[151] HL Deb 09 April 1968 vol 291 cc177-321.

[152] Ibid.

That there were some risks inherent in investing a wide discretion in a lay body was a point acknowledged by the Government. On introduction of the Bill Lord Hughes noted three 'safeguards' to mitigate this risk; the 'careful selection' of individuals to be panel members, the existence of rules of procedure for children's hearings to follow and the ability to appeal a hearing decision to a sheriff.[153] Similarly, the Secretary of State for Scotland when introducing the Bill to the House of Commons outlined the need for safeguards against 'the abuse of the legal rights of the child and his parents' as well as 'honest mistakes' of a hearing.[154] He referenced the same three 'safeguards' as Lord Hughes as well as the role of the Council on Tribunals in observing the impact of procedural rules and making amendments if required.[155]

In the same way as considered earlier in this chapter in relation to the discussions of the Kilbrandon Committee and the witnesses to it,[156] the language of 'safeguards' is peppered throughout the debates in both the House of Lords and the House of Commons. Discussion in this area was most prominent when MPs and Peers considered the procedural protection that the proposed system would offer to the child accused of criminal behaviour and whether this would be akin to the procedure adopted in courts. Areas such as the burden of proof and the presumption of innocence were raised in debate[157] alongside the need for legal representation.[158] The liberty of the child was a concern to some:

[153] HL Deb. 21 March 1968 vol 290 cc792-849.

[154] HC Deb 06 May 1968 vol 764 cc 49 – 150.

[155] Ibid. The Council on Tribunals was set up by the Tribunals and Inquiries Act 1958 to review and report on administrative tribunals in the UK.

[156] At p 63.

[157] At Second Reading in the House of Lords Baroness Elliot of Harwood cited representations from sheriffs that noted concern about the new body having new rules of procedure that may not be as 'scrupulous' as the court rules in areas like the burden of proof and presumption of innocence. HL Deb. 21 March 1968 vol 290 cc792-849.

[158] The fact that the Bill did not contain provision for legal representation was raised by some but perhaps surprisingly this did not attract the level of debate that one may expect given the discussion before the Kilbrandon Committee and when the issue is viewed from a modern context and the litigation on this issue over the last 15 years.

> *Clause 15 gives local authorities very wide powers to remove a child from its home and family. I hope that the Under-Secretary will emphasise that the greatest care and reflection must be exercised by the new departments before that power is used… I hope that the Under-Secretary will confirm that, wherever possible, the treatment and training which a child needs will be applied in the child's home, because normally I believe it is there that treatment and training are most likely to succeed*.[159]

Ms Ewing, MP for Hamilton, was one of the few MPs who spoke against Part III of the Bill and the creation of children's hearings. It was the lack of confidence in the ability of the proposed new system to protect legal rights that underpinned Ms Ewing's objections to it, based on her experience as a court solicitor. She said:

> *In Scotland lawyers are prejudiced against laymen with this power and not without reason. We have, therefore, been anxious to evolve a fair system of trial, and such a system cannot be brought in overnight. It takes a long time for fair rules to be evolved and we have a fair set of rules in Scotland. Our trials are as close to a scientific process as human justice can be. I am alarmed because I think that a child's interests may not be safeguarded because of the secrecy of the hearings under the new system.*[160]

When the Bill was considered in the House of Commons Committee, the issue of secrecy balanced with privacy was one that occupied discussion when the Government brought forward an amendment to give members of the press the right to attend children's hearings. This issue is something of particular note to this thesis, since rights of privacy were not typically rights that one would associate with criminal procedure at the time, which marks a departure from the other specific legal rights considered that can more easily be traced back to criminal procedure. During the debate there was a balance of views between those who wished the press to be given a right of attendance, as one vehicle towards protecting the due process rights of the child, and those who were against this largely for reasons related to the

[159] HC Deb 06 May 1968 vol 764 cc49 – 150, per Mr Ian MacArthur.

[160] HC Deb 06 May 1968 vol 764 cc49 – 150. The use of the word 'interests' as opposed to 'rights' should be noted.

potential for adverse publicity and the negative impact this could have on a child as well as the increase in the number of people present that may inhibit the type of discussion required at a hearing.[161] The subsequent debate on this issue at Third Reading was conducted from a legal rights based perspective (in this case the right to confidentiality) and can be summarised in the following points made during the debate:

> *If it is a matter of safeguarding the rights of the child appearing before a hearing, it seems to me that they are adequately safeguarded already by the child's right to have present his parents or anyone else whom he wishes to speak for him.*[162]

> *While we all welcome the informality of children's hearings, there still lurks a doubt in our minds that that informality could lead, quite unconsciously, to some abuse of the child's judicial rights. The press is a great champion of the individual and the rights and liberties of the individual.*[163]

> *It would be as well for the independent eye of the press to be on children's hearings in order to ensure that the liberty of the child and the rights of the child are properly protected within the atmosphere of informality which is such an important aspect of this part of the Bill.*[164]

From the Parliamentary debates there is evidence of a greater anxiety amongst Ministers, MPs and Peers to ensure adequate protection for various legal rights of the child and his or her parents in the new system created by Part III of the Bill than was evidenced in the submissions to the Kilbrandon Committee. Generally, the objections to Part III of the 1968 Bill, particularly in the House of Commons, were based on the ability of the new system to protect legal rights with concerns raised about the ability of a lay body to do this, how the liberty of the child would be secured and how the right of appeal would operate. This, I

[161] HL Deb 24 July 1968 vol 295 cc 1197-209 per Lord Hughes.

[162] HC Deb 17 July 1968 vol 768 cc 1583 – 604 per Mr Dewar.

[163] Ibid. Per Mr MacArthur.

[164] Ibid.

submit, is in recognition of the fact that what was being created was a legal system where procedures and the decisions made had the potential to impact on the rights of the child and his or her family. Thus the focus was on ensuring adequate protection or, in the language of the Parliamentary debates, 'safeguards' for those procedural rights. However, when this is considered in detail it cannot be said that this anxiety is motivated by a desire to recognise the protection of the legal rights of all children, which would have been something of an advance at that time. Rather, it was as a result of the child coming before the new system being conceptualised as an offender and the desire to ensure that all offenders, whether dealt with in a traditional court setting or under Part III of the Bill, received the same protection from the law. Nevertheless the effect was to ensure that both procedural and substantive rights would be protected for all children dealt with by children's hearings, whether referred on the ground of having committed an offence or otherwise.

D. Chapter Conclusion

In 1964 the Kilbrandon Committee proposed 'a new alternative' to address the inconsistent and fragmented law relating to children in need of an intervention from the State. I have argued within this chapter that this 'new alternative' was not, in fact, radically new since the principles underlying the recommendations demonstrate a combination of drawing on existing good practice with new elements viewed as strengthening what was already in place theoretically if not in practice. This characterisation of the proposals is informed by contemporary accounts that describe the reception to the Kilbrandon recommendations,[165] alongside elements of the principles which adapt and strengthen the existing approach, such as the focus on the needs of the child in determining the measures required, the physical separation of decision-making fora for children and adults and the involvement of lay people in decision making. The 'new alternative' was itself thus part of an evolution in Scot law as opposed to a revolution.

[165] Such as the civil servants who described the Kilbrandon report as 'radical', the criticisms of the legal profession directed at the proposals for lay panels to be the primary decision-makers and that some parliamentarians clearly viewed the 1968 Bill as something of an experiment.

In relation to the principal question posed in the introduction to this thesis, the core argument I have made in this chapter is that legal rights, although constructed in a narrower sense than we may consider today, were clearly reflected in the conception and construction of the children's hearings system alongside its decision-making emphasis on the child's welfare, something particularly true of the adults involved and those children who were accused of criminal offences. This is clear from the discussions, report and recommendations of the Kilbrandon Committee and from the parliamentary debates and subsequent legislation enacted. The legal rights that were considered most consistently across the period were those of a defined procedural nature, such as the right to legal representation and the right to appeal and were akin to those derived from criminal procedure. In addition, there is some evidence of what we may now consider to be substantive rights reflected within the 'new' system such as in relation to key elements of participation rights.

However, it must be accepted that legal rights were not at the forefront of the evidence given to the Kilbrandon Committee. The same is also true of the subsequent parliamentary debates related to the legislation enacting the principles from the Committee. What is evident is a clear recognition across the period that even if a traditional court based setting was not the forum to make decisions about children who had committed criminal offences or who were otherwise in need of care and protection, whatever replaced the courts would still be a legal tribunal operating to a system of legal rules and procedures. This put in place a structure and an understanding that allowed the system to evolve in subsequent years to accommodate the more expansive understanding of legal rights that we have in modern Scots law.

The main rights considered by the Committee members and parliamentarians by way of safeguarding individuals involved in the process were the rights to legal representation and to appeal the decision made by the tribunal. Where these rights were considered it was primarily the rights of the parent as opposed to the rights of the child that were discussed. This is consistent with how children and children's rights were viewed at the time: that the child was described as 'a wage-earning asset' in evidence to the Committee from the Law Society of Scotland and the conflation of rights and interests of the child that we see across both the Committee records and parliamentary debates are illustrative of this point. The notable exception to this was where the child was thought of as an offender first and foremost

and it was in these instances that the emphasis on the protection of his or her rights was most prominent in the House of Commons debates in particular, with a strong Ministerial commitment given to ensuring the proposed legislation would not detract from the legal rights of the child accused of a criminal offence. The conception and construction of the children's hearings system was certainly underpinned by a view that the majority of children who would need the intervention of the State through the new system would be accused of having committed an offence. This was a justifiable assumption given the ratio of children who offended to children in need of care and protection who came before the courts at the time the Kilbrandon Committee carried out its investigations as well as the understanding and prominence of child abuse and neglect at the time.

During the period under consideration in this chapter it was not commonly envisaged that the legal rights of the child would differ from those of his or her parent, but there is some evidence of more progressive views on this point among the Kilbrandon Committee members compared to some of the witnesses, such as can be seen in the exchanges described above between the Committee and the Law Society of Scotland and the City Prosecutor for Edinburgh. As I will discuss in subsequent chapters this would prove to be a significant point of departure as the children's hearings system became embedded in Scots law and the nature of the issues experienced by children that came to the attention of the system changed, meaning that the legal rights of the child would need to be viewed separately to those of his or her parent.

What I have established in this chapter is that legal rights, although narrowly defined, were incorporated within the children's hearings system at the very outset. The next chapter will consider the extent to which these legal rights provisions were implemented in practice.

Chapter Three: The Place of Legal Rights in the Children's Hearings System 1971 – 1997

Based on how the children's hearings system was conceived and constructed in the 1960s I argued in chapter two that legal rights, though understood in a more limited way than in modern Scots law, were clearly recognised as being a necessary part of the children's hearings system by its early architects. Following on from this, in the present chapter I will consider the operation of the children's hearings system from its inception in April 1971 through to the first substantive legislative change, in the form of the Children (Scotland) Act 1995, through a lens of legal rights. The end of this period also coincides with the point at which what became the Human Rights Act 1998 and the Scotland Act 1998 were beginning their parliamentary journeys, which as will be discussed in the next chapter continued the evolution of the children's hearings system in its protection and promotion of individual legal rights.

This third chapter contributes to the principal question by considering the extent to which legal rights were an integral part of practice during the early period of the operation of the children's hearings system and exploring the scrutiny applied to the system that contributed to its evolutionary development. I will consider the areas that attracted academic, judicial and governmental scrutiny in relation to legal rights within the children's hearings system and the extent to which legal rights were implemented in practice within children's hearings. I will argue that the welfare focus of the children's hearings system was the predominant discourse in the early years, particularly for panel members and children's reporters. The scrutiny applied in the 1990s laid this bare. However, that is not to say there was no emphasis on legal rights amongst commentators and researchers, since there was wider discussion of certain aspects of the children's hearings system that could be characterised as of legal rights in nature. Rather it was the inconsistent practical application of the legal rights set out in the legislation within children's hearings that was problematic. This was because the focus of practitioners, particularly panel members, was on making decisions in the best interests of the child; but protecting and promoting the legal rights of the child as a whole, and those of

his or her parents, was not viewed as being central to decision making in the best interests of the child at that time.[1] I will show that while legal rights as understood at the time were foundational within the children's hearings system, in practice they were not often seen as an integral part of the operation of the system during this early period in its history. The reasons for this are not clear. I will argue in chapter four that the children's hearings system has evolved to incorporate a more expansive understanding of legal rights in Scots law and therefore it cannot be said that in the early years there was a fundamental flaw in the design of the system during this period. More likely, is that the more limited understanding of legal rights at this time within Scots law generally and the lesser prominence given to legal rights than in more recent times meant that their application in practice was not given the level of attention that the law requires today. What can be concluded with more certainty, however, is that the foundations set during this period wrote into the children's hearings system a flexibility that allowed it to take account of the increased emphasis on legal rights in Scots law in later years without altering fundamentally the principles on which it was based.

To develop this argument the chapter is split into three sections. In the first section I will examine the initial years of the operation of the children's hearings system in practice, from 1971 until 1985. In the second section I will analyse the period in the early 1990s when the children's hearings system came under its first phase of sustained external scrutiny, with its protection and promotion of legal rights forming a central part of that scrutiny. The third section will conclude the chapter by drawing together the issues explored with relevance to the principal question this thesis seeks to explore. Thus, the chapter has the following structure:

A. 1971 – 1985: The Children's Hearings System Established in Practice
B. 1990 - 1997: The Children's Hearings System Scrutinised
C. Chapter Conclusion

[1] Now we would recognise decision-making in the child's best interests as being a child's right in accordance with the UNCRC, Article 3.

A.1971 – 1985: The Children's Hearings System Established in Practice

In chapter two I argued that the underlying assumption of the Kilbrandon Committee and of the parliamentarians who debated the subsequent enacting legislation was that the vast majority of children who would come to the attention of the new tribunal would do so having been accused of a criminal offence. This inevitably led to a focus on due process given its centrality to criminal procedure, and, as I suggested in the introduction, gives less room for the legal rights of children and their parents to conflict. A second assumption, based on information gathered by the Kilbrandon Committee, was that the vast majority of children who attended children's hearings accused of a criminal offence would agree with the grounds of referral and thus a court process of proof, with all the procedural protections of rights that that entails, would not be required. This was important from a legal rights perspective since the children's hearing could then move immediately to consider how the child's needs could be better met and, according to the Committee, legal issues would rarely arise as part of this consideration. As these two assumptions are essential context to the application of legal rights within the fledgling children's hearings system, it is important to consider whether these underlying assumptions of the system's early architects proved to be correct in practice.

Although statistics were not collated systematically in the early years of the operation of the children's hearings system there was a clear trend in the types of referrals that the system was dealing with. This trend demonstrates that the assumption made by the Kilbrandon Committee about the type of referrals that would be made to the new system was a correct one since the majority of referrals to the children's reporter in the early years were based on the behaviour of the child. However, what is of note for the purposes of this thesis is that, while remaining consistently the majority, the proportion of offence referrals began to decrease almost as soon as the children's hearings system came into force. By way of illustration of both these points, for example in 1972 offence referrals made up 92% of all referrals to the children's reporter.[2] By three years into the operation of the children's hearings system, in 1974, 85% of referrals to the children's reporter were on the grounds of

[2] Stewart Asquith, *Children and Justice* (Edinburgh University Press, 1983) 130.

offences committed by children.[3] This was a downward trend in the proportion of offence referrals that was to continue steadily during the period under consideration in this chapter.

As set out above, the Kilbrandon Committee also assumed that when a child attended a hearing on an allegation of having committed an offence the child and his or her parents would agree with the allegation. This was derived from the fact that the Kilbrandon Committee identified that in approximately 95% of situations in the current criminal courts there was no dispute as to the facts that led the child to be before the justice system.[4] While this 95% figure was never reached in the early days of the operation of the children's hearings system, it is true to say that the vast majority of grounds of referral were accepted without the need for the matter to be referred for the adjudication of a sheriff. In 1971 87% of grounds were accepted to the extent that a children's hearing could proceed.[5] By 1974 81.5% of cases proceeded without the need for a proof hearing[6] and so while the grounds were still accepted in the overwhelming majority of cases there is the beginning of a similar downward trend to that discussed in the previous paragraph related to the types of referrals made to the children's reporter.

Therefore, in the early years of the operation of the children's hearings system the two assumptions made by the Kilbrandon Committee were correct, though there was already evidence of change in both the proportions of referrals coming to the attention of the children's reporter and in the numbers of factual situations recorded within grounds of referral to a children's hearing that required the adjudication of a sheriff. However, it was still the case during the initial years that the majority of referrals to the children's reporter were based on the behaviour of the child, as opposed to the behaviour of others towards the child, and that the grounds of referral were not generally referred to the Sheriff Court for proof. As

[3] Joe H Curran, *The Children's Hearings System: A Review of Research* (Scottish Office – Central Research Unit, 1977) 5.

[4] Kilbrandon Report, 73.

[5] Curran (n3) 25.

[6] Ibid.

will be discussed further below, this is important context to consider the application of legal rights within children's hearings.

As may be expected with any new legal process there was an initial surge of academic interest around the procedures and practices of the new children's hearings system as well as its theoretical underpinnings. There are common themes amongst much of the initial research into the operation of the system such as inconsistency of practice amongst children's reporters and panel members,[7] legal representation at children's hearings and in particular the absence of legal aid,[8] a 'widespread laxity'[9] in adherence to the procedural safeguards by panel members,[10] the provision of the papers provided to panel members in advance of the hearing to families[11] and the lack of resources to assist panel members to make decisions and then to implement these decisions.[12] With the exception of the availability of resources,

[7] See, for example, John P Grant, 'The Legal Safeguards for the Rights of the Child and Parents in the Children's Hearing System' 1975 JR 209, where it is suggested that national leadership is required to promote consistency in decision making. See also FM Martin and Sandford J Fox and Kathleen Murray, *Children Out of Court* (Scottish Academic Press, 1981), chapter 16: Implications for Change in Scotland, where it is recommended that there is a need for greater accountability for the work of reporters in particular.

[8] See, for example, Grant (n7), where it is argued that there is only a need for children and their parent to seek legal advice in relation to the grounds of referral prior to a first children's hearing. See also Gerald Gordon, 'The Role of the Courts' in Martin, Fox and Murray (n7) where it is argued that one of the greatest weaknesses of the children's hearings system is the lack of specific provision for legal representation.

[9] Martin, Fox and Murray (n7) 270.

[10] Ibid. See also Grant (n7) and Nigel Bruce, 'The Scottish Children's Panels and their Critics' 1978 *Journal of Adolescence* I 243.

[11] Following a review of available research, Martin, Murray and Fox concluded that the professional reports prepared for a hearing have a 'substantial influence' on both the points of discussion at the children's hearing and the ultimate decision reached (n 8) 278. See also Grant, (n7). As will be discussed in chapters three and four this issue has been resolved to the extent that papers are provided to all 'relevant persons' and the child, if they are deemed of sufficient age and maturity to receive them, by the courts in *McMichael v UK* [1995] 2 FCR 718; (1995) 20 EHRR 205; [1995] Fam Law 478, relating to 'relevant persons' and *S v Miller* 2001 SLT 531; 2001 SC 977, relating to children.

[12] See, for example, Martin, Murray and Fox, (n7) at chapter Two 'Areas of Debate'; Bruce (n10); Curran (n3) which describes the lack of resources as a major issue in the initial years of the operation of the children's

which is outside of the scope of this thesis, these themes can all be viewed as having some relevance to legal rights consciousness within the children's hearings system and therefore will be explored in more detail within this section.

i A welfare orientation

From the earliest time after the Kilbrandon Committee published its conclusions and the Westminster Parliament passed the subsequent enacting legislation, the welfare orientation of the new process attracted comment and in some cases this was presented in juxtaposition to the ability of the new system to ensure due process. Writing extrajudicially in 1968, Lord Kilbrandon stated that public opinion:

> *has tended to mistrust the consequences of the abolition of the juvenile courts. The man in the street is quite unprepared for an extension of humanitarian or even experimental remedies in the face of what he regards as a growing social menace*.[13]

In the face of professional and academic concern related to the protection of legal rights, amongst other matters, Lord Kilbrandon wrote:

> *the criminological objections tend to take an opposite if not an inconsistent line. Fears are expressed lest the panels act as nameless and faceless bureaucrats issuing lettres de cachet, on the motion of the social services, for the incarceration of helpless victims who seem to have lost some of their civil rights.*[14]

The 'textbook answer' to this concern as Lord Kilbrandon put it is that the panels will not be deciding on matters of guilt or innocence but rather upon treatment, and that there will be a

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hearings system, with some arguing that the issue was undermining the philosophy behind the system; John P Grant 'Social Work in Scotland in 1971: An Unsatisfactory Report' 1973 SLT (News) 69.

[13] Lord Kilbrandon 'The Scottish Reforms I- The Impact on the Public' (1968) 8 Brit J Criminology 235, 238. See also Nigel Bruce and John Spencer, *Face to Face with Families: A Report on the Children's Panels in Scotland* (MacDonald Publishers, 1976) 155; David May, 'Rhetoric and Reality – The Consequence of Unacknowledged Ambiguity in the Children's Panel System' (1977) 17 Brit J Criminology 209 at p209; Bruce (n10).

[14] Lord Kilbrandon (n13) 239.

right of appeal to the sheriff from a panel decision. In questioning whether these answers are adequate, Lord Kilbrandon turned the question towards the notion of due process as related to the panels. The doctrine of due process, he said, is one that belongs to the adversarial system, whereas the panels will be more inquisitorial.[15] This central focus of the right to appeal as being sufficient to offer protection for a child and his or her parents' legal rights is stark and consistent with the legal rights examined in chapter two, as is the argument that due process is not a concern related to panel decision-making since a panel is focused on the 'treatment' a child requires. What Lord Kilbrandon's argument fails to acknowledge, and what became clear as the children's hearings system matured, is that the potential 'treatment' options decided upon by the panels could represent significant interferences in the lives of children and families, potentially no less significant than any interference authorised by a criminal law process, and that interference might well be experienced by the affected individuals as being punitive in nature. It also fails to acknowledge the reality of the exercise of the right of appeal by children and their parents, which requires them to take a proactive step to secure their rights and this was not a proactive step that was taken often in this early period; for example in 1974 there were 16 appeals from 8773 supervision orders made.[16]

Operationally, the welfare orientation of decision-making within the children's hearings system was prominent in this early period as opposed to any wider or general legal rights focus. Following the terminology within the Kilbrandon report the 'treatment' of children in need was a predominant discourse, particularly amongst panel members and children's reporters. In writing about the children's hearings system, 'sole criterion' was a common phrase used to describe the interests of the child in relation to decision-making by those writing from both a panel member and practitioner perspective. That this discourse was prominent can be seen in the commentary from a variety of stakeholders in the children's hearings system, as well as in the recruitment and training of panel members and in the interpretation that was taken to the role of the children's reporter.

[15] Ibid.

[16] Curran (n3) 26.

Nigel Bruce, a panel member who was also a psychologist, collated statistics on the children's hearings that he was a member of in Edinburgh for two years between April 1971 and 1973 and placed the emphasis of hearing decision-making very much on solving the problems of the child 'in trouble' for whatever reason.[17] He stated that 'the sole criterion for decisions is the interest of the child.'[18] Further:

> *The role of the hearings emerges not so much as one of deciding between two or more options as of trying to reach a consensus on the interpretation of the child's behaviour and on the choice of appropriate measures of care. Where a consensus is not achieved, hearings exercise an independent judgment in weighing the opinions of the parents, the child, the social worker, the school, the psychiatrist, the assessment team and so on.* The interest of the child is the sole criterion in reaching their decision.[19]

Similar 'sole criterion' language is also found in the writings of other practitioners involved in the children's hearings system in its earliest period. Murray opined that the best interests of the child 'is the sole criterion to which the hearing is required to address itself.'[20] Similarly in his exploration of Part III of the Social Work (Scotland) Act 1968 from a legal academic perspective,[21] John Grant stated that 'As no other criterion – such as public interest – is mentioned it can safely be taken that the best interests of the child is the sole factor to be considered.'[22] However, in contrast to the previous practitioner writings, this factor is positioned by Grant very clearly in the children's hearing being a tribunal exercising a judicial function.[23]

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[17] Nigel Bruce, 'Children's Hearings: A Retrospect' Brit. J. Criminol. Vol 15 No. 4 (1975) at p333.

[18] Ibid 339.

[19] Ibid 343. Emphasis added.

[20] George J Murray, 'Juvenile Justice Reform' in FM Martin and Kathleen Murray (eds), *Children's Hearings* (Scottish Academic Press, 1976) 10.

[21] Though he was also one of the earliest appointed panel members.

[22] John P Grant, 'Juvenile Justice: Part III of the Social Work (Scotland) Act 1968' 1971 JR 149, 167.

[23] Ibid 167-169.

In this early period it was recognised that decision-making based solely on the best interests of the child brought with it a great deal of discretion for children's hearings and some acknowledged that this could have implications for the legal rights of children and their parents. In 1976 Martin and Murray cautioned against what they called 'welfare totalitarianism' and wrote:

> *Given a high degree of discretion in a system which attaches very great value to promoting the interests of the individual child, there is always a danger that in an excess of well-intentioned enthusiasm measures may be taken which are experienced as punitive or highly restrictive and which are manifestly disproportionate to the scale of the offence. Especially if taken outside the scope of a judicial system, such measures can make serious inroads on civil liberties and understandably provide converts to a belief in retributive justice and tariff systems of punishment.*[24]

That the welfare emphasis was the most prominent issue in the focus and operation of children's hearings during this time can also be illustrated by the recruitment and training of panel members. The Kilbrandon report placed the emphasis on the need for a panel member to be 'specially qualified either by knowledge or experience',[25] which suggests either a professional background or life experiences that would contribute to an understanding of the issues being experienced by the child. By the time of the White Paper that preceded the 1968 Act, as Murray points out, the emphasis had moved toward 'community involvement'[26] and the desirability for panel members to be representatives from the child's community.

It was the Children's Panel Advisory Committees (CPACs) that were charged with recruiting individuals to be panel members on the basis of some, albeit limited, guidance from the Scottish Office: 'Persons appointed as panel members should have shown themselves capable

[24] FM Martin and Kathleen Murray, 'Achievements, Issues and Prospects' in Martin and Murray, *Children's Hearings* (n20) 236.

[25] Kilbrandon Report, 92.

[26] Kathleen Murray, 'The Children's Panel' in Martin and Murray, *Children's Hearings* (n20) 58.

of taking reasonable unbiased attitudes towards children in trouble.'[27] Initial circulars emphasised personal qualities like intelligence, good judgement, capacity to be objective, concern for people and their problems, absence of bias and prejudice, knowledge and understanding of children and their family and a belief in the potential for an individual to change.[28] Notably there was no reference to understanding of the legal framework, something that attracted criticism.[29] However, this should not be considered to be an unexpected omission given the lay character of the panel and the practice of children's reporters at that time to provide legal assistance to panel members similar to that of legally qualified assessors at district courts providing assistance to lay magistrates which had long been a feature of criminal court practice. In pursuit of the recruitment of the lay people desired to be part of the children's hearings system the qualities listed are all desirable qualities; understanding of the legal framework could be learned through pre-service and ongoing panel member training. However, this argument does not bear much scrutiny in light of the nature of the training at the time since coverage of legal and procedural matters during preliminary training was described as 'very light indeed' in some regions.[30] The training offered to panel members, both before sitting on children's hearings and during their period of service did not follow any agreed national programme during this period[31] and so the potential for regional variation and inconsistency in practice is clear. Criticisms were laid that the training was too heavily focused on social work concepts[32] and was 'overly academic' in

[27] As quoted ibid 59.

