

Linda Haskell Memorial Master Class: 29 October 2010

Parent, child and community participation in child welfare decision-making. Is there room for lawyers? The unique Scottish experience of the Children's Hearings

I am very pleased and honoured to be here today to deliver the Linda Haskell Memorial Master Class. It is especially poignant today as Mr. William Haskell, Linda's father recently died. I also want to thank Professor Emilia Martinez-Brawley who jointly with the Haskell family invited me to Arizona to deliver this class. Thank you everyone for coming along today.

Public intervention in the lives of troubled and troublesome children and young people presents fundamental and enduring challenges for policy, law and professional practice. Child welfare decision makers are required to balance the merits of intervention against non-intervention in often-complex cases where final outcomes for children's welfare are not easily gauged. In youth justice decision-making, whilst the relative balance between justice and welfare-oriented responses in different jurisdictions remain contingent on socio-economic, cultural and historical factors, the challenge of just decision making for often-vulnerable children and young people remain. These challenges lie at the heart of all systems of child welfare and youth justice decision-making regardless of the nature of formal adjudicative structures.

Today I am going to discuss the Scottish children's hearing tribunals system, which takes a unique approach to these challenges. First, I will briefly outline the philosophy and origins of the system and the key features that differentiate children's hearings from

juvenile courts, including the pivotal role of the lay tribunal. I will then review the evidence from research on participation and representation in the hearings including the growing contribution of lawyers.

The Scottish Children's Hearings System was established in 1971. It is the primary child welfare and youth-justice decision-making forum for children under 16 years<sup>1</sup> in Scotland. Children in trouble with the law and those in need of care and/or protection who require formal public intervention are not dealt with by a juvenile court. Instead they are dealt within a system of lay tribunals staffed by volunteer citizens drawn from local communities. These lay volunteers are the independent decision makers once the facts of a case are accepted by the child and family or formally proved in court if disputed. Their role is not to make findings of guilt or innocence but to decide if compulsory public intervention is required in the child's life. Three citizen volunteers (called panel members) meet together with the child and family in a room in a hearing centre (provided across Scotland) to decide if compulsory measures of supervision are required. These measures include protection, guidance, treatment or control (section 52(3) Children (Scotland) Act 1995). Each panel member gives their independent view and if there is no consensus a majority vote is taken<sup>2</sup>.

Panel members are recruited each year through public advertisement. They must be at least 18 years and if selected they undergo induction training in the law, child welfare and skills such as analytical thinking, decision-making and negotiation. They are required to undertake regular ongoing training. Panel members are drawn from all walks

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<sup>1</sup> Children can be retained under formal supervision through the children's hearings up to seventeen and a half years.

<sup>2</sup> This has been established practice since the inception of the hearings in 1971.

of life and at any time there are around 2,500 panel members across Scotland. They do not receive payment although they will be paid travel expenses. A loss of earnings allowance is payable if their employer does not offer paid time off (there is a statutory right to reasonable time off for tribunal duties).

Children's hearings are unique to Scotland. In the other jurisdictions in the UK - England, Wales and Northern Ireland - youth courts adjudicate on offence referrals and family courts deal with care and protection cases. In Scotland, which has its own legal system, the courts are only involved where the facts of a case are in dispute, in appeals from decision of children's hearings and where serious offences are committed. From the beginning the option to retain some children in the adult criminal justice system has remained. The age of criminal responsibility in Scotland is eight years and remains one of the lowest in Europe. Prosecution is extremely rare under 16 years and requires the explicit consent of the Lord Advocate (chief public prosecutor in Scotland). This will change in the near future as new legislation provides immunity from prosecution for children under 12 years of age, although commission of an offence will continue to be a ground of referral to children's hearings for children aged between 8 and 12 years (section 52 Criminal Justice and Licensing (Scotland) Act 2010).

The foundations of children's hearings lie in the report of the Kilbrandon Committee (1964), commissioned by the government in 1961 to review the legal framework in regard to juvenile offending, children in need of care and protection and those beyond parental control. This followed public concern about post-war increases in juvenile offending. The Kilbrandon<sup>3</sup> proposals offered a radical alternative to court based

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<sup>3</sup> Lord Kilbrandon was a Scottish judge and Law Lord.

systems to deal with the behaviour and needs of children seen to require special measures of education and training. The adversarial forum of the court was considered inappropriate to deal with the welfare needs of child offenders.

