

**LONDON SCHOOL OF ECONOMICS AND POLITICAL
SCIENCE**

‘PUNISH AND BE DAMNED’

*Judicial Discretion in Juvenile Courts:
The Welfare and Punishment Dichotomy
in England / Wales and Scotland*

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**A thesis submitted to the Department of Social Policy of the
London School of Economics for the Degree of Doctor of
Philosophy**

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DECLARATION

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ABSTRACT

Judicial discretion is at the heart of a humane criminal justice system, but the latitude exercisable in the UK juvenile courts allowed constructive treatment at one end of the spectrum and penal custody the other. Official acknowledgement of the different culpability of adult and juvenile offenders really began in the middle of the 19th century, and Parliament finally made provision early in the 20th century for this 'welfare principle', that reform and welfare rather than punishment were to guide judicial discretion in the decisions and conduct of juvenile criminal courts.

This thesis offers an explanation for the varying emphasis given to this principle in England/Wales and Scotland, concentrating on the last 40 years of the 20th century. The lack of implementation of earlier reforms was confronted in two major reports, chaired by Kilbrandon in Scotland and Longford in England and Wales. Although they came to similar conclusions about the causes and the remedies for juvenile delinquency, and their subsequent legislation shared the same general philosophy, the implementation took diametrically different routes in the two jurisdictions.

It is argued that deep-seated cultural and historical differences played a significant role both in legislative reforms and their application, coupled in Scotland with a conjunction of agency and political pragmatism that produced radical reforms. Significant factors implicated in the failure of the English reforms were political ambivalence towards the legislation; judicial/magisterial resistance or lack of training, particularly on child development; the absence of accountability in the magistracy; and the influence exercised by the Magistrates' Association.

The research draws on archival papers and research literature, supplemented by interviews with key people. It has sought to find the origin of some influential ideas and explain their acceptance or rejection by the lay justices, through their exercise of judicial discretion. As there were further Acts related to juvenile defendants in both jurisdictions in the 1990s, the research was concluded with a consideration of their implementation.

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GLOSSARY

England and Wales

Legislation was applicable to both these countries during this period as one jurisdiction. For ease of reference, they will be referred to collectively as England/Wales.

Children, juveniles and young persons

Under the United Nations Convention on the Rights of the Child, ratified by the UK in 1991, a child is defined as one aged under 18 years.

The age of criminal responsibility from 1933 was 8 years in both jurisdictions, and raised in England/Wales in 1961 to 10 years.

From the 1933 Act in England/Wales in juvenile courts, those aged under 14 were referred to as children, those aged 14-17 and later 18 (1991) as young persons. To avoid confusion, all aged under the maximum age are here referred to as juveniles rather than children.

The relevant age of a juvenile was decided as at first appearance in court, by the Lord Chief Justice (TLR 11 February 1982)

In Scotland until 1971, the maximum age for those appearing in juvenile courts was under 17, and thereafter reduced to 16, in certain circumstances 18, at the 'hearings'.

Justices of the Peace and Magistrates

In England and Wales, the lay, non-paid members of summary courts could be called justices of the peace (JP) or magistrates: it was one and the same title. In this research they will be referred to as magistrates, although some quotations may refer to them as justices.

Stipendiary magistrates were legally qualified and paid members of the summary courts, in the 1970s numbering less than 100 throughout the major cities, the vast majority in London.

In Scotland, justices of the peace were not called magistrates, but like their English and Welsh counterparts were appointed to a Commission of the Peace. They were entitled under certain circumstances to put JP after their names. In this research, the Scots justices of the peace will be referred to as JPs or justices.

Magistrates or bailies were local councillors who were appointed by their colleagues to sit in the Burgh or Police courts. They will be referred to as bailies. None of them was paid.

Chairman

The word 'chairman' was used in the 1968 and 1969 Acts, and was still used by the Magistrates' Association in 2010. It was used here for consistency.

Juries

Scots juries included 15 people, with a simple majority vote sufficient for a conviction, and verdicts included guilty, not guilty and not proven.

English/Welsh had juries of 12, a unanimous decision of guilty or not guilty necessary until 1967, when, in restricted circumstances, a decision of 10 was possible.

Latin Phrases

doli incapax	incapable of evil
parens patriae	parenthood of the state
actus reus	action as a constituent element of a crime
mens rea	intention or knowledge of wrongdoing
sui generis	a unique situation - In this instance, legal cases held under civil proceedings yet requiring the test 'beyond reasonable doubt' to establish a finding of guilt

Scots Terminology

Accused	defendant
Admonition	a 'telling off'
Procurator Fiscal	prosecutor – commonly referred to as 'fiscal'
Solemn Proceedings	Higher courts for grave crimes (murder, manslaughter, gbh with intent)

ACRONYMS/ ABBREVIATIONS

ACOP	Association of Chief Officers of Probation
ACPS	Advisory Council on the Penal System
ACTO	Home Office Advisory Council on the Treatment of Offenders
ADSS	Association of Directors of Social Services
AJJ	Association of Juvenile Justice
BASW	British Association of Social Workers
BOV	Board of Visitors
CAYP	Children and Young Persons
CFYO	White Paper 'Child, the Family and the Young Offender'
CHE	Community Home with Education
CPAC	Children's Panel Advisory Committee
CRPC	Children's Regional Planning Committee
DC	Detention Centre
ECHR	European Convention on Human Rights
EWO	Education Welfare Officer
GBH	Grievous Bodily Harm
HC	House of Commons
HC SC	House of Commons Standing Committee
HL	House of Lords
HOC	Home Office Circular
HORU	Home Office Research Unit
ILJC	Inner London Juvenile Court
ILJP	Inner London Juvenile Panel
ISMS	Intensive Support and Monitoring Service
IT	Intermediate Treatment
JCC	Juvenile Courts Committee, Magistrates' Association Council
JP	Justice of the Peace
LAC	Local Authority Circular
LCJ	Lord Chief Justice
MA	Magistrates' Association
MAC	Magistrates' Association Council
MCC	Magistrates' Courts Committee

MNTI	Magistrates' National Training Initiative
MRC	Movement Restriction Condition
NACRO	National Association for the Care and Resettlement of

Offenders

NAPO	National Association of Probation Officers
NCCL	National Council of Civil Liberties
NCVCCO	National Council of Voluntary Child Care Organisations
NITF	National Intermediate Treatment Federation
PSSC	Personal Social Services Council
PPS	Parliamentary Private Secretary
RCPS	Royal Commission on the Penal System
RSSPCC	Royal Scottish Society for the Prevention of Cruelty to

Children

SACCC	Scottish Advisory Council on Child Care
SACTO	Scottish Advisory Council on the Treatment of Offenders
SASD	Scottish Association for the Study of Delinquency
SCRA	Scottish Children's Reporter Administration
SED	Scottish Education Department
SHHD	Scottish Home and Health Department
SOHHD	Scottish Office Home and Health Department
SWSG	Social Work Services Group
TWOC	Taking (a motor vehicle) Without the Owner's Consent
UNCRC	United Nations Convention on the Rights of the Child
YCC	Youth Courts Committee, Magistrates' Association Council
YJB	Youth Justice Board
YOI	Young Offender Institution
YOT	Youth Offending Team

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CHAPTER 1

INTRODUCTION AND METHODOLOGY

1.1 Introduction

This thesis is a study, in the two jurisdictions of England/Wales and Scotland, of the application of the principle that children committing offences should be treated as ‘children in need’, as envisaged in the 1960s legislation reinforcing the welfare principle enshrined in the 1930s Acts. The Ingleby Report 1960 drew attention to the institutional contradictions of the juvenile court, highlighting its seemingly irreconcilable tasks of being a criminal court, with the focus on the offence, and having regard to the welfare of the juvenile, with the focus on the defendant.

The findings may have implications for future juvenile justice legislation, particularly in relation to the control of judicial discretion and the training and accountability of juvenile panel members. Indeed, it could be argued that the welfare of young offenders will only be paramount, as envisaged by the UN Convention on the Rights of the Child 1991, when the power to punish is removed entirely from the range of disposals available to bodies dealing with such defendants.

There is a wealth of literature on each jurisdiction and some comparing the two on specific aspects. None concentrates on the role of the judiciary throughout the period, particularly the English/Welsh magistracy from the perspective of the minutes of Magistrates' Association (MA) and articles and letters in the ‘Magistrate’. It is important to remember that magistrates did not act alone. Decisions were taken by two, more usually by three magistrates, with a majority decision acceptable, and the chairman, sitting in the middle, having no greater rights than the ‘wingers’. Most magistrates sat very infrequently in the juvenile courts, rarely twice a month, with adult court sittings in between. All juvenile courts until 1991 dealt with care and protection cases of children, often of a highly sensitive nature such as sexual abuse and incest, usually interspersed amongst their criminal cases in the day’s list. This research is only concerned with those children whose presenting factor was their alleged offending.

This research both provides a detailed history of juvenile justice and aims to shed light on why Scotland and England/Wales, under the same national

government, took such seemingly divergent paths in juvenile justice from the late 1960s onwards.

1.2 Methodology

The Research Strategy

Research must be approached with an open mind, and guided by the theoretical proposition. This author was a practising magistrate and juvenile court panel member for 23 years, from 1976. She was a member of the Magistrates' Association Council for 5 years, finally chairing its Youth Courts Committee in 1998, and was given complete access to the archives of the MA for this research. She served on the Magisterial Committee of the Judicial Studies Board 1995-2000, and was particularly involved with the introduction of appraisal for magistrates, and more training on domestic violence issues. She was also a member of the Council of the Howard League for Penal Reform for 25 years and served on committees of 'Justice' and NACRO, and as such was conscious of and sympathetic to many criticisms made of the lay judiciary in the literature on juvenile and youth courts. As an 'insider' the researcher had the advantage of knowing the culture, the history and, personally, many people in the criminal justice system (Bryman 1988), but has not relied on any personal experiences or anecdotes. She attended a study tour of the Scottish Hearings System in 1986, became a member of the Scottish Association for the Study of Delinquency¹, and later led a study tour of the Scottish criminal justice system for the MA, and also one in Denmark.

Few researchers come to their task free of value judgments (May 1997), but, given constant self-reflection and a desire to maintain the high standards of good scientific research (Becker 1970), it is hoped that any bias shown was open to scrutiny. As an interviewer, the researcher was sensitive to new evidence which might counter expectations, sought corroboration from other sources, and was aware that her own reputation or personal relationship to people or events could influence the responses (Yin 1994).

An historical, comparative case study was chosen as the most suitable research strategy, given that this was not an experiment to test causal relationships, nor a survey of quantitative data. It was essentially a chronological, comparative narrative, and an examination of why and how two jurisdictions under the same

¹ Became Scottish Association for the Study of Offending - SASO

national government, Scotland and England/Wales, came to similar conclusions about dealing with juvenile delinquency and then followed seemingly contradictory paths in practice for the next 40 years. It concentrated on the 1960s juvenile justice reforms, from their conception, almost certainly beyond personal living recollection, to their enactment, which was within the recall of key players, so that the later documentary evidence could be enriched by personal interviews, often including their subjective interpretations (Lofland 1971). The research followed standard historical research practice in drawing on primary and secondary sources, largely documentary.

The Design of the Case Study

There were three distinct periods to this research: pre-1900 to 1963, 1964 to 1970 and 1971 to 2000. Initially the research was restricted to a period covering the major juvenile justice legislation of the 1960s, from the appointment of the Kilbrandon Committee in Scotland in 1960 to the Social Work (Scotland) Act 1968; and in England/Wales from the Longford Committee to the Children and Young Persons Act 1969; and their implementation. This period was then extended to the year 2000 in order to examine further major legislation in both jurisdictions in the 1990s.

After reading the official documents, reviewing the literature and having preliminary discussions with various practitioners in the Scottish system, it became clear that there were fundamental differences between the two jurisdictions in the philosophy and understanding of juvenile offending. To find an explanation for this historical or cultural divergence it was necessary to investigate the social and political responses informing criminal justice legislation before the 20th century, and the early juvenile justice legislation and policy documents until the 1960s. It was also apparent that the institutional attitude and actions of the MA had changed radically over time, and this, too, needed an explanation.

The Units of Analysis

The juvenile court magistrates and the MA in England/Wales and the 'hearing panel' members in Scotland were the main subjects for research, along with the reports of major inquiries into juvenile justice, especially Kilbrandon and Longford, as well as others who tried to influence the legislation. As this research

was concerned with the behaviour of around 10,000 magistrates and about 2000 panel members at any given time, inevitably there were great variations shown in attitudes and responses both to their task and to juvenile offenders. At all times the researcher sought to be fair and objective in reporting the comments and actions of these decision-makers, whether in quoting the voluminous literature, archives or the interviews. The Parliamentary debates were read in their entirety to discover major ideas and their sources for the differing attitudes to solutions for juvenile offending; and political biographies and autobiographies provided additional perspectives on the thinking of politicians and civil servants.

Data Collection

All data were collected by the author, relying on a wide variety of documentary evidence, both primary and secondary, and on personal interviews. This triangulation aimed to increase the validity of the findings (Robson 1993).

The primary documentary sources were the Parliamentary debates in Hansard and government papers from throughout the 20th century, from the 1908 Children Act, the 1933 Children and Young Persons Act, the 1948 Criminal Justice Act, the Social Work (Scotland) Act 1968 and the Children and Young Persons Act 1969 to the relevant Acts in the 1990s. The major inquiries relevant to juvenile offenders were also studied, from Molony and Morton in the 1920s, the Cadogan Report of 1938, and the Ingleby Report of 1960. The Kilbrandon and Longford Reports of the 1960s were examined in great detail, as were parts of later Acts which impinged upon the welfare principle.

The archives of the MA, the MA Council and sub-committee minutes, annual reports and the 'Magistrate', the official organ of the MA, were all extremely important sources of information and very lengthy, over 30,000 pages. The minutes were usually only a record of final decisions and seldom indicated the atmosphere or the level of support or dissent for any proposal, which was only revealed by a rare vote. Where there was a choice between the minutes and articles, editorials or letters in the 'Magistrate', the latter were quoted in preference, as this journal was sent to all magistrates who belonged, about 80% of active magistrates from the 1960s, and was thus the main forum for their views. Other primary sources included the Public Records Office, (PRO) the London Metropolitan Archives (LMA), letters from magistrates in 'The Times', political memoirs, and standard reference volumes: the

National Dictionary of Biography, 'Who's Who', and annual volumes of Whitaker's Almanack. All are included under References.

These sources were augmented by some 25 semi-structured interviews with key players at the time of the 1960s reforms, including magistrates, clerks, and politicians and civil servants who had varying perspectives on the MA's response to the 1969 legislation; and politicians, 'panel' members and 'reporters' involved in the early years of the Children's Hearings in Scotland. The researcher has attended a number of conferences in both jurisdictions as an observer, in particular the annual conferences of the Scottish Association for the Study of Offending and the AGMs of the MA.

Interviewees were chosen in several different ways. For the research in England/Wales, a list was compiled of all magistrates who were members of the MA Council and the Juvenile Courts Committee (JCC) in 1970. The Chief Executive of the MA agreed to check their availability and asked each person to contact the researcher via the MA. Three magistrates came forward and were subsequently interviewed. Additionally, two magistrates were interviewed who had served on the JCC and as chairman of the MA, and a further two who had chaired the JCC, all either during implementation in the 1970s or in the 1980s and 1990s. They were the only surviving members fulfilling the criteria. Another JCC member who was on the Inner London Juvenile Panel (ILJP) was interviewed, as was the chairman of the ILJP, as their appointment and court arrangements were historically very different from the normal juvenile courts in the rest of the country. One other Council member from the 1970s invited two senior bench colleagues to join the interview for a group discussion, with topics suggested by the researcher. The only surviving editor of the 'Magistrate' of the period covered was also interviewed.

The Council and sub-committees of the MA have always invited observers / advisers, their status varied over time, from the relevant government departments to their meetings. The researcher identified and interviewed four of these who had been present at the time of the 1960s reforms, and who eventually held senior positions in Ministries. The researcher also found the last surviving members of both the Longford Committee and the Kilbrandon Committee and interviewed them at length. Three Conservative MPs who were active in the debates in England were invited to be interviewed; all declined, two explaining, despite a 'prompting' letter, that they could not remember anything about the issue. The one surviving Conservative

involved with the Scottish reforms declined for the same reason. No Labour members have been located except for two in Scotland, who were interviewed. A justices' clerk with experience of the implementation of the 1969 Act was interviewed, and two other clerks gave *ad hoc* interviews on specific questions relating to the training for magistrates.

In Scotland, interviews included two of the original 'reporters' to the Hearings and two Children's Panel members, one of whom was also chairman of the appointments advisory committee. *Ad hoc* interviews were conducted with panel members, civil servants and academics attending conferences, several of whom provided documents, information and further contacts.

All who agreed to be interviewed at length were sent a prior explanatory letter about the nature of the research and their particular area for discussion, and informed that the interviews would be tape-recorded and transcribed by the researcher. Almost all the interviews were held in the home of the person being interviewed, which involved visits to London, Hampshire, Kent, Lancashire, Norfolk, Suffolk, Sussex, Wiltshire and in Scotland, Dumfries, Edinburgh, and Glasgow. A few people providing specific points only were interviewed over the telephone. Each person was later invited to check the typed interview and make any alterations or delete or add any comments they wished. Few comments were deleted, and none that impinged on the research questions².

Each in-depth, semi-structured interview was conducted in the manner of a co-operative venture, with a sharing of information and ideas (Humm 1995), and lasted between one and two hours. The researcher used her knowledge of the documentary evidence and her personal knowledge and understanding of magisterial history and culture to stimulate or even remind participants of historic events, and was conscious of the interviewer-respondent dynamic (Kahn & Cannell 1957). She was also aware of the difficulties and dilemmas of accurate recall after such a long period of time, and of the danger of influencing the responses, particularly as many of the participants were in their eighties or nineties. In three cases it was clear that there were serious problems with short-term memory, but by using triangulation, asking the same questions from different angles, it was possible to ascertain credible answers from two of the participants.

² Appendix 1.1 Interviewees and Questions

All interviews were analysed according to subject matter, and each quotation is referenced in the text. Much of their evidence enriches the narrative, but in some cases also provided vital clues and insights that this researcher had not found in the literature, which is the source of much of the narrative and comparison.

For secondary sources, there is an enormous literature on juvenile justice in general, and particularly on the English/Welsh system from the implementation of the 1969 Act. There is remarkably little on the early period of the Scots reforms, significantly more in the 1990s. The researcher selected the literature originally from that suggested in the youth justice module of the Masters in criminal justice, London University, and thereafter followed up the relevant bibliography provided in each book, in 'snowball' fashion, eventually totalling some 300 articles and books.

This research has looked at the two differing systems from the perspective of the decision-makers in the juvenile courts and the hearings panels, first to find out how Scotland could move to an entirely welfare-based system and England and Wales could not, and second how that situation was compounded and confused by subsequent events. The evidence has enabled a cohesive and plausible narrative to emerge explaining the divergence in the two jurisdictions, and to offer some possible solutions to the welfare and punishment dichotomy in the future.

1.3 Plan of Thesis

Chapter Two considers theories of juvenile justice: the tension between the protection of the public, a justice-based model, and the welfare of the delinquent child, an individualized treatment-based model. It gives examples of other Western democracies. It describes the complexity of the exercise of judicial discretion, and the accountability of those charged with such power. It considers the theory of the political process and pressure groups wishing to change public policy; and the people and organisations connected with the judiciary leading to the juvenile justice reforms.

Chapter Three examines the historical situation of political and judicial decision making in relation to juvenile offending, and the theory, principles and practice in the two jurisdictions to seek an explanation for the subsequent divergence. It describes the actual practice of the law within the courtroom until the early 1960s, the attitudes to parents, and the role of the MA throughout the period.

The next four chapters deal with the juvenile justice reforms of the 1960s. Chapter Four is concerned with the two committees charged with investigating the situation of juvenile justice, Kilbrandon in Scotland and Longford in England/Wales, both reporting in 1964. It reveals the importance of agency, along with the official responses and subsequent Bills for reforming legislation. Chapter Five follows in detail the passage of both Bills through Parliament, and their relationship to each other, with particular reference to the role the judiciary in the summary courts played in attempting to influence the course of events. Chapter Six describes the implementation of the Social Work (Scotland) Act 1968, the system, the decision-makers and any subsequent legislation and regulations, and how it was viewed by those subject to its measures. Chapter Seven follows the fate of the Children and Young Persons Act 1969, and explains what extraneous factors may have helped thwart the intentions of the legislators, and the effect of subsequent legislation by both Conservative and Labour governments on the original Act.

Chapter Eight gathers all the evidence and explains the conclusion and policy implications, and suggests further useful avenues for research.

OoOoo

CHAPTER 2

THE CONTEXTUAL FRAMEWORK AND DECISION-MAKING

This chapter describes the broad socio-political and legal context of the two jurisdictions, Scotland and England/Wales; the status of childhood and the complex issues around the age of criminal responsibility; and the problems of criminal statistics. It considers decision-making and juvenile justice; the theories associated with the ‘welfare punishment’ dichotomy; the exercise of judicial discretion and the accountability of the judiciary. It looks at the political processes and pressure groups, in particular the MA and at the judiciary in the juvenile courts: the lay, non-legally qualified, unpaid justices of the peace (JPs) or magistrates in England/Wales and in Scotland, the bailies or magistrates, and justices of the peace. It explains their role in court, their appointment and training, their accountability, their interest groups and organisations, and the mechanisms available to them to try and influence juvenile justice legislation.

2.1 The Socio-Political and Legal Context

2.1.1 Scotland and England/Wales

Under the 1707 Act of Union Scotland kept control of the church, education and legal systems, although its civil proceedings remained subject to the House of Lords acting as a Supreme Court. The ‘tandem principle’ applied whereby at the UK Parliament in Westminster Scottish legislation usually followed the provisions for England and Wales (Murphy 1992, Devine 2000). With only five politicians responsible for Scottish affairs, the Secretary, Minister and three joint Parliamentary Under-Secretaries of State, great power and knowledge rested with the Departmental heads, the civil servants based in Edinburgh (Cowperthwaite 1988).

The Scots Church, with ministers rather than priests, had promulgated its message through the written word, so that “by the 1660s it was already a ‘normal thing’ for a Lowland parish to have a school under the supervision of the kirk session”, a system then uncommon in Western Europe (Devine 2000:68). In 1872, compulsory schooling was introduced for children aged between 5-13 years, with

assistance from the Poor Law if necessary; and with inducements for the charitable foundations to be integrated, by 1918 these ‘board schools’ incorporated almost all private and church schools. In England/Wales, from the 1870 Education Act “schooling was not at first compulsory and a large voluntary sector survived that had higher status than the public³ schools, which were virtually confined to the poorer classes”. In Scotland, “since the vast majority of pupils attended the board schools, the public system possessed no such stigma” (2000:396) as children of the middle-classes sat alongside their working-class neighbours. By 1963, only 2% of children were in private schools in Scotland, 9% in England/Wales (Whitakers 1964).

Until the discovery of oil in 1971, Scotland was a poor country and the need to “escape poverty was widespread” with “saving habits often to the point of parsimony”. The powerful “in industry, commerce, the professions and local government usually believed in the efficacy of running works, businesses or services on the simplest and cheapest lines” (Murphy 1992:10). This also contributed to high levels of emigration, depriving the country of much of the “educated, leisured, influential middle class” which made up most of the magistracy in England (p.11). Money was not to be wasted, and courts avoided the more expensive corporal and custodial sentences in favour of fines (Skyrme 1991 vol.III:73).

The legal systems of the two jurisdictions were historically different. England/Wales developed its own independent adversarial system based on common law, while Scotland maintained a hybrid one more akin to the Continental inquisitorial system, rather than the Roman law which only really developed in Scotland in 1887⁴. Many Scots advocates studied abroad, particularly Utrecht and Leyden until the middle of the 18th century (Skyrme 1991 vol. III), and learned more of the different disciplines of the criminal justice system, and Dutch cases were even cited in Scottish courts. Dutch prosecutors, seen as part of the judiciary, recommended the sentence, and therefore learnt about criminology and the options available (Downes 1988). With the creation of the Lord Advocate’s office in 1587, Scotland, developed a network of independent prosecutors, procurators fiscal, “grown out of the sheriff’s job, not a man created by Parliament to harry the

³ State funded rather than the ‘public schools’ which were charitable foundations or privately funded

⁴ First Code of Criminal Procedure introduced

criminal...”⁵. Their duty was to decide on prosecution and trial venue, with their added non-partisan, magisterial role of acting in the interests of the accused to “find the truth in an objective and neutral manner” (Ringnalda 2010:125), and could even withdraw a prosecution “up to the stage between conviction and sentence” (Cowperthwaite 1988:70). With a small group of lawyers acting in the criminal field, around 200⁶, they would have known each other and their culture handed down. Legal representation was available, while in England/Wales this was not a right until 1836. In Scotland only, the 1617 Act⁷ confirming and strengthening the role of JP also stated that fines and ‘recompense’ were by Statute “according to the qualitie of the crime and the estate of the offender” (Findlay 2000:32).

At the end of the 1960s England/Wales had a population of about 50 million, Scotland around 5 million. In 1964, the Conservatives lost the General Election, never to regain their supremacy in Scotland. Under the Labour administration of the 1960s, William Ross⁸ “extracted as large a share as possible from the public purse for Scotland... public expenditure rose spectacularly by 900%”, the universities were doubled to eight and 20% more teachers were employed (Devine 2000:579).

As to the state of domestic life in the-mid 1960s, Kilbrandon noted (1964 para 66):

At 12 a girl can leave home, but for the next year until 13 she may not be employed. She must attend school until 15. She may not purchase cigarettes until she is 16. She may marry at 16, but she is still subject to the jurisdiction of the juvenile court until she reaches the age of 17, and may not purchase a bottle of stout until 18, by which time she may be a wife and a mother.

And as the Longford Committee began its deliberations in 1964,

We perceived children as living in families. We went along with the stereotype of father, mother, more likely to be married than not married, representing a structured, easily identifiable household unit ... We saw divorce as a deviant pattern.⁹

Martin et al. (1981:19) claimed Scotland was “an unlikely setting” for a radical reform of juvenile justice as it “seemed to retain many illiberal and even punitive

⁵ John McFadden, Reporter to Children’s Hearings in 1970s, interviewed by Ravenscroft, Dumfries, Scotland, 20.xi.2006

⁶ www.lawscot.org.uk

⁷ APS, 1617, c.8, vol. IV

⁸ Secretary of State, Scotland

⁹ Professor T. Morris, JP, member of Longford Committee and former MA Council member in 1970s, interviewed by Ravenscroft, South Wonston, Hampshire, 4.viii.2006

features in its social life”, outside the social reforms passed in England on divorce and homosexuality. Hart¹⁰ rejected using the education department as having “too many illiberal features” (p.6) for the Kilbrandon reforms.

By the end of the 20th century, major cities in both countries were more ethnically diverse than in the 1960s. 34% of the black and ethnic minority population were children, as opposed to 20% of the white population, and their families 50% bigger and four times more likely to be living in overcrowded conditions, lacking basic amenities. Estimates suggested 5000 young people were sleeping rough, and 3000 children accommodated in domestic violence refuges (Tisdall & Donaghy 1995). At least 30% of marriages ended in separation or divorce, 20% of families were headed by one parent, and some children were coping with multiple relationships with little continuity of care; and alcohol, drug and substance abuse were no longer rare in primary schools (Lockyer & Stone 1998: xii).

In both jurisdictions, compulsory schooling began at five and in 1973 the school leaving age was raised from 15 to 16. This meant that just as the juvenile justice reforms of the late 1960s were being introduced a cohort of reluctant pupils was forced to stay at school for another year: many truanted¹¹. Comprehensive schools were replacing the old bifurcated system of grammar and secondary modern schools. This process was virtually completed in Scotland by 1974, when the number of school leavers gaining certification rose from 27% in 1964 to 66%, whereas only half the schools in England/Wales had changed (Devine 2000), and several counties retained grammar schools permanently, or sold them to the private sector. This division by the ‘11 Plus’ exam where unsuccessful children were perceived as failures contributed to low achievement, which with a poor life-style was closely related to delinquency (Tutt 1974).

2.1.2 Childhood and Parents – Rights and Responsibilities

Most of the first Children Act 1908 dealt with the protection of children from cruelty, exploitation, and parental neglect (Steedman 1990). At the end of the 20th century, legislation and reports were still concerned with child abuse, whether physical, sexual or emotional: estimates suggested that 150,000 children suffered

¹⁰ Judith Hart MP, Minister of State, Scotland

¹¹ John Stacpoole, Under-Secretary, Children’s Department, DHSS, observer to JCC 1973-79, interviewed by Ravenscroft, Kent, 28.iii.2006

severe physical punishment each year and 350-400,000 children lived in environments “low in warmth and high in criticism” (Williams Report 1996). About 20,000 children were in refuges escaping domestic violence, and Britain had the highest child poverty rates in the EU (Cunningham 2006). Over 10,000 children under 16 ran away from home ten times or more; one in seven who had run away, usually to escape an abusive situation, was “providing sex for money as a means of survival” (Stein et al 1994).

For many, life as a child is one of humiliation and shame as parents irrationally vent their spleen. If a child tries to express his feelings of distress, he is often punished even more...any wonder these same youngsters experience uncontrollable rage that surfaces and manifests itself in violent behaviour (Boyle 1994:124)

Psychiatrists dealing with traumatised families and children during and after the Second World War found a close link with later delinquency (Winnicott 1990; Bowlby 1969; Stone¹²). This problem was also identified by a London magistrate, Margery Fry, a founder member of the MA Council; and confirmed by criminological research (Wilkins 1960). Trauma included events such as the great depression of the 1920/30s causing abnormal family circumstances, particularly damaging to children 0-5 years and surfacing as delinquent behaviour in teenagers. “Delinquency is basically caused by deprivation” of affection and love, through death, illness, separation, alcoholism and ignorance, and of “opportunities to play and develop” through poverty, unemployment, and inadequate housing (Tutt 1974:29-32; Jones 1983). “Particularly serious, from all points of view, are the instances of some children subjected to persistent abuse who then abuse others” (Utting 1997 para.1 29/30). A wealth of research provides a link between abuse, trauma, poverty, and domestic violence all leading through exclusion to alienation and delinquency (Spratt et al. 1954; Newson & Newson 1968; West & Farrington 1973; Windlesham 1987; Hagell 2000).

History has shown a tension between the rights and responsibilities of parents, the latter only coming to the fore in the 20th century, after the Children Act 1908 with its concern for the protection of children. In 1887, the Charity Organisation Society had strongly opposed free school meals for the under-fed as,

¹² Professor Fred Stone, Adolescent and Child Psychiatry, Glasgow University, member of Kilbrandon Committee, interviewed by Ravenscroft, Glasgow, 18.v.2007

it is better, in the interests of the community, to allow in such cases... the sins of the parents to be visited on the children than to impair the principle of the solidarity of the family and run the risk of permanently demoralising large numbers of the population by the offer of free meals to their children. (Cohen, E 1949:20)

There was also a tension between the need to provide support and advice and to hold parents accountable for their children's behaviour. This research may establish where the balance lay in the two jurisdictions, and how the courts regarded parents and applied any sanctions, for "whatever can be done to help parents to do the job of parenting well, will at the same time be preventing future criminal behaviour" (Bonnell Report 1980:61).

2.1.3 Juvenile Crime – Statistics and Systems

Children have always posed conceptual and philosophical problems for the criminal law by virtue of their age and status of dependency on adults. (Asquith 1983:4)

In both jurisdictions, the age of criminal responsibility was raised from seven to eight in 1933. In England/Wales it was raised to ten years in 1963. Until 1992, the maximum age for those appearing in juvenile courts was 17, and thereafter 18. In Scotland the maximum age for those appearing in juvenile courts was 17 until 1971, and then reduced to 16 for appearance in the hearings while the age of criminal responsibility remained at eight. In almost every other European country it was much higher¹³. The concept of an 'age of criminal responsibility' indicates both when a child is thought to have the mental and moral capacity to commit a crime, and when society expects prosecution and formal sanctions for such behaviour. Historically, under common law, a child under seven was protected by the doctrine known as *doli incapax*, incapable of evil, unable to know the difference between right and wrong and thus not able to commit a crime.

"The criminal law makes few concessions to the youth of an accused" and the presumption of *doli incapax* could mitigate that (Ashford and Chard 1997:27). In England and Wales only, there was the rebuttable presumption that a child aged 7-14 was *doli incapax*: the prosecution had to establish beyond reasonable doubt that the defendant committed the *actus reus* with the necessary *mens reus* at the time of the offence. It also had to be proved by clear evidence that the child knew it was

¹³ Appendix 2.1

seriously wrong: the facts alone of the offence were not sufficient to rebut the presumption (*R v Kershaw (1902) 18 TLR 357*). The home background, education and previous convictions would be relevant, and the prosecution should bring that evidence (*R v B [1979] 3 All ER 460, DC*). The courts had to be aware of

the trap of applying the presumption of normality – that any child of the appellant’s age in today’s society would know perfectly well that to behave in this way was to behave in a way that was seriously wrong. (*W [A Minor] v DPP [1996] CLR 320*; Fionda 1998; Bandalli 1998)

In 1998¹⁴ the rebuttable presumption was removed by statute. It had been ‘abolished’ by a case¹⁵ in 1994 and reinstated by the House of Lords in 1995¹⁶. Straw (1996:11), a future Home Secretary, claimed “most young people aged 10-13 are plainly capable of differentiating between right and wrong, especially where the issue is one of theft or damage to the property of others”. Yet, the act of theft required five elements to be proved, including the intention to permanently deprive the owner of the goods. The government had rejected the view that “the general law was not meant to apply without qualification to children under 14” (*WLR 1994 vol III:888*); and some felt an important protection for youngsters suffering from behavioural disorders and mental disabilities had been removed (BJFCS 2000: March), or that some courts might not ascertain the comprehension of the children (Howard League 1999:5). The MA had asked that the presumption should remain, with the burden resting with the defence on the civil test of a balance of probabilities (Mag.1997: 258). It is hard to perceive how magistrates could assess the understanding of children if they did not engage with them and their parents, yet there was a wealth of evidence that magistrates throughout the existence of the juvenile/ youth courts had failed to do so (Elkin 1938; Fry 1942; Burney 1979; McCabe 1984; Allen 2001).

Criminal statistics are highly problematical. They can conceal almost as much as they reveal, can be misleading, and can be abused (Giles 1946; Downes 1965; Watson & Austin 1975; Mayhew and Smith 1985, Morris and Giller 1987; Raine 1989). The criminal justice system consists of a collection of separate agencies all dependent upon the actions of the others, and not least upon the general public,

¹⁴ Crime and Disorder Act 1998

¹⁵ *C [a Minor] v DPP [1994] All ER 190*

¹⁶ *C [a Minor] v DPP [1995] 2 Cr App R 166 per Ld. Lowry*

who report over 80% of all recorded crimes (Maguire 1996). The attrition rate is high: of 100 crimes committed, only two end in conviction and sentence (BCS 1994). Historical comparisons are problematic as 'new' crimes are defined; domestic violence, child abuse, white-collar and corporate crime, drug offences and football hooliganism were all virtually unheard of before 1970 (Ditton 1977, Pearson 1987, Dobash 1992). Moral panics are fuelled by the media (Pearson 1983, Cohen S. 1987, Gelsthorpe & Morris 1994, Muncie 1984, Campbell 1993, Taylor 1994, Winter & Connolly 1995) and by politicians (Gibson 1994, Newburn 1996), and the police can change their priorities and targets (Morris T.1989, Ashworth 1994).

Recorded crime seriously underestimates the true level of crime: people do not report if they think no action is likely or that action will further aggravate their situation; companies remove rather than prosecute staff to protect their reputations; the Inland Revenue settles with its debtors, and many motoring offences are victimless (Raine 1989). Many children, like their adult counterparts, will escape notice or detection: in the age range 14-25, half of all males and one third of females admit to having committed an offence (Graham 1995). Others may be apprehended, referred to a welfare agency, or given an informal or formal caution. There is discretion to be exercised at every stage. Different types of offences have different attrition rates, with violent offences more likely to be reported and detected, as are offences by juveniles. Defendants in court are not a random group but have been selected in some way, and since so few offences end up attracting a sentence, undue weight should not be placed upon the deterrent effect (Ashworth 1994).

2.2 Official Responses to Juvenile Crime

2.2.1 The Welfare / Punishment Dichotomy

I will take a bolder and more perilous line, and will attack the concept of 'due process' itself, so far as it is sought to apply it in this field. The doctrine is a concomitant of the accusatorial or adversary system of criminal procedure... But I wonder whether some form of the inquisitorial system is not more appropriate to the work of the panels than is our current dogma. Certainly we hear nothing about 'due process' in the nursery or the schoolroom, where it would be totally out of place. It is not necessarily a reputable concept. It is part of the armoury of the accusatorial lawyer, who when he leaves the court having obtained the acquittal of his guilty client is not at all ashamed of himself... (Kilbrandon 1968: 239).

The entire history of the juvenile court has reflected the competing and conflicting ideologies of punishment and welfare, both in the decision-making (Molony 1927; Ingleby 1960; Longford 1964; Feeley 1979; Adler 1985; Morris & Giller 1987), and in the manner in which the courts were conducted (Carlen 1976; Wootton 1978). Traditionally, sentencing has been based on the four classic principles of retribution, deterrence, prevention and rehabilitation¹⁷ (Wasik 1991; Duff & Garland 1994), to which some have added respect for the law (Cooke 1987). These principles have often conflicted or overlapped (Hogarth 1971; Samuels 1987). There were no guidelines as to which aim was applicable to what type of offence or offender (Ashworth 1995). In addition there were the legal constraints on sentencing in the juvenile court, including from the 1930s, the requirement to have "regard to the welfare of the child or young person."¹⁸ The juvenile court was obliged to balance this duty, although with no guidance as to what weight should be put upon it, with the sentencing principles, first by deterrence, both general and specific through punishment or the fear of it (Raine 1989; Howard 1993); or secondly by rehabilitation through 'treatment' (Rutherford 1992), i.e. welfare measures implemented through social support (Fry & Russell 1942; Miller 1976; Farrington 1984).

¹⁷ *Sergeant [1974] 60 M Cr App R 74*

¹⁸ S44 Children and Young Persons Act 1933

Traditional punishment was seen as the classicist approach. It was identified in the 'justice' model of legal rules and procedures, the 'due process' designed to protect the rights of the individual (Morris et al 1980; Freeman 1981), with determinate sentences to reflect the seriousness of the offence. This was usually coupled with a 'law and order' and just deserts rhetoric, concern with the offence, retribution and punishment to fit the crime. The court was held to express society's disapproval of the act (Bankowski, Hutton and McManus 1987), and to deter that defendant or others from offending in the future (Kapardis 1981), regardless of the needs of the young defendant which would not be addressed by such a sentence (Eadie & Morley 1999). Critics, however, claimed that severe punishment might make offenders more likely to re-offend (Brody 1976; West 1982), the young thief meeting and learning from more experienced criminals (Becker 1963:35), or through isolation and stigma, excluded from normal groups and then identifying with deviant sectors of society.

The 'welfare' model looked at the individual circumstances of a child and to the future, was consequentialist, and offender-oriented. For some it was an attempt to relieve social injustice and deprivation, with treatment based on the pathology of the individual child (Longford 1964, Rutherford 1992, Hughes 2001). Critics said the wide discretion required could and in many cases did lead to injustice, discrimination, disproportionality and net-widening (Morris & McIsaac 1978; Morris et al 1980; Cohen 1985); or that as juvenile delinquency was patently widespread, it should be seen as part of adolescent development and that treatment would thus make the behaviour abnormal (Morris & Hawkins 1970). Others claimed that appearance in court itself could be criminogenic (Bacon 1963; Longford 1964; Wootton 1968; Kilbrandon 1965; Christie 1974; ACC 1984). Some felt it was wrong that children should have to go to court to get treatment (NCCL¹⁹ 1971), whilst others considered that only courts should take decisions that impinged upon a child's freedom or time (Cavenagh 1959; NAPO 1965; MAC 1965). As welfare was seen to give more discretion to social workers and punishment was the prerogative of the magistrates, "the Magistrates' Association, with its scepticism about welfarism, [has] fought to retain, and indeed to enhance, the magistrates' right to punish young offenders" (Parker et al.1989:4).

¹⁹ Renamed 'Liberty'

An added disadvantage to the welfare model, particularly if the treatment involved adventure activities as in IT schemes, was the fear of “creating an ‘elite’ amongst offenders and tempting some of the less privileged youngsters to offend in order to participate in activities normally beyond their reach”²⁰ (Mag.1977:136). This meant that “these measures be always provided in a less eligible form and that they be supplemented by a strong deterrent policy for the wicked and the dangerous” (Garland 1985:259). Yet such measures for reform were not new. Boys’ Clubs were introduced to “provide other outlets for the energies and high spirits of the young people” (Cadogan 1938: para 31), yet an attempt to bring constructive and positive influences – fitness skills, techniques, by a visit of the Ballet Rambert into a borstal, was treated with contempt by a magistrate²¹ (Mag.1977:188).

It was argued that procedural rules must be observed (Adler 1985), but those were often incomprehensible to the defendants (Wootton 1978; Pitts 1988). The situation was further complicated by the age range of defendants, from child to near adult; some had learning or behavioural difficulties; some specific measures were available for different ages to reflect the developmental nature of the young (Adler 1985; Rutherford 1992), and at different times in history to reflect social changes.

Additional to all these complexities, many commentators throughout the existence of the juvenile court have noted that policy has often been ignored, the practice contradictory or there have been unintended consequences (Elkin 1938; Skyrme 1979; Muncie 1984; Burney 1985; Morris & Giller 1987; Harris & Webb 1987; Cavadino & Dignan 1997). It is thought, for example, that the movement to protect children’s rights from the preventive work of expanding social work departments, enabled the proponents of punishment to advance their cause in the guise of the due process model (Hudson 1987). Those passing sentence had little idea of the effect of their decisions. There was neither oversight nor any method of ascertaining whether the order made had achieved the required outcome, nor any systematic, if any, access to research findings.

From the inception of the juvenile court there was debate as to whether the identity of juvenile defendants should be revealed to the general public via the press: the competing theories mirrored the arguments about welfare and punishment. Some

²⁰ Maureen Smith, JP

²¹ Dorothy Padmore, JP

argued that the public was entitled to know the offenders in its midst, or that the fear of publicity deterred juveniles from committing offences. Others said that juveniles either acted on the spur of the moment, or conversely, courted the notoriety to be gained from exposure in the local newspapers (Henriques 1950). The contrary argument held that anonymity was important to facilitate the rehabilitation of the juvenile, so that it did not perceive itself as an outcast nor be treated by society as such (Parsloe 1978).

2.2.2 Other Juvenile Justice Jurisdictions

By the late 1950s Cavenagh JP (1959:237) noted that of all European countries, “only England, Scotland and Ireland still bring schoolchildren before a court of criminal jurisdiction”, a situation, that was little changed by the end of the century (McCarney 1996). The 1970 International Association of Youth Magistrates held in Geneva, ironically under the chairmanship of an English magistrate and MA Council member²², with 49 countries represented, decided that:

the moral and educational needs of children, not the gravity of the offence must determine the court’s decision, the commission of an offence being considered a symptom, and its nature should not be the over-riding factor in making an order (Mag.1971:9).

United States of America

In 1967, the USA had moved towards a justice-based model, in the opposite direction from most of Europe. The Task Force on Juvenile Delinquency (President’s Commission 1967) reported that the informality of the juvenile court deprived young offenders of their liberty without the protection of the due process of law. There was an enormous diversity of systems in the USA, with some 50 states and varying legal definitions, let alone the discretion exercised by some 12,000 enforcement agencies (Carter 1984:20). The Supreme Court decision, *Kent v the United States* (383 U.S. 541, 1966) challenged this “almost unlimited discretion” claiming that the child had the worst of both worlds, neither the due process accorded an adult nor the “solicitous care and regenerative treatment postulated for children” (Carter 1984:32).

²² Clare Spurgin, OBE, JP

In the landmark case of *re Gault 1967 387 U.S.1*, the court changed the juvenile justice system, which had been based on the notion of ‘*parens patriae*’ and the welfare of the child, to one of due process, just deserts and determinate sentences, as in the adult court (Powers 1968:38-9). This decision was probably based on the recognition of the increasing maturity and independence of youth in Western societies and the growing awareness of civil rights and individual liberty. Some states went further with transfers to adult courts, the ‘waiver’, for greater punishment (Hudson 1987:138). However, as in Europe, there was acceptance that court appearances could lead to young defendants identifying with criminals, the ‘labelling theory’ (Becker 1963: 35-9; Farrington 1977:112-125).

The reforms in the United States were virtually unknown in Britain at the time of the proposed reforms to juvenile justice in the mid 1960s, and were never used by any of the opponents to the English 1969 legislation (Bottoms 1974). By the end of the 1970s even within the United Kingdom there were four different arrangements for dealing with youngsters who offended. This research studied in great detail the Scots and English systems, but Inner London and Northern Ireland were different from both of those.

Northern Ireland (N.I.)

The Black Committee (1979) rejected both the new Scots and English systems and chose a clear separation of criminal and care cases: the Youth Court was essentially a criminal court for 10-17, with a professional judge and two lay people, the latter appointed by the Lord Chancellor on the advice of a selection committee chaired by the N.I. Resident Magistrate. Young offenders only appeared in court after three cautions from the Juvenile Liaison Bureau run by the police. The custodial sentence, a Juvenile Justice Centre Order for 1-24 months, with half served in the community, could only be passed if the juvenile was considered a real danger to the public (O’Neill 1999).

Inner London Juvenile Courts

For historical reasons related to corruption and incompetence there were no lay justices in London (Findlay 2000). The Juvenile Courts (Metropolis) Act 1920 created the first Juvenile Court Panel anywhere in the country, with a stipendiary or Metropolitan magistrate as the chairman, and two lay justices of each gender, the

first time such equality was recognised in the courts. They worked exclusively on juvenile justice matters and were drawn from a panel nominated by the Home Secretary, who also appointed the chairmen, lay presidents from 1936. Over the following 50 years, many members played a prominent national role in promoting and formulating new policies in regard to juvenile offenders, and sat on official inquiries, Royal Commissions and Advisory Councils. Their juvenile courts were held in a variety of buildings, even church halls in Brixton and Greenwich in 1964. The clerks were specialists in juvenile law and procedure. Renamed the Inner London Juvenile Panel (ILJP) in the early 1960s, the members were appointed by the Lord Chancellor, their ages “a long way below the average for the rest of the country” (Mag.1968:181). Secrecy prevailed around appointments nationally until 1989, but the names of the Inner London Advisory Committee were published from 1970. The London branch of the MA, with this high concentration of juvenile justices, was able to promote regular training through conferences with national and international speakers (Mag.1964:72 & 74).

Whilst it appeared that much was different from juvenile courts outside London, there was little available evidence to suggest that the sentencing practices were or were not different as the separate statistics have not been located. Official criminal statistics, those published in Parliamentary records as Command Papers, did not include patterns of sentencing compiled by petty sessional areas until the 1980s.

After 50 years of this juvenile specialism, the Conservative Lord Chancellor Hailsham in 1971 felt “It was wrong that the two jurisdictions of Adult and Juvenile should be separate” (Lowry Report Consultation Document 1978:1). In 1978, the Labour Lord Chancellor Elwyn-Jones appointed the Lowry Committee, which claimed that the desperate shortage of qualified juvenile court magistrates was:

a consequence of the Children and Young Persons Act 1969. Many of the experienced Adult Court magistrates are of the opinion that the Juvenile Courts play no real judicial role; that a court with little or no power to order effective punishment is really not a court at all (Lowry 1979:9),

and that a small, elite group of the ILJP gave an impression that “juvenile courts are more interested in doing good, than in doing justice” (p.7). Even so, in 1974 there were complaints about the “criminal atmosphere” of the juvenile courts being unsuitable for domestic court work (PRO BN 229/1377).

Complete integration of the ILJP with the adult system was rejected as the workload of the juvenile courts was too great for other magisterial duties. The compromise solution meant that magistrates should serve at least 18 months on the adult bench before applying to the ILJP, and thereafter to sit sometime in the adult court as well. Candidates were interviewed and selected by an appointments' panel, which ensured that "everyone selected had some relevant experience in the realm of children, youth clubs, social work or education"²³. However, when there was a desperate shortage, interviews could be "most perfunctory"²⁴. Members of the ILJP were required to sit double the normal minimum requirement for adult courts. By 1978, only 12%, 18 of the 149 ILJP justices, sat in the adult court as well and in the 1980s about 20%. Once refresher training came in 1980, those appointed before that "used to tell you quite firmly 'It wasn't part of my contract' ... they had never agreed to do it"²⁵.