[28] Social Work Services Group, Circular No. SW7/1969 as quoted in Martin, Fox and Murray, *Children Out of Court* (n7) 13. See also Murray (n26) and Elizabeth Mapstone, 'The Selection of the Children's Panel for the County of Fife' 1973 Brit J Social Work 2.

[29] For example, Martin, Murray and Fox stated:

> *As far as skill in observing all the procedural requirements of the hearing are concerned, training must obviously carry by far the greater part of that responsibility. We cannot help wondering however whether the emphasis that some regions in their recruitment publicity place upon the common sensical nature of the panel member's work may not encourage an underestimation of the more formal, procedural aspects of the role from the very beginning.*

Martin, Fox and Murray, *Children Out of Court* (n7) 273.

[30] Ibid.

[31] Murray (n26) 64.

[32] May (n13) 215-216.

its nature.[33] Martin and Murray, themselves involved in the design and delivery of panel member training in Glasgow, reported in 1982 that 'ideas about panel member training were changing' from a focus on the support services available to children and families to a specific focus on the practice required of a panel member during a children's hearing.[34]

With this background of lay panel members being recruited for their personal qualities rather than their legal knowledge and who did not receive an adequate level of training on the broader legal rights aspects of the children's hearings system, the focus must shift to the children's reporter as the 'central figure'[35] within the system and the extent to which that officer played a role in ensuring the protection and promotion of legal rights within the children's hearings system. While the children's reporter would attend all children's hearings, according to Finlayson, then Regional Reporter to Lothian Children's Panel, 'the actual role of the reporter within the hearing has been the subject of considerable discussion among members of the Reporter Association.'[36] What was generally agreed upon was the 'quasi-legal advisory role'[37] of the reporter to panel members. It is an interesting consideration in itself that Finlayson gives no further commentary on the role of the children's reporter in a children's hearing beyond these brief remarks, but it is clear from the description of the role generally at this time that there was considerable variation in practice between and even within regions. Therefore, one can conclude that there was a lack of consistency with how this advisory role within children's hearings was carried out. This conclusion is supported by the research evidence gathered in relation to the application of legal rights related provisions within children's hearings and I will examine this in the next section of this chapter.

ii Legal rights in children's hearings

As I set out in the preceding section many of the professional stakeholders within the children's hearings system focused on the welfare criterion for decision making within the

[33] Ibid.

[34] FM Martin and Kathleen Murray (eds), *The Scottish Juvenile Justice System* (Scottish Academic Press, 1982) xi.

[35] Alan R Finlayson, 'The Reporter' in Martin and Murray, *The Scottish Juvenile Justice System,* ibid*,* 48.

[36] Ibid 49.

[37] Ibid.

children's hearing during this period. Panel members were not recruited for their legal rights knowledge or commitment and there was a lack of focus on this aspect of the children's hearings system within their training. In addition, the lead professionals at the tribunal (the children's reporters) had an inconsistent approach to their quasi-legal advisory role. In this section I will examine what this meant for the protection and promotion of legal rights, understood in the broadest collective sense, within children's hearings over the course of their initial period of operation. This is important to this thesis since I will establish the extent to which legal rights were respected and promoted in practice during the early period in the children's hearings system's history.

By 1975 academic commentators were writing about 'expressions of concern'[38] in relation to the application of legal safeguards within the children's hearings system for children and their parents. By way of an example, Fox quotes a case he was able to observe directly in June 1973, in which the sheriff on appeal drew attention to the incompatibility of the procedure followed within the children's hearing with principles of natural justice.[39] The case involved a lack of parental care grounds for three children, which were denied at the initial grounds hearing. At the subsequent proof hearing the sheriff found the grounds to be established for the elder of the three children. This child thereafter was removed from the family home by a decision of a children's hearing and this decision was appealed to the sheriff. The decision of the children's hearing was based on information within the social background report described as being of 'a highly prejudicial nature' about the relationship between the child's mother and another man which did not form part of the grounds of referral.[40] The argument of the children's reporter that 'the hearing [has] absolute power to take any steps [considered] to be in the child's best interests – and without having any further regard to any limitation in their discussion' was rejected 'emphatically' by the sheriff. The sheriff is quoted as saying:

[38] John P Grant, 'The Legal Safeguards for the Rights of the Child and Parents in the Children's Hearings System' 1975 JR 209, 209.

[39] Sandford J Fox, 'Juvenile Justice Reform: Innovations in Scotland' 12 Am Crim. L. Rev. 61 1974-75 92–93.

[40] It is also important to consider that the mother may not have seen the social background report in advance of the children's hearing either, given there was no legal obligation within the 1968 Act or Rules on any of the parties with sight of the report to share it with her.

> *any other interpretation is not only a misinterpretation of the law, but a breach of natural justice which must allow to any person fair notice of the crime or fault or negligence, call it what you will, with which they are charged.*[41]

A similar observation involving the inappropriate explanation of grounds of referral was apparent in another case cited by Fox.[42] The case concerned the role of a 10 year old boy in the theft of some copper piping. The boy had denied being involved in the theft; instead he maintained throughout the process that he had been trying to encourage his friends not to engage in the theft and this was the position of the boy when asked if he agreed with the grounds of referral that he had committed an offence of theft. The children's hearing is then reported to have asked the following questions: 'But you knew they were going to do it, didn't you?', and 'You could have run away, couldn't you?', and 'You were involved in this thing then, weren't you?' and finally, 'You therefore accept the grounds of referral, don't you?'. This was inevitably followed by an 'ay' from the 10 year old boy. Not only does this exchange demonstrate a series of leading questions to the child but it also indicates that an acceptance of grounds was taken by the children's hearing in the face of that not being the true position of the child. Such a conclusion flies in the face of the statutory right of the child to accept or deny the grounds of referral to a children's hearing and to have the facts determined by a sheriff in the event of a denial.[43] There is no evidence to indicate how widespread such inappropriate explanations were, and therefore it is unknown whether this was an entirely unique case.

Two studies in particular undertaken in the 1970s require close scrutiny to examine the application of legal rights in practice within the operation of the children's hearings system. This scrutiny informs my argument within this thesis since the studies provide insight into the application of legal rights in practice within the children's hearings system in its initial period

[41]Fox (n39) 92.

[42] Sandford J Fox 'Juvenile Justice Reform: Some American-Scottish Comparisons' in Martin and Murray and Fox *Children's Hearings*, (n20) 217.

[43] 1968 Act, s42(1).

of operation. This enables an assessment of the principal question to be undertaken not only based on what the legislation says but also on how that legislation was applied in practice.

The first study is a smaller one and is reported in 'Face to Face with Families'.[44] In 1973 and 1974 Bruce and Spencer undertook a study in two urban and two rural areas to research the children's hearings system in operation. Across the four areas the researchers received 120 questionnaires from panel members and interviewed 12 children's reporters, 4 Children's Panel Advisory Committee chairs, 4 children's hearing chairs, 60 social workers, 9 education representatives, 2 psychiatrists, 2 psychologists, 4 sheriffs and 7 police representatives in the course of undertaking their research. They also attended and observed 51 children's hearings in order to analyse the process against 6 criteria they described as 'appropriate yardsticks to apply to modern systems of juvenile justice'[45]: these being respect for rights, communication between professionals, discriminatory power, intelligibility, the availability of a wide variety of positive measures and community involvement.[46]

The authors found that the disclosure of the substance of the reports to families was not something 'accorded much importance'[47] by panel members. An important consequence of this was, they said, that report writers were less likely to take care about justifying their conclusions, in the knowledge that those conclusions would not be open to challenge by those who may have an alternative point of view. In addition, the researchers found that the right of a parent to attend all stages of a children's hearing about their child was not diligently respected. The authors cite a frequent practice whereby panel members would withdraw to consider their decision. They also cited a practice of children's hearings speaking with a child on their own in the absence of a specific rule regulating this practice at this time.[48] However, by way of contrast in relation to the application of certain legal rights it was found that children's hearings were 'conscientious about drawing the family's attention to the right of

[44] Bruce and Spencer (n13). Hereinafter 'Face to Face with Families'.

[45] Ibid 82.

[46] The absence of a detailed methodology for the study is problematic for analysis of the findings; the information contained in this paragraph is taken from the Acknowledgements, 6.

[47] Face to Face with Families (n13) 117.

[48] Such a provision was later introduced via the Children (Scotland) Act 1995.

appeal against their decisions and to the availability of legal aid'[49] and that the right to confidentiality 'is conscientiously respected by children's hearings.'[50]

The conclusions of this study illustrate how, at the time the children's hearings system was in its infancy, legal rights were understood in practice as being more limited in scope than we would understand in modern Scots Law. The right to appeal, to legal representation and to legal aid were viewed as important to implement in practice but a right of access to information contained within the reports presented to the children's hearing and to a fair process, for example placing importance on who was in attendance, were not seen as so significant in practice at this time.

Had this been a single study, especially given it covers only four areas and contains little detailed information about its methodology, then some caution would have been exercised in extrapolating the conclusions in Face to Face with Families to the wider children's hearings system. However, a second and larger study carried out within the first decade of the operation of the children's hearings system reached broadly similar conclusions in relation to the application of legal rights within children's hearings. This second study is reported in 'Children Out Of Court'[51] and comprised a major and more comprehensive study of different facets of the children's hearings system, those that the researchers considered to be the most important, carried out in 1978-79.[52] In contrast to Face to Face with Families this study sought to be representative of Scotland as opposed to being a study of a small number of geographical areas. The researchers also used a number of different methods to gather

[49] Face to Face with Families (n13) 121.

[50] Ibid.

[51] Martin and Fox and Murray, *Children Out of Court* (n7). Hereinafter 'Children Out of Court'.

[52] Ibid 45.

data;[53] observation of children's hearings[54], analysis of hearing documents[55], interviews with children and some parents[56] and questionnaires.[57]

In the observation of children's hearings, the researchers recorded the observance or not of some of the rules of procedure as well as some elements that were observed as being 'good practice' at the time. Therefore, these observations provide further contemporary evidence of the implementation of certain specific legal rights within the initial years that the children's hearings system was in operation. The rules of procedure examined were that the child was identified by name and age,[58] the purpose of the hearing was explained,[59] the social background and school reports were 'referred to',[60] the reasons for decision were stated[61] and the right to receive written reasons and to appeal the decision were explained.[62] The 'good practices' examined were the right to receipt of legal aid indicated and that the child and parent were asked if they agree with and understand the decision made. That these were the procedural requirements viewed as most important by the researchers is of interest and further supports the understanding of how legal rights were conceptualised at that time that I have presented in this thesis, in essence in a narrower sense than would be understood today, especially given the parallels with the 'Face to Face with Families' study discussed above.

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[53] Ibid 46.

[54] 301 children's hearings were observed. Review hearings were excluded, meaning all children's hearings observed had resulted from the acceptance or establishment of grounds of referral.

[55] The papers were examined for each of the children's hearings observed.

[56] 105 children aged between 12 and 15 years referred to a children's hearing on offence grounds were interviewed. 36 parents were also interviewed, although for practical reasons these parents were mostly from Glasgow and surrounding areas.

[57] 678 questionnaires on decisions made by children's reporters were examined, along with 921 panel member and 174 social worker questionnaires exploring their opinions on the operation of the children's hearings system.

[58] Social Work (Scotland) Act 1968 ss42(2), (7).

[59] Children's Hearings (Scotland) Rules 1971 SI No. 492 R17(1).

[60] Ibid Rs 17(3) and 19(4).

[61] Ibid R17(4).

[62] Ibid.

The following table is reproduced from the study to summarise the findings:

Table 7.1: Frequency of Compliance with Certain Procedural Requirements[63]

Formal Rules	**Per cent of hearings**
Child identified by name and age	94
Purpose of hearing explained	63
Social background report referred to	35
School report referred to	60
Reasons for decision stated	58
Right to receive written reasons indicated	44
Right to appeal indicated	74
'Good practices'	
Right to legal aid indicated	6
Child asked if agrees/understands decision	37
Parent asked if agrees/understands decision	31
(N = 100%)	301

The researchers demonstrated through further analysis that it was not the case that some children's hearings ignored many or all of the procedural requirements while others adhered strictly to the requirements.[64] Rather there was more of a distributed spread of requirements met and not, which suggests that strict adherence to procedural requirements designed in many cases to offer protection for an individual's legal rights was not prioritised in the decision making of children's hearings at this time. The researchers also concluded that there was no one factor that led to a children's hearing adhering, or not, to the procedural

[63] Reproduced from Children Out of Court (n7) 103. It is not indicated within the research whether there were any children's hearings observed when the child and/or either parent was not in attendance. This is an important omission since if a child and/or parent is not present certain of the procedural requirements being assessed could not as a matter of practicality be carried out, for example asking if they understand and agree with the decision.

[64] Ibid 108-109.

requirements. They analysed a number of influential factors and found some slight variations. For example, they found that a higher proportion of children's hearings adhered to the procedural requirements studied where the grounds narrated more serious offences. Perhaps unsurprisingly, children's hearings that started late tended to be slightly poorer in terms of meeting the procedural requirements as did those of a shorter duration. Worryingly, though possibly reflective of gender norms at the time, the attendance of the child's mother did not indicate a particular change in procedural compliance but there were fewer children's hearings of below average compliance when the child's father was in attendance. Very few children's hearings were above average in terms of compliance when another family member attended rather than the child's parents. In the small number of children's hearings examined where there was no social worker in attendance, adherence to procedural requirements was also noted to be poor. Where the procedural requirements were adhered to, it was reported that these children's hearings also tended to be above average in terms of the participation of the child and his or her family.

Alongside the direct observation of children's hearings, by questionnaire the researchers asked panel members and social workers to select three objectives from a pre-determined list that they considered necessary for a 'good' children's hearing. As can be seen in the table reproduced from the research below, the suggested objectives ranged from the full participation and understanding of the child and his or her parents in the children's hearing, to the atmosphere within the hearing room to adherence to and explanation of legal procedures.

Table 15.1: Aspects of an Ideal Hearing[65]

	Panel Members (%)	Social Workers (%)
The full participation of the child and parents in the discussion	85	94
The parents and the child's understanding of *all* that takes place at hearings	86	89
The hearings impact on the child and parents as a serious event	43	40
An atmosphere of community and equality between family and other hearings members	38	30
The difference between the hearing and the court	19	22
The hearing as a body of authority with powers over the family	13	9
The observance of all the procedural requirements	6	4
Conveying legal and technical information to the family	4	9
(N = 100%)	921	170

It is striking that only 6% of panel members indicated to the researchers that observing procedural requirements was an important aspect of a 'good' children's hearing. In

[65] Ibid 256.

considering this response rate the question asked of panel members must be acknowledged; panel members were asked only to select the top three objectives that they thought characterised a 'good' children's hearing and so this is not to say that the panel members surveyed did not think that adherence to procedural requirements was an important objective within a children's hearing. Rather what it can tell us is that it was not seen by nearly all panel members surveyed to be within the top three objectives of a 'good' hearing at this time. There was a strong response to the importance of the full participation of children and their parents in the children's hearing and to ensuring their understanding of proceedings. From a modern perspective, we might view these features as being derived from a legal rights based approach, and though there is no evidence that these responses from panel members in 1978-79 were driven by an explicit understanding and desire to safeguard and promote the child and his or her parent's legal right to participation they do indicate an implicit acceptance of the importance of these matters.

Considering both these studies together I conclude that there was some awareness of selected legal rights in practice and some limited recognition of what we might now refer to as the right to participation in legal proceedings in the initial years that the children's hearings system was in operation. However, similar to my conclusion from chapter two about the prominence of legal rights in the conception and construction of the children's hearings system, it cannot be said that legal rights, in an expansive sense, were well embedded in the practice of the children's hearings system in the initial years of operation. For example, there is a clear dichotomy between a substantial portion of panel members who completed the questionnaire in Children out of Court viewing the full participation of children and their parents in a children's hearing as being one of the top three objectives of a 'good' hearing, with the lack in practice of basic safeguards to enable participation such as disclosing the substance of reports before the children's hearing and requiring report writers to justify their contents. Later research from Asquith in 1983 reported his findings from observations of children's hearings in the course of a comparative study between children's hearings in Scotland and youth courts in England. In children's hearings he found that social workers were not that actively involved in the discussion: 'The main question directed to the social worker

was of the nature 'have you anything to add to your report?''[66] Therefore, if the substance of the report is not disclosed to the child and his or her parent/s at the outset of the children's hearing there is a significant question mark about how children and their parents could be expected to be aware of the content of the report to a degree sufficient to enable them to agree or disagree with the contents.[67] A similar contradiction can be seen in the high proportion of panel members who saw the understanding of the child and his or her parents to be an important objective of a 'good' children's hearing but yet, suggestive of an implementation gap, in practice the percentage adherence to the suggested practice of asking a child and parent if they understood the decision was around one third of children's hearings.

Two further conclusions of relevance to this thesis can be drawn from these studies. The provision of information on the right to appeal and about legal aid appears from these studies to have been more regularly applied in practice and this is consistent with the conclusion I reached in chapter two about the prominence of these specific rights and there being a narrower understanding of legal rights than we would have today, certainly amongst the individuals charged with operating the children's hearings system.[68] Secondly, that the researchers in both studies included measurements on respecting legal rights within children's hearings demonstrates that at the academic level there was a consciousness of the application of legal rights and that some of the researchers involved in these two studies were also practitioners should be noted. The issue that can be seen clearly during this period was the translation of this consciousness into the practical application within children's hearings and ultimately to the child and his or her parent's experience of the children's hearings system.

Against this background of limited implementation of measures to protect and promote individual legal rights, the children's hearings system operated under the Social Work

[66] Asquith (n2) 190.

[67] This is a question that the European Court of Human Rights considered in the 1990s. *McMichael v United Kingdom* (1995) 20 EHRR 205.

[68] While families may have been informed of the right of appeal it is clear from the statistics that the right to appeal the decision of a children's hearing was not often exercised. As was noted above, Curran reported that in 1974 of the 8773 supervision orders made there were 16 appeals made. Curran (n3) 26.

(Scotland) Act 1968 without substantial amendment throughout the 1970s and 1980s.[69] However, by the early 1980s the inadequacy of the protection given to children and adults' legal rights by children's hearings was gaining an increased focus, alongside more references to the United Nations Declaration on the Rights of the Child and the ECHR. Grant stated:

> *It is all too easy in a system deliberately designed so as to be operated by non-lawyers, so as to be informal and so as to have regard only, as s43(1) of the 1968 Act provides, to 'the best interests of the child', to think that law and legal procedures are at least burdensome technicalities or, at most, complete irrelevances. There is an inevitable tension in all modern systems of juvenile justice between rights and needs, between justice and welfare.*[70]

Towards the end of the 1980s, a series of events took place that would ultimately see the first sustained period of external scrutiny of the children's hearings system, much of it geared towards the evolution of the system to secure better protection and promotion of individual legal rights, and it is this scrutiny that I will now examine within the second section of this chapter.

B. 1990 - 1997: The Children's Hearings System Scrutinised

In the previous section I argued that within children's hearings the protection and promotion of individual legal rights enshrined within domestic law was not at the forefront for practitioners in the early years of the operation of the children's hearings system. However, as the children's hearings system began to mature into the 1990s so did its understanding of the legal rights of children and their parents. With several reports, inquiries and judgments, the 1990s in particular saw an intense period of scrutiny of the children's hearings system and

[69] Reform in the 1970s and 1980s was piecemeal, with the most notable amendments being the introduction of a Safeguarder to safeguard the interests of the child by the Children Act 1975 s66, and the introduction of a new ground of referral related to solvent abuse by the Solvent Abuse (Scotland) Act 1983 s1.

[70] John P Grant, 'The Role of the Hearing: Procedural Aspects' in Martin and Murray, T*he Scottish Juvenile Justice System* (n34) 59. As was discussed in the introduction this period coincided with a critical period for children's rights in particular with 1979 being the International Year of the Child and the beginning of the drafting process of what would ultimately become the UN Convention on the Rights of the Child.

ultimately the first major legislative change to the system via the Children (Scotland) Act 1995. In this section I will discuss three specific and significant instances where the protection and promotion of legal rights within the children's hearings system was scrutinised during this period; the Orkney Inquiry and subsequent Clyde report,[71] the judgment of the European Court of Human Rights in *McMichael v UK*[72] and finally the Scottish Office commissioned Evaluation of Children's Hearings in Scotland.[73] Through this discussion I will suggest that each of these instances contributed to a period of sustained scrutiny of the protection and promotion of legal rights within the children's hearings system which challenged the system ultimately to evolve but without a fundamental revolution of the principles underpinning its design.

First, however, I will provide some context to the changing nature of the issues the children's hearings system was being called on to determine during this period since this is essential background to contextualise the subsequent discussion in this section. As I discussed in the introduction to this thesis and in section A to this chapter, this context is important to consider in relation to the assumptions made by the Kilbrandon Committee about the nature of the discussion and decisions made by a children's hearing and the alignment of a child's legal rights with those of his or her parents.

In contrast to the trends identified by the referral statistics in the early years of the operation of the children's hearings system, which tended towards youth justice related referrals,[74] as the system was becoming more mature so was society's understanding of child abuse and neglect. The trends in referrals that I identified above in the early 1970s continued throughout the 1980s and resulted in a change to a heavier focus on referrals as a result of behaviour towards rather than by the child. For example, the Association of Reporters to Children's

[71] Lord Clyde, *The Report of the Inquiry into the Removal of Children from Orkney in February 1991* (HMSO)(Edinburgh)(1992). Hereinafter 'The Clyde Report'.

[72] (1995) 20 E.H.R.R. 205.

[73] Christine Hallett and Cathy Murray, *The Evaluation of Children's Hearings in Scotland Volume 1: Deciding in Children's Interests* (The Scottish Office Central Research Unit) (Edinburgh) (1998). Hereinafter 'Deciding in Children's Interests'.

[74] Discussed in Section A above.

Panels[75] reported in 1992 that the number of referrals to the children's reporter had grown from 24,219 in 1972 to 40,099 in 1990[76] and described the 'mushrooming of child protection cases'[77], with care and protection cases, defined as those grounds referred under ss32(2) (a) – (e) of the 1968 Act, having grown from approximately 5% of referrals in the initial years of the operation of the children's hearings system to 32% in 1990.[78] A similar growth in referrals was reported in relation to those under s32(2)(d) of the 1968 Act, where a schedule one offence had been committed against a child or another child in the same household, which represented 0.4% of all referrals in 1972 but equated to 15.4% of referrals by 1990.[79] In August 1993 the White Paper that preceded what became the 1995 Act reported a five-fold increase in referrals to the children's reporter on what it called care and protection grounds between 1980 and 1990.[80]

The changing nature of referrals presented different challenges for the children's hearings system to those that may have been envisaged when the system was being designed and implemented, particularly with reference to the legal rights of those involved:

> *Those designing the system were unaware of what has become an enormously important area of work, and one which involved many heightened conflicts of interest and rights and legal complexities and procedural demands which were not anticipated in 1971.*[81]

[75] Association of Reporters to Children's Panels Submission to the Orkney Inquiry (Unpublished, 17 March 1992).

[76] Ibid 2.2.1.

[77] Ibid 2.2.3.

[78] Ibid 2.2.2.

[79] Similarly, Hill, Tisdall and Murray report that 'neglect, ill-treatment and risk of abuse' grounds of referral went from 600 in 1972, to 1700 in 1980 and to 13,535 in 1993. Malcolm Hill and Kay Tisdall and Kathleen Murray, 'Children and their Families' in John English (ed), *Social Services in Scotland* (4th ed, The Mercat Press, 1998) 100.

[80] The Scottish Office Social Work Services Group, *Scotland's Children: Proposals for Child Care Policy and Law* (Cmnd 2286, 1993) 5.2.

[81] Association of Reporters to Children's Panels Submission to the Orkney Inquiry (n75) 2.2.4.

Based on the archival material examined in chapter two to this thesis, it is unfair to suggest that the early architects were 'unaware' of care and protection related issues, but it is true to say that the focus was on youth justice, driven by the fact that this was the majority issue that was coming to the attention of the courts at the time the Kilbrandon Committee and legislature were contemplating the issues. It is a foreseeable consequence of an increasing number of referrals related to child abuse and neglect that the legal rights of children and their parents may compete and thus require to be carefully balanced in decision-making, as opposed to a consideration of the child's criminal behaviour or truancy. For example, the legal rights to attend a children's hearing and to receive information may require careful management where the perpetrator of abuse is a parent in order to avoid any additional risk to the child. It is also foreseeable that child abuse and neglect referrals bring with them a degree of heightened anxiety and litigious, adversarial approaches as parents seek to demonstrate that they did not do to their child what is alleged, and indeed to challenge allegations that may have come from the child themselves, and/or prevent the child from being removed from their care. This is reflected in the number of cases where grounds were taken to proof at the Sheriff Court, which was almost 5000 in 1990 more than double the number in the initial years.[82] This increase in the number of proof applications is important since these proofs are conducted in the adversarial tradition of the Sheriff Court, which presents an unrealistic expectation that children and families will switch easily between the non-adversarial philosophy of the children's hearing to adversarial court proceedings.

It is against this background of increasing focus on behaviour towards rather than by the child that I consider a series of events, reports and Inquiries that contributed to a sustained period of scrutiny of the children's hearings system in the early to mid 1990s. In the remainder of this section, I will consider three particular instances, resulting both from the experiences of individual children and Government initiatives, to demonstrate this scrutiny which I suggest drove further the evolutionary development of the children's hearings system towards the end of the period under consideration in this chapter.

[82] Ibid.

i The Orkney Inquiry

Significant events that occurred in relation to individual children in the early 1990s and an apparent willingness to review the children's hearings system after two decades of experience of the Kilbrandon principles in practice led to the production of four investigative reports which would shape the future direction of the children's hearings system – the Clyde Report in relation to events in Orkney,[83] the Kearney Report related to events in Fife,[84] the Finlayson report examining the role of the children's reporter,[85] and the Government's own Review of Childcare Law.[86] The clearest and most detailed examination of the children's hearings system and its protection of legal rights in both theory and practice resulted from the events in Orkney and therefore this represents the first area of scrutiny that will be examined in this section.

On 27 February 1991 nine children from four different families living on South Ronaldsay, aged between eight and fifteen years, were removed to places of safety on the mainland by social workers who had obtained place of safety orders for each child from the sheriff under s37 of the 1968 Act.[87] The granting of the place of safety orders was prompted by two main

[83] The Clyde Report (n71).

[84] Sheriff Kearney, *The Report of the Inquiry into Child Care Policies in Fife* (HMSO) (Edinburgh)(1992).

[85] Alan Finlayson, *Reporters to Children's Panels: Their Role, Function and Accountability* (HMSO)(Edinburgh)(1992).