Kilbrandon's (1964) fundamental contention was that the underlying similarity in children's circumstances made the legal classification of children into offender and non-offender of limited 'practical significance' (para 13, p.12). It would also be fair to say that the restricted development of juvenile courts in Scotland created space for alternative approaches (Cowperthwaite 1988). A 'failure in natural upbringing' was seen to lie at the root of children's difficulties and a national department was envisaged to support and assist parents in meeting their child's needs. Punitive measures holding parents responsible for the actions of their children was specifically excluded. Kilbrandon's proposals can be seen as an attempt to 'narrow the gap' between children who offend and those in need of care and protection (McGhee and Waterhouse 2007). There is evidence to suggest that children with more contact with the hearings system are likely to have both offence and non-offence referrals at different times in their involvement (Waterhouse *et al* 2004).

Three elements distinguish the children's hearings. First, the explicit welfare philosophy: the child's welfare 'throughout childhood' is the 'paramount consideration' in decision-making (section 16(1) 1995 Act). It is the child's 'needs' rather than his/her 'deeds' *per se* that underpin decision-making and intervention. 'I realise' in the USA following *In re: Gault* 387 US1 (1967) greater emphasis was placed on 'due process' for children and restrictive welfare disposals were limited (Martin *et al* 1981) with status offences removed from juvenile courts' jurisdiction. An exception to the welfare

principle is built in to the hearings for public safety (section 16(5) 1995 Act). In addition there is a sharp transition from child to adult and from welfare oriented to justice approaches at sixteen years. The majority of young offenders aged 16 and 17 years are routinely dealt with in the adult criminal court. In 2005-06 for example, 7,955 young people under 18 years of age were convicted in Scottish courts. This included 135 young people aged under 16 years. Custodial sentences were imposed for 807 of this total, including 23 for young people aged under 16 years (Scottish Executive 2007).

There is provision for children<sup>4</sup> who are dealt with in the adult criminal court to be remitted back to the hearing for disposal in cases where the penalty is not fixed by law (section 49 Criminal Procedure (Scotland) Act 1995). In addition young people aged 16 years and more than 6 months short of their 18th birthday, and who are not subject to a supervision requirement, if convicted or having plead guilty in summary proceedings<sup>5</sup> may, following advice from a children's hearing, be remitted to the hearings for disposal. This latter provision is rarely used.

Second, the role of the children's reporter<sup>6</sup> is central. Employed by the Scottish Children's Reporter Administration (SCRA, a non-governmental national body that staffs and supports the hearings framework) they are based across Scotland and have both decision-making and administrative responsibilities. They are the gatekeepers to the system as the officials who assess initial referrals. Anyone may refer a child to the children's reporter and police are the main source of referrals for both offence and care

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<sup>4</sup> Child refers to children under 16 years; however children who are subject to a supervision requirement are also defined as a child and this includes those under 18 years. In the latter case advice must be sought from a hearing prior to any remit back to a hearing for disposal.

<sup>5</sup> Judge sitting alone without a jury (less serious cases)

<sup>6</sup> There is no specific qualification although legal or social work qualifications are common.

and protection cases (section 53 1995 Act) – 47,178 children were referred in 2008/09 (SCRA 2009a). The reporter has responsibility to investigate the case, seeking reports from school, social work or other relevant agencies as required (section 56(2)(7) 1995 Act). They may decide to take no further action, refer the child to the local authority for voluntary measures of support (infrequent) or decide to arrange a children’s hearing (sections 56(4, (6), 66(1) 1995 Act).

Compulsory public intervention requires the presence of at least one ground of referral (broadly these relate to the care of the child, the child’s behaviour including offending and status conditions such as truancy- section 52(2) 1995 Act lists the grounds) **and** the need for ‘compulsory measures of supervision’ (section 65(1) 1995 Act). There were 42,866 children’s hearings in 2008/09 (SCRA 2009a). Children’s reporters attend hearings but have no locus in decision-making, their responsibility is to keep a record of proceedings although they have a role in supporting fair process.