A comparison by Anderson (1978) between a northern court and the ILJP, found the latter acting as an agent of social welfare, with disposals concentrated on meeting individual needs. However, such research findings were similar to those of Parker et al. 1981 comparing two urban and rural panels in northern England. Although detention centres were intended to be abolished, ILJP members felt they were "one of the things you might have to do if there were no alternative"²⁶. Comparative disposal statistics from the 1980s, when little integration had taken place between the adult and juvenile courts, did not indicate a radical difference between the ILJP and other major urban areas.²⁷

In the mid 1990s with too few applicants,

about 20-30 people found to their great surprise that they had been appointed to the youth panel, and according to them, had not expressed any great preference for youth work... and were not happy about it.²⁸

After the failure of a brief system of electing chairmen, too few had known enough to choose, a structured selection procedure was introduced in the 1980s. After five

²³ Anne Weitzman, OBE, JP former MA Council member and Juvenile Courts Committee, interviewed by Ravenscroft, London 24.i.2008

²⁴ Annabella Scott, OBE, JP former chairman Inner London Youth Court Panel, former member Youth Justice Board, interviewed by Ravenscroft, London 12.xii.2007

²⁵ Interview Scott 2007

²⁶ Interview Weitzman 2008

²⁷ Appendix 2.2

²⁸ Interview Scott 2007

years' service, candidates spent a week-end being interviewed, doing mock exercises, with the chairmanship selection panel. Successful candidates sat alongside chairmen and finally went on to an intensive four day training course, long before other areas introduced any such schemes.

Eventually, the administration came through the adult court, and the clerks did both adult and youth work. Although the physical separation of juvenile and adult remained, as did their less formal physical courtroom arrangements, they lost their anonymity, and 'Juvenile', later 'Youth Court' was clearly marked outside the building. "Everyone knew they were going to court".²⁹

The ILJP may have been more welfare-oriented in the first 60 years of its existence, but even in the early 1970s, if intensive constructive welfare measures were not available, magistrates would use the punitive detention centres. By the 1980s and 1990s, despite its earlier history as a discrete, welfare-oriented juvenile panel, statistics suggest that the ILJP was not exercising significantly fewer powers of punishment than the national average. Magistrates' courts generally showed huge variations in sentencing practice, even within benches (Ashworth 1995).

2.2.3 Judicial Discretion and Accountability

The exercise of any judicial discretion is historically comparatively new, as all felonies had warranted the death penalty until the 17th century and when transportation was introduced as an alternative there were mandatory time limits. It was only in the 19th century that judges were able to exercise their discretion by deciding the length of time for such banishment (Thomas 2003). In 1907, limits on judicial discretion were promulgated through the establishment of the Appeal Court, providing some measure of accountability in the sentencing process, although this was not applicable to the magistrates' courts, of which the juvenile court was one (Thomas 1974).

The exercise of discretion is essential if there is to be any individualization of sentencing, but exercised within a framework to limit the risk of discrimination on unfair grounds such as race or class, or of disparity, such as like cases not being treated with like sentences (Gelsthorpe & Padfield 2003). There was no training on dealing with 'diversity', particularly on race relations, until the 1990s: Hailsham,

²⁹ Interview Scott 2007

when Lord Chancellor, “resisted any pressure that this type of training should be made compulsory... I see no need for it” (Mag.1985:4).

Decision-making in the courtroom is not done in isolation and is dependent on many factors. Discretion may be fettered by earlier decisions such as plea-bargaining by the prosecution; the nature of the offence as presented to the court (Shapland 1987); or the availability of the options applicable to the particular case (Hawkins 2003). Even where guidelines with sentencing tariffs were issued, they appear to make little difference to sentencing and can even have had the opposite effect from that intended (Thomas 1974). Some people follow rules more closely than others and some do not understand them. Others may be more influenced by a colleague, or the charisma of an expert, and each will bring their own viewpoint according to their experience of life (Wilkinson 1992). Within the criminal justice system, decision-makers should be aware of the consequences of their actions upon others, such as potential victims, and may tailor their responses accordingly.

the more complex the range of information presented to an individual, the more likely will judgements be made according to the most simple and obvious variables. This has been found time and time again...what counts are crude variables of offence seriousness, past record and social status. (Cohen S. 1985:189)

Whilst discretion allows greater “flexibility to respond to different combinations of facts” (Ashworth 1995:24), it can also be used to subvert policies with which the decision-maker disagrees (Gelsthorpe & Padfield 2003). There was no compulsory training at all for magistrates until 1966. Discretion is the power to decide the fate of others, and the safeguard against misuse is accountability through some external body or an appellate system. However, there was little effective control or accountability over the decisions of juvenile courts: appeal was to the Crown Court where sentences could be increased, an effective deterrent. Different judges took different views and their rulings were not binding on the magistrates. It was not until the 1980s that guidelines from ‘liaison judges’ on mode of trial decisions were thought to be having some effect (Riley & Vennard 1988).

Scotland and England/Wales were unique in having criminal courts presided over by people with no legal qualifications, a situation that has been examined by many but never significantly altered (Radzinowicz 1977, Bankowski et al. 1987, Raine 1989, Royal Commission 1948 & 1991, Morgan 2000, Auld 2001). Some critics have proposed legally qualified chairs (Law Society 1967).

This lay involvement in the criminal justice system, like the jury system, was seen as giving legitimacy to the state's exercise of power over citizens: the decisions of the court broadly in line with the man and woman in the street or on 'the Clapham omnibus' (Morgan 2000). Rather than being "the esoteric preserve of lawyers" (Skyrme 1979:8), this was expected to help maintain respect for the law (Darbyshire 1996). This concept of citizens' involvement was also reinforced by changing attitudes to authority in the late 1960s and 1970s, with the recognition that ordinary citizens should take part in decision-making institutions, such as Community Health Councils and the governing bodies of schools (Richardson 1983).

Under both international and domestic law (van Beuran 1998), courts should be accessible, fair, open and comprehensible, acting within defined aims and values (Ashworth 1994, Duff & Garland 1994, Raine 1989, Bankowski 1987). Many have thought this has not always happened (Carlen 1976, Gray 1980, Ball 1983, Adler 1985, Pitts 1988, Feeley 1992, Allen et al. 2001) and have referred to inexplicable disparities in court procedures and sentencing (Parker 1981 & 1989, Burney 1985, Moxon 1985, Tonry 1996, NACRO 2000), along with various other discriminatory practices (Harris & Webb 1987, Campbell 1981). It is important that the appointment of those passing judgment should be by open and accountable processes, (Burney 1979, McCabe 1984, Raine 1989, Bankowski 1987) which was not the case until the last five years of the 20th century in England/Wales.

2.3 Decision Makers

2.3.1 Political Processes and Pressure Groups

Public policy making is “ a set of processes, including at least (1) the setting of the agenda, (2) the specification of alternatives from which a choice is to be made, (3) an authoritative choice among those specified alternatives, as in a legislative vote or a presidential decision, and (4) the implementation of the decision.” (Kingdon 1995:3)

In order for a policy matter to reach a government’s agenda, Kingdon suggests that both participants and processes are involved in recognising the particular issue, generating the policy and utilising the political system. The critical point for success is when the “three process streams” coalesce (1995:19), the problem, the solution and a change in the political climate, all largely independent of each other and with their own dynamics.

In Scotland, by the beginning of the 1960s, for ideological or financial reasons, the radical reforms to juvenile justice of the 1930s had largely not been implemented, and the vast majority of areas still had no specialist juvenile courts. In 1960, the Ingleby Report, based on England/Wales but reviewed by Scotland, highlighted the dichotomy of the justice and welfare axis in the juvenile court. It also noted that the punitive measures introduced in the 1948 Criminal Justice Act had not stemmed the rise in juvenile crime, a matter of concern to a ‘law and order’ administration. The Conservative government sought to remedy the deficiencies by measures in the 1961 and 1963 Acts, which did not satisfy the Labour Opposition, nor did they apply to Scotland. Thus, these two agencies, the Labour Party in England/Wales and the civil service in Scotland, separately identified ‘the problem’.

Two committees, albeit with different structures, timescales and briefs, were appointed to deal with the juvenile justice dilemma in their jurisdictions. By 1964, through the workings of what Kingdon calls “the policy primeval soup” (1995:200), the complex collection and evaluation of ideas and alternatives, committees chaired by Kilbrandon in Scotland and Longford in England/Wales produced broadly similar proposals, providing a potential solution in each jurisdiction. Later that autumn, a new, Labour government came to power providing the change in the political climate

and with a raft of measures for social and criminal justice reform. Thus the three 'streams' were joined and the policy proposals added to the government's agenda.

Once through the Parliamentary process and on the statute book implementation of policy is by no means guaranteed and, as Jackson (1985:12) argues, "a number of constraints must be satisfied". Are sufficient resources allocated to implement the measures, and are they technically possible? Additionally, are the objectives clearly defined for if not, given that policy is implemented by individuals, the exercise of local discretion or a lack of communication may thwart the intentions of the legislators. This research will reveal how differently the two jurisdictions received and dealt with the juvenile justice reforms relevant to them.

Presthus (1974) argues that governments need interest groups who can advise them with their expert knowledge and experience, while governments can advise the interest groups of proposed legislation in exchange. In England/Wales, from the MA's inception in 1921 there was constant communication between senior civil servants and ministers in London and the MA Council. In the 1950s some members of the MA Council used its countrywide membership to galvanise support for the reintroduction of corporal punishment, and enabled a future Council to utilise this active membership: the interest group had become a pressure group, mobilizing support and lobbying on a wide scale to achieve its ends. In the 1960s, it was much helped by the Conservative Opposition, who, seeking power, found it difficult to resist the opportunity (Stewart 1974) and championed the magistrates' resistance to proposed legislative changes. There was no such interest or pressure group co-ordinating the disparate juvenile justice system in Scotland.

Labour won the 1964 general election with a majority of just five, reduced to three before another general election in March 1966, when it was returned with a majority of 99. Over a quarter of the country's electorate was a member of either the Conservative or Labour Parties (McKenzie 1974). In 1968, no fewer than 65 members of the House of Commons and 120 members of the House of Lords were or had been justices.³⁰ There was a general perception that the magistracy had closer links with the Conservatives than Labour (Morris T 1989), and this continued to be equally true in the 1980s (Wilkinson 1992). A Labour government with a tiny

³⁰ Appendix 2.3

majority knowing these factors would have been unwise to propose radical reforms which were not supported by the magistracy.

The optimum period thought necessary for successful reforms is between two and six years (Kingdon 1995). The Longford Committee produced its report (Longford 1964) after only four months, and the resulting White Paper with its radical juvenile justice proposals was published just a year later. In Scotland, the Kilbrandon Committee members deliberated for three years, and the White Paper was published another two years later, allowing ample time to test “the political support or opposition they might experience” (1995:19), to consult relevant organisations, and make plans for their radical proposals.

Interest and pressure groups are sometimes argued to fall into two categories, those that share a common attitude and those that share a common interest (Castles 1967). Thus professional bodies, such as the MA to which about 75% of the 16,000 active magistrates belonged in 1965 (Mag.1965:118), were essentially interest or sectional groups. Interest groups are concerned with “protecting current benefits and prerogatives,” and professional organisations of higher income and status, like the magistracy, were more likely to resist change than promote it (Kingdon 1995:67). The proposals in the 1965 White Paper ‘The Child, the Family and the Young Offender’ (CFYO) included the abolition of juvenile courts, so it was not surprising that when the MA saw a major part of its work threatened - about 50% of magistrates were also members of juvenile panels - it resisted fiercely. There was a similar response to the 1969 Bill, which severely restricted the magistrates’ powers of punishment in the juvenile courts.

Interest groups also provide services such as training and information, and their leaders negotiate with governments on proposed policy. MA members may not have shared the same attitudes to crime and punishment but joined a ‘promotional’ group to support a broad view of criminal justice matters. Over time, priorities and policies vary within a group, as the history of the MA showed. The effectiveness of a cause can be damaged by internal conflicts (Baumgartner & Jones 1993), as was made clear to the Juvenile Courts Committee of the MA (JCC) when it was asked to give a final response before the Second Reading of the 1969 Bill (JCC 1969:274).

Most groups mirror governments in their hierarchical structures (Castles 1967), with elected boards and paid staff, accountability to members exercised through annual general meetings, and policy proposals subject to ratification. The

MA was no exception, and furthermore, its President was the Lord Chancellor of the day; some Council members were MPs or peers; and even its meetings were held in Committee Rooms in Parliament until 1965. Whilst members generally need to feel involved in order to continue their membership, decisions are likely to be made by an elite group, the oligarchy, in this instance the ‘executive committee’. The length of service of this committee was on average over 12 years in 1986 (Wilkinson 1992:223), and the very nature of the work of the magistracy enabled the committee to build up a network of contacts with the government and associated bodies (Presthus 1974).

Success may depend on the lack of an “articulate opponent” at a given time (Kingdon 1995:190). In Scotland, Kilbrandon was appointed by the Conservative government and there was no organised body to campaign against the loss of juvenile courts. It was the parallel reforms to local government, by their very nature affecting many, which attracted controversy, rather than the changes to juvenile justice, which affected comparatively few. In England, Longford faced a highly organised, nation-wide, politicised body, the MA, able to campaign against the juvenile justice proposals from the start, if it chose to do so.

Success too, may depend on a “policy entrepreneur”. Kilbrandon was a much admired, senior judge, who rigorously and persistently promoted the reforms and prompted “important people to pay attention” (Kingdon 1995:20), helped by the smaller arena of Scotland. Longford was a Labour politician, whose report encompassed many wide-ranging, important and radical reforms within the criminal justice system, and was distracted with his fellow political colleagues from promoting the juvenile justice reforms. These lacked a dedicated protagonist to challenge any articulate opponent.

2.3.2 The Judiciary in Summary Courts up to 1970

Lay Justices in England and Wales

...a third are competent, a third passable and a third who ought not to be there at all. (Criminal Law Review 1961:661³¹)

³¹ Edition commemorating 600 years of the Justices of the Peace

Although potentially the system of lay justices can be very good, in practice it can be very bad, as has happened in the past. Constant effort is needed to see that it does not slip backwards... (Skyrme 1979: 214)

The office of ‘Justice of the Peace’, or magistrate, dates from the 14th century, and throughout the centuries has included the most powerful men in their counties: “as JPs the gentry put down the riots of their labourers, and as MPs they passed the statutes which allowed them to do so” (Harding 1966:244). Many became county councillors when the new councils took over their administrative functions in 1888 (Moir 1969). With the creation of police forces in the mid-19th century, they were relieved of their direct policing function, but survived as representatives on Standing Joint Committees and later the Police Authorities, still giving them influence over local law enforcement (McCabe & Treitel 1984), even in the late 20th century. It was only in 1949 that ‘Police Courts’ were renamed ‘Magistrates Courts’. It was one of the few offices to receive public recognition by the use of titular initials J.P. (Justice of the Peace). Women were first appointed in 1920, but only represented one seventh of the 28,000 magistrates in 1983 (Skyrme 1991 vol. II).

Until 1971, some 2,550 holders of certain offices from Privy Councillors to mayors were *ex officio* justices, who were often, despite sitting rarely, chairman of the ‘borough bench’. Governments recognised that a lay magistracy was both cheap and flexible; part of the ancient traditions of the country (Radzinowicz 1977; Raine 1998); and that a local bench reflecting its community should be more democratic and open than remote professional judges.

The 1910 Royal Commission created ‘advisory committees’, an official body to advise the Lord Lieutenants - most of whom “were of course politically active peers” (Moir 1969:184), who appointed the ‘county benches’ and submitted the list to the Lord Chancellor. Borough advisory committees and their chairmen were appointed by the Lord Chancellor. The interviewing of candidates by advisory committees only started in the late 1960s, and was made compulsory from 1972. There was constant criticism throughout the latter part of the 20th century that the recruitment of the lay magistracy remained secretive (Burney 1979; Ravenscroft 1987). In 1987 advice to advisory committees stated that chairmen should begin the interview of a candidate by saying “I will not introduce myself or my colleagues to you by name” and end it by telling the candidate “not to reveal anything about it to anyone else, not even the identity of any of us whom you may recognise” (Lord

Chancellor's Department 1987). Gardiner³² suggested the members should be named, but Sir Thomas Skyrme,³³ in defending their anonymity, strongly supported by the 'Magistrate' (1979:84), wrote, "it protects their members from being lobbied..." as there were instances after publicity when "the Advisory Committee became submerged in a spate of wholly unsuitable candidates." The qualities required of magistrates were never clearly defined, although Skyrme (p.73) claimed that,

The most essential qualification for the magistracy is a judicial mind and sound common sense, which are congenital qualities; nevertheless, if present in embryo, they can be developed with training and experience.

Given that the appointment of magistrates was never advertised, potential candidates could almost only approach or be approached by serving magistrates,

It was 1959... I received a telephone call one morning and it was the Duke's secretary saying that he wished to see me that afternoon... I said that my uncle had been chairman of the ... Bench, and he had known him.³⁴

There were a few exceptions: Cheshire advertised in the local press (Mag. 1971:87) and Lord Denning in a radio interview explained how anyone could apply (1972:8). In 1986, 72% of magistrates were still nominated by another magistrate (Wilkinson 1992), perpetuating "their own attitudes and beliefs about justice" (King & May 1985:154). It was not until the late 1980s that a universal system was suggested for encouraging applications by publishing the names of Advisory Committee members and even by advertising.

Many observers and even Lord Chancellors have commented on the elitist and unrepresentative nature of the appointments (Hood 1962; Baldwin 1976; Dignan & Wynne 1997; Morgan 2000). Skyrme was offered inducements and sometimes threats to secure the appointment of some individual. As early as 1910 the Royal Commission stated that magistrates should be "working men with a first-hand knowledge of the conditions of life among their own class" (Skyrme 1991 vol. II: 226). Gardiner (Mag.1965:178) declared that there was a strong connection between social class and political affiliation, and Labour passed the Employment Protection

³² Lord Chancellor 1964-69

³³ Secretary of Commissions 1947-1977, advising the Lord Chancellor on the appointment of magistrates

³⁴ PH, OBE, JP, DL, Council MA in 1970s, interviewed by Ravenscroft, South Coast, 27.v.2007

Act of 1968. Employers were required to release workers for magisterial duties, although in practice employers were reluctant to take on such a commitment.

Hood (1962:53) found 61% of magistrates in his survey belonged to a political party, 34% Conservative and 24% Labour, although Raine (1989) has argued that there is little evidence to link political affiliation and attitudes to crime and punishment. In 1971, Hailsham announced that magistrates could not operate in the constituency where they were the MP, agent or adopted candidate, as they were “peculiarly vulnerable to political pressure in difficult decisions” (Mag.1971:186), but county councillors were free to be magistrates. In June 1977, candidates and current magistrates were invited but not obliged “to indicate in confidence their political views” to help balance the bench (Mag.1977:144). Wilkinson (1992) found 56% of magistrates supported Conservative views, more than double that of any other party.

This limited range of backgrounds, even husband and wife on the same bench (Mag.1979:32), encouraged insularity and little interest in other methods, often reinforced by the lack or nature of the training, which for most was

none at all. You had a chat with the Clerk to the Justices at the beginning who gave you the basics... Otherwise, you really learnt by sitting on the Bench with your colleagues.³⁵

And on one small rural bench,

...the training by the Chairman was pretty good, as he had a very pleasant habit, which taught me so much about the set-up as a whole, as when business finished in the morning, he would say ‘Come along, we will go to the local hostelry and we will have a glass of sherry and I am going to ask the prosecuting person and the defending solicitor. If they are free, they can come too’.³⁶

Downes (1988:81-9) has related extensive judicial training to more humane, progressive sentencing. Initial training was not made compulsory until 1966, and then only for the newly appointed. Six years later, the Solicitor-General³⁷ considered it “an intolerable burden to enforce attendance at even one course of instruction a year” (Mag.1973:114). Later, there was a major change in the attitudes of the

³⁵ Joyce Rose, CBE, DL, JP, Chairman MA 1991-3, interviewed by Ravenscroft, Hertfordshire, 12.vii.2006

³⁶ Margaret Romanes, OBE, JP, BA, Dep. Chairman MA Council 1982-85, interviewed by Ravenscroft, Edenbridge, Kent, 27.ii.2007

³⁷ Sir Michael Havers, MP, later Lord Chancellor

professional judiciary to the idea of their having training which would affect magisterial training.

The abhorrence which all concerned had previously shown to such a concept was abandoned, and although the expression ‘training’ remained unacceptable on the ground that the independence of the judiciary would be undermined if they were told what they should do, it was agreed that some degree of judicial education was desirable. (Skryme 1991 vol. II: 323)

There was “strong opposition, especially from the judiciary” (Skryme 1991:323) before a study programme of one week for new judges was accepted, and in 1979 the Judicial Studies Board was created, the title “an exercise in semantics” to avoid “the objection that ‘training’ provided the means of influencing or conditioning the mind...” (Skryme 1991:324). A Magisterial Committee was added in 1985 to formulate the principles and approve the syllabus for magistrates’ training, produced and delivered locally as the responsibility of the Magistrates’ Courts Committee (MCC). Refresher training for magistrates, just 12 hours over a period of three years, was not introduced until 1980 and initially only applied to those appointed from that date.

For new magistrates there was a pressure to conform, the subtle process “which instils in new recruits (and reinforces in existing magistrates) the predominant norms, values, attitudes and expectations” of the bench (Wilkinson 1992:21). This could distort judgment (Parsons 1995), even taking precedence over legal advice (Hogarth 1971) and key players could also influence matters (Hood 1962 & 1972). Interest was rarely taken in the sentencing practices of other benches (Tarling & Weatheritt 1979): disparities between Benches and even the same Bench have been called “excessive and occasionally scandalous” (CLR 1961: 661). It was little wonder that the new magistrates thought their work unique, almost an ideology (Cavadino 1997) binding them together, and obliging them to “accept certain inhibitions on [their] freedom of behaviour” (Skryme 1979:141).

Only the Chairman or Deputy Chairman of a Bench could preside in court until Parliament³⁸ in 1977 decided the chairman could “invite another magistrate to preside, and to sit beside him and help him in the daunting ordeal of taking the

³⁸ An amendment proposed by the MA

Chair” (Mag.1977:120). Scott³⁹ was horrified in the 1980s at the system of appointing chairmen in the London adult court, “Buggins' turn with the entire emphasis on seniority and virtually no attention paid to suitability”.

It became a mercy when the chairmen’s tenure was limited. We joined the Bench when the chairman was on until he retired. After all, you appraise a chairman by voting them off don’t you, in a way? In those days, you couldn’t, you were stuck with them.⁴⁰

Specific chairmanship training was not introduced nationally until the 1990s, despite a “litany of appalling behaviour by chairmen” (Mag.1978: 164).

It was exceptionally rare to dismiss a justice, and only possible by the Lord Chancellor:

...the independence of the magistracy must be maintained... no justice should be removed, suspended or reprimanded except for substantially indisputable cause...Independence requires some tolerance of magisterial behaviour, and conduct which would exclude a person from appointment does not necessarily justify removal if it occurs after he has become a magistrate...(Skyrme 1979:136).

The Juvenile Courts in England and Wales in the 1960s

As constituted under the 1933 Children and Young Persons Act (CAYP), the juvenile courts were to be composed of three magistrates, “specially qualified for dealing with juvenile cases”.⁴¹ The qualifications were not defined “as it was thought best to leave this to the good sense and discretion of justices” (Mag.1933:697). The ‘Magistrate’ (1964:2) suggested factors such as having children, or “plenty of nephews and nieces”, or working with children; and having

less easily identifiable qualities, such as elasticity of mind, acceptability of personality and appearance, and even that elusive achievement, being ‘with it’ which justices will have to look for , as best they can, in their colleagues .

However, one magistrate⁴² in 1962 “found, first in Durham County and then in Cumberland, a total disregard of the requirement that only those fitted for juvenile courts were elected to the panel” (JCC 1962:10). Outside Inner London, juvenile court justices were elected by and from the members of their Petty Sessional Division.

³⁹ Interview Scott 2007

⁴⁰ Interview PH 2008

⁴¹ Ld. Chancellor’s Rules under 1933 Act [1954 no. 1711]

⁴² D.A.N. Roper, JP

The age range for appointment was 21-50, with retirement fixed, despite some resistance, at 65 from 1949 (MAC 1952:1025). In 1946, nearly 40% were over the age of 60.⁴³ In the early 1960s, Skyrme received complaints that magistrates were elected on seniority rather than aptitude for juvenile court work. Hogarth (1971:211-2) noted that age was closely associated with certain attitudes and beliefs: older people "...select fewer factors concerning causes of crime", were more "offence oriented" but had a "greater feeling of independence, self-reliance, confidence and moderation". Despite the strong suggestion in 'News for Magistrates' that "women often 'jump' to a conclusion... the very antithesis of the working of the judicial mind" (Mag.1947:17), the Home Secretary announced that from 1955, "all juvenile courts should contain at least one man and at least one woman ... except in emergency" (MAC 1954:1128).

As some magistrates sat so rarely in the juvenile court, just four times a year, there was little inducement to learn (Fry and Russell 1942). Ingleby (1960 para.164) commented that few areas had combined to increase their workload. In 1966, there were 820 juvenile courts, with 5,060 men and 3,450 women on the juvenile panels (Mag.1966:80): "we didn't have to sit very often, because in those pleasant days parents took a lot of responsibility for their own children".⁴⁴ To cover all the Bench work, including juvenile and adult courts, the minimum number of sittings was 52 sessions, or 26 full days a year. In 1973 this was reduced by half to only 13 full days.

The chairman of the juvenile court was elected by all members of the panel. Ingleby (1960 para.157) rejected the idea of their appointment by the Home Secretary, as "he and his staff would rarely have personal knowledge of those suitable ... or any source from which they could properly take advice except the local justices to whom the power of appointment belongs." In Inner London, the Home Secretary, and later the Lord Chancellor, appointed the juvenile panels and their chairmen.

In 1952, many justices did not "seek to keep themselves up to date by attending conferences, nor even to gain an elementary knowledge of their duties" (Mag.1952:221). Ingleby (para.160) said magistrates needed training, "particularly true of those who are to sit in the juvenile court" and that every MCC should make

⁴³ 5th Report (1938) Home Office Children's Branch, London: HMSO

⁴⁴ Interview PH 2007

and administer training schemes. There was no official requirement for any training until 1966, and no commitment to require refresher or further training until 1980. The MA had provided its members with training programmes for those who wanted them, often at their own expense, and published articles in the 'Magistrate'. It was the clerk's duty, whether invited or not by the magistrates, to advise them on the law, practice and procedure, as well as having administrative and judicial functions for their courts. Clerks were often on a part-time basis from local solicitor's offices:

... the chief clerk had his own solicitor's firm... I was horrified when I learnt about this. He would have his people defending somebody and he sitting there as Clerk of the court... (Patience Marshall JP, 2007⁴⁵)

There is much evidence to suggest that "magistrates tend to believe the police" (Parker et al.1981:57; Carlen 1976; Raine 1987; Vennard 1981; Skyrme 1979). One very senior magistrate explained that when the police lost they just shrugged and said "We know he did it, but we couldn't prove it"... One used to go to the poor sergeant and say 'You tried hard'".⁴⁶

Molony (1927 para. 36) concluded that juvenile courts should not be held in the same building as any other courts, as separation was "one of the best ways of emphasizing the difference of treatment between the juvenile and the adult". This was not specifically included in the CAYP Act 1933, merely separation from adults in courts and police stations. However, Elkin (1938) found that the majority of juvenile courts were still held in the same building as ordinary courts, with the magistrates sitting high up on a raised dais. This structural elevation was seen as necessary for practical purposes by some, but as part of the coercive, dominating nature of the courts, by others (Argyle 1967). Cavenagh JP (1959:131) suggested that if parents stood near their child, it could

reveal a highly suggestive resemblance between parent and child, seeming to imply that the accused is after all nothing more nor less than a chip off the old block and as unlikely to yield to treatment.

"There was often confusion in the mind of the child or his parents about what was happening..." (Ingleby para.186), with too many people in court; and differing practices in regard to handling reports, some being read aloud in full, to the detriment of the child. In Brighton in 1965, "Parents...were often rudely addressed

⁴⁵ Patience Marshall, OBE, JP, BA, Council of MA in 1960s, interviewed by Ravenscroft, Devizes, Wiltshire, 19.i. 2007

⁴⁶ Interview PH 2007

by the magistrate or clerk, not allowed to say what they wanted to...” (Cohen S. 1987:104). An Inner London chairman of 40 years’ experience complained that simplifying “the language and the formalities as one may, the extreme artificiality of any criminal trial must be wholly incomprehensible to young children” (Wootton 1967:222). In practice, many of the juvenile courts throughout the country appeared to be little different from their adult counterparts, yet were dealing with children as young as ten years old, many with social, physical and mental difficulties. As Asquith (1983:39) has noted,

the ideological orientations of members of relevant organisations affect whether or not, or to what extent, the objectives contained in the formal or official ideology are actually realised.

Sheriffs, Justices and Burgh Magistrates – Bailies in Juvenile Courts in Scotland

The Edinburgh Burgh Court was like Dante’s ‘Inferno’. The bailie’s qualification was that he or she was a senior councillor, and in the main they were absolutely useless. (Finlayson 2008⁴⁷)

In 1587⁴⁸ James VI of Scotland made provision for the appointment of Justices of the Peace “because of the overwhelming success of the English justices...” (Findlay 2000:1). However, the legal system of England/Wales was based on common law which, along with the “large and independent squirearchy”, was “the basis of the Institution of the Justice of the Peace” (Skyrme 1991 vol. III:58). The Scots had remained under the Continental system, and its justices were of “low social standing”, and “lack of education” (2000:61). They had more limited powers: fines, corporal punishment, and a maximum two months’ custody, the last two rarely used “to avoid the appreciable cost” and some “sentiments of humanity” (vol.III:73); while English justices had the additional, harrowing powers of capital punishment, transportation and prison. After 1747, the sheriffs replaced the JPs, and as qualified lawyers were “more impressive both in their personal status and in the ability with which they performed their judicial, administrative and investigative functions” (p.72).

Until 1955, when the Secretary of State for Scotland assumed responsibility, appointments for JPs in either country were by the Lord Chancellor, although in

⁴⁷ Alan Finlayson, Reporter to the Lothians, interviewed by Ravenscroft on the telephone, 27.viii.2008

⁴⁸ APS 1587 c.57 s1 vol. III 458

some parts of Scotland, there were no JP courts. The 1930s legislative reforms had required appointment by the Secretary of State on the advice of local Advisory Committees (Morton 1928) but this was never implemented. In 1953 Scottish JPs, who sat two or three at a time, dealt with only 10% of the criminal work and minor civil matters; English JPs dealt with 90% (Skyrme 1991 vol. III). As Cowperthwaite (1988:6) has observed, a “large proportion of Scottish justices of the peace did not sit in court (and would have been surprised if called upon to do so).” There was no national body to represent their interests.

The sheriff court, presided over by a single lawyer, was the main court for summary jurisdiction with, until 1975, two other summary courts both involving lay members advised by clerks, the JP courts and the burgh or police courts. The last were essentially town councillors appointed by their colleagues to act as ‘magistrates’ or bailies, sitting alone, and whose jurisdiction was limited to their burghs, dealing with minor criminal offences. Otherwise, JP courts had jurisdiction over the whole county.

All three courts could sit as juvenile courts until 1971, and were not without their critics. Kilbrandon spoke of the ineffectiveness of the “kindly admonition” of the juvenile court (The Scotsman 13.iv.1964). One solicitor, later a senior ‘reporter’ to the hearings, said of a burgh juvenile court,

the city prosecutor was a very able chap but had the bailies in his pocket. There was no legal aid ... Pre 1964, there were the Poor Law solicitors, but after that, nobody went...

The county juvenile court

was presided over by three worthies, justices ... a different breed from the city bailies. They tended to be very posh and very, very courteous to everyone in the court... But, they were pretty incompetent too. They had no training at all. They relied very heavily on the legal adviser...⁴⁹.

The sheriff’s juvenile court fared little better, with horror tales of how these courts operated where it was by no means unusual to have 40 individual cases disposed of in a two hour session (Finlayson 1992:41).

There was considerable resistance to lay people sitting in law courts (Bankowski 1987:11-16). In the 1970s when their abolition was proposed by the

⁴⁹ Interview Finlayson 2008

Conservatives, reversing their earlier decision,⁵⁰ both the Scottish Law Society and the Glasgow Bar were delighted, “the principle of lay – or half-baked – justice has been discarded” (Scotsman 19.x.1973). Nonetheless, in 1975 the Labour government abolished burgh and JP courts but replaced them with District Courts with lay justices, one or more to sit. An editorial in the ‘Scotsman’ (15.ii.1975) declared that “lay justice is inferior whether it operates in England or in Scotland”, others said it stood for a trend to a more ‘welfare’ oriented and thus ‘humane’ justice, in line with Kilbrandon (Bankowski 1987:28).

The fiscals exercised their discretion, as a filter between the police and the court, whether to prosecute or not, and to decide the venue and type of trial. The English and Welsh courts had no such officer until 1986⁵¹: the police prosecuted their own cases through local solicitors, and the magistrates decided the venue for trial. The English magistrates were fully part of the legal and social framework of the town and countryside, stemming from their historical role as keepers of the king’s peace and their multitude of administrative duties, and the juvenile courts were their sole preserve. From 1921 they were represented by a powerful, influential body, the MA, with close links to Parliament. Historically, the Scottish JP had been less influential; by the 20th century their role was minimal, and as juvenile court justices they were the least used tribunal.

2.3.3 The Magistrates’ Association (MA)

The MA was formed in 1921, with considerable assistance from the penal reforming Howard League, whose Secretary became the Secretary of the MA in 1924, although some members had reservations about the connection (MAC 1921:4). The objects of the MA were to publish information and advice for magistrates; provide conferences and meetings; promote “uniformity of practice and the best methods of preventing crime and of treating offenders with a view to their reform”; and consult with governmental and other bodies (MA 1954: Memorandum). The MA was lobbied by many different organisations, the majority demanding more severe punishments, some offering constructive advice and knowledge of child development matters.

⁵⁰ ‘Justice of the Peace and Justices Courts’ 1973 Cmnd. 5241

⁵¹ Prosecution of Offences 1985

Perhaps its most important function, before compulsory training was introduced in 1966, was to provide training, even “the examination and correction of such papers as were sent in by the magistrates” (MAC 1948: 837). The MA provided postal courses, lectures and conferences: hundreds of magistrates took these courses at their own expense (Mag. 1949:230). Ingleby (1960 para.160) commented on its “admirable publication entitled ‘Lectures on the work of the Juvenile Courts’”. All this was paid for out of subscriptions, the Lord Chancellor refusing to give financial help (MAC 1948:851), until the MA’s contribution to training was recognised in 1970 (Exec.1970:3757).

Through its magazine, the ‘Magistrate’, published bimonthly, and monthly from the 1960s, magistrates read erudite articles by experts covering a wide range of criminal justice issues from different perspectives, juvenile justice systems in other countries (Mag.1966-68), and reports of the MA ‘council’, official publications and Home Office circulars. A correspondence column allowed differing views to be aired, most received were published, although occasionally letters were censored (Exec 1966:3463). Editors remained in post for many years and were invariably retired justices’ clerks. The appointment of an academic, Caroline Ball JP in 1990 broke that mould and her editorial freedom was exercised to the full, articles and editorials expressing views contrary to MA policy, received with conflicting views by different chairmen. On her resignation in 1995, the magazine returned to being a House magazine, with professional editors

Magistrates and stipendiaries originally joined the MA on an individual basis or by belonging to their local bench, which had joined. By 1950, there were 7,473 members and 133 benches (Exec: 1950:1793). Benches and later branches held local meetings, the MA held the ‘annual meeting’, usually in London. Open to all members, it regularly attracted an audience of 400, which the Lord Chancellor invariably addressed (MAC 1934:358). Debates were held and votes taken, although the result was not binding as “the policy of the Association was the policy of the representative Council” (MAC 1965:1791).

The ruling body of the MA was the council, which, in the early years included five of the first women justices. Individual appointments to the Council, many from Inner London, were a feature of the first thirty years. Their nominations were ratified at the Annual Meetings in London, later roughly in equal numbers to bench representation, all holding office for three years (Exec: 1949:1766). In 1950,

there was criticism “in many quarters that the Association was not in fact representative of the views of the members throughout the country” (MAC 1953:1115). Looking back to that time, Sir William Addison⁵² declared,

The Council in the 1950s was a self-perpetuating body drawn from the magisterial elite of London and the Home Counties, and it was distinguished by a belief in the perfectibility of human nature that was in the best – or worst – traditions of Rousseau. (Mag.1977:6)

Dissatisfaction culminated in the constitutional reforms and would appear to be related to the abolition of corporal punishment in the 1948 Criminal Justice Act. This had attracted national interest in the press, and showed a clear conflict between the Council members and magistrates in the country. The MA had given evidence to the Cadogan Committee in favour of the abolition of whipping in 1937, but support for whipping was raised by members in 1942, 1947, and 1948 when the MA reiterated its support for abolition. In 1950, the Executive Committee was over-ruled in objecting to a referendum on corporal punishment, but headed off further calls for the re-introduction of corporal punishment until 1952, when the Lord Chief Justice wanted it re-introduced (MAC 1952:1059). Eventually, the Council felt obliged by the supporters of corporal punishment to hold a referendum of the whole membership. The Council effectively lost (MAC 1953:1118), some “47% of members who received papers voted for corporal punishment and 22% against, leaving 31% who had not voted at all (MAC 1953:1085). Much of these proceedings was shrouded in secrecy.

The reintroduction of corporal punishment was never accepted as MA policy, despite being raised a further three times. In 1960, however, after the major constitutional changes, the Council sent a Memorandum to the Advisory Council on the Treatment of Offenders (MAC 1960:1476) with a more equivocal statement of its views:

The question of a return to corporal punishment must largely depend upon whether or not it is a deterrent to individual offenders and to potential offenders. This is a matter needing intensive investigation into the results of past sentences...

The new Labour government abolished corporal punishment in prisons in the 1967 Criminal Justice Act, and a later Labour government finally abolished it in all schools and institutions in 1999. The issue was not *seriously* raised again but it

⁵² Chairman MA Council 1969-1977, the last to be knighted for this service

would seem there is an “enduring appeal... exemplified above all in the issue of corporal punishment, especially for young offenders” (Bottoms & Stevenson 1992:16). As one magistrate opined, “My boys got whacked at school, and they are very nice and successful now.”⁵³

The unprecedented increase in membership of the MA in 1950-51, which was attributed to new appointments following the Justice of the Peace Act 1949, was followed by a decline, thought owing to the “undesirable publicity arising out of the referendum” on corporal punishment (MAC 1954:1171). The new chairman Lord Merthyr instigated a reform of the constitution. This led to the gradual replacement of bench with branch membership, so that by 1956 all members were assigned to branches, often coterminous with Commission of the Peace boundaries (MAC 1955:1231). By 1965 there were 12,400 members, and by 1972 some 18,700 of the 21,000 active justices were members (Mag.1972:187).

Individual elections to the council were abolished and all its members were elected on a regional basis. The first newly constituted council meeting was held in November 1956: 40% of the JCC membership had been replaced. Eventually, council members were elected by their own branches and co-options were reduced to five in 1971 (MAC 1971:2041). Morris, an Inner London magistrate, noted the difference in attitudes from those in London,

Out in the sticks, you had splendid examples of what I call ‘fossilised reaction’, utterly opposed to what they regarded as a softening and lily-livered approach to dealing with a problem that needed to be addressed by much sterner measures. This resonated right through all my time on the Council...⁵⁴

A chairman of the ILJP who served on the JCC found members in the 1980s of whom “I cannot imagine how they got there... they seemed to have very little knowledge of children and young people”. Nonetheless, there were “some very able and enlightened people at the head of the Association, but they had a hard job introducing change”.⁵⁵ Both (Lady) Cordelia James and (Lady) Teresa Rothschild of the JCC were members of the Younger Committee (1970 para 16) on detention centres, which successfully recommended the closure of the only detention centre for girls, and recommended much more constructive regimes.

⁵³ HG, JP 2007, Chairman Family Panel, South Coast, interviewed by Ravenscroft 29.v.2007

⁵⁴ Interview Morris 2006

⁵⁵ Interview Weitzman 2008

The council met three times a year, with a similar number of meetings by the various sub-committees, whose decisions had to be ratified by the main council, and occasionally led to serious conflict (MAC 1968:1918). Observers from government departments attended council and sub-committee meetings. Many of the meetings were held in Committee Rooms of the Houses of Parliament until 1965, when that arrangement ceased for practical reasons (MAC 1965:174), rather than from any sense of safeguarding the independence of the magistracy from the legislature and the executive.

The leadership of the MA was the executive committee, comprising the officers, elected by the Council, and sub-committee chairmen. The average length of service was over 12 years, only five for Council membership (Wilkinson 1992:223). The executive provided the delegations visiting government ministers, and members sat on official working parties and Royal Commissions. It also chose the members of the sub-committees, vetted the resolutions for the 'annual meeting', and produced the nominations for co-options to the Council. During most of the 1960s, the Chairman of the Council was a Deputy Chairman of the House of Lords and a Deputy Chairman was a Labour MP, later ennobled, and member of the Longford Committee. With these lengthy time commitments on top of bench sittings, they were a very unrepresentative selection of the magistracy.

A close relationship with the government was almost the *raison d'être* of the MA, and it was prepared to forgo financial benefits as a charity rather than "be unable to take an active part in making representations to Parliament" (MAC 1951:13). The Lord Chancellor was, by virtue of his office, the President. The MA expected to be listened to, and usually was. In 1955, the Home Secretary agreed to a deputation from the council after being "informed of Council's view that the time was ripe for a new inquiry into the treatment of young people appearing before the juvenile courts" (MAC 1955:1232): the Ingleby Committee was appointed in 1956.

Historically, the MA was careful to remain politically impartial, at least publicly. In 1944, Mr Turton JP MP said that as the Conservatives were considering reforms they would like help from the MA. This was refused, though with the caveat that it was "better not to send a member officially" (MAC 1944:682). The MA had discussions with both main political parties after an approach by the Conservatives to discuss the Criminal Justice Bill 1967 (Exec 1967: 3535), and thereafter openly sought political support for its own proposals. These mostly coincided with those of

the Conservatives, and maintained relations with them in and out of office. However, it was angry with them at their removal of magistrates' powers of imprisonment for serious motoring offences in the 1973 Road Traffic Bill, and was rebuked for being so by the Lord Chancellor (Mag.1974:20). It was equally irate with the following Labour government when it reintroduced the same measures (MAC 1973:2130 & MAC 1974:2161). Nonetheless, the MA was seen to be generally more sympathetic to the Conservatives (Pitts 1988:118; Wilkinson 1992:241).

2.4 Conclusion

The political processes and the pressure groups relating to juvenile justice were different in Scotland and England/Wales during the 1960s. The passage of the Kilbrandon reforms fitted the optimum pattern for success as propounded by both Kingdon and Presthus, whilst those of Longford did not. The proponents of the detailed and carefully argued and constructed Scottish proposals foresaw resistance and worked hard to minimize it. Meanwhile, the English juvenile justice reforms were part of a wide-ranging, radical package of criminal justice reforms, and this small section was subjected to a sustained attack by several groups, their authors seemingly caught unawares or unable to respond to the criticism. Given the history of the MA, the background of its leading officers, and the regular attendance and advice of civil servants, there was ample opportunity for it to respond to and influence any proposed legislation. The reformed Council of the late 1950s reflected the views of magistrates throughout the country, members less exposed to new ideas and criminological research. A significant number of magistrates were members of both Houses of Parliament from all Parties. They were in a formidable lobbying position.

Judicial decision-making is problematical for adult offenders held fully responsible for their actions, but, for juveniles, courts were faced with extra difficulties and responsibilities. The evidence would suggest that in neither jurisdiction were the judicial decision-makers selected, trained or supported to fulfil their functions properly. How they were expected to deal with juvenile offenders is the subject of the next chapter.

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CHAPTER 3

LEGISLATION AND PRACTICE: PRE 1900 TO 1963

In 1814, five children aged between eight and twelve were hanged for petty larceny (Pinchbeck and Hewitt 1973:352): in 1849 more than 10,000 young offenders under 17 were sentenced to prison or transportation. Until the legislative measures of the 20th Century set up special courts for juveniles, whether troubled or troublesome, there were few criminal justice agencies which recognised the needs of children at all. Juveniles, as young as seven years, took their turn with the most hardened criminals appearing in Magistrates' Courts and Assizes in England/Wales, before Stipendiaries in London; and in Scotland, before Justice of the Peace Courts, Police or Burgh Courts, and Sheriff Courts. Bailies, justices, sheriffs and judges did not have any expertise or training in dealing with such youthful offenders. Of the lay members in both jurisdictions, none was trained, many sat rarely, there were no women, and no upper age limit, with some in their nineties still sitting.

When those with responsibility for decision-making, the Parliamentarians, civil servants, the judiciary and criminal justice agencies, became aware of the different needs of young people, working parties were appointed with a range of expertise, to inform the legislators of suitable methods to deal with juvenile delinquency. However, once on the Statute Book, the enactment of those provisions would be at the mercy of many others. It would need the commitment of the authors with both the political will and the resources, financial and otherwise; it would need application by the judiciary, some thousands of justices or magistrates, with little contact even within their own courts, let alone between a thousand petty sessional divisions and counties; and it would require enforcement by the agencies given responsibility for the practicalities, scattered across the country, with different funding arrangements and priorities. In addition, the 'law of unintended consequences' was to complicate the issues still further.

3.1 Before the 20th Century

In the 17th & 18th centuries, “the harshness of the law, together with the changing social conditions” led to a “large increase in the number of youthful delinquents, recruited from what were termed the ‘perishing and dangerous classes’” (Molony 1927:7-8). The charities turned their attention to the failure of the State to provide help. They ran schools and reformatories, saving children from transportation or imprisonment. The Parkhurst Act of 1838 was the first legislative recognition of separate treatment for young offenders, “a separate prison...to be conducted on such lines as should ‘appear most conducive to their reformation and to the repression of crime’” (1927:7-8).

In 1854, the Reformatory Schools Act enabled courts to send young offenders to institutions with powers of detention and control. The same year, Scotland passed the Industrial Schools Act (Scotland) providing for “the needs of destitute and erring children” (Morton 1928:83). It was said that these schools played an important part in reducing the prison population for those aged 14-16. England passed a similar Act in 1857. “For the first time children in trouble began to be seen officially as being the victims of society and their poverty, rather than as the performers of evil deeds” (Murray K 1976:140). The 1887 Prison Act introduced a national, centrally controlled system under the Prison Commission, although some local powers remained including “the decision to promote and maintain special institutions for juveniles” (Garland 1985:10).

The issue of parental rights and responsibilities was to be at the core of juvenile justice thinking, with parental rights uppermost during the 19th and early 20th centuries, their responsibilities coming to greater prominence afterwards, as social reformers understood child development more. In 1840, an Act⁵⁶ gave the High Court the power to give custody to any person willing to take certain children, as “the object of the Act, which was vigorously opposed as an interference with the rights of parents, was to remove children from the influence of vicious parents” (Molony 1927:10). Shaftesbury had opposed compulsory education as “a direct infringement of the right of a parent to bring up his child as he saw fit and could only encourage a dependence on the State” (Pinchbeck & Hewitt 1973:358). The

⁵⁶ Act for the Care and Education of Infants who may be committed for Felony 1840

Youthful Offenders Act 1901 enabled courts to punish parents who “conducted to the commission of the alleged offence by wilful default or by habitually neglecting to exercise due care of him”.

There was a marked difference in attitudes to punishment in the two jurisdictions. In England in the 19th century, there were nearly 300 capital offences, yet Scotland only had 50 (Findlay 2000). In England/Wales, the 1865 Prison Act proposed a regime “non-productive and of a harsh and menial character, designed not to teach particular skills but to enforce discipline, work habits and obedience” (Garland 1985:13).

Sentences, involving hard labour, are comparatively rare in Scotland while in England they form the great majority...the tread-wheel and the crank have both been tried in Scotland and abandoned many years ago as improper instruments of punishment. The Scottish prisoner is therefore engaged entirely in industrial labour (Scottish Office 1895:vii).