[86] Scottish Office Social Work Services Group, *Review of Childcare Law in Scotland* (HMSO)(Edinburgh)(1990). As well as these four reports, the Social Work Services Inspector for Scotland, *Another Kind of Home: A Review of Residential Care* (HMSO) (Edinburgh) (1992) also contributed to the reform of the wider system for the protection of children.

[87] s37(2) of the 1968 Act provided that a child may be removed to a 'place of safety' by a person authorised by a court to do so where the child has been, or is believed to have been, a victim of an offence under Schedule One to the Children and Young Persons (Scotland) Act 1937. This rather loose criterion for removing a child from their parent is something to which Lord Clyde would return in his Inquiry into the case. Discussed further below. The lack of a definition of a 'place of safety' in the 1968 Act has also been criticised by Elaine E Sutherland, 'The Orkney Case' 1992 JR 93. Under s37(3) the child may be 'detained' in this place until either the children's reporter decides that compulsory measures of care are not required for the child, a children's hearing is convened to consider the child's circumstances or a period of 7 days has lapsed. The use of the word 'detained' is somewhat unfortunate considering that the child who falls under this section is one against whom a schedule one offence has been committed as opposed to a child who themselves has committed an offence.

concerns. First, allegations had been made by the children of a fifth South Ronaldsay family in interviews which had taken place after they themselves had been removed to places of safety in November 1990. Secondly, the social workers regarded as unusual behaviour from the parents of the four families who were sending messages and gifts to the children of the fifth family after they were taken to foster care. These concerns led the social work department to conclude that the allegations made by children from the fifth family that all five families in South Ronaldsay had been engaged in the ritualistic sexual abuse of their own and other children were credible, and true.

Following their removal to places of safety the children's reporter referred the nine children to children's hearings some six days later.[88] Prior to the children's hearing itself private meetings between the panel members and the children's reporter took place to consider whether the children should be required to attend the forthcoming children's hearing. No notice of these meetings was given to the children or their parents, since the holding of the meetings, and accordingly notice of them, had no statutory basis at the time. The meeting for each child decided that the children should not attend their hearing. At the statutory children's hearing grounds of referral under ss32(b) and (d)[89] were denied by the parents of the children and the grounds were referred to the Sheriff Court for proof. Meanwhile the children were further detained by the children's hearings issuing warrants to keep the children in places of safety.[90] At a preliminary hearing of the application to establish the grounds of referral the sheriff upheld a challenge to the competency of the proceedings and

[88] Social Work (Scotland) Act 1968, s37(4).

[89] s32(2)(b) provides that 'through lack of parental care he is falling into bad associations or is exposed to moral danger' and s32(2)(d) provides that 'any of the offences mentioned in Schedule 1 to the Children and Young Persons (Scotland) Act 1937 has been committed in respect of him or in respect of a child who is a member of the same household'.

[90] s37(4) provides that where a:

> *hearing are unable to dispose of the case and are satisfied that his further detention is necessary in his own interest, or have reason to believe that he will run away during the investigation of his case, they may issue a warrant requiring the child to be detained in any place of safety for such a period not exceeding twenty-one days as may be necessary.*

Again the reference to 'detention' is an unfortunate one.

discharged the grounds of referral: as a result, the children were immediately returned to the care of their parents. Although the children's reporter subsequently had his appeal upheld by the Inner House in relation to the shrieval decision as to the competency of the proceedings[91] he had by then abandoned any further proceedings to establish the grounds, thus bringing the proceedings related to the nine children to an end.

The decision of the Inner House was only the beginning of the story for the purposes of the scrutiny and ultimately reform of the children's hearings system that I examine in this section. There was an explosion of media interest in the case and the public concern that arose led to the appointment of Lord Clyde to conduct an Inquiry with a remit:

> *'To inquire into the actings of Orkney Islands Council (in particular those of their social work department and of their Reporter to the children's panel for their area), of the Northern Constabulary and of all the persons acting on behalf of either of them, and into the effect on those actings and the attendant publicity in relation to: 1. The decision to seek authority to take to a place of safety nine children resident in South Ronaldsay; 2. The removal of those children from their homes on 27 February 1991; 3. The detention of those children in places of safety following the removal and until they were returned to their homes (and in particular how they were cared for and interviewed while so detained); 4. The decision not to continue proceedings before the Sheriff for a finding on the evidence; and to make recommendations.'*[92]

The conclusions of the Orkney Inquiry provide detailed scrutiny of the children's hearings system from an explicitly legal rights-based perspective. The issues highlighted by the Inquiry demonstrate movement from the protection of legal rights being rooted in procedural matters that had been the focus of the legal rights protection within the children's hearings

[91] *Sloan v B* 1991 SLT 530. The judgment of the court considered three aspects of the operation of the children's hearings system, the attendance of the child at the initial grounds hearing and the requirement placed upon the chairperson to explain the grounds of referral to the child, the requirement placed upon the sheriff to hear evidence before determining an issue of competency of the application and thirdly, the attendance of the press at children's hearings court proceedings.

[92] The Clyde Report (n71).

system to that point, such as the right to appeal decisions made and to receive legal aid, towards a more expansive and proactive approach to the protection and promotion of legal rights of children and their parents within a system of decision-making based on the welfare of the child. The Inquiry also provided the most comprehensive consideration to date of the practices applied within the decision-making of the children's hearings system against international legal rights set out in the ECHR and the UNCRC. Indeed, a specific recommendation was made that 'in setting out the principles within which revised legislation and guidelines on child protection should be considered, reference should be made both to the European Convention on Human Rights and to the UN Convention on the Rights of the Child.'[93]

The Report of the Inquiry made a series of wide-ranging recommendations, many of which are out with the scope of this thesis. However, the scrutiny of three areas demonstrates this movement to a more expansive approach to the protection and promotion of legal rights within Scots law and the children's hearings system. These three areas are place of safety orders, private meetings between the children's reporter and the panel members before a children's hearing and the attendance of the child at his or her children's hearing. In the remainder of this section, I will examine each of these three areas and demonstrate how this scrutiny contributed to the evolution in the protection and promotion of legal rights within the children's hearings system without a fundamental alteration to the principles that underpinned the design of the system.

Place of safety orders

The main area of the legislation at issue in the Orkney case, which attracted significant criticism in the Clyde Report, was the provision governing place of safety orders in s37(2) of the Social Work (Scotland) Act 1968 which provides:

> *A constable or any person authorised by any court or by any justice of the peace may take to a place of safety any child in respect of whom any of the offences mentioned*

[93] Ibid 15.2. Chapter 15 of the Inquiry report also specifically sets the modern context as being related to the ECHR and UNCRC.

in Schedule 1 to the [1937 c. 37.] Children and Young Persons (Scotland) Act 1937 or any offence under section 21(1) of that Act has been or is believed to have been committed, and any child so taken to a place of safety or any child who has taken refuge in a place of safety may be detained there until arrangements can be made for him to be brought before a children's hearing under the following provisions of this Part of this Act, and, where a child is so detained, the constable or the person authorised as aforesaid or the occupier of the place of safety shall forthwith inform the reporter of the case.

In relation to the events in Orkney a decision was taken by the social work department that the children were at such risk that it was necessary that they were removed to a place of safety. A full two weeks followed before an application was made to the sheriff for the place of safety orders and a further 24 hours before the orders were implemented and the children removed from the care of their parents. The Inquiry deemed that s37(2) was both vague in terms of purpose and the terms of its exercise,[94] concluding that 'the uncertain scope of the discretion embodied in section 37(2) leaves open the opportunity for a child to be removed on the basis of suspicion and uncertainty. The scope of the discretion is excessive.'[95] This, the Inquiry stated, was potentially in contravention of Article 8 of the ECHR which guarantees respect to family and private life for everyone, and Article 16 of the UNCRC which provides a similar guarantee for children.

In place of s37(2) a new power was proposed, which the Inquiry termed a 'Child Protection Order', which would authorise the removal of a child to a place of safety only where 'there is a real, urgent and immediate risk that the child is otherwise going to suffer significant harm, whether physical, moral or psychological.'[96] Consistent with the principle of the role of the family that underpins the Kilbrandon Committee recommendations, these orders, the Inquiry argued, should only be sought as a last resort and when all other courses of action have been

[94] Ibid 16.1.

[95] Ibid 16.2.

[96] Ibid 16.5.

considered and discounted.[97] Additional safeguards were proposed in that the child and/or their parent could apply to the sheriff to have the place of safety order varied or cancelled and the children's reporter would have discretion to discontinue the order.[98] In addition, if the order was not implemented immediately then it would cease to have effect since it could no longer be deemed to be immediately necessary for the child to be removed to a place of safety, which the Inquiry proposed should happen within three days.[99] Subject to some minor amendments around timescales, these proposals were accepted and enacted through s57 of the Children (Scotland) Act 1995.

Private meetings before the children's hearing

The second area highlighted by the Inquiry that is indicative of a more expansive approach to legal rights compared to when the children's hearings system was constructed related to the practice whereby the children's reporter met with panel members in private and out with the terms of the legislation, without the knowledge of the child and their parent/s, prior to the children's hearing taking place. This practice had been approved by the Court of Session in *Sloan v B*,[100] but the Inquiry saw real dangers in it being unregulated by statute. This was because the Inquiry recognised the children's reporter as being one of the parties before the tribunal and therefore questioned the fairness of the practice of the reporter meeting in private with the members of the tribunal, the children's panel members, as well as the lack of transparency of this meeting to the other parties, being the children and their families. The clear conflict between this provision and Article 12(2) of the UNCRC was identified by the Inquiry.[101] To combat the unfairness, and again consistent with the Kilbrandon principle to involve the family in decision-making, the Inquiry recommended that the child and his or her parent/s should be informed of the meeting and their views on the matter being referred to

[97] Ibid 16.9.

[98] Ibid 16.28 and 16.29.

[99] Ibid 16.33.

[100] 1991 SLT 530. In obiter comments the Inner House drew a distinction between the children's hearing meeting in private to make decisions and meeting in private to give the children's reporter guidance on how to exercise his functions in preparation for the children's hearing, 540.

[101] Article 12(2) of the Convention provides a right for the child to express a view in any judicial and administrative proceedings affecting them.

the meeting be presented either orally or in writing,[102] and once again this proposal was adopted through the 1995 Act.[103]

The attendance of the child

The third area considered by the Orkney Inquiry which, I suggest, demonstrates a move to a more expansive approach to the protection and promotion of legal rights within the children's hearings system relates to the attendance of the child at his or her children's hearing. The attendance of the child at the initial children's hearing at which grounds of referral were considered was a key issue explored by the Inner House on the children's reporter's appeal against the decision of the sheriff to dismiss the application in relation to the grounds of referral.[104] In an attempt to strike a balance between the welfare of the children and the protection of their legal rights the court opined that there was a need to look behind the purpose of the relevant provisions within the 1968 Act which gave the parent and the child the right to dispute the grounds of referral. Described as 'an imaginative example of purposive interpretation'[105] the court held that because if either party disputed the grounds then the children's hearing either had to discharge the referral or direct the children's reporter to make an application to the sheriff for proof[106] once the parents had denied the grounds of referral there was no need to explain the grounds of referral to the child as the outcome would have been the same regardless of the response of the child. In demonstrating a very paternalistic approach, the Inner House was clearly anxious to avoid distress to the children by insisting on their attendance, since the court considered that this is something a children's hearing should seek to avoid. In this respect it is also apparent that the argument of the Inner House was motivated by the legislative provision in s41(1) which allowed the parent to be present at all

[102] The Clyde Report (n71) 18.31.

[103] s64.

[104] *Sloan v B* 1991 SLT 530.

[105] Joe Thomson, 'Sloan v B – The Legal Issues' 1991 SLT (News) 421, 425. See also Sutherland (n87); Kenneth McK. Norrie, 'Excluding Children from Children's Hearings' 1993 SLT (News) 67. Wilkinson and Norrie have argued persuasively that the decision of the Inner House was not one that could be reached based on the terms of the 1968 Act. Alexander B. Wilkinson and Kenneth McK. Norrie, *Parent and Child* (1st ed. W.Green/Sweet & Maxwell, 1993) 465.

[106] s42(2)(c).

stages of the children's hearing. There was thus no way, under the legislation as it stood in 1991, that the child could be seen separately from the parent, unless the parent agreed to waive their right to attend that part of the children's hearing.[107]

The question of whether the children should have attended the hearings which were held about them was therefore one which occupied Lord Clyde's Inquiry and was again one of the areas approached from a legal rights perspective. This is especially the case given the ages of the children involved in the events in Orkney, being between eight and fifteen years – all of whom were decided by the informal pre-meeting to be too young to understand the grounds of referral. In order to preserve the child's right to participation enshrined in the UNCRC the Inquiry proposed that the right of the parents to attend all stages of the children's hearing be qualified by a provision to exclude the parent if the interests of the child require it. In something of an otherwise uncharacteristic paternal approach, the Inquiry also proposed that the child could be excluded from the children's hearing if it is in their interests to do so.[108] But notwithstanding that qualification, the right of the child to attend at all stages was afforded high importance by the Inquiry, which represents an evolution from the position in the 1968 Act, which contained no right for the child to attend his or her children's hearing. The proposals from the Inquiry were subsequently enacted by the 1995 Act.[109]

Each of the three areas discussed in this section that formed part of the deliberations of the Orkney Inquiry demonstrate movement to a more expansive approach to the protection of legal rights, especially in relation to the child. However, it cannot be said that any of the legislative changes that followed on from the recommendations from the Inquiry fundamentally altered the Kilbrandon principles. As was explored in chapter two, the

[107] *Sloan v B* 1991 SLT 530, 549.

[108] The Clyde Report (n71) 18.32.

[109] s45(1)(a) provided a right for the child to attend the children's hearing. s46(1) provided a power for the children's hearing to exclude a 'relevant person' from the children's hearing, where he or she would otherwise have a right to attend, in order to obtain the views of the child or where their presence is causing, or is likely to cause, significant distress to the child. The definition of a 'relevant person' will be discussed in more detail in chapter 4 but for present purposes included any parent, or person, with parental responsibilities or rights and any other person who 'ordinarily … has charge of, or control over, the child'. s93(2)(b).

principles are rooted in the participation and co-operation of the family, 'through which the individual parent and child can be assisted towards a fuller insight and understanding of their situation and problems, and the means of a solution which lie in their hands.'[110] Thus, strengthening the provisions relating to the involvement of children and parents in decision-making within the 1995 Act can be considered as a natural evolution of the Kilbrandon principles.

ii McMichael v UK[111]

Alongside the reports and inquiries discussed in the previous section, which shaped the future direction of the children's hearings system, the 1990s also saw the first opportunity for the European Court of Human Rights to scrutinise the application of a parent's ECHR Article 6 and 8 rights within the children's' hearings system. I argued in chapter two that while there was some focus on protecting and promoting the legal rights of the individuals involved in the children's hearings system by its early architects, especially for adults and children accused of criminal offences, the specific rights relied on for this protection were the right to appeal and the right to legal representation. However, in *McMichael* the European Court of Human Rights established that these traditional mechanisms, of the right to appeal decisions made and to be legally represented, relied upon to protect individual legal rights in the children's hearings system simply did not go far enough. The case is also important in the development of the children's hearings system since it was the first occasion where a higher court canvassed, although in brief, whether a children's hearing, as a different type of decision-making body to a court, was capable of upholding the convention rights of individuals. This is a point that would be returned to subsequently in later case law.[112]

The case concerned a child whose parents, Mr and Mrs McMichael, were not married when he was born and so, under the law related to parenthood and the acquisition of parental responsibilities and rights at the time,[113] Mr McMichael did not have parental rights for the

[110] Kilbrandon Report, 35. Discussed further in chapter two at pages 51 - 53.

[111] (1995) 20 E.H.R.R. 205.

[112] *S v Miller* 2001 SC 977. Discussed in chapter four at pages 136 – 139.

[113] Law Reform (Parent and Child) (Scotland) Act 1986, s2(1).

child. Initially Mrs McMichael denied that Mr McMichael was the child's father, however this position changed formally when the child was around 3 months old at which point Mr McMichael's name was added to the child's birth certificate as his father. Both parents had a history of mental illness, although Mrs McMichael's health was more significantly impaired and she was admitted to hospital on a compulsory basis on several occasions. As a result of Mrs McMichael's health the child was removed from her care by virtue of a place of safety order around 2 weeks after his birth. Once grounds were established Mrs McMichael attended children's hearings with Mr McMichael as her representative. The papers and reports before the children's hearing were not provided to Mr or Mrs McMichael but in accordance with the procedural rules in force at the time the chair of the children's hearing informed them of the substance of the reports.[114] Following proof when the child was 2 years old, a sheriff granted an order freeing him for adoption. The child was subsequently adopted by his foster parents.

Mr and Mrs McMichael made application to the European Court making complaints against the taking of the child into care, the termination of their access (as it was called at the time) and subsequent freeing for adoption. These were declared inadmissible by the Commission. Mr and Mrs McMichael further alleged that they had not received a fair hearing since they had had no access to the reports before children's hearings and that this was contrary to both Articles 6 and 8. This complaint was deemed admissible by the Commission and thus was considered by the court. Mr McMichael further alleged that he had been discriminated against since he had not been able to participate in the children's hearings by virtue of being the natural father, contrary to Article 14 in conjunction with Article 6 and/or 8, and this was also declared by the Commission to be admissible.

It was a matter of concession by the Government that the failure to enable Mrs McMichael to see the papers before the children's hearing was a violation of her rights under Article 6(1) but nonetheless the court still stated:

[114] The Children's Hearings (Scotland) Rules 1971 SI No. 492 R17(3).

> *The Court accepts that in this sensitive domain of family law there may be good reasons for opting for an adjudicatory body that does not have the composition or procedures of a court of law of the classic kind. Nevertheless, notwithstanding the special characteristics of the adjudication to be made, as a matter of general principle the right to a fair – adversarial – trial 'means the opportunity to have knowledge of and comments on the observations filed or evidence adduced by the other party.' In the context of the present cases, the lack of disclosure of such vital documents as social reports is capable of affecting the ability of participating parents not only to influence the outcome of the children's hearing in question but also to assess their prospects of making an appeal to the Sheriff Court.*[115]

In its determination, the Commission considered the impact on the parents' participation of not having access to the papers before the children's hearing:

> *Nonetheless it is open to question the effectiveness of a parent's participation in this process if he or she has no sight of reports and documents which are presumably relevant to the proceedings and contain matters at least indirectly relating to the welfare of their child and their own capacities in that respect. The opportunity of appealing to the Sheriff Court either for an alleged failure to give the substance of a document or on any other ground suffers from the basic defect that the parent has no knowledge of the material's contents to begin with. Further, the Commission notes that even before the Sheriff Court, the parents are not provided with copies of reports or other documents. Without the documents in question, it must also be difficult for a parent to seek independent advice as to their significance or as to the existence of a ground of appeal, advice which takes on added importance where as in their case the parent suffers from emotional or mental health problems.* [116]

In a subtle distinction, but one ultimately of no practical consequence, the Court held that the failure to provide the papers before the children's hearing to the child's parents was a breach

[115] (1995) 20 E.H.R.R. 205, [80]. Emphasis added.

[116] Ibid [68].

of Mrs McMichael's Article 6 and 8 rights but for Mr McMichael only a breach in respect of his rights under Article 8. The Court held that while Article 6(1) did apply in respect of Mrs McMichael, it did not apply in respect of Mr McMichael since he had not taken the steps set out in domestic law to obtain legal recognition of parenthood: the children's hearings was not thus making a determination of his rights.[117] The court stated 'Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.'[118] The court also quoted previous dicta from *W v UK* where it was said:

> *[W]hat … has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8.*[119]

The decision of the European Court of Human Rights, and the Government concessions therein, challenged the children's hearings system to react to provide better protection of the legal rights of parents by enabling provision of the papers that were before the children's hearing to those parents entitled to them. Provisions were introduced following this case to do just that.[120] These provisions cannot be considered as being in contrast to the Kilbrandon principles which, although not termed in this way, have the involvement of parents in the children's hearing as core. I identified in chapter two that the role of the parents was a crucial theme throughout the Kilbrandon Committee's report and that the second of the Kilbrandon principles is that there should be a social educational approach with familial participation in

[117] Ibid [77].

[118] Ibid [87].

[119] Ibid, quoting paras 62 and 64 of *W v UK* (1988) EHRR 29.

[120] 1996 Rules, R5. Provision was also made for people in Mr McMichael's situation who are the biological father of the child but not recognised as a 'relevant person' to receive the papers, so long as they lived with the child's mother.

order to effect change in the child's circumstances. The Committee stated that there should be 'extensive consideration and discussion with the parents …'. [121] As the European Commission pointed out in *McMichael*, this involvement of the family can only be meaningful if they are fully informed in advance about the matters being considered by the children's hearings. Thus, the amendments to the children's hearings system to enable the provision of information to parents in advance are evolutionary by way of further development of the principles in practice, rather than as a response that undermines the Kilbrandon principles.

iii The evaluation of children's hearings in Scotland

The third area of scrutiny of the children's hearings system in the early 1990s I will examine came by virtue of a government evaluation of the children's hearings system commissioned in 1994. This provided an opportunity to examine the application of certain legal rights within children's hearings for the first time since the studies discussed in Section A of this chapter, 'Face to Face with Families' and 'Children out of Court'. In 1991 Sandford J. Fox when giving the inaugural Kilbrandon lecture drew on changes that had been made to panel member training and monitoring to address the concerns that had been raised about the application of certain procedural requirements within children's hearings. However, he opined:

> *But still there is absent any methodologically sound research to report to the international community that would verify the results flowing from training and CPAC monitoring. No one can say with any authority just what changes in procedural regularity have taken place. Anecdotal evidence can readily be found that says 'very great change' but there is also some other anecdotal evidence that says 'very little change.' In the 10 years since the research was published no additional research data have been produced, for either domestic or foreign consumption, addressing the question of procedural regularity. Nor does there appear to be any provision for periodically and systematically monitoring such vital signs as adherence to legal rules. Since Lord Kilbrandon clearly saw the Hearings as part of a system of law for children,*

[121] Kilbrandon Report, 76.

it would seem that the spirit of that vision, if nothing else, requires steps to verify that measures taken to ensure the integrity of legal rules have had the desired effect.[122]

The Scottish Office commissioned evaluation provided the opportunity to address this point and therefore provides a further important source to consider how the children's hearings system has developed with respect to its protection and promotion of individual legal rights. Thus, it contributes further to the principal question I consider within this thesis through its examination of the implementation of certain legal rights within children's hearings.

The evaluation initially comprised two studies, the first on decision-making within the children's hearings system[123] and the second a longitudinal study of a cohort of children.[124] A third study was commissioned in 1996 to place the children's hearings system in an international context.[125] It is the first of this trilogy of reports, 'Deciding in Children's Interests', which is of most relevance to this thesis since the research team undertook a detailed study of decision-making in the children's hearings system part of which involved assessing the extent to which certain of the rights of children and their families set out in the legislation were implemented in practice.[126] The findings of this study present an opportunity to compare with the Face to Face with Families and Children out of Court studies from the 1970s to question the extent to which the children's hearings system had addressed the concerns raised in these 1970s studies about the application of legal rights in practice.[127]

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[122] Sandford J Fox, *Children's Hearings and the International Community* The 1991 Kilbrandon Child Care Lecture, 14. https://www.strath.ac.uk/media/1newwebsite/departmentsubject/facultyofhumanitiesandsocialsciences/documents/1st_Lecture_-_Sanford_Fox.pdf

[123] Deciding in Children's Interests (n73).

[124] Lorraine Waterhouse; Janice McGhee and Nancy Loucks, *The Evaluation of Children's Hearings in Scotland Volume 3: Children in Focus* (The Scottish Office Central Research Unit) (Edinburgh) (1998).

[125] Lorraine Waterhouse; Neal Hazel; Cathy Murray and Christine Hallett, *The Evaluation of Children's Hearings in Scotland Volume 2: The International Context* (The Scottish Office Central Research Unit) (Edinburgh (1998).

[126] The legislation in operation at the time was the 1968 Act. The period of change against the background of which the study took place is discussed at p1. Deciding in Children's Interests (n73) 1.

[127] Discussed in Section A above.

In Deciding in Children's Interests, the researchers explored the decision-making of children's reporters in a sample of 130 cases, observed 60 children's hearings across three areas[128] and carried out follow up interviews with 98 participants from 30 of the observed children's hearings. A further 34 interviews were conducted with key informants within the children's hearings system such as sheriffs, representatives of the police, social work and education departments within each area as well as area panel chairs.

It is important to note that the procedural rights recorded during the children's hearing observations were limited in scope, more so than the previous studies from the 1970s. The particular rights recorded during children's hearing observations were that the parent and child were advised of their right to appeal; the parent and child were informed of the decision and the reasons for that decision; the parent and child were advised of their right to receive the decision of the children's hearing in writing; 'families' (presumably the parent and child) were informed about the availability of legal aid for an appeal; and finally that 'families' were informed of their right to ask for a review children's hearing. Although not directly framed in relation to legal rights, the extent to which individuals participated in the children's hearings observed was also discussed, with participation being measured by the number and length of 'contributions made'; contributions being defined to mean a verbal or non-verbal interaction during the children's hearing. There is no information within the study to explain how this relatively limited range of procedural rights were selected. However, in contrast to these earlier studies from the 1970s, the Deciding in Children's Interests study frames much of the wider discussion in relation to the children's hearings system around what it refers to as 'children's substantive rights' as distinct from their 'procedural rights', for example concerns about the availability of resources.[129] This highlights further the move away from individual legal rights being confined only to rights of procedure that derive from the criminal law as they were conceptualised in the period discussed in chapter two.

[128] These areas being Dumfries & Galloway, Strathclyde and Grampian.

[129] The researchers adopted this classification from Adler and Asquith who describe procedural rights as being concerned with process and substantive rights being about outcome, Deciding in Children's Interests (n73) 98, quoting from Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1981) 17.

The observance, or not, of the selected procedural rights was recorded in relation to 53 of the 60 children's hearings observed.[130] The remaining 7 children's hearings were excluded for three reasons. First that the family was not present (3 children's hearings); second, that the parent left before the end of the children's hearing (1 children's hearing); and third that the rights were said not to apply given the purpose of the children's hearing being observed.[131] In the context of the extent to which the children's hearings system protected and promoted individual legal rights at this point in its history, it is illustrative to consider not only the choice of observed rights but also the reasons why these 7 children's hearings were excluded from the discussion. It was a natural conclusion of the selection of the rights observed that they could not be fulfilled if the child and/or relevant person was not present, but it is marked that physical presence was regarded as necessary to fulfil *all* the procedural rights. In addition, while the purpose of the children's hearing may determine the right to appeal and the right to ask for a review children's hearing at a future point, the remaining rights to be informed of the decisions and reasons and to receive these in writing apply regardless of the type of children's hearing. This suggests that despite some evidence of a demonstrable move away from an individual's legal rights being considered solely as a matter of procedure within the study, some questions still remained about the extent to which those procedural rights that were built into the system were considered integral at this time. These questions are illustrated further by the mixed picture presented in the findings of the study in relation to the application of legal rights within the remainder of the sample of children's hearings observed.