Despite the underpinning welfare philosophy the children’s hearing system operates within a clear set of legal and procedural requirements set out in the Children (Scotland) Act 1995. There is clear separation of adjudication of the facts of a case or the guilt of a child if an offence is alleged from the decision regarding the best interests of the child. This has been described as the ‘genius’ of the hearings system (Lord President Hope, Sloan v B). In other words, if a children’s hearing is arranged, at the beginning of the process the chair of the lay tribunal (this role is taken on by one of the three panel members) outlines the grounds of referral. If the child or relevant person<sup>7</sup> (parent/carer)

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<sup>7</sup> The Act refers to relevant persons and includes all those with parental responsibilities and rights (not necessarily all parents) and those with de facto care and control of the child but not through employment (section 93(2)(b) Children (Scotland) Act 1995). I will refer to parent/carers/family for ease of discussion

dispute the facts, or if the child is unable to understand the grounds, then the case may be discharged but in most instances will be suspended and referred on the instructions of the lay tribunal to the sheriff court. A formal proof hearing is then conducted before a sheriff (as judges at this level are called in Scotland) in chambers. If the facts are proved the case is referred back to the lay tribunal<sup>8</sup>, i.e. another hearing is arranged. This is attended by the child and family and other relevant professionals. Following discussion the three panel members decide if compulsory measures of supervision are required. Appeal is possible against the decision, on procedural grounds, but not the merits of the case (section 51 1995 Act).

Public intervention comprises a supervision requirement being placed on the child and this may have conditions attached. The hearing can impose any conditions on the child provided they are in his/her interests. These include regulating the child's contact with others and medical examination or treatment (section 70 1995 Act). Local authorities are responsible for implementing supervision requirements (section 71 1995 Act)<sup>9</sup>. In the majority of cases children remain in the community living with parents or sometimes other relatives or friends and are supervised by a social worker. In other cases out-of-home care in foster or residential settings is a condition attached to the supervision requirement. Although the supervision requirement is placed on the child parents are effectively required to co-operate. Review of supervision is annual unless the tribunal sets an earlier date – almost 63% of children's hearings in 2008/09 were review hearings (SCRA 2009a). The child and parents also have rights to seek early

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<sup>8</sup> If the facts are not proved then the case will be discharged.

<sup>9</sup> Local authorities can request the assistance of other agencies in relation to their wide range of functions under Part II of the 1995 Act and this includes health agencies.

review (a minimum of three months post-hearings decision) (section 73 1995 Act)<sup>10</sup>. This is one of the checks and balances in the system – review rights can be seen to provide a brake on professional power. Social workers play a central role as provider of social background reports (they also attend the child’s hearing), and directly working with children subject to supervision and their families.

The underpinning aim of the children’s hearings is to create a straightforward, non-adversarial system that supports child and family participation alongside panel members in discussing difficulties and potential outcomes. Kilbrandon (1964) saw this arising ‘in an atmosphere of full, free and unhurried discussion’ (p.50, para 109). The majority of parents (and adults with care and control of the child) and all children have both explicit rights and obligations to attend the hearing (section 45 1995 Act). Participation by all parties therefore sits at the heart of the children’s hearings. The informality and transparency of the process is intended to promote communication and panel members do take considerable time and effort to involve children and families.

I intend now to explore the experience of participation in the tribunal for children and their families drawing on evidence from research and to consider the place of lawyers. First, I would like to briefly set a broader context to the discussion. Many children in public child welfare systems in the UK have backgrounds of social and economic disadvantage (Bebbington and Miles 1989, Gibbons et al 1995). A similar pattern of disadvantage can be observed for children involved in the hearings system: Waterhouse *et al* 2000 found substantial levels of dependency on state benefits (especially for lone

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<sup>10</sup> Local authorities are required to seek review where there is a need to vary or terminate the supervision requirement, where there is a failure to comply with a condition of the requirement or where permanency is being sought for the child (i.e. placing the child for adoption or where there is an application for a permanency order, or variation, amendment or revocation of such an order (section 73 1995 Act).



parent families), households located primarily in public housing and almost two-fifths of children residing in areas characterized as disadvantaged. Lone parenting continues to be a feature for almost half of children referred (Waterhouse *et al* 2000 46% of children; SCRA in 2009a 47.9% of children). Evidence demonstrates that children of separated families have a higher probability of being in poverty and poor housing (Rodgers and Pryor 1998). This pattern of disadvantage represents one of the underlying similarities in the lives of the children, whether referred on offence or non-offence grounds (Waterhouse *et al* 2004).