The courts had made no distinction between adult and juvenile offenders, children facing trial by jury. The 1879 Summary Jurisdiction Act provided that under 16s could be tried summarily for almost all indictable offences, which reduced the number of juveniles in prison, and their trial process was simplified. At the turn of the 20th century other powers included reformatory and industrial schools; whipping and fining. The Gladstone Report 1895 introduced the concept of reform through training and education in prisons, which eventually led to the creation of borstals.

From the outset, there were three major differences between the two criminal jurisdictions of England/Wales and Scotland. The English justices of the peace were fully part of the legal and social framework, entirely responsible for all summary courts, except in London, whilst the judicial role and standing of their Scottish counterparts was negligible (Skyrme 1979). In Scotland, since 1587 the fiscals exercised their discretion, choosing whether to prosecute or to divert from the courts, and the venue, a summary or higher court. There were no such officials in the English jurisdiction until 1986: where there was discretion, the magistrates chose the trial venue, a higher court to exercise greater powers of punishment when necessary. Finally, attitudes to prisoners were markedly different, Scotland promoting productive work, England menial, hard labour.

3.2 The First Decade of the 20th Century

The 1908 Children Act - saturated with the rising spirit of humanitarianism (Hansard HC 186: 1284).

In 1906 the landslide victory for the Liberal Party heralded a period of significant social welfare reforms designed to reduce poverty, sickness, and criminality, which, during this period applied both to England/Wales, and to Scotland. 'The Times' (31.v.1906) referred to HJ Tennant's⁵⁷ Bill to introduce separate courts for children, a precursor to the government reforms. The Home Secretary noted that regulations keeping children's cases separate from adults in summary courts were being applied in 49 areas and later, that the "working of the Children's Courts in Birmingham have been most satisfactory in reducing the number of children committed to prison" (29.xi.1906).

3.2.1 The Probation of Offenders Act 1907

Special probation officers were appointed to deal with offenders under 16, with a duty to visit, receive reports, and inform the court about the child's behaviour and to "advise, assist, and befriend him, and, when necessary, to endeavour to find him suitable employment". The order was made without a conviction being recorded, "*discharging* the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour ...". This wording caused some confusion and led to a perception by some that the child was being 'let off'.

The Act was often ignored by the magistrates and the Home Office urged them to use probation more widely, particularly for young offenders (Bailey 1987). Many of the key figures in the Children's Department of the Home Office had been teachers or worked in Boys' Clubs and saw the need for education, sport and hobbies. These ideas became the basis for this 1907 Act and the Prevention of Crime Act 1908, which introduced borstal institutions for training, although the early ones had an "austere, discipline-orientated regime developed by its founder, Sir Evelyn Ruggles-Brise" (Hood 1965:xi). Significantly, the governor decided the date of release, not the judge.

⁵⁷ Brother-in-law of the Prime Minister Asquith

3.2.2 The Children Act 1908

In February 1908, Herbert Samuel, Under-Secretary Home Office, introduced his Children Bill, “To consolidate and amend the law relating to the protection of children and young persons, reformatory and industrial schools, and juvenile offenders” (HC.183:1432). It extended to the whole of the UK and of the six parts, most dealt with the protection and welfare of juveniles, only the last dealing with juvenile offenders. There were three main principles: the child offender was to be kept separate from the adult criminal; second, parental responsibility was emphasised, for

He cannot be allowed to neglect the upbringing of his children and having committed the grave offence of throwing on society a child criminal, wash his hands of the consequences and escape scot-free”. (HC.183:1436)

Third, committing children to common gaols stopped, “with a few carefully defined and necessary exceptions”.

The fundamental tenet was that:

the child offender... should receive at the hands of the law a treatment differentiated to suit his special needs... the courts should be the agents of rescue as well as the punishment of children... held in a separate room or at a separate time from the courts which are held for adult cases, and that the public who are not concerned in the cases shall be excluded from admission. (HC.183:1436)

At the Second Reading, the Scottish Lord Advocate Shaw explained that:

The magistrate has placed before him a series of alternatives, the object being to treat these children not by way of punishing them – which is no remedy – but with a view to their reformation.

He too, spoke strongly of parental responsibility and liability, a view much supported in both Houses of Parliament (186:1252-8). A clause required a parent to give security for the good behaviour of a young offender under 16, without a conviction recorded.⁵⁸

Almost everyone agreed that juvenile offenders should be kept separate from adult offenders, and not held in prison. There was concern that Metropolitan Magistrates (lawyers) varied greatly in their sentencing, although few children in London were sent to prison. Birmingham in 1904 sent 166 to prison and after the juvenile court was established, only 20. Newcastle, half the size of Birmingham sent

⁵⁸ S 99(2) and (3)

159 in 1905/6. Both Irish and Scots MPs spoke enthusiastically of the new proposals, the Scottish Gulland “heartily approved of Children’s Courts” noting them in a dozen places already in Scotland and that public opinion was very strongly in favour of them (187: 570).

The part relating to juvenile offenders defined a child as being under 14, and a young person as one aged 14-16, and required designated courts for all young offenders with separate rooms if not separate buildings. It abolished prison for under 14s, otherwise sanctions included fines, birching, probation, industrial & reform schools, and prison in exceptional cases. Parents had to attend court if not unreasonable, and in the case of a child pay the monetary penalty, unless they were found not to have conduced to the commission of the offence by neglecting to exercise due care of the child or young person. They could be ordered to give security for his good behaviour. No young person could be sentenced to penal servitude for any offence, and only to prison if of so unruly a character, or so depraved. The death penalty for those under 17 was replaced with detention ‘at His Majesty’s Pleasure’. Those convicted of attempted murder, manslaughter, or GBH with intent would be detained for the length of sentence, the Secretary of State to determine the place. No one could enter the court except those involved and bona fide newspaper representatives.

The Earl of Crewe, Lord Privy Seal, expressed “deep gratification at the reception... unanimous and harmonious chorus of approval... a universal bill dealing with England, Scotland and Ireland” (HL.195: 235). Paterson (1911:190), later of the Prison Commission, hoped “employers will with confidence prosecute their office-boys...” because of the help the boys would receive. Most of the Act was concerned with protecting children from abuse and neglect, usually by their families, such that “from the first the court was empowered to intervene to rescue the child from the vagaries of working-class socialisation” (Garland 1985:223). This eventually led to cases where children were removed from their own homes for welfare purposes, which many children saw as punishment, a sentence (Morris, Giller, Szwed & Geach 1980). Nonetheless, this Act, with the support of all the political parties, established the principle that delinquent children should be treated differently from adults: the next crucial stage would be its implementation.

3.3 The 1920s, Molony 1927 and Morton 1928

England/Wales - ...neglect and delinquency often go hand in hand.
(Molony 1927:6)

Scotland - The connection between neglect and delinquency is distressingly close. (Morton 1928:95)

The publicity surrounding children's courts, predicated on reform rather than punishment (Elkin 1938:281), was thought responsible for the 40% increase in the number of juveniles charged between 1907 and 1910 in England/Wales, with a similar rise in Scotland (Morton 1928). Ironically, most of the reforms were never implemented in either jurisdiction. Special juvenile courts were not set up, (Mag.1924); many justices were not fit for the work; and some new sanctions were largely ignored⁵⁹ (Molony 1927). During the 1914-18 War and afterwards, it was a period of review concerning juvenile justice, with parallel inquiries, reports and organisations in both jurisdictions, both involving well-informed, active justices.

In England/Wales a small, influential group of the lay magistracy was at the forefront of promoting reform in the early half of the 20th century. Its leaders, largely London based and helped by stipendiary magistrates, in 1921 formed the Magistrates' Association (MA) to educate their own members and to lobby the government with ideas for reform. An early campaign was to remove the distinction between the much criticised reformatory and industrial schools. Over the first half-century, the leaders were distinguished citizens serving on national bodies and would have been obvious candidates for government inquiries, regardless of their magisterial experience. They wrote erudite articles in the 'Magistrate', had regular access to government ministers, and attended conferences around the world on juvenile justice issues.

Applicable to London, the Juvenile Courts (Metropolis) Act 1920 not only required that the appointment of presidents of the London juvenile courts must have regard "to their previous experience and their special qualifications for dealing with cases of juvenile offenders" but, of the justices sitting, one must be a woman, and the court must not be held in the building of the police courts, as summary courts were then called. Scotland followed suit, a Scottish Office Circular (1923) requested:

⁵⁹ Appendix 3.1

a separate rota of magistrates or justices, which should include those who have gained experience of the problems of juvenile delinquency as social workers or teachers, or who are otherwise specially interested in the training of young people.

3.3.1 The Probation Service

Despite the increase in crime during the war, the Home Secretary issued a circular to all justices to encourage the wider use of probation, yet by 1922 out of 1034 summary courts “no less than 215 have taken no steps to appoint a Probation Officer” (MAC 1922:29). The Criminal Justice Act 1925 set up, on a local basis, ‘probation committees’ of justices in England/Wales, with a duty to appoint a probation officer for their area, and specially qualified children’s officers for every juvenile court (Baird Report: 425-438). This gave the magistrates in England/Wales the responsibility and control of the probation service. The MA laid “great stress on the considerable saving to public funds which is likely to follow from the use of probation” (Mag.1923:9), thereby not excluding financial considerations in its sentencing criteria.

The Act did not apply to Scotland, which relied on the Probation of Offenders Act 1907, and the Criminal Justice Administration Act 1914. There was no national body, some areas relying entirely on volunteers for probation officers, and others a mixture of professionals and volunteers. The Morton Committee (1928:74) had favoured a probation service under local probation committees, but was not included in the CAYP (Scotland) Act 1937. This Act made greater demands on the probation service as it included care and protection cases and meant it was disproportionately concerned with juveniles until at least the Morison Report in 1962.

3.3.2 Molony and Morton

In 1925, two committees were appointed, one in England/Wales under Sir Thomas Molony, the other in Scotland under Sheriff Principal George Morton, to inquire into the treatment of young offenders and young people who, owing to bad associations or surroundings, require protection and training; and to report what changes, if any, are desirable in the present law or its administration. (Molony 1927:1)

Both committees had leading magistrates on them. Molony reported in April 1927 and Morton in April 1928 (p.9), the latter observing that “it is significant to find that the two Committees are agreed with reference to a large number of the questions which came before them”.

They both entirely agreed that there was no distinction between neglected and delinquent children, and recommended that industrial and reform schools should be amalgamated into schools 'approved' by the Home Secretary. Whilst Molony acknowledged the importance of preventive measures in reducing juvenile offending, it was Morton which devoted nearly 12% of the report to the dreadful social conditions, with 114, 937 people in Glasgow living more than four to a room (1928:21); and felt "no solution of the problem of delinquency is possible without the removal of these conditions". Reports from both jurisdictions referred to the serious and demoralising effects of juvenile unemployment, bearing in mind the school leaving age then at 14.

Parental responsibility was again emphasised, which included paying their children's fines, but Morton (p.53) wanted to help them, with the court "held in the evenings and at an hour at which the parents can attend". Both wanted a complete separation of juvenile courts from other courts; the use of simple, intelligible language; and ordinary tables and chairs, with only people involved in the proceedings present. The press would not be able to publish anything leading to the identification of any child. The police could only be present if essential and the court would decide if they should wear uniforms.

The Committees were critical of the current personnel in the juvenile courts and wanted people with "a love of young people, sympathy with their interests, and an imaginative insight into their difficulties" (Molony p.25), younger magistrates and a sufficient number of women. However, Molony (26-7) did not accept a direct appointment scheme as in London, as it attached "great importance to local interest and local initiative", still leaving the members of the Petty Sessions to choose from their numbers, whilst Morton (p.43) favoured the Lord Chancellor appointing on advice from local Advisory Committees.

Both Committees recommended that the age of criminal responsibility should be raised to eight years, although only Molony confirmed the common law principle of *doli incapax* and its rebuttal. Scotland had never relied on this and Morton (p.48), remained "satisfied that the courts make every necessary allowance and that no hardship is caused" without it. Aware that most European countries had an upper age limit of 18, Morton only recommended to 17 years because "in all but the most serious cases, the problem of the offender and not the nature of the charge should be the first consideration. To this principle we attach paramount importance..." and did

not want the character of the juvenile court changed (p.49). It recognised the importance of the discretion exercised by the fiscals and their power to issue a caution. It did not want the police to have the power to caution with supervision, but greater co-operation between the police and schools, although there should be no corporal punishment as a result. Molony made no reference to any pre-court diversion.

Molony (p.20) rejected a suggestion from some magistrates for civil rather than criminal procedures, because there were serious cases and any disposal made outside a court would undermine respect for the law, the “gravity should be brought home to the offender”. Morton however, was “attracted by the proposal” of an ‘education authority tribunal’, less formal, with no stigma of a court appearance and whose members could have a “real knowledge of child life”, able to gain information about the character, health, home circumstances, and education. Morton regretted it could not accept the idea, largely because of constitutional problems, but hoped that its own proposals for reform of the juvenile court would “secure the advantages claimed for an education authority tribunal” (p.39). Neither committee had made any reference to the high percentage of guilty pleas, and each wanted anyone under 21 charged with a juvenile to be tried in the juvenile court.

In each jurisdiction the recommendations regarding the new juvenile courts focused on choosing the best qualified magistrates to sit on a panel with sufficient, regular sittings to acquire the necessary experience. In England/Wales this should have been feasible given that magistrates sat in ordinary summary courts as well as dealing with juvenile offenders. They also had the added responsibility of administering and controlling the probation service. In Scotland, the situation was more complicated as there were three different judicial avenues for dealing with juveniles, the sheriff courts, the police or burgh courts and the justice of the peace courts. Morton concluded that sheriffs were not appointed for their skills with dealing with young offenders, and burgh magistrates, the bailies, were elected for their administrative skills on local councils. Neither was as suitable as justices of the peace, who could be specially chosen by the Lord Chancellor on advice from area Advisory Committees. It was not seen as a disadvantage, given the equal lack of expertise shown by the others, that the justice of the peace court was currently the least used forum for juvenile offenders (Morton:42).

3.4 The 1930s -Children and Young Persons Acts 1932/33 and 1937

Every court in dealing with a child or young person who is brought before them, either as needing care or protection or as an offender, shall have regard to the welfare of the child or young person...and for securing that proper provision is made for his education and training. (Section 44 CAYP Act 1933.)

In 1932 the Labour Lord Chancellor, Viscount Sankey, congratulated the MA on the 1932 CAYP Bill, its “offspring” (Mag. 1932:561-3). Ministers had closely consulted the MA, which had made some 23 recommendations (MAC 1932:294) and frequent articles appeared in the ‘Magistrate’. These legislative reforms took place at a time of severe economic depression, high unemployment, and rising crime in general, the proportion of offenders under 16 rising from 267 per 100,000 in 1921 to 354 in 1932. Ramsay MacDonald was the Prime Minister of the National Government, with ministers from all the major political parties, the Home Secretary, Samuel, had introduced the 1908 Act. The CAYP Bill was shared with Scotland, certain minor matters applicable to one jurisdiction or the other, and MPs from both jurisdictions spoke in the debates. Eventually, there were two Consolidated Acts, the 1932 Act for Scotland, further consolidated in 1937 and the 1933 Act for England/Wales, each dealing with offenders and children who were in need of protection and care.

Introducing the Bill, mostly based on the Molony Report, the Conservative Oliver Stanley, Under-Secretary Home Office, explained the philosophy:

the child’s upbringing at home, the discipline he receives in the home circle or the lack of it, the economic conditions under which he lives, the squalor and misery of his life, even the companions with whom he associates in school or out of it may have had much more to do in turning that child into an offender than any spirit of natural evil... the prison, the fine, the whip and all the paraphernalia of the law are useless if they are followed by the immediate return of the offender to the very condition which caused the offence. (HC.261:1168)

Juvenile court magistrates would not be chosen from the ranks of ordinary magistrates, but from a panel of those magistrates who have been selected for their knowledge and interest in work of this kind... it is essential that this is done... and a special chairman to preside (1171).

No age limit was specified, despite one MP speaking of a juvenile case in 1930 where the average age of the magistrates had been over 80 years (HC.SC ABC:

1143). When the Rules were published, the MA “recommended that every panel should have at least one woman on it” (MAC 1933:315). Lady Astor, the Conservative MP, had fought hard, with support from some Scottish MPs, to have such a clause included in the Bill (SC ABC: 1074), but the Rules merely said “...so far as practicable, one woman”. The MA sent out some 11,500 copies of the article “On Selecting Children’s Magistrates,” and other matters relating to the Act (Ann.Rep 1933-1934).

Court procedures were to be “more intelligible, less frightening” (HC. 261:1171) and held in separate buildings altogether, not least because the government wanted

the co-operation and not the hostility of the parent, and we believe we are much more likely to get it if we take them away from the ordinary police court and from the ordinary police court penalties (1172).

Fatally, a clause allowed dispensation in certain circumstances, usually for financial constraint. As the MP Morgan Jones had questioned at the time, “what guarantee is there that some future Home Secretary may not be rather less inclined to look favourably upon a provision of this kind?” (HC SC. ABC 1931-2:1064)

The Act raised the upper age limit of the juvenile court from 16 to 17, against considerable opposition. Stanley mentioned the support of the MA (HC.265: 2220). No one opposed raising the age of criminal responsibility, from seven to eight years. However, the Act said that juveniles co-accused with adults should be tried in the adult court, when both Molony and Morton had advocated the reverse. All offences other than homicide should be dealt with by the juvenile court, with a maximum power of 40 shillings (£2) for indictable offences. Offences that for an adult would qualify for imprisonment could be dealt with by way of an approved school order, or being placed in the care of a ‘fit’ person, with probation added. The lower age for incurring the death penalty was raised from 16 to 18.

The Bill had proposed the abolition of whipping for boys under 14, but this was defeated in the House of Lords (HL 87:740). A duty was placed on local authorities, rather than the Home Office, to provide remand homes for their area; and the police had to notify both the probation service and the local authority when a juvenile offender was referred to court (HC.SC.ABC 1931-2:1202). The difference between industrial and reformatory schools was finally abolished, and replaced by ‘approved schools’. Against the wishes of the MA, the magistrates’ discretion to

choose the length of time was transferred to the school head, the maximum period set at three years. However, an attempt to allow the local authority to alter a ‘fit’ person order was firmly rejected by Stanley, foreshadowing difficulties that were to arise in the 1969 reforms.

We must hold inviolate that it is for the magistrates to decide the case to settle the form of treatment required; that we cannot allow a subsequent body entirely to alter the course of treatment which the magistrates consider is the proper sequel to the offence they have dealt with... (1229)

Parental responsibility was clearly defined, as were their rights, the courts obliged to give parents the opportunity to be heard, challenge remarks made in reports, bring further evidence,⁶⁰ and appeal. The parents of the ‘child’ were to pay the fine, damages or costs, and in the case of a ‘young person’ *may*, unless found not to have conduced to the commission of the offence by neglecting to exercise due care of the child or young person.⁶¹ The court may order parent / guardian to give security for his good behaviour.⁶² A Home Office Circular (1933) stated that “The new Act makes no fundamental change of principle, but it embodies the results of experience”, banning the use of the words “conviction” and “sentence”, replacing them with “finding of guilt” and “order upon such finding”, endorsing the concept of welfare rather than law enforcement. It forbade the publication of anything leading to the identification of the juvenile offender, although the court could lift this restriction if it were in the public interest. The Act was explained in a lengthy article in the ‘Magistrate’, the juvenile courts to “get away from too much legal formality” (Mag. 1933:701).

Scotland and the Act

The CAYP (Scotland) Act 1932 had followed the recommendation of the Morton Report, using the JP courts for the new juvenile courts, with the JPs for the county appointing sufficient for a juvenile court panel.⁶³ At a time of severe financial constraint and requiring the reduction of three types of juvenile courts to the one “least used and least organised” (Cowperthwaite 1988:9) the Act would come into force only when the Secretary of State made an order for that area. These

⁶⁰ Ryle 11 s.47(3) Children and Young Persons Act 1933

⁶¹ Cl.55(1)

⁶² Cl.55(2)

⁶³ Juvenile Courts (Constitution) (Scotland) Rules 1933

administrative changes fell victim to institutional inertia and legal battles over funding.⁶⁴

The legislation was consolidated in the CAYP (Scotland) Act 1937. A Circular in 1938 wrote ‘when’ rather than ‘whether’ it should be implemented, but the Second World War was declared before any further developments (Cowperthwaite 1988:10-11).

Whatever was to happen in either jurisdiction as to the practicalities of the 1930s CAYP Acts during the succeeding years, the framework of the juvenile court was permanently enshrined in s44, the ‘welfare principle’, “a first and guiding principle which enshrines the whole spirit in which the English juvenile courts shall approach their task” (Watson⁶⁵ 1943:24). The Annual Meeting of the MA claimed the difference between the 1908 and the 1933 Acts was because

those who drafted the new Children Act could consult magistrates collectively... and draw up its provisions in the light and with the experience of the magistrates who have to administer it (Mag.1933:713).

⁶⁴ *Boase v Fife County Council 1937 SLT 395*

⁶⁵ John Watson, JP ILJP Chairman

3.5 The 1940s – Criminal Justice and Children Acts 1948 & 1949 and Justices of the Peace Act 1949

We are, however, anxious that these [detention] centres shall be definitely reformatory in their effect, and to that end desire to see special provision made for education and training for those detained therein, followed by a period of skilled supervision on release. (MAC 1948:838)

In England/Wales in 1930, some 11,000 under 16 year olds were found guilty of indictable offences, but by 1938, including those under 17 years, the figure had risen to nearly 28,000 and to 44,000 in 1948.⁶⁶ There was a widely held belief that the courts' leniency had been responsible for rising crime, although the courts had not changed their sentencing practices significantly (Elkin 1938:289): articles in the 'Magistrate' disagreed (Mag.1939: 247⁶⁷). Whipping was very rarely used, but in 1935 figures showed that the Scots used this disposal four times more often than the English, 1.63% of the 14,215 juveniles found guilty in Scotland, 0.39% in England (Cadogan 1938:para.14). By 1948, a similar proportion of juveniles was sent to some form of residential disposal as had been in 1930, but probation had decreased by about 12% and fining increased by four times the 1930 figure (Bailey 1987:316).

If the sentencing practices had not significantly changed since the 1933 Act in England/Wales, the administration had not either. Many articles in the 'Magistrate' referred to the failings; "the scandalous lack of equipment" and "the failure of the justices in many parts of the country to work the machinery for the local administration of probation" (Mag. 1938:25); magistrates sending inappropriate cases to approved schools, epileptics, the nearly blind, and "mental defectives so gross as to be certifiable" (Mag. 1939:210-12); a solicitor justice not knowing his powers nor how to discover them (Mag.1938:69); and clerks inexperienced in dealing with children and adolescents (MAC 1942:597). Elkin (1938:210) reported, "I have rarely come across a head master or mistress who did not deplore the lack of interest taken by the justices" in approved schools. There was much advice to justices on how to change their courts and practices.

⁶⁶ Appendix 3.2

⁶⁷ Mr Dummet, Bow Street Magistrate

By the middle 1930s, “borstal was seen as a panacea for adolescent crime where boys would be taught a trade, educated and taught to develop their sense of responsibility.” Paterson, the Prison Commissioner responsible, had changed the nature of the regime,

abolished the staff’s prison uniform, strengthened its educative role, imported men from public schools and universities as housemasters, established open institutions and fired them with a missionary zeal”. (Hood 1965: xi)

In 1938, the MA Council welcomed the Circular, ‘The Resignation of Justices’, in which “justices who feel themselves unable or unfit to attend regularly at the Court” could be placed on the ‘Supplemental List’ and cease active work (MAC 1938:482). This was a necessary option given that in 1933, there were 1,284 aged 70-80 and 130 over 90 years (Elkin 1938:298). Unfortunately, “it quickly became known as the ‘Resurrection Circular’... the somewhat senile hastened to put in appearances on the Bench...” (Wootton 1967:218), an unintended consequence.

In 1936, the Cadogan Committee was appointed to examine the efficacy of corporal punishment, four of the nine members being magistrates. The Report (Cadogan 1938 paras. 13-18), said that in Scotland there was a marked difference between sheriffs who were unanimous in wanting to keep whipping and extend it to under 17s, and the lay judiciary in the juvenile and burgh courts, who did not use it. In England/Wales, whipping was used mainly in country districts or in the smaller towns: in London and in many of the larger towns, the practice had ceased, although “birching still remains dear to the heart of certain justices, probably because it is traditional, it involves little trouble and it is cheap” (Elkin 1938:160). It was certainly not a deterrent with many returning to court within weeks of their punishment (Fry and Russell 1942:14). The MA gave evidence to the Committee, and recommended that all birching by any courts of males under 16 should cease, as should the “infliction of the ‘cat’ on adult offenders” (MAC 1937:458). For the next two decades, there were regular and vociferous requests from members of the MA to keep corporal punishment, against the wishes of the Council. Cadogan recommended the abolition of judicial whipping and suggested “some form of short and sharp punishment which will pull him up and give him the lesson which he needs” (1938 para 31).

Scotland never had the power to order corporal punishment for any offence against discipline in local prisons or in Borstal Institutions, only in relation to penal

servitude in Peterhead Prison (para.6). In England and Wales Prison Boards could still order birching until 1967 and flogging as late as 1955, when 10 men were flogged with the cat-o-nine tails (Morris T. 1989).

In 1938, the Conservative Home Secretary, Sir Samuel Hoare introduced a Criminal Justice Bill abolishing judicial corporal punishment, not to be replaced by any residential detention but by ‘attendance centres’,

some new form of quick, sharp punishment that would not mean a break, or a serious break, in the young offender’s life... quick short punishment, say, of the loss of a half-holiday...to prevent their going to a football match or a cinema. (HL 156:297)

He wanted to strengthen probation, as half the juveniles convicted of indictable offences were given probation. The Bill fell because of the impending War.

After the Second World War, crime, which from 1938 to 1945 increased overall by 70%, was nonetheless seen as part of the general malaise, and not a party political issue: social reconstruction was the pressing need (Morris T. 1989). Following the 1944 Education Act, the new Labour government in 1945 embarked on reforms to create the ‘welfare state’, with National Health, National Insurance, and National Assistance Acts. The magistracy expressed its concern at the unhappy homes, poor health, bad social conditions, indifference of parents, and lack of educational and recreational facilities. This led the Council to campaign for preventive measures such as better facilities for children, and more child guidance clinics (MAC 1942:597). The Council in 1944 considered further reforms of the juvenile court. It rejected detention up to 28 days but accepted education in remand homes, or special camps for up to six months followed by 12 months supervision. It wanted proper training for all juvenile panels and, apart from London, appointment by their local benches from a selected list. The information was sent to the Home Office and the Lord Chancellor’s Department (MAC 1944:663).

In 1948, the new Labour Home Secretary, Chuter Ede, introduced the Criminal Justice Bill, which finally abolished judicial whipping⁶⁸ (this part applied to Scotland too); introduced ‘detention centres’, ‘attendance centres’, and ‘conditional discharges’; and probation only became an order after conviction. The

⁶⁸ S.2 Criminal Justice Act 1948

Conservative Viscount Templewood,⁶⁹ now chairman of the MA, was pleased to see his idea of attendance centres, “an experiment supported by the Magistrates’ Association” (HL 157:41). The Act also abolished flogging with cat-o-nine-tails as a sentence, which Scotland had abandoned in “Mediaeval times” (HC.SC.vol.1:730).

Chuter Ede explained that the detention centres were for those aged 14-21, needing residential training for three or six months, according to age,

a short sharp punishment that will cause the young offender clearly to realise the injudiciousness of attempting to continually flout the law. I want that part of the work to be clearly understood by all concerned... I do not want these places turned into a kind of junior or specialised approved school. (HC.SC 1947-8:971)

This measure was probably based on the experience of military detention centres during the war (Younger 1970): punishment was gaining prominence. As the government minister, Lord Chorley stated, “The primary object of this type of sentence is not, by any means, reformatory” (HL.156: 781). Templewood was alarmed and regarded the proposal

with very grave apprehension. Moreover, my anxiety is shared by the Magistrates’ Association, who have considered this question, and they also take the view that there is a grave risk of these detention centres becoming nothing more than little short-term prisons for the young. (HL 156:297)

Scotland, in its Criminal Justice (Scotland) Act 1949, had certain different powers. The powers of restitution in the 1908 Children Act were removed, as they were “not matters appropriate to the criminal courts” (Kilbrandon 1964 para.30). Attendance centres were not included, although significantly, there was provision for detention centres for the 14-17s. These were never provided, possibly because “the smaller a system is the less it can specialise”,⁷⁰ the expenditure could not have been justified, and

“on the principle of the inappropriateness of including young persons in the penal system. The only such sanction in Scotland for the younger group was detention for a limited period in a Remand Home under the Children and Young Persons Act, which was frequently if not very effectively used”.

These too, were in short supply because “the small numbers involved made it difficult to justify provision in any one place” (Murphy 1992:72). That provisions in

⁶⁹ Formerly Sir Samuel Hoare, MP

⁷⁰ Correspondence February 2009 between Ravenscroft and Niall Campbell, former Under-Secretary, Scottish Office

the Act were never implemented also suggests that, “In the late 1940s ... the Scottish Office as well as the Scottish people seemed less compliant to a London lead...” (p.73), or was it system inertia again? Borstal was seen then as “a course of training to fit the offender, and not a term of punishment to fit the offence” (Mag.1947: 83).

Parallel to these reforms, in England the Curtis Report (1946) and in Scotland the Clyde Report (1946) were both highly critical of social work and the care afforded to children in care. The government acted on the advice⁷¹: local authorities were obliged to further the best interests of the child, for the proper development of its character and abilities. The experience of Bowlby in London and Stone⁷² in Israel working with evacuees and displaced families, along with the problems of cost and the failure of placements, led to the emphasis on prevention and keeping the family together (Hendrick 1994). New ‘children’s departments’ in each local authority “were given wide powers of intervention when children appeared to be at risk and for the promotion of child care in all its preventive and remedial aspects”, any dispute with parents to be settled in the juvenile court as before (McCabe & Treitel 1984:30). They would provide reports on young offenders to the courts and have responsibility for children sent to remand homes, approved schools or to ‘fit persons’. This enabled local authorities to acquire greater knowledge of child development, and in Scotland “provided a motive for reforms for juvenile offenders from experience gained” (Cowperthwaite 1988:8). Much of this ‘Children Code’ was later to be incorporated into the Social Work (Scotland) Act 1968.

In England/Wales the 1948 Criminal Justice Act regularised the position of the probation service, as many magistrates had not been supportive of probation and appointed part-time, poorly paid officers (Skyrme 1991 vol. II). The service not only remained under the control of the magistracy, but one third of the juvenile panel was to constitute the ‘case committee’ to discuss each juvenile case with the probation officer, meeting quarterly. This was the first formal method for magistrates to know the effect of their sentencing. The ‘tandem’ Act⁷³ in Scotland too, was important for the probation service, which came under the control of ad hoc local authority

⁷¹ S.12 Children Act 1948 applied to both Scotland and England/Wales

⁷² Interview Stone 2007

⁷³ Criminal Justice (Scotland) Act 1949

committees. This was “to prove crucial when it came to the question of including probation within the new social work departments” in the 1960s (Murphy 1992:73-4).

The 1949 Justices of the Peace Act was applicable to both jurisdictions, and arose from the findings of the Royal Commission on the Justices of the Peace 1948. The Act introduced an upper age limit of 75 years (in 1947, 28% of all male justices were over 70) and a limit of 65 years for the juvenile court. There was to be one qualification only for justices in either jurisdiction: they must live within 15 miles of the Commission area. By then in England/Wales, the magistrates were dealing with 90% of all criminal cases, but in Scotland only 10%, and juvenile courts had still been established only in Aberdeen and the counties of Renfrew, Fife and Ayr. An important provision affecting England/Wales was the introduction of Magistrates’ Courts Committees (MCC), which gave magistrates the duty to administer the summary courts, with responsibility for staff, buildings and all necessary facilities, and the training of magistrates. These new committees could recommend combining areas: in the 1940s there were 619 juvenile courts, many with not enough work for either clerks or magistrates to gain the necessary experience. There appeared to be little public or political pressure for further change in Scotland.

Fifteen years after the reforming Acts of the 1930s regarding juveniles in trouble, little had changed in the courts practices. In the 1940s, three further pieces of legislation were passed, one concerning offending children, another mostly about the deprived, although the earlier Acts had recognised their overlapping and similar needs; and one about the structures for the appointment and retirement of magistrates. Most changes were applicable to both England/Wales and Scotland, but, regarding court disposals, Scotland did not introduce the punitive attendance and detention centres. The magistrates in England/Wales, unlike in Scotland, were now responsible for everything to do with the management and administration of their courts and the probation service. Would any of these reforms help change the practices of the juvenile courts or affect juvenile crime rates?

3.6 The 1950s, Ingleby, and 1961 1963 Acts

The latter half of the 1950s was a period of rising crime figures alongside a growing realisation of the long-term harm that disruption throughout the war years had inflicted on families in both jurisdictions, with children born during the war having “an exceptionally high crime rate in each year of their childhood and adolescence” (McClintock & Gibson 1961:47, Wilkins 1961). For some, there was a suspicion that support from the State was leading to dependency on the State. In criminal justice, there was the beginning of a polarization between those who felt the loss of strict discipline enforced by corporal punishment, and those who wanted much more support for welfare services to aid the family with whatever social or health problems it might have. As in past decades, the new government, now the Conservatives, sought solutions to intractable problems through more inquiries and then legislation.

3.6.1 The Results of the 1940s Legislative Reforms

The new decade heralded a stormy period for the MA. Templewood, in the Parliamentary debate abolishing whipping in 1948, had mentioned that in the previous year there were only 25 sentences of birching for under 16s in the whole country (HL 157:34). Despite this simple fact, the issue of judicial corporal punishment was to dominate the MA’s business for years. It would seem that a schism between the Council and the rank and file members had been exposed once the issue of whipping had become a matter of national interest following the Parliamentary debate. By late 1950, with membership of the MA rising significantly, and the overall numbers of magistrates falling, the MA could claim to represent about 50% of magistrates. In 1952, Templewood, who had strongly opposed whipping, retired as chairman of the MA. Goddard LCJ had announced he wanted whipping reinstated, and the membership forced a referendum, the result being 70% in favour of its reintroduction (MAC 1953:1085). That never became MA policy. There were regular proposals for a reintroduction of whipping from 1950 to 1958 (MAC 1958:1371) and, ten years after its abolition the Council was more equivocal in its objection. In Scotland there was no such campaign at all.

Contemporaneous to the whipping debate, and not it is argued merely coincidental, was a major reform of the structure and leadership of the MA. In 1953,

the new Chairman, Lord Merthyr, proposed a complete reform of the Council, responding to “the many adverse criticisms levelled at the Association from time to time” (MAC 1953:1095). After several different methods had been examined, by 1956 all members of the Council were elected for a triennium by their branches only, largely based on Commission areas, bench members having been absorbed into branches (MAC 1955:1231). There was provision for six annual co-options. The Council now reflected the magistracy throughout England/Wales, with members from the punitive country benches (Parker, Caswell and Turnbull 1981), rather than just the elite and often highly informed, erudite members in London. There appears to have been no active, comparable organisation for JPs in Scotland.

An article on the new detention centres (DC) in the ‘Magistrate’ commented that “the nature of the discipline to be enforced at these centres is going to displease some who envisaged them as providing “short, sharp punishment”, with the accent on punishment (Mag.1950:37). The first junior DC, Campsfield House, Kidlington, Oxfordshire, opened in 1952, for those aged 14-17, and only if the court considered that none of the other available methods of dealing with him was appropriate. The period was normally for three months, with a minimum of one and maximum of six months, and up to 1/6th remitted for good conduct. They were to occupy the boys “in a manner conducive to health of mind and body”. However, in 1954, Council member Lady Archibald, after her visit to Campsfield House,

“expressed concern because the aim and regime were entirely punitive and there appeared to be no reformatory element...” with “provision for removal to a detention room as a punishment which she considered to be solitary confinement, a practice which had been condemned many years ago.”

Some Council members who had visited agreed with her, others felt “that this new form of hard training was fulfilling a need and was proving successful” (MAC 1954:1128). A report of the newly constituted Council in 1957 found “divided opinion on the general principle of the value of these centres, particularly for those aged 14-17” (MAC 1957:1326), but a year later Council made representations to the Home Secretary wanting more places (MAC 1958:1387).

The Probation (No.2) Rules 1953 made it clear that magistrates as members of case committees, rather than follow up their own cases,

were required under the Rules to exercise general supervision over the work and records of probation officers, including after-care work, and to afford officers help and advice in carrying out their duties, and to review their work or part of it not less often than once every three months. (MAC 1953:1119)

There were examples of the magistracy being most obstructive in the development of the probation service as late as 1958 (MAC 1958:1359).

The 1948 Royal Commission on JPs made 80 recommendations, including a new organisation for magistrates in Scotland (Mag.1951:153). MCCs needed to be reminded of their power to amalgamate juvenile courts to “secure an adequate selection of justices, a good choice of chairman, and a volume of work that will give both justices and their clerks the necessary experience” (Mag.1951:162). Compulsory retirement at 75 years was an unpopular decision for some, as was retirement at 65 from the juvenile panel (MAC 1952:1025).

Improvements to the advisory committees did not appear to make much difference to the “social-class backgrounds from which magistrates came in the years between 1946 and the second half of the 1960s” (Hood 1972:50). Skyrme (1979:48) from the Lord Chancellor’s Office admitted in 1947 that “many justices regarded their office as one of social distinction only...” and were often retired or of independent means, whilst Council member Viscountess Ridley found magistrates on the juvenile panels still not “appointed for any special qualifications for understanding and handling children” (Mag.1951:158). After years of campaigning by the MA, the Home Secretary announced that from 1955, “all juvenile courts should contain at least one man and at least one woman ... except in emergency when a court can be composed of two men or women” (MAC 1954:1128).

Training was part of the new MCCs, but many “argued that all training was profitless...This was the almost unanimous opinion of the professional judges and was shared by successive Lord Chancellors from 1951 to 1964” (Skyrme 1979:95). It would seem it was shared by “many justices who, for one reason or another, do not seek to keep themselves up to date by attending conferences, nor even to gain an elementary knowledge of their duties” (Mag.1952:221). The Lord Chancellor’s Office and the MA designed a postal course, taken by over 3000 justices at their own expense between 1955 and 1965. There were constant demands by the MA for more training. Finally, in 1964 Lord Chancellor Dilhorne appointed a National Advisory Council on the Training of Magistrates (1979:67). A lengthy article with full details

of requirements for appointments to juvenile panels appeared in ‘The Magistrate’ (1964:1), and the first Home Office handbook of its kind, ‘The Sentence of the Court’ was given to all magistrates (p.77).

In Scotland, the Morton Report had recommended that juvenile courts should be based only on JP courts, yet 21 years later only four areas had complied. A high level meeting at the end of 1951, with the new Conservative Scottish ministers, their officials and some of the judiciary, failed to agree a solution. The sheriff courts in Lanarkshire, including Glasgow, wished to be relieved of their task but the county councils were fearful of added expenditure and the burgh magistrates, who were the local politicians in Glasgow, would not relinquish their role in the juvenile courts “outfacing the possibility that the alternative could be an improvement. Heads bloodied, Central Government retreated to consider the next move” (Cowperthwaite 1988:12).

Cowperthwaite (1988: 12-14) argued that the ensuing stalemate was largely a result of three factors; the Morton recommendation to use the JP courts; a less progressive attitude to juvenile offending in the 1950s; and the unacceptability of English solutions to Scottish problems, as they were perceived to be. Lord Advocate Cooper, in 1939, had said, “Scotland will never be reconciled to the alien institution of the J.P. for the native institution of the Magistrate and the Sheriff.” In January 1952, the Secretary of State James Stuart, respecting the independence of the judiciary, announced there would be no more 1932 Act juvenile courts.

In England/Wales in 1954, the Labour politician, Lord Pakenham⁷⁴, undertook an ‘Inquiry into the Causes of Crime’ and sought the views of the MA (MAC 1954:1145). Senior members responded:

We think criminality is the result of environment rather than heredity... physical or mental inferiority, emotional instability by far the most important... it may be the predominant reason for much anti-social conduct (para 9-10)...most offenders come from broken homes by death, divorce, separation, service abroad and extra-marital relations...disharmony and constant friction and disagreement... many aggressive and anti-social attitudes are forms of compensation for lack of affection in childhood... a very important factor indeed (MAC 1954:1145-para 13).

⁷⁴ Later Earl of Longford

They were concerned at the lack of parental responsibility, which they attributed to those parents considering “that the school and the State have taken over the welfare of their children” (para 16.). Some Association members shared that view of the Welfare State too (para 28). But, they

“always wholeheartedly supported the present emphasis on the reformatory element in punishment and treatment... We recognise however that the primary function of the court must always be the protection of society” (para 36). They emphasised the “importance of help given to the family when difficulties arise, by probation officers, Family Service Units and the like” (MAC 1954 June para 38.).

There was no mention of any specific forms of deterrence such as whipping or detention centres, the thrust of the Memorandum being entirely one of support and guidance.

3.6.2 Ingleby

The law bids us consider the ‘welfare’ of the child; instinct may suggest punishment. These different aspects may or may not result in the same decision in court.⁷⁵ (Cavenagh 1959:9)

In 1956, the Conservative Home Secretary G. Lloyd George appointed Viscount Ingleby, a former Conservative MP and barrister, and fourteen members, none was a social worker but eight were magistrates, to inquire into all aspects of the juvenile courts, both civil and criminal, in England/Wales only. With crime rising considerably, the under 14 offenders in 1958 had increased by 27% on 1955, the 14-17 group by 47% on 1954, the Committee considered that “current methods were not working and would review the whole approach” (Ingleby 1960 para.6). The MA was delighted, having sent a delegation of senior Council members to meet the Home Secretary to consider just such an inquiry in 1955, even wanting a ministry of Juvenile Welfare (MAC 1955:1213 and 1232).

The Ingleby Report (1960 paras. 7-8) proposed

...not only that children are not neglected but that they get the best upbringing possible... It is often the parents as much as the child who need to alter their ways, and it is therefore with family problems that any preventive measures will be largely concerned.

Thus, the main focus was to identify the needs of families at risk and provide better, more comprehensive welfare services to deal with social breakdown,

⁷⁵ T. Hamilton-Baynes, JP Chairman Juvenile Courts Committee and MA Council

recognising the need for much closer co-operation between the agencies, with their different professional backgrounds, specialisms, and rivalry. “We regard such positive measures for prevention and for the building up of community services as the first and main line of defence” (para.14) and only when they failed, should legal sanctions be invoked.

However, Ingleby spoke of the need for the courts to protect the public and noted that the Commissioner of the Metropolitan Police had said cautioning was used much less since the 1933 Act. This was with the approval of magistrates and probation officers, as the

intention of Parliament... was to provide in the juvenile court system a means of dealing with young offenders in the interests of their own welfare and in a way that would prevent them from taking to a life of crime. (para. 145-6)

The MA had objected in principle to the creation of police juvenile liaison officers providing supervision, as “an extra judicial body” (MAC 1956:1288). A similar approach was reflected in the provision⁷⁶ forbidding written guilty pleas to be submitted by juvenile offenders, in order to enable courts to assess the understanding of the juvenile in front of them.

Despite recognising the conflicting principles involved, with the court’s need to focus on the offence to establish guilt, through an adversarial system, and on the offender to establish any welfare needs through an inquisitorial system, Ingleby (para. 60) did not alter the juvenile court structure. The “majority of the members of the Ingleby Committee which recommended the retention of juvenile courts were magistrates” (McCabe & Treitel 1984:31). Magistrates were expected to be adequately trained and “best to have adult court experience” (1960: 162). Ingleby rejected any merger of approved schools and residential homes feeling that the former should stay within the Home Office, perhaps mindful of an MA Council member’s comment, “An Approved school ... should be dreaded, even if in fact there are few grounds for such fears” (Henriques, B. 1950:150). Ingleby wanted, as had the MA, to raise the age of criminal responsibility from 8 to 12, having rejected up to age 14 on the basis that the ages 13 and 14 were peak offending times. The minimum age for eligibility for borstal was to be reduced to 15 for those misbehaving in approved schools, and juvenile courts should have the power to sentence directly to

⁷⁶ S.1(1) Magistrates’ Courts Act 1957

borstals. The MA had also wanted to raise the upper age limit to 18; to remove the common law presumption of *doli incapax*, reversing its earlier opinion; and to reduce the minimum age for attendance centres to ten years (Ann Rep. 1958 Appendix III). In a Fabian Pamphlet article, an ILJC chairman proposed separating offenders and non-offenders to appear on different days, and the age of criminal responsibility to be 13. The danger from the stigma of courts was highlighted, and greater emphasis placed on helping the family, as breakdown played an “important part in producing the delinquents (Donnison et al 1962:22-4).

According to Cowperthwaite, (1988:17) in 1956, there was no great concern about juvenile offenders in Scotland, despite the non-implementation of the 1932 juvenile courts. With its police warnings and police juvenile liaison officer schemes, there was an underlying belief that dealing with minor offences in court was disproportionate and possibly harmful, whether the appearance resulted in a penal sentence or an admonition. A corrective, educational approach was preferred to “prosecution, with its connotations of personal responsibility, criminal guilt and punishment” (Cowperthwaite 1988: 7). The Children Act 1948, dealing with the protection of children, had covered both England/Wales and Scotland and there had been close co-operation between the countries. However, relating to juvenile delinquency, the differences in the criminal law between the two jurisdictions precluded any joint committee, and the Scottish Secretary of State agreed to the advice of the Scottish Office to have a separate inquiry, in December 1960.

3.6.3 The 1960s

Although Ingleby made no changes to the juvenile court itself, it had laid great emphasis on the environmental and psychological factors affecting delinquency. Such views were not those of the Conservative backbenchers, who attributed the rising delinquency to lack of parental discipline, the ending of birching and conscription (Harris & Webb 1987). As a result, few of Ingleby’s proposals were in the 1961 Criminal Justice Act, and those that were mostly increased the likelihood of more punitive responses to juvenile offending.

There were four significant changes affecting juvenile justice, and only one could be seen to reduce the risk of more punishment: detention centre (DC) orders

could now only be made if the court had been notified that an appropriate DC was available to it. For the most serious offences,⁷⁷ the categories of attempted murder, manslaughter and wounding with intent to do grievous bodily harm were deleted, and replaced by “any offence punishable in the case of an adult with imprisonment of 14 years or more”. At the time, just three more offences were added to the list, rape, robbery and firearms offences, but in later years this less specific criterion was to have a profound effect on the number of juveniles being held for lengthy periods in custody. The minimum age for an attendance centre order was reduced to ten years, the normal period being for 12 hours. The fourth change concerned borstal training. As prison was no longer an option for under 21s, the whole

concept of borstal training, which has ceased to be regarded primarily as a special rehabilitative measure... must now be considered as a general purpose sentence fulfilling deterrent as well as reformatory purposes... (Hall Williams, 1965:273-280).

For under 17s, the court had to find “that no other method of dealing with him is appropriate”,⁷⁸ but it was no longer necessary to consider character, previous conduct and the nature of the offence to ascertain whether borstal training would be “expedient for his reformation and the prevention of crime”.⁷⁹ As Parker, LCJ stated, “borstal training nowadays ranges from schooling to near imprisonment and the courts may indicate the kind of treatment they consider defendants should receive” (*Angell 1964 CLR 553*). Additionally, the Act lowered the qualifying age to 15. Magistrates still had to commit juveniles to the Quarter Sessions for consideration for borstal, except for the transfer of those in approved schools on application from the manager. The minimum period was reduced from nine months to six, and the maximum from three years to two.

In the 1963 CAYP Act no changes were made to the juvenile court structure but juvenile panels were yet again encouraged to amalgamate to provide sufficient experience, and panels were warned to resist “the temptation to put everybody on the juvenile court panel who is thought worthy of the honour, or who has time to spare” (Mag. 1964:2). After 30 years, despite a successful amendment to raise it to twelve in the Lords, the age of criminal responsibility was only raised from eight to ten.

⁷⁷ S.53(2) Children and Young Persons Act 1933

⁷⁸ S.1(2) Criminal Justice Act 1961

⁷⁹ S.20 Criminal Justice Act 1948

Even at that low age compared to other countries, Brooke, the Home Secretary “knew there was concern among some magistrates and probation officers as to whether this was wholly in the child's best interest or in the interest of society” (Mag.1963: 171). The Council of the MA had overruled the unanimous decision of the JCC, all juvenile panel members, to raise it to twelve years (Mag. 1963:42).

The Act removed the discretion of magistrates to choose the approved school, which the MA had wanted to keep. The Act stated that for appeals from juvenile courts at Quarter Session, the Recorder would have one man and one woman from the juvenile panel, although when earlier “discussed at some length” by the newly constituted Council, “no resolution was proposed by any member” (MAC 1962:1581). Earlier Councils had fought hard for such equal treatment.