Of the 53 children's hearings, the parent and child were informed of their right to appeal in 98% of children's hearings. This is a notable increase from the previous studies in the 1970s.[132] They were informed of their right to receive the decision in writing in 70% of children's hearings, of the availability of legal aid in relation to the appeal in 9% of children's hearings and of the right to call a review hearing in 72% of children's hearings, although the researchers noted that sometimes incorrect information was given. Consistent with the previous studies,

[130] Deciding in Children's Interests (n73) 44.

[131] Ibid.

[132] At p105.

the researchers identified inconsistency in the practice of children's reporters within children's hearings, especially with the extent to which this incorrect information given by children's panel members was corrected:

> *While some reporters did contribute to hearings by prompting or correcting panel chairmen about families' rights there were many instances in which they did not. Martin, Fox and Murray also noted this in their study and commented: 'the fairly modest contribution made by reporters to the maintenance of procedural standards is on the face of it surprising'. (1981:277).*[133]

The researchers found that reasons for the decisions were given in all but 2 children's hearings. However, consistent with the approach of the study to look at the application of legal rights in a wider sense than just whether a particular individual right had been implemented, or a box ticked, the researchers concluded that 'Informing families of their rights verbally at the end of hearings led to difficulties in families absorbing the information.'[134] In relation to the measures of participation studied, the contribution of children and young people was described as 'limited'[135] and family awareness of their rights as 'partial and limited.'[136] Representation was not recorded during the observations but it was discussed with the key informants. It was said to be clear that in practice few families were legally represented at children's hearings and opinion was split 'sharply' as to the desirability of such a position.[137]

The significance of this study to the principal question being addressed in this thesis is two-fold. This study tells us that, in relation to the specific rights examined, while still not perfect the application of procedural legal rights within children's hearings had improved since the studies from the 1970s. Second, and of more note from this study, is the more expansive

[133] Deciding in Children's Interests (n73) 52.

[134] Ibid ii.

[135] Ibid 62.

[136] Ibid 84.

[137] Ibid 99.

approach that is evident to consideration of legal rights by the researchers and to an extent by children's hearings, an approach that moved from certain limited procedural rights and into legal rights that were more substantive and that collectively amounted to an overall approach to decision-making rather than as a box ticked. However, the study presents early signs that this more expansive approach to legal rights was leading towards more technicality and formality, with the study concluding that 'there was an inescapable degree of formality in the hearings associated with ensuring their proper conduct and protecting the rights of families.'[138] This is a point that will be examined in the next chapter in relation to the modern children's hearings system.

C. Chapter Conclusion

In this chapter I have argued that some legal rights, as understood during the relevant periods, were part of the discourse in the early period of the operation of the children's hearings system. This supports my argument in chapter two that some legal rights were part of the children's hearings system from the outset and so some discussion was to be expected, even if it represented a more limited understanding of the protection and promotion of individual legal rights at the time.

In the first decade of the children's hearings system in practice the predominant narrative was one of welfare-based decision making. The best interests of the child were generally considered to be the 'sole criterion' on which children's hearings made their decisions and the protection and promotion of legal rights was not seen as a core part of making decisions in the best interests of the child. Although in our modern conception of children's rights it is the right of the child to have their case decided according to their best interests, at the time under consideration in this chapter this was not the way that this 'sole criterion' language and practice was approached. In line with the conclusions of the Kilbrandon Committee the wide scope this welfare approach offered in panel member discretion was considered a necessary part of determining the 'treatment' required for the individual child. Panel members were thus not recruited or, more importantly, trained to ensure a practice of protecting and promoting the legal rights of children and their parents in children's hearings.

[138] Ibid 85.

However, particularly as the first decade of the children's hearings system progressed, there was discussion in the academic literature of the importance of ensuring legal rights were respected and 'expressions of concern'[139] were made that the legal rights provisions enshrined in the legislation and in accepted 'good practice' were not being implemented by panel members and children's reporters. Two studies in particular highlighted the relatively low application of some of the procedural legal rights within children's hearings in practice but there was some evidence of an understanding of the importance of the involvement of children and their parents in the children's hearings and that they understood what was happening; something that from a modern perspective we would consider to be rights of participation.

It is unsurprising that the implementation of certain procedural rights was relatively low. I say this with reference to the types of skills and qualities looked for in the recruitment of people to be panel members as well as the training they received, both in advance of becoming panel members and during their service, which had very little if any focus on procedural legal rights. While this could have been negated by the presence of the children's reporter at children's hearings, who it was accepted had something of a quasi-legal advisory role to panel members at this time, it is clear that this role was not discharged consistently between or even within the different regions in which children's reporters operated. Thus, what can be concluded from this period in the 1970s and early 1980s is that not only were legal rights conceptualised in a much narrower way than we would understand today, the more limited conception of legal rights was not an integral part of practice in the early period of the operation of the children's hearings system.

The scrutiny applied to the children's hearings system in the early 1990s brought this limited application of legal rights in practice into sharp focus. The Orkney Inquiry and decision of the European Court of Human Rights in *McMichael* in different ways demonstrated that the traditional conception of legal rights within the children's hearings system, of being about the right to appeal and to have legal representation, were no longer enough to protect and

[139] Grant (n38).

promote the legal rights of individuals affected by the decisions of children's hearings. And while the evaluation of the children's hearings system commissioned by the Scottish Office in the mid-1990s showed that much had improved from the 1970s in terms of the application of certain procedural rights, and in an awareness of more substantive legal rights alongside those of a procedural nature, it highlighted that much still had to be done.

Collectively, the three instances I examined in the second part of this chapter challenged the children's hearings system ultimately to evolve but this happened in a way that did not entail a fundamental revolution to its underlying principles. That the children's hearings system was set up to accommodate some formation of legal rights from the outset meant that the legislative change that resulted through the Children (Scotland) Act 1995 can be viewed as an evolution rather than as a fundamental alteration of the operation of the children's hearings system and principles on which it was based. How this evolution has continued to manifest itself in the modern children's hearings system will be examined in the next chapter.

Chapter Four: The Place of Legal Rights in the Modern Children's Hearings System 2000 - 2021

This fourth chapter will consider developments in the modern children's hearings system, which I define as being from the early years of the 21st century to the present day. This period has seen intense development within the children's hearings system, much of it with the intention of ensuring the protection and promotion of the legal rights of children and their families.[1] This period saw the coming into force of the Scotland Act 1998 and the Human Rights Act 1998, which set out new duties on public authorities such as the Scottish Parliament, Scottish Government, children's reporters, children's hearings and courts, and opened up new avenues of litigation for children and their families to challenge perceived infringements of rights and injustices in the intervention of the State in their private lives.[2] This period also saw the enactment of the third piece of major legislation setting out the operation of the children's hearings system, the Children's Hearings (Scotland) Act 2011, and the biggest structural change in the operation of the system since it was conceived and constructed in the 1960s.[3]

In this chapter I will argue that during this period the children's hearings system has demonstrated its ability to accommodate the more expansive understanding of legal rights in our law today, an understanding that was demanded by the constitutional legislation of 1998 mentioned above. This accommodation has strengthened the underlying principles on which

[1] For example, as will be discussed in Section B below, the consultation and policy memorandum in advance of what became the Children's Hearings (Scotland) Act 2011 reveal the policy drivers as being related to the protection of legal rights, especially of the child. Scottish Government, *Children's Hearings (Scotland) Bill Policy Memorandum* (Scottish Parliament, 2010), 7, 11, 16, 17. Hereinafter 'Policy Memorandum.'

[2] The relevant provisions of the Human Rights Act 1998 entered into force on the 2 October 2000 via the Human Rights Act 1998 (Commencement No. 2) Order 2000 SI. 1851. The relevant provisions of the Scotland Act 1998 entered into force on the 6 May 1999 by virtue of the Scotland Act 1998 (Commencement) Order 1998 SI 3178.

[3] This included the creation of a national Children's Panel, headed up by a National Convener, with a non-departmental public body to support its operation. A national Safeguarder panel was also established. Children's Hearings (Scotland) Act 2011, ss 1(1), 2, 4 and 32(1).

the children's hearings system was based but it has added further technicality to the legislative provisions setting out how the system operates in contrast to the previous legislation from 1968 and 1995. This technicality matters to the principal question I discuss within this thesis since it was not something that the Kilbrandon Committee considered should feature in the new system and it places more onus on the skills of children's panel members and children's reporters to implement legally technical provisions within children's hearings without compromising the underlying Kilbrandon principles.

The contribution I make in this chapter to the principal question posed at the outset of this thesis is to show how the developments related to legal rights within the children's hearings system in more recent years and ultimately to the present day were reflected in the system without compromising the principles around which the system was originally designed. Using reported case law in particular I will demonstrate that the children's hearings system has continued to build on the foundations set in the earlier periods of its operation and ultimately displayed its ability to strengthen the protection and promotion of the legal rights of those affected by its decisions.[4] Thus I conclude that the more recent developments related to legal rights within the children's hearings system can be viewed as evolutionary rather than revolutionary.

In order to advance and explain this argument the chapter has four sections, which allows the developments to which I refer to be analysed over time:

A. The Legal Rights Challenges 2000-2010
B. The Children's Hearings (Scotland) Act 2011
C. The Legal Rights Challenges 2013-2020
D. Chapter Conclusion

A. The Legal Rights Challenges 2000-2010

Through discussion of case law arising during the first decade of the 21st century I will argue in this section that the children's hearings system demonstrated its ability to respond to legal

[4] That this should be viewed as a continuing and evolving process rather than an end goal reached is considered in the conclusion to this thesis.

rights-based arguments which strengthened rather than compromised the principles on which the system was based. I make this argument with reference to three particular areas: state funded legal representation, disputed information and the question of who had a right to attend and participate at a children's hearing as a 'relevant person'. Each of these areas was considered judicially during this period, with arguments being made based specifically on an individual's legal rights.

i. State funded legal representation

As I set out in chapter two, one of the legal rights that was recognised explicitly by the Kilbrandon Committee was the right to legal representation, especially for those children accused of criminal offences and parents. While the right to representation was enacted in the 1968 and 1995 Acts, there was no provision for the State to fund that representation when it was provided by a solicitor. It followed that representation by a solicitor was only available to those children and families who could pay for it themselves or where the solicitor, acting on a pro bono basis, provided that representation free of charge. The compatibility of this position with an individual's rights under the ECHR was one of the first matters to be considered following the incorporation of the Convention into Scots law and ultimately the children's hearings system needed to adapt in response.

The start of the decade under consideration in this section saw a clear statement by the Inner House that Article 6 of the ECHR did apply to children's hearings proceedings and that the basic structure of the children's hearings system as a whole was compatible with that Article, albeit some aspects could be strengthened.[5] The issues canvassed in *S v Miller* were wide-ranging, with many of the issues argued and decided upon by the Inner House argued further as standalone issues in subsequent cases. The areas in which the children's hearings system

[5] *S v Miller* 2001 SC 977. To summarise the facts a young person was referred to a children's hearing on the offence ground, the supporting facts alleging that he had committed an assault to severe injury when aged 15 years old. The allegation related to an incident following which the young person's father died of his injuries and there was a question to be resolved as to whether the young person acted in self-defence. During proceedings to establish grounds of referral the young person argued that his ECHR rights under Articles 5 and 6 were infringed by several aspects of the children's hearings system and thus a devolution minute was lodged against the failure of Scottish Ministers to take action to rectify what he claimed were deficiencies in the system.

was argued by S not to meet Article 6[6] requirements specifically related to the fact that panel members could be removed from office by Scottish Ministers at any time, that children did not receive copies of the reports and other documents before the children's hearing and that legal aid was not available for the young person to fund solicitor representation at the hearing.[7] The first of these arguments was dismissed by the court with relative ease,[8] however the latter two areas led to change in the children's hearings system and, as will be discussed further below, that change can be viewed as strengthening the principles on which the system was based.

The second matter argued before the court related to the provision of information to children and it was a matter of concession that this amounted to a breach of Article 6.[9] However, the

[6] It was a matter of concession that Article 6(1) did apply to children's hearings proceedings since a children's hearing was determining civil rights and obligations. The Inner House rejected an argument that Article 6(3) applied, holding that children's hearings are not proceedings to determine a criminal charge and repeated the characterisation of the proceedings as civil proceedings *sui generis.* Per Lord Roger, ibid, [19 – 20]. However, the matter was rendered academic since the court then stated it was 'trite' that the specific guarantees set out in Article 6(3) 'are also embraced by the *lex generalis* in Article 6(1), per Lord Rodger [24].

[7] While I will concentrate on the Article 6 arguments advanced, it is important to note that a further, more tentative, argument was advanced in relation to Article 5. It was argued that a decision by a children's hearing to authorise secure accommodation was contrary to Article 5 of the ECHR since the decision was not for the purposes of education as required by that Article. However, this was easily dismissed by the court: 'It is … plain that this form of supervision is specifically designed to promote the child's education in the widest sense.' ibid [46]. Matters related to secure accommodation were revisited subsequently in *BJ v Proudfoot* [2010] CSIH 85; 2011 SC 201 where the argument related to the role of the chief social work officer and head of the secure unit in making the final decision to implement a secure authorisation made by a children's hearing. It was argued that this meant that the decision was not made by the competent legal authority required by the ECHR. This argument was dismissed by the Inner House, who drew in particular on the need for flexibility in matters related to the welfare of the child, for example per Lord Hardie [38].

[8] 'Where the members of a hearing are unpaid lay people appointed and trained with the aim of providing assistance to children, the mere fact that they do not enjoy the kind of security of tenure associated with judges of courts of the classic kind does not mean that they are not independent.' 2001 SC 977 [27].

[9] While the court did not require to come to a concluded view on this point in light of the concession, Lord Rodger indicated that in all likelihood the court would have found that the blanket failure to provide documents to the child would have been incompatible with Article 6, ibid [29]. The difficulty with blanket policies related to the application of legal rights in the children's hearings system is a theme to which the higher courts would

third matter, related to the provision of state funded legal representation of children, was the subject of argument and determination by the Inner House. The argument that the lack of provision of legal aid for a solicitor to attend a children's hearing to represent a child was a breach of the child's Article 6 rights was resisted strongly by Scottish Ministers. They advanced an argument that as a matter of policy having lawyers in children's hearings would 'detrimentally affect the informal and flexible nature of the proceedings'[10] since it would affect the direct exchange between the child and panel members and therefore that 'the system would be fundamentally altered for the worse.'[11] This is something of an odd argument, since it cuts across *how* solicitors provide representation in the children's hearing rather than the principle of whether or not a child requires legal representation within a hearing. Lord Rodger was singularly unconvinced that lawyers would be unable to moderate their approach while attending hearings:

> *skilled lawyers are chameleons who readily adapt their approach and techniques to the particular tribunal in which they appear. I would therefore expect them to be sensitive to the atmosphere and ethos of a children's hearing and to perform their role accordingly.*[12]

Thus, the Inner House concluded that a blanket policy of no child being able to access State funded legal representation for attendance at children's hearings was not compatible with Article 6. It drew attention to particular circumstances where State funded representation should be available such as when secure accommodation was under consideration since that put the child's liberty at stake, in which case the interests of justice require that the child has

return time and again. For example, most recently related to consideration of brothers and sisters as relevant persons by the Supreme Court, discussed in Section C below, which set out the need for a 'bespoke approach' in considering rights to participate in decision-making. *ABC (Appellant) v Principal Reporter and Another (Respondents) (Scotland); In the matter of XY (Appellant) (Scotland)* [2020] UKSC 26.

[10] *S v Miller* 2001 SC 977 [32].

[11] Ibid. The more appropriate option, according to Scottish Ministers, was for the children's hearing to appoint a safeguarder for the child.

[12] Ibid [33].

access to legal representation.[13] Another circumstance in which paid legal representation would be required was when there was doubt 'whether the person involved in the litigation could effectively conduct his or her own case.'[14] The court emphasised, however, that it was not the case that the ability to apply for legal aid was necessary for every child at every hearing:

> *It may, of course, be that in some cases the issues are so straightforward and the child so mature and capable that he can indeed conduct his own case quite satisfactorily, especially since the procedure before the hearing is designed to be informal and is intended to enable the hearing to elicit the child's views. On the other hand, it is important to bear in mind that many of the children who appear before hearings will be young, unable to read well and unused to expressing themselves beyond the circle of their family and friends, especially to adults whom they do not know.* [15]

Quite correctly, Ministers' suggestion that the appointment of a safeguarder could be utilised was not viewed as being sufficient since the decision to appoint a safeguarder is one for the children's hearing and not the child since there is no right for a child to have a safeguarder appointed.[16] In addition the appointment of a safeguarder is to safeguard the child's interests as opposed to all of their wider legal rights.[17]

Following on from the decision of the Court of Session, Scottish Ministers acted swiftly to put in place an interim arrangement whereby a legal representative could be appointed for a child by a children's hearing in certain, limited, circumstances.[18] Of course the idea of legal representation within children's hearings was not something that was an entirely new

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[13] Ibid [34].

[14] Ibid [36].

[15] Ibid.

[16] Ibid [37].

[17] Ibid. A safeguarder was to be appointed by a children's hearing under the Children (Scotland) Act 1995, s41(1) if it considered it 'necessary to appoint a person to safeguard the interests of the child in the proceedings.'

[18] The Children's Hearings (Legal Representation) (Scotland) Rules 2001. SSI 2001 No. 478 entered into force on 23 February 2002.

innovation for the system since children from families who could afford to pay their own solicitor to attend at hearings had been able to do so since the system began operation. So contrary to the position of Scottish Ministers in *S v Miller* the provision of the interim scheme for the State funded legal representation for children was not a revolutionary departure from the principles upon which the system was based. As was discussed in chapter two, one of the two primary legal rights that was discussed by the Kilbrandon Committee was the right of legal representation, especially for the parent/s and when the child was accused of a criminal offence.[19] Although the right to representation was given effect to in the 1968 Act, state funding for legal representation was not provided for. Thus, the consequence of the decision in this case is not one that could be considered alien to the early architects of the system; rather it recognises the significance of the matters at stake by the decisions made by children's hearings and expands the envisaged 'safeguard' for children whose liberty is at stake and who may not otherwise be able to take part in the proceedings, again viewed as something important by the early architects.

The legislative scheme put in place as a result of the decision in *S v Miller* addressed State funding for legal representation as far as children were concerned.[20] However, that then left the same question open for relevant persons, who were not afforded State funded legal representation for children's hearings either.[21] This point was argued subsequently in *K v Paterson*,[22] where the parent of a child who had been removed from her care challenged the absence of State funded legal representation for the attendance of a solicitor at children's

[19] Chapter two, at pages 64 - 65.

[20] 2001 SC 977. In *Martin v N* 2004 SC 358 the compatibility of this legislation was challenged with reference to emergency children's hearings. A warrant with secure authorisation was issued by a children's hearing despite the young person not having a legal representative present. The Court of Session held that this was not a procedural irregularity against her Article 6 rights given the emergency nature of the children's hearing and when considering the proceedings as a whole the young person had legal representation at the appeal and there was flexibility in the timescale for arranging a future children's hearing after the emergency one. [18 – 19].

[21] Like the position in relation to the child, a parent or relevant person' could be accompanied by a representative at the children's hearing but there was no provision for this representation at children's hearings to be state funded when it was provided by a solicitor. Children's Hearings (Scotland) Rules 1971 (SI 1971 No. 492) Rule 11(1) and subsequently the Children's Hearings (Scotland) Rules (SI 1996 No. 3261) Rule 11(1).

[22] 2009 SLT 1019.

hearings as being contrary to her rights under Articles 6, 8 and 14. The parent had significant learning difficulties and was represented at children's hearings about her child by her father and a lay advocate. Despite the lay representation, the argument related to the provision of State funded legal representation for relevant persons in certain circumstances was conceded by the children's reporter. In a further emphasis of the incompatibility of blanket approaches when it comes to the protection of legal rights, in strongly worded dicta, the court stated:

> *the rights of a parent during any hearing where that parent's civil rights are determined include the protection of a fair hearing afforded by art. 6. In these circumstances, we agree that the absence of* any *statutory provision entitling state funded legal representation to be made available to relevant persons whose civil rights would be determined at a children's hearing, but who would be unable, without such representation, to participate effectively during it, amounted to an inbuilt systematic flaw in the legal aid scheme as it applied to the children's hearing system.*[23]

Further, in considering how one is to judge what constitutes effective participation the court referred to the case law from the European Court and emphasised the need for the situation to be considered on the basis of its own facts and circumstances:

> *The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.*[24]

In considering the facts and circumstances the court went on to say:

> *the importance and potentially long term consequences of decisions taken at children's hearings, the stress that may be experienced by parties involved in proceedings related*

[23] Ibid [60]. Emphasis added.

[24] Ibid [65].

to family life, the complexity of the factual and legal issues involved, the ability of the individual to understand those issues and the contents of any reports or other documents relevant to those issues and the availability of any representatives prepared to assist the individual during the hearing.[25]

As I set out in chapter two, one of the two legal rights that was considered explicitly by the early architects of the system was the right to legal representation. This was especially the case in relation to parents and for children accused of criminal offences. Therefore, the determinations of the courts that both children and relevant persons should, in certain circumstances, have access to State funded legal representation for children's hearings and the subsequent legislation to enact this would not be an alien concept to those who created the children's hearings system. It had always been the case since the inception of the children's hearings system that both children and their parents could be represented at children's hearings and this could be by a solicitor but only if they could afford to meet the solicitor's fee themselves or the solicitor provided the representation free of charge; a position that the courts identified as an 'inbuilt systematic flaw' in the legal aid scheme.[26] The legislative responses following on from court decisions thus served to level out access to legal representation in situations where the individual would not be able to participate effectively in the children's hearing without such representation or in the case of the child where his or her liberty was at stake. The legislation that followed these decisions of the courts in this area, therefore, can be characterised as strengthening the principles on which the children's hearings system was based at the outset.

ii Disputed information

The basic principle of enabling access to information for both children and relevant persons in the form of the reports and associated information provided to children's hearings had been settled by the early years of the 21st Century.[27] By this time both relevant persons and children assessed by the children's reporter to be of an age and maturity to understand the

[25] Ibid.

[26] Ibid [60].

[27] *McMichael v UK* (1995) 20 EHRR 205 related to relevant persons and *S v Miller* 2001 SC 977 related to children.

information received copies of all the information provided to panel members in advance of the hearing, and it was procedurally unfair to receive that information significantly outside of the timescales set down in the legislation.[28] However, in 2010 the Sheriff Principal for Glasgow and Strathkelvin had cause to revisit an issue that had been considered periodically throughout the life cycle of the children's hearings system, that of the approach a children's hearing should take to information before it that is not contained within the statement of grounds that initiated the proceedings, especially when that information is a matter of dispute.[29] That this issue is one that has been considered at different points in the development of the children's hearings system means it is particularly instructive to our understanding of the impact an increased recent focus on legal rights has had on the system. The separation of the determination of fact from the decision on disposal set out by the Kilbrandon Committee may sound simple in its terms but, reflecting the lived realities of children and their families, more often than not things are in practice not as straightforward. New issues, whether positive or negative, may arise once the children's reporter has referred grounds to a children's hearing and matters referred to in a statement of grounds will very often change, sometimes very quickly indeed. This may be especially likely as the years go by and the child continues to be subject to compulsory measures which are regularly renewed. So, to what extent can a children's hearing consider these changes in a child's circumstances and what must a hearing do when information about these changes is a matter of dispute?

This question was explored in 1973 at shrieval level in Edinburgh[30] and then latterly by the Inner House in 1991.[31] In 1973 the sheriff at Edinburgh took a restrictive approach and one clearly driven by principles of the criminal law, by stating that any approach that allowed the hearing to consider other facts not established in the grounds of referral put the hearing's powers 'too high.'[32] Further the sheriff opined 'to my mind, any other interpretation is not only a misinterpretation of the law but a breach of natural justice which must allow to any

[28] Such as in *P v Reporter* 2008 SLT (Sh Ct) 85 where the sheriff held it was not fair for a relevant person to receive a copy of a supplementary report from the local authority minutes before a continued hearing for her children.

[29] *H&M v Bell* 2014 SLT (Sh Ct) 57.

[30] *K v Finlayson* 1974 SLT (Sh Ct) 51.

[31] *O v Rae* 1993 SLT 570.

[32] *K v Finlayson* 1974 SLT (Sh Ct) 51, 53.

person fair notice of the crime or fault or negligence, call it what you will, with which they are charged.'[33] This early restrictive approach was later rejected by the Inner House in a judgment driven by the purpose of the children's hearings system and what it was established to achieve.[34] In delivering the judgment Lord President Hope stated 'The children's hearing had a duty to act fairly in relation to the appellant, but that duty was fulfilled so long as they gave him a fair opportunity of correcting or contradicting what was said about him or against him in the reports.'[35] Further, and for present purposes most interestingly, Lord President Hope cited Lord Justice-Clerk Ross in an earlier case saying 'the principles of natural justice must yield to the best interests of the child.'[36]

In *H&M v Bell* Sheriff Principal Taylor had the opportunity to consider this issue further.[37] The case concerned an allegation that the child was displaying sexualised behaviour, an observation made by both the child's nursery teacher and foster carer after the grounds of referral for the child had been established. Despite the fact this observation was disputed by the parents it formed part of a range of information relied upon by the children's hearing to decide that the child should reside with foster carers.[38]

In making a determination about whether this disputed information was information on which the children's hearing could properly rely, Sheriff Principal Taylor took something of a middle ground between the previous cases. He held:

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[33] Ibid.

[34] *O v Rae* 1993 SLT 570. Lord President Hope said 'But it is important not to lose sight of the intention of Parliament as expressed in Pt III of the Act. The tests of openness and unfairness to which counsel for the appellant drew our attention must be seen in the context of these provisions and what it is they were designed to achieve.' [574].

[35] Ibid [575].

[36] Ibid.

[37] 2014 SLT (Sh Ct) 57.

[38] The situation was, therefore, different in essence to *O v Rae* where the disputed information was an allegation that the father had sexually abused an older child that the father vehemently denied, and which had been removed by the children's reporter from grounds of referral at the Sheriff Court without any proof proceedings.