Poverty and social deprivation can be seen to create additional jeopardy for children referred alongside problematic behaviour and/or inadequate parental care (McGhee and Waterhouse 2007). In this way many children in the hearings and their parents are amongst the most vulnerable citizens in Scottish society.

Second, the orientation of the children's hearings system has fundamentally changed, from one primarily dealing with offending by children and young people to a system focused on children where care and protection concerns are prominent. There are increasing numbers of very young children being referred (5,651 children under 2 years were referred in 2008/09 (SCRA 2009a). Less than ten years after the inception of the hearings in 1971, Martin *et al* (1981) found 73% of first grounds of referral were for child offending and 5% for child neglect or an offence committed against a child. Forty years later, alongside a substantial increase in referrals (reducing in the last two years) a significant reversal in the balance of referrals has arisen: in 2008/09, 69% of referrals were on care and protection grounds and 31% on offence grounds (SCRA 2009a). This brings great challenges in balancing conflicting interests and rights of parent and

children when it is parental actions rather than child behaviour that have precipitated a hearing.

### Children's participation

Child welfare systems in the UK aim to directly involve children in decisions about their lives and this is embedded in Scottish legislation (section 16 and 17 1995 Act), reflecting the influence of the United Nations Convention on the Rights of the Child (UK ratified in 1991). The child lies at the centre of the hearings system. Children have rights to express their views and specific regard must be taken of these for sufficiently mature children. Capacity to form a view is presumed for children aged 12 years and older (section 16(2) 1995 Act, Rule 15, Children's Hearings (Scotland) Rules 1996). Children do not have legal rights of access to social background reports, although those aged 12 years and over will be provided with copies (detrimental aspects may be excised) and those less than 12 years may request copies. In principle children have both access to information and legal provisions to allow effective participation at the hearing.

Research over the years paints a mixed picture of participation suggesting that for many children and young people bringing their own perspective to the hearing is not straightforward. Anxiety levels can be high at hearings (Howells 1996) and are associated with fear of outcomes. This tends to be time and experience-dependent (SCRA 2009b). There is evidence of children feeling disempowered by the hearings process and some consider their contribution may not influence the decision (Waterhouse *et al* 2000, McGhee 2004, Creegan and Henderson 2006). The formal

processes at the beginning and end of hearings (outlining grounds of referral and appeal rights) are concluded in legal language that is often less accessible to children and young people.

Other features affecting participation include: reticence due to parental presence - 'I was wanting to say something; I couldn't because my ma (mother) was sitting there. I couldn't say stuff in front of her' (young person, McGhee 2004); family loyalty; the need to discuss personal and often-sensitive issues with panel members; and the social distance between children and panel members (Triseliotis *et al* 1995, Hallett *et al* 1998, Griffiths and Kandel 2000, McGhee 2004, Creegan and Henderson 2006). More recently a survey of 232 children and young people attending hearings found almost three-quarters (74%) felt confident that they could express their views and that these would be taken into account by the hearings. The downside is that fewer children said they had 'things to say' to the panel (28% children (under 12 years); 38% young people (12+ years) SCRA 2009b). However court-based systems do not do well. Timms and Thoburn (2006) surveying 735 children in public care in the UK found that almost one quarter (24%, n=721) had attended a court making decisions about them (some were youth court) but this was not generally seen as opportunity for involvement in decision-making. Over half (57%) did not have the opportunity to speak directly to the judge.

Panel members make every effort to support participation by children and small contributions can be crucial. Hallett and her colleagues (1998), observing 60 hearings, found that young people's contribution could be monosyllabic or one line. However they recognised these may be crucial to the outcome and give the example of a panel

member asking a child what they thought should happen – “I’d like a supervision order’ was the response (young person, p.21).