The MA had wanted probation to be replaced by a supervision order for under 14s, a measure that it bitterly opposed later in the 1969 CAYP Act. The 1963 Act acknowledged the failure for 50 years to provide separate juvenile court premises, whether from lack of commitment or financial constraint, and made provision that juvenile courts could be held once again in adult courthouses, one hour before or after any adult court sitting. 35 years earlier, Morton (1928:51) in Scotland had strongly deprecated such a practice, not least because, “If they meet and wait with adult offenders, they are more likely to see themselves as criminals” (Parsloe 1978:140).

However, if most of these changes were minor or retrogressive, Clause 1 of the Act could have had a profound impact upon juvenile justice, and was “rightfully claimed to be one of the most progressive and imaginative pieces of legislation concerning children in this country” (NCCL⁸⁰ 1971:2-3). It placed a duty on every local authority to provide advice, guidance and assistance, even cash, to “promote the welfare of children” by diminishing the need to receive them into care or to take them before the juvenile court; and the police were obliged to consult with the local authorities before prosecuting anyone under twelve.⁸¹ As Alice Bacon had said, “it is not just the nature of the charge made in court; it is the appearance in court which can do so much damage to a young child” (Hansard HC 672:1288). The politicians had not yet abandoned penal welfarism (Garland 2001) but the MA was wary of

⁸⁰ Renamed Liberty

⁸¹ Home Office Circular 20/1964

local authorities introducing diversionary schemes, which might lack the legal safeguards of a “juvenile court sitting in a civil capacity” (JCC 1963:86).

In 1959 the Morison Committee (1962: 88) was set up to “Inquire into and make recommendations on all aspects of the probation service in England and Wales and Scotland”. It considered “Scotland has not developed as it should have done, because it has been regarded as a relatively minor local authority service” and preferred the method of administration in England/Wales, by the magistrates, because it was “efficient, and has been of prime importance in the growth of the probation system”. But, with the McBoyle Committee (Report 1963) and Kilbrandon (Report 1964) committee still sitting, probation remained part of the local authority, and became part of the later re-organisation of social work. Probation in England/Wales remained “a specialist service to the courts, administered largely by the justices of the peace” (Murphy 1992:78-9). It was recommended in both jurisdictions that probation officers required professional training and that their reports to the courts would be known as ‘social enquiry reports’.

The reforms of the 1950s and early 1960s were against a backdrop of rising crime and a debate about corporal punishment that was not confined to the magistracy. The Conservative Home Secretary Butler (1971:110) complained of “the birching and flogging at the Home Office, which haunted me almost every week of my time at the Home Office”. He was under strong pressure by the Tory grass-roots to reintroduce it, as the “Tories [were] in no mood to minimise the moral seriousness of juvenile crime” (Bottoms 1974:324). But, in explaining the 1963 Act, his successor, Henry Brooke, recognised that

“parents’ inadequacy and family breakdown often gave rise in the children not only to suffering and maladjustment but to delinquency” and “every local authority [was] to offer material assistance and the experienced help of social case-workers to families.” (Mag. 1963:171)

Conversely, the new Lord Chancellor, Dilhorne claimed “excessive leniency can be the greatest encouragement to the young offender to embark on a career of crime while a short sentence may deter him from doing so” (Mag.1964:102). Borstals were no longer restricted to those in need of training and DC places were in great demand in England/Wales: neither was available in Scotland for those under 16.

An attempt, by the Streatfield Committee (Streatfield Report 1961) to reform the structure of the criminal courts largely failed as it succumbed to the power of “traditional professional values and local loyalties” (Bottoms & Stevenson 1992:15).

This could be seen as a warning to any government considering radical reform of the judicial and legal systems. In 1963, the new Home Secretary, Brooke “set up an Advisory Committee on Juvenile Delinquency whose members included a pop singer” (Windlesham 1993:92).

3.7 Conclusion

The history of juvenile justice in the first half of the 20th century reveals a number of factors which suggest that by the early 1960s, despite the ‘tandem principle’, parallel legislation and official reports throughout, the situation in England/Wales and Scotland was significantly different. In addition, the spirit of the law, if not the legislation itself, had certainly not been followed in either jurisdiction. Despite the hopes of the 1908 Parliament, crime rates steadily rose; more juveniles appeared in courts designed for adults; and more punitive sanctions were added, albeit whipping was abolished 40 years later. However, s.1 of the 1963 Children and Young Persons Act offered great hope for the welfare protagonists. Encouragement of parental responsibility was seen as a key factor in both jurisdictions, initially through co-operation but by punitive means such as fines when that failed. But the Scots had favoured co-operation with parents, and wanted evening courts to make it easier for them to attend.

Special juvenile courts, as demanded under the 1930s Acts, had hardly been set up in either jurisdiction. Scotland used four different types of courts for juveniles while in England/Wales, there were two types, Inner London Juvenile Courts and those in the rest of the country. In Inner London, the Home Secretary chose the panel members; most never sat in adult courts; and their juvenile courts were held in buildings quite separate from the police or courts. In England/Wales through the creation of the MCCs, the justices were responsible for their own courts, and most had chosen not to provide special juvenile courthouses and by 1961 were no longer required to do so. There were magistrates in place throughout the country, appointed to juvenile panels by their colleagues, many without consideration of their ‘special qualifications’ for juvenile work. Many had been part of a highly organised grass-roots campaign to restore corporal punishment, and apart from having more punitive views, were well skilled in lobbying politicians. Scotland had always favoured the central, independent appointment of justices, and it was only the sheriffs in Scotland who had supported whipping.

The Scots justices had no national organisation to campaign on their behalf, and were the least regarded of the judiciary in Scotland. From its inception in 1921, the MA had well informed, mostly progressive minded, influential leaders, who maintained strong links with government ministers. However, with its constitutional

reforms of 1956, the Council membership had changed radically, with new members from all over the country, the small towns and rural areas where whipping had been used most, and access to training the least. The Labour Opposition may have relied on the MA's earlier, more progressive views expressed in the Pakenham Report of 1954, and would feel the MA would support progressive measures for juvenile offenders.

Historically, Scotland had always had an independent prosecuting body, the procurators fiscal, able to act over and above the wishes of the police, to divert juveniles from the courts, and choose the trial venue. It also had police warnings and police juvenile liaison officer schemes. The magistrates in the English summary courts had no such body exercising its discretion to prosecute or not, only the police who caught, charged and prosecuted the suspects. The magistrates decided the venue, a higher court if they thought necessary to exercise greater powers of punishment. The police were cautioning fewer juveniles as a result of the 'welfare' provision of the 1933 Act; provisions in the 1957 Act specifically forbade guilty pleas by post; and the MA had objected to the creation of police juvenile liaison officers providing supervision and social workers diversionary schemes. It would seem that the Scots favoured diversion from the court rather more than the English.

The Scots in the 19th century had shown a much more constructive and reformatory attitude towards prisoners, while the English felt it necessary to inflict harsh and demeaning punishment. In England/Wales the magistrates increasingly used DCs, conceived solely as a punitive sanction, but Scotland had none for juveniles. The only punitive sanction available to the Scots was fining, which had always been related to the means of the offender, and few children had any means. Borstals, not available to under 16s in Scotland, had been seen as a constructive, training and educative sanction, but were beginning to accept juveniles for punishment rather than training, the regime changing considerably.

The Probation Service in England/Wales was under the management and control of the justices, who were responsible for their employment, their offices and their work arrangements. The justices would see any future removal of such officers from their courts as a diminution of their authority. Control of the Probation Service in Scotland lay with the local authorities and never with the courts.

The Ingleby Report led to a few significant changes to juvenile justice in England/Wales but the Scots rejected it as a basis for any further reforms of juvenile

justice. With the age of criminal responsibility remaining at eight years in Scotland, rather than 10 years in England/Wales, and the under 14 year olds not having the added protection of *doli incapax*, Scottish juveniles were in a different position from their English counterparts. An earlier report by Morton in 1928 had regretted rejecting the concept of juvenile justice being dealt with under the Education Department because of its own proposals for a much reformed juvenile court system. This had never materialised, and paved the way for reconsideration of that concept.

Throughout this period, leading up to the reforms of the 1960s, the legislation applying to England/Wales and to Scotland was often parallel, but its practical application was very different. There were inherent differences in other relevant legislation, the management of the probation service and the magistrates' courts, and an underlying philosophy that in England/Wales juvenile offenders should be dealt with in the courts, while the Scots' emphasis was to keep them out. All this was to have a considerable bearing on the subsequent fate of the Social Work (Scotland) Act 1968 and the Children and Young Persons Act 1969.

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CHAPTER 4

KILBRANDON and LONGFORD – THE 1960s

The 1960s were a period of considerable social change, not least because the public was made more aware of social issues through the growth of television journalism. As T. Morris (1987:100) has observed, group violence of the kind that occurred at Millwall in the 1920s was unknown outside the immediate area, but in Clacton-on-Sea at Easter 1964, the ‘Mods and Rockers’ became a front-page story and “police intervention was swift and magisterial justice severe”. After subsequent seaside disturbances, local MPs talked of

a sense of horror and outrage... as if all the conventions and value of life had been completely flouted ... MPs announced they would be calling for a return of corporal punishment for hooliganism (S. Cohen 1987:52 and 133).

There was also “a series of spectacular escapes from prison” (Callaghan 1987:240).

A Labour government was elected in October 1964, after 13 years of Conservative rule, which had ended in a scandal involving the Minister of Defence at the height of the ‘Cold War’ with Russia. The Establishment was rocked. The new Prime Minister, Harold Wilson, wanted to modernise the country, and spoke of the “white-heat of the technological revolution” to wipe out poverty and social inequality. He gathered academic social scientists around him, who had “a profound impact on Labour Party juvenile justice policy in the 1960s” (Pitts 1988:5). This led to a “substantial shift in power away from central government towards local authorities; away from the courts and the legal profession, and towards welfare professionals and experts” (Pitts 1988:6). The government embarked on a massive legislative programme including reform of juvenile justice and the magistracy in England/Wales.

These reforms were passed against a backdrop of ‘folk devils’, “the Mod, the Rocker, the Greaser, the student militant, the drug fiend, the vandal, the soccer hooligan, the hippy, the skinhead” (Cohen 1987:11). The consumer society was in the ascendancy: more people owned more things with “greater opportunities for acquiring them illegally” (Ingleby 1960:11); and more cars and motorbikes, with their implications for road traffic legislation. The young wore different clothes from

their parents' generation, had long hair, and played pop music. Military conscription had ended, which some thought would have dealt with delinquency: boys sent to detention centres were immediately given a military 'short back and sides'.

International matters were an added factor. The expulsion of Kenyan Asians in 1968 led to some 13,000 arriving in January and February, with no homes or jobs, and sometimes little money. Newspapers carried

lurid and exaggerated accounts of how homeless families were drawing lavish assistance from Social Services... Everything conspired to build up an atmosphere of alarm, resentment and panic... Enoch Powell fanned prejudice to fever heat with his speech in April 1968... Dockers marched to Parliament to support his attacks (Callaghan 1987:265).

The Vietnam War led to students all over Europe protesting: in England, the LSE occupied, all the provincial universities occupied. People of a conventional outlook were deeply troubled because it must have felt like 1848 for some people... I can recall going to a meeting of the London Magistrates' Association at the time of the Grosvenor Square demonstrations outside the USA Embassy ... We were all summoned to this meeting to be addressed by a senior officer of Scotland Yard... We were shown a film and briefed on how mounted police were going to be used to nudge the crowd... There was a feeling that you had to hold certain institutions together, and they were very important, and law was one of them.⁸²

In Scotland there were only minor demonstrations against the war, and the universities were not affected. In his Scottish 'History of the Nation', Professor Devine (2000) makes no reference to any social disturbances in the 1960s, but the political scene was changed by the rise of the Scottish Nationalist Party (SNP) in 1962. In the West Lothian By-Election, the SNP came second to Labour and the Conservatives lost their deposit. The SNP put up 15 candidates in the 1964 election, and after winning the Hamilton by-election in 1967, the membership rose to 80,000 (Marwick 1990:166). The Conservatives never regained their majority of votes or seats in Scotland after losing the 1964 general election. Both England/Wales and Scotland were affected by "violence in Northern Ireland, which had entered a new crisis phase in 1968, [which] increasingly overshadowed British life" (1990:14).

There was no universal system of juvenile courts in either Scotland or England/Wales, and criticism of both the systems and their office holders. Following the findings of the Ingleby Report of 1960, and with a widespread belief that crime

⁸² Interview Morris 2006

was “one of the gravest social problems of our time” (Longford 1964:7), the time was ripe for reform. Significantly, “there certainly wasn’t much difference between the Parties and it was still the post-War consensus when the understanding developed about the welfare state”.⁸³ In England/Wales, the Conservative government only incorporated minor aspects of Ingleby in two Acts of Parliament in 1961 and 1963, while in Scotland the criticisms of the Ingleby Report were noted.

⁸³ DER Faulkner CB, Under-Secretary Home Office, co-opted to Treatment of Offenders Committee MA Council 1970-74, interviewed by Ravenscroft, Pimlico, 9.viii.2006

4.1 Kilbrandon

The relationship between politicians and civil servants in Scotland was different from that in England/Wales: the ministerial departments were in Edinburgh, the headquarters of the Scottish Office in Whitehall, and Parliament held in Westminster. The five Scottish Office Ministers inevitably carried a much wider range of responsibilities than their English counterparts, and could not be expected to bear in mind everything (Cowperthwaite 1988⁸⁴). It was not unusual for Scottish Office officials to initiate debate on policy, and that led to rejection of the Ingleby Report by the Conservative Secretary of State, John Maclay. He had been a National Liberal MP, was still president of the National Liberals and his brother had been a Liberal MP. He proposed a new committee:

to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles, and to report. (Kilbrandon 1964 para.1)

An existing statutory committee, Scottish Advisory Council on Child Care (SACCC) was seen as one of “two major, positive progressive influences of the period” (Murphy 1992:114), particularly in relation to children’s officers and social work. It produced critical and constructive reports (SACCC 1961 and 1963) and instigated the McBoyle Report (1963) on dealing with child neglect and abuse. Most significantly, SACCC was chaired for many years by Baroness Elliot, JP, one of the first women Life Peers; long-serving member of the Advisory Council on the Treatment of Offenders (ACTO), visiting every prison in the UK; and national chairman of the Conservative Party 1956-65. She was “an important strand in Scottish Unionist politics and in Alec Douglas-Home’s life” (Thorpe 1996:36), the Prime Minister when the Kilbrandon Report was published in 1964.

Her father was a Gladstonian Liberal; her half-sister was Margot Asquith, wife of the Liberal Prime Minister; while a half-brother, the Liberal MP ‘Jack’ Tennant, had introduced a private Member’s Bill in 1906 for separate courts for children, the fore-runner of the 1908 Act. “She grew up... with strong Liberal ideals...never lost touch with her Liberal roots”; studied under Laski and Beveridge

⁸⁴ Under-Secretary, Scottish Home Department

at the London School of Economics (LSE) and “remained a passionate opponent of the death penalty, and closely involved in prison reform” (Linklater 2004). She was renowned for her political salon in Westminster with its “cross-party friendships” (1996:56) and had “the respect and affection of her political opponents”⁸⁵. Lord Sanderson⁸⁶, a later Conservative Scottish Minister, said he could “well understand her attitude towards juvenile courts and children’s hearings! She was a real individualist and went her own way...” In Scotland she was on the social work and education committees of her county council and in the ‘Lords’ “was incapable of trimming...the despair of the whips” (Linklater 2004).

4.1.1 Kilbrandon and His Committee

The choice of chairman had not been obvious. Officials had “doubts about the appropriateness of a senior judge as chairman” but Ministers’ views prevailed. Before choosing Lord Kilbrandon, the Conservative Maclay had rejected “with regret” the social scientist and Labour Baroness Barbara Wootton, because being a juvenile court chairman in London she would have been too identified with English law (Cowperthwaite 1988:68). Soon afterwards, Wootton (1961:677) criticised her own juvenile court system and, somewhat presciently, proposed health and education responses to juvenile delinquency. Kilbrandon had chaired the Standing Council of Youth Services, and was “elected Dean of the Faculty of Advocates, the highest honour which can be conferred on a member of the Scots bar” (Brand 2004). The Scottish Conservative Lord Balerno, described him as “one of our most eminent and humane Judges and Senators of the College of Justice...” (Hansard HL 291:180). Professor Stone, appointed to the Kilbrandon Committee, said he was “quite remarkable, an extraordinary character...he cared about people. No question about that.... great charm and a very quick mind...”⁸⁷

Kilbrandon, with Cowperthwaite as an adviser to the Committee, chose the members from SACCC and Scottish Advisory Council on the Treatment of Offenders (SACTO) and Baroness Elliot recommended her protégé, the child psychiatrist Stone. Kilbrandon later described his Committee:

⁸⁵ Sir Tam Dalyell, MP interviewed by Ravenscroft by telephone, 11.viii.2008

⁸⁶ Correspondence between Sanderson and Ravenscroft, 3.ix.2008

⁸⁷ Interview Stone 2007

there were two judges of the sheriff court...one a woman... three magistrates experienced in juvenile court work, two of them being women, an expert in probation work, a professor of law, an approved school manager, a clerk to a juvenile court, a very distinguished child psychiatrist, a well-known secondary school headmaster, and a senior county chief constable... This does not look like a bunch of firebrands... (Kilbrandon 1966:114)

Stone explained that he, personally, was “there for a reason”: he had written an influential paper on dealing with the behavioural problems of traumatised children. Kilbrandon relied heavily on him when Committee members expressed punitive responses. Kilbrandon would say, “You’re not listening to what Fred Stone is saying from the point of view of someone who is in child psychiatry. We may all have opinions but he is doing it, it’s his work, so listen”.

The Kilbrandon Committee sat for three years, consulted widely and members visited juvenile courts and residential institutions; police juvenile liaison schemes; and studied systems in other countries. Stone considered Kilbrandon “a magnificent facilitator of a committee... He brought out things from all of us that we didn’t know we had...” But, “some of the ideas which emerged as the Committee’s conclusion... were his. He just pushed the discussion”⁸⁸. Kilbrandon (1968:235) was to write of his “intense pleasure” to have chaired the Committee.

4.1.2 Kilbrandon Report –‘Children and Young Persons Scotland’ 1964

... the question which confronts society (in the shape of the juvenile courts) in every case is the essentially practical one, namely, the child’s need for special measures, since the normal educational process has for whatever reason fallen short or failed to have effect. Our proposals ultimately imply no more than a full and realistic acceptance of that fact and the consequences flowing from it. (Kilbrandon 1964 para. 87)

The Kilbrandon Committee learned “over the entire field” of the “sense of dissatisfaction and unease” (para.16). It saw that the courts had conflicting roles, which could not “fail in practice to create confusions and misconceptions” (para.71), and that “the legal procedures involved ... were incomprehensible to the parties”⁸⁹. As the greatest influence on a child was its home, it considered parental co-operation very important and not readily secured in the adversarial courtroom, particularly

⁸⁸ Interview Stone 2007

⁸⁹ Interview Stone 2007

unnecessary when the facts were disputed in only 5% of cases. Kilbrandon found, “the true distinguishing factor, common to all the children concerned, is their need for special measures of education and training...” (para.15), regardless of whether they had committed offences, were in need of care or protection, were refractory or beyond parental control, or were persistent truants.

Kilbrandon identified, as had Ingleby, the problems arising from the incompatibility of criminal responsibility and punishment with the principle of prevention and the welfare of the child: early intervention could lead to stigma, whilst fear of a disproportionate response to an offence could lead to a lack of a suitable and timely intervention. The Report found it

inconceivable that a court could ever guarantee to have chosen, at the moment of commencement of its sentence, the exact treatment - to be given perhaps over a period of years – appropriate to the individual person before it. (para.54)

The problems were compounded because there was no “formal responsibility on anyone” to inform the juvenile courts of the apparent effectiveness or otherwise of the measure applied (para. 88). Additionally, Kilbrandon considered that two co-accused should be dealt with differently since they had different needs. This might be thought to conflict with the principle of ‘equality before the law’, although Professor Stone did not remember any such discussions about this issue, which later so vexed the magistracy and the Conservatives in England/Wales.

Kilbrandon (1966:118), himself, was highly critical of the concept of the ‘age of criminal responsibility’⁹⁰; it was “emotional immaturity - which is at the bottom of a great deal of crime”. The report (1964 para. 62) observed “It cannot possibly be said that the age so laid down bears, or was ever intended to bear, any relation to the observable phenomena of child life”, and offered no guide to personal responsibility. It recommended that, “any rule of law or statutory provision establishing a minimum age of criminal responsibility should be repealed” (para.139).

The issue of parental responsibility, rather than their rights, had featured in most juvenile justice legislation. From the 1908 Children Act, successive Acts made parents liable for their children’s fines. However, Kilbrandon wanted the co-operation of the parents and considered that fining “amounts to a vicarious liability on the parents” (para. 22) and would be counterproductive. Kilbrandon, himself,

⁹⁰ S.55 Children and Young Persons (Scotland) Act 1937 set age at eight years

“was absolutely adamant about this,” saying “the skills needed to help the families in difficulties are totally contradicted if you start issuing fines.” Stone recalled, “There was a lot of quiet dissent, nobody challenged it openly”⁹¹. The report was equally opposed to compulsory restitution, as the child would see it as punishment and the parents’ co-operation could be damaged, especially as a direct relationship between the parent’s and child’s actions could not be assumed (para.32), although voluntary restitution with the agreement of the parents was considered “highly desirable”. However, if the child was subject to compulsory supervision and there was no obvious parental co-operation, the panel could impose a “Finding of Caution”⁹² by parents for the child’s good behaviour” (para. 159).

Kilbrandon was convinced that the way forward was through social education on a persuasive and co-operative basis to help the parents and child understand their “situation and problems, and the means of solution which lie to their hands” (para.35). Punishment was not specifically rejected in the report, but could only “be imposed for its value to the purposes of treatment... not for its own sake” (para.53), so that participation at an attendance centre might have a “useful if limited part to play...to be run by the social education department” rather than the police (para.166).

Measures such as corporal punishment and admonitions were rejected largely because of their incompatibility with securing parental co-operation, as they did not help “parents to face the potential seriousness of the situation” (paras.34-6). Junior DCs had never been set up in Scotland and Kilbrandon felt short-term discipline should be provided under educational rather than penal regimes. The Committee had visited DCs which “were awful...really disgraceful”⁹³. Borstal training was not available for those under 16. Kilbrandon rejected detention in remand homes, as it was “almost always ineffective” as a method of treatment (paras.191-2). Approved schools had catered for both the delinquent and those in need of care or protection, but were seen by the public as “punitive establishments” and should be re-designated as residential schools to avoid the stigma (para.179).

Kilbrandon opted for a completely new structure because:

⁹¹ Interview Stone 2007

⁹² Sum of money lodged as security

⁹³ Interview Stone 2007

We do not believe that a retention of the present system, resting as it does on an attempt to retain the two existing concepts in harness, is susceptible of modification in any way which would seem likely to make any real impact on the problem (para. 80).

It rejected the whole concept of juvenile courts and treatment through the criminal justice system. The key new principles were the separation of treatment from a dispute of the facts; the use of a lay panel to decide on treatment; the needs of the child being the first and primary consideration; the vital role of the family in tackling the children's problems; and the adoption of a preventive and educational approach to the whole issue.

The executive body was to be a Social Education Department, in the Department of Education, "drawing on a long Scottish tradition of the importance of education" (Bottoms 1974:341). The Committee was surprised and delighted that the Directors of Education "liked the idea of the school as the basis..."⁹⁴. Scottish schools were highly regarded throughout Britain, with their strict discipline, corporal punishment, and attendance officers who prosecuted parents of truanting children. The system of private boarding schools prevalent in England was not a common practice in Scotland and schools were rarely residential, even special schools for those with disabilities (Lockyer/Stone 1998). The department would need specialist services, such as psychiatrists and psychologists, along with those normally within education and social services, to provide special measures, advice and guidance to parents, a family service. Many of the agencies for this co-operation had already been identified in the 1963 Act (para. 233).

An entirely new, lay tribunal, the 'juvenile panel' would deal with the treatment of those children thought to be in need of compulsory measures of care, regardless of whether their presenting issue had been as offenders, truants, in need of care or protection or beyond the control of their parents. Kilbrandon had wanted "a way of getting in touch with families in difficulties that [would] somehow be acceptable to the public". The Committee had observed the Danish system of 'family interviews' and was convinced of the need for a system of "volunteers to sit and observe and listen and get professional advice when they need it... so emerged the idea of the panel, as it was called."⁹⁵

⁹⁴ Interview Stone 2007

⁹⁵ Interview Stone 2007

The sheriff would appoint the lay juvenile panel and designate the chairman and two deputy chairmen. Members would be selected because they were “specially qualified either by knowledge or experience to consider the children’s problems”; whenever practicable a woman should sit; members should be able to sit regularly and for a continuous period of three months each year; appointments would be for three years, renewable; with retirement at 65 years. Their appointment was not to be linked to the appointment of justices (paras. 92-95), and there would be a possibility of some full-time, paid, panel chairmen (paras. 225). These criteria were very similar to those for the appointment of the ILJP. Kilbrandon expected people similar to those already sitting in Scots juvenile courts (Stone 1995:xii).

An official would be required to deal with the referral of children up to the age of 16, whether for offence, truancy, care or protection issues, from the police, schools, GPs, health visitors, priests, education welfare officers (EWOs) and others. This independent official, the ‘Reporter to the Panel’, would be legally qualified and have administrative experience relating to child welfare and education. The main role would be to sift cases. Having established that the grounds were accepted, and after close co-operation with the police and social education departments, the Reporter could decide to take no further action, arrange voluntary support, or, where that failed and compulsory care was considered necessary, put the juvenile before the hearing’s panel for it to decide. Only juveniles charged with the most serious offences, - murder, attempted murder, grievous bodily harm (GBH) and rape - would be referred by the Lord Advocate directly to the Sheriff or High Courts.

Kilbrandon (para.77) had feared that a lay bench might favour treatment needs without applying the legal test, leading to “unintended irregularities”. Thus a sheriff in the privacy of chambers would deal with any disputed facts. If proved, the case would be sent back to the panel for a treatment decision based solely on needs. The Reporter would also be the legal adviser to the panel; present the case to the sheriff when necessary; and keep the records (paras. 98-100).

The juvenile panel itself was to meet in simple, modern accommodation, entirely away from criminal courts and the police, possibly in schools after normal closing time, or in libraries, places with plenty of waiting areas (para.226). There should be some evening and Saturday sessions so that both parents could attend, with the possibility of reimbursement for loss of earnings and travel costs. The meeting should be conducted in an “atmosphere of full, free, unhurried discussion”

to “enlist the co-operation of the parents”, and in private (para.109). The new panel was to have continuing oversight of the measures applied. Supervision would be local, under the social education department and not probation officers as they were too closely associated with the criminal courts. All orders and variations could be appealed to the sheriff. The jurisdiction would be up to the age of 16 for new referrals, and to 18 for those already under supervision. Orders would have the force of law, but the whole philosophy of the panel was to assume co-operation by the family, and only where there was a total lack of this, would the child be removed from home.

4.1.3 Receiving the Kilbrandon Report – The Conservative Government

The Kilbrandon Report, published in April 1964, reflected the unanimous decision of the Committee and was described as “incontestably the best argued British policy document in this field in the 1960s” (Bottoms (1974:341). A former Conservative Lord Advocate, Lord Fraser of Carmyllie, wrote 30 years later that it was “remarkable in its time and it still reads as a clear, fresh and enlightened document” (Fraser 1995:ix).

The relevant Scottish Departments were “aware of [its] radical nature”, and its publication in April 1964 was done in close co-operation with them (Cowperthwaite 1988:25). Michael Noble, the Secretary of State, insisted on consultation with interested parties, having distilled the recommendations of the Report into two broad proposals:

- (1) ... where compulsory measures are required, they should be ordered not by a criminal court but by a public authority which would maintain a continuing oversight over the measures concerned and have powers to vary them, as appropriate;
- (2) ...the re-organisation of the services at present concerned with children and the creation of a new ‘social education department’ under the education authority (p.27).

The Scottish Office wrote “a careful summary to form part of the Press Notice announcing the Report’s publication” for fear that media treatment and the public response might “‘kill’ the Report” (p.26). Kilbrandon “anticipated there would be very high resistance, from police and probation officers especially....and

went all over the place talking and writing” to make sure it was received properly⁹⁶. ‘The Scotsman’ (13.iv.1964) reported a speech by Kilbrandon in which he spoke of the failure of the current system to reduce juvenile delinquency, and the ineffectiveness of the “kindly admonition” of the juvenile court. Ten days later, the newspaper wrote of the controversial and radical nature of the report and how it would “bring Scotland into the mainstream of world penal reform” (The Scotsman 23.iv.1964), distinct from England/Wales, perhaps an accolade that would appeal to the rising Scottish Nationalists. ‘The Times’ leader expressed no opinion, but commented

"There would no longer be any distinction between children who have committed an offence and children in need of care or protection" and that "going wholeheartedly for prevention rather than punishment opens a new vein of argument" (The Times 23.iv.1964).

The tactic had worked. The summary of media responses given to Ministers said, “Despite the possibility of a line that the Report was proposing ‘letting young thugs off’, there was a remarkable and complete absence of criticism...” (Cowperthwaite 1988:28).

A week later, at a meeting of the JCC (1964:119) in London, a member made a somewhat defensive reference to Press comments on the Kilbrandon Report as it “might have been taken to reflect upon the work of juvenile courts in England”. It was “suggested... that Lord Kilbrandon be invited to speak on his report at a weekend conference”. Nothing appears to have come of that idea even though in its submission to the Royal Commission on Penal Affairs, the MA referred to a “minority of our members... [who] would be in favour of a system on the lines recommended by the Committee on Children and Young Persons in Scotland (Kilbrandon) Report” (M.A. Ann.Rep. 1964-5 App.V.).

Kilbrandon’s persuasive powers, the later emphasis on the greater power of the new system with its continual oversight of the juveniles, and media support (A. Morris 1974), encouraged the Secretary of State in June, 1964 “to accept the recommendation on juvenile panels” [Hansard HC 764:49]. As Kilbrandon (1968:235) himself remarked, this was “after a period of reflection in high quarters which was to us flatteringly brief, but which to others no doubt seemed to be scandalous and irresponsible precipitation”. A summer general election had been

⁹⁶ Interview Stone 2007

anticipated but was postponed. This, fortuitously, given the general acceptance of the revolutionary proposals, allowed time for a ‘Grand Committee’ in Scotland to air the report, and ascertain the views of Scots MPs

4.1.4 ‘Grand Committee’ Scottish, 23rd July 1964

A ‘Matter Day’ debate was held with only MPs for Scotland, and no voting. 38 MPs attended, two thirds were Labour, including Margaret Herbison, who had once been a Scottish minister and was a member of the Longford Committee in England, yet chose not to speak in this debate. The Labour Thomas Steele, a member of SACTO, said it would “mean the end of the cry ‘Punishment to fit the crime’ ...” and represented “the consensus of experience and informed opinion today”, mentioning the Longford Report, with its “rather similar general conclusions” (HC SC vol.vi 1963-4:57-60). He was wary of using the over-pressured Education Department and wanted to wait for local government reorganisation. Another Labour MP, Neil Carmichael, agreed about not using the Education Department and spoke of the “sane and humanistic” approach, having attended a large meeting addressed by Kilbrandon (vol.vi 1963-4:72). The Conservative Miss Harvie Anderson remarked that it was a “social problem quite outwith party politics” (vol.vi 1963-4:80).

Two magistrates spoke, both Labour, one against the reforms, William Small, as the proposals were “too rapid a change in thinking” (vol.vi 1963-4:95). Lady Tweedsmuir, Under Secretary of State, called it a “fascinating and far-reaching Report”, and although waiting for the results of the widespread consultations accepted that the present system did “not obtain the willing co-operation of the parents”. The common need of delinquents was for education and training (vol.vi 1963-4:66). She recognised the changing role of the probation service, and the necessity “to balance the claims of society... to extend social intervention” with “the very valued right of a family to be protected from undue interference” (vol.vi 1963-4:72). She was the only one to speak of ‘rights’. No one else raised the issues of public protection or deterrence, and only eight members spoke.

The Kilbrandon Report had identified the “need for special measures of education and training” (1964 para.15) so logic demanded that the new social work department would be housed in the education departments of the local authorities. Forrest (1998:214) has argued that the Scottish Grand Committee may have decided

against this proposal because at that time, Scottish schools still had no ‘guidance’ teachers; secondary schools were selective; and there was still corporal punishment, none of which factors was conducive to a “progress toward social selfhood” and the “constant and active goodwill” towards the child as envisaged by the Advisory Council on Education 1947. However, with such minimal criticism of the radical Kilbrandon Report, and acceptance by the Conservative government of its principles, the way was clear for officials in the Scottish Office to devise the new structures and plan a White Paper.

4.1.5 ‘Social Work and the Community’ (Scotland) 1966

A week after the Kilbrandon Report was published the Labour Party delivered its review ‘Crime – A Challenge to Us All’ (Longford Report 1964) under the chairmanship of Lord Longford. It made little reference to the Kilbrandon Report, accepting that some proposals reinforced its own views, and that a working party was urgently needed. It would seem Labour was committed to future legislation. At the general election in October 1964, a Labour government was elected, with a slim overall majority of five.

With Kilbrandon as a government report, albeit Conservative, favourably received in Scotland, with a basic philosophy not dissimilar from ‘Longford’, in February 1965 Scottish Office officials put forward their submissions including the results of the consultations. The higher judiciary, sheriffs and probation officers were opposed but there was the “important support of the chief constables” (Cowperthwaite 1988:30-1), and enough others to proceed with the Kilbrandon reforms.

The new, Labour Secretary of State William Ross and the Minister, Judith Hart, accepted the main proposal of juvenile panels but rejected the organisation being based in the education department. They considered this was too inflexible with its demands for parental responsibility, and likely to thwart “the emphasis within social work on the need to assess all the factors (social, environmental, and individual) which influence a child’s development” (McGhee, Waterhouse and Whyte 1996:57). They suggested that it be based in social work departments. Hart had a particular interest “and background in this field” and appointed and worked closely with her advisers, the social work consultants Richard Titmuss, her old tutor

from the London School of Economics; Megan Browne from Edinburgh University; and Kay Carmichael, from Glasgow University⁹⁷. Stone⁹⁸ claimed this was

the hidden agenda of the Kilbrandon Report... because they realised they could propose detailed planning in such a way as to give a huge boost to their own discipline... There was no such thing as a professional social worker until that Report was accepted.

The Scottish working party deliberated for another year before publishing its White Paper in October 1966, 'Social Work and the Community – Proposals for Reorganising Local Authority Services in Scotland'. It proposed the reorganisation of social work in new, autonomous, local authority social work departments to include childcare, community care, care of the handicapped and the aged, and significantly, Kilbrandon's new juvenile panels.

The Scottish justices had not objected to the reforms, since few had any connection with juvenile courts, and Kilbrandon had expected juvenile justices to become the new panel members, appointed by the local sheriff. However, this was altered by the White Paper, which, stressing the desirability of the community dealing with its own problems, wanted a wider range of people from the local neighbourhood. They were to be appointed by a special body, because Kilbrandon had rejected the juvenile court "based in part on the inappropriateness of the skills of the judiciary for making decisions about the welfare of children" (Asquith 1983:99). Lawyers, used to fiscals exercising their discretion, had no problem with the concept of the 'reporter' and, with the legal safeguard of appeal to the sheriff court, did not resist (Bottoms 1974).

Kilbrandon (1966:120) did not consider that social workers or their department which provided the information should be on the decision-making tribunal: the child might need to be "protected against the social worker". The sheriffs had now accepted the new panels, but wished to keep an autonomous probation service for adults, instead of being absorbed within social work departments. The National Association of Probation Officers (NAPO) objected to this, but, unlike its English counterpart, concentrated on its own position rather than the substantive issue of the replacement of juvenile courts with juvenile panels. Their

⁹⁷ Bruce Millan, PC, former Secretary of State, Scotland interviewed by Ravenscroft on telephone, 16.viii.2008

⁹⁸ Interview Stone 2007

cause had not been helped by a poor report (Morison 1962) on the Scottish Probation Service (1974:342).

The White Paper did not incorporate any of the three measures that had an element of punishment about them, the power to admonish, with or without a supervision order (Kilbrandon 1964 para. 160); to require limited attendance at an ‘attendance centre’ (para. 166); or to make a finding of caution (para. 159). The most contentious part of the White Paper was the size of the local authority unit chosen, counties rather than large burghs. Local authorities wanted to wait until the outcome of the Wheatley Royal Commission on local government reform, three years hence. Kilbrandon continued to promote his reforms, pleased they had “been studied and debated with a wonderful openness of mind” and that professionals with daily responsibility for children “faced the proposals with a disinterested integrity which [did] them infinite credit”. He felt that the criticism of his proposal to use the Education Department was a “subjective reaction against educationalists”, who were seen as reactionary and disciplinarian, whereas he saw teachers as well as social workers as at the front line to spot things going wrong (Kilbrandon 1968:235, 237). He reiterated his belief that the public was not being protected by the current system, and earlier intervention was more likely to be helpful.

4.1.6 Conclusion

...there is no reason whatever to suppose that the substitution of the social for the criminal tribunal will in any sense herald a permissive millennium, or that in practice the treatments ordered by the panels will be more lenient than heretofore. (Kilbrandon 1968:238)

The key principle underlying the Kilbrandon Report, that those under 16 found guilty of offences should have their welfare needs addressed rather than be punished, was never seriously challenged in Scotland, and the practicalities were barely altered up until publication of the Bill. Issues of ‘due process’ were not considered relevant in treatment decisions, and professional judges would deal with disputed matters. There was no united juvenile judiciary to oppose the reforms, and any objections were about the administrative rather than philosophical changes. Kilbrandon himself, a respected senior judge, part of the criminal justice system in Scotland, had the support of the Scottish Office, and as the “policy entrepreneur” (Kingdon 1995:122) promoted the reforms vigorously. The report had been

commissioned and accepted by the Conservative government and then the Labour government. There were eighteen months between publication of the White Paper and the Bill published in March 1968. The only significant change was organisational, which was not announced until after the Queen's Speech proposing the legislation. This was to prove the only stumbling block.

4.2 Longford

I think we had, on reflection, a naïve belief in the automatic effectiveness of all social work... We thought you did not need to prove that somebody is 'ill' in the same way that you need to prove that somebody is guilty of an offence. That it was a social malady capable of being rectified, providing we went about it in a generally benign and positive way. We hadn't addressed the question of civil liberties and all the rest of it.⁹⁹

4.2.1 Lord Longford and his Committee

In December 1963, whilst in Opposition, Harold Wilson asked the Earl of Longford¹⁰⁰,

to advise the Labour Party on the recent increase in recorded crime, the present treatment of offenders, and the new measures, penal or social, required both to assist in the prevention of crime and to improve and modernise our penal practices. (Longford 1964:1)

In 1954, Longford had undertaken an 'Inquiry into the Causes of Crime' to which the MA had given constructive rather than punitive responses (MAC 1954:1145 para.13), and he may have thought it would still hold those more progressive views. David Faulkner¹⁰¹, Callaghan's Private Secretary, said Longford was generally thought to be "very clever, intelligent, sharp", his public persona that of a Labour politician, a peer, "with a personal reputation for eccentricity... a person you could not make part of a team". However, Professor Morris, a member of Longford's Committee, described him as "...a brilliant chairman... a man who mended fences and built bridges, having what is now called 'people' skills"¹⁰².

The members of the Longford Committee included two lawyers, both to become Lord Chancellors, Gardiner and Elwyn Jones; and five members became Ministers, one the social worker Bea Serota. Margaret Herbison was the only Scottish MP and two other MPs, James MacColl and Charles Royle were members of the Council of the MA. The remaining four were a criminologist, a former police officer, a Prison Visitor and a psychiatrist, TCN Gibbens, whose negative experience as a prisoner of war made him "all the more sensitive to penal affairs"¹⁰³.

⁹⁹ Interview Morris 2006

¹⁰⁰ Formerly Lord Pakenham

¹⁰¹ Interview Faulkner 2006

¹⁰² Interview Morris 2006

¹⁰³ Interview Morris 2006

The Committee finished its Report by 28th April 1964, having “made an intensive study of the whole field of crime and penal practice” (p.1). This was one week after the Kilbrandon Report was published, and the only reference to its comparatively similar, radical reforms of juvenile justice were that Longford had taken note of them and did not consider its own findings were affected, although were “in some respects” reinforced by them (p.3). Longford recommended that “both Family Courts and Young People’s Courts should be set up in Scotland as well as in England/Wales” (Longford 1964:27), which rather suggests the Committee had not known of Kilbrandon’s proposals for ‘juvenile panels’. There is no evidence of any meetings with members of the Kilbrandon Committee, and when Margaret Herbison later sat on the Scottish Grand Committee debating Kilbrandon, she made no reference to her having served on the Longford Committee.

In its four months, the Longford Committee had 25 meetings, took written and oral evidence and visited a range of institutions. Its remit was very wide and juvenile justice only a minor part. Indeed, Morris¹⁰⁴ claimed that there was:

A sub plot of Longford... being hatched by Gerald and Elwyn¹⁰⁵. They were sketching out the blueprint for the legislative programme for reform, this cataract of reform; the abolition of capital punishment; a new criminal justice bill; the legalisation of homosexuality; abolition of the Lord Chamberlain’s powers of censorship...

Perhaps this intense activity may explain the lack of overt interest in Kilbrandon.

4.2.2 The Longford Report - ‘Crime – A Challenge to Us All’

Something more is needed for the true protection of the citizen: the prevention of crime by the care of the inadequate and immature, the healing of the sick, the rehabilitation of the offender, the restoration of his self-respect and his training in respect for the rights of others. These are the positive aspects of penal practice and reform. (Longford 1964:6)

This Report, covering four broad areas of criminal justice, was not “a policy statement by the Labour Party, but a report submitted to it” (Brown 1964 Foreword). The overall aim was to “forestall delinquency”, and it proposed reforms of the

¹⁰⁴ Interview Morris 2006

¹⁰⁵ Gerald Gardiner, QC and Elwyn Jones, both later Lord Chancellor

treatment of juveniles, the police and prison services, the courts' sentencing practices, and the law relating to murder.

Regarding juveniles, it proposed a 'family service' to remove from the criminal courts and the penal system all children below the school-leaving age, then 15 but raised to 16 in 1973; and to extend the 'welfare principle' to those under 21 years. The guiding belief for Longford (1964:4) was that whilst "it is an axiom that democracy means the acceptance of responsibilities as well as the claiming of rights" it is also true that "a society which fails in its obligations to many of its citizens must not be surprised if some of them do not keep its rules..." It noted that some half million children lived on National Assistance, and proposed a broad response to "remove or reduce the factors which predispose people to crime" (Longford 1964:12) by better housing, education and health reforms.

The 'family service', echoing Kilbrandon, extended the powers conferred by the Conservative government¹⁰⁶. Local authorities were to provide advice and assistance for the welfare of children, especially those with any kinds of handicap, for these "as well as causing great personal unhappiness, can predispose to anti-social behaviour or delinquency" (Longford 1964:17). Early identification and the closest co-operation between teachers, health visitors, school medical and housing officers, welfare staff and other agencies were important.

If there was no agreement, Longford, like Kilbrandon, said that there must be a judicial body to resolve any dispute and ensure that "individual liberty is protected." This 'family court', would deal with care cases, criminal cases for those aged between 15-18 years, plus family matters of the magistrates' court. Specially selected magistrates would be suitably trained and "the emphasis and atmosphere of the court will... be essentially human: the welfare of the family as a whole will be a primary consideration" (Longford 1964:23), the court conducted under civil proceedings. Children under the school leaving age would only be referred to the court if there was no agreement with the parents as to the treatment proposed by the family service. For those over 13, if there was serious delinquency, the police as well as the family service could refer the case to the court. Removal from home would be through a 'fit person' order if necessary. The family court would have the full range

¹⁰⁶ Cl.1 Children and Young Persons Act 1963

of facilities, including residential. There would be the right to appeal decisions and those aged 14-18 could elect trial by jury on indictable offences.

The report also proposed ‘young people’s courts’, with special panels of magistrates to deal with those over the school-leaving age and under 21, so that the “principle that the welfare of the child or young person should be a primary consideration – should be extended to young people up to 21” (Longford 1964:26). Longford also considered that radical changes were needed in the approved school system, along with a complete reappraisal of residential treatment for young offenders, including DCs.

Unlike Kilbrandon, which spoke of the random nature of an appearance in a juvenile court because of care or criminal proceedings, Longford (1964:21) emphasised the socially divisive nature of the juvenile court:

There are very few children who do not behave badly at times; but the children of parents with ample means rarely appear before juvenile courts. The machinery of the law is reserved mainly for working-class children who, more often than not, are also handicapped by being taught in too big classes in unsatisfactory school buildings with few amenities or opportunities for out-of-school activities.

Suggestions of a class bias in their courts would have sat uneasily alongside the obligations of the magistrates’ judicial oath, “to do right to all manner of persons without fear or favour, affection or ill-will” (Lord Chancellor’s Office, 1974).

On publication, ‘The Times’ (18.vi.1964) made no comments, merely reporting Alice Bacon’s explanation of the new proposals. The ‘Magistrate’ published a lengthy critique just two months before the General Election:

The bench is above politics, but politics, needless to say, is not above intervening in the affairs of the bench. In order therefore that you may know what you are voting for or against in the forthcoming general election, here, very briefly summarised, are some of the Labour Study Group’s recommendations...

It mentioned family courts superseding juvenile courts; raising the age of criminal responsibility to the school-leaving age; young people’s courts for offenders aged 16-21; giving written reasons for refusing bail; reform of the system of appointing magistrates, “to give more attention to interest in and aptitude for social and welfare work in candidates for the bench”; and an end to “the widespread flouting by magistrates of the First Offenders Acts”. The article acknowledged that the proposals had “...not yet been accepted as the official policy of the Party” (Mag.1964:120), but by underlining the implied criticism of the magistrates, had put

them on notice: if they voted Labour, this was how their powers would be changed. In the event, however, the Labour Party made no reference to juvenile justice in its election manifesto (Downes and Morgan 1994).

Dr Gray, JP, (Mag. 1965:82) complained that the family court would “deprive the Bench of its most experienced magistrates in matrimonial work”. Another article from a magistrate¹⁰⁷ questioned whether magistrates would

become a rubber stamp to the whims of the reporting social workers, endorsing out of sheer lack of knowledge and skill such reports – sometimes ill-conceived, ill-informed and biased – as are presented? (pp.114-5)

The Longford Report was not solely devoted to juvenile justice, and the other reforms may have attracted more interest from the public. The early magisterial response to the juvenile justice reforms would appear to have been more hostile than favourable, and at this stage more concerned about its own changing powers.

4.2.3 Royal Commission on the Penal System

In 1964 the Conservatives had set up a Royal Commission on the Penal System (RCPS), under the chairmanship of Viscount Amory¹⁰⁸:

to frame a philosophy for criminal justice and to measure the performance of penal proceedings against it. The remit extended to offenders of all ages... the prisons, young offender institutions, approved schools and the Probation Service... (Windlesham 1993:100)

The 15 members included a Scottish judge, whilst three of the four magistrates were members of the MA Council, a fact noted with satisfaction by the ‘Magistrate’ (1964:127). The MA responded with a ‘Memorandum of Evidence’ (MA Appendix V 1965). It wished to retain Juvenile Courts for those under 17 years of age; and “to safeguard the interests of the individual, the judiciary should remain independent of the social and welfare services and the ultimate disposal of a case should rest with juvenile court magistrates” (para.19). It did not approve of non-judicial tribunals to deal with juvenile offenders but welcomed further development and strengthening of the 1963 Act, including ‘family advice centres’, as magistrates recognised the need for “all possible help from social services, voluntary and statutory, working in this field”. It did not consider it practicable to combine juvenile

¹⁰⁷ RE Hughes, JP

¹⁰⁸ Former Chancellor of the Exchequer

court and domestic proceedings in ‘family courts’, nor see any necessity for ‘youth courts’. It accepted that there were “grounds for criticising the present Juvenile Courts” and suggested “stricter application of the rules for electing juvenile court magistrates from among persons with special qualifications”, who should have special training. It admitted that the Home Secretary should amalgamate juvenile courts since they “will not combine voluntarily”. The MA sent the Memorandum to the press “and received wide notice” (JCC 1965:183).