It … seems to me to be highly desirable that when considering what is in the best interests of a child, up to date relevant material is before any children's hearing convened after grounds of referral have been established or accepted. One is dealing with a dynamic situation and it would be artificial for a subsequent hearing to be limited to looking only at the grounds of referral. Indeed, as was submitted on behalf of the Reporter, the whole system would break down were such to be the case.[39]

However, he went onto qualify this by saying:

That does not mean that the children's hearing is unconstrained in the material to which it can have regard. I agree with what was said by Professor Norrie: Children's (Scotland) Act 1995 (2nd Edn) at page 5 where he records that prior to the Human Rights Act 1998 coming into force it was sometimes said that the child's best interests were considered paramount. He refers to Kennedy v A 1986 SLT 358 at 362A where it might be thought that Lord Justice Clerk Ross was expressing the view that the child's welfare was more important than due process. I respectfully agree with Professor Norrie that if such was the case it can no longer be so given the terms of article 6. Parents and other relevant persons have rights which require to be protected as well as the interest of the child. Thus it seems to me that when considering other relevant information put before it in terms of Section 69(1) of the Act, 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 article 6 the hearing may require to refer the issue to the sheriff in order that the facts can be determined. Whether or not there should be a referral will also depend on the nature of the information and its source. If, as in this case, the information regarding the child was such that the parents could have no knowledge of it and the source was independent, for example a nursery nurse or a foster carer, the argument in favour of a referral to the sheriff for the facts to be established will be less convincing. As the

[39] *H&M v Bell* 2014 SLT (Sh Ct) 57, [34].

solicitor for the respondent pointed out, some parents might challenge facts not within their knowledge, simply to thwart the proceedings before the children's hearing. Thus, when a referral will be required will vary and in my opinion cannot be made the subject of a hard and fast rule. Each case will turn on its own facts and circumstances.[40]

The Sheriff Principal acknowledged that he had departed to an extent from *O v Rae*,[41] however he stated that 'it may well be that if a case with facts similar to O v Rae was to come before the Inner House today, a different decision would be reached standing the introduction of article 6 rights to those appearing before a Children's Hearing.'[42]

The mechanism by which Sheriff Principal Taylor suggested a referral is made to the sheriff when a disputed fact arises once grounds are accepted or established is not a clear one since the children's hearing has never had a power to make a referral to the sheriff to determine a disputed fact or facts on its own volition, except insofar as the fact is included in the statement of grounds of referral. The only power a children's hearing has is to refer grounds not understood or accepted following on from a referral from the children's reporter. Thus the practice of children's reporters is vital in this area, both in terms of ensuring initial grounds referred to a hearing reflect the substance of the concern about the child and avoiding the pitfall evidenced in *O v Rae* where such significant and disputed information as whether a father sexually abused his child or not, which would be clearly relevant to the decision making of a children's hearing, is removed at proof without the opportunity for evidence to be heard and decided upon by a sheriff. In addition, the practice of ensuring that new grounds are referred to a children's hearing when required for a child who is already the subject of supervision is pivotal. The centrality of this significant decision-making power that rests with children's reporters is reflected in the Practice Direction that the Principal Reporter gives to

[40] Ibid [34].

[41] The importance of the disputed facts in *H&M v Bell* and *O v Rae* was different. In *H&M v Bell* the disputed information was part of a wider range of information on which the decision was based and was information that the parents could have no direct knowledge of. By contrast in *O v Rae* the disputed information was the significantly driving factor for the decision and as it concerned an allegation about the father's behaviour was clearly within the knowledge of the father.

[42] *H&M v Bell* 2014 SLT (Sh Ct) 57, [33].

children's reporters in how to exercise the discretion inherent in their decision-making function, which states:

> *The Court of Session confirmed in O v Rae 1993 SLT 570 that a children's hearing may take account of information that is not in the statement of grounds (referred to as the grounds of referral in that case). However in H and M v Bell Sheriff Principal Taylor was clear that there are limits to the information which may be so considered. The hearing must protect the rights of individuals to a fair hearing as well as considering the interests of the child. Therefore the principle in O v Rae is no substitute for the proper drafting and establishment of a relevant statement of grounds.*[43]

In considering whether to refer new grounds of referral to a children's hearing for a child who is already subject to supervision children's reporters are directed to only do this if the child's welfare requires specific new grounds or the new grounds indicate that the child's order should be varied.[44] In considering this a number of factors are given for the reporter to consider, including a direction that:

> *The more similar the current referral is to the statement of grounds which have been established or accepted (especially in relation to patterns of behaviour such as lack of parental care or non-school attendance) the less likely it is that the reporter will need to refer the child to a hearing.*[45]

For this position to have the desired effect of protecting the legal rights of the child, relevant persons or both, the criterion that 'the child's welfare requires' new grounds needs to have an expansive interpretation in practice. It is possible to foresee a situation where the disputed

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[43] Scottish Children's Reporter Administration, *Practice Direction 7: Statement of Grounds – Decision-Making and Drafting* 2.2. Available at https://www.scra.gov.uk/wp-content/uploads/2020/09/Practice-Direction-07-Statement-of-Grounds.pdf

[44] Scottish Children's Reporter Administration, *Practice Direction 6: Decision Making Framework* 32. Available at https://www.scra.gov.uk/wp-content/uploads/2020/09/Practice-Direction-06-Decision-Making-Framework.pdf

[45] Ibid 33.

information is the basis for the retention of the status quo, such as in *H&M v Bell*, rather than a variation but nonetheless the information is of such significance to the potential decisions open to the children's hearing that it requires to be determined if true or not. That is not to say that every disputed fact requires to be referred to the sheriff for determination as clearly the role of the children's hearing is to make decisions based on the information presented to it, some of which may be contradictory.[46] However, when a particular fact is so serious and pivotal to decision-making, such as whether a father with care of the child has sexually abused the child or not, the appropriate forum for that to be determined is by the sheriff rather than the children's hearing.

This issue is an example of the important role that decision-making by the children's reporter plays in the operation and realisation of the legal rights of participants in the children's hearings system. This role is so important that the appropriateness of reliance being placed on the discretion of the children's reporter must be considered. Although ultimately relying on the existence of discretion as being capable of protecting and promoting legal rights in the children's hearings system, the Supreme Court recently expressed some concern about the extent to which discretion is always suitable to protect legal rights.[47] The alternative approach to a discretionary one in this case would be to enact an obligation within the legislation for the children's reporter to refer disputed information to a children's hearing in the form of a statement of grounds. However, it is difficult to envisage how this could practically operate. For example, what would the trigger be for a referral? If it were that a point of dispute was raised by a child, young person or relevant person then as Sheriff Principal Taylor pointed out in *H&M v Bell* the potential for someone to use the mechanism to frustrate the proceedings is readily apparent. If the trigger were vested in the children's hearing to direct the reporter to prepare a statement of grounds then this would seem to be an unnecessary delay when the power could simply be vested in the children's hearing to refer the matter of dispute to the sheriff without the need to await the reporter's statement of grounds and a further

[46] As argued by Norrie in his defence of the judgment in *O v Rae*. Kenneth McK. Norrie, 'In Defence of O v Rae' 1995 SLT (News) 353.

[47] *ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland); In the matter of XY (appellant) (Scotland)* [2020] UKSC 26, [53].

children's hearing, should this be considered necessary. This latter solution would mean that the children's reporter would retain discretion to refer new s67 grounds to a children's hearing as at present, but this would be accompanied by a new power for the children's hearing to refer to the sheriff a matter of dispute, in cases in which they consider its resolution to be necessary for it to make a decision. Such cases are likely to be very rare, just as are cases in which established grounds are subsequently reviewed.[48] Nevertheless the introduction of this new power, together with the existing mechanisms of appeal which allows for challenges to decisions made on the basis of facts that are wrong, would in all probability offer sufficient protection from ECHR challenge.

By tracing how this issue related to disputed information has been dealt with throughout the development of the children's hearings system it is possible to demonstrate the impact of more focus on legal rights in our modern law on decisions reached in relation to the children's hearings system; in particular the consideration of Article 6 and 8 arguments in *H&M v Bell* and the decision reached therein, in contrast to *O v Rae* when these Articles were not part of the arguments considered. The implication of the more expansive approach to legal rights within the children's hearings system demonstrated in *H&M v Bell* means that a children's hearing does not have unfettered discretion to consider all disputed information before it. Article 6 and the fairness that must be given to children and relevant persons can act as a check to the otherwise very wide net that a children's hearing can cast in its decision-making about the child. This leads to the issue relevant to the principal question posed at the outset of this thesis, as to whether this position undermines the principles set out by the architects of the children's hearings system and has resulted in a departure from them. I conclude that it does not. This is because a central element of the underlying principles is that the children's hearing is not the forum to determine disputed questions of fact since this best rests with a court. Norrie has argued it is artificial to say that all disputes related to facts must be determined by the sheriff as opposed to the children's hearing, since it is the role of the children's hearing to 'make judgments of credibility and to resolve disputes of fact.'[49] While

[48] Under ss.110-117 of the 2011 Act. Unfortunately, SCRA does not collect statistics on the number of applications for a review of grounds determinations.

[49] Norrie (n46) 354.

this is true, it cannot be the case that the children's hearing is unconstrained in its ability to take disputed information into account. There are two types of disputed information that a children's hearing may encounter. First, is the factual information as to what the concerns are for the child's welfare which provide the basis for State intervention in a child's life. For example, as in *O v Rae*, whether a child has been sexually abused by her father or not. Second is the factual information about what is best for the child in terms of the decision to be made by the children's hearing and this is where the hearing has to exercise its own judgment. For example, in *H&M v Bell* the matter in dispute related to the child's current behaviour, which is clearly a relevant consideration to determine the ongoing need for compulsory intervention by the State. I do not make an argument that all disputes of fact should be referred to the sheriff since clearly that would lead to significant problems with the operation of the children's hearings system. Rather I argue that where a statement of fact is referred to the sheriff for proof and is either found not to be established or is removed without proof as occurred in *O v Rae*, it would be unfair to allow it to form part of the subsequent discussion or determination by the children's hearing. That the Inner House gave the green light for this practice to occur is a matter of deep regret. It follows that the realignment offered by the late Sheriff Principal Taylor in *H&M v Bell* is to be welcomed in rebalancing practice in this area to align with the underlying principles on which the children's hearings system was based at the outset; that disputed matters of fact providing the basis of State involvement in family life should be considered in a separate forum from forward looking determinations about what is in the child's best interests to address the issue/s of concern.

iii Participation in the children's hearings system as a 'relevant person'

A third issue that arose in case law during this decade which turned on legal rights arguments related to the interpretation of the definition of 'relevant person' within the Children (Scotland) Act 1995. This question in essence concerns who has the right to participate in full in all stages of the children's hearing process, from the original grounds hearing to the disposal of any final appeal against a hearing's decision. This right, in its fullest, is conferred (as well as on the child) on anyone who comes within the definition of 'relevant person'.

There was a comparatively small amount of case law exploring the definition until later in the first decade of the 21st Century. As the Human Rights Act 1998 became more embedded into

legal consciousness towards the end of the decade the court jurisprudence on the interpretation of the definition increased in frequency. In particular, the compatibility of the existing provisions with the ECHR was challenged, the culmination of which was the first children's hearings case to be argued in the Supreme Court.[50]

The definition of a relevant person for the purposes of the Children (Scotland) Act 1995 could be found in s93(2)(b), which stated that:

> *'relevant person' in relation to a child means –*
> *(a) any parent enjoying parental responsibilities or parental rights under Part I of this Act*
> *(b) any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act; and*
> *(c) any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child.*

In the initial years of the decade under consideration in this section a handful of cases were reported that turned on their own facts, circumstances and application of the law.[51] In the early cases, what is notable is the fact that determinations in relation to relevant persons were still approached largely from the standpoint of relevant persons being people who were able to assist the children's hearing with its decision-making, rather than individuals with rights in relation to the child. However, references to a right to be heard are not completely absent. For example, in *S v N*[52], as well as this emphasis on relevant persons being individuals

[50] *Principal Reporter v K* [2010] UKSC 56; [2011] 1 WLR 18; 2011 SC (U.K.S.C.) 91; 2011 SLT 271; 2011 Fam LR 2. As will be discussed in section C below, this is a trend that has continued in the second decade of the 21st Century.

[51] For example, *S v N* 2002 SLT 589 considered whether foster carers could meet the definition of 'relevant person'. The Inner House had 'no difficulty' in holding that foster carers could come within the factual definition of relevant person, stating 'there was no reason to think that in enacting the 1995 Act Parliament intended to make any radical alteration to the definition so as to exclude the very individuals who might be in the best position to assist the children's hearing, or the court, in determining where a child's best interests lay', 592. Also, *M v Irvine* 2005 Fam LR 113 considered the case of a grandfather and whether he met the factual definition in light of his level of involvement with the child.

[52] 2002 SLT 589.

who could assist the children's hearing, the court also referenced relevant persons having 'a right to intimation' and 'a right to be heard.'[53] The reference to a right to be heard attracted little emphasis in the judgment but the inclusion of this language is significant. Up to this point the reported judgments in relation to the children's hearings system had made little mention of the rights of relevant persons, and when they did they did not stray from those rights being to appeal, to attend and to be represented as had been recognised within the system from the outset.[54] As the decade progressed, a more significant series of cases, argued on the basis of an individual's legal rights, arose in connection with unmarried fathers who did not hold parental responsibilities and rights for the child nor were involved in the child's day to day care and so were considered by children's reporters and children's hearings not to meet the definition in s93(2)(b) set out above. How the children's hearings system has considered this issue of unmarried fathers is instructive to understand the impact of a more expansive understanding of legal rights in modern Scots law and whether this understanding has required the system to revolutionise in its approach.

Unmarried fathers as relevant persons

At least part of the explanation for the more recent upward trend in reported case law is the general increased attention within the courts and legislators to the issue of the legal rights of unmarried fathers, particularly the acquisition of parental responsibilities and rights by an unmarried father as well as their involvement in decision making about the child; his exclusion from which was becoming increasingly untenable in a legal system that had recently taken the step of removing the status of 'illegitimacy'.[55]

[53] Ibid, 591.

[54] The court in *Kennedy v H* 1988 SC 114 makes no mention of the consequences of being a relevant person, other than the right to appeal. Similarly, no mention is made in *S v Lynch* 1997 SLT 1377. The Inner House in *C v Kennedy* 1991 SC 68, 71 makes several references to a relevant person 'enjoying rights' but as this concept is not explored further within the judgment there is nothing to suggest that this was 'rights' in the sense of appearance, representation and appeal as had been understood within the children's hearings system at the outset.

[55] Law Reform (Parent and Child) (Scotland) Act 1986, s1 as amended by the Family Law (Scotland) Act 2006, s21. The issue of the legal rights of unmarried fathers had received attention from the European Court and

This attention culminated with amendments to the law in 2006 enabling an unmarried father who was registered as the father on the child's birth certificate, subsequent to the date of commencement, to be conferred parental responsibilities and parental rights for the child without the need for further action.[56] The fact that this legislative amendment was not retrospective and relies on the consent of the child's mother to register on the birth certificate, means that there will still, even today, be fathers who do not have the parental responsibilities and parental rights imposed and conferred by Pt.1 of the Children (Scotland) Act 1995. Therefore, in order to be recognised as a 'relevant person' for the purposes of Pt.2 of the 1995 Act, such a man would have to satisfy the factual test in s.93(2)(b)(c) of 'ordinarily having charge of or control over the child', which not all fathers could easily satisfy if they were not closely involved in the care of the child.

The status of unmarried fathers in the children's hearings system had been canvassed some years previously before the European Court in *McMichael*[57] and it had held that the provisions as regards the status of the unmarried father were justified since Mr McMichael had not taken the requisite steps under domestic law to secure legal recognition of his parenthood and thus there was no breach of Article 14 in conjunction with Article 6 and/or 8 as Mr McMichael had alleged. However, during the period under consideration in this section the status of unmarried fathers was challenged again, in particular when a contact order had been made to regulate contact between the father and child.[58] At shrieval level, there was a difference

campaigning groups such as Fathers for Justice led high profile campaigns for the increasing recognition of the legal rights of unmarried fathers in domestic law.

[56] Children (Scotland) Act 1995, s3(1)(b)(ii) as inserted by the Family Law (Scotland) Act 2006, s23(2)(b).

[57] *McMichael v UK* (1995) 20 EHRR 205. This European Court's judgment, specifically related to the provision of the papers before a children's hearing to the child's parents, was considered in chapter three, section B ii above.

[58] Children (Scotland) Act 1995, s11(2)(d). Challenges were not exclusively related to contact orders, however. For example, in *RD v Children's Reporter, Stranraer*, unreported, Stranraer Sheriff Court. 3 December 2008, an unmarried father of a child whose birth was registered in Wales a month before the change in law in Scotland in 2006 was held not to be a relevant person since he did not hold parental responsibilities and rights in Scotland. This was held not to be a breach of Articles 6, 8 or 14 since a father in Scotland who had registered the birth in the Scottish registers on the same date would be in the same position – the 2006 amendments were deliberately not retrospective.

of opinion as to whether the existence of a contact order meant that a father was 'enjoying' parental responsibilities and rights to the extent that he would be a relevant person. For example, the Sheriff Principal at Glasgow[59] held that a father with a contact order did not have a right of contact and was thus not a relevant person. Whereas Sheriff Stoddart at Edinburgh[60] held that a father with an interim contact order was 'enjoying' parental responsibilities and rights under s93(2)(b) and so was a relevant person. This latter case was appealed and along with a second case[61] reached the Inner House for determination in May 2010.[62] The Inner House held that an ordinary reading of s92(b)(a) and (b) does not mean that an unmarried father with a contact order is included. However, in the situation where an unmarried father has a contact order which is then the subject of determination by a children's hearing, such determination can be said to be an interference with the father's Article 6 rights. Therefore, the provision had to be read down so that 'or a right of contact in terms of a contact order' is inserted into s93(2)(b)(a): in this way the applicant's Article 6 rights were protected.[63]

This was not, however, the end of the story since the matter was subsequently appealed in what became the first children's hearings case to be considered by the Supreme Court. The decision of the Supreme Court proved to have a significant influence on decisions related to relevant person status, which is continuing to this day, and therefore it is appropriate to consider the judgment in detail.

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[59] *Children's Reporter v D* 2008 SLT (Sh Ct) 21. What is particularly notable about this case, given it was decided in 2008, was the focus on statutory interpretation to decide the case rather than the legal rights of the father.

[60] *SS v Children's Reporter* 2008 SCLR 709.

[61] L was a father with a contact order and the sheriff at Perth held that the existence of the contact order did not mean that L was a relevant person.

[62] *Knox v S & L v Ritchie* 2010 SLT 765; 2010 Fam LR 54.

[63] For further discussion of this case, see Alyson Evans, 'Unmarried fathers, contact and children's hearings: exploring Authority Reporter v S' 2011 Edin LR 15(1) 106 – 111. In *MH v Children's Reporter*, unreported, Dumbarton Sheriff Court, 3 November 2010, Sheriff Pender extended this decision to apply to a grandmother with a contact order by reading para (b) in the same way as the Inner House had done to para (a) since there was said to be no reason why the grandmother should be treated differently to an unmarried father as they are both people without parental responsibilities and rights but with a civil right to contact.

Principal Reporter v K[64]

The case had something of an unusual procedural history. In summary, K was the father of a child, Louise[65], born in May 2002, but K did not hold parental responsibilities and parental rights in relation to her because he was not married to Louise's mother and the birth was before the Family Law (Scotland) Act 2006 which recognised unmarried fathers registered on the child's birth certificate as having parental responsibilities and parental rights. On the breakdown of his relationship with Louise's mother, K raised proceedings in the Sheriff Court in May 2004 under s11 Children (Scotland) Act 1995 seeking parental responsibilities and rights and a contact order. K was granted interim contact with Louise and that contact took place until December 2005 when allegations were made by the child's mother about K's behaviour towards Louise. As a result of these allegations, and the level of conflict that existed between her parents, Louise was referred to a children's hearing in June 2006. K was not a relevant person under the 1995 Act, because he did not hold parental responsibilities and rights in relation to Louise (the status test in s.93(2)), nor did he ordinarily exercise charge of, or control over, her (the factual test in s.93(2)). Part of the grounds of referral to the children's hearing were concerned with K's behaviour, in particular an allegation that he had sexually abused Louise, but as he was not a relevant person he was not afforded the opportunity to respond to the grounds during either the children's hearing or the Sheriff Court proceedings to establish the grounds of referral. In August 2006, while the matter was in the process of being considered within the children's hearings system, K raised separate proceedings in the Sheriff Court under Part One of the 1995 Act and the sheriff awarded K interim contact with Louise and purported to confer upon him parental responsibilities and rights 'to the extent that he became a relevant person' in the children's hearings proceedings. For reasons that were not made clear to the Supreme Court, this interlocutor remained in place unchallenged until the Principal Reporter decided to challenge it in March 2009 which she did before Lady

[64] 2011 SC (U.K.S.C.) 91.

[65] In the judgment, the child is known by the letter 'L'. In this writing I have expanded this to the fictional name 'Louise' as a way of humanising the situation and reflecting the reality that at the heart of this reported case is an individual child with negative early life experiences that brought her to the attention of a number of children's hearings and courts.

Stacey in the Outer House.[66] Lady Stacey held it to be incompetent under s11 to confer parental responsibilities and parental rights limited to becoming a relevant person for children's hearings purposes, and her decision was upheld by the Inner House.[67] The matter then went to the Supreme Court.

The unanimous decision of the Supreme Court was given as a judgment jointly written by Lord Hope, the then Deputy President, and Lady Hale, subsequently Deputy President and then President of the Supreme Court. Lord Hope considered the question of what kind of Sheriff Court order is sufficient to bring an unmarried father within the ambit of a relevant person, and Lady Hale considered whether the current law was compatible with the ECHR. In a clear statement that who is a relevant person is not simply about the decision maker having relevant information, early in its judgment the court drew attention to the principles of natural justice, specifically fairness and the right to be heard,[68] and these principles are threaded throughout the judgment of the court. On the facts of this particular case, if K was not considered a relevant person then he would not be permitted to have a say in the establishment of the grounds of referral, notwithstanding that they were based in part on his behaviour, nor on the subsequent decision to restrict contact between himself and his daughter.

As well as the father's legal rights that were engaged Lady Hale considered the issue from Louise's perspective:

> *But the child as well as her father has an interest in the full participation of her father in important decisions about her future. The children's hearing has to have the best and most accurate information that it can in order to make the best decisions about the child. Everyone is deprived of that information if findings of fact are made by*

[66] *Principal Reporter v K* [2009] CSOH 94 (Outer House). An all the more unusual position since the Principal Reporter had challenged successfully an interlocutor in similar terms in an earlier case from 2006: *Principal Reporter, petitioner* 2006 SLT 1090; 2006 Fam LR 110.

[67] *Principal Reporter v K* 2010 SC 328 (Inner House).

[68] Ibid [14] and [15].

agreement without the participation of the very person whose conduct is in question. If decisions are then made on an inaccurate factual basis the child is doubly let down. Not only is the everyday course of her life altered but she may be led to believe bad things about an important person in her life. No child should be brought up to believe that she has been abused if in fact she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has.[69]

As was explored in the introduction, the European Court of Human Rights has placed strong emphasis on procedural aspects when a question in relation to Article 8 is being considered. Therefore, the judgment of the Supreme Court that the legislation as it stood breached both K and Louise's rights cannot be categorised as a surprising one. The breach occurred because K and Louise had established family life with each other within the terms of Article 8, with which the children's hearing may (and indeed did) interfere, and yet in not allowing K to take part in the proceedings the legislation did not provide the minimum procedural protections that are required. It was not sufficient to say that the father could make an application to the Sheriff Court for parental responsibilities and rights, to enable him to acquire relevant person status, since timeous decisions could not be guaranteed, and this application would come at a cost should legal aid not be available. Pending this decision, the children's hearing could proceed and make life-altering decisions: as Lord Rodger graphically put it, 'the train may have left the station while the father is still waiting at the barrier'.[70] In other words, as the Supreme Court pointed out, the procedural protections require that someone with established family life is enabled to participate in the process *that leads to* the decision of the children's hearing to interfere in their family life: only then can the right to participate in the that process be said to be properly guaranteed.[71]

Ultimately the Supreme Court held that the defect in the legislation could be cured by reading into the definition of relevant person in s. 93(2)(b)(c) of the 1995 Act (the part of the definition

[69] Ibid [44].

[70] Ibid [33].

[71] Ibid [41]. This point also has relevance to s126 of the 2011 Act and provisions for an individual with a contact order, discussed further below.

that encompassed the factually-based test) the words 'or who appears to have established family life with the child with which the decision of a children's hearing may interfere.' And the Supreme Court went further, for it advocated an expansive approach to the interpretation of the legislation in relation to participation in legal proceedings: 'In a borderline case, it would be safer to include him and let others argue than to leave him out.'[72] In practice, such an expansive approach would necessitate a number of adults being recognised as relevant persons, with all the rights that this status permits under the legislation such as to receive information and attend children's hearings. As discussed further below, this calls for careful practice by children's reporters and children's panel members to manage this consequence since it could create a tension with the child's right to participation, to privacy and to protection from further harm. For example, the presence of a number of adults, some of whom may be barely known to the child, could inhibit the child's ability to participate at the children's hearing itself; permitting access to information to individuals who have harmed or demonstrated a risk of harm to the child in the past could give rise to further risk of harm to the child; and there is potential for conflict with a child's right to privacy. This area calls for a careful balance between ensuring those whose Article 8 rights to family life may be interfered with, including the child, are able to participate effectively in the proceedings, while ensuring respect for rights of privacy of the most sensitive information about the child and their family. This is an example of another of the careful balances that are required in this area of law and is one that has been raised again by recent developments related to the involvement of brother and sisters, which will be considered further below.

While this tension was not discussed explicitly by the Supreme Court, it was acknowledged to some extent by the court opining that:

> *If all that may be at risk is informal contact with the wider family, then the participation of each parent and the child will in most cases afford adequate procedural protection for any Article 8 rights which the child and other family members may have. But there are cases in which the child's hope of reintegration in her natural family depends upon maintaining the close relationship established with a*

[72] Ibid [69].

grandparent or other family member. There would then be a procedural obligation to involve that relative in the decision-making process.[73]

The situation of unmarried fathers proved to be one of the most significant legal rights challenges to the children's hearings system since its inception. It will be recalled from chapter three that in *McMichael v UK* the exclusion of the unmarried father was not held to be a breach of the rights set out in the ECHR.[74] This decision was based on the age-old concern about the 'unworthy' father interfering with the mother bringing up a child alone. However, that attitude, and stereotyping, was rejected less than two decades later with the Family Law (Scotland) Act 2006 and subsequently by the Supreme Court in relation to the children's hearings system. This end result cannot and should not be characterised as anything other than a modern embodiment of the Kilbrandon principles. As seen in chapter two, the effective involvement of the parents in the discussion about the best way forward for the child was one of the key drivers of the principles underpinning the system.[75]

The approach taken by the Supreme Court can be contrasted with the earlier approaches to the position of unmarried fathers in the children's hearings system and this contrast is illustrative of the developments within the children's hearings system as a result of a more expansive approach to legal rights in the system in recent years. Two examples in particular related to the position of the unmarried father arose in the 1990s and provide a useful comparison to illustrate the evolution of the children's hearings system in this respect.

In 1990, the Inner House held that the father of a child who was not married to the child's mother although excluded from the meaning of 'parent' could meet the definition of 'guardian' if, as a matter of fact, he had custody or charge of or control over the child.[76] An interesting feature of this case was that the legal argument centred on whether the father of the child who was not married to the child's mother, but who lived with both the child and

[73] Ibid [68].

[74] (1995) 20 EHRR 205. Discussed in chapter three at pages 122-126.

[75] Chapter two at pages 51 - 54.