There are provisions to support participation. A child may send their own views directly to the hearing – SCRA provides straightforward ‘Having Your Say’ forms. These are helpful to a greater or lesser extent but are limited in their use (only 36% of 232 children and young people surveyed, SCRA 2009). In addition these become part of hearings papers so relevant persons (parents and carers) will receive a copy, which may act as a barrier for some children.

The hearing has the power clear the room (section 46 1996 Act) to obtain child’s views or if the presence of a relevant person is causing distress to the child. This recognises the difficulties children may face in expressing views where abuse and neglect by parents or carers is the reason for the hearing.

This may provide better access to important information, not necessarily contained within reports potentially leading to improved decision-making. However the provision does not offer confidentiality to a child, as the substance of the discussion must be disclosed to the parent/carer on their return. This stands in somewhat sharp contrast to the situation in private law family proceedings where the judiciary may place the recorded view of the child (verbal or otherwise) in a sealed envelope that is only accessible to the sheriff (Sheriff Court Rules OCR r.33:20(2)<sup>11</sup>).

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<sup>11</sup> Sheriff Court (Scotland) Act 1907, Ordinary Cause Rules 1993, Schedule 1, Part 33, para.33.20(2).

Children and the majority of parents (and others with care and control of a child) have rights to bring a representative (Rule 11, Children's Hearings (Scotland) Rules 1996). The function is to 'assist...in discussion of the case of the child'. This is a facilitative role rather than an adversarial role. Lawyers have never been routinely involved in the children's hearings. This is for a combination of reasons: first, the hearings have never been seen as an adversarial forum, they are not a sitting as a criminal tribunal (*S v Miller* 2001 S.L.T. 531) and lawyers are thought to bring unnecessary legalism into what is a community based decision making forum. The adversarial approach is seen as inconsistent with the ethos of the hearings. Second, legal aid (state funded legal assistance) has not, until recently for very specific circumstances, been available to fund representation at the hearing (although available for advice/assistance prior to a hearing, and for court hearings if grounds are contested and appeals). A child's interests in the proceedings may be protected by the appointment of a safeguarder<sup>12</sup> who provides independent advice or guidance to the hearing and will produce a report (section 41, 1995 Act). Appointments are made in around one in ten cases (*Hill et al* 2002).

Representation or advocacy is most often fulfilled through personal or professional relationships – parents, relatives, friends or occasionally in the case of children in public care, a children's rights officer (often employed by the local authority). Social workers are frequently identified as key advocates/supporters although the nature of the relationship and associated levels of trust and confidence are central (*Creegan et al* 2006, SCRA 2009b). Similar findings are in place for children in public care involved in court proceedings in the UK (*Timms and Thoburn* 2006).

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<sup>12</sup> Local authorities hold approved lists of safeguarders who are primarily legally or social work qualified. The role is similar to a guardian *ad litem* in that the focus is on the protection of the child's interests.

Legal representation for some children has been extended following the case *S v Miller* SLT 2001 531. This human rights challenge reflects growing scrutiny of the hearings following the incorporation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law with the Human Rights Act 1998. The Convention provides protection for civil and political rights including the ‘right to respect for private and family life’ (Article 8) and the ‘right to a fair hearing before an independent and impartial tribunal’ (Article 6). The *Miller* case can be seen to reflect concerns to ensure children’s welfare and their rights are respected within the hearings system.

A fundamental question is whether autonomy, rights and welfare can be balanced within the children’s hearings. *S v Miller* concluded that the procedural framework of the hearings, as whole, was consonant with the ECHR apart from the lack of availability of legal representation in some circumstances. This was judged non-compliant (see also *S v Miller* (No.2)). Interim measures were put in place to allow the lay tribunal to appoint a legal representative, from a specific list<sup>13</sup>, where secure care is being considered (this amounts to a deprivation of liberty but is allowable under the ECHR for educational supervision) or where the case is very complex (*Children’s Hearings (Legal Representation)*(Scotland) Rules 2002, SSI 2002 No. 63) to ensure effective participation by the child.

This does not provide a right to legal representation for children and the decision lies in the hands of a business meeting held in advance of the hearing or the hearing itself.

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<sup>13</sup> Legally qualified safeguarders or curators *ad litem* who are paid by the local authority at a restricted rate.