The MA also printed the minority view (para.19A) on the Council, lost 66 to 11, which supported reforms similar to Kilbrandon and Longford. That this alternative proposal was published may be indicative of the weight of authority of those who were behind it. It included two Labour MPs both on the Longford Committee, one now on the Royal Commission itself, the other ennobled and Deputy Chairman of the MA. Furthermore, Cordelia James was a liberal-minded former teacher, a member of the Seebohm Committee on Social Services, and a great friend of the Commission member Bea Serota¹⁰⁹, with whom she would later serve on the new Advisory Council on the Penal System (ACPS). Events overtook the Royal Commission and after resignations of half the members, the Labour Prime Minister Wilson took the “almost unprecedented decision” to disband it (Windlesham 1993:100-05).

4.2.4 White Paper - ‘The Child, the Family and the Young Offender’

The causes of delinquency are complex... much delinquency – and indeed many other social problems – can be traced back to inadequacy or breakdown in the family. The right place to begin, therefore, is with the family. (HMSO 1965 para.5)

In August 1965, the first White Paper was published, with provisional proposals for consultation and to “seek advice of those who will have to operate any new system” (HMSO 1965 para.1). It included the somewhat altered ideas of the Longford Report. Its two main purposes were still to take children and young persons “as far as possible outside the ambit of the criminal law” and to keep the 16-21 age group for trial and treatment separate from ordinary criminal courts (para. 42). Perhaps anticipating some resistance, just as Kilbrandon had done, it also stated that:

¹⁰⁹ Interview Morris 2006

the determining factor... must be the welfare of the particular child or young person... The object... must be to make him into a useful and law-abiding citizen. There is no intention to deal lightly with young offenders... What is needed is firm discipline and constructive treatment directed to the welfare or rehabilitation of the individual... (para.43).

On top of the family service, it introduced 'family councils', "social workers of the children's service and other persons selected for their understanding and experience of children..." They were to include a man and a woman, to "be conducted in an unhurried manner", and "would in no case meet in a court building" (para.12). They would deal with all offenders and care cases for under 16s. The decisions could be made only with the agreement of the parents, and "formally recorded... and in any event be reviewed from year to year" if not sooner (para.14). Treatment could include supervision by social workers; periods at an attendance centre; in a detention centre; in an approved school once they were absorbed into general residential care; and payment of compensation, although not fines.

Where there was no agreement or "the gravity of the case" was such, a case would be heard by special magistrates' courts, juvenile courts transformed into family courts, to determine the facts, where the "full safeguards of the law are available". If proved, "the case would be referred back to the family council for the discussion of treatment" (paras. 11-13) or, conversely, the family court could make any order available to the juvenile court, except where "long-term residential training was considered to be appropriate, the child or young person would be committed to the care of the local authority" (para.15). This court would also have the power to order to a remand centre those aged 14 and 15, if 'too unruly or depraved'.

The structural proposals were similar to those of Kilbrandon, sharing a philosophy of reform through care and support for juveniles, removing treatment decisions from the criminal court, with the safeguard of judicial proceedings where there was dispute. But, there were three crucial differences. First, there was no independent 'reporter' but a council of social workers to decide on agreed treatment; second, the Scots juvenile panel was quite separate from the providers of services, whereas this White Paper proposed that the family council would include "social workers of the children's service" (para.12), thus removing that element of independence and, as Kilbrandon (1966:120) had observed, put justice at risk, for the child might need to be "protected against the social worker". Thirdly, this council

had the power to order punitive measures, attendance and detention centre orders, as would the family court, which could order fines as well.

The MA held a special meeting and later at the AGM, debated retaining juvenile courts (Mag. 1965:169-175). The chairman of the JCC, Mrs MacAdam, was unequivocal in her view:

the judicial function of magistrates in properly constituted courts must be maintained for all young offenders, whose liberty should have adequate legal protection. The agreement of weak and irresponsible parents was not a sufficient safeguard...The sooner young offenders realised that the law would catch up with them in a court, the better.

One former chairman of the JCC wanted the facts established in the juvenile court and the treatment decision by the family council while Cordelia James, a future chairman of the JCC, opposed the resolution:

Children under ten could already be sent to schools and away from home by administrative decision in a great number of ways. The liberty of the subject had been pressed into service as a bogeyman. The family should be brought more into the picture, even though all parents were not perfect. The judicial power would still be there to deal with difficult or contested cases.

However, the resolution was carried by a resounding 269 votes to 38.

A deputation took a memorandum (MA 65/197) of the Association's views to the Minister, Alice Bacon, but was "given little opportunity to discuss the proposals" (Exec. 1965:3439). "Juvenile Courts should be retained and that there should be no power by a non-judicial body to intervene until there had been proof in a court of any allegations concerning a young person under 17." Once again, a memorandum was sent to the press and the 'Magistrate' (MAC 1965:1795). It did not agree with raising the age of criminal responsibility to 14, let alone 16; and rejected family councils because they "would be able to overbear many inadequate parents who cannot state their case, and who need an advocate and the judicial process to safeguard the weak and stupid" (Mag. 1965 Dec). It considered that "probation officers who are officers of the court" should supervise those over 14. Significantly, the Probation Committee, composed entirely of magistrates, employed and controlled probation officers.

Lord Royle was re-elected Deputy Chairman of the MA, despite saying he would vote in Parliament in favour of the reforms; and the 'Magistrate' (1965:161) published an article describing the Swedish system, similar to that being proposed. But, another three articles were critical of the philosophy of the White Paper because

it “studiously avoids words like ‘finding of guilt’, ‘justice’, ‘right and wrong’, ‘punishment’” (Mag.1965:162). There was a fear that the family councils “would become a closed shop” and it would “need more courage than most parents possess to resist Auntie’s suggestion for residential treatment” (Mag.1965:165). This paternalistic view of parents was later echoed by Cavenagh (1967:275), a Birmingham Juvenile Court chairman, in her book on juvenile courts:

The type of parent commonly seen in the juvenile court, muddled, inadequate, beaten, pathetic or truculent would not be capable of becoming involved in discussion of the type envisaged”

Wootton (1961:226), a social scientist, and significantly, a Labour peer and ILJP chairman, rejected the White Paper because she wanted informal proceedings, but was emphatic that if the system of establishing guilt and delivering punishment were to remain:

a case can be made for the present procedure. For to retain the basic pattern of criminal jurisdiction, but at the same time to jettison the requirement of proof beyond reasonable doubt and to deprive the accused of his present rights to self-defence, would be a most dangerous compromise...That is why one must view with concern ...to substitute ‘Family Councils’ for the present Juvenile Courts.

She feared “the strong inducement that it will hold out to the child to admit whatever is alleged against him so as to ‘get it over with’ and not have to go through the whole rigmarole again before another body”. She wanted a complete change of system because she considered social and moral training was “a matter of educational, not penal concern” (Wootton 1967:227).

The Conservatives claimed that the White Paper had “few friends and many enemies... probation officers, many magistrates and many of the children’s officers have condemned this Report most substantially” (HC723 –CFYO Oral Questions). As Bottoms (1974:329) observed, there was a “flood of criticism”, interested parties mostly arguing for judicial assessment, which, coincidentally, would involve their own jobs. The probation service shared the philosophy behind the reforms, but was concerned that the family councils lacked independence, and was also sceptical of parental co-operation. It thought “a well conducted Juvenile Court” should involve the parents and that had the resources been put behind the 1963 Act, “the situation the White Paper seeks to remedy may have been prevented or considerably minimised” (NAPO 1965:83), as did the MA (MAC 1966:1821).

The government withdrew the White Paper: it had a massive legislative programme, major economic difficulties, and a majority of only three in the Commons, with 10% of MPs also magistrates and about 13% in the Lords. The government felt it had to wait until a more propitious time for this reform. The new Home Secretary, Roy Jenkins, was more concerned with reforms of the police and the criminal justice system as a whole than those of juvenile justice that might risk defeat. Alice Bacon “was definitely committed to it herself, and it was probably the political pressures and judgments of Jenkins and Callaghan which caused them to move away”¹¹⁰. Others said the Paper had been poorly argued, a short document (Harris and Webb 1987), unlike its successful counterpart in Scotland, the Kilbrandon Report. The Conservatives had allied themselves with the magistrates, clerks and the police and fought their cause successfully (Parker et al. 1981) The Longford Committee members felt

considerable disappointment, verging on hostility ... We had no idea that it is possible that the restriction of liberty for children and young people could be actually something that needs to be scrutinised for its legal status.¹¹¹

Nor did they invoke Kilbrandon in support, “No. It didn’t apply. Scotland was another place.”

4.2.5 ‘Children in Trouble’ 1968

To me it seems to set the system back 100 years or more... Oliver Twist will have to run away because of the threats of the Council’s Children’s Officer, because there will be no juvenile court to provide scrutiny and protect innocence from official intervention. (Juvenile Panel Chairman Mag.1968:161)

“The decision was taken right at the top in the Home Office in effect to ditch the first White Paper, to bring in some new people and start again”¹¹². Roy Jenkins wanted to keep the government policy “to rely less on judicial proceedings, and ‘punishment’, and to concentrate on the background of the children, and what could be done to improve their prospects in life...”¹¹³ He brought in Derek Morrell from the Department of Education to be head of the Children’s Department, “a distinctive,

¹¹⁰ Interview Faulkner 2006

¹¹¹ Interview Morris 2006

¹¹² Alec Gordon-Brown, Children’s Department Home Office, interviewed by Ravenscroft, Lewes, W. Sussex, 1.viii.2006

¹¹³ Interview Gordon-Brown 2006

imaginative approach, quite unlike the usual civil servant...”¹¹⁴, described as “brilliant and strong-minded” (Callaghan 1987:238); and Joan Cooper, former Children’s Officer for East Sussex, became head of the Children’s Inspectorate. “The two of them were formidable advocates for the ‘69 policies”¹¹⁵, and Morrell “left a deep impression on the children’s world” particularly relating delinquency, deprivation, supportive educational and therapeutic responses and community participation (Fries 2004).

In November 1967, Callaghan became Home Secretary. He was influenced by the experience of his wife, who chaired the South-East London Children’s Committee and saw that “control of delinquency in children is not a separate process from social measures to help and protect them and their families” (Callaghan 1987:232-4). The new White Paper, ‘Children in Trouble’, was published in April 1968. The title “was deliberately all embracing, not trying to distinguish between whether the ‘trouble’ was technically a criminal offence or, if it was because they had no proper family or whatever. The issue was how best to improve matters”¹¹⁶. The ‘Magistrate’ (1968:86) claimed, “On many points it echoes the constructive criticisms which the Association made in common with other bodies”.

To meet the demands of earlier critics, the Paper proposed no changes to “the system of courts for dealing with offenders both over and under 17” until “further consideration” of other current inquiries. It reiterated that “the Government attaches great importance to the further development of the services concerned with the prevention and treatment of juvenile delinquency ...” (HMSO 1968 paras 3-10). The Paper also declared that “an important object of the criminal law is to protect society” (para.7), a comment much welcomed by the magistracy, because “the determining factor must always be the appropriate balance between the protection of the public and the welfare of the child or young person in the particular case” (MA Appendix V 1968).

The Paper wanted better assessment centres, greater variety of residential and non-residential facilities and greater flexibility to “increase the effectiveness” of treatment (HMSO 1968 para.20) to help children grow into responsible, mature

¹¹⁴ Interview Gordon-Brown 2006

¹¹⁵ Correspondence from Sir Geoffrey Otton KCB, CB to Ravenscroft, 22.ii.2006

¹¹⁶ Interview Gordon-Brown 2006

members of society. It acknowledged the “devoted attention” of the magistracy and said its proposals would “preserve for each of the services concerned an important role in co-operation with the others” (para.8). The changes would be implemented over a period of years, as staff would need training and resources, and meant that different places could be at different stages of implementation.

The idea of ‘family councils’ was abandoned in favour of voluntary agreements with the parents, and failing that, determination through the judicial proceeding of the juvenile court. The upper age limit for the court would remain at 17 years, with a division at 14, seen as a “critical phase” in the transition from dependence to responsibility. This meant that children under 14 would only be subject to care proceedings for the commission of any criminal offence, except homicide, thus effectively raising the age of criminal responsibility to 14 years. Even for ‘young persons’, those aged 14-17, prosecution would be restricted, and “possible only on the authority of a summons or warrant issued by a juvenile court magistrate” based on set criteria (HMSO 1968 para.16), and with discretion somewhat similar to that of the Reporter in Scotland.

As in Inner London, magistrates in the new juvenile courts would be appointed directly by the Lord Chancellor, to avoid “invidious choices” or elections conducted in ignorance of the candidates; and panels would be encouraged to amalgamate (para.13). There would be much closer consultation and co-operation between all the agencies, including the magistracy, both at the local and county/borough level “to appreciate different aspects of the problems of delinquency” (para.18), and at regional level through Joint Planning Committees (para.28).

There were three main changes envisaged to the treatment of juvenile offenders. The approved school order would be abolished and compulsory removal from home would be through a care order to the local authority. All supervision of children under 14 would be by the local authority and not the probation service. There would be a completely new form of treatment, “intermediate between supervision in the home and committal to care” (para.21), using “facilities not provided expressly for those who have been before the courts” (para.25). There would be two types, “temporary residence, attendance or participation” totalling not more than a month a year of supervision, and residence at a specified place for a maximum of three months. “The court will fix the actual period... its timing and

nature to be decided by the supervisor” (para.26-7). The ACTO Report 1962 on non residential treatment had “laid the foundations for the[se] recommendations” (PSSC 1977:14).

Importantly, as ‘intermediate treatment’ (IT) developed, borstals, detention centres and attendance centres would be phased out, although their facilities might be incorporated into the new schemes. Juvenile offenders would no longer have the right to jury trial except those accused of grave offences¹¹⁷, when the juvenile court would decide the venue.

The Children’s Department of the Home Office invited a Consultative Group of the JCC (1968: June), led by Cordelia James, to be “consulted informally on detailed points in preparation of the Bill to give effect to the proposals”. Ironically, on the same day as the Scottish Standing Committee on the Social Work (Scotland) Bill 1968 accepted that children under 16 should not be prosecuted, a few miles from Westminster, the JCC held a special meeting to discuss ‘Children in Trouble’. Its new chairman, Cordelia James, “on the reforming side certainly”¹¹⁸ was the sole voice “who wished to raise the age of criminal responsibility to 16 years... children should be dealt with under care, protection and control proceedings” (MAC 1968:1903), just as Kilbrandon had proposed in Scotland.

The JCC was to see its support for many of the proposals over-ruled by the Council. Curiously, its Memorandum, (MA 68/119) without the Council’s heavy amendments, is no longer in its Minute Book, but a report in ‘The Magistrate’ (1968:138) mentioned four major alterations, “keenly debated”. The JCC agreed that the Lord Chancellor should appoint panels, but the Council preferred “the present democratic vote by Benches”. The JCC wanted the age for criminal proceedings raised to twelve, but the Council “after a spirited if confused debate” kept it at ten. The JCC had been divided about the upper age, 17 or 18 years, the Council preferred 17, as in the White Paper. The JCC had agreed to abolish approved school orders but its vice-chairman proposed that courts should recommend to the Home Secretary a new custodial treatment away from home, which the Council agreed. The changes led to “the strong feeling in the Committee that some of the Council members who had voted against proposals in the Memorandum, 68/119, may not have had recent

¹¹⁷ S.53(2) Children and Young Persons Act 1933

¹¹⁸ Interview Faulkner 2006

experience of juvenile court work” (MAC 1968:1918). Importantly, neither body wanted the additional criterion of the offence ground having to be coupled with the need for compulsory care before any action was possible.

The MA appreciated the retention of the juvenile court, and the abandonment of family councils. It accepted “that children should not be brought before the courts unnecessarily...” (MA Appendix V 1968: Paras. 3 and 4), but considered that the restriction to bring children who had offended to court solely under care proceedings was “likely to lead to injustice. It would mean that a boy from a 'good' home could not be brought before the court, whereas a boy from a 'bad' home could be...” (Para.12). A letter in ‘The Times’ (19.ix.1968) signed by 21 ILJP chairmen expressed the same concerns. The MA was to argue this point forcefully through its members and the press when the Bill was subsequently published. The MA also objected strongly to the idea of a single magistrate deciding whether prosecution should proceed or not for the 14-17 group as

the juvenile court magistrate is in effect being asked to join with the police and the children's department, or act as umpire between them, in exercising discretion in what would be a social welfare rather than judicial decision” (Para.19).

This role was very similar to that of the Reporter in Scotland, who would then put the child before a panel to decide on compulsory measures of care, but not take part in those proceedings. Invited to explain the Paper by the JCC (1968:261), Morrell suggested

that since the Association was to all intents and purposes fundamentally opposed to the Government’s proposals there would be little to be gained from a formal discussion of the Association’s official views. There was instead ‘an informal exploratory exchange of ideas’.

The MA complained that 95% of requests for junior detention centre places had been refused in 1966 (JCC 1967:230) and continued to argue for more places, despite their proposed abolition, and to keep approved schools. Throughout the summer and autumn of 1968, there were continual discussions, debates, articles and letters in the ‘Magistrate’, almost all expressing negative views of the White Paper. The editors wrote that it would “drastically curtail” the jurisdiction of the juvenile court, and gave statistics to indicate that about 50,000 children in 1966 were found guilty and in future “will have to be dealt with either informally or as in need of care,

protection or control” (Mag.1968:77). In “A critical Comment on the White Paper” the author¹¹⁹ claimed that delinquent children were “virtually untreatable” because their appearance in court was too late, and that many parents would be unwilling or unable to accept help (Mag.1968:84). Mr Justice Thesiger raised the spectre of political influence on the courts through the local authority (Mag.1968:113), while a children’s officer¹²⁰ claimed “appearance and non-appearance at court will be determined by the most ephemeral whims and prejudices, alike of social workers and police” (Mag.1968:143).

Cordelia James, as chairman of the JCC visited branches to discuss 'Children in Trouble' and many disagreed with the Paper. She “expressed her own personal views and indicated those of the Association, emphasising points of difference with Government” (Mag.1968:155). The civil servant who observed the JCC meetings felt that:

she was pulled in two different directions. She was progressive and could see what the two White Papers were getting at. But, as a magistrate and chair of the Juvenile Courts Committee, she had to reflect, and did genuinely reflect, the views of the magistracy...¹²¹

In October 1968, three months after the successful passing of the Social Work (Scotland) Act 1968, which was largely his brainchild, Kilbrandon spoke at the Annual Luncheon of the MA “as Chairman of the Scottish Law Commission...” (Mag. 1968:171) There is no record of his having referred either to his juvenile justice reforms, although he had campaigned ceaselessly for them in Scotland, or the proposed English/Welsh reforms. Scottish ministers, both Labour and Conservative, have observed at different periods that there was very little interest in any Scottish proposals by the English¹²². Faulkner, later of the Home Office, said, “That doesn’t surprise me at all. Scotland and England really are two separate systems. They certainly were then and as far as I can tell, still are.”¹²³ Morrell’s replacement, Gordon-Brown¹²⁴ echoed this, “I knew that the Scots were pursuing their own line which was normal: why have a separate Scottish set up if they are going to do the same as the English and vice versa?”

¹¹⁹ TA Ratcliff, MA, MB, DPM, DCH

¹²⁰ Kenneth Unwin, Camden Borough

¹²¹ Interview Gordon-Brown 2006

¹²² Interview Millan 2008

¹²³ Interview Faulkner 2006

¹²⁴ Interview Gordon-Brown 2006

Through the ‘Magistrate’ and their branch membership members of the MA were alerted to the proposed legislative changes to their juvenile courts, while their leaders continued to press for changes before a Bill would be published. Nowhere was there any mention of the recent and very radical reforms of the Scottish juvenile justice system. Perhaps the Parliamentary debate would rectify that situation and enlighten the English/Welsh MPs and the juvenile courts.

4.2.6 1967 – Parallel Reforms

The 1968 White Paper mentioned that the government was awaiting the outcome of reports on related issues, Latey on the Age of Majority, the Beeching Royal Commission on Assizes and Quarter Sessions, the Law Commission and the Advisory Council on the Penal System. Even these expected reforms were not the only ones taking place and likely to impinge upon the role of the magistrates. Marwick (1990:10) claimed “The upheavals of the 1960s were at least as great as those of the Second World War”.

In 1964, the Home Office had produced a handbook for magistrates, the “first official publication of its kind” (Mag.1964:77) but Faulkner¹²⁵ remembered it as “another continuing row... magistrates thought their discretion was being curtailed.” Lord Dilhorne finally instigated compulsory training and spoke of the reluctance of successive Lord Chancellors to do so as “lay magistrates are volunteers giving their service to their fellow-citizens at the cost of some sacrifice of time and money”. ‘The Times’ noted that “it is only the preliminary or basic training which is to be in any sense compulsory” (Mag.1964:101). The Justices of the Peace Act 1968 introduced compulsory retirement for justices at 70 years, implemented over five years so as not to denude benches. Choosing who should go “was a most invidious task and only served to exacerbate the feeling of grievance among those who were obliged to go immediately” (Skyrme 1979:143). Beeching’s proposals on reform of the higher courts, with its implications for magistrates, were in the pipeline.

The Criminal Justice Act 1967 included two measures which directly affected the magistracy and others affected them indirectly. A new form of selection included an interview; and ex-officio appointments were abolished. The latter move was fiercely resisted, successfully for a time with the help of the MA, by the

¹²⁵ Interview Faulkner 2006

influential City of London bench which, incidentally, provided the prestigious venue of the Guildhall for the AGMs. More controversially, magistrates had to suspend any prison sentence, with a few exceptions. This loss of their traditional discretion was “frustrating, almost humiliating” (Mag. 1968:29). The Conservatives opposed this measure too and the MA campaigned until amended by a Conservative government. Another measure¹²⁶ removed the magistrates’ power to order corporal punishment in Prison Service establishments: no Home Secretary had used the power since June 1962, and Jenkins refused a magistrate’s decision to birch a prisoner in Maidstone. Another clause introduced licenses for shotguns, which was “unpopular with farming and sporting interests and was strongly opposed by Conservative members” (Windlesham 1993: 111); and probably the squirearchy on the rural benches too.

The 1970 Social Services Act, arising from the Seebohm Committee 1968, created local authority social services departments, a local, generic service to include all the welfare services for the elderly, homeless, handicapped, sick, children and babies. This meant the disbandment of a specific childcare service (Hendrick 1994), and put the Children’s Department of the Home Office in a somewhat anomalous position. As the Home Secretary Callaghan (1987:235) observed:

by combining welfare, discipline and care in the hands of one Ministry we would initiate a reform that would be more beneficial both to the children in trouble and to society. Unfortunately, this objective was threatened by a parallel set of reforms published at almost the same time.

This massive reorganisation of social services took place just as that much greater responsibility was being transferred to social workers from the courts, a problem noticed by the magistrates (MA. Appendix v 1968).

The government introduced social reforms of a more universal, and to some magistrates, very radical nature. The Murder (Death Penalty) Act 1965 might well have been opposed by a sizeable number of magistrates, given there were 14 subsequent attempts to reintroduce capital punishment. The Divorce Law Reform Act 1969 led to 120,000 divorces per year, treble the total number for the preceding four years, although “a justice who was cited as a co-respondent was normally required to resign” (Skyrme 1979:146). This restriction was relaxed only marginally in the mid 1970s. The reform of the laws regarding homosexuality by the Sexual Offences Act 1967 did not apply to the magistracy: the Lord Chancellor felt justices

¹²⁶ S.65

“who indulged in homosexual practice even without infringing the Act should not remain in office” (Skyrme 1979:146). Further, if a magistrate took part

in a peaceful demonstration which did not involve a breach of the law...
it was the Lord Chancellor’s practice to ask him to consider whether
what he was doing was compatible with his position as a magistrate

and to remind him that he had not been obliged to accept the office of justice
(p.141).

The traditional, conservative view of society was further challenged by the loosening of the laws relating to pornography; the abolition of the role of the Lord Chamberlain in censorship; the 1967 Abortion Act; and the Committee on Drug Dependence 1967, which recommended relaxing the laws on cannabis (Newburn 1992). As Morris T. (1987:119) has observed, in six years there were more reforms affecting the criminal justice system than in the rest of the century. Furthermore, ‘The Times’ exposed examples of gross misconduct by senior officers in the Metropolitan Police, “a bombshell that still reverberates...and what was most shocking was the revelation of the systematic, institutionalised and widespread network of corruption” (Reiner 1992:78-9). It is not surprising that traditionalists would favour “a firm response within existing frameworks, rather than resort to a new and untested framework based on social work principles” (Bottoms and Stevenson 1992:36).

4.2.7 Conclusion

Unlike Kilbrandon in Scotland, it took three attempts before a Bill was published. Interested parties, especially the magistrates and lawyers, had demanded judicial oversight of any decisions. Magistrates were contemptuous of parental co-operation and feared coercion by social workers, who, unlike probation officers, were not officers of their courts, nor answerable to them. They did not accept the premise that the needs rather than the deeds of the offending juveniles were the paramount consideration. Additionally, other reforms affected the magistrates’ role and status, and wide-ranging social reforms challenged their traditional views. All this may have led them to feel their world was changing beyond recognition, and to blame the government, Labour, and to mobilise resistance. Through the MA they were in a position to lobby politicians and galvanise the membership throughout the country to influence Parliament, especially the Conservative Opposition. The

government had made concessions, by keeping the juvenile courts, but never invoked the successful Kilbrandon reforms to support its cause.

4.3 Conclusion

One is reminded of the mighty precedent of the Reformation, complete and drastic in Scotland, moderated in England to a broadly conservative re-adjustment of ecclesiastical and dynastic loyalties. (Mack 1968:245)

The two major reports on juvenile justice in the early 1960s, Kilbrandon's 'Children and Young Persons Scotland 1964' and Longford's 'Crime – A Challenge to Us All' were published within a week of each other. Despite their similarities, there was virtually no official communication between the two committees, their officials or even the MPs responsible for passing the resulting legislation. Both were critical of the dual role of the juvenile court with its punishment and welfare dichotomy, and produced solutions based solely on the welfare of the child. Both wanted the establishment of the facts separated from the choice of treatment. Both wanted a 'family service' removing all school-age children from the criminal courts. Where there had been no agreement with the family, both wanted a new, independent tribunal, a 'juvenile panel' in Scotland, a 'family court' in England/Wales to make decisions as to treatment. Yet the metamorphosis of these reports into Parliamentary Bills was remarkably different.

In Scotland, the Conservative government had appointed Kilbrandon, a respected High Court judge, to examine juvenile justice and protection only. He produced a completely new system for children aged up to 16 who had committed an offence or who satisfied another specified ground, and aimed at securing the co-operation of the parents. Kilbrandon, himself, took many opportunities to promote his reforms, and was supported by the Scottish Office and Baroness Elliot, an influential Conservative peer. The newspapers saw the reforms as putting Scotland in the mainstream of international penal reform. These facts, together with the rise of the SNP, may have had some influence on the readiness of the Conservative Secretary of State to accept the broad principles of these revolutionary proposals. Two years were spent formulating the White Paper, and the professional judiciary's criticisms were largely met. Kilbrandon had rejected the principle of 'due process' as irrelevant in the field of the treatment of juveniles, but made sure disputed facts were decided by a professional lawyer, many of whom were critical of lay members making legal decisions. The main criticism was about the administrative base for the new system, not the principles behind it. Kilbrandon continued to promote the

reforms until the publication of the detailed Bill in 1968, by which time the Labour government had been re-elected with a large majority, and was supportive. Although the reforms were aimed at the least advantaged children, there was no reference to any previous class bias in the justice system. Children accused of very serious offences would appear before a sheriff, exceptionally a judge and jury, while those aged 16+ would effectively be treated as adults and face penal custody.

In England, the Labour Party had appointed Longford, a career politician to consider major and wide-ranging reforms of several parts of the criminal justice system. The juvenile section was short, was largely aimed at securing a less class-biased system, and removed school-age children from the criminal courts. It created a family service to help families, and a family court for disputed cases. There appears to have been little attempt to promote its conclusions, and the MA rejected most of its proposals; indeed, a hostile article in 'the 'Magistrate' referring to other reforms in the report linked them to magistrates' choices in the impending general election. The ideas of Longford were later crucially altered in the first White Paper: the 'family service' became a 'family council' of social workers with powers of punishment, though as with Longford, a special family court for disputed facts. There was strong opposition from many quarters; the Law Society, the probation service, and particularly the MA, who feared coercion of 'weak' parents by social services and wanted under 14s to appear in their juvenile courts. All had a vested interest in the existing proceedings. The Labour government, fearful of defeat withdrew the Paper.

A new start was made under the leadership of a charismatic civil servant, who produced another White Paper, 'Children in Trouble', carefully named to include the troublesome as well as the troubled. It wisely spoke of the need to protect society, and kept the juvenile courts, though under 14s found guilty of offences would only be brought to them if they were also in need of care. It included phasing out punitive custody once alternatives were in place, and proposed new methods of appointing juvenile court magistrates. The MA mounted a nationwide campaign to remove the 'care' criterion, claiming it would make their courts look discriminatory.

The Labour government had embarked on a raft of legislative reforms that affected the world of the magistracy, and the 1960s' social revolution, repeatedly evident in the media, challenged their stable world still further. Scotland did not have a single, powerful judicial body to resist Kilbrandon's reforms and had the support

of Conservatives and Labour. Both jurisdictions relied on the rehabilitation of children in trouble by meeting their welfare needs, but the Scots believed in the power of the family, with support and guidance, the English/Welsh magistracy did not.

Kilbrandon had rejected the argument for 'due process' in this field, and equality of outcome, and saw the needs of the individual child as paramount. Only the choice of the administrative base for the juvenile justice reforms was to prove the stumbling block, not issues of 'due process', 'children's rights', punishment, deterrence or public protection. In England/Wales, the magistracy and lawyers, supported by the Conservative Opposition, strongly opposed the perceived inequality between the treatment of two juveniles found guilty of the same offence. The Longford reforms were rejected from the beginning by the magistracy, and neither of the two subsequent White Papers was acceptable to them. Throughout, there had been a remarkable lack of communication between Scotland and England/Wales: neither jurisdiction had invoked the reforms of the other in support. It was left to the Parliamentarians to do so.

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CHAPTER 5

THE SOCIAL WORK (SCOTLAND) BILL 1968 AND THE CHILDREN AND YOUNG PERSONS BILL 1969

The Bills were heavily based on their earlier White Papers, the Scots 'Social Work in the Community' and 'Children in Trouble' for England/Wales, both published in 1968. Whilst the Scottish reforms proposed an entirely new body to deal with juveniles in trouble and those who were troublesome, and the English retained their juvenile courts, nonetheless there were considerable similarities between the two Bills. Each required a body of lay people to take decisions over the future of the juveniles; used a single individual to sieve the cases; expected the 'hearing' or the court to be used as a last resort; required that the child was also in need of compulsory measures of care; involved a change in the use of the existing probation services; required multi-agency co-operation; and had been developed over several years.

However, there were significant differences between the two countries before the start of these proposed reforms. The age range for children accused of offences was 8-17 in Scotland, 10-17 in the English juvenile courts. There was no single juvenile court structure covering Scotland, but a mixture of several, including lay people and sheriffs, and no single organization to represent them to politicians or civil servants. In England, there was essentially one uniform structure and a central, powerful body to represent its interests. The English courts had a full range of punitive measures, including borstal training from 15 years, DCs, attendance centres and fines, whereas Scotland only had fines as a purely punitive measure, apart from borstal training for 16s. Both had approved schools and could order remand in penal custody under 'unruly certificates', an exceptional measure. The English were more used to punishing than the Scots and would see it as a weapon in their armoury against juvenile delinquency.

Both Bills were before the Houses of Parliament for the United Kingdom at Westminster, the Scottish Bill was first introduced in the House of Lords, the English Bill in the House of Commons. After the general election of 1966, the Labour government was returned with a majority of 100. In the Commons, of the

630 members, no fewer than 65 were currently or had been Justices of the Peace (JP) in Scotland or England and Wales, and another 108 were lawyers. In Scotland some were burgh magistrates, elected councillors, but all held judicial office in a lay capacity and are referred to here as magistrates as are the JPs in England and Wales. Of the 68 Scottish MPs, 17 were magistrates, of those, 13 were Labour, four Conservative. Politically, there were nearly twice as many Labour MPs in Scotland as there were Conservatives, 41 to 22, with five Liberals. In the Lords, at least 132 of the 1000 peers were magistrates. Lord Merthyr, a deputy speaker, was the current chairman of the MA; Lord Royle a former Labour MP and deputy-chairman of the MA; several peers had wives who were magistrates, including Cordelia James and Teresa Rothschild, both members of the JCC. There was a large Conservative majority in the House of Lords. At the time, the MA represented some 15,000 magistrates, about 65% of the total number in the country on the active list.

The Social Work (Scotland) Bill 1968 was debated in Parliament from March to July 1968, covering the period of the publication of the English White Paper 'Children in Trouble', but the ensuing Children and Young Persons Bill was debated almost exactly a year later.

5.1 Social Work (Scotland) Bill 1968

The Parliamentary procedure of the United Kingdom was extremely complex and a Bill that was essentially Scottish in nature had added rules to circumnavigate, as did one introduced in the House of Lords, such as this Bill. As the Second Reading was not opposed, the Conservatives when in power had accepted the main proposals, the Bill had been ‘considered in principle’ by a ‘Grand Committee’, of all Scottish MPs in July 1964. For various technical and procedural rules the main scrutiny was now by the ‘Scottish Standing Committee’ of the Commons, only Scottish MPs and reflecting the Party numbers, so that the government kept its majority (Cowperthwaite 1988); and the Second Reading was taken on the Floor of the House of Commons (Hansard SC 1967-8 X:554).

There had been one major change to the White Paper in writing the Bill. The original had proposed that the whole county should be the ideal administrative unit, big enough to provide a career structure to attract the best talent, resources and facilities for the new role of social work departments. However, the Bill proposed the large burghs, not least because some burghs were much larger than counties in population, and many Labour MPs were from the large burghs. It was to prove a highly controversial change.

On the 6th March 1968, Lord Hughes¹²⁷, a magistrate himself, introduced the Bill in the House of Lords. He said that the Bill intended to restrict the prosecution of children for offences and “to establish children’s panels to provide children’s hearings in the case of children requiring compulsory measures of care” (HL 289: 1348). The old juvenile court maximum age limit of under 17 would be lowered to under 16 for the children’s hearing, except for those already subject to supervision, when it would be under 18. The minimum age would remain at eight years. With the new age limit, it meant that those aged 16 were no longer protected by care and control proceedings, and could be liable to be sentenced to borstal, detention centre and young offender institutes. The children’s hearings system would mean that the current, single arena for trial and sentence, the court however constituted, was to be replaced with two separate bodies if the ground were not accepted, a sheriff in chambers for the establishment of the ground, and the hearing for the disposal.

¹²⁷ Joint Parliamentary Under-Secretary of State, Scotland

5.1.1 Lords – Second Reading

Hughes introduced the Second Reading in a debate that started at 8.40 p.m. The lateness of the hour attracted considerable criticism from the Opposition, rather than the principles surrounding the radical concept of the non-prosecution of those under 16, the needs rather than the deeds of the child being the relevant factor. Hughes, in introducing the debate, set the tone by declaring that:

The quality of any society may depend largely on the stature and calibre of the people who shape it, but in the last resort it will be judged by the humanity it shows towards those who are shaped by it. I believe that this Bill offers us the means to extend that humanity in accord with our social conscience... (HL 290:801)

The Marquess of Lothian from the Conservative benches rose “to extend a general welcome to the Bill...any criticisms and suggestions which are offered by my colleagues and me are offered in an entirely constructive spirit” (HL 290:801-2). After paying tribute to Kilbrandon, he supported both the Bill’s fundamental purposes, a single social work department and the abolition of juvenile courts, replaced by “children’s panels composed of lay persons of experience, whose decisions, if disputed, can always be subject to appeal to the sheriff” and welcomed the more “relaxed, informal and sympathetic atmosphere” of the children’s hearings and that they “should operate by parental consent” (HL 290:802).

Only one speaker, the Scottish Ferrier, a Conservative, refused to support the Bill, “so full of defects that it would be much better to start again” (HL 290:834-6), and said “Local authority councillors are not fitted to select such panels” yet that was exactly how the burgh magistrates were appointed. Others who had reservations about the hearings were all on the Conservative benches, except the Labour Wells-Pestell, the only non-Scot to speak, a former probation officer. He could see no reason to abolish juvenile courts (HL 290:825). Baroness Elliot was “anxious to see it become a good and useful Act” but implied that it was hardly necessary to set up a whole new machinery for the small number of delinquents (HL 290:821).

Given that new lay panels were to replace the lay JPs and bailies who dealt with about two thirds of the cases of young offenders, Hughes, a justice himself, acknowledged the “risks in investing a lay body with this wide range of compulsory powers over a child” (HL 290:798), and offered to have “careful selection of people to serve on these panels”. Lothian wanted obligatory training, a fixed period of appointment and proposed an age range 25 – 65, suggestions considered ‘eminently

reasonable' by the government at Committee stage. Lothian also wanted the appointment of "housewives, and people like that who have experience of children and of families from the practical point of view" (HL 290:805).

Many on both sides of the House had praised Kilbrandon, and no one spoke of the need for punitive measures against juvenile delinquency. As a Scottish Bill, the legal issues based on Roman law were not of interest to those English parliamentarians who were lawyers practicing Common Law, and thus took little interest in it. However, magistrates from both jurisdictions had spoken, none speaking of the loss of powers, the need for punishment, or any inherent unfairness in the proposed new system.

5.1.2 Lords - Committee Stage

This Committee was of the whole House of Lords. A Conservative amendment to remove the large burghs from the local authority unit to administer the Act was by far the most contentious and politically problematic issue for Labour given the Conservative inbuilt majority in the Lords. Of the 76 peers who voted in favour of the amendment, ten were magistrates, but a further eight were happy to vote with their Party against the amendment, and none spoke claiming any authority as magistrates. They all voted on Party lines, and the government lost 47:76,

The second contentious issue was that of the absorption of the probation service into social work departments. Two people, who spoke quoting their experience as magistrates, were from each side of the House, and took opposing views. The government won 48:46 with 15 English magistrates equally divided.

The Conservative Balerno wanted the panel to have a responsibility to reduce and prevent delinquency and in that role, saw the importance of better family services and recreational facilities; and his colleague Drumalbyn wanted to enforce the dissociation of the hearings from the criminal courts and police stations, and to restrict the numbers able to attend a hearing. Hughes acknowledged the tension between the press and the public's legitimate interest in the hearings, and the need for an informal atmosphere, and hoped the "Press will be able to do much to form public attitudes towards the hearings" (HL 291:227).

5.1.3 Lords - Third Reading

The most criticised aspect of this radical Bill was the speed with which the Conservatives perceived it had proceeded. Whilst a number of peers were or had been magistrates or bailies and several mentioned that fact in their speeches, none spoke on behalf of them nor that they had been lobbied in any way by any related organisation. Some had mentioned that the Sheriff-Substitute Association had objected to the removal of the probation service as an independent body. With the exception of Ferrier, everyone approved of the principles behind the radical proposals of Kilbrandon, if not all the practicalities, regardless of their judicial experience.

5.1.4 Commons – Second Reading – 6th May 1968

Crossman and Hart¹²⁸ of the Department of Social Services, aware that Scotland was a year ahead of England/Wales with proposals for social services reforms had intended to listen to the debate. However, just as they were going in:

we realized that the Scots would suspect some poisonous English conspiracy so we would have to keep out, come what may. I quote this to show how deep is the separation which already exists between England and Scotland. (Crossman 1977:48)

Hart's absence demonstrates this divide even more: although her brief now was social services, she had been the Under-Secretary Scotland who had proposed that the new juvenile panels in Scotland would come under the social services and not the education department which Kilbrandon had planned.

Ross, the Secretary of State, outlined the three main parts of this unopposed Bill, with the "very considerable change on the lines recommended by the Kilbrandon Committee" with its establishment of children's hearings to replace juvenile courts. He emphasised the need to safeguard the legal rights of the child and that panels should be carefully selected for their "suitability and their ability to help children and not because of their prominence in any existing organisation or body" and properly trained and prepared. Like many later speakers, he reminded the House of the concern about delinquency and that the hearings would not be a soft option (HC 764:58-9).

¹²⁸ Richard Crossman, MP Secretary of State DSS 1968-70 and Judith Hart MP, Minister DSS, England/Wales

Noble, for the Opposition, gave a warm welcome to the Bill, having been the Secretary of State for Scotland who had accepted the recommendations of the Kilbrandon Report. He too, spoke of the “appalling rise in juvenile crime”, but also of “the fragile generation, the teenagers between 14-16 who seem to be the hardest and most difficult to handle”. He spoke of the need to recruit far more and better qualified social workers, comparing the position unfavourably with that in England. The only areas of disagreement were about the timing, the issue of the large burghs and the need for the probation service for adults to remain a separate identity.

Two magistrates next spoke, from each side of the House: both mentioned the rising crime rate, and both generally supported the proposals. Many speakers mentioned the volume of their post-bag, and the main comments against the proposals were the dangers of a lay body. The Conservative Wolridge-Gordon was one of the few to want an element of punishment and Lord Dalkeith wanted to fine the parents, a proposal particularly rejected by Kilbrandon because of the need to seek the co-operation of the parents.

In summing up this debate, remarkably uncontentious on the substantive issues, Millan, the Under-Secretary of State, mentioned the continuing responsibility that the hearing would have over the child, and that if Scotland were ahead of the English in this legislation he hoped to maintain that advantage (HC 764:142).

5.1.5 Commons – Scottish Standing Committee

There were 30 Scottish MPs on the Standing Committee, including three lawyers and nine magistrates, and Margaret Herbison had been a member of the Longford Committee. There was a Labour majority. There was an extremely lengthy debate on the use of large burghs as the administrative base, which the government won 11:8, reversing the decision of the Lords. The second contentious issue was the absorption of the probation service into the social work departments. The Conservative Younger acknowledged that the probation service itself was divided over the issue, but courts needed to “have real confidence that a completely new face which appears before them will carry out the requests of the court” (SC 67-8 X:330). The government won, voting being on Party lines. Confidence in the probation and social services was to be a key issue in the implementation of the English juvenile justice reforms too. Members on both sides of the House had spoken of the shortage of social workers in Scotland.

Clause 31, the heart of the Bill, restricted prosecution of children (8-16) to offences such as murder, culpable homicide, rape or robbery and other crimes considered serious enough to be brought to the attention of the Lord Advocate. The Conservative lawyer Wylie welcomed this restriction. Millan said that there was a problem with road traffic matters, which might require disqualification and the children concerned would have to go before a court. With no official opposition, and few other comments, there was no need for a vote on this crucial clause and thus children under 16 in Scotland would no longer be prosecuted except for special categories.

Clause 32, concerned the issue of children being in need of compulsory measures of care before they could be brought before the hearing, the vital 'second leg'. The Edinburgh Conservative, although English barrister, Hutchison, "was concerned about the child's rights and feared that the informal atmosphere encouraged the child to admit his or her guilt". He wanted experts to "handle them rather than a lot of amateurs" (HC SC 1967-8 X: 379), rather suggesting that he was unaware that two thirds of juvenile cases were already dealt with by lay people with minimal training in the burgh and juvenile courts.

The rights of the child, in relation to the protection thought to be afforded by the judicial approach of the court rather than the informal hearings, were a continuing theme throughout the Committee's deliberations, Conservative MPs largely supporting that contention. But, the Labour Eadie, a former juvenile court chairman, described a juvenile court as, "one most prejudicial to the best interests..." (1967-8 X:462). A vote on a Conservative amendment requiring the child to have the charge put to him and a formal admittance or denial was just defeated, 10:12, Members voting on Party lines, Millan stating it was inconsistent with the whole spirit of the hearings (1967-8 X:458).

Dewar questioned bringing minor offenders before the hearings and Millan reminded him that providing the parents were co-operative with the social workers, there would be no need for a hearing. Two Conservative lawyers were alarmed at this, "offences vanishing into thin air" (1967-8 X:386) but another Conservative was assured by Millan that the hearing would be able to rebuke a child. At 'consideration stage', Dewar reiterated his wish for a wide range of sanctions and said that in England and Wales in the White Paper 'Children in Trouble' courts would still have the deterrent of the fine, and asked why not in Scotland (HC 768:1531). Millan was

not unsympathetic to the dilemma of the minor offence question, but feared that the fine “may become an easy way out for the children's hearing which is perhaps slightly baffled or puzzled about what it might do” (SC 1967-8 X:504).

Millan emphasised Kilbrandon's view of the importance of the hearings meeting in schools, local halls, not purpose built because “if they were to establish premises of their own which were recognised as premises belonging to the children's hearing that advantage would be lost” (1967-8 X: 392). That desire to remove any sense of stigma had been a key feature of the juvenile justice reforms in the Longford Report too. The Conservative Baker feared that “it is the do-gooders who will be put on the panels... we shall have cosy chats taking place within the panels, with no kind of sanction on the child” (1967-8 X:395), a view supported by the Conservative Hutchison. However, a quite contrary view was taken by another Conservative, MacArthur, pointing out that many Members had talked of the “terrifying rise in juvenile crime in Scotland”, which had happened under the present system, and he did not want to give the impression that there was any substantial concern about the proposed reforms. He wanted to see “commonsense panels... cast the net more widely” (1967-8 X:400).

The Opposition welcomed Millan's offer of the safeguard that legal representation for the child would not be excluded. He assured them that the independence of the new ‘reporter’ was critical, although need not be a lawyer but perhaps a children's officer or a probation officer.

Millan explained that implementation would be in two distinct phases: the reorganisation of the local authority services, followed by the introduction of the children's hearings once the “matching field organisation” was in place, the panels appointed and trained and the reporters recruited. He hoped commencement would be sometime in 1970. The Opposition had tabled some hundred amendments, yet no one seriously challenged the philosophy of this radical Bill, despite the Labour Hugh Brown later claiming that “tempers were somewhat frayed, doors were being banged and various points of order were being raised...” (HC 768:1473)

5.1.6 Commons – Consideration

There was considerable discussion about the finger-printing of children, a practice that was allowable from the age of eight years, whereas in England there had to be special circumstances for under 14s. Most of the Labour MPs were against

the practice because it was “associated with the concept of criminality... abhorrent and so contrary to the other ideas embodied in the Bill” (HC 768:1460). Ross countered that serious offences were committed by children and it was sometimes essential for collecting evidence.

In discussing the complex issue of informality and public accountability in the hearings¹²⁹, as offered by the presence of the press, Millan said there would be provision to remove the press from the hearing if necessary. There would also be a prohibition on publishing anything on the proceedings or to identify the child, and that the numbers of people at the hearing should be limited (HC 768:1522). Dewar was not happy with the press being present and argued that if the child or parents “feel that they are getting a raw deal, they can go to the Press and turn the spotlight of publicity on events.” (HC 768:1523) The Conservative, MacArthur, sympathised with that view but argued that as this was a “challenging experiment... public interest in them should be encouraged” (HC 768:1524) Dempsey, the Labour justice, said he had never ever seen anyone from the press in court (HC 768:1526).

5.1.7 Commons – Third Reading

Some Conservatives still had reservations: Wolridge-Gordon thought punishment was essential, while Baker thought the Bill would have to be reconsidered. Nonetheless, the Conservative MacArthur felt able to point out that Kilbrandon “was set up by the Conservative Government, and the Bill which largely resulted from it was introduced by this Government, so ... we can both share the credit” and significantly mentioned the “rising crime and frightening violence in Scotland” (HC 768:1526). Mackenzie for the Liberals said that his Party welcomed the Bill (HC 768:1588). As in the House of Lords debates, no one spoke of a campaign by any organisations to defeat or alter the philosophy of the Bill. Margaret Herbison, the former member of the Longford Committee, though she never referred to that in any of her speeches, somewhat ruefully observed that, “having had the Kilbrandon Report early, [we] are going far ahead of England and Wales in this social legislation provision” (SC 1967-8 X:553).

¹²⁹ Cl.35

5.1.8 Lords Consideration of Commons Amendments and Assent

Hughes said “when the Bill was considered in another place it was given a general welcome, as indeed it had been by your Lordships. There has been no appreciable dissent from the main purposes of the Bill...” The Commons’ amendments were accepted, only three peers spoke. Lady Elliot hoped local authorities would combine and she would “do everything possible to see that the area in which I live co-operates... I hope that it will prove to be a successful Act of Parliament” (HL 295:1208). Royal assent was granted on the 26th July 1968.