[76] *C v Kennedy* 1991 SC 68.

the mother, could meet the factual definition of 'guardian' as a matter of statutory construction as opposed to questioning the appropriateness of his exclusion from the definition of the word 'parent.' In 1997, the application of the definition of guardian to an unmarried father was back before the Inner House and the decision is particularly instructive to examine an apparent shift in this area of law.[77] The grounds of referral concerned the care provided to two children by their father, Mr S, who was not married to their mother. The appeal arose because Mr S was not permitted to participate in the court proceedings to establish those grounds having had the children removed from his care by the children's mother between the date of the children's hearing that sent the grounds to the Sheriff Court for proof and the date of the subsequent Sheriff Court hearing. In what may be considered revealing of the narrow rights framework that existed prior to the Human Rights Act 1998 the decision to dismiss Mr S's appeal was made with reference to the strict interpretation of the legislation rather than the impact on the rights of the father concerned, in contrast to the Supreme Court decision in *Principal Reporter v K* as discussed above. It was not considered problematic that the unmarried father had been recognised as a guardian at the children's hearing, had denied the grounds of referral that narrated concerns about the care he gave to his children, but that by the time the matter was before the sheriff, because the mother had forcibly removed the remaining child from his care, he was no longer to be considered to be a guardian and thus had no right to participate in the proceedings to consider the establishment of the grounds of referral. The unfairness inherent in this approach differs markedly from the position later developed. However, this narrow approach to the legal rights of an unmarried father was confirmed not to be inconsistent with the ECHR at the time.[78]

The Supreme Court handed down its judgment in *Principal Reporter v K* a matter of weeks after the Children's Hearings (Scotland) Bill was passed by the Scottish Parliament.[79]

[77] *S v Lynch* 1997 SLT 1377.

[78] *McMichael v United Kingdom* (1995) 20 EHRR 205.

[79] The Bill completed its Stage 3 on 25 November 2010, and thereafter received Royal Assent on 6 January 2011. The *Principal Reporter v K* judgment was handed down on 15 December 2010, having been argued on 20 and 21 October 2010.

However, aware of the pending decision, the Scottish Government added a late amendment to the Bill giving it the power to amend, by statutory instrument, the definition of relevant person in what became s.200 of the 2011 Act. Subsequently, the Scottish Government exercised this power to ensure that all 'parents' were included in the definition of a relevant person: that dealt with everyone in the position of the father in *Principal Reporter v K*.[80]

So, as I have set out within this section, during the first decade of the 21st century the children's hearings system demonstrated its ability to evolve to accommodate a more expansive understanding of legal rights without departing substantially from the principles on which the system was based. That evolution continued with the enactment of the Children's Hearings (Scotland) Act 2011 and it is to this stage in the development of the children's hearings system that I now turn.

B. The Children's Hearings (Scotland) Act 2011

In this section I will argue that the drivers behind the introduction of the Children's Hearings (Scotland) Act 2011 were legal rights based, in a much more explicit way than was the case with the Children (Scotland) Act 1995, and that the changes introduced added a new layer of legal technicality to the operation of the children's hearings system. It is no part of my argument that this new technicality is inappropriate in all cases, since it affords additional protection for an individual's legal rights, but I will argue that in some cases the added technicality has led to unnecessarily complex procedures and that is not something that is typical of the Kilbrandon principles.

In section A of this chapter, I established that the first decade of the twenty first century saw a surge of case law within the children's hearings system argued explicitly on the basis of legal rights. At the same time as the children's hearings system was receiving this judicial scrutiny, politicians were also becoming increasingly active with the publication of several

[80] The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013 SSI No. 193.

consultations related to the future of the system.[81] What became the 2011 Act was the culmination of these various proposals and consultations which centred primarily on how the children's hearings system should be structured and whether there should be a national body in some form to replace the largely local arrangements that had characterised the children's hearings system since its inception. By the time the Bill that subsequently became the 2011 Act[82] was introduced into the Scottish Parliament in early 2010, the policy drivers for the new legislation had become much more explicitly based on individual legal rights, particularly of the child. [83] In a continuation of the language of the 2008 consultation, the overall aim of the Bill was to 'strengthen and modernise' the system.[84] It is unclear what is meant explicitly by 'strengthen and modernise' but it would seem to encompass both a desire to achieve more consistency in practice and to respond to newly emerging needs of children and families[85] as well as ensuring that the children's hearings system is 'robust against future legal challenge.'[86]

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[81] There were four distinct but interrelated consultations during this period – *Consultation Pack on the Review of the Children's Hearings System* (Scottish Executive, 2004); *Getting it Right for Every Child: Proposals for Action* (Scottish Executive, 2005), the responses to which were published in *Getting it Right for Every Child: Proposals for Action. Analysis of Consultation Responses* (Scottish Executive, 2006); *Strengthening for the Future: A consultation on the reform of the children's hearings system* (Scottish Government, 2008), the responses to which were summarised in *Strengthening the Future: A consultation on the reform of the children's hearings system. Consultation Responses* (Scottish Government, 2009); and finally the *Draft Children's Hearings (Scotland) Bill* (Scottish Government, 2009) the responses to which can be found in the *Draft Children's Hearings Bill – response to initial engagement with stakeholders. Overview* (Scottish Government, 2009).

[82] The Bill was introduced by the Scottish Government to the Scottish Parliament on 23 February 2010. It received Royal Assent on 6 January 2011 and entered into force (largely) on 24 June 2013.

[83] Policy Memorandum (n1) 11, 15, 16, 17. One of the policy objectives for the Bill was to put 'children's rights at the hearing of the system' 17. Further, the Scottish Government stated 'Improving outcomes for children is the key driver for the Bill and wider reforms. The new arrangements must have the child and their rights and welfare at the centre. The Scottish Government has made clear its commitment to the UNCRC and to promoting and supporting the rights of children in Scotland.' 33.

[84] Ibid 13. 'The changes to the Hearings system proposed in the Bill are designed to protect those [Kilbrandon] principles at the same time as modernising and strengthening the system to enable it to continue to work well both now and in the future.'

[85] Scottish Parliament Education, Lifelong Learning and Culture Committee, *Stage One Report on the Children's Hearings (Scotland) Bill* (Scottish Parliament, 2010) 283.

[86] Policy Memorandum (n1) 16.

In seeking to accommodate a wider understanding of individual legal rights within the legislation setting out how the children's hearings system operates, the Children's Hearings (Scotland) Act 2011 added a layer of technicality not seen in the preceding legislation. This was considered necessary to address legal rights related issues arising from the UNCRC and ECHR. That the children's hearings system accommodated legal rights in a more limited form from the outset meant that this additional layer of technicality could be accommodated in an evolutionary way without wholly compromising the principles on which the system was based. The point can be illustrated most directly with reference to the provisions related to relevant person status and also in the provisions in relation to a person with a contact order.

i. Relevant persons

The 2011 Act provides a two-way track to the identification of 'relevant person' and thus a two-way track to the conferral of participation rights to family members at children's hearings involving their children. First, the 2011 Act provides a definition of 'relevant person' in s.200, which is notably more limited than the somewhat looser definition in s.93(2) of the 1995 Act. Coming within the definition enables a person to be recognised as a relevant person automatically. But secondly, the 2011 Act creates a wholly new process for those who do not fall within the limited definition to be 'deemed' as a relevant person. If a person who is not within the s200 definition can establish that they are sufficiently involved in the child's upbringing, then the children's hearing or pre-hearing panel can deem them to be a relevant person. Thus, the approach of the 2011 Act is to separate out those who are relevant persons by virtue of their legal relationship with the child and those who are involved in the child's upbringing by matter of fact. A deemed relevant person is for all intents and purposes of the children's hearings system treated as if he or she is a relevant person.[87]

On the face of it, the criteria for acquisition of automatic relevant person status set out in s200 are straightforward, more so than under the 1995 Act. A person will be recognised as a relevant person if they are the parent of a child, unless they have had their parental

[87] s81(4).

responsibilities and rights removed by a court,[88] a child's guardian or other person who has parental responsibilities or rights under s11(2)(b) or s11(12) of the 1995 Act for a child, a person in whom parental responsibilities or parental rights are vested by virtue of a permanence order, as well as broadly similar provisions surrounding parental responsibility within the terms of English, Welsh and Northern Irish laws. However, two particular issues still arise: (i) the interpretation of the word 'parent', which still causes problems particularly for the child's father and (ii) the meaning of the concept of 'parental responsibilities or parental rights' which leaves unclear whether holding one, or a limited range, only of these responsibilities and rights in relation to the child will be sufficient.

The criteria for being deemed to be a relevant person are different. A person may be deemed to be a relevant person by a children's hearing or pre-hearing panel applying the factual test set out in s81(3), and may have that status removed by the same bodies on a finding that the factual test is no longer satisfied. The factual test, whose satisfaction will require the pre-hearing panel or children's hearing to deem the individual to be a relevant person is that 'the individual has (or has recently had) a significant involvement in the upbringing of the child.' The imperative is to be noted. The previous approach whereby the legislative definition of relevant person in the 1995 Act covered both legal and factual involvement in a child's life, with the children's reporter applying the definition to the particular case in advance of the children's hearing, was eliminated by the 2011 Act. The added technicality in this area of the 2011 Act arises both from separating individuals into classes of 'relevant person' and 'deemed relevant person' and from the mechanism that has been created for decisions to be made about deeming relevant persons.

The stated policy objective of these changes is two-fold[89] – to clarify individuals who should automatically receive relevant person status and to provide a means by which an individual

[88] The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013, Art. 3. Hereinafter 'the 2013 Order'. The specification resulting in all parents being considered as relevant persons did not feature in the 2011 Act as passed, but rather was provided for by virtue of secondary legislation shortly before the 2011 Act entered into force on 24 June 2013.

[89] Policy Memorandum (n1) 469.

may, because of their involvement with the child, request that they be considered as a relevant person for a child – neither of which can be argued as undesirable policy aims. The specific drivers for the changes to the legal criteria were a stated desire that decisions based on facts should be made by children's hearings as they will have the benefit of hearing from those most closely involved in the child's life,[90] while balancing this against a wish not to expand the number of adults present at the hearing which, it was stated by the Government, would conflict with the separate duty placed by legislation on the chairing member to keep the number of adults present at the hearing to a minimum.[91] Again, both of these drivers can be said to be laudable aims for the legislation. However, a further driver was said to be perceived interpretative problems with a factual test when it overlaps with a legal test.[92] The policy memorandum makes mention of the *Principal Reporter v K* case[93] but it is not clear how that related to the factual element of the test and the need to separate out those individuals who have relevant person status automatically and those who require to be 'deemed' a relevant person by a pre-hearing panel or children's hearing. The policy memorandum notes that the proposals in relation to the relevant person definition were not consulted upon prior to the drafting of the Bill, since 'it is an issue that has emerged more recently'[94]; almost certainly an oblique reference to the litigation that was about to reach the Supreme Court. Thus, the rationale for the more legally technical approach of two routes to relevant person status, is not readily apparent. In the absence of a specific rationale for why the technicality had to be introduced, I argue that the retention of the ability of the children's reporter to apply the factual test in situations where it is readily apparent who has a significant involvement in the child's upbringing alongside the mechanisms introduced for people to request a pre-hearing panel and to appeal decisions made for those small number of contentious cases would have struck a better balance between protecting individual legal rights without the introduction of unnecessary technical procedures.

[90] Ibid 484.

[91] Ibid 483.

[92] Ibid. At that point the case had been considered by the Inner House.

[93] Ibid 472.

[94] Ibid 485.

ii. Persons with a contact order

As part of the desire to achieve legal certainty, and in response to the cases discussed in section A above, it is provided explicitly within the 2011 Act that a parent does not have parental responsibilities or rights merely by virtue of having a contact or specific issue order under the 1995 Act.[95] This provision was rendered redundant on the enactment of the 2013 Order specifying that all parents are relevant persons automatically unless their parental rights and responsibilities have been removed by a court.[96] However, this still leaves the question open in relation to other individuals, albeit likely to be a small number, who have a contact order in relation to a child as these individuals will not be recognised as relevant persons automatically in terms of the criteria set out in s200 and unless an extremely high level of contact is specified in the court order it is unlikely that these individuals will be able to satisfy the factual test to be deemed as a relevant person. As was demonstrated in *Principal Reporter v K*, there is potential for this individual's, and the child's, Article 8 rights to be infringed since a decision made by a children's hearing which conflicts with a contact order will take precedence, thus interfering with the individual's contact rights.[97] Rather than recognising these individuals as relevant persons, with all the rights to participation and to challenge the decisions of the children's hearing that the status brings, the legislation offers a solution whereby contact directions made by a children's hearing are subject to review in the event that a contact order is in place, thus introducing yet more technicality into the process.[98]

The process introduced by the 2011 Act is that the Principal Reporter is required to arrange a children's hearing to review a contact direction made by a children's hearing if a contact order[99] regulating contact between the child and an individual who is not a relevant person

[95] s200(2). As discussed above, the position of unmarried fathers and some others with a contact order had been a specific focus of argument related to whether the relevant person definition within the 1995 Act was met.

[96] The 2013 Order (n88).

[97] *D v Strathclyde Regional Council* 1985 SLT 114.

[98] s126.

[99] Either a contact order under s11(2)(d) or contact specified as part of a permanence order. This latter definition brings in biological parents who have their parental responsibilities and rights removed by virtue of the permanence order, but who have had their contact with the child preserved.

is in place[100] or if requested to do so by an individual who has, or has recently had, a significant involvement in the child's upbringing.[101] The children's hearing arranged for this purpose is to take place no later than 5 working days after the initial children's hearing[102] and is limited in its options either to confirm the decision of the children's hearing or vary the contact direction included with the order made by the hearing. The children's hearing may take no further action if it considers that the person who has requested the hearing does not, in fact, have, or have recently had, a significant involvement in the child's upbringing.[103]

These provisions are flawed significantly both in terms of the process and most importantly in relation to the overall purpose of decision-making for a child and, it is submitted, amount to overly technical provisions. First, while the intention is to be noted that the contact direction review hearing is to take place when a children's hearing has made a decision which may interfere with a right of contact granted by another legal fora the drafting of the legislation means that in reality a review hearing must be arranged in the event that a contact direction is included within an order by a children's hearing and that there is a contact or permanence order in place regulating the child's contact with an individual who is not a relevant person. There is no requirement that the same individuals be involved in the two decisions made in relation to the child's contact. For example, a child may have a measure of contact included within a Compulsory Supervision Order that she have contact with her father and alongside this her maternal grandmother has obtained a contact order that she have contact with the child. In these circumstances a contact direction review hearing would be necessary since the children's hearing has included a measure of contact within a compulsory supervision order and there is a contact order in force in relation to the same child. Although there is no obligation to attend a contact direction review hearing, the child will still be

[100] s126(2)(a); (3).

[101] Specified in the 2013 Order, Art. 2.

[102] s126(4).

[103] s126(5).

notified that it will take place[104] assuming they are of sufficient age to receive a notification,[105] and therefore will be aware of the impending hearing. Thus, not only is this process unnecessary in this scenario it will in all likelihood offer further disruption to a child who has only recently attended a children's hearing.

Second, in terms of the process, the review children's hearing is required to be arranged within a very short timescale and it is very likely that three different panel members will conduct the contact direction review, which will require the matter to be revisited in its entirety.[106] This is all the more significant given that neither the child nor relevant persons have a duty to attend the contact direction review hearing[107] and considered alongside the short timescale it may very well be that none of the original attendees are available to assist the contact direction review hearing.

In other words, this process is attempting to give some involvement in the proceedings to those whose legal rights may be interfered with, and who are not considered to be a relevant person with rights to participate, but its substantive effect is likely to be so minimal that the level of protection for individual legal rights is small in reality. Furthermore, the criteria that has been specified for a person to require the children's reporter to arrange a contact direction review hearing is that he or she has, or has recently had, a significant involvement in the child's upbringing; which it will be noted is the same criteria to be deemed as a relevant person. If a person satisfies this criterion then, arguably, it is more appropriate that they be

[104] Rule 42(2)(a) The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 SSI 2013/194. Hereinafter 'the 2013 Rules of Procedure'.

[105] Rule 18(2) of the 2013 Rules of Procedure provides that a children's reporter need not notify the child or provide information 'where, taking account of the child's age and maturity, the child would not be capable of understanding' the information. In practice the Principal Reporter has a working presumption that children under the age of 6 years will not normally be notified or receive information about their children's hearing. Scottish Children's Reporter Administration, *Practice Direction 14: Notification and Papers* (2019). Available at: http://www.scra.gov.uk/wp-content/uploads/2016/03/Practice-Direction-14-Notifications-and-Papers.pdf

[106] The exception being where a request for continuity of a panel member has been made by the original children's hearing and facilitated by the National Convener, Rule 3(1) 2013 Rules of Procedure.

[107] s126(7).

deemed to be a relevant person in advance of the initial children's hearing, and for future children's hearings, to enable them to participate in the decision making as a whole. This is particularly the case when one considers the purpose of relevant person status in relation to the child, which from the perspective of the decision maker is to enable the children's hearing to have the full facts and circumstances in order to make a decision in the best interests of the child, and from the perspective of the individual concerned to have a right to participate in the decision-making process. With the system of contact direction review hearings, the individual may only be present *after* a decision is made, assuming the person is not present at the initial hearing and the chairing member does not exercise his or her discretion to enable attendance.[108] The individual is also only able to participate in relation to contact with the child, and not any wider issues of relevance to the decision-making of the hearing, as they should be legally entitled to do as a relevant person.

Almost certainly because unmarried fathers are now considered automatically to be relevant persons these criteria have not attracted the jurisprudence that the process of 'deeming' elsewhere in the 2011 Act has.[109] Indeed, the only cases in which s126 has attracted any judicial discussion, and it was very indirect, has been as a possible solution to a brother or sister being deemed to be a relevant person. So, while s126 provided an attempt to protect an individual's right to family life all it has done in fact is to introduce complexity into the process that achieves nothing in reality.

C. 2013 - 2021 Case Law

In this section I will show how the children's hearings system has continued to demonstrate its responsiveness to challenges based on legal rights without compromising the underlying principles of the system. However, the technicality of the 2011 Act that I argued in the previous section had increased from the preceding legislation has manifested in quite extensive case law and subsequent legislative amendments since the commencement of the 2011 Act in 2013.

[108] s78(2).

[109] Considered in Section C below.

i. Deemed relevant persons

It is the issue of deemed relevant person status that has attracted the most jurisprudence since the enactment of the 2011 Act. By way of illustration,[110] following the coming into force of the 2011 Act in June 2013, between August 2013 and June 2021 there have been 11 reported cases.[111] These figures can be contrasted with the number of cases reported under the previous legislation. Although between 2008 and July 2013 there were 7 reported separate cases where a court, or in some cases multiple courts, was asked to consider a question in relation to the definition of 'relevant person' under the Children (Scotland) Act 1995,[112] before 2008 the figure stands at 3 in relation to the definition of 'relevant person' in the 1995 Act,[113] and 3 on the meaning of 'parent' and 'guardian' within the 1968 Act. An increase in reported cases is unsurprising as the boundaries of a new statutory test that is, at least in part, factual are established and tested; also the new process had designed within it an explicit appeal mechanism which did not exist under the earlier legislation. Courts at Sheriff, Sheriff Appeal and Court of Session levels have been asked to consider the meaning of the test itself. What are meant by the words 'significant', 'involvement' and 'upbringing'?[114] How recent must the 'involvement' have been?[115] What of situations where the individual's

[110] These figures are provided by way of general illustration only, since it is acknowledged that they represent *reported* cases only and not all court or children's hearing activity in relation to the relevant person definition.

[111] These cases are: *G and Principal Reporter* (28 August 2013 and 12 December 2014); *M, Appellant* (6 January 2014); *F and Principal Reporter* (20 March 2014, 11 July 2017); *H and Scottish Children's Reporter* (25 April 2014); *P and Locality Reporter Manager* (15 July 2014); *AR, Appellant* (17 December 2015); *C and Locality Reporter* (25 November 2016); *Brooke and Children's Reporter* (12 January 2018); *DM and Locality Reporter* (27 November 2018); *XY, Appellant* (27 March 2019 and 18 June 2020); *ABC and Principal Reporter* (31 July 2018, 27 November 2018 and 18 June 2020).

[112] These cases are: *S and Authority Reporter, Edinburgh* (30 May 2008, 26 May 2010); *Children's Reporter and D* (16 January 2008 and 3 December 2008); *Principal Reporter and K* (30 June 2009, 21 January 2010 and 15 December 2010); *M, Appellant* (3 November 2010); *V and Locality Reporter Manager* (23 November 2012); *W and Children's Reporter* (29 July 2013); *P and Locality Reporter Manager* (15 July 2014).

[113] These cases are: *S and N* (8 February 2002); *M and Irvine* (26 October 2005); *Principal Reporter, Petitioner* (9 November 2006).

[114] See, for example, *MT and AG v Gerry* [2014] CSIH 108; 2015 SC 359; 2015 Fam LR 2; *AR, Appellant*, unreported, Extra Division, Inner House, 17 December 2015; *Esther Brooke v Reporter to the Children's Panel* [2018] SC Ham 3; 2018 SLT (Sh. Ct.) 17; 2018 GD 2-42.

[115] See, for example, *DH v Scottish Children's Reporter* 2014 Fam LR 63; 2014 GWD 15-273.

involvement has been curtailed by state intervention?[116] What place do the views of the child have?[117] It is clear from an analysis of the answers provided that the protection and promotion of legal rights is very much at the forefront of judicial thinking. This has been evidenced either directly in terms of addressing an argument made[118] or as background to the need for a relevant person determination.[119]

One of the early issues to emerge in the jurisprudence was the place of the child's welfare when deciding whether an individual should have deemed relevant person status. This is a point of interest to the principal question I explore within this thesis since the issue addressed was about the extent to which the paramountcy of the child's welfare applies when decisions are being taken about a person's legal right to participate in proceedings. Under s25 of the Act when a children's hearing or pre-hearing panel is making a decision about *a matter* relating to a child it is 'to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.'[120] Therefore at first glance one may consider the statements of Sheriff McCulloch in *M, Appellant*[121] and *AG v Principal Reporter*[122] to be obviously correct: that when making a decision about deemed relevant person status a pre-hearing panel is to have regard to the need to safeguard and

[116] See, for example, *CC v Manns* [2016] SAC (Civ) 13; 2016 GWD 38-680.

[117] See, for example, *CF v MF and JF and Scottish Reporter* [2017] CSIH 44; 2017 SLT 945 2017 Fam LR; 2017 GWD 23-394.

[118] In *MT and AG v Gerry*, 2015 SC 359 [14], the Inner House stated:

> *it appears to us that the focus of the provision [s81(3)] should be on whether the individual in question has had an involvement in the upbringing of the child of such significance as to give rise to a relationship between the individual and the child which calls for the procedural protection of constituting the individual as a party to the proceedings, with all the procedural obligations and rights which that status entails.*

[119] In *F v F*, 2014 Fam LR 57, [39] the sheriff stated 'since participation in a decision-making process is a crucial element in the protection of a person's right to a fair hearing under Article 6, ECHR, and or the right (of a family member and the child) to respect for private and family life under Article 8, ECHR, the conferring and removal of 'relevant person' status is a matter of significance.'

[120] s25(2).

[121] 2014 Fam LR 55.

[122] 2013 SLT (Sh Ct) 125; 2013 Fam LR 100.

promote the child's welfare throughout childhood as the paramount consideration. However, on closer examination the situation is not as straightforward as it seems on first glance. As Norrie has argued,[123] it cannot be the case that in every decision that is made by a children's hearing, pre-hearing panel or court the welfare of the child is the paramount consideration since these fora make a wide variety of types of decisions, some of which are purely procedural in nature, and some of which are purely factual: these decisions do not engage the forum's assessment of the child's welfare. When making a decision about the application of relevant person criteria the children's hearing or pre-hearing panel is applying a test set out in law to a set of facts and 'whether a fact exists or not cannot logically be determined by the consequences for the child's welfare of that fact.'[124] However, how can we arrive at this logical conclusion when s25 states that when 'a matter in relation to' a child is being considered the need to safeguard and promote his or her welfare is the paramount consideration? Norrie suggests a way out of the conundrum is to recognise that a decision in relation to a relevant person is not 'a matter in relation to a child' but is rather a matter in relation to an adult. Thus, the requirement to consider the welfare of the child as the paramount consideration when making a decision does not apply. This is an attractive argument since it is predicated on the reality, which has existed since its inception, that the children's hearings system is not only about the child and his or her rights but it is also about the rights of other people with parental responsibilities and parental rights and/or established family life with the child and a careful balance requires to be struck between the rights and interests at play within the children's hearings system.[125] As such, there are some decisions which cannot be subjected to the welfare test.

The argument I make throughout this thesis is that the development of the children's hearings system that has been driven by wider developments related to legal rights within Scots law

[123] Kenneth McK. Norrie, 'Children's Hearings, Relevant Persons and the Welfare of the Child' 2014 Fam LB 128(Mar) 4-7. A contrary view is advanced by Sheriff Kearney, that the child's welfare is a legitimate consideration when a question of fact or of fact and law is being considered. Brian Kearney, 'Children's Hearings, Relevant Persons and the Welfare of the Child: Some Thoughts on Professor Norrie's Comments' 2014 Fam LB 129 (May) 2-4.

[124] Ibid 6.

[125] Norrie's reasoning was adopted by the Inner House in *T and G v Gerry* 2015 SC 359.

has been evolutionary and has not entailed a revolutionary departure from the principles on which the system was based in the 1960s. It could be argued that the proposition that the child's welfare is not paramount in all decision-making is a demonstration of a more revolutionary approach than my core argument suggests especially in the situation where a decision to deem a person as a relevant person places the child at some risk of harm. However, such an argument risks looking at the consequences of the deeming decision in isolation from the many protective measures that the children's hearings system can offer to children to prevent them being harmed by virtue of the proceedings. This may include a decision by the children's hearing or children's reporter to withhold information from the relevant person, for example the child's whereabouts[126], and/or excluding the relevant person from part of the hearing to enable the child to provide her views to the hearing.[127] In sum, there are a range of practical measures at the children's hearings system's disposal to manage a risk of harm to the child so that an individual's right to participate can be protected. So, a potential outcome of harm to a child without the application of mitigatory measures should not be used to justify an argument that recognition of a more expansive understanding of legal rights has led to a revolutionary departure from the underlying principles of the children's hearings system.

ii. Brothers and sisters[128]

Until recently the case law on relevant persons has concentrated on unmarried fathers, foster carers and grandparents.[129] In the latter part of the decade under consideration in this section the courts have had their attention turned towards relationships between brothers and sisters and whether they can be, and indeed should be, relevant persons in relation to each other. The result of this attention has been the addition of further legally technical provisions

[126] 2011 Act, s178(1) and the 2013 Rules, R16.

[127] 2011 Act, s76(1); (2).

[128] The term 'brothers and sisters' will be used within this section to describe what may otherwise be referred to as sibling relationships, unless the term 'sibling' is used by the quoted source. Driven by the views of children and young people, this was the favoured term of the Independent Review of Care in Scotland, the findings of which were published in February 2020: https://www.carereview.scot/wp-content/uploads/2020/03/The-Promise_v7.pdf

[129] As discussed in section i above.

through the creation of a wholly new category of individuals within the children's hearings system. The case law and legislation related to brothers and sisters demonstrates the overall argument I advance in this chapter, which is that the modern children's hearings system has continued to evolve in response to the more expansive approach to legal rights in Scots law but that this has involved the introduction of more legally complex legislation. In this section I will explain the recent developments related to the status of brothers and sisters in the children's hearings system and why, despite the introduction of unnecessarily complex legislation to address perceived issues with the participation of brothers and sisters in decisions about their relationships, areas for challenge remain.