There is no provision for children to request representation. This has more consistently introduced lawyers, to a limited extent, into hearings but the experience of young people has been mixed: interviews with 23 children in secure facilities found that some experienced representation helpful, others considered their views were not transmitted effectively and some preferred to express their own views. Young people who had limited contact with their legal representative prior to the hearing were most dissatisfied (Ormston and Marryat 2009).

Legal representation is not the complete answer to effective participation. Many children and young people attending hearings prefer to speak for themselves despite the challenges this may present (Triseliotis *et al* 1995, Griffiths and Kandel 2004, Ormston and Marryat 2009, SCRA 2009b). Direct participation remains important to many children and young people. What is also clear is that emotional support and personal/professional relationships based on trust and confidence are central in supporting children to discuss their lives and present their views directly to the hearing.

Legal representatives need to be able to understand the nature of the hearings system and consider their role. They need to be able to communicate with children, to assist them in making sense of reports and to support them in participating in the hearing to ensure their views are taken account of in the deliberations of the hearing. These elements are central to promoting the child's welfare alongside upholding rights. Otherwise, there is a risk lawyers may simply become another adult in a roomful of adults; or their presence may serve to 'impose another professional discourse with its own power and knowledge that young people will find still another distortion' (Griffiths and Kandel 2004, p.255).

## Parents

Research on parental views is more limited and is primarily based on small-scale qualitative studies. There are two exceptions: first, research in the 1980s interviewing 100 parents, of children referred on the offence ground, demonstrated that participation in itself was valued by parents, even if this did not affect the outcome (58% were satisfied with their participation, Petch 1988); and second, a survey in 2009 of 398 adults attending hearings (48% were parents) found overall a generally positive view of participation (SCRA 2009b). Qualitative research has identified that parents generally view panel members collectively and in most cases individually as sympathetic, fair and genuine (Waterhouse *et al* 2000, Hallet *et al* 1998, SCRA 2009b). However, although the hearing strives to promote full discussion and participation there are sources of tension. The formal arrangements of three panel members (usually sitting in opposite sides of a table) reinforce the formality of the situation. This sits alongside the anxiety engendered by uncertain outcomes for their children especially fears about separation. These experiences are partly time and experience-dependent and tend to reduce as parents become more familiar with the process and develop greater awareness of their own and their children's rights (Hallet *et al*, Waterhouse *et al* 2000, SCRA 2009b).

Parental concerns about privacy and confidentiality are present: parents prefer few people to be present in the hearing room as often-sensitive matters are being discussed. This militates against their bringing a friend as a representative. In addition they are uncomfortable with discussions of their own past and present life experiences and



difficulties in front of their children (SCRA 2009b). This is reinforced since some children have direct access to social background reports prepared by social workers.

The relationship between social work and the independent tribunal may not always appear straightforward to some parents; and outcomes that promote the child's welfare may not always reflect parental desires. There are stereotypes about social workers although these often break down over time and may serve to diminish anxiety 'I was reluctant at the beginning because I was always led to believe that social workers basically take your children away...' (a parent, Waterhouse *et al* p.101). For many parents social workers remain key sources of information about the hearings and in the context of productive relations their contribution is perceived as helpful (Hallet *et al* 1998, Waterhouse *et al* 2000).

Kilbrandon (1964) recognised that consensus and active participation would not always be achieved especially where care and protection concerns are to the fore. Although improved outcomes for abused and neglected children have been found when parents are involved in non-adversarial settings (Department of Health 1995), the increased numbers of care and protection referrals brings the tension between parents rights and wishes and children's rights and interests to the fore. This brings complexity and challenges to the process of the lay tribunal's independent decision making in care and protection cases. This especially may be the case where parents have additional vulnerabilities, for example due to intellectual disability.