5.1.9 Conclusion to Social Work Scotland Act 1968

Cowperthwaite (1988:1), the Assistant Secretary of the Criminal Justice Division in the Scottish Home Department during the period, wrote an account of the progress of the legislation of this particular Act, because he had:

a continuing feeling of surprise that so radical a change in measures for dealing with juvenile delinquents should have taken place so smoothly in a country that had not previously been strikingly innovative or ‘progressive’ in the criminal justice field.

Magistrates in Scotland and in England and Wales had certainly contributed to the debates on this Bill in both Houses, but their partisanship had been to their political party rather than their judicial office. We cannot know what conversations may have been had outside the debating chambers, and can only speculate on the influence the justice Baroness Elliot may have had on her Tory colleagues, both as chairman of the Conservative Party and as a close personal friend, as the powerful and knowledgeable chair of SACCC, and her association with the Kilbrandon Committee. As Professor Stone said “People were terrified of her!”¹³⁰

There was no evidence of any concerted effort to resist the fundamental change in philosophy in regard to juvenile delinquents that the Social Work (Scotland) Act enshrined. Cowperthwaite (p.31) mentions that both the higher judiciary and sheriffs opposed the ‘hearings’ part of the Bill in 1965, but there is no evidence that they pressed their complaint. It is possible that Kilbrandon himself, a very senior member of the Scottish judiciary, was able to allay their fears, just as he had won over the Conservatives back in 1964. The abolition of the juvenile courts clearly aroused little opposition, perhaps because of their disparate nature and

¹³⁰ Interview Stone 2007

because the justices in Scotland had a “lack of a national political movement and opposition from the population as a whole” (Skyrme 1991 vol. III: 91).

What little talk there had been of punishment only referred to fines. Significantly, there was no mention of deterrence, not even in terms of a threat once the age threshold had been crossed into ‘adulthood’, with the punitive powers available post 16 years.

It was an Act that returned wholesale to the belief propounded by the Lord Advocate Shaw in the 1908 Children Bill, “the object [is] to treat these children not by way of punishing them – which is no remedy – but with a view to their reformation” (Shaw 1908). Perhaps it was the manifest failure of the existing system to reform, as the Conservative MacArthur had pointed out, that had led to so little opposition, and a willingness to try radical new measures.

5.2 Children and Young Persons Bill 1969

On the 30th January 1969, the JCC held its regular meeting, at which Cordelia James, despite personally wanting to see the age of criminal responsibility raised to 16, was re-elected as chairman. They discussed 'Children in Trouble' and the 'CAYP Bill' and reported that representatives of the Committee had a 'useful' meeting with members of the Liberal Party and were about to meet those from the Labour and Conservatives Parties. The Conservatives' Home Affairs Committee had first suggested a discussion, and, no doubt mindful of the MA's apolitical constitution, Cordelia James had consulted the other political parties too (JCC 1969:271).

On the 4th March 1969, she chaired a special meeting of the Committee to discuss the CAYP Bill one week before its Second Reading. The Secretary of the MA, AJ Brayshaw, pointedly reminded the Committee of the MA policy in the memorandum 'Children in Trouble' July 1968, when the Council had "substantially amended" the JCC's own response. He warned that if there were changes, "any apparent indecision or wavering of opinion would be taken to discredit the firmness of the Association's views" (JCC 1969:274). There was none. The JCC endorsed the Council's view to delete the additional requirement to bring a child or young person before the court only if he were also "in need of care or control..." However, even at this late stage, two members, unidentified, voted against the official response of the MA on this crucial clause: both Cordelia James and Teresa Rothschild, close friends of the Minister Baroness Serota, were present at the meeting.

The Committee was unanimous in wanting to retain the power to order compensation; to delete all reference to the consent of a juvenile justice before proceedings could be brought; to recommend that the Secretary of State should give directions to the local authority about a child in their care; the parent to have a right of appeal; and that if the age of criminal responsibility were to be raised at any time it should only be by one year until treatment facilities were available. Since the Lord Chancellor had explained that he would only use his power to appoint juvenile panels outside London where the panels were not working well, the Committee decided to take no further action. They wanted to change the name of Community Homes by adding 'and Schools', with special school status under the Department of

Education and Science. A campaign was launched against the provisions of the Bill to which the Association objected, Cordelia James and the Secretary would send letters to Parliament, and the media, especially ‘The Times’ (JCC 1969:274).

5.2.1 Commons - Second Reading - 11th March 1969

The Bill is not in any way ‘soft’ or permissive... it is endeavouring to get to the root of the troubles with which we are dealing, and not just attempting to handle the symptoms and then forget the cause of the problems... (Callaghan – Hansard HC 779:1177)

On Tuesday, 11th March 1969, the first letter in ‘The Times’ was from Brayshaw, Secretary of the MA, highly critical of the crucial clauses of the CAYP Bill. It announced that equality before the law was at peril, and juvenile offenders would get off scot-free¹³¹, a view, according to the civil servant dealing with the Bill, that the proposers would have considered “a grossly distorted and partial presentation of the facts”¹³².

When the Home Secretary, Callaghan, rose later that day to introduce his Bill, he faced a House of Commons which could include some 47 current or former magistrates in England and Wales, 27 from his own benches, 20 from the Opposition. Added to this powerful group were many MPs, who had been lobbied by their local magistrates individually, or the local bench, or by a letter from the MA or seen the MA’s comments in the libraries of both Houses. During the debates many MPs were to quote these comments of the magistracy, or, indeed, their own experiences as magistrates. However, there were a further 17 Scottish magistrates, fresh from the successful and radical reforms of their own juvenile justice system, which had moved entirely to a welfare-based system to deal with the issues of juvenile delinquency. Of the 17, three were Conservatives who had served on the Standing Committee of the Social Work (Scotland) Bill 1968, none had voiced any objections to the principles of the proposed Children’s Hearings System, which provided that only those thought to be in need of compulsory measures of care should be brought before a tribunal. Other Members in the Commons with a particular interest were 107 lawyers, including 46 on the Labour Benches, 52 on the

¹³¹ See Appendix 5.1

¹³² Interview Gordon-Brown 2006

Conservative, four Ulster Unionists, four Liberals and one from the Scottish National Party who had wished to retain the juvenile courts in Scotland.

Callaghan, well aware of the antagonism towards the main thrust of the Bill, acknowledged that the Opposition Amendment “accepts the case put forward by the Magistrates Association”, although “not all magistrates or juvenile magistrates support the case” (HC 779:1189). There were two “distinguished lawyers” supporting the magistracy leading the Opposition, Mark Carlisle and Quentin Hogg, QC. Callaghan spoke of the Bill’s aim, “to prevent the deprived and delinquent children of today from becoming the deprived, inadequate, unstable or criminal citizens of tomorrow”, and countered the charge of unfairness in Brayshaw’s letter by explaining that the government hoped,

to ensure as nearly as we can real equality for all children of all classes and backgrounds... I mean ‘equality’ and ‘uniformity’. [Because of police cautioning] ...there are thousands of children who, in the strict sense of the word, are delinquents, but who do not go near a court today (HC 779:1177)... They should come before the court only as a last resort. I want to see that the range of facilities which is naturally available to support the middle-class child who goes wrong – what is called in the letter from the Secretary of the Magistrates' Association the ‘good’ home as against the ‘bad’ home...available for other children (HC 779:1191).

Hogg, for the Opposition, moved an amendment to refuse the Second Reading, on this issue of ‘fairness’. He quoted the separate memorandum from the London and Southport magistrates saying that all they needed were more facilities (HC 779:1197). Perhaps with an eye to the weight of magisterial support, he made a less than oblique reference to the fundamental tenet of the magistrate, “...some of us care more about justice than almost anything else in the world...” (HC 779:1203). The Labour barrister Peter Archer spoke of the “more rational and compassionate way of dealing with these problems”, and that the MA saw the law distinguishing only “between conduct, not between persons or circumstances... equality before the law means that the law makes only distinctions which are relevant to fairness and commonsense” (HC 779:1278). He warned that courts must take great care over the offence condition, since “an innocent child has a right not to be helped” (HC 779:1278).

Several Labour lawyers spoke. Paul Rose mentioned the MA and his own constituency juvenile panel in Manchester, and gave an unflattering description of the courthouse environs:

an overcrowded ill-lit room, in which the juvenile offenders, traffic and other offenders, police officers, court ushers, probation officers, children's officers, solicitors, counsel –all sorts of people- mill about, apparently aimlessly... (HC 779:1209)

Gordon Oakes MP spoke of such areas as a “snakepit” outside the courtroom, often in the corridors, whilst in the courtroom, the magistrates sit

... in lofty isolation on their bench far removed from the children they are considering. The children stand bemused, often amused, in the well of the court. The parents stand behind them disconsolately or angrily, knowing little of the proceedings going on (HC 779:1235).

Harry Howarth, JP, Labour, former member of the MA Council, challenged this view saying they were “conducted in the best possible manner with the equipment and facilities available” and the Conservative lawyer, David Waddington had the “highest regard for juvenile court magistrates... the great care which is already taken to make juvenile courts different in character and atmosphere from ordinary courts”.

Waddington also thought the Lord Chancellor should not appoint juvenile panels “in secret” (HC 779:1272), seemingly unaware that the vast majority of magisterial appointments were made in complete secret (Mag. 1971:81). Howarth hoped that no-one would be appointed to the juvenile panel if they had not served on the adult bench, as was the case in Inner London, and that the Lord Chancellor could not know the suitability of potential juvenile magistrates more than the local Benches (HC 779:1257). The Conservative William Deedes agreed, accepted that some magistrates supported the Bill, but thought “the majority have reservations” (HC 779:1218). The Labour Member and juvenile court chairman himself, Charles Mapp thought the early sifting process should not be done by a magistrate and wanted some form of compensation to victims (HC 779:1223).

Gill Knight quoted the MA to support her view that the age of criminal responsibility should remain at ten years, and that it “was a considered opinion of the magistrates that no changes were needed in the treatment of the 10-17 age group” (HC 779:1240). The Liberal lawyer Emlyn Hooson wanted children to be held accountable for their actions and the age not to be raised. At the Standing Committee, Worsley spoke of the “many magistrates’ courts, as far apart as Wimbledon and Tees-side”, wanting the age to be raised by only one year at a time, and the Conservatives wanted affirmative action by Parliament, a later vote, to raise the age from 12 to 14 years. This was agreed at Report Stage by the lawyer Elystan Morgan, Under-Secretary, Home Office (Hansard SC 1968-9 V: 472).

Concluding for the Opposition, Sir Peter Rawlinson, QC said that as some 150,000 juveniles were being cautioned or prosecuted, it was

no time for softness... the interests of the State demand that an offence shall, generally, be prosecuted, irrespective of the circumstances of the accused. (HC 779:1288)

He made no reference to the role of cautioning, nor how that discretion was exercised, a point picked up for the government by Morgan, who also mentioned the silence of the MA on the matter, and the huge variations between police services in the rates of cautioning, from 65% to under 5%. The Bill was designed to

reflect developments in the organisation of the services concerned ...how personal and environmental factors during childhood and adolescence may influence the whole of an individual's later life. (HC 779:1291)

Each child had individual needs and to ignore them would be unjust.

The Conservative amendment to reject the essence of the Bill was lost by 140 to 200 votes. There had been 44 magistrates in the House, 14 Conservative, 1 Ulster Unionist and 29 Labour, but all voted on party lines. The Conservative MPs who voted included five who had been on the Scottish Standing Committee for the Social Work (Scotland) Act 1968. Only one of them had expressed outright hostility to that Act, the other four, two were JPs, nevertheless voted against Clause 1 of this 1969 Act.

'The Times' on the following morning, took an unfavourable line, concentrating on the lack of punishment for the under fourteen year olds, "... a child needs above all an exemplary punishment as a sharp warning to mend his ways". A lengthy article in the 'Magistrate' (1969:45) sent to all 15,000 members forcefully recorded the views of the MA, its strong objection to the 'double' test, "...the whole idea of equality before the law is flouted", one law for the rich and another for the poor. The MA did not accept the proposed various forms of treatment excluding punishment, and felt "very strongly indeed that the court should retain power to order payment" of compensation and fines. Magistrates all over the country had equally objected to the proposal that consent of a juvenile court magistrate was required, as "it was a social welfare decision rather than a judicial one". The article concluded in stark terms,

the Bill will encourage children to believe that they are not answerable for their actions, nor have they to pay any penalty for wrong-doing ... they will know that some favoured children are never brought to court, when others are.

A further note reported that two Labour MPs, who were magistrates, had been left off at Committee Stage because they had criticised the Bill.

5.2.2 Commons – Standing Committee - 20th March - 13th May 1969

The Standing Committee, with 20 members and chaired by the Labour MP Rogers, included eight lawyers and two magistrates, one Conservative and one Labour from Scotland, the Opposition complaining at some length about the composition of the Committee. Each MP had received a letter from the MA expressing its strong reservations about the Bill, and not surprisingly, in speaking against the Bill, almost all MPs mentioned communications from magistrates or their own experiences.

The Conservative David Lane reported letters from the Cambridgeshire Juvenile Panels “worried by some of the provisions” and that it was “a measure of their concern that for the first time they have thought it right to raise these matters with their local MP” (SC 1968-69 V: 13). Carlisle reported objections by Manchester City and the London Juvenile Benches; the “strong article in the Times”; the Clerk to Liverpool Justices and MPs with “experience of being magistrates and chairmen of benches” (1968-69 V:59). Gill Knight thought the Bill would lead to “Young persons appearing at any rate in the eyes of the public, to get clean away with wrong doing...” She had “watched with enormous admiration, the way in which juvenile benches have dealt with children appearing before them” (1968-69 V:76). An opposite view was taken by two Labour lawyers: Davidson, who had practiced in the same courts as Carlisle, said “it is very rare indeed for a young child, as for anyone at all, to come out of court feeling that he has been fairly treated” (1968-69 V:71); and Oakes said there were “many magistrates on this side” along with the Association of Municipal Corporations, the Association of Managers of Approved Schools, and the County Councils Association (1968-69 V:78).

Callaghan expressed “astonishment that there is such unanimity in supporting the magistrates’ view among the Opposition” (1968-69 V:86). In defence of Clause 1, he quoted the Conservative s.2 Children and Young Persons Act 1963 which stated that if a child “...is not receiving such care, protection and guidance as a good parent may reasonably be expected to give”, and said in the new clause the definition of a good parent had been removed, as it was about the child and not the parent; and spoke of the dissatisfaction of both children and parents with the juvenile courts,

which he learnt in his surgeries as an MP. The Opposition amendment to remove the second hurdle, ‘in need of care...’ was defeated by 8:10 votes. On learning of this, Cordelia James, as chairman of the JCC, had urged all MA Council members to keep up the pressure by contacting their MPs, particularly if they happened to be members of the Standing Committee as the clause might be changed at the Report Stage or in the House of Lords.

Several Conservatives quoted magistrates in their own area wanting a greater range of treatment, and powers to award compensation and fines “rather than other powers such as probation orders or conditional discharges” (1968-69 V:115), which Morgan noted were “all founded upon a punitive element... entirely repugnant to the main theme of the Bill”. Callaghan explained that social workers visiting children in their own homes would have much greater insight than magistrates in an hour in a courtroom, which was why he did not want “the magistrate to fetter the discretion of the children’s officer” (1968-69 V:127-8). He wanted to encourage parental responsibility, offering greater facilities and when that failed, a police caution, and even try voluntary measures after that. (1968-69 V:184). Worsley feared a “young, rather headstrong... children’s officer going to a family and involuntarily putting the matter as a threat... So the matter is agreed” (1968-69 V:190). Carlisle said probation officers, like magistrates, also felt that there was too much discretion being given to supervising officers, who could ignore the court’s directions (1968-69 V:324). Morgan noted that the MA had originally said the probation service should operate from the 10th birthday upwards but recently had made no comment in a new memorandum, and presumed their objection was “no longer sustained” (1968-69 V:352).

Clause 5, which required the consent for criminal proceedings against young persons by a single magistrate, was one of the few clauses to be criticised by both sides of the Committee. Carlisle proposed an amendment, supported by magistrates and probation officers, thinking the concept “cumbersome...largely unworkable...undesirable... unnecessary” (1968-69 V:226). Archer, Labour, spoke of the difficulties of a single magistrate deciding, being unable to investigate like a ‘Juge d’Instruction’. Morgan said it was an “accident of geography” that a child appeared in court, and expressed surprise that the “Magistrates Association has taken the attitude that this is no proper part of magistrates’ functions”. However, in view of the opposition from both sides of the Committee he withdrew it (1968-69 V:235),

but there would be consultation between the social services and the police before a decision to prosecute.

Carlisle objected to the power in Clause 10, which removed the court's discretion to publish names, "another example of the slight...anti-magistrates' court bias which appeared to exist in the Home Office at that time..." (1968-69 V:298). He quoted a magistrate's letter in 'the Times' and information from the London Magistrates Association. Goodhart quoted objections from the Chair of the ILJP. For the government, Morgan said that the specific power to use publication to trace a witness had not been used since 1932 and there was a suggestion that

courts might consider that they could use this in a punitive way, that the actions of the young person were such that it would be proper for him to be exposed to public stigma and contempt. (1968-69 V:305-6)

At Report Stage, the Opposition accepted an amendment to publish only to "avoid injustice" (HC 784:1124). Over future years there would be repeated calls by magistrates for identification of young offenders (JCC 1979:711; 1982:913; 1994:1436).

In Clause 19, Morgan explained the role of the Regional Planning Committees, which were expected "to work in the closest co-operation with the local magistrates, the police, the probation service and any voluntary organisations in the area." The Home Secretary would have the power to withdraw DCs "after alternative facilities already exist and are actually in operation", using existing facilities like youth and sports clubs, and dramatic and musical societies and whilst programmes might include repairing damage or clearing up mess, "punishment should not be regarded as the central, dominating theme in relation to the needs of young children" (SC 1968-9 V: 399). Carlisle warned that the public would not "necessarily accept readily what we have heard from the Under-Secretary... they should be sold to the public if we are not to have public resentment against them..."

Clause 21 gave the courts power to vary or discharge care orders on application, and the local authority to review all care orders after six months with an idea to discharge. The government considered it inappropriate for the court to be involved at that stage (1968-9 V:431). Unlike in Scotland, there was going to be no power for the independent body to have a statutory review of a case.

In discussing the role of new 'community homes', both Carlisle and Worsley wanted to "distinguish between what we have been calling the deprived and the

depraved persons...” and did not want them placed together (1968-9 V:508), nor had Waddington. Morgan replied that “the determining factor in every case is the particular condition of that particular boy and his own special needs.”

Worsley JP, opposed the Rules relating to the appointment of juvenile court panels as “magistrates know their fellow magistrates better than the advisory committee and, obviously, better than the Lord Chancellor sitting in London”. This new scheme was like that for Inner London but he claimed that London was different, with many more magistrates to choose from and possible for the Home Office to know them (1968-9 V:584). Lane suspected an element of political interference and a shift of power from the provinces to the centre. Carlisle had heard “the general condemnation of the Clause by a great many individual benches of magistrates... who have written to members of this Committee”. Morgan, however, said that the idea had come from magistrates throughout the country and the MA was divided on the issue. He spoke of large areas where people “year by year [were] re-elected to these positions, and sometimes persons who are not suited to discharge those duties” (1968-9 V:590). They had ample evidence, but the power would only be used in a minority of areas.

5.2.3 Commons – Report Stage - 9th June 1969

The June ‘Magistrate’ reported “an astonishing number of communications from Branches, Benches and individual magistrates all over the country. Almost without exception, they support[ed] the main points which the Association had raised” (Mag. 1969:88). The article mentioned the government concessions: that the effective age of criminal responsibility would only go up to 12 until experience showed what happened; compensation orders would be available; and the requirement for a justice to give consent for prosecution had been removed.

Morgan, having conceded the rejection of the position of the examining magistrate, a position Archer QC had noted was rather like that of children’s reporter in Scotland (HC 784:993), said it had been accepted by the Association of Municipal Corporations, County Councils Association, the Police Federation and professional child care associations. The critics had been the MA, a number of juvenile court panels, the Justices’ Clerks Society and a majority of chief officers of police. Morgan explained the need for criteria for prosecution to reduce the huge cautioning discrepancies (HC 784:1002), it was “Parliament’s job to remedy this situation”.

Only a qualified informant could lay information, they must consult the local authority, and prosecution should follow, under criteria set by the Home Secretary (HC 784:993) and only if the matter could not be dealt with by the parents or teacher.

Carlisle, supported by another lawyer, Grieve, said it was unnecessary to restrict the prosecution of young people of 15 and 16 as the public expected them to be punished (HC 784:994). A contrary line was taken by the Labour lawyer, Paget, who said whilst children must learn not to do certain things, the infliction of punishment or pain was likely to be counterproductive (HC 784:999). Morgan reminded the House of s.1 of the Children and Young Persons 1963, that the local authority must make available “such advice, guidance and assistance as may promote the welfare of children by diminishing the need ... to bring children before a juvenile court” and s.1 of the Children Act 1948 in which the local authority had a duty to receive a child into care, for example if an offence arose out of family difficulties and parents asked that child be received into care (HC 784: 1004). The Tory amendment to remove restrictions on prosecuting 15 and 16 year olds was lost 141: 203. 18 JPs voted with the Conservatives, 24 JPs voted with the government.

The House considered Clause 1 yet again, and the Conservative amendment to delete the second leg, requiring a child to be in need of compulsory measures of care, which, Carlisle said

was wholly opposed by the Magistrates’ Association...by all those involved in administration of justice... substantially opposed by a great many members of the probation service and by the chief probation officers (HC 784:1021).

Another lawyer, Miscampbell, said serious offences were committed by those aged 12-14, and Goodhart complained of the likely workload of the children’s departments and feared “Young girls coming from university, with a sociology degree” being influenced by “the superficial appearance of the relationship between the child and his parents...” (HC 784:1030). Two magistrates spoke, the Conservative Errington of the great difficulty of having to prove two things, and the Labour Mapp thought “magistrates always try to find the answer and then see whether the law lets them take that course” (HC 784:1027). Davidson said that “there was always a sense of resentment and injustice” by the parents or anyone given different sentences. Morgan reported that the MA stated “quite categorically

its wish never to see a case taken to court unless it is necessary that that should be so” (HC 784:1040). The basic question was not the background of the child but the needs of the child. The amendment was lost 125 votes to 182, 15 magistrates voting with the Conservatives, another 22 with the government. Two Scots, the Conservative MacArthur and the Liberal Mackenzie, having welcomed the additional “in need of care” in Scotland, voted to abolish it in this Bill.

Carlisle proposed an Amendment to Clause 7, wanting probation available from the age of 12 not 17 years, again fearing the “comparatively inexperienced” children’s officers. Turton, a member of a probation case committee and the juvenile court, spoke of “destroying one of the greatest and most worthwhile weapons we have for dealing with juvenile delinquency...” (HC 784:1092), echoed by the Labour Mahon JP, who said children’s officers did not have enough experience. The Home Secretary said after 20 years they had wide experience while Dame Irene Ward still sat as a magistrate, and insisted “that the probation officers know exactly how the magistrates’ minds work on these matters” (HC 784:1103). The Amendment was defeated 160:117, 16 JPs voting with the Conservatives, 22 with Labour.

Another successful government amendment restored words that had been removed in Committee, which had taken discretion away from a supervising officer to decide the nature of the treatment. The Opposition had feared that a “supervisor would be able entirely to disregard the powers given to him by the court and issue no directions at all...” (HC 784:1130), a charge that was to be levelled later at the social workers by magistrates. The Opposition Knight successfully moved an amendment for a probation officer to remain dealing with a family if already involved, but failed in an amendment to limit a ‘Care Order’ to three years as she feared the local authority, under pressure of work, was not likely to review the case “thoroughly” every six months (HC 784:1149).

5.2.4 Commons – Third Reading - 9th June 1969

At 2.30 a.m. the Home Secretary, Callaghan accepted that the Bill was better, and “the fulfilment of a personal ambition”. There had been ... “complete agreement that children who are in trouble should, wherever possible... be dealt with outside the courts” and went on to pay tribute to the juvenile courts and the probation officers (HC 784:1180). He tried to allay some fears of the Opposition, saying the Bill would be “introduced at a time when the local authority structure can stand the

additional weight that will be placed upon it” (HC 784:1182). He said the essence of the ‘Care Order’ was that the local authority needed “the power to select the arrangements which are best calculated to meet the needs of the particular child” and had had experience over 35 years acting “as substitute parents for children of all kinds, including those who have broken the law and been prosecuted” (HC 784:1183). The Bill aimed “to combine social justice with protection for the liberty of the subject” (1184).

5.2.5 Lords - Second Reading - 19th June 1969

Lord Stonham, the Minister of State, Home Office, opened the debate with the contentious Clause 1, and a membership that could have included some 120 justices. He referred to the discrimination already existing in the system and a speech of the President of the Association of Child Care Officers about the juvenile court, “A segment of the social services reserved almost exclusively for the working class” (HL 302:1129). He described “indefensible discrimination” in the rates of police cautioning and pointed out that juvenile courts distinguished between joint offenders. He noted a recent letter in ‘The Times’ from the chairman of a juvenile court attacking the clause and demanding that all should be brought before the court, regardless whether they were in need of care and control (HL 302:1133).

Lord Jellicoe, for the Opposition, reminded the House that he had launched the 1963 Act, which had introduced an obligation on local authorities to look at measures to prevent juvenile delinquency, but considered that Clause 1 would create injustice. Lord Byers welcomed the flexibility and thought once the public understood it, much healthier attitudes would develop. The Bishop of Leicester welcomed the Bill on behalf of the Bishops’ Benches, and was happy with the age at 14, and welcomed the abolition of custodial detention. Lady Gaitskell mentioned yet another letter in ‘the Times’ from a magistrate objecting. No fewer than five juvenile court chairmen spoke, four of them women. The Labour Baroness Birk, wanted to raise the age to 16 years and spoke of the stigma of the courts and the sense of unfairness; Baroness Wootton wanted

to remove the juvenile courts altogether as a separate structure and extend the educational system to embrace the problems of the difficult child... we make more delinquents in the waiting room than we ever cure in the court room. (HL 302:1187)

Two Conservatives, Lord Hamilton, President of NAPO welcomed the intentions of the Bill; while Baroness Emmet did not think the current method of selection for the juvenile court was right as on small benches everyone under 65 was appointed (HL 302:1175).

Baroness Serota, Minister of State at the DHSS, in summing up for the government was encouraged by the response of the Lords,

Not one of your Lordships has raised serious doubts about the general wisdom of the changes proposed, nor seen this move ... as a threat to the individual liberty of children or, indeed, to the proper inculcation of moral values during their upbringing” (HL 302:1203).

She said that discrimination existed already, one child before the court the other not (HL 302:1207). The Bill was designed to help parents in bringing up their children and was based on the 1963 Act introduced by Lord Jellicoe.

5.2.6 Lords - Committee Stage - 3rd July 1969

The first session was chaired by Lord Royle JP, Labour, a former deputy chairman of the MA. Lord Stonham, a Home Office Minister, explained that the Bill did not raise the age of criminal responsibility, but under 14s could not be charged with any offence except homicide, “A child remains capable of committing an offence... the Bill raises to 14 age at which two of the normal consequences of criminal responsibility – liability to prosecution and to punishment – take effect” (HL 303:751). At the next session, Baroness Wootton moved, unsuccessfully, an amendment to remove the offence ground, speaking at length about the inordinate complexity of the Bill and the age of criminal responsibility, which she thought should be the same as the school leaving age. She objected to the concept of guilt as children under 14 “are either troublesome to other people or they have troubles of their own” (HL 303:771).

Jellicoe moved an amendment to remove from Clause 1, the ‘second leg’. There was a lengthy discussion about the issue of discrimination and fairness, as there had been in every debate on this Clause, Jellicoe arguing that it discriminated, slowed things up and set parent against the child. The government supporters said that if the courts were seen as helping agents, this issue of discrimination would be irrelevant. Wootton, from her experience said “juvenile courts are for other people’s children... middle-class and public school children are not brought to court” (802), but she voted with the Conservatives on this occasion as she disapproved of

interfering before the offence had been proved, otherwise the House divided on Party lines. The amendment was carried 68 to 48 votes, 11 JPs voting with the Conservatives, nine with the government, three had spoken in the debate, and the article in ‘The Times’ of another JP was mentioned.

At a meeting of the JCC the result was reported and that the Minister had hoped the Commons would reinstate it. The Secretary of the MA had written to ‘The Times’ on the 24th July urging it not to be done. Aware of the MA’s hostility to many of the Bill’s proposals, Alec Gordon-Brown from the Children’s Department, before it had even been passed had “supplied for the Committee a confidential note setting out the expected stages of the gradual implementation of the Bill” (JCC 1969:288).

In a series of amendments that were eventually withdrawn, magistrates and lawyers featured significantly as speakers, the Labour Leatherland JP pleading for comprehensible legislation for the lay magistrates, who had to decipher it; Wootton wanting to remove joint offenders from the adult court; Stonham pointed out that NAPO had accepted the new role of probation but not the Central Council of Probation and After-Care Committees, composed mainly of magistrates. Stonham referred to the MA memoranda on both the White Papers in relation to the probation service and Jellicoe spoke of the Oxfordshire magistrates and their twice yearly meetings with child care officers being most useful, leading to fewer approved school orders (HL 303:1112).

5.2.7 Commons – Lords’ Amendments - 15th Oct 1969

Morgan opened the debate on the Lords’ amendment to Clause 1, saying it was the third time it was being discussed and there were no new arguments, the words represented a statutory aim, to deal with children outside the court if possible and that had been “championed from the very first by the MA which had written, ‘We share the desire to keep children out of the court as far as possible and to involve their parents in responsibility for their future good behaviour.’” At Report stage, Hogg had agreed that not every child should be prosecuted (HC 788:416). Morgan said that “Slavish uniformity of system would bring not equality of justice but only equality of misery”. Carlisle for the Opposition spoke of the debate being between all sides of House.

Backbenchers, whatever their other professional interests, did not necessarily speak on their party line, though no one actually voted against his/her party, but no Conservatives spoke in favour of the amendment to restore the need for care. Several Labour members took a punitive line: Mapp, JP said the age should only be raised to 12 years, but did not vote, while Ted Leadbitter MP, a former head-teacher, spoke of “the weakness in authority. Too much time is spent in pontificating pseudo-psychology” and forcefully complained of magistrates “imposing nominal fines for thuggery, for vandalism and for theft” (HC 788:439-40). He said he was respected for his quick justice by the boys he caned, and he could not support the government. He was applauded by the Scottish justice Glover and the lawyer Grieve, both Conservatives. Oakes took a quite contrary view, “Most of those who deal with children in trouble – probation and children’s officers; and not all magistrates take the view of their Association – support the Bill” (HC 788:425). The Amendment was rejected 146 votes to 120, the Liberals voting with the Conservatives, against the ‘care’ test, having supported it in the juvenile justice reforms in Scotland.

5.2.8 Lords – Commons’ Disagreements to Lord’s Amendments

Jellicoe had noted the narrow vote to reinstate Clause 1 and said it “may well reflect something of the disquiet which has been felt on both sides of both Houses” and warned of the “grave risk of serious discrimination” because 50% of young people before the court were jointly charged. He said he was “quite willing to grant that there is a great deal of good in this Bill” (HL 304:1629), the Opposition acquiesced and Royal Assent was read on the 22nd October 1969.

5.2.9 Conclusion to Children and Young Persons Act 1969

In Parliament, the Opposition repeatedly quoted the magistracy and the MA and concentrated on the ‘fairness’ argument, that two juveniles guilty of the same offence would be receiving different treatment. It never accepted the argument by the government that discrimination was already taking place, both by the police in their decision to caution or not, and in the different sentences of the courts. Given the high profile of the magistracy in Parliament, and the sustained campaign of letters and articles in the press by the MA, it is noteworthy that on only two occasions, magistrates voted against their party. However, the Conservatives, supported by the MA were implacable in their opposition to the main tenet of the Act, that the needs

rather than the deeds of the juvenile were the key factor. A change of government could spell disaster for the implementation of the Act.

The new Act retained the lay magistracy in juvenile courts; the age of prosecution and the 'double test, would only be raised to 12 years without affirmative action from Parliament; borstals, detention and attendance centres would only be abolished when other constructive facilities such as 'intermediate treatment' were available. There were new supervision and care orders; and the court would have discretion for the 14 plus age group to be supervised by a probation officer rather than social worker. Fines and compensation orders were still available. The juvenile courts had been given a raft of new measures without their previous ones being removed, and the government had abandoned the idea of the 'examining' magistrate. The only immediate problem for the magistrates was their difficulty with the concept of the child aged 10-12 years being in need of compulsory measures of care as well as admitting an offence before he/she could be brought to court. The problem for the government was to produce the resources and facilities for the new measures.

5.3 Conclusion

These two acts, each containing radical reforms of juvenile justice, one relating to Scotland, for children 8-16, and in England and Wales for children 10-17 years, were debated one year apart. Each Act intended that juveniles should only be brought before an official tribunal of lay people as a last resort, and for those under 16 in Scotland and under 14 in England and Wales, they must also be thought to need compulsory measures of care. In Parliament, the Scottish Act received almost unanimous support for its clauses relating to the 'hearings' system, no one challenging that last concept for care, and no objections were raised by English or Scottish lawyers. Yet, in England, it was seen as an assault on 'equality before the law', unfair and discriminatory, bitterly opposed by the lawyers and others in the Opposition, who openly claimed support from the MA and magistrates throughout the country.

Parliamentarians from all sides had shown some resistance to the reorganization of the probation service in each country, supported by the sheriffs in Scotland and the magistracy in England and Wales: the magistrates in the juvenile courts were losing their absolute control over the probation officers in their courts, in return for unknown social workers who were outside their control. The Scots had accepted the new post of reporter, that person to act as a filter between the police and the hearing, whilst the English had successfully rejected the offer of a single magistrate to act in that capacity, a role seen as unacceptable by the MA, yet no one had suggested an alternative arbitrator. The juvenile court would decide any disputed matters in the normal criminal trial, while in Scotland any disputed matters would be heard before a sheriff in chambers, making a complete separation of trial and disposal.

The Scots Act made no provision for purely punitive measures, the English Act proposed to abolish all punitive measures other than fines when alternative facilities were available. Each country would require a multi-agency, co-operative approach with some radical reorganization of departments to cope with the new arrangements. Whilst greater discretion for treatment was vested in the social services, the hearing in Scotland would have a statutory duty to review each order annually, in England, the court could only vary an order on application from other parties. This lack of oversight by the magistracy was to prove highly contentious.

The Children and Young Persons Bill 1969 was fully debated one year after the Social Work (Scotland) Act 1968 was passed in the same chambers. There was just one reference to that Act, by a Labour QC comparing the role of the reporter with that of the examining magistrate, a measure that failed. The government did not refer to Scotland in any way, neither mentioning any arguments used to support the wholesale conversion to a welfare system of juvenile justice, the support of the justice MPs there, nor to any advice the civil servants may have been able to offer to put the Act into practice. As Professor Morris¹³³, a member of the Longford Committee has commented, “It would seem that Scottish affairs only really attracted a minority of people who were interested in what was going on in Scotland”. However, only a handful of MPs from either House voted differently in the two Bills, and the government won its reforms, but, as the civil servant Cowperthwaite (1988:61) observed,

Although the objectives of Part I of the Bill were the same as those of Part III of the Social Work (Scotland) Bill, its reception in Parliament was strikingly different... subject of criticism and resistance by the official Opposition throughout...

The judiciary in Scotland had played a very minor role in the arguments, the lay members virtually silent on the loss of their juvenile courts, unlike the English magistracy, which had been vociferous in its objections. A civil servant working closely on the reforms in England, and observer on the MA Council commented that it “was generally accepted as a fact of life that in most areas, but not all, the magistrates would be Conservative rather than Labour inclined” and they felt that “if there had been an offence proved by proceedings in court, it was natural that punishment should follow. That attitude in some cases was so ingrained that they either couldn’t or didn’t want to adjust”¹³⁴.

The history of juvenile justice legislation suggests that both its implementation and the practice has at best been problematic. Many of the English reforms were conditional on new measures being made available, and whilst the Scottish civil servants had been planning for over three years, the English also needed time before implementation. Neither system was to become operational until 1971. Tragically, and perhaps significantly for the future of the 1969 Act, the

¹³³ Interview Morris 2006

¹³⁴ Interview Gordon-Brown 2006

charismatic Morrell was to die before implementation, leaving its supporters without a persuasive protagonist. However, he had seen his two other related projects for positive discrimination, 'educational priority areas' (Plowden Report 1967), and 'community development projects'(Lees R and Smith G 1975) accepted (PSSC 1977). The unexpected change of government just eight months later to a party that had bitterly opposed the 1969 Act was to have a profound effect.

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CHAPTER 6

THE CHILDREN'S HEARINGS (SCOTLAND)

We had one criterion: the decision had to be made in the best interests of the child. There was no other criterion. We could not consider what was best for society, the community, that this child was a danger to the community so ought to be locked up. That was not part of our work, only the best interests of the child. (Margaret Dobie, Chairman of the Dumfries and Galloway Regional Panel¹³⁵).

It took three years from the passing of the Social Work (Scotland) Act 1968 to its implementation, but as Lord Kilbrandon (1976:ix) remarked, "It was quite a feat that the elaborate, and in some ways revolutionary, system was evolved and brought into action so soon". This was especially so given the long history of failure to implement juvenile justice legislation; the likely radical reform of local government arising from the Wheatley Commission; and in June 1970, a return to the Conservatives, who had recently strongly opposed a welfare model in England/Wales. However, the previous Conservative administration in Scotland had accepted the Kilbrandon proposals; their 1970 manifesto had described the root causes of crime as "social problems, educational inadequacies, and economic frustration" (Scottish Conservative Party 1970); and Gordon Campbell, the new Secretary of State, was "the first since 1945 to belong to a government that did not possess a majority of votes or seats in Scotland" (Devine 2000:581). This all reinforced "the long-standing tradition that England does not interfere with Scotland on criminal justice"¹³⁶.

The system of lay 'children's panels' and 'hearings', based in the new local authority social work departments, was part of the philosophy of "involving the community in finding solutions to the problems that arise within it" (Social Work Services Group [SWSG] 1979:9); and would deal with children whether offending, truanting or subject to neglect or abuse. The philosophy of Kilbrandon was carried

¹³⁵ Margaret Dobie, OBE interviewed by Ravenscroft, London 18.xi.2005

¹³⁶ Interview Faulkner 2006

through to implementation. The dual function of previous juvenile courts was abandoned, because:

Criminal procedure does undoubtedly affect the whole atmosphere and manner of proceedings in juvenile courts; it also colours the entirely separate stage of the proceedings in which... the question of practical action falls to be resolved. (Kilbrandon 1964 para.71)

A full-time, professional judge, would determine any disputed grounds, for fear that a lay bench might “lean too far to treatment” and produce “unintended irregularities” (para. 71) by not applying the correct legal test in its eagerness to provide help; and would hear appeals against the decision of the hearing. Only children satisfying one of the specified grounds *and* thought to be in need of compulsory care, would be referred to a ‘reporter’, and if necessary referred on to the new children’s hearing. This, a panel of lay people, would decide on the most appropriate treatment and thereafter that treatment would be the responsibility of the social work department, although the hearing would review the case on at least an annual basis.

By April 1971, the reporters and panels had been appointed and trained, the places to hold the hearings identified, and the legal, judicial and police procedures put in place. Scotland was about to embark on its radical new juvenile justice system¹³⁷ whereby the needs and not the criminal deeds of those aged 8-16 years, always explicitly referred to as children, were the paramount consideration. There was no mention in the Act of retribution, deterrence or public protection. As one sheriff remarked, “The onset of the children’s hearings system was greeted with some apprehension and perhaps some hostility by the legal profession, including the judiciary” (Kearney 1998:159), although one of the first reporters, a lawyer, observed,

Right the way down, members of the legal profession were at least prepared to give it a try, and even convinced that the newly proposed system had a part to play... on the other side, the social work side, there were many people who thought it was not going to work at all.¹³⁸

¹³⁷ Part III Children’s Hearings (Scotland) Rules No.492

¹³⁸ Interview McFadden 2006

6.1 Implementation and Practice – The First Decade

6.1.1. Before the Hearing

Kilbrandon (para.149) had valued the role of police juvenile liaison schemes in diverting young offenders from the formal criminal justice system. That “long-standing and widely recognised practice” continued (Bett 1976:45) with the police filtering out 20% of cases between 1970-76, (Morris, A. & Giller, H., Szwed, E & Geach, H. 1980:59). For centuries the procurators fiscal had acted as a ‘gate-keeper’ between the police and the courts, and the new role of reporter to the hearings exercised a similar and additional role. Statistics confirm this belief in diversion from formal responses to offenders, at all levels of decision-making (Murray G. 1976:17).

Table 6.1 Diversion and Treatment of Juveniles Committing Offences 1972-1974

Action	1972	1973	1974
Offences by children u 16	29,626	35,932	38,993
Police Warnings	9,167	9,824	10,716
Juvenile Liaison Scheme	599	740	758
Proceedings in all courts	2,390	3,192	2,900
All Reports to Reporters (incl. non-offence grounds, c. 20%)	24,219	29,384	31,524
Reports referred to Hearings	12,519	14,961	15,108
DISPOSAL AT HEARING			
No supervision requirement	4,502 (36%)	6,155 (41%)	6,335 (42%)
Non-residential supervision	6,209 (50%)	7,069 (47%)	7,181 (48%)
Residential Supervision	1,808 (14%)	1,737 (12%)	1,592 (10%)

(Martin & Murray 1976:17) HMSO Scottish Social Work Statistics

Residential supervision meant that the child was *required* to reside at home, with relatives, foster parents or in one of a range of residential establishments S.44 (1) 1968 Act.

Reporters

The official at the heart of the hearing's system was the reporter, who exercised wide discretion in choosing which cases to put before the hearing; acted as administrator and legal advisor to the panel; convened the hearing, ensured attendance by the appropriate people and provided all the necessary reports. It was essential that the reporters liaised with all the agencies, including police, fiscals, the social work department and the schools, to obtain the fullest information about each child.

They were appointed, employed, and their costs were borne by the local authority. Of the 100 initially appointed, 50% were solicitors, others were probation officers or had worked with young people. There was a gender balance throughout. Only the Secretary of State could dismiss them, to safeguard their independence, so that their decisions were not subject to "temporary political or social considerations, only to the perceived good of the individual child" (McCabe et al. 1984:35). The post, according to Finlayson¹³⁹, attracted

really interesting characters... such as Donald Dewar, later Scotland's First Minister, who used his familiarity with Parliamentary process and issues... as a great source of information and support...

However, after the Wheatley reforms¹⁴⁰ many reporters resigned, especially the lawyers, who did not wish to be absorbed at lower grades in the enlarged administrative areas (Martin, Fox & Murray 1981:15).

Training was provided by the SWSG, although one reporter complained of little training at the beginning¹⁴¹. Asquith (1983:29) claimed that the reporter's "lack of a definitive statement as to his qualifications" and the wide discretion to be exercised led to different policies in different areas, perhaps not least because the reporters did not "share a common set of beliefs concerning the factors that indicate the need for compulsory measures" (Martin et al 1981:65). But, 75% of all new referrals diverted from a hearing in 1976 did not come to the reporter's attention again.

¹³⁹ Interview Finlayson 2008

¹⁴⁰ Local Government (Scotland) Act 1973, operational 1975, led to local government changes such that five years after coming into existence, the 50 social work departments and 50 reporters' departments were each reduced to 12. Regions and districts, Strathclyde with half the population of Scotland, replaced counties and burghs.

¹⁴¹ Interview McFadden 2006

Children in Criminal Courts

About 10% of children accused of offences were not dealt with by the hearings, regardless of whether they denied the charge. For those offences on the Lord Advocate's List¹⁴², the fiscal, by training aware of the sentencing options and their nature at the different levels of court, in consultation with the police and the reporter would consider prosecution at the Sheriff Court or the High Court of Justiciary, or referral back to the reporter¹⁴³. Initially there were wide variations in practice, but this gradually changed as understanding and confidence grew between fiscals and reporters (Finlayson¹⁴⁴), and many more were diverted to the hearings. Wherever the referral ended up, both the fiscal and the reporter had to be satisfied, "on an identical standard of proof, that they believe they can prove the offender's guilt beyond reasonable doubt" (Finlayson 1992:42).

Table 6.2 Referrals by Fiscals back to Reporters 1975 – 1981

Referrals	1975	1976	1977	1978	1979	1980	1981
From Fiscal to Reporter	3,470	4,367	4,686	4,883	5,134	6,063	6,808

(McCabe et al. 1984: 37) Children's Hearings Statistics 1981

There was a pragmatism about the reporters' decision making, probably born of the Scottish belief, arising from the general historical levels of poverty, "in the efficacy of running works, businesses or services on the simplest and cheapest lines" (Murphy J. 1992:10). When told that domestic burglary by a juvenile would be tried at the Crown Court in England, a reporter responded, "How do they have the time to deal with such things?"¹⁴⁵ The fiscals became increasingly prepared to let the hearings rather than the sheriff deal with cases.

Most juvenile cases in courts were summary prosecutions with a sheriff sitting alone, and most of those because there was an adult co-accused. Of the 3,192 juveniles before the court in 1973, about one third was there for theft including housebreaking and another third for breach of the peace.

¹⁴² S.31 SWS Act 1968 – "very grave offences such as murder, rape and serious assault, offences involving weapons, road traffic offences involving motor vehicles, offences in which a child is alleged to have committed... with an adult and where it would be prejudicial to separate the accused, and any offence which may require prosecution in the public interest" (SWSG 1979:11).

¹⁴³ S.38 SWS Act 1968

¹⁴⁴ Interview Finlayson 2008

¹⁴⁵ Interview McFadden 2006

In September 1973, a girl aged nine convicted of a serious stabbing was given two years detention by the Glasgow Sheriff Court. Widely reported in England, where the age of criminal responsibility was ten, it was thought that a nine year old should not have been put through a public trial, identified and given that sentence. The Court of Appeal reduced it to probation, and the case consolidated public support for the hearings. Lord Advocate King-Murray QC declared that no child under 13 could be prosecuted without authorisation from the Lord Advocate's office (Cowperthwaite 1988). Lord Kilbrandon (1976: ix) expressed his "misgivings at the number of cases" prosecuted, considering it "... a concession partly to a public opinion which is not yet sufficiently familiar with the new system... and partly to the innate distrust of change common among those learned in the law". The use of courts went down by two-thirds from 1972 to 1979.

Table 6.3 Referrals to Reporters & Children in All Courts 1972-1979

Year	Total referrals to Reporters	Number of children referred	Children (u.16) proceeded against in all courts	%
1972	24,219	17,950	2,390	13
1974	31,876	21,907	2,900	13
1976	29,514	18,638	2,094	11
1977	28,551	18,537	1,727	9
1979	25,842	16,924	1,055	6

(Data from Martin et al. 1981:35) N.B. A child may be referred more than once p.a.

The pattern of juvenile crime changed little over the decade, theft rising and housebreaking decreasing proportionately, probably related to more self-service supermarkets and shops generally. Research showed that cases of taking and driving cars accounted for 20% of cases dealt with at the courts, not least because the hearings could not order driving disqualification (Martin et al. 1981).

There were special procedures for the court¹⁴⁶: it was held at a different time and place (usually in chambers) from adults, in private, with the juvenile kept away from adult offenders. The judge explained the charge in language understandable to a child. The parents could assist in the child's defence, a lawyer or anyone else could

¹⁴⁶ S.1No. 446 Act of Adjournal (Summary Proceedings) Children 1971

represent both them and the child¹⁴⁷, and legal aid was available. Publication to identify anyone under 17 was prohibited, except by permission of the Secretary of State.

The sheriff in summary matters could remit to the hearing for advice or disposal, order an absolute discharge, admonition, fine, probation, or committal ‘to such place as the Secretary of State may direct for the purpose of residential training’¹⁴⁸, and detention not exceeding two years in a ‘List D’ school. On indictment, the powers were similar but detention was for a fixed period, with release through the parole board¹⁴⁹. Significantly, any case except murder could be remitted to the hearing for advice (Gordon 1976). As in England/Wales, children over 14 were sent to penal institutions for unruly behaviour: numbers varied widely each year, as low as seven in 1989, 67 in 1995¹⁵⁰.

Referrals

Anyone, a friend or neighbour, could refer a child to the reporter if concerned about its welfare, but all were obliged to act “in the best interests of the child” (SWSG 1979:14).