In recent years the importance of brother and sister relationships has been highlighted in research and a partnership formed within Scotland between a number of legal and third sector organisations, known as Stand Up for Siblings, in order to influence law, policy and practice in relation to brother and sister relationships.[130] As a matter of law, the UNCRC requires that States Parties respect the right of the child to preserve family relations, such being part of preserving a child's overall identity.[131] In addition, the UN General Assembly Guidelines for the Alternative Care of Children say:

> *Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests*.[132]

By way of examination of the implementation of these guidelines in practice, research undertaken by Jones and Henderson about children in Scotland who are, or have been, looked after by the State noted that:

[130] More information about the partnership can be found at www.standupforsiblings.co.uk

[131] Article 8(1).

[132] UN General Assembly Resolution 64/142: Guidelines for the Alternative Care of Children (2010) 17.

> *Siblings are … growing up in multiple households and in a range of care settings including kinship, foster, residential care and adoption. This creates challenges in terms of supporting relationships. Previous research has indicated that placement decisions regarding sibling separation or co-location are often dictated by resources rather than children's needs or preferences.*[133]

Further, when brothers and sisters were living in different households:

> *there were varying experiences of, and plans for, contact including direct contact, indirect and no contact. Around four fifths of children had direct contact with at least one separated sibling while looked after. The tendency was for contact to diminish over time.*[134]

Against this background of the implementation of the international rights standards, and an increasing acceptance of the importance of the relationship between brothers and sisters, it was only a matter of time before the issue of brother and sister relationships within the children's hearings system came to the attention of the courts and the focus of the recent legal argument has been on the legal rights of brothers and sisters, in particular to family life under Article 8.

The case law

Ultimately, the matter came before the Supreme Court in June 2020 in relation to two cases, in only the second occasion where the Supreme Court has been asked to consider matters arising from the children's hearings system.[135] The first of those cases, *ABC v Principal*

[133] Christine Jones and Gillian Henderson, *Supporting Sibling Relationships of Children in Permanent Fostering and Adoptive Families* (University of Strathclyde School of Social Work and Social Policy Research Briefing No. 1. 2017) 3. See also Christine Jones, 'Sibling Relationships in Adoptive and Fostering Families: A review of the international research literature.' Children and Society 30(4) p324-334 (2016).

[134] Jones and Henderson (n133).

[135] *ABC v Principal Reporter and another; In the matter of XY* [2020] UKSC 26; [2020] 1 WLR 2703; [2020] 4 All ER 917; 2020 SC (UKSC) 47; 2020 SLT 679; 2020 SCLR 602; 2020 Fam LR 86. The first occasion being *Principal Reporter v K*, discussed in section A above.

Reporter, involved a young person who was 16 years old at the time of the Supreme Court case and who wished to take part in children's hearings for his 9 year old brother to enable him to have a say in relation to the contact that the two brothers had. At first instance[136] Lady Wise held that contact directions represented a significant interference with established family life since the default position within a family unit is that brothers and sisters have unlimited contact. Therefore, this attracted Article 8 procedural protections for those affected, to the extent that they should be recognised as a relevant person. However, the provision of these procedural protections could be achieved in the same way as the Supreme Court achieved protection for the unmarried father in *Principal Reporter v K*, that is to say by the reading down of s81(3) as:

> *the individual has (or has recently had) a significant involvement in the upbringing of the child* or persons whose established family life with the child may be interfered with by the hearing and whose rights require the procedural protection of being a relevant person**.**[137]

This decision was, however, reversed on appeal to the Inner House for three principal reasons.[138] First, the Inner House drew a distinction between parents and other relatives

[136] 2018 SLT 1100; 2019 SCLR 190; 2018 Fam LR 106; 2018 GWD 28-353.

[137] 2018 SLT 1100 [60]. Emphasis added.

[138] *ABC v Principal Reporter* [2018] CSIH 72; 2019 SC 186; 2018 SLT 1281; 2018 GWD 38-468. On the same day the Inner House handed down a second judgment in the case of *DM v Locality Reporter and the Lord Advocate* [2018] CSIH 73; 2019 SC 196; 2018 SLT 1308; 2018 GWD 38-469. The case concerned a brother and sister although differed in the facts from ABC in that a children's hearing had made a decision about the elder brother's relevant person status and had decided that he was not to be deemed to be a relevant person in relation to his sister. The young person appealed that decision to the Sheriff Court arguing that the decision was incompatible with his Article 8 rights. This argument was rejected by the sheriff and that rejection was appealed to the Inner House. The core of the argument to the court was that given the way the legislation is drafted the only way in which he could challenge a contact direction made by a children's hearing preventing him having contact with his sister would be by being deemed to be a relevant person. Similar to the case of *ABC*, the argument was made about the children's hearings system having an all or nothing approach to participation. The contrary argument, which the court preferred, was that there was more than enough flexibility in the children's hearings system to accommodate those whose interests are directly affected by contact decisions, principally with reference to

when it comes to involvement in the children's hearings system, opining that the ratio of *Principal Reporter v K*[139] is not so wide as to extend to relatives other than an unmarried father.[140] Secondly, it was argued before the Inner House that participation in the hearings process was an 'all or nothing' situation – if you are a relevant person you are in and everyone else who is not a relevant person is out. Quite correctly the court rejected this black and white argument and referred to s78(2) of the 2011 Act which permits the chairing member discretion in people attending the hearing other than those with a right to attend the children's hearing. Thirdly, the court observed that for many brothers and sisters the participation of parents or professionals would offer sufficient protection of their contact rights. The Inner House said:

> *A panel considering such an issue* [of contact] *and the other professional persons involved, should be mindful of a sibling's interest in the matter and the need to take it into account. Depending on the specific circumstances this might trigger the need for active measures … usually this will not be necessary but there may be circumstances where fairness requires that the sibling has an opportunity to provide written information in advance. Only exceptionally would his or her attendance at the inquiry be required. In most cases the presence of others, including parents, the reporter and social workers will give the panel enough information to reach an appropriate decision.*[141]

Further:

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s78(2)(a), which permits the chairing member to allow the attendance of a person if it is 'necessary for the proper consideration of the matter before the children's hearing.' This decision could not be further appealed to the Supreme Court.

[139] [2010] UKSC 56; [2011] 1 WLR 18; 2011 SC (U.K.S.C.) 91; 2011 SLT 271; 2011 Fam LR 2. Discussed in section A, part iv. above.

[140] *ABC v Principal Reporter* (n138) [13] 'where decisions are taken which affect the article 8 rights of a relative other than a parent, generally this will not require the same level of involvement in the whole process as that of a parent if it is to be justifiable as necessary in a democratic society.'

[141] Ibid [19].

> *it is wholly understandable that parents, and those in an equivalent position, stand at the apex of procedural protections; but equally understandable that to extend this to all relatives whose established family life with the removed child is likely to be affected by decisions would be not only unnecessary and disproportionate, but also unjustifiably damaging to the efficient operation of the system, and thus to the interests and welfare of the child at the heart of the process.* With regard to those with an interest in contact decisions, there is more than enough flexibility in the current system, if sensibly operated, to allow them to be taken into account in a fair and procedurally satisfactory manner.[142]

The second case considered by the Supreme Court concerned XY who was 24 years old at the time of the case and wished to be deemed as a relevant person for his three younger sisters. His motivation for wishing to be a relevant person is not explicit, however it is noted in the Inner House judgment that he was 'strongly in favour of family reunification.'[143] XY had an application to a pre-hearing panel to be deemed as a relevant person declined and his appeal to the sheriff against this decision was refused. The appeal to the Inner House was also refused on the basis of the earlier decisions of the Inner House in *ABC* and *DM*.

In considering the two cases, the Supreme Court held that it was not necessary for the protection of a brother or sister's Article 8 rights for her or him to be deemed to be a relevant person. This was for four reasons, which broadly followed the decision of the Inner House in *ABC* of which the Supreme Court was complimentary.[144] First, the child-parent relationship and the child-brother/sister relationship are different. The Court explained that:

[142] Ibid [20]. Emphasis added. Continuing the trend of the higher courts considering the nature and purpose of the children's hearings system the argument that because the elder sibling had his own legal capacity it was inappropriate for his procedural protection to come from the presence of his parents was dismissed as overlooking 'the essentially informal child-centered nature of the children's hearings system' ibid [21].

[143] [2019] CSIH 19 [1]. Motivation is of interest since as will be discussed below subsequent amendments to the law are based around the sole interest of the brother or sister being in having contact with the child.

[144] [2020] UKSC 26 [45], for example, in relation to the Inner House's analysis of *Principal Reporter v K*.

> *The parents and other people who have a significant involvement in the upbringing of the child are those who make decisions for the child. It is those decisions which are now being made by the public authorities through the CSO. The interference with the article 8 rights of such people is qualitatively different from the interference with the article 8 rights of siblings, which normally will be concerned with maintaining their relationship with the referred child, whether through contact or (if they are both the subject of CSOs) through being placed together. The conferment of the status of relevant person is an acknowledgement of the gravity of the interference with the family life of the child and the parents and others with that significant involvement in the child's upbringing.*[145]

The second reason that the court determined that it was not necessary for a brother or sister to be given the status of a relevant person in order to protect his or her Article 8 rights was that it was not 'appropriate' for a brother or sister to have an obligation to attend a children's hearing with the criminal penalty that can attach to a failure to attend a hearing. [146] It is not immediately clear why the court does not consider this to be appropriate. It may be a view based on the conception of a brother or sister being a child themselves but more likely the answer is found later in the judgment when the court emphasises the importance of the statutory obligation on a chairing member to keep the numbers present at the child's hearing to a minimum.[147] Self-evidently the number of people who are relevant persons raises the number of people in attendance at children's hearings and who can only be excluded from the hearing on limited grounds.[148] Thirdly, the court considered it was not appropriate for a

[145] Ibid [46]. The focus on decision-making is of note in the paragraph, given the approach to that as a determinant of the application of the criteria for deeming of relevant person status. Discussed above, at section i.

[146] Ibid [47].

[147] Ibid [50].

[148] Children's Hearings (Scotland) Act 2011, s76(1). From 26 July 2021 this was supplemented by a new Rule 20D in the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 which expands the criteria for exclusion to also include any person who conduct is violent or abusive or otherwise so disruptive that the children's hearing or pre-hearing panel would end or be adjourned or whose presence is preventing or likely to prevent the panel or children's hearing obtaining the views of a relevant person or is

brother or sister to have the power to agree or disagree with grounds of referral, which comes along with relevant person status, since this could result in 'unnecessary and disruptive referrals to the sheriff court'.[149] Finally, the sensitivity of the information that could be contained within the papers for a children's hearing in some cases may mitigate against them being shared with a brother or sister to afford privacy to those whom the information is about, for example the child concerned and his or her parents.[150]

In essence what the Supreme Court emphasised was the need for a balance to be struck between competing priorities, rights and interests at play in children's hearings but that ultimately Article 8 does not require a brother or sister who does not otherwise meet the test for being deemed a relevant person of having, or having recently had, a significant involvement in the child's upbringing, to be a relevant person.[151] This does not deny, however, that there are Article 8 requirements that have to be met in relation to siblings:

> *The nature of the sibling relationships will vary from family to family and there needs to be a nuanced approach which addresses the extent of family life in that relationship, the home circumstances, how far the interests of the parents, the sibling and the child coincide and the possibility that the child, the parents and other siblings may have article 8 rights which are in conflict with those of the sibling. There needs, in short, to be a bespoke enquiry about the child's relationship with his or her siblings when the children's hearing is addressing the possibility of making a CSO.* [152]

The Court concluded that the measures available to the children's hearings system within the 2011 Act if operated 'in a practical and sensible manner'[153] were capable of affording a

causing or likely to cause significant distress to a relevant person attending the children's hearing. Inserted by the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021 SSI 2021/68.

[149] *ABC v Principal Reporter and another; In the matter of XY* [2020] UKSC 26 [47].

[150] Ibid [48 – 50].

[151] Ibid [50 – 51].

[152] Ibid [52].

[153] Ibid [41].

framework that gave sufficient scope for the involvement of brothers and sisters in individual cases. However, the Court also opined that this framework is not the only source of obligations since children's hearings and children's reporters are public officials within the meaning set out in the Human Rights Act 1998 and therefore their obligations to act compatibly with Convention rights must also direct the decisions made in relation to the 'sensible operation' of the provisions in the 2011 Act.[154]

There is no doubt that such a bespoke approach creates onerous obligations on panel members and especially children's reporters, and that it is a further example of the increased technicality in the operation of the children's hearings system that I have argued exists as a result of the more expansive interpretation of legal rights in modern Scots law. This applies especially to children's reporters when they are arranging children's hearings; something that is reflected in the Practice Direction provided to children's reporters by the Principal Reporter, updated in between the Inner House and Supreme Court hearings related to *ABC*, which requires a children's reporter 'to consider whether there is anyone … whose attendance is likely to be necessary for the proper consideration of the matter before the hearing.'[155] This is particularly the case, according to the Direction, when a person has established family life and an ongoing relationship with the child and the hearing is likely to consider contact between the child and the individual.[156] Children's reporters are also directed to be alert to situations during children's hearings where contact with such a person is being considered but the person has not been invited to the hearing.[157]

It is an obvious outcome of the wide discretion afforded to children's reporters to create a bespoke approach that variations in informal practice will be seen in particular cases. One such example following on from the Supreme Court decision was scrutinised by Lady Wise in the Outer House.[158] In this case the children's reporter had devised an informal approach to

[154] Ibid [32].

[155] Scottish Children's Reporter Administration, *Practice Direction 3: Relevant Persons*, (2019) 9.1. Available at https://www.scra.gov.uk/wp-content/uploads/2020/09/Practice-Direction-03-Relevant-Persons.pdf

[156] Ibid 9.2.

[157] Ibid 9.3.

[158] *MB v Principal Reporter* [2021] CSOH 19; 2021 SLT 383; [2021] 2 WLUK 221; 2021 GWD 8-109.

facilitating the participation of a brother in a series of applications to the sheriff for an extension to Interim Compulsory Supervision Orders for his four sisters. In holding that the practices adopted by the children's reporter in the case struck a reasonable balance between enabling the brother's participation while retaining focus on the paramount consideration of the court being the welfare of each sister to whom the application related, Lady Wise stated 'It would be inappropriate, in my view, to attempt to set out guidance for future cases. By definition a bespoke approach requires fact sensitive solutions that are not capable of being standardised.' [159] Further:

> *Much depends on the context, but what is required in every case is a well-considered scheme that gives all those with an interest an opportunity to participate in a manner proportionate to their level of relevant interest in the particular case and bearing in mind that the central consideration must always be for the children who are the subject of the proceedings.*[160]

As well as the practice of the children's reporter, greater attention is also required to the obligations of panel members under this bespoke approach, specifically those of the chairing member, since they will need to carefully consider their powers to enable attendance by those who are not relevant persons and those decisions will be scrutinised more closely than ever before. Section 78(2)(a) of the 2011 Act states that the chairing member may permit a person to attend the children's hearing if they consider it 'necessary for the proper consideration of the matter before the children's hearing.' However, they must also balance this with their corollary duty, in relation to persons who do not have a right to attend, 'to take all reasonable steps to ensure that the number of persons present at a children's hearing at the same time is kept to a minimum.'[161] This difficult balance requires a consideration of two often-conflicting interests. However, similar to comments made by the Supreme Court in

[159] Ibid [2021] CSOH 19 [39].

[160] Ibid. Based on the facts of this particular case, Lady Wise held that the scheme devised by the children's reporter was a reasonable one, however it did fall down on one occasion out of four when it appeared that the sheriff had not been aware of the submissions submitted by the petitioner and had therefore not considered those submissions before deciding on the applications.

[161] Children's Hearings (Scotland) Act 2011, s78(4).

Principal Reporter v K about when there is uncertainty, the Inner House has said in relation to brothers and sisters:

> *if in doubt it will usually be better to permit participation in the matter which is of concern to a person making an application under section 78. The opportunity for contributions from all or on behalf of all with a direct interest in a particular issue will improve the quality of the decision-making, and thus promote the welfare of the child at the centre of the proceedings.*[162]

It is inescapable that the exercise of the inherent discretion in s78 has implications for the chairing member's duty to keep numbers present at the children's hearing to a minimum, both to enable the child's participation and to recognise that they have a right to privacy of their most intimate information. But it is important to note that the exercise of discretion under s78 does not mean that someone attends *every* part of the hearing, for he or she may be allowed to attend for the part of the discussion relevant to the contact direction/s only. Again, this places more emphasis on how the children's hearing is managed by panel members and gives rise to potential for intricacy of operation since it entails some comings and goings during the children's hearing and a requirement to play close attention on who has rights of attendance and who requires to be provided with a summary of what took place in their absence and who is not.[163]

While the inherent discretion enabled by s78(2) is a useful mechanism to enable participation, it does have flaws as a mechanism to offer protection for an individual's legal rights, and these should not be overlooked. As was pointed out to the Court in *DM* there is no right to representation for someone attending at the discretion of the chairing member since any representative would also be present at the discretion of the chairing member: representation may be particularly important if the individual in question is another child who wishes contact with his or her brother or sister.[164] Also, the discretion is to be exercised by

[162] *DM v Locality Reporter and the Lord Advocate* [2018] CSIH 73 [13].

[163] 2011 Act, s76.

[164] *DM v Locality Reporter and the Lord Advocate* (n162) [12].

one person, the chairing member, as opposed to it being a decision of all three panel members. Both of these issues, I argue, can be addressed by empathetic panel member practice. For example, if discretion is to be exercised to permit a child to attend to talk about contact with their brother or sister and they wish to bring someone for support discretion to permit that person's attendance could be exercised too, the children's hearing being managed in such a way as to reduce the numbers of other people who are attending the hearing without a legal right to attend. Similarly, it would be good practice for the chairing member to consult with their fellow panel members when considering how to exercise discretion under s78.

The most significant flaw with reliance on the discretionary elements in s78, however, is how do people who have either not been permitted to participate by the chairing member, or who have participated in the process but remain dissatisfied with the decision in relation to their contact, challenge that decision? Under the Children's Hearings (Scotland) Act 2011 they have no recourse to an appeal court. The only option available would be to rely on judicial review. The Inner House in *DM* addressed this question and identified a possible route of legislative amendment to s126 of the 2011 Act, which as discussed in section B above enables a person to challenge a decision made by a children's hearing in relation to contact.[165] A second look at these conditions would not require a significant amount of ministerial or parliamentary effort and could provide a vehicle for a person who has, or has not, participated in a children's hearing at the discretion of the chairing member and in respect of whom the contact direction has been made to challenge that direction. Such an amendment would provide a proportionate response to the situation a small number of brothers and sisters find themselves in without introducing any further, unnecessarily, complexity into the legislation.

However, this is not the legislative route that the Scottish Government chose in an attempt to improve the law for brother and sister participation in children's hearings. Instead, as I discuss in the next section, the legislative amendments add further procedural complexity to the children's hearings system but despite this complexity the remaining significant flaw in terms of the absence of an ability to challenge a decision remains.

[165] Ibid. As discussed in Section B above s126 is a problematic provision.

Amendments to the legislation

Despite the Supreme Court's decision that the framework under which the children's hearings system functions could be operated in a manner compatible with Article 8 rights, the Scottish Government nevertheless brought forward amendments which were subsequently passed by the Scottish Parliament to introduce new provisions to confer some rights on brothers and sisters in relation to children's hearings.[166] The rationale for doing this despite the decision of the Supreme Court was explained by the Minister for Children and Young People to the Education and Skills Committee when she said that 'the Supreme Court's decision recognised that the legislative scheme behind children's hearings is compatible with children's article 8 rights, but we want Scotland's childcare system to move from compliance towards excellence.'[167] And further that 'the reform will also enable Scotland to honour important aspects of the independent care review promise on siblings.'[168]

The Children (Scotland) Act 2020 introduces a new s79(2)(ba) to the 2011 Act and in effect creates a new classification of person in relation to the children's hearings system: 'those who are to be afforded an opportunity to participate' adding yet another layer of technicality into the modern operation of the children's hearings system.[169] Those who are to be afforded the opportunity to participate acquire rights by virtue of a new s79(5ZA) to be notified of the children's hearing, to provide a report or other document to the hearing, to be provided with

[166] Children (Scotland) Act 2020, s25.

[167] SP ES 27 January 2021 col 9.

[168] Ibid.

[169] This primary legislation provides the power for a pre-hearing panel to determine whether a person is someone with a right to participate in the children's hearing, the matter having been referred by the children's reporter following a request from an individual. This appears to exclude the matter from being referred on the children's reporter's own volition or from being determined by a children's hearing but these omissions have been corrected by the subsequent secondary legislation which states that 'An individual is to be afforded an opportunity to participate in relation to a children's hearing if the reporter is satisfied, or a pre-hearing panel or children's hearing has determined …' that the criteria is met. R2A(2) Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 as inserted by the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021.

information specified in the Rules,[170] 'authorisation' to attend the hearing and to be represented at the hearing.[171] The right to appeal a decision made is conspicuous by its absence, although a new s132(3A) provides the right to require a review on the same basis as a child or relevant person after three months but only if they have previously been recognised as a person with a right to participate.

The crucial relevant factor is obviously the criteria, specified in Rules, as determinative of whether a person can acquire these rights to participate in a children's hearing, which is set out as being that:

> *(a) the individual is living or has lived with the child*
> *(b) the individual and the child have an ongoing relationship with the character of a relationship between siblings (whether or not they have a parent in common)*
> *(c) the children's hearing is likely to make a decision significantly affecting contact or the possibility of contact between the individual and the child, and*
> *(d) the individual is capable of forming a view on the matter of contact between the individual and the child.*[172]

There are several matters of note with these criteria and where I argue there is scope for more potential challenges by individuals whose family life is, or could be, interfered with by

[170] Specified in new Rule 23A.

[171] What 'authorisation' means in practice is defined in a new Part 5 to the Hearings Rules which states that the authorisation is for a period which 'begins at such time as the chairing member considered appropriate' and 'ends when the chairing member decides that the individual's attendance is no longer necessary for the proper consideration of how a decision of the hearing may affect contact or the possibility of contact between the individual and the child.' This underlines the sole purpose of these provisions is in relation to contact decisions as opposed to any other considerations before the children's hearing. The level of discretion this formulation permits to the chairing member should be noted.

[172] Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 as inserted by the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021, Rule 2A(3).

a children's hearing. Thus, despite the added legal complexity in the legislation issues that were identified as needing corrected through legislation remain.

First, the criterion in part (a) of living or having lived with the child appears unnecessarily restrictive. A situation can easily be envisaged where two brothers or sisters have never lived together, perhaps because the younger child was removed from the care of his or her parents at birth with the older child having been previously removed. It is feasible that the children may have an ongoing relationship with which the decision of a children's hearing may interfere, but this criterion would prevent them from having rights to participate in each other's children's hearings since they will never have lived together. There is a need for some provision to ensure that only those with close familial relationships, in the widest sense, are included within the definition but living with the child is, I argue, not the right criteria to apply. Something akin to the 'member of the same household' provisions that are familiar in terms of the s67 grounds would have addressed this concern since having lived together is not a pre-requisite to be considered to be a 'member of the same household.'[173] Secondly, the word 'significantly' in para (c) adds an additional qualification to the interference with the contact. If a children's hearing considers the inclusion of a contact direction affecting the contact between brothers and sisters then Article 8 becomes engaged without the need for any further barrier of this being a 'significant' interference.[174] Thirdly, and the most serious of the criticisms that can be advanced at the criteria, the limitation to 'relationships that have the character of a relationship between siblings' leaves the door open for further challenge from other family members. In the *ABC* and *XY* cases, the Supreme Court appears to countenance that the same issues the court was considering in relation to brothers and sisters could also apply to other relatives:

> *The challenges which ABC and XY have mounted have revealed concerns about whether the children's hearing system has been and is operated in a way that gives adequate protection to the legitimate interest of siblings* and other family members,

[173] Case law related to the 'member of the same household' provisions in s67 of the 2011 Act is discussed by Kenneth McK. Norrie, *Children's Hearings in Scotland* (3rd ed. W. Green 2013) 3-12 – 3-13.

[174] See, for example, the dicta of Lady Wise in the Outer House decision in *ABC v Principal Reporter* (n138).

such as aunts, uncles and grandparents, *who do not have a significant involvement in the upbringing of the child, to preserve a family relationship with the child and indeed to the legitimate interest of the child in preserving a family relationship with siblings and other relatives.*[175]

Similarly, two further issues remain outstanding following on from these amendments which likewise leave the door open to further litigation.[176] The absence of a right to appeal a decision made by a person with a right to participate is significant. The rationale for this was explained in the Stage Three Parliamentary debate by the then Minister for Community Safety. When introducing the amendments, the Minister said that:

an appeal right would be disadvantageous overall, both to the child at the centre and to their siblings. Court proceedings are not the most appropriate forum for disputes over how long brothers and sisters should see each other for. That is better discussed in the less formal children's hearings environment.[177]

Rather, the Minister stated that provisions enabling those with a right to participate also to call for a review would be included. While the inclusion of a right to request a review will be suitable in some circumstances, it only applies 3 months after the decision was made and only to someone who was recognised as having a right to participate at the previous children's hearing. This could leave a person with a right to participate, who does not consider that this right was fully realised, unable to challenge a decision of a children's hearing to interfere with their contact with the child for a full three months, plus the time then required to arrange a further children's hearing after the request is made. The remaining issue that the

[175] [2020] UKSC 26 [26]. Emphasis added.

[176] The fact that what became the 2020 Act amendments were introduced at Stage three of proceedings and that the criteria were set down in secondary legislation does not appear to have helped with detailed scrutiny in which these matters could have been considered. While the amended Rules were subject to affirmative procedure in the Scottish Parliament it is notable that not a single question was asked by Members of the Education and Skills Committee prior to the Scottish Government motion to approve the proposed Rules. SP ES 27 January 2021 col 10.

[177] SP OR 25 August 2020 col 97.

amendments fail to address is the provision of legal aid to those with a right to participate to enable them to receive state funded legal representation to exercise their rights. Especially given the individuals who come within the definition are likely to be children themselves, the necessity for support to enable their effective participation in the children's hearing about their brother or sister is readily apparent in some situations. While the person with a right to participate does also have a right to be represented,[178] as has been successfully argued in relation to the participation rights of the child and relevant persons,[179] the absence of State funded legal representation does not enable their participation rights to be fully realised in certain situations.

The Scottish Government has chosen to pursue reform despite the fact that this was not strictly necessary to enable the children's hearings system to operate in a legal rights compliant manner. This in itself should not be criticised, indeed the ECHR itself sets down minimum as opposed to maximum standards as best summed up in the Minister for Children and Young People's statement to Parliament that she wanted the children's hearings system to move from 'compliance to excellence.'[180] However, when scrutiny is applied to these amendments related to brothers and sisters, it is clear that the Scottish Government has not taken account of the full implications of the judgment. This means that three areas in particular remain ripe for challenge: whether persons other than brothers and sisters could have rights to participate in children's hearings, the lack of a mechanism for persons with a right to participate to challenge decisions made by children's hearings that impact on their legal rights and the absence of ability to access state funded legal representation. The recent changes, therefore, represent something of a missed opportunity for the children's hearings system to meet the Minister for Children and Young People's ambition to move towards 'excellence.'