On one hand the hearings system and the role of panel members as independent decision makers provide a potential balance to the exercise of professional power (McGhee and

Waterhouse 1998). However, on the other some parents and some reporters consider that hearings may be highly influenced by the social work perspective (Waterhouse *et al* 2000, Hunter and McGhee, ongoing research). Professionals and panel members see care and protection cases as relatively straightforward and Hallet *et al* (1998) identified an 84% agreement between social work recommendations in reports and hearings decisions. This is not to suggest that hearings decisions are not sound and well informed. However, there is evidence, certainly from research on parents with intellectual disabilities, that they are disadvantaged in public child welfare and adversarial court proceedings (Booth *et al* 2005). Social work holds a great deal of power in this process and, especially for more vulnerable parents, I am beginning to consider that the analytical and representational skills of lawyers may be helpful for the lay tribunal in their decision making. They may assist in bringing other relevant information to the attention of the panel, in supporting parents in challenging any potential inaccuracies and or disagreements in what are often very lengthy and complex social background reports and in presenting parental perspectives more cogently.

A recent human rights challenge brought by a parent with an intellectual disability, SK v Paterson [2009] CSIH 76 XA25/09; sub nom K v Authority Reporter 2009 S.L.T. 1019, led to the extension of state funded legal representation at a hearing to support effective participation for parents who require additional support beyond that available under current representation rights (The Children's Hearings (Legal Representation)(Scotland) Amendment Rules 2009, SSI 2009, No.211). This is in specific circumstances, primarily where parent-child separation and/or where contact may be regulated as part of a supervision requirement. The process is similar to child

representation in that the parent will be appointed a state-funded legal representative. There has been no evaluation of this development as yet.

## Summary

Balancing autonomy and welfare for children and proportionate public intervention in the lives of children and families are issues faced by all child welfare adjudicative systems. The Scottish approach emphasises engagement between the community and its children and parents and this lies at the heart of the hearings system. The lay tribunal provides a place for all parties to participate and to meet together as citizens to explore a child's needs, however complex and difficult this may be for all concerned. The primary focus is on the welfare of the child as the basis for decision-making and there is a clear set of procedural safeguards. Children and their families point to strengths as well as challenges in their participation.

Two issues emerge. First, despite the best efforts of SCRA, individual children's reporters and social workers, parents and children, especially on encountering the hearings system for the first time, may not be fully aware of their legal rights especially in complex cases. This may have long-term consequences: for example, children who accept the offence ground and who may have had a reasonable defence will find this information is retained on police records for enhanced disclosure (required for certain types of employment) until they are aged 40 or 20 years has passed (Rehabilitation of Offenders Act 1974). Second, in a system that is now primarily engaged with care and protection cases, where life-changing decisions are being made in an effort to safeguard

the welfare of children whose parents are often themselves vulnerable, the question of effective participation remains open.

Maintaining a welfare based-perspective and at the same time creating further formal due process safeguards for children's and parents rights and interests when they are often in opposition brings inherent tensions. It is likely that lawyers could bring an additional perspective to decision making with more robust examination of, for example, social background reports. This may well provide panel members with additional information. However, there remains a concern that the informality and participative elements of the hearings could be adversely affected. Observations of family courts in England point to lengthy delays in care proceedings and a lack of appropriately trained child lawyers (Masson 2010). The hearings system provides an immediate decision that can be appealed and is subject to regular review.

The Children's Hearings Bill currently under discussion in the Scottish Parliament will potentially provide for state funded legal representation at hearings in a range of specific circumstances (not yet fully defined) that will permit parents and children to select their own lawyer. Lawyers may well demonstrate an ability to work effectively within the ethos of the hearings but this requires commitment and a willingness fully to take on the facilitative role. As Lord Rodger observes 'skilled lawyers are chameleons who readily adapt their approach and techniques to the particular tribunal in which they appear' *S v Miller* 2001 SLT 531 at 543.

Conclusion

Almost 40 years after inception in 1971 the Scottish Children's Hearings System retains a community based, welfare-oriented approach to decisions regarding the need for compulsory public intervention in children's lives. Active and effective participation by the child and family is central to any meaningful partnership between parents, community and professionals. A greater involvement of lawyers creates a potential to change the nature of this community involvement in decision-making for Scotland's children. However, there remain gaps in parents and children's knowledge about their rights and a recognition that some parents may benefit from legal representation. This suggests that there is a place for lawyers. However, the response of the legal profession to the ethos of the hearings and the needs of vulnerable children and their families will be crucial. A straightforward importation of adversarial approaches may simply serve to undermine a system that taken as a whole works well for many of Scotland's children.

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