Table 6.4 - % of Alleged Grounds by Type 1972-1980

Ground	1972	1973	1974	1975	1976	1977	1978	1979	1980
A. Beyond Control	3.0	2.4	2.4	2.0	1.9	1.8	2.0	2.6	3.1
B. Moral Danger	0.8	0.6	0.5	0.3	0.4	0.3	0.5	0.7	0.7
C. Lack of Care	2.1	1.8	2.3	2.6	3.0	3.1	3.5	4.1	4.6
D. Victim	0.4	0.3	0.6	0.7	0.9	1.2	1.7	2.4	3.1
D.D. At Risk	-	-	-	0.0	0.0	0.1	0.1	0.2	0.1
E. Incest	0.0	0.0	0.0	-	0.0	-	0.0	0.0	0.0
F. Truant	6.0	6.8	7.2	6.5	9.7	11.8	11.3	9.7	9.8
G. Offence	87.5	87.9	86.8	87.8	84.1	81.6	80.8	80.2	78.3
H. Transfer	0.2	0.2	0.2	0.1	0.0	0.1	0.1	0.1	0.1
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Table 4 - Social Work Services Group 1980 – Statistical Bulletin – Scottish Office

¹⁴⁷ The child could make a statement not on oath and was not cross-examined

¹⁴⁸ S.413 Children Act 1975

¹⁴⁹ S.206(2)

¹⁵⁰ Appendix 6.1

In 1973, of those referred, 82% were by the police, 8% by the fiscals, 5% by the education authorities, 1-2% by social services and 0.6% by the RSSPCC (Martin FM 1976:33), statistics that remained fairly constant to the end of the decade. A child was defined as under 16, but if already under supervision to the hearings system, could be referred back again until 18. Other offenders aged 16 - 18 were sent to court where they were no longer subject to 'care and control' procedures, and were eligible for detention centre or borstal orders.

At least one of nine grounds¹⁵¹ had to be established for consideration of referral for measures of compulsory care. Decisions, taken on a local basis, inevitably reflected the conditions and facilities in a given community: "social conditions around Scotland vary quite widely... I think autonomy of this sort is very valuable"¹⁵².

Thereafter, the reporter had three courses of action, playing a pivotal role in deciding who entered the formal system¹⁵³: discharge the case, provide voluntary help, or put before the hearing. Of the 18,000 children referred to the reporter in 1972, only half went on to a hearing. However, cases marked with the statutory phrase 'no further action' actually meant the reporter explaining "such decisions to parents and children in a way geared to promoting appropriate parental responsibility for their own children and backing parental authority in this regard" (Finlayson 1992: 43).

Table 6.5 - Offence Referrals 1972-1974

	To Reporter	To Hearing	% to Hearing	Residential
1972	33,107	19,260	58%	15%
1973	44,713	25,697	57%	12.5%
1974	47,933	26,473	55%	9%

(Asquith 1983:130)

The main indicators for referral to the hearing were a previous history of offending or known family problems (Lockyer & Stone 1998:56-61). The shortage of either community facilities or social workers, even if the parents were fully co-operative, might mean that the reporter referred the case to the hearing for

¹⁵¹ Appendix 6.2

¹⁵² Interview McFadden 2006

¹⁵³ S.39(3) SWS Act 1968

compulsory measures to access the treatment¹⁵⁴. For those referred on offence grounds, there could be the added complication of co-defendants receiving differing treatment, compulsory measures or not, which might be considered unfair and discriminatory, the view taken in England/Wales.

With duplicate or multi-offenders we could, and on many occasions did, refer one or more to hearings and deal differently with co-offenders... we felt obliged to recognise parents' and children's sense of 'fairness': we could not expect them all to understand the nuances or niceties of the pure legislation. This might be particularly the case where the 'major player' in the offence did not seem to be in need of measures of care but 'tail-end Charlie' did¹⁵⁵.

Social Workers

Before the 1968 Act, probation officers had dealt with juvenile offenders in the courts, but now they were absorbed with social workers and childcare officers into the new 'social education' department of the local authority, which dealt with all children's issues. "Kilbrandon had assumed specialist, not generic social workers"¹⁵⁶. The Director was answerable to the hearing. Probation officers more used to office-based reporting and holding children accountable for their behaviour, brought "different methods and values", whilst child-care officers worked within the home context, dealing with poverty, alcohol abuse and relationships. However, "the distillation of the two approaches tended to favour the child-care model" (Gilmour & Giltinan 1998:147). In Dumfries, the panel chair, herself a former social worker, thought that

social workers on the whole were not sympathetic to the hearing system. I was very surprised about that. They resented these lay people coming in thinking they could take decisions about these children... We worked very hard at trying to build bridges... It persisted for a good many years.¹⁵⁷

A different problem in Edinburgh was hardly better: "the social services were very thin on the ground. The caricature of the picture 'When did you last see your father?' turned into 'When did you last see your social worker?'"¹⁵⁸ In the 1970s, 49% of social workers had less than 5 years professional experience, and overall

¹⁵⁴ Interview Finlayson 2008

¹⁵⁵ Interview Finlayson 2008

¹⁵⁶ Interview Dobie 2005

¹⁵⁷ Interview Dobie 2005

¹⁵⁸ Interview Finlayson 2008

numbers doubled in the latter half (Martin et al. 1981: 240). These problems were compounded when the local government reforms came into force in 1975. Some courts were highly critical, one sheriff speaking of the disastrous decline in service described the new social workers as mini-skirted ‘Rosemarys and Gwendolines’ (Murphy 1992:179).

Both the reporter and the children’s panel relied heavily on the fact-finding and opinions of the social workers. The reporter liaised with the police and fiscals, and along with the panels could seek the advice of the schools, EWOs and medical and other specialists. Social workers were obliged by law to provide the panel with the relevant reports at least three days before the hearing. Some “had a constant battle to get the reports in time”¹⁵⁹.

6.1.2 The Hearing – the Participants, the Place and the Procedure

Kilbrandon (1964: para.73-4) had wanted this new body, a ‘juvenile panel’, to be a totally independent, public agency with the widest discretion to vary or terminate the treatment, with members appointed by the sheriff and drawn from “a much wider field of suitable persons than is at present the case” in the old juvenile courts (para.78). The White Paper¹⁶⁰ “dramatically changed the emphasis to ‘community involvement’...” (Murray K 1976:58), and to disassociate itself still further from the past, it would be called a ‘children’s panel’, and the criteria¹⁶¹ for membership included “a genuine interest in the needs of children in trouble and their relationship to the community”. Initially about 1,500 members were required, chosen by a local ‘children’s panel advisory committee’ (CPAC). A ‘hearing’ required a chairman with two members.

The CPAC and the Panel

Each CPAC normally had five members, ten in Strathclyde, reflecting the 50% of Scotland’s population in that local authority area. The Secretary of State appointed the chairman and two other members, the local authority another two. Members came from a variety of backgrounds but, unsurprisingly, included a high proportion of middle class professionals (Lockyer & Stone 1998). The CPAC

¹⁵⁹ Interview Dobie 2005

¹⁶⁰ ‘Social Work and the Community’ 1966, Cmnd. 3065

¹⁶¹ Appendix 6.3

submitted names for consideration of appointment to the Secretary of State; decided the appropriate number of members necessary; considered responses to poor performance and training needs and the relationship of the panel with the public; and commissioned research. The CPAC also chose the chairman of the whole panel. Panel chairmen monitored their members, their availability and attendance at training; whilst members of the CPAC observed hearings and discussed any problems with the panel, which were not always welcomed.

One of the first panel candidates, responding to a newspaper article, considered “The committee had no training whatsoever... most of them hadn’t taken in the Kilbrandon philosophy that there was no punishment... they had a lot to learn”¹⁶². Other CPACs were more rigorous in their selection procedures for hearings members. The system was standardised by guidelines in 1982 after a national meeting of the chairmen of the CPACs, “though each area would have its own particular way of following them”¹⁶³.

Recruitment began with “a massive advertising campaign: full page advertisements on radio and television and notices and explanatory videos available in libraries” (Ravenscroft 1987:475). Selection was done in a four-stage procedure: initial applicants were sent an explanatory leaflet. Those that responded were given an interview by two members of the CPAC, with a third observing candidates in the waiting room. They had to consider availability to serve; commitment to attend training, both pre- and in-service; and clear unsuitability. Only on the unanimous decision of all three members would a candidate be rejected at this stage. The third stage involved a whole day: candidates were sent “a time-table of the day’s events and a case-study, with school reports and social inquiry reports. Each candidate took part in a group discussion of topics such as alcoholism, drug abuse, truancy, etc, and an individual interview” (Ravenscroft 1987:476). They were assessed by the CPAC and experienced panel members. All were told that the final decision, by the Secretary of State, would be made within three months, allowing time for assessment, police checks and constructing the panel to reflect the wider community, with a balance of sexes, and age range between 20-60 years.

¹⁶² Interview Dobie 2005

¹⁶³ Interview Dobie 2005

The commitment of panel members was for three years, renewable only after reassessment; to sit once fortnightly on average; and to undertake training delivered to national guidelines (Murray G. 1976:8). The local authority had a duty to publish the names and addresses of panel members, particularly at places like the local library. It was also responsible for paying members their expenses (SWSG 1979:13).

Initial appointments were much more likely than English justices to be from the health, education and welfare professions (Asquith 1983:134). A decade later, there was not much change except a “modest increase in the proportion of manual workers” (Martin et al. 1981:240), “lorry-drivers, farmers, shift-workers in factories, people living in huge local authority housing estates, single-parent mums dependent on supplementary benefits” (Ravenscroft 1987:476). There were equal numbers of men and women; every hearing had to include one of each¹⁶⁴. The average age of 40 years was much lower than for other public bodies (Murray G 1976:13), 11% were under 30 and 58% between 40 and 59 (Reid 1998:186). This broad selection succeeded, perhaps because wide publicity had attracted enough recruits: Dumfries and Galloway, for example, had 50 applications for six vacancies (Martin & Murray 1976:234). Whatever their background, panel members seemed to share values and beliefs; and showed a flexibility acceptable to clients (Martin et al (1981:159); they “had a wonderful pioneering spirit... felt privileged and very very enthusiastic”¹⁶⁵. Within five years there was a turnover of 20-25% p.a., thus bringing in more recruits and spreading knowledge of the system. The children’s panels, based on the large burghs, varied in size from the 900 members in Strathclyde to 11 in Shetland. In 1977, the Scottish Association of Children’s Panels was formed to provide a single voice for negotiations with the Scottish Office.

The chairman of the panel did not always chair the hearing, but could choose who chaired on each occasion. The chairman at the hearing had certain statutory duties over and above being a panel member, although all joined in the discussion with the child and the family. Chairmen were not without their critics: “the belief that all panel members are able to chair a Hearing flies in the face of reality” (Grant 1982:65-6).

¹⁶⁴ S.34(2) SWS Act 1968

¹⁶⁵ Interview Dobie 2005

Training

As in the previous system of juvenile courts, the decision-makers were lay people but now came from a greater variety of backgrounds. Their duty was to make decisions about compulsory measures of care having assessed the information from different professionals, both written and oral. Panel members had their common knowledge but needed specialist information about the social work possibilities and “to develop considerable skills to overcome silence, reticence, fear or aggression” on the part of children and their parents (McDonald M 1976:231). They learnt “a lot about child development. It was extremely helpful”¹⁶⁶.

Children’s panel training organisers, based in universities, provided the training, although each area developed independently (Reid 1998:188) and “several professional bodies [were] involved and not just the social work profession” (Asquith 1983:101). Dumfries panel members

were given a very interesting reading list, with not only text books but also several novels, one of which was ‘High Wind in Jamaica’... all about the behaviour of children when they have misbehaved... [which] to me indicated the breadth of the whole concept that our training was going to embrace...¹⁶⁷

Another wrote of the importance of training to build up “good relationships, based on mutual respect... between the part-time lay panel members and the full-time professionals” (McDonald M 1976:230). Visits included schools, children’s homes and social work teams to discover what could be done to help children in trouble, and “discussing and scrutinising the services available” (Lockyer & Stone 1998:47). In the early 1980s in-service training became part of the panel members’ commitment, with experienced members often acting as tutors and monitoring performance. Glasgow University provided a Panel Training Resource Centre (Martin et al. 1981:272). Research findings on the hearings were put into standard training manuals (1998:67).

The Place

Kilbrandon (1964 para.226) wanted the new panel to be entirely away from criminal courts and police stations, with simple accommodation. Large urban areas

¹⁶⁶ William Stuart, Panel Member and Prison Officer, ad hoc interview with Ravenscroft, Peebles, Scotland, 14.xi.2009

¹⁶⁷ Interview Dobie 2005

had premises “exclusively for this purpose” (SWSG 1979:12), but in the late 1970s Martin et al. (1981:94-5) observed 301 hearings across the country and found “hearings centres ranging from excellent to wholly inadequate”. One was “a more formal setting than the most sumptuous juvenile court” (p.95), while in Dundee hearings were “held in a large tenement flat in the centre of town” (p.94). There was no record of any being held near courthouses or police stations.

At the hearing, in most everyone sat around one table, “a few used armchairs and coffee tables...a box of tissues on the table was almost universal” (Martin et al.1981:95). The size of the table could provide some protection at times of high tension when unpopular decisions were made, and could also be a barrier to informality (Lockyer & Stone 1998:51).

Most of the hearings were in the evening... After a while, the social workers rebelled against the evening sittings... We tried not to have more than one family waiting at any one time¹⁶⁸.

The system allowed detailed investigation, given the median duration was 31-45 minutes, significantly longer than the old juvenile courts, where “it was by no means unusual to have 40 individual cases disposed of in a two hour session” (Finlayson 1992:41).

The Children and the Parents

Any child referred to a hearing was obliged to attend, except in very limited circumstances¹⁶⁹; and it was desirable that the parents attend; both had the right, and one must attend¹⁷⁰. Failure to do so could result in a fine¹⁷¹. Both parent and child could each be accompanied by a representative¹⁷², although this was rarely exercised (Adler 1985:140). All were entitled to claim expenses for travelling and subsistence from the local authority¹⁷³ but legal aid was not available.

Children came before the panel on a variety of grounds, and during the first decade there was a tenfold increase in children as victims, of physical, emotional or sexual abuse. This changed the gender balance considerably from 7:1 boys to girls down to 3:1, although the figure remained constant for girls on offence grounds, 1:8

¹⁶⁸ Interview Dobie 2005

¹⁶⁹ S.40(2) SWS Act 1968

¹⁷⁰ S.41(1) and (2)

¹⁷¹ S.41(3)

¹⁷² Children’s Hearings (Scotland) Rules [Statutory Instruments, 1971] No. 492 Rule 11 (1) and (2)

¹⁷³ Rule 29 Children’s Hearings (Scotland) Rules 1971

in the same period (Lockyer & Stone 1998:57-8). 75% of referrals were on offence grounds and 16% truancy.

nearly half the children... were classified by their schools as having a poor level of attainment in relation to age; three in ten were graded as average and only five per cent as 'good' (Martin et al.1981:82).

Offending charges varied from the "relatively trivial to unquestionable seriousness". Property offences predominated, some 80%: "forced entry into premises [were] not very much less common" than other forms of stealing. There was violence or the threat of violence in 8% of cases, but serious assaults were sent to the sheriff court (Martin et al.1981:96-7). Some 8% were for drunkenness or breach of the peace, while drug offences did not warrant separate recording in the 1970s.

At the hearing, significantly, the child was without any co-defendants as "the offence has lost its importance and the needs of the offending child [were] the panel's first concern" (McCabe et al. 1984:34). 81% of children were with their mother; 55% their father, and in 11% of cases with a grandparent or older sibling (Martin et al.1981:99). The panel was keen to promote a relaxed atmosphere, but mindful of the quasi-judicial role many found this

a difficult reconciliation... the Hearing is not a democratic meeting of equals, discussing the child's best interests from equal standpoints... one set is going to impose a decision on another ... backed by the full force of the law (Dobie 1976:226-7).

Nonetheless,

The majority of parents spoke very positively of their experiences. Most parents also felt that they had understood everything that happened... their own opinions were valued and that they had participated in the process in a way which would not have been possible in another setting (Martin et al.1981:233-4).

The Procedures

Panel members were expected to arrive prepared, having read the reports. Kilbrandon (1964 para.109) had wanted an "atmosphere of full, free, unhurried discussion" to "enlist the co-operation of the parents". Thus, the hearing was held in private, with, importantly, no police or fiscals. The press was allowed, but in practice rarely attended, and could not identify the child.

To reduce the chance of informality conflicting with due process (Lockyer & Stone 1998:51), there was a statutory duty on the chairman to explain the procedures

and their rights to the parents and child, including that of appealing the decision¹⁷⁴. “If you hadn’t done that, it would invalidate any decision that was made.”¹⁷⁵ The next duty was to ascertain if the child and parents accepted the ground of referral¹⁷⁶. Even that could be fraught with difficulties for the chairman, who might be accused of ‘leading’ to achieve an admittance of the act alleged (1998:53). Any disputed grounds were referred to the sheriff “to secure a ‘finding’” (Kearney¹⁷⁷ 1998:159). Legal aid and representation were available before the sheriff, as this process established the culpability or otherwise of those concerned. In 1979, of the 1,999 applications for proof of ground, some 15% of all referrals, in 40% the ground was not established or the case abandoned.

At the hearing, anyone could speak, everything was discussed “in front of all the participants and the decision [is] reached in public” (Adler 1985:76) with all three panel members asking questions. The chairman of the panel, after discussions with the child and family, and using the relevant reports, consulted publicly with his panel colleagues, and announced the decision, together with the reasons for it, explaining the substance of reports if it were material to the decision¹⁷⁸. Panel members could technically adjourn for a discussion but “most of the panel members felt it would be contrary to the spirit of the Kilbrandon philosophy” (Asquith1983:188). At the end of the hearing, the chairman was obliged to explain the right of appeal to the sheriff court, where legal aid was available¹⁷⁹. Finally, the panel would write its full decision with reasons, and hold another hearing within a year to review the case. The chairman alone, and not the reporter, was responsible for seeing that the hearing complied with all legal requirements¹⁸⁰.

Not all panels and reporters were as diligent as this however: research found that “a mere 6% of over 900 panel members ...thought that the observance of procedural requirements was an important aspect of the Hearing” (Adler 1985:143). In one third of all cases, there was no attempt to explain the purpose of the hearing

¹⁷⁴ Rule 17(4)

¹⁷⁵ Interview Dobie 2005

¹⁷⁶ S.42 SWS Act 1968

¹⁷⁷ Sheriff Kearney: an “investigation of what a child is alleged to have done – a pure question of fact” where the judicial proceedings remain a civil matter but the sheriff had to be satisfied beyond reasonable doubt, the criminal standard – a unique process, sui generis

¹⁷⁸ Children’s Hearings (Scotland) Rules [Statutory Instruments, 1971] No. 492 Rule (s.60) 17(3)

¹⁷⁹ S.49(1) SWS Act 1968

¹⁸⁰ Alan Miller, Reporter, ad hoc interview with Ravenscroft, Peebles, Scotland, 13.xi.2009

(Martin et al. 1981:103) and in one quarter there was no mention of the right to appeal, although most of those cases were for discharges some were for residential supervision (p.104). Compliance with rules increased with the seriousness of the offence, and was more common for offence grounds than truancy. But these researchers felt that “anything that falls short of 100% compliance must be taken extremely seriously” and that reporters should intervene more to ensure correct procedures (Martin et al.1981:107-8). The lawyer and panel member Grant (1976: 214) had felt “the Act and the Rules afford adequate protection in the Hearing situation,” but five years later admitted that the findings in ‘Children Out of Court’ were “nothing less than an indictment of the way the system has operated for the past decade” (Grant 1982:66).

There were few complaints by parents, although most thought the offence the reason for being at the hearing (Martin et al.1981:234), and a “significant minority... felt the need for some kind of advocacy on their behalf...”(p.233). However, the hearings compared favourably with the earlier juvenile courts by most parents experienced in both (Murray K. 1998:234); and 85% of the children said they were satisfied they had told the hearing everything they wanted to and 50% felt they had influenced the decision (Erickson 1982:98). 53% knew who everyone was, only 10% none (1981:193).

On appeal, the case was treated as a civil matter to be discharged or remitted back to the hearing. The sheriff could only change the decision for a procedural error, not because another treatment might be more appropriate¹⁸¹; nor could a hearing change the decision of the sheriff by acting on reports which had not been before the sheriff¹⁸². Appeals were extremely rare: of 32,000 disposals during 1972-4, there were just 61 appeals, of which 2/3rds confirmed the disposal (Scottish Office Statistical Bulletins). This too, would suggest a high degree of satisfaction with the hearings system.

6.1.3 Choosing the Treatment

It is perfectly feasible for an individual to be concerned about the serious nature of offending and the need to offer society protection without being committed to punishment. (Asquith 1983:169)

¹⁸¹ *D v Sinclair (1973) SLT (Sheriff Court) 47/8*

¹⁸² *K v Finlayson (1974) SLT (Sheriff Court) 51*

In many cases these decisions are not being carried out... there are not the resources in the form of residential places and social workers' hours to give the child the care he needs. The Hearing is then akin to a charade. (Dobie 1976:225)

The sole criterion for the panel, once the grounds had been accepted, was acting “in the best interests of the child”¹⁸³ to decide if compulsory measures of care were necessary. Having read the relevant paperwork, the panel could explore concerns further at the hearing. As lay people, they were expected to challenge the opinion of the expert, the social worker (Morris A.1974:369), a difficult task, but as a panel chairman explained, members should

be consoled by the thought that the task is one to which experts of different kinds have applied themselves all down the ages and it can be seen by the state of our society today how unsuccessful they have been. (Dobie 1976:227)

There was a “much closer relationship between the social workers and the panel members” than had been found in English juvenile courts (Asquith 1983:164), and the writer of the report was normally present at the hearing, although in around 6% of cases there was no social worker at all (Martin et al. 1981:99). But, standards varied: “In more than half of all the cases examined, the reports did not provide the Hearing with information on basic features...” and in 14% of cases there was no recommendation by the social worker (pp.156, 161). Where there was one, the panel agreed with the social worker’s recommendations in over 80% of cases (Morris A.1974:368).

The panel expected to have a school report, but the relationship between the schools and the hearings was often unsatisfactory. Budget constraints meant it was hard for teachers to attend the hearings, while many parents were fined by the courts for their children’s failure to attend school, when the children might have been in need of compulsory care. Panels saw the importance of schooling, emphasised in 91% of cases, “with reminders that the Hearing possess powers to compel school attendance by making residential orders” (Martin et al.1981:113). Some teacher members

¹⁸³ S.43(1) SWS 1968 Act

found it very difficult to tolerate what they saw as impertinence from the children. They would slip into their teacher role and start to tell them off if the child, often from fear and a sort of bravado, would appear to be cheeky, and needed to be ignored.¹⁸⁴

Corporal punishment¹⁸⁵ in schools was not made illegal until 1986¹⁸⁶. This may explain the more punitive attitudes expressed by teacher panel members, but also emphasises the radical, welfare approach of the hearings.

Critics of the philosophy of the hearings argued that because reporters were influenced by the persistence, seriousness and the previous record of the child, the panel was similarly influenced, and its decision was not based solely on the needs (Morris A. 1974:368-9). Asquith's research found no evidence of any such tariff, but that a more serious case "may well indicate a greater need for intervention, rather than provide the basis for some form of penal calculus" (1983:160). There were "no overt references to punitive objectives" (1983:173), but some panel members would "endow the Hearing with an air of formality, despite the promise of the Act... lecturing and invoking a sense of shame..." (1983:204). One reporter felt obliged to "stop a children's panel member... being rather too hard on the laddie who was in front of him"¹⁸⁷. A Strathclyde panel member (Watson D. 1976:201) felt that regardless of the intentions of the panel, sending a child away would look like punishment to him or her, so that the hearing was not totally different from the old juvenile court, for "the worst imaginable eventuality for most children is the prospect of separation from their family and usual environment" (Erikson 1982:94).

"The majority of panel members favour the view that something outside the child is most likely to be responsible for his or her delinquent behaviour" (Martin et al. 1981:244). Although the "overwhelming view" was that parents' shortcomings were the major factor (Martin et al. 1981:219), the panel seemed to avoid criticism or apportioning blame and was "usually extremely reluctant to risk provoking a confrontation", such that the parents were not made to feel that the "measures to be

¹⁸⁴ Interview Dobie 2005

¹⁸⁵ The government said "there is no evidence of a widespread demand among education authorities, parents or others that it should be summarily stopped before alternative measures to help keep discipline in the worst cases available, and there would undoubtedly be violent opposition from the teachers' associations" (Foster 2009). An attempt by the Secretary of State Bruce Millan in 1977 to remove the use of the tawse (a leather strap) on girls was thwarted by the Sex Discrimination Act 1975

¹⁸⁶ Education (No.2) act 1986

¹⁸⁷ Interview McFadden 2006

imposed by the Hearing [had] relevance for them as well as to the child” (Martin et al. 1981:247).

The Powers

If the panel did not consider compulsory measures were necessary, it discharged the matter, although probably aware that voluntary measures of care had been agreed. Over the first decade, around one third of cases were discharged¹⁸⁸. The panel would want an assessment of the appropriateness of different types of supervision in the reports, and was expected to have visited any projects and establishments in its area. As a Glasgow panel member (McDonald 1976:232) commented,

It is quite irresponsible of any panel member to be a party to a decision to remove a child from home if he does not have a clear idea of the type of establishment to which that child is being committed.

Members maintained an independent stance, remaining “impervious[ness]... to social work or any other professional language” (Martin et al.1981:139). They wanted to know about “the social, personal and environmental circumstances of the child” and the child to explain his actions to ascertain his moral development, rather than the intention or culpability (Asquith 1983:193-4).

Table 6.6 Decisions of Hearings for Offence Grounds 1972-1981

	Non-Residential Supervision		Residential Supervision Requirement		Un-changed Supervision Requirement		No Supervision Requirement		Total
	Nos.	%	Nos.	%	Nos.	%	Nos.	%	Nos.
1972	4,794		1,377	13.6	-	-	2,902		9,073
1973	5,495		1,421	11.8	-	-	4,133		11,049
1974	5,438		1,301	11.4	-	-	4,276		11,015
1976	4,133	26.5	1,752	11.2	1,370	8.8	4,972	31.9	12,227
1977	3,918	25.9	1,633	10.8	1,237	8.2	4,541	30.0	11,329
1978	3,373	23.8	1,522	10.7	1,094	7.7	4,413	31.1	10,402
1979	3,312	24.1	1,415	10.3	878	6.4	4,568	33.3	10,173
1980	3,538	23.0	1,457	9.4	817	5.3	4,974	32.3	10,786

¹⁸⁸ SWSG Annual statistics

1981	3,394	21.5	1,353	8.6	794	5.0	5,568	35.3	11,109
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Social Work Services Group – Annual Statistical Bulletins – Scottish Office

If it were thought that compulsory measures were necessary for the proper development of the child's character and abilities¹⁸⁹, the panel had only two powers, to make a supervision requirement in the community, with or without 'intermediate treatment' (IT), or a residential requirement. It would decide the type and any conditions, which could include "attendance at some place, the performance of some task or a combination of these conditions" (SWSG 1979: 26). As the panel acted "in the best interests of the child," it had to be aware of the consequences to the child of breaching those conditions; that any action might be done best voluntarily rather than compulsorily; and the problems arising if one child did an activity voluntarily and another child under compulsion. As any change required another hearing to consider it, with the panel exercising its continuing responsibility for choosing the treatment, the SWSG recommended flexibility through lack of detailed prescription. There were no powers to order borstal, detention centre or attendance centres, nor any financial penalties, including restitution or costs. Once a requirement was made, it was normally effective from that date, and for most purposes allowed "the local authority in appropriate cases to assume parental rights"¹⁹⁰ (SWSG 1979: 29). The panel did not specify the period but was obliged to hold a review within one year. If the child offended again during the period, the reporter would decide whether to refer the child back to the hearing or deal with it guided by the views of the social workers.

Supervision in the community applied to about 80% of those in need of compulsory measures of care. The child would live at home, have one-to-one or family-oriented casework, or

Be involved in group activities...community service, sport or outdoor pursuits... or in group discussions under the social worker's guidance (SWSG 1979:24-5).

Two thirds of social workers saw the objective of home supervision as "less emphasis on control of the child and more on working with the family" (Martin et al.1981:252) to provide the necessary measures of care.

¹⁸⁹ S.20(1) SWS Act 1968

¹⁹⁰ S.44(5)

IT¹⁹¹ was another form of supervision, “intermediate, that is between supervision at home and residential care”: the purpose was to prevent the child “requiring residential care in the future” (SWSG 1979:26). It was based on the concept that by providing “recreational pursuits to widen the child's interests” it would “increase his ability to find satisfaction in purposeful co-operation with others” (McDonald M 1976:11). There was a serious shortage of this provision. If the hearing had recommended a short residence away from home and that was unavailable, another hearing had to be convened to reconsider the treatment.

A residential condition, specified in the order, could involve sending a child to a foster placement, a children’s home or a residential school. The SWSG (1979:25) warned that “removal from home is a drastic step which can greatly upset the child and his family,” and should only be done “after careful consideration of the advice and views of those concerned and a full assessment of the child’s problems.” Residential establishments were run by the local authority or voluntary organizations. Most children, some 1,617 in 1973, went to ‘List D’ schools, the old approved schools (Murray G. 1976:11)¹⁹², and most children needed remedial educational help (Murray K. 1976).

There were huge regional variations in the use of residential requirements, ranging from four to 37 per cent of disposals¹⁹³. Kilbrandon had warned of the possible over-use of resources by hearings finding extensive needs of children despite minor offences, and in the early 1970s demand for List D schools was “outstripping availability” (Cowperthwaite 1988:54), with panel members “resistant in principle to allowing supply to determine demand” (Lockyer & Stone 1998:62). By 1976 demand had reached its maximum of 1,750, marginally higher than those sent to approved schools and under sentence in remand homes just before implementation of the 1968 Act. Additionally, there were 52 secure places, and a demand for more.

Panel members were vociferous in their complaints:

¹⁹¹ Appendix 6.4

¹⁹² In 1976 there were 26 schools for children aged between 8 and 16 years, 1,500 places for boys, 260 for girls, in both rural and urban settings, with very different regimes and classified by sex, age and religion.

¹⁹³ Appendix 6.5

We were wasting our time, having come to a decision that residential care was essential, and then nothing was happening. We were cross and lobbied our local MP.¹⁹⁴

Later she admitted that, as history has shown with many new initiatives in the juvenile justice system, “There was an overuse of residential orders in the 1970s and in the 1980s it went down.”

Children were sent to List D schools not only from the hearings but by the Sheriff and High Court as a result of criminal convictions. Significantly, research (Rushforth 1978) found that of boys sent to List D Schools by the courts or the hearings there was no difference in their home background or offending history but, ‘court’ boys stayed longer in schools and were likely to be transferred to borstal. To Adler (1985:50), this indicated that despite being subject to the judicial process, “granting legal rights in itself guarantees very little...and more stigmatisation than those who are referred to the panel for similar offences”. Asquith (1983:203) found

Panel members do confess to differentiating between children who appear for offence reasons, and those who appear for other grounds...[which] underlies the demands by some panel members for the provision of separate establishments for offenders and non-offenders and for more powers to deal with ‘hard cases’.

By the end of the decade there was a surplus of List D school places with “serious discussion of possible closures”, due to falling referrals and growth of community based IT (Martin et al.1981:20 & 313). There were the inevitable geographical problems, with the right placement often far from the child’s home. This led to alternatives such as foster care, so that by 1981 50% of those subject to compulsory residential supervision were in foster homes as opposed to children’s homes (Lockyer & Stone 1998:63-4).

The hearings had exceptional powers to refer a child for special education, hospital or guardianship for mental health considerations; or transfer to another hearing. They could also detain a child in a “place of safety” for up to seven days pending a hearing: “In 1980, there were 202 orders for detention ... in which the grounds of referral involved offences committed by the child” and 621 where the child’s protection was the primary consideration (SWSG 1980 para.19).

After wide consultation, a review of the powers by the newly returned Labour government in 1974 concluded that minor procedural changes were

¹⁹⁴ Interview Dobie 2006

necessary, but rejected any suggestion of fines and cautions¹⁹⁵ on parents (Cowperthwaite 1988:57). Despite the hopes of the politicians, the volume of work was such that social workers had to deal with the crisis first, rather than any preventive work with vulnerable families. In 1978, there were 15,000 referrals to the hearings, all requiring reports, 7,000 orders for supervision in the community and 1,500 for residential (Martin et al.1981:15).

Reviews

“No child shall continue to be subject to a supervision requirement for any time longer than is necessary in his interest”¹⁹⁶, and every case was reviewed before a hearing, within one year¹⁹⁷. At the review it was customary to include one of the original panel members: however, despite the crucial importance of knowing the results of their actions, some 80% of panel members claimed some difficulty in following the progress of their cases (Martin et al.1981:263). The hearing could terminate, continue or vary the supervision requirement: early research showed 38% of cases were terminated and another 36% varied (Morris A. 1974:371-2).

6.1.4 Conclusion to the First Decade

In 1973 there were severe financial constraints arising from the international oil crisis and subsequent widespread industrial disruption just as the hearings system was trying to establish itself. Nonetheless, sufficient panel members had been openly recruited, by rigorous selection procedures, from a broad and younger spectrum of the local community, and were trained and monitored; a variety of venues was used for the hearings, none in any way connected to the courts or police stations. The new post of reporter had attracted enough applicants, but there was a serious shortage of social workers, many lacked experience, and the situation was exacerbated by the reorganisation of social services following the Wheatley reforms.

There was a good deal of criticism of the hearings, encouraged by lurid articles in the popular press (Glasgow Herald 1975). Furthermore, the initial enthusiasm of the panel members was severely dampened by the lack of resources to

¹⁹⁵ recognizance

¹⁹⁶ S.47 SWS Act 1968

¹⁹⁷ S.48(3) The Social work department could request a review at any time, and the parents or child could ask for one after three months

implement their decisions. While Kilbrandon himself (1976:x) regretted “the inadequacy, arising from malnutrition, of the supporting field organisation”, he felt it important to emphasise the fact, not infrequently ignored, that the available resources would be equally inadequate were they deployed by the criminal enforcement agencies.

Later research indicated that “the system had come to be accepted as an integral part of the Scottish scene”, with “muted condemnation” by the police (Martin et al.1981:21). Between 1974 and 1978 the numbers of field social workers had doubled; the numbers referred to the reporter had declined; and there were spare places in List D schools. Whilst some panel members clearly harboured punitive thoughts, with “the use of sarcasm and sermonising” (Martin et al.1981:270), most saw the young offenders “to an overwhelming extent” as victims of their circumstances, and of the inadequacies of their parents (Martin et al.1981:318). Kilbrandon had emphasised the importance of co-operation with the parents and perhaps this may explain the reticence on the part of panel members to confront the parents with their failings. There was academic criticism of the hearings’ failure to observe procedural matters, although the families largely felt

a sense of having been listened to, a sense of having been allowed to express themselves, a belief that panel members were genuinely interested in the views expressed and were helpful in their intentions (Martin et al.1981:271).

For the 10% of children dealt with by the courts, only a quarter received a purely punitive sanction, that of a fine, although most children sent to a List D school would have seen it as punishment. For the 90% of children reported for offending to the hearings system it had dealt with them, along with all the care cases, on the basis of their needs.

There was consistent criticism of the hearings during the first decade related to the two ideologies of “welfarism and legalism”, balancing the rights of the child and the parents and the proportionality of response to the offence. Some academics were critical of what they deemed were the indeterminate and disproportionate ‘sentences’ and called for a return to determinate sentences and proportionality in the interests of justice (Morris, Giller, Szwed & Geach 1980).

After the diversionary methods of the police, reporters and the hearings, some panels, despite not identifying any reason for the offending, felt they could not ‘do nothing’ so assumed a ‘need’ for a supervision requirement (Adler 1985:79).

“There is an argument which says that some attention, even of the wrong kind, is better than none” (Dobie 1976:225), offending behaviour required a response. As

in so many other areas of penal policy, results matter rather less than the impression that something firm and decisive is being done about the problem in hand” (Taylor, Lacey & Bracken (1979:64).

With the return of a Conservative government under a new leader, the non-punitive hearings might be vulnerable to scrutiny and reform.

6.2 Review and Reform in the 1980s

There is a sense of pride, reflected by the media in Scotland, that Scotland should have introduced a unique and radical approach to the problem of child offenders. Criticism has never developed, either in Scottish public opinion or in Parliament, into a concerted demand for the replacement of the system. (Cowperthwaite 1988:57)

The first decade of the operation of the hearings in Scotland had been under both Conservative and then Labour governments. In 1979 the Conservatives were returned under their new leader, Margaret Thatcher, on a 'law and order' platform. The Scottish Conservative Party Election Manifesto (1979:22) spoke of reviewing the children's panel system, and would "consider whether it might be appropriate to extend their [community service orders] use to the panels" and thought "compulsory attendance centres and custodial sentences may be the only remedy, particularly for football hooligans".

The subsequent consultative document found no need for "fundamental alterations", but considered there were not "sufficient measures of discipline and punishment" (SWSG 1980...) and suggested fines, reparation, and community service orders for children, and cautions (recognisance) on parents. It was widely distributed, and of the 61 responses, all were highly critical of any punishment powers save the Scottish Police Federation, which "wholeheartedly endorsed the punitive measures" and claimed lack of punishment contributed to the "escalating crime and vandalism rate" (SWSG 1980...), a view not supported by the statistics. The Strathclyde Panel (50% of all panel members in Scotland) said the government did not understand the philosophy, since grafting punishment onto the welfare approach would produce the "worst of both worlds" (Lockyer & Stone 1998:69-70).

In 1981, the Secretary of State Sir George Younger rejected any additional powers. His predecessor, the Labour Millan, felt that as

a traditional Tory... it must have been difficult for him. He had to fight to maintain some degree of Scots independence... We will do things that suit Scotland.¹⁹⁸

Consistent with that, a clause restricting the reporting and identifying of juveniles in all criminal courts was passed in the Conservative's Criminal

¹⁹⁸ Interview Millan 2009

Justice (Scotland) Act 1980, having fallen in Labour's 1979 Bill (Cowperthwaite 1988:56).

6.2.1 Panels

Research by Martin et al (1981:266-7) on attitudes of panel members and social workers to additional powers produced a rather more mixed picture, where "...the not insubstantial ghost of a belief in the efficacy of the crime-punishment approach to delinquency still lingers."

Table 6.7 Views on Extended Powers for Hearings System

Supporting power to:-	% of Panel Members (no. 921)	% of Social Workers (no. 170)
Defer decision	66%	65%
Fine parents	41%	25%
Confiscate weapons	63%	48%
Reparation or CSO	89%	75%
Reclaim goods/ cash	58%	38%
Corporal punishment	11%	5%
Refer to Sheriff	74%	59%

(Martin et al. 1981: 266)

That three-quarters of panel members wished to refer cases to the sheriff, and 41% to punish parents, suggested a considerable challenge to the ethos of Kilbrandon. Conversely, there was strong support to include custody arrangements after divorce or separation, and adoption and fostering, reflecting

the assumption inherent in the Hearings system that children who offend and children who are in need of protection or basic care constitute compatible groups" (Martin et al. 1981:268).

Although there had been significant support for voluntary reparation, a Circular (SWSG 1982) found it was little used.

In the late 1980s, the Children's Panel Chairmen's Group (CPCG) commissioned research on the panels. This found 20% of the panels felt their decisions were constrained by lack of resources, with offence and truancy cases twice as likely to suffer. Some felt there was a danger of saving the young only to abandon them as teenagers (Lockyer 1988:2). There were enough national residential places but local shortages, and "panel members wished to see more children

adequately contained in an open setting than more locked places” (Lockyer & Stone 1998:85). The worst problem was the lack of time for home supervision, and IT was scarce and not seen as an alternative to residential provision.

Panels showed a decline in male members from parity in 1971 to only 37% of the new intake in 1996, but social representation had widened, with the manual and skilled group some 47% of the total membership (Lockyer 1992). Although there was never a shortage of applicants, there was much ‘early’ retirement: in 1992 the average length of service was under five years, with some new authorities having more than half with less than two years experience (Lockyer & Stone 1998:185-191).

6.2.2 Referrals

Table 6.8 Initial Reports on Children aged 8-u16: Action by Police 1980-1988

Police Action	1980	1981	1982	1983	1984	1985	1986	1987	1988
All Reports	33,087	33,578	30,859	33,357	32,284	33,528	31,922	32,186	27,842
Police warn or JLO	5,661 17.1%	5,020 15.0%	4,821 15.6%	6,148 18.4%	5,693 17.6%	5,400 16.1%	4,649 14.6%	4,871 15.1%	3,518 12.6%
Referred to Reporter	16741 50.6%	18147 54.0%	16540 53.6%	16986 50.9%	16825 52.1%	17981 53.6%	17471 54.7%	19851 61.7%	20505 73.6%
Reported to: Fiscal	10685 32.3%	10411 31.0%	9498 30.8%	10223 30.6%	9766 30.3%	10147 30.3%	9802 30.7%	7464 23.2%	3819 13.7%
Reports per 1000 children	48	50	48	54	54	59	59	61	55

SHHD 1990 Statistical Bulletin, Table 3

During the 1980s, the police gave proportionately fewer warnings, but in line with the Lord Advocate’s new guidelines in 1987, fewer children were sent to the fiscal and more to the reporter. Overall, the nature of referrals to the reporter changed considerably, with far more children referred on grounds for their protection than previously.

Whilst “offence grounds constituted 7 out of every 10 cases with fresh grounds for referral” (Scottish Office 1988 para 4.3) there was a tenfold increase over the period 1977-1987 in physical and sexual abuse cases.

Table 6.9 % of Alleged Grounds by Type 1981-1989

Ground	1981	1982	1983	1984	1985	1986	1987	1988	1989
No of Referrals	30,786	29,226	30,071	31,595	34,151	36,306	36,785	37,545	37,252
No of Children	20,111	19,017	19,365	19,529	21,108	21,865	22,150	22,403	22,460
Rate per 1000	16.7	16.3	17.0	17.5	19.4	20.4	21.0	21.6	21.8
A. Out Control	3.0	3.0	3.0	2.0	3.0	3.0	3.0		4.5
B. Moral Danger	0.7	0.5	0.4	0.2	0.3	0.4	0.6		2.0
C. Lack Care	4.0	5.0	5.0	5.0	5.0	6.0	7.0		11.5
D. Victim	3.0	4.0	4.0	5.0	5.0	7.0	9.0		19.0
D.D. At Risk	0.2	0.2	0.2	0.1	0.3	0.4	0.5		1.5
E. Incest victim	-	0.0	-	-	-	-	-		0.0
F. Truant	10.0	9.0	10.0	10.0	10.0	9.0	8.0		9.0
GG. Solvents	0.0	0.0	0.3	2.0	2.0	1.0	1.0		0.5
I Care of LA			0.0	-	-	-	-		-
G. Offence	79.0	79.0	78.0	75.0	73.0	71.0	70.0		51
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Table 4 - Social Work Services Group 1988 – Statistical Bulletins – Scottish Office

* a child could be referred more than once and for different grounds

6.2.3 Legislative Reforms

In 1983 the hearings were given the power¹⁹⁹, with stated criteria, to authorise ‘secure’ accommodation. Against their wishes, they could be overruled by the directors of social work who needed the flexibility of treatment to suit changing needs (SWSI 1996), although there was a ‘widespread belief’ that this related to scarcity of places²⁰⁰. Scotland had proportionally 30% more secure places than England, in constant demand (1996 para 85). Whyte (1998:209) suggests this may have been due to a shortage of community-based programmes with “routinely available, intensive day programmes”.

¹⁹⁹ Health and Social services and Social Services Adjudications Act 1983

²⁰⁰ In 1994, 2/3 to ¾ of authorizations led to a placement. Hearings competed with courts for interim detention. Early 1980s, Scotland had over 50 designated secure places, but still some children were held in police cells or remanded to prison (Lockyer and Stone 1998:74-6)

In 1986, the chairman of the panel and the sheriff were given the power, where there was a conflict between the parent and child, to appoint 'safeguarders'²⁰¹, the majority were solicitors, others social workers. Most were appointed for cases of non-offence grounds (McGhee, Waterhouse & Whyte 1996), which took at least 75% of the reporter's time (Lockyer & Stone 1998:82-3). This changing character of the hearings reflected the increasing awareness of the level of child abuse, particularly sexual, and required panel members to have less training based on delinquency and much more on issues related to child abuse (Reid 1998:191). An early attempt by academics to compare methods of dealing with such cases with the DHSS in England/Wales was rebuffed: there was a

deep reluctance to embark on any investigation which might conceivably be interpreted as implying that there was anything useful to be learned from the barbarians in the North (Murray K. 1998:236).

In 1988 the Secretary of State for Scotland set up a review (Scottish Office 1990), but

emphasised that the system should remain 'as a separate and distinct feature of Scottish legislation for children whose conduct has brought them into conflict with the law or who are in need of care or protection' (Scottish Office 1990).

It made 95 recommendations, with no radical changes to the hearings, but improvement and simplification. This was in direct contrast to a similar review in England/Wales, where care proceedings were removed from the juvenile courts, thus separating 'the troubled and troublesome'.

²⁰¹ Children's Hearings Rules 1985

6.3 Review and Reform in the 1990s

In 1991, the UK ratified the 1989 UN Convention on the Rights of the Child with a reservation to operate the children's hearings without allowing legal representation. At the time, there were serious concerns surrounding much publicised child abuse cases in England (Cleveland and Rochdale) and in Scotland (Orkney), while Fife concerned relationships between the panel and social workers. In the latter two, public inquiries (Kearney 1992 and Clyde 1992) exonerated panel members from any criticism (Reid 1998: 191). A White Paper (Scottish Office 1993) covering the hearings, residential care and adoption law, and local government reform took specific account of those Reports, the UN Convention, and the European Convention on Human Rights (ECHR), although not previously considered applicable in Scotland (Reed 1999:22).

6.3.1 Children (Scotland) Act 1995

This came fully into force in April 1997, just before another general election fought partly on a juvenile crime and law and order platform by the Labour Party, which was returned to power. It was also a period of extreme publicity related to juvenile offending, when "juvenile crime became the single most discussed criminal justice issue in Western nations" (Roberts 2004:495). Yet, essentially, the Act redefined and re-emphasised the 1968 Social Work (Scotland) Act and was based on six key principles, all reinforcing those of Kilbrandon:

- the interests of the child are paramount
- children who have offended and children in need of care and protection are dealt with in the same system
- children and parents are involved in the process
- the views of children must be taken into account
- inter-agency co-operation and partnership
- intervention only when legally justified, necessary and to the required level (Miller 2001:44)

The 'best' interests of the child were raised, so that when a hearing or court decided "any matter with respect to a child, the welfare of that child throughout its childhood shall be their or its paramount consideration"²⁰². But, significantly, further sub-sections allowed derogation from that principle "for the purpose of protecting

²⁰² S.16(1) Children (Scotland) Act 1995

members of the public from serious harm”²⁰³, which was not defined. Five years later Bottoms & Dignan (2004:28-31) found this derogation had “rarely been invoked”. The hearing could make a “secure accommodation authorization”²⁰⁴, once approved by the director of the social work department or the person in charge of the residential establishment, where a child was at risk of harm to self or others and absconded. Additionally, ‘compulsory measures of care’ became ‘compulsory measures of supervision’, which might not necessarily include guidance and protection issues (Lockyer & Stone 1998:111).

To comply with the ECHR²⁰⁵ and its incorporation into UK law, on appeal a sheriff could hear further evidence²⁰⁶ and substitute his/her own disposal for that of the hearing²⁰⁷, because an appeal had to be a “genuine review of all aspects of the Children’s Hearing decision, albeit one which respects the primacy of the Hearing’s decision where it can be seen to have an objective justification” (Reed 1999:29). Some thought this was against the Kilbrandon principle of the separation of fact finding and treatment disposal, but as only the parent or child could appeal, it was considered unlikely to be a “covert way to introduce punitive powers” (Lockyer and Stone 1998:117).

There were more powers to protect the rights of the child. Hearings could exclude people, including the parents, and the press²⁰⁸, whose reporting restrictions were increased; safeguarders could appear in a greater range of cases, their duties clarified; legal aid became available for representation; and the hearings had to announce the review date when an order was made. It was once feared that lawyers would alter the whole nature of the proceedings, but they soon became

aware of the difference between courts and hearings and most lawyers have adopted the discursive and constructive role required (Reid 1998:191).

²⁰³ S.16(5) An earlier case, *Humphries v S 1986 SLT 683*, which found that a child could be detained in his own interests to stop him making his position worse by continuing to offend, may have prompted this clause (Kearney 1998)

²⁰⁴ S.70(10)

²⁰⁵ Hearings were ordering compulsory measures in a non-adversarial system

²⁰⁶ S.51(3)

²⁰⁷ S.51(5)(c)(ii)

²⁰⁸ S.43(4)

The Act, by certain expectations of parents,²⁰⁹ explicitly set out “parental responsibilities as the foundation of parental rights” (Lockyer & Stone 1998:107). There were new Children’s Hearings Rules²¹⁰ and, like the principle in the English/Welsh 1989 Children Act, no order should be made unless “it would be better for the child that the requirement or order be made than that none should be made at all”²¹¹. This was not the “minimal intervention” approach, the “radical non-intervention” found by the Fife Report (Kearney 1992) but the “no non-beneficial order” principle of Kilbrandon (Bottoms & Dignan 2004:44).

A specific power²¹² enabled the hearing to order the child to attend some form of IT instead of a residential order. Recommended in the 1968 Act, panels had waited a long time for any schemes, often of great diversity, innovation, and little co-ordination. The more intensive, lengthy, more structured IT programmes for the ‘heavy end’ had the best outcomes (Hill 1998:141-2). Arising from the lack of co-operation in Fife, the panel chairman and chief reporter were to be consulted when the local authority was planning services for children²¹³ (Lockyer & Stone 1998:93-4). Another clause gave the panel, not the reporter, the duty to write the report of the hearing.

6.3.2 Reporters

In 1996, the reporters’ service was reorganised into the national, Scottish Children’s Reporter Administration²¹⁴ (SCRA), whose “benefits will be consistency in practice, national guidelines, a national data bank and a research facility” (Lynch 1997). Four years later there was a national average of 24% of offence referrals passed to the hearing, yet without a standard assessment, there was a range of 10 to 47% in the 47 ‘reporter areas’ (Audit Scotland 2002:24). But the role itself

²⁰⁹ Part 1 s.1(1): a) safeguard and promote health, development and welfare, b) provide direction and guidance, c) maintain regular contact (if not living with), d) act as child’s legal representative. Applies to both parents whatever their subsequent relationship, and for the children, these apply up to 16 and as guidance to 18

²¹⁰ Rule 5(3), arising from the ECHR (*McMichael v United Kingdom* (1995) EHRR 205), required all documents to be seen by ‘each relevant person’ entitled to be present at the hearing, except the children, although the substance had to be explained to them. Courts and hearings were obliged to let the child, depending on maturity, express his/her own views and to take them into account (s16 [2]), and the child had a right to attend.

²¹¹ S16[3]

²¹² S.73

²¹³ S.19(5)

²¹⁴ Local Government etc (Scotland) Act 1994

demanded wide discretion as well as the knowledge of local circumstances, and there appears to have been little serious criticism of the reporters' service. Kuenssberg and Miller (1998:178-80) hoped that with the SCRA accountable to the Secretary of State and thus Parliament, there would not only be more publicity and interest in the hearings, "often surprisingly little understood by the Scottish public at large", but the opportunity "to defend its welfare principles when under attack".

6.3.3 Jointly Reported Children and Young People

The Lord Advocate's guidelines were further refined in 1996, such that for children under 16 to be prosecuted, the offences had to be 'very serious'; or likely to result in disqualification from driving; or, at the discretion of a chief constable, other offences if there were special reasons, which had to be stated (Kearney 2000:15-6). Nonetheless, these could have included simple assault, breach of peace and shoplifting.

Research revealed that children aged 13-17 referred by the police and jointly considered by the fiscals and the reporters were amongst the most vulnerable to neglect and criminality. They:

had experienced major social adversities, had long histories in the Children's Hearings system, and had been subject to supervision at some time in their lives.....A number had experienced neglect and abuse in childhood, and had recorded psychological or psychiatric difficulties – alcohol and drug misuse represented a serious problem for some of the young people and was a major concern of professionals. Just under half (46%) had experienced public care. (Waterhouse et al. 1997-9: Chapter Five, Summary)

It was thought that the fiscals lacked information, for some 64% of this group were sent to court where nearly two-thirds were given financial penalties, yet, "given their financial circumstances, many might have been at high risk of default" (Waterhouse et al. 1997-9: Chapter Five, Jointly Reported). Additionally, outstanding offences could not be 'taken into account' (TIC) at a single court hearing, making it possible that "many young people found themselves sentenced to custody for persistence, as much as for the seriousness of their offending" (Chapter Five, Jointly Reported). That research preceded implementation of the Act²¹⁵

²¹⁵ S.168 Criminal Procedure (Scotland) Act 1995

whereby fiscals and courts were encouraged to refer to the hearing for advice or even disposal²¹⁶, which led to a significant reduction in numbers before the courts²¹⁷.

6.3.4 The 16-18 Age Group

Research by Waterhouse et al. (1997-9 : Chapter Five) covered 175 children over 16 who had been referred to the hearings for offences in February 1995 and found 74% had a criminal conviction in a court two years later. Of those, 53% were from lone parent families; 58% relied on state benefits; 34% were in public care in 1995; 28% had at least one period of detention, half of whom had more; and 74% had previous referrals for offending. As Asquith et al. found (1998:114),

There has been an unspoken tradition that when the 16th birthday is reached, supervision requirements are discharged, casting young people adrift and leading to problems with homelessness, drug abuse and offending, which often results in prison sentences.

Scottish criminal statistics did not even record as a separate category those sentenced to custody aged 16-18.

Other Acts in the same period encouraged a closer relationship by all the agencies when dealing with offenders up to 18. This was significant because the hearings in 1994 for offence grounds dealt with 442 offenders aged 16-18 (Scottish Office 1995). As with the under 16s, for those under 18, the Lord Advocate or fiscals could seek reports²¹⁸; and the courts could seek the advice of the panel²¹⁹ and even remit to the hearing for disposal.

The first director of the SCRA, the reporter Alan Miller (1999:42-4) felt the system should

stop treating 16 and 17 year olds who offend as if they were adults... Many of them have far more basic needs than the kind of needs that sentences such as probation are designed to address.

The penal custody figure for this age group in 1998 was 215, only marginally less than the total proportionate use in England/Wales, a system which used penal custody from the age of 14. The custody figures²²⁰ are even more phenomenal when compared with other European countries, the UK locked up six times more as a

²¹⁶ S.372

²¹⁷ Appendix 6.6

²¹⁸ s.66 Criminal Justice Act 1995

²¹⁹ s.49 Criminal Procedure (Scotland) Act 1995

²²⁰ Appendix 6.7

percentage than Denmark, Finland, Netherlands, Spain and Sweden (Bottoms & Dignan 2004:143). Yet, as Whyte (1998: 211) has observed, there is

no research evidence to support the view that punitive, coercive or custodial responses have any positive effect on reducing crime among children and young people. Overall the evidence indicates that such approaches have a destructive and negative effect.

6.3.5 Referrals in the 1990s

Research into 464 children referred to reporters for offending in February 1995 revealed that 86% were boys, 88% were aged between 12-15 years and 68% were aged 14 or 15 and 2% were over 16 at the time, reflecting the law. 80% were referred by the police, 5% referred at least six times. 74% had been referred to the reporter before for offending, with an “average of 10.9 referrals each before 1st February 1995”, for a variety of grounds. Reporters found adequate or good childcare in the lives of only 9% of the children and

many...were growing up in personal circumstances of discontinuity and disruption in family relationships, and in adverse social and economic circumstances...just under a third had at least one experience of living in care away from home (Waterhouse et al. 1997-9: Chapter Five, Children and Young People who Offend).

Of their previous referrals, 30% were for being beyond parental control and 30% for truancy, both “factors strongly associated with later offending behaviour”. As to their offences, over 50% were property related and 16% for assaults, which reflected a typical picture for offenders under 16.

Table 6.10 - Initial Action by Reporters on Alleged Offence Referrals 1980-2000

Offence Referrals	1980		1985		1990		1995		2000	
	Nos.	%	Nos.	%	Nos.	%	Nos.	%	Nos.	%
	22,303	100	25,144	100	24,694	100	27,606	100	26,766	100
Action by Reporter										
To Hearing	10,705	48	9,806	39	8,149	33	8,282	30	6,424	24
To SWD.	892	4	1,006	4	1,481	6	1,656	6	2,677	10
To Police	1,784	8	1,760	7	988	4	828	3		
No Action:	8,698	39	12,321	49	13,829	56	16,840	61	17,666	66

Data from Bottoms & Dignan 2004:48-9²²¹

²²¹ It looked as if diversion from the Hearings increased during the late 1980s and 1990s, while in England the reverse applied, but a direct comparison is risky as if the child were already on

Waterhouse (2002) thought there was a danger of youth justice not being seen to be taken seriously, a view endorsed by Bottoms & Dignan (2004:55). The Strathclyde police, who, despite recognising the large part played by truancy and domestic violence in the lives of children, felt

authorities must be able to demonstrate to neighbourhoods and communities that they are able to respond to the repeat offenders who demoralize and cripple the development of safe and secure areas... (Pearson 1999: 44)

Reid (1998:191-2) warned that the proper provision of facilities, including residential, was

necessary if the Scottish system is to continue, to resist the popular clamour, which is periodically heard in England for more Draconian measures to deal with youth crime.

Between 1976 and 1996, residential placements, mostly for offenders and those with behavioural problems decreased from 6000 to 2000 (Hill 1998: 138).

Table 6.11 - Disposals by Hearings in Offence-Based Cases 1987-2000:²²²

Children not Already Under Supervision (%)

Year	Supervision Requirement	Discharge or Other Disposal	Total	N
1987	54.3	45.7	100	2,984
1990	62.0	37.9	100	2,552
1995	64.6	35.4	100	1,730
1996	63.9	36.1	100	2,102
1997	63.6	36.3	100	1,498
1998	58.9	41.1	100	1,480
1999	58.4	41.6	100	1,092
2000	61.0	39.0	100	1,170

(Bottoms & Dignan 2004:56)

supervision, the Reporter would be unlikely to refer back to a Hearing. On average, about 18% were already on supervision in the 1990s. (Bottoms & Dignan 2004:48)

²²² SWSG Statistical Bulletin – Annual Volumes

6.3.6 Post-Devolution Developments

The children's hearing system was one of the functions fully devolved in the new Scottish Parliament in 1999, along with its related services, the police, local authority services and the criminal justice system. Now, Scottish politicians were more clearly and publicly accountable to their electorate, who “if opinion polls are to be believed – worried about crime...” (Bottoms & Dignan 2004:76); and, “the criminal justice ... policy-making network that worked through Edinburgh not Westminster... relatively insulated from close scrutiny”, which had produced the hearings, would now be open to the scrutiny of the Scottish Parliament (Young 2001:37-8).

Youth crime and the hearings became of significant interest to the Scottish Executive, and almost immediately led to the ‘Advisory Group on Youth Crime’ culminating in an Action Plan with fast-track schemes²²³ for the “hard core of persistent offenders”; pilot youth courts in Hamilton for 16/17 year olds and persistent offenders²²⁴; national standards for youth justice (Scottish Executive 2002); and targets for reducing the number of persistent offenders (Bottoms & Dignan 2004:75).

In 2005, the hearings were given the power²²⁵ to impose a ‘movement restriction condition’ (MRC) for up to 12 hours per day, as part of a supervision requirement on young people aged 12 plus who fulfilled the ‘secure criteria’²²⁶. Where compliance was monitored by an electronic tag, “in accordance with the welfare approach of the Hearing’s System” the young person would receive “an intensive package of support that is tailored to their individual needs and ‘deeds’” , an intensive support and monitoring service (ISMS)²²⁷(Vaswani 2006:2). There was no criminal sanction, unlike the English system, as the condition was a measure to protect the child without resorting to removal from home. Early research in Glasgow indicated “some small but positive changes observed in frequency and seriousness of offending” (Vaswani 2006:16).

²²³ in court within 10 days from charge

²²⁴ 3 separate incidents with criminal charges in last 6 months

²²⁵ Antisocial Behaviour (Scotland) Act 2004

²²⁶ “a) having previously absconded, is likely to abscond and, if he/she absconds, it is likely that his/her physical, mental or moral welfare will be at risk; or
b) is likely to injure him/herself or some other person”

²²⁷ a direct alternative to secure accommodation

Morris et al. (1980:48) at the end of the first decade had argued that

It is not at all clear that doing something is better than doing nothing, or that doing one thing is better than doing another. It is also now clear that intervention can harm as well as help, and that the actions of even the well-meaning do as much harm as good.

A generation later, longitudinal research (McAra and McVie 2007) on some 4,300 Scottish children, found that “the deeper a child penetrates the formal system, the less likely he or she is to desist from offending” (p.315). The researchers considered that:

the key to tackling serious and persistent offending lies in minimal intervention and maximum diversion. Although the Scottish system is better placed than most other western juvenile justice systems to deliver such an agenda, as currently implemented it appears to be failing many young people. (p.319)

They acknowledged the role of the police and the reporter in diversion, but also in recycling ‘the usual suspects, those who had previously been referred.’ On social work, they commented on “the relative paucity of regular one-to-one contact with child offenders”, that “only one in three were in receipt of any offence-focused work” and “the sometimes chaotic nature of social work services and supervision” (2007:335-7). Whyte (1998:203) too claimed that “the empirical evidence from Scotland supports the case for the maximum use of informal processes and diversion from prosecution”, and suggested special focus on parenting and the individual characteristics of the child.

6.4 Conclusion

Nobody dreams of blaming a boy who has a deformed foot for not being able to do gymnastics. The boy is excused his disability and given the normal love and care which every child needs... But many people do blame a child who is born into a situation where he is not wanted and who grows up unable to love and care about other people...They are therefore handicapped emotionally and require help rather than further punishment. (Margaret Dobie 1976:225, Chairman of the Dumfries and Galloway Regional Panel).

In 1971, a Conservative government implemented, without reservation, Part III of the Social Work (Scotland) Act 1968, largely based on the principles of the Kilbrandon Report and concerned with the welfare of children, including offenders, aged under 16. Before 1971, Scotland had encouraged diversion from the formal process, initially through police cautioning and liaison schemes, and then by the fiscals, who also chose the level of court. Under the new hearings system, diversion was likewise exercised by the police and the fiscals when relevant, and additionally by the reporter and even the hearing. In the first decade about 40% of cases were not referred on to the hearing, and in the latter two decades this rose to over 60%. The reporter, responsible for collecting all relevant information about the children, exercised great discretion to divert children to informal measures, or put them before a hearing to consider compulsory measures of care, or occasionally in fairness to a co-defendant, for the hearing to take that initial decision.

Cases in the Lord Advocate's List were dealt with by a sheriff or on indictment by a sheriff and jury or, exceptionally, the high court with a maximum power of sending the child to a list D school up to aged 18, thereafter penal custody. In line with the Kilbrandon philosophy, co-operation between reporters and fiscals kept these numbers down to around 10% cases per year. Sheriffs in the privacy of chambers, using language and procedures appropriate to the child, including a more inquisitorial approach, would deal with any dispute as to facts, and appeals. Only the Secretary of State could approve identification of the child in court, and no one could identify a child before a hearing.

Before hearings were introduced in 1971, children accused of an offence aged between eight, the age of criminal responsibility, and 17 years would appear in one of four different types of juvenile court. They had the power to send boys aged

16 to borstal, otherwise all juveniles were eligible for detention up to 28 days in a remand centre/police cell/prison; for an approved school; for care by a 'fit person'; for probation, a fine, or an admonition or a caution²²⁸.

Under the hearings system, all children aged 8-16 admitting to offences would be dealt with solely on the basis of their needs; while any child under 16 could be referred for other grounds, mostly related to their protection from abuse or neglect. The similarities in the backgrounds and circumstances of children who offended and those needing care or protection far outweighed the differences, and the vast majority of children referred for offending were living in poor economic and social circumstances. The system was predicated on the local community taking responsibility for its own problems: panel members were recruited from a wider section of the community than previous decision-makers, through open and widely publicised advertisements. Candidates went through rigorous selection procedures, with many younger people and equal genders being appointed. Training was given before taking part in the hearings, and reappointment was contingent upon satisfactory performance. In the 1990s, the average length of service was less than five years, and some 11,000 citizens had been panel members, enabling a wider understanding by the community of the complexities of adolescence, juvenile crime and its links with childhood deprivation and abuse.

From first encounter with the authorities, everything was designed to enlist the co-operation of the parents, including paying their travelling expenses to the hearings, which were held in inconspicuous buildings. There, the children appeared without police, prosecution or co-defendants: the offence lost its central role and only the child's needs were relevant. The chairman had a duty to explain the procedures, the rights of participants and how to appeal, and both parents and child were given the opportunity to take part fully in the discussion. The panels showed a great reluctance to confront the parents, although many members believed they were mostly responsible for their children's offending behaviour. Despite some failings on the part of some panel members, most parents and children felt they had been

²²⁸ The equivalent of the English 'bind-over', whereby a fixed sum of money would be forfeited if the condition of the bind-over were breached.

listened to and their opinions valued. The hearings had removed the stigma of court appearances and sanctions.

The local community, through its local authority and voluntary agencies, was expected to provide facilities for the social, educational and physical development of children before the hearings found in need of compulsory help. Reorganisation of social services to provide a generic service to deal with all aspects of family problems, combined with rising unemployment, higher family breakdown and rising expectations, dissipated the availability of experienced staff and the quality of provision. For the first decade, there was great demand for residential places, mostly List D schools, but demand declined by 2/3rds in the mid 1990s; intermediate treatment did not become a reality until the 1980s; and even supervision at home suffered from the shortage of staff.

The 1995 Act, passed at a time when concern about juvenile crime was a major political issue in Britain, strengthened the rights of children and their parents, in line with international conventions. Despite the premise of the Act, the needs not the deeds, a minority of panel members favoured some punishment-based measures to demonstrate the unacceptability of certain behaviour. In effect, the new hearings had only removed the punitive sanctions of short detention in a remand centre and fining. It could be argued that where preferred community treatment was not available but punitive sanctions were, either in the form of fines, attendance centres or, more importantly, the residential provisions of detention centres and the new punitive borstals, they might have been used to 'protect the public.' As it was, the measure in the 1995 Act invoking the protection of the public did not introduce penal custody or deterrent sentences: the treatment of the child, albeit through tighter control using welfare measures, remained the goal and the reality.

However, the hearings system effectively ended at the age of 16, two years below the UN definition of adulthood at 18 years. Thereafter, penal custody was ordered at a rate similar to that in England/Wales, such that punitive custody for all offenders under 18 was only marginally less in Scotland. This was despite the knowledge that the circumstances of these older children were very similar to the younger group in terms of multiple disadvantage. It would seem that, as with the hearings, if punitive sanctions were available, decision-makers in the criminal justice arena would use them in the alleged interests of the public rather than measures for the long-term rehabilitation of the young offenders. Research has shown that for the

majority of offenders under 18 informal action is likely to be more successful, and for the few with multiple, serious problems, the hearings need to identify those early and provide targeted, high quality, non-stigmatising support and help. Having successfully resisted any punitive sanctions for 35 years, the culture of the hearings would suggest that record would continue: the challenge is to embrace such an entirely constructive, positive approach with the more troublesome and damaged, especially in the 16-18 age group.

ooOoo

CHAPTER 7

ENGLAND/WALES – JUVENILE COURTS AND THE CHILDREN AND YOUNG PERSONS ACT 1969

Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, 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 the proper provision is made for his education and training. (s44 Children and Young Persons Act 1933 as amended by s72 (4) Children and Young Persons Act 1969)

I do remember the resistance, the resistance...²²⁹

The welfare principle had been explained by Caldecote LCJ as not “cut-and-dried rules” but “a privilege entrusted to them [magistrates] of shaping the destinies of children who would otherwise be wholly without guidance or protection” (Watson and Austin 1975:8). Far from criminalising juveniles, the Children and Young Persons Act 1969 was predicated on the belief that the delinquent and deprived were one and the same and should be dealt with outside the criminal courts whenever possible. No child under 14 could be prosecuted except for homicide, and those aged 14-17 only in specific cases: it was hoped that voluntary agreements between the family and local authority would suffice, and if not, the non-criminal ‘care proceedings’. This was broadly similar to the philosophy held in Scotland but crucially, in England/Wales, included a requirement to consider the public interest as well as the child’s welfare. The Bill passed in October 1969 also indicated clearly that certain vital clauses would be implemented only when the appropriate facilities were in place.

The Magistrates’ Association (MA), supported by the Conservatives, had consistently opposed the main clause of the 1969 Act, clause 1, that a child found guilty MUST ALSO be found to be “in need of care or control which he is unlikely to receive unless the court makes an order ...”, before any disposition could be made, the ‘double test’. In March 1970 a general election returned a Conservative

²²⁹ Joyce Rose, CBE, JP, DL Chairman MA Council 1991-3, interviewed by Ravenscroft in Hertfordshire, 12.vii.2006

government, and Quintin Hogg was appointed Lord Chancellor, who had not only championed the MA's opposition but was now its President²³⁰.

The Act placed great responsibility on the local authorities, particularly the completely reorganised and short-staffed social services departments (Crossman 1977) and the education departments, which were for several years politically divided and functionally weakened by the introduction of comprehensive schools (Devine 2000:580). The new Home Secretary²³¹ transferred the Children's Department to Social Services, cutting its links to the criminal and police departments within the Home Office, leaving "no one with overall responsibility for juvenile offenders" (Morris P.1978:ix).

The magistracy's direct concerns were compounded by domestic factors: the compulsory retirement for justices at 70; the greatly changed "nature of the office of lay magistrate" through abolition of Quarter Sessions²³², (Raine 1989:12); the strongly resisted re-organization of magistrates' courts²³³ (MAC 1972:2056); and the Home Office guide, the 'Sentence of the Court', "deeply resented" by the MA²³⁴. The issue of the mandatory 'suspended prison sentence'²³⁵ was also fiercely resisted (Mag.1971:24) until repealed by the Conservatives in 1972²³⁶. The Lord Chief Justice, Parker, had refuted the autonomy of Benches (Mag.1970:17), and the Lord Chancellor²³⁷ told magistrates not to do anything "thought to be in conflict with their position as keepers of the peace", a view robustly challenged by some magistrates (Mag.1970:52 & 154).

Compounding this catalogue of fears, upheavals and objections was the increasing social tension in the country as a whole: serious industrial violence and disruption; an energy crisis and financial depression; IRA bombers threatening ministers, and killing and maiming in major cities; gang violence, police murders, and the arrival of 'the Mugger'. Government, Parliament and public opinion were increasingly concerned with law and order, "a tense House of Commons" asked "to

²³⁰ as all Lord Chancellors from 1921

²³¹ Reginald Maudling MP

²³² Courts Act 1971

²³³ Reduced the MCCs, membership of the most senior magistrates, from 154 to about 78 (Mag 1972:82)

²³⁴ Interview Faulkner 2006

²³⁵ Criminal Justice Act 1967

²³⁶ s.11(4) Criminal Justice Act 1972

²³⁷ Ld. Gardiner

choose between democracy on the one hand and ‘chaos, anarchy and a totalitarian or Communist regime’ on the other” (Campbell J. 1994:593). The conservative magistracy was now being asked to implement a radical, non-punitive justice system for juvenile miscreants. Would it be equal to the task?

7.1 The Juvenile Courts: the Law and Implementation in the 1970s

7.1.1 Implementation?

Limited parts of the Act became operational in April 1971: the historical structure for juvenile justice in England/Wales, the juvenile court, with its dual function of dealing with both criminal and care proceedings, remained unchanged. The Justices' Clerk would administer and advise the court; and with no authority to divert would receive cases for prosecution (those aged 10-17) from the police, and for 'care' (from birth to 18) from local authorities. Panel members would still be chosen by their magisterial colleagues on the adult bench²³⁸, and sit in their former court rooms to decide the cases and the disposals. The local authorities and probation service were expected to apply the orders, as would staff in borstals, detention centres and attendance centres until replaced by IT (intermediate treatment) schemes. There were new 'welfare' powers for care and control measures.

The new Home Minister, Carlisle, believed that "the vast majority of magistrates" opposed raising the effective age of criminal responsibility²³⁹ to 12 years, let alone 14 and did not implement relevant sections of the Act (Mag.1973:152). "The Conservative Government and the Magistrates' Association were really more or less at one, that those key features of the Bill were not to be put into effect."²⁴⁰ The age was never raised, even by the subsequent Labour government, a purely political decision informed by public opinion (Tutt 2000:7). In 1978, several letters in the 'Magistrate' (1978:9, 61, 90) suggested lowering the age to six for 'teeny criminals'.

Twelve Children's Regional Planning Committees²⁴¹ (CRPCs) were created to design comprehensive systems of community homes and intermediate treatment facilities. Magistrates wanted to serve on them, although "the initiative would have to come from the local authorities acting through the Children's Committee" (MAC 1969:1967). Magistrates were soon complaining bitterly about "the shortcomings of

²³⁸ Except ILJP

²³⁹ s. 4, 1969 Act - no child under 14 could be charged with an offence. This did not alter the age of criminal responsibility, which remained at 10.

²⁴⁰ Interview Faulkner 2006

²⁴¹ S.35-50

local authority social services' departments" (MAC 1972:2061) and even in 1978 were complaining about their limited role on the committees (JCC 1978:622).

... the fate of a child depends very often on whether he or she first bumps into a policeman or a social worker. The Act seeks to reduce the odds in this strange lottery. (Ford²⁴² 1975:11)

Non-implementation of sections 4 and 5²⁴³ meant that juveniles accused of offences could be brought to a juvenile court under either care or criminal proceedings. None of the regulations regarding criteria for prosecution (Anderson 1978), or that a juvenile co-accused with an adult must be tried at a juvenile rather than a magistrates' or crown court unless this was considered "undesirable", were implemented. This was despite consideration of diversion, prosecution or care proceedings being a crucial gate-keeping exercise. Most cases were brought as prosecutions (Cavenagh 1976:14), leaving magistrates able to make punitive orders and not obliged to apply the extra test of needing care which they had so disliked. Some police areas organised Juvenile Bureau Schemes for consultation with education, social services and the family, otherwise the initiative came from the social services. Some magistrates were highly critical of this discretion, particularly for joint offenders (Mag.1974:54-5²⁴⁴), complaining to the police (JCC 1977:553) but the JCC (1974:431) eventually accepted, as did some courts (JCC 1977:564), that the police should deal with each case on its merits. This broad discretion still baffled some senior magistrates: "We don't know that, do we? We only saw the ones that came to court"²⁴⁵. Although there were considerable variations between forces in cautioning, by 1974 two thirds of the 10-13 age group were cautioned, double the number before the Act, and one third in the 14-16 group, up from one fifth (Mag.1977:35; Ditchfield 1976).

The new social services were given responsibility for the prevention of offending and most of the treatment of juvenile offenders. Added to reorganisation of local government, with its new boundaries, duties and staff, the old children's departments were absorbed into social services, their expertise dissipated by new

²⁴² Donald Ford JP, ILJP, Chairman Children's Committee of LCC, Member Ingleby Committee 1956-1960

²⁴³ s. 4 and s.5 raised the age for prosecution and imposed statutory restrictions on prosecution

²⁴⁴ Appendix 7.1

²⁴⁵ FM, JP interviewed by Ravenscroft, South Coast 16.v.2007

responsibilities for all needy members of society. Local authorities had, however, looked after delinquents in approved schools, remand homes and reception centres. The probation service, employed and monitored by the magistracy, was expected to be largely divested of its role with juveniles, but at the discretion of magistrates still supervised some of the 14-16 age group. Social workers were answerable to a committee of the local authority: magistrates were “expressly excluded, by a ruling of the Lord Chancellor from membership” (McCabe & Treitel 1984:16). The MA seemed to fear contamination of the probation service by social services, rejecting any amalgamation (MAC 1971:2029) or even a statutory forum to exchange views with both (JCC 1973:379).

7.1.2 Juvenile Court

In the family court the welfare of the child was paramount, but in the juvenile court we *had regard* for the welfare, and there were these kinds of differences that we recognised in the different courts.²⁴⁶

The lynchpin of the Magistrates’ Courts was the Justices’ Clerk. In 1977 some 17% of the 345 were neither barristers nor solicitors: some were part-time (Skyrme 1979:155-65), and some covered several benches. They were administrators of the benches and courts, ensured the training, much of the content devised by themselves, of their magistrates, if not the delivery itself, and most were Secretaries to Advisory Committees²⁴⁷. It was their duty, whether invited or not by the magistrates, to advise them on the law, practice, procedure, and sentencing guidelines²⁴⁸, as well as recording all decisions. Their advice might not be impartial (Ball 1983; Darbyshire 1984; Mag.1977:164; Raine 1989), and they could restrict information to their justices (Mag.1977:95). Significantly for the principles of the 1969 Act, one assistant clerk was told:

... not to be involved with other agencies because it interfered with judicial independence... Most people would only just marginally have taken notice of what came from the Home Office... Social Services, you didn’t have to talk to them if you didn’t want to, you didn’t have to deal with them at all.²⁴⁹

²⁴⁶ Dr Rachel Brook, JP Chairman Y (Youth) CC of MA 1995-1998, interviewed by Ravenscroft, Nottingham, 11.i.2008

²⁴⁷ Appointing magistrates

²⁴⁸ 1952 Lord Goddard, *LCJ [1952] QB 719 R v East Kerrier JJ., ex parte Mundy*

²⁴⁹ Bryan Gibson, Director Waterside Press, Barrister, interviewed by Ravenscroft, Sheffield-on-Loddon, Hampshire 25.i.2009

With several courts held at the same time, often “where the least experienced chairman is sitting, the clerk will be one of the most junior” (Mag.1977:180) and “some magistrates would do illegal things because the justices’ clerk would not contradict them”²⁵⁰. Other magistrates “left too much of the conduct of the proceedings to the clerk” (Skyrme 1979:163). Clerks were seen to be the most punitive by far of criminal justice agencies, including magistrates (Mag.1994:32-3). One Justices’ Clerk wrote of the new Act:

a blank cheque has been written for all children and young persons under the age of fifteen and that there is no effective measure of control over them... (Berlins and Wansell 1974:77)

As the clerk was the one constant in the life of the magistrates, “he can be and often is, the master of the whole proceedings” (McCabe and Treitel 1984:81).

The Judges

...social scientists will increasingly number among bench numbers in the future. If we value freedom, democracy, unfettered justice, and reality in dealing with offenders we must now be on our guard. (Mag.1977:13)²⁵¹

The juvenile panel was the body responsible for dealing in court with juveniles who were thought to be offenders or in need of care and protection. The 1969 Bill²⁵² had enabled the Lord Chancellor to appoint all juvenile court panels directly, from outside the magistracy. However, opposition from the MA and Justices’ Clerks, claiming “the blend of the more informal atmosphere and procedure of juvenile courts and of the more formal approach in adult courts is a benefit to both” (Hansard SC 1968-9 V: 584), led the Labour government to concede that these powers would be used only “in those areas representing a minority of juvenile courts” (V:592). No regulations were ever brought in to alter the original system of the juvenile panel being elected by and from among the ‘adult’ bench magistrates, whose recruitment was still shrouded in mystery, with candidates sworn to secrecy by the Advisory Committee (Mag.1977:123; Burney 1979:56; Mag.1979:84; McCabe & Treitel 1984:15; Ravenscroft 1987:475/6; Raine 1989:15).

²⁵⁰ MH, former Justices’ Clerk, ad hoc interview with Ravenscroft, December 2009

²⁵¹ T Cross, JP

²⁵² S.57

This meant the magistracy was essentially a self-perpetuating body: “I was invited to put my name forward. In those days that’s how it was done”²⁵³. In 1974 to interview candidates was “by no means uniform practice” (MAC 1974: 2158). In 1982, 94% of the Advisory Committees were magistrates, which limited the range of values and attitudes sought in candidates, with single parents, the industrial working class and the unemployed not represented at all. Yet there were shortages: “They were so desperate for magistrates that year that we were sworn in by the chairman of the bench.”²⁵⁴ Gibson²⁵⁵ found the full range of social class on his panel but “there was never any great tension, and they would often come to the same kind of decision about cases...” Virtually all the men would have done two years compulsory National Service²⁵⁶, and the majority had fought in the War.

It was from this body of people that members of the juvenile panel were elected every third year, “having regard to their age, special qualifications and aptitude for the work involved” (Mag.1977:154), none of which was explained. “I think it was because I was younger...I am not aware of anyone being appointed and asked their special qualifications”.²⁵⁷ In some areas all the younger magistrates were put on the juvenile panel without any election (McCabe & Treitel 1984:16), while others regarded the juvenile court as a “distinct specialism”, with middle-aged and middle-class women sitting very frequently (Parker, Sumner and Jarvis 1989:22). “The difference in the social class and educational background of most magistrates [from the juveniles was]... one of the major problems” (Mag.1979:5). Initial appointments were unlikely after the age of 50, retirement at 65.

Magistrates sat in the juvenile court from once a fortnight to less than four times a year²⁵⁸: the average was monthly, with all their other sittings in adult criminal courts. Their overall annual commitment had been reduced to a minimum of 26 half days (Mag.1971:19). Small juvenile panels yet again were advised to combine²⁵⁹ to “enable their members to sit regularly” (Mag.1977:38). Juvenile panel magistrates after sitting in an adult court might help to finish the juvenile court list

²⁵³ HG, JP interviewed by Ravenscroft, South Coast, 16.v.2007

²⁵⁴ Interview FM 2007

²⁵⁵ Interview Gibson 2009

²⁵⁶ Military Service

²⁵⁷ Brian Worster-Davis, OBE, JP Chairman JCC 1984-1992, Council MA 1975-2001, Dep.Ch. 1995-98, interviewed by Ravenscroft Blundellsands, Merseyside, 16.xi.2006

²⁵⁸ Interview PH 2007

²⁵⁹ Appendix 7.2

(Asquith 1983:131), with the inherent difficulties of switching their minds from adult to juvenile court jurisdiction. Until 1979, only the chairman or deputy of the panel could chair the court²⁶⁰, and received no specialised training until the late 1980s.

Beware all compulsory training. The law may be observed to the letter by obtaining our physical presence; but like the horse taken to the water, drinking does not always result.²⁶¹ (Mag.1979:175)

Training for the juvenile court although compulsory was “short and sweet... a few evenings’ training.”²⁶² For some, “in large measure, you were trained by the Chairmen of your Bench”²⁶³ and many magistrates felt much of their training was best achieved while ‘sitting’ (Mag.1974:78; Ralphs & Norman 1987; Raine 1989; Parker et al.1989). Others were trained by the clerk,²⁶⁴ “very good old court clerks, not these intensive courses with piles of notes and where you came out cross-eyed”.²⁶⁵ Local training reinforced Bench ‘culture’ and insularity (Parker et al.1989) and when shared with the local juvenile justice agencies constrained sentencing decisions (NACRO 2000). In 1974, Monger JP, (1974:123) commented that training was at a “disturbingly basic level”.

Magistrates were told that their prime duty was

“to sustain the rule of law, to maintain order and to enable decent people to live in peace and happiness”, and acting as “in a court of law, not on a welfare committee” (Mag.1977:162²⁶⁶).

The training concentrated on the law, procedures and powers of the juvenile court, and the nature and purpose of sentencing (Mag.1976:164). In the mid 1980s magistrates were encouraged to follow a more structured decision-making process to improve standards (Ashworth 1986, Haynes 1987; Barker & Sturges 1986), but “Throughout the country, the provision of continuing training for members of juvenile court panels is often scanty, and sometimes non-existent” (Mag.1986:12).

²⁶⁰ Justice of the Peace Act 1979 s.17(2)

²⁶¹ Dr RI Button, JP

²⁶² Interview Gibson 2009

²⁶³ Margaret Romanes, OBE, JP, BA Council MA 1965-1990, Dep-Ch. 1982-85, interviewed by Ravenscroft, Edenbridge, Kent, 27.ii.2007

²⁶⁴ Interview Rose 2006

²⁶⁵ Interview HG 2007

²⁶⁶ Hon. Mr Justice Boreham, Chairman, Lord Chancellor’s Advisory Committee on the Training of Magistrates

Importantly, “magistrates never had any training at all on child development”²⁶⁷, even though they also dealt with child protection cases, when the training focused on the legal aspects for the protection of the child, not the relationship that abuse might have to later delinquency. With no official reading list, the diligent could have found several articles in the ‘Magistrate’ (1974:28, 30²⁶⁸,139; 1977:113-4), about 90% received it, related to childhood deprivation, violence and criminality, alongside many articles demanding severer, deterrent punishment; and information about the MA, and some Appeal Court decisions.

Successive Lord Chancellors seemed apologetic about the “additional burden of undertaking courses of instruction” (Mag. 1976:85; 1979:1; 1986:171), and by 1977 there were still magistrates who claimed they did “not require to be trained” (Mag.1977:181²⁶⁹). Refresher training, of twelve hours instruction within three years, was not even compulsory until the 1980s. Panels were obliged to meet twice a year to discuss matters related to the juvenile court, but attendance was not obligatory.

The Judged

...a new privileged class of young thugs and vandals²⁷⁰

Dad tried to strangle my Mum and the kids were screaming and furniture got broke (Tutt 1974:147).

In the juvenile court for criminal matters, the powers and procedures were different for the two age groups, ‘children’ 10-14, and ‘young persons’ 14-17. Juvenile offending was “predominantly a male problem”: in 1971, of *all* offences committed 19.3% were by boys under 17, only 2.1% by girls (Tutt 1974:5). Most children were from the working-class, not least because

middle class children in particular [were] likely to be defended in various ways, both by their parents and by their schools, from prying police eyes (Wootton 1978:154).

Tutt (1974:11; Newson & Newson 1962; Trasler 1962) considered that different, class-related child-rearing habits played a very significant role in working-

²⁶⁷ Kevin Moore and Roy Sanderson, former Justices’ Clerks, ad hoc interviews with Ravenscroft, December 2009

²⁶⁸ Dr Mia Kellmer Pringle, Director National Youth Bureau

²⁶⁹ JB Jenkins, Justices’ Clerk, Bedwelty

²⁷⁰ Sir William Addison, JP, Chairman MA Council 1970-77, last chairman to be knighted (Mag.1977:6)

class families: "...aggression was often fostered and indirectly encouraged", the child expected to stand up for himself and hit back. Middle-class parents resolved issues by verbal not physical means.

The Act had accepted, as many official reports before it had done (Ingleby 1960: 10), that

It is the situation and the relationships within the family which seem to be responsible for many children being in trouble, whether the trouble is called delinquency or anything else.

In March 1976, some 100,600 children were in the care of the state in England/Wales (Mag.1977:99), and additionally, later research indicated that generally, around 22,000 children were in refuges escaping domestic violence each year (Women's Aid Federation). Tuck of HORU (Mag.1992:131) thought domestic violence "may account for a quarter of violent crime" because "too many of the offenders ... have grown up in violent circumstances and have themselves become corrupted by that violence." Research on persistent young offenders identified their having chaotic family lifestyles, in and out of care, high levels of drug and alcohol abuse, truanting and exclusion from school (Hagell and Newburn 1994; Graham and Bowling 1995).

An AGM debate of the MA revealed that 700,000 children were truanting each day (Mag.1974:183). Given that low achievement preceded and was closely linked to delinquency (Tutt 1974:27), it was little wonder that magistrates were exercised about truancy and saw the need for excluded children to have education in special units (JCC 1976: May – 76/56AA). Truanting had many causes, mostly related to family circumstances, low self-esteem (Devlin 1995), delinquent brothers, and bullying, about 450,000 children were bullied at school at least once a week (Williams 1996:9). The Criminal Law Act 1977 provided a requirement that children should attend school (JCC 1978:616) as a sanction for breach of supervision order. The MA (JCC 1979:750) persistently called for rigorous enforcement of school attendance, demanding residential care orders (Mag.1978:18), which was rejected by the Department of Education and Science. Another magisterial initiative, simple monitoring by the court, was said to reduce truancy (Mag.1978:22-3²⁷¹) but independent research claimed this was more about social conformity, with lack of

²⁷¹ RP Hullin, JP, PhD, Chairman Leeds Juvenile Panel

understanding by magistrates of the complexities of the problem (Grimshaw and Pratt 1985). Tutt (1974:176) found nearly 30% of children in one Approved School were classified with an IQ less than 80% and in another, “half of the boys needed some very intensive remedial education to alleviate the situation”. In 1971, about 7000 children were in Approved Schools.

“75% of juvenile crime is some form of larceny...delinquents have a high need for material goods but a low achievement motivation” and rather than “satisfying their needs through legitimate means, therefore, they opt for the delinquent solution.” (Tutt 1974:29)

Children were brought before the courts as much due to varied cautioning practices as to the seriousness of their offences, and even to satisfy “specific policing practices based on organisational goals” (Parker, Casburn and Turnbull 1981:76). The pattern of juvenile offending always showed acquisitive crime around 80%.

Table 7.1 - % of Boys 10-14 and 14-17 Convicted of Indictable Offences in 1971

Offence	Under 14 years	14 - 17
Violence v person	1.8	6.7
Sexual offences	0.6	1.4
Burglary and Robbery	47.1	36.4
Theft/ taking	41.5	47.3
Handling stolen goods	5.7	5.5
Fraud	0.6	0.7
Other	2.7	2.0

(Tutt 1974:5)

Far greater use...must be made of measures against parents who fail to exercise control over their children; after all, it is their job, not that of the Social Services. We need more of this enforcement by realistic penalties and less ‘taking into care’ which merely releases the parents from any further duties. (Mag.1977:136²⁷²)

Such attitudes by magistrates may have led them to demand penalties on parents for their children’s misdeeds, “a parental bind over with other types of punishment and treatment ...” (JCC 1979:709). Some magistrates were well aware of the poverty of the families, “It wasn’t uncommon to find three generations of

²⁷² Maureen Smith JP

unemployed”.²⁷³ Many parents may have lacked the skills to become effective parents and needed help (Taylor, M. 1994).

Due Process – The Courts

Adults and children would enter through the same main entrance of the Guildhall, a big old Victorian building, and you would then divide in the big lobby off to the different courts.²⁷⁴

This made nonsense of the rule²⁷⁵ to keep juveniles away from the contamination of adult offenders by allowing an hour to elapse between adult and juvenile sittings. There had been little commitment by the magistrates, who were responsible for providing and administering their courts, to “recognize, in the design of special rooms or the provision of separate buildings, that the juvenile court was set up to promote the welfare of the child” (McCabe & Treitel 1984:24). Many new courthouses were built in the 1960s and 1970s, but only some had special rooms designed solely for juvenile courts (Asquith 1983:182).

At least one parent was expected to attend the court with the child, probably several times for one matter. They were not given expenses or loss of earnings. Families would sit anxiously in a crowded waiting room, from 10 a.m., some until late afternoon, which did “nothing to enhance for them the authority of the courts” (Curtis 1999:189), while ushers, “generally officious ... provoked resentment” (Anderson 1978:15-18). Better management could have timetabled cases. Luckier families were assisted by having an explanatory leaflet²⁷⁶ to read, which had taken the MA many years to agree (JCC 1975: 4530; 1976:529; 1977:591; 1978:618, 663).

Children and parents entered a room full of unknown people to face the magistrates, many women in hats until the mid 1970s (Mag. 1972:1 & 44; Brook²⁷⁷), sitting high up on a raised dais, even the “smell and feel of traditional criminal courts” (Parker et al. 1981:46), the situation compounded by poor acoustics (Carlen 1976). “All the while the magistrates maintain[ed] their usual expression of severe impassivity” (Monger 1974:124). Some courts were held in a small room, with

²⁷³ Interview Worster-Davis 2006

²⁷⁴ Interview Brook 2008

²⁷⁵ 1963 CAYP Act

²⁷⁶ HOC 125/1978

²⁷⁷ Interview Brook 2008

magistrates on the same level at a desk, parents and children sitting a few feet in front of them.

Of course, the defendants – and if they are present - the parents, arrive in court with some trepidation. It is surely right that they should do so... too much informality might perhaps take away some of its awe which I believe to be a vital part of the child's education. (Mag.1979:54²⁷⁸)

The proceedings were similar to the adult court, with the additional requirement “to have regard for the welfare of the juvenile”, although the practice and ethos varied greatly between juvenile courts, one an “instrument of law”, another, an “agent of social welfare” (Anderson 1978:18; McCabe & Treitel 1984; Parker et al. 1981). In some the police introduced the juvenile to the court to “emphasise the gravity of the proceedings” (Mag.1979:54²⁷⁹); in others, the chairman “eyeball them... leaving the solicitor to show them where to sit” (Mag.1998:42²⁸⁰); or the chairman or clerk tried to explain the proceedings, which were often “completely incomprehensible to the defendant and parents” (Ford 1975:61; Mag.1978:109; 1979:5-7²⁸¹).

Research showed that children are “particularly susceptible to efforts to change their behaviour at this climatic stage of appearing before the judge” but confusing traditional courts do not enable this to happen (Martin et al. 1981: 192). The juvenile, presumed innocent²⁸², probably told to “Stand up straight and take your hands out of your pockets” (Mag.1979:6), would be identified by the clerk or chairman and asked whether the offence was admitted (90% of cases) or denied. There was a duty to explain the substance of the charge in simple language²⁸³. The prosecutor, until 1986 usually a uniformed police inspector or solicitor for the police, would then dominate the proceedings. If the juvenile were under 14, the prosecution had to rebut the principle of *doli incapax*²⁸⁴, (see Chapter 2) although by 1998, when it was abolished, some courts had not been “assiduous in applying the presumption” (Ball, McCormac & Stone 2001:20-1): “Children are far more intelligent than adults

²⁷⁸ D King, JP

²⁷⁹ D King, JP

²⁸⁰ Lynne Ravenscroft, JP

²⁸¹ Dr Barbara Gray, JP

²⁸² Magistrates Courts (Children and Young Persons) Rules 1970 Statutory Instrument 1970 No. 1792

²⁸³ Rule 60

²⁸⁴ Incapable of evil

give them credit for, and they know whether they should or should not do something”²⁸⁵.

If magistrates felt the alleged offence committed by a young person would require a greater sentence than their powers, they could commit the juvenile to a higher court with a judge and jury. The twelve-fold increase in these ‘grave crime’ proceedings²⁸⁶ during the 1970s probably reflected the rising juvenile crime rate, the increasing numbers of juveniles in court and the general increase in the use of custody (Dunlop and Frankenberg 1982:44). The most serious offenders were found to be the most damaged by their childhood (Boswell 1996).

Children whose lives have been damaged and disfigured by disadvantage, neglect and abuse are the very children who occupy the juvenile remand wings of our prisons. (Goldson 2001:51)

A young person could be remanded in penal custody only if the court was satisfied that the local authority could not “undertake his safe-keeping” and issued a ‘Certificate of Unruliness’²⁸⁷, some 4,750 in 1976, although a measure often forced upon magistrates through lack of alternative provision (Goodman 1973). A further 5,900 children and young people were estimated to have been placed or detained in care (Mag.1977:99). The MA considered it a scandal to remand juveniles to prison establishments, and “kept up unremitting pressure for more secure places to be provided by local authorities...”, not satisfied with the 20 extra places from 1975 to 1977, and a further 118 under construction (Mag.1977:198). By 1979 no girl under 17 could be committed to penal custody²⁸⁸.

If a trial was necessary, the proceedings were much the same as for an adult, although the juvenile without a lawyer was allowed a parent, guardian or friend to “actively assist with such matters as cross-examination of prosecution witnesses” aided by the court if necessary (Pain 1982:33). Legal representation of juveniles was the “exception rather than the rule” (Morris P 1978: vii) but rose to 40% in 1984 (Allen 1991); some lawyers were noticeably more acceptable to the bench than others (McCabe & Treitel 1984:19). Lawyers increased the adversarial atmosphere

²⁸⁵ Interview HG 2007

²⁸⁶ Appendix 7.3

²⁸⁷ S.23 CAYP 1969 and Appendix 7.4

²⁸⁸ HOC 128/1978

and inhibited participation by children and parents (Asquith 1983). No one other than those engaged in the case, which included the press, was entitled to be in the court, although Burney once counted 20 adults. Section 10 of the 1969 Act made it clear that publicity was not to be used as a punishment, only to reveal names in order to protect others who might have been wrongly accused. Some magistrates wanted football hooligans identified “as an added deterrent to those responsible”, a view rebutted by the Home Office (JCC 1979:711).

After a finding or admittance of guilt, the prosecution gave details of the offence. Not all areas informed the court of any previous cautions (MAC 1973:2,100), and by 1978 still the “practice varied throughout the country, as it did also on cautioning itself”, some magistrates refusing to hear cautions (Mag.1978:14). Home Office guidelines²