The arguments canvassed in relation to the participation of brothers and sisters in children's hearings encapsulate the issues facing the children's hearings system and its response to a

[178] s79(5ZA)(e).

[179] Discussed in Section A above.

[180] n167.

more expansive approach to the protection and promotion of legal rights. The children's hearings system needs to balance carefully the procedural protections inherent in Article 8 both for the child and others involved in his or her life but alongside the welfare of the child about whom the children's hearing relates. In a postscript to the Inner House decision in *XY, Appellant*[181] the court shared the concerns raised by the safeguarder about this delicate balance not being struck against the best interests of the children involved. The safeguarder raised concerns about the privacy rights of the children should their elder brother be granted relevant person status;[182] the sheer number of people involved in the hearings, including multiple relevant persons pursuing the same objective as well as their lawyers; the frequency with which hearings were being held, in this case 18 hearings in 18 months and that they are 'lengthy and disputatious'[183]; and that the children find the hearings 'stressful and intimidating'[184] to the extent they leave or do not attend in the first place. This demonstrates that the importance of remembering the child's interests when considering the protection and promotion of others' legal rights cannot be underestimated.

D. Chapter Conclusion

In this chapter I have argued that from the start of the 21st century to date the children's hearings system has continued to demonstrate its ability to respond to and accommodate the more expansive understanding of legal rights in our law today. This can be characterised as an evolutionary development of the Kilbrandon principles although it has necessitated the current legislation to be more legally technical compared to the 1968 and 1995 legislative frameworks and in some cases that technicality could have been avoided.

Throughout this period the case law has demonstrated that the system *can* operate in the manner required to take proper account of legal rights. The clear statement at the turn of the Century by the Inner House that the children's hearings system as a whole was compliant with

[181] [2019] CSIH 19.

[182] Of note in this particular case is that one of the children involved did not wish for her brother to have relevant person status to the extent that she lodged an appeal against the decision of the sheriff. The view of the second sister on this matter is not noted.

[183] *XY, Appellant* [2019] CSIH 19 [11].

[184] Ibid.

ECHR rights was a welcome and stabilising message. Where changes were then either driven by pending court cases or insisted upon by decisions of the court, they were developments that strengthened the Kilbrandon principles by enabling access to information for children and the provision of state funded legal representation, particularly when deprivation of liberty was at stake, or by ensuring that an unmarried father had a right to participate in the same way as a married father. The approaches of the respective courts to matters of disputed information provide a useful illustration of changing approaches to legal rights in the system, with the Sheriff Principal in *H&M v Bell*[185] interpreting the dicta of the Inner House in *O v Rae*[186] in light of Articles 6 and 8 of the ECHR. The inherent flexibility in operation that has always been characteristic of the children's hearing system, to enable the 'full free and unhurried discussion' the Kilbrandon Committee envisaged, has enabled this evolution.

The jurisprudence and legislative amendments about who has a right to participate at a children's hearing is the paradigm example of the impact of a legal rights-based approach on the children's hearings system. As demonstrated by the areas canvassed in this chapter, participation has been a theme running through the developments; whether it be in the provision of information to relevant persons and children or access to state funded legal representation at children's hearings, or more recently who has rights either as a relevant person or as a person entitled to participate in children's hearings.

The argument I have set out within this chapter is that in focusing more specifically on legal rights, the Children's Hearings (Scotland) Act 2011 introduced more legally technical provisions. This technicality has continued to increase with more recent case law related to brothers and sisters and further legislative amendments that introduced a new category of person to children's hearings: those who are to be offered an opportunity to participate. I do not argue that this additional legal technicality is inappropriate as a matter of principle, however there are areas discussed within this chapter where the desired protection for legal rights could be obtained in a less complex manner and this would have been more in accordance with the underlying principles of the children's hearing system, that I set out in

[185] 2014 SLT (Sh Ct) 57.

[186] 1993 SLT 570.

chapter two. I will consider what this means for the future of the children's hearings system in the next and concluding chapter.

Chapter Five: Conclusions and Looking Ahead

The argument I offer within this thesis provides a strong defence of the flexibility of Kilbrandon principles, which has enabled the children's hearings system to evolve in response to social and legal changes over the 50 years since it began operation. The original contribution to knowledge that I have made is to explore the children's hearings system in its historical context and demonstrate that its development related to the implementation of legal rights has been an evolutionary process, rather than a revolutionary one that required a move away from the principles on which the system was based by its early architects. As I explored in the introduction,[1] this is an especially important and timely contribution to existing research on the children's hearings system because of the continuing necessity for the system to evolve to meet modern day challenges both within the children's hearings system itself and within Scots law and society as a whole. The centrality of its origins in the discourse surrounding the children's hearings system means it is essential to understand fully the extent to which the system has developed in response to modern imperatives related to domestic legal rights. By exploring this issue, this thesis has filled an important gap in the literature. In this concluding chapter I will discuss and analyse the principal question that was posed at the outset of this thesis. Thereafter I will look ahead at the need for the children's hearings system to continue to evolve to meet modern-day challenges and consider how this can continue to be done without losing or compromising the Kilbrandon principles.

A. The Principal Question

In the introduction I set out the principal question that I sought to consider throughout the subsequent chapters: how has the children's hearings system developed in response to an increased focus on protecting and promoting legal rights in Scots law, and do the developments represent an evolution of or revolution away from the principles that inspired its original design?

[1] At pages 4 – 5.

To analyse this question, I examined three discrete periods in the history of the children's hearings system, broadly defined by the periods of legislation governing its operation; the conception and construction of the system in the 1960s; its formative years in the 1970s through to the first substantive legislative change in the mid 1990s; and finally the case law and substantial legislative changes brought about in the initial years of the 21st century. Through examination of these periods, I have argued that the protection and promotion of legal rights within the children's hearings system should be considered as an evolutionary process rather than one of revolution of the fundamental principles set out by the Kilbrandon Committee and implemented by the legislators. This evolution has been possible because some legal rights were incorporated into the construction of the children's hearings system at the outset, albeit based on a more limited understanding of the breadth of legal rights than we would have today. In particular within the discussions and debate that led to the creation of the children's hearings system there was a strong focus on procedural rights such as to legal representation and to appeal, especially so for parents and when the child was attending the children's hearing as a result of their own, usually criminal, behaviour. However, despite being incorporated in this narrow form within the construction of the children's hearings system, I established in chapter three that the practical application of the specific legal rights incorporated in the law was not given much prominence by children's panel members in the early operation of the children's hearings system. This highlights the need to consider the implementation of the legislation as well as the terms of the legislation itself when considering the extent to which an individual's legal rights are protected and promoted, something most recently described by the Supreme Court as the children's hearings system being 'operated sensibly.'[2]

From the late 1980s onwards this gap in the implementation of legal rights in practice started to be addressed with a series of developments that came together and over time led to the evolution in what, and how, legal rights are implemented within the children's hearings system. The drivers for this change can be categorised into three broad areas. First, from a purely legal perspective legal rights reflected in the ECHR gained greater prominence as the

[2] *ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland); In the Matter of XY (Appellant) (Scotland)* [2020] UKSC 26 [32].

European Court of Human Rights entered a more activist phase and the understanding of what legal rights are also expanded, with due process and the perception of respect for legal rights becoming much more significant. The interpretation of Article 8 by the European Court of Human Rights was influential in this respect. The incorporation of the ECHR into domestic law through the Human Rights Act 1998 and the Scotland Act 1998 added strength to the ability of children and adults to realise their rights set out in the Convention in the domestic courts. Second, the UNCRC was negotiated, signed and ratified in the 1980s and early 1990s, which provided a more specific focus on the distinctive rights that signatory States must accord to their children. Domestically, the Children (Scotland) Act 1995 began the adjustment to secure more promotion of children's legal rights within the decision making of the children's hearings system. Third, the greater understanding of, and recognition of the role of the State in preventing and responding to, child abuse and neglect I suggest is a significant development. This is because situations of abuse and neglect can mean that the legal rights of children and their parents may not be always aligned in the way that the Kilbrandon Committee had envisaged when the children's hearings system was conceived in the 1960s. This brings the recognition and implementation of the legal rights of children and of their parents separately into focus in a way that was not envisaged by the early architects of the children's hearings system.

My core argument is that how the children's hearings system has been able to respond to these changes is because certain legal rights were incorporated into the system at the outset, especially in relation to rights of appeal and to legal representation for adults and those children accused of criminal offences. While the protection and promotion of individual legal rights were not something that was at the forefront of the design of the children's hearings system, in the way it would be if an exercise like that undertaken by the Kilbrandon Committee was carried out today, it did mean that as our understanding of what legal rights an individual should have and the practice required to ensure they are realised has grown, the children's hearings system has been able to evolve to accommodate this more expansive understanding. Furthermore, this evolution has taken place without loss of the underlying principles on which the children's hearings system was based, which remain reflected in the governing legislation. I set out these principles in chapter two:

1. The needs of the individual child should be 'the test for action'[3] and in considering those needs no distinction should be drawn between the four 'categories' of children the existing law recognised.
2. There should be a social educational approach to 'treatment' within which familial participation and co-operation should be an essential element.
3. Disposals should be made by a system of lay panels that have continual involvement throughout the 'treatment'.
4. The establishment of essential facts should be separate from the responsibility for 'treatment'.

When these principles are assessed against the modern legislation and practice they are very much still present in the children's hearings system today. In relation to the first principle, the welfare of the child is the paramount consideration which is the modern expression of the needs of the child being the 'test for action.'[4] As discussed through examination of the case law in chapter four, the welfare of the child is not the paramount consideration when it comes to certain procedural decisions, but this does not detract from this principle, which is about the action to be taken to address the issue of concern in relation to the child rather than the process of how decisions are made. With the s67 grounds in the 2011 Act the law continues to draw no distinction between the four 'categories' of concern in relation to children that were set out by the Kilbrandon Committee. In relation to the third principle, the children's hearings system still has a system of lay panels with continued involvement although a slight challenge to this was introduced by the Children (Scotland) Act 1995 with a power given to a sheriff on appeal to substitute a decision for that of the children's hearing.[5] However, the comparatively rare use of this power cannot be considered to present a significant challenge to the principles.[6] Similarly, with respect to the fourth principle, the modern legislation still

[3] Kilbrandon Report, 77.

[4] 2011 Act, s25(2).

[5] s51(5)(c)(iii).

[6] Unfortunately, SCRA does not collect statistics on the use of this power of the sheriff to substitute a decision for that of the children's hearing. However, in my own practice experience this is something that is done comparatively rarely, which is illustrated by the fact that it is not something reported by SCRA in its suite of statistics about the operation of the children's hearings system.

operates on the basis of separation of facts in terms of the reasons for State involvement from decision making on the 'treatment' required to address the concern. Although as was discussed in chapter four,[7] when information before the children's hearing is disputed (after the statement of grounds has been established) the separation is not as straightforward in practice as the principle suggests.

It is when the second principle is considered, related to the participation of family members, that the evolutionary process in relation to legal rights I have set out within this thesis can best be seen. Since the children's hearings system was conceived and constructed around these four principles, our understanding of participation as a group of rights within the UNCRC and developed by the European Court of Human Rights in relation to the protection of rights under Article 8 has developed. While there were some elements of what we now understand to be participation rights within the children's hearings system as originally enacted, particularly in relation to the rights of a parent but with some references also to the child's rights when they were accused of offending behaviour, these participation rights and the justification for having them have developed and changed over time. For example, at the outset of the children's hearings system the emphasis on the parent taking part in the decision-making was to enable the decision-maker to have all the information on which to make a decision, as well as securing the co-operation of the parent and child with the State in order to bring about the change required in the child's life. This can be contrasted with the modern justification of a legal rights-based approach to family decision-making, driven principally, although not exclusively, by Article 8 of the ECHR and Article 12 of the UNCRC in relation to children. Our understanding of what participation rights are constituted by has developed from physical presence and the opportunity to speak to the lay panel members, with legal representation and the right to appeal if required, towards participation being viewed as a process whereby an individual is actively involved in decision-making on the basis of mutual respect and that the decision-makers consider their views expressed. It encompasses access to information, the ability to provide views on the decision to be made, with representation if required and understanding how their views have been considered by the decision-maker and how the decision has been made. Who holds participation rights has

[7] At pages 142 – 150.

also evolved over time, especially related to significant others in the child's life. As discussed in chapter four,[8] this can be illustrated through a comparison between judicial decision-making in *S v Lynch,*[9] *McMichael v UK*[10] and *Principal Reporter v K.*[11] A wider range of people come within the definition of relevant person and there is now an additional category of persons with rights to participate in children's hearings, at present confined only to brothers and sisters to the exclusion of wider family members.

The argument I set out in chapter four is that, in seeking to strengthen the protection and promotion of legal rights, the modern children's hearings system has introduced more legally technical provisions to an extent not recognised as required by the Kilbrandon Committee. This can be seen in both the current legislation, the Children's Hearings (Scotland) Act 2011, and the judicial interpretation of it as well as the more recent legislative amendments related to persons with a right to participate. While this legal technicality is not completely inappropriate, there are areas I identified in chapter four where the desired protection for an individual's legal right to participate could have been achieved in a less complex manner.

In the context of the principal question addressed by this thesis does this increased focus on who has rights of participation within the children's hearings system, and how those rights are realised, challenge fundamentally the Kilbrandon principles? While what was conceived was not a decision-making process layered with legal complexity, it cannot be said that the original principles have been departed from in seeking to emphasise rights of participation within the children's hearings system. Indeed, the principles can be viewed as having been strengthened by the increased emphasis on participation of the child and his or her family. The Kilbrandon Committee proposed, and the Westminster Parliament enacted, a legal system whereby the welfare of a child could be considered, and decisions made, with the input of those who were presumed to be most closely involved in the child's life. While more technical in application than was envisaged by the Kilbrandon Committee the current

[8] At pages 159 – 160.

[9] 1997 SLT 1377.

[10] (1995) 20 EHRR 205.

[11] [2010] UKSC 56; 2011 SC (U.K.S.C.) 91.

provisions retain this desire. Furthermore, the positive procedural obligations inherent in Article 8 would not have been a consideration at the point the Kilbrandon Committee and Westminster Parliament were constructing the children's hearings system and so this area demonstrates the ability of the children's hearings system to evolve to take account of new legal considerations, whilst at the same time retaining the basis on which it was conceived.

Thus, there were clear foundations put in place when the children's hearings system was conceived and constructed that allowed the more expansive understanding of, and practice related to, legal rights to be implemented within the children's hearings system as it has developed in the wider legal system. However, the modern children's hearings system is undoubtedly more legally complex than was constructed by its early architects. This does not detract from the principles on which the children's hearings system was based but does call for more attention and skill from children's panel members and children's reporters in the application of the various provisions underpinning the operation of the children's hearings system to ensure that respect for legal rights in the broadest sense is experienced by children and their families involved in the system. It also calls for more support to be available to children and adults to understand and navigate what can be complex processes.

I have argued that the children's hearings system has displayed its ability to strengthen the protection and promotion of the legal rights of those affected by its decisions, however this should be viewed as a continuing and evolving process rather than an end goal reached. In the next and final section of this thesis I will consider the future for the children's hearings system as it continues this evolutionary process within the framework offered by the underlying Kilbrandon principles.

B. Looking Ahead

While this thesis has provided a strong defence of the evolution of the children's hearings system and the principles upon which it is based, it is important not to consider this defence as meaning that there is no scope for further improvement in relation to the protection and promotion of legal rights within the system. Continued evolution is required to improve and strengthen still further the operation of the children's hearings system and ensure it respects the legal rights of the child and those closest to them to the maximum possible extent. But

given I have argued in this thesis that its evolution to date has led to more legal complexity in the modern children's hearings system than was envisaged by the early architects of the system, the question arises as to whether the evolution can continue in the same way or whether it will necessitate a move away from the Kilbrandon principles. This is the question I will consider in this concluding section. I will consider the areas that will continue to drive the evolution of the modern children's hearings system and suggest that by retaining an element of flexibility in the operation of the system, through operating the system sensibly (in the words of the Supreme Court) and in line with existing legal rights principles, the evolution can take place whilst retaining the Kilbrandon principles as the underlying ethos of the children's hearings system.

I have argued throughout this thesis that there have been three drivers for the evolution of the children's hearings system, which are the prominence and breadth of ECHR rights, especially Article 8, the understanding of and respect for children's rights and the increasing understanding of the need for the State to intervene in cases of child abuse and neglect when the legal rights of children and their parents may not be consistent in the way that the Kilbrandon Committee envisaged. All three of these areas are continuing to develop and therefore the flexibility that the children's hearings system has demonstrated over the past 50 years will need to continue. The current Scottish Government has indicated a desire to continue to increase a rights perspective within Scots law and by the end of the current Scottish Parliamentary term in 2026, based on current plans, three important pieces of legislation will have been passed that will provide impetus for the continued evolution of the children's hearings system to ensure it offers the fullest protection for individual legal rights. These pieces of legislation are the UNCRC (Incorporation) (Scotland) Bill,[12] a broader Human

[12] The Bill was passed by the Scottish Parliament on 16 March 2021. However, sections 5, 19, 20 and 21 of the Bill were subsequently held by the Supreme Court to be beyond the powers of the Scottish Parliament and therefore the Bill has been referred back to the Scottish Parliament. *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; 2021 SLT 1285. At the time of writing, although the Scottish Government has indicated its intention to amend the Bill and still incorporate the UNCRC into Scots law, no plans have yet been laid before the Scottish Parliament to do so.

Rights Bill,[13] and children's hearings system specific legislation committed to as a result of the Independent Review of Care.[14] The proposed incorporation of the UNCRC into Scots law in particular will drive further the evolution of the children's hearings system in its protection and promotion of children's legal rights. This is because, assuming the stated political intentions are acted upon, for the first time children and those acting on their behalf will be able to argue directly that their rights under the UNCRC have been infringed by the children's hearings system and this will provide renewed focus on the practice of ensuring legal rights are protected and promoted within the children's hearings system.[15]

However, as we seek to ensure that the children's hearings system continues in its evolution to protect and promote legal rights particular attention is needed to ensure that this evolution continues to take place in the context of the Kilbrandon principles on which the system is based and avoids the temptation to add layers of unnecessary legal complexity in a manner

[13] A consultation on a Human Rights Bill was set out in the 2021-22 Programme for Government on 7 September 2021. This proposed Bill builds on the work of the First Minister's Advisory Group on Human Rights Leadership and the National Taskforce for Human Rights Leadership and its aim will be to incorporate, within the limits of competence devolved to the Scottish Parliament, the International Covenant on Economic, Social and Cultural Rights and treaties on the empowerment of women, disabled people and minority ethnic people. https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/pages/2/

[14] The Independent Review of Care found that there was 'a lack of understanding of families, siblings and their respective legal rights' within the children's hearings system. Independent Care Review, *The Promise* (2020) 39. Legislation to reform the children's hearings system following on from the Independent Review of Care is expected towards the end of the current parliamentary term. The Promise *Plan 21-24* (31 March 2021), 36 https://thepromise.scot/plan-21-24-pdf-spread.pdf; The Promise *Change Programme One* (25 June 2021), 64 https://thepromise.scot/change-programme-one-pdf.pdf .

[15] A stark example of where the children's hearings system still needs to go to ensure the implementation of children's legal rights was provided by the investigation by the Child and Young People's Commissioner Scotland into compliance of Chief Social Work Officers with the procedural requirements of the placing of a child in secure accommodation. While this investigation was not about the operation of the children's hearings system itself, the lack of compliance by Chief Social Work Officers with basic safeguards identified within the report is clearly a concern and is an issue that needs rectified quickly or successful legal challenges will be brought. Commissioner for Children and Young People Scotland *Statutory Duties in Secure Accommodation: Unlocking Children's Rights* (2021) https://www.cypcs.org.uk/wpcypcs/wp-content/uploads/2021/06/Secure-Investigation.pdf .

that detracts from those principles. As I have demonstrated throughout this thesis, the principles have proven themselves to be sufficiently flexible to enable such evolution and that, largely, the necessary balance has been found to accommodate the protection and promotion of the legal rights of children and significant others but while still retaining the principles on which the children's hearings system was based.[16] The challenge to which the children's hearings system must address itself is that as the protection and promotion of the collective of individual legal rights becomes ever more prominent, and potentially demanding, this balance must be retained and not tipped away from the principles that characterise the children's hearings system.

This is an important consideration since the impact of a technically complex system on the ability of a child and his or her family to understand and participate in decision-making is clear, as it is on the ability of lay decision makers to apply complex legislative provisions; two aspects of the children's hearings system that are core to the Kilbrandon principles. The Supreme Court decision in *ABC* is welcome in this regard, in that the Court opined that the children's hearings system *is* capable of protecting the legal rights of children and their families to participate if the existing provisions are operated in a 'sensible' way.[17] However, is this too wide and variable a term to offer sufficient protection for the legal rights of those whose family life is affected significantly by the decisions of children's hearings? Should a modern children's hearings system strive to have more uniformity in the procedures and practices it applies to protect and promote legal rights even if that means a departure from the Kilbrandon principles?

My argument is that a legal process like the children's hearings system requires a degree of flexibility in its processes to accommodate the wide range of children with diverse needs who require the intervention of the State through the legal system whether that be because of

[16] In chapter four, section B, I identified two areas as examples of where legal complexity has been introduced that was unnecessary to achieve the desired outcomes, these being the provisions in the 2011 Act related to relevant persons and persons with a contact order.

[17] *ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland); In the Matter of XY (Appellant) (Scotland)* [2020] UKSC 26 [41]. The Oxford Dictionary defines 'sensible' as to be 'done or chosen in accordance with wisdom or prudence; *likely to be of benefit*.' (Emphasis added).

their own behaviour or the behaviour of others towards them. The danger of trying to prescribe more uniformity is that it brings with it more rigidity and this was something the Kilbrandon Committee rejected specifically. Therefore, another approach stopping short of uniformity and rigidity as a method of securing the protection and promotion of individual legal rights is needed in this particular area of the legal system. This other approach is already available. As the Supreme Court pointed out in *ABC*, both the children's reporter and children's hearing are public authorities under the Human Rights Act 1998 and so must act in a manner compatible with Convention rights in exercising their functions.[18] Therefore, it follows that in operating the children's hearings system the legislation must be interpreted with consideration to the way in which an individual's legal rights are likely to be protected and promoted. In other words, *theoretically*, the system can protect and promote legal rights and so the focus must be on the practice that turns that theory into reality, and which shapes the experience that children and young people have of decision-making in the children's hearings system and their future outcomes. This is what should be meant by 'sensible' operation. It is about applying the existing legal provisions in a way which secures the protection of individual legal rights in a particular case to the maximum possible extent within the confines of the legislation. I acknowledge that this is an inherently flexible approach however the children and families who the children's hearings system is designed to help are also wide and variable and so the system must flex accordingly to meet their diverse needs. The Kilbrandon Committee itself stated that:

> *we do not consider that it is either necessary or desirable to seek to lay down any rigid framework governing the panel's proceedings. The questions arising are in our view likely to emerge most clearly only in an atmosphere of full, free and unhurried discussion, as a result of which the underlying aim and intention is made apparent to all concerned.* [19]

[18] *ABC (Appellant) v Principal Reporter and another (Respondents) (Scotland); In the Matter of XY (Appellant)* (n17) [32].

[19] Kilbrandon Report, 109.

One consequence of increased technicality in the legislation and, I acknowledge, of the requirement to operate this in a sensible manner is that much more onus is placed on children's panel members, chairing members in particular, and this in turn places more onus on the training and practice support that is offered to them. As a direct result of the legal technicality now inherent in the operating legislation calls have been made to review the use of volunteer decision-makers in children's hearings, calls that were first made in the 1970s against the background of the 'expressions of concern' made at that time in relation to the implementation of legal rights in practice within children's hearings.[20] Most recently the Independent Review of Care found that:

> *children and their families have told the Care Review about the difficulties of inconsistency of panel members and decisions, the pain of retelling difficult stories and panel members have said they feel unsupported and inexperienced to manage the cases that appear before them. The nature of a system reliant on volunteers can be that the focus and energy is on their recruitment, training, development and retention, rather than on how well decision-making structures deliver for children and families and the quality of these decisions.*[21]

Utilising the conclusions of this thesis related to the history of the development of the children's hearings system I suggest that there are parallels to the current debate that can be drawn from the initial period of operation of the system and that this period in its history can be used to demonstrate how the system can evolve to respond to modern challenges within the context of the Kilbrandon principles. As I set out in chapter three, the implementation of the legal rights provisions in the 1968 Act fell short in the initial years and that led to calls for a children's hearing to have a legally qualified chairperson rather than comprising three lay

[20] See, for example, John P Grant, 'The Legal Safeguards for the Rights of the Child and Parents in the Children's Hearings System' 1975 JR 209, 231-232.

[21] Independent Care Review, *The Promise* (2020) 44. A 'redesign' of the children's hearings system to implement the recommendations from the Independent Review of Care was announced in August 2021, such redesign being undertaken by a Hearings System Working Group: https://thepromise.scot/hearing-system-working-group

decision makers.[22] This was resisted in favour of changes to panel member training and observations undertaken of panel member practice,[23] and the children's hearings system continued to evolve to ensure that legal rights, including as more expansively defined in later years, were implemented within children's hearings. Improvements to support for panel members through training and observation should therefore be considered again to meet, at least in part, the 21st Century challenges laid at the door of the children's hearings system. My argument is that in looking to the future, rather than changing fundamentally the children's hearings system and its operating legislation, it is possible, as the Supreme Court recently found, to protect and promote legal rights without adding further technicality into the system that is challenging to implement in practice. This does require a flexible, and sometimes discretionary approach. However, a certain amount of flexibility is needed to enable the children's hearings system to operate in the manner in which it was intended but with minimum procedural safeguards as a backstop.[24]

To conclude, I return to a point I made in the introduction to this thesis. For thousands of children and young people each year the children's hearings system is not an abstract concept. It is the reality of their lives. The legal rights that they and their families have provide a framework within which life-changing decisions are made by children's hearings. Therefore, the importance of ensuring the continued evolution of the children's hearings system to ensure the maximum possible protection and promotion of the legal rights of the child and those significant others within their lives cannot be understated.

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[22] Ibid. Of course, it is important not to conflate lay persons with volunteers, since a lay person could be employed as a panel member.

[23] Discussed by Sandford J Fox in his 1991 Kilbrandon lecture 'Children's Hearings and the International Community.' Sandford J Fox, *Children's Hearings and the International Community* The 1991 Kilbrandon Child Care Lecture, 14. Available at https://www.strath.ac.uk/media/1newwebsite/departmentsubject/facultyofhumanitiesandsocialsciences/documents/1st_Lecture_-_Sanford_Fox.pdf

[24] An example of where this practice happened with relative success can be seen in *MB v Principal Reporter* 2021 SLT 383.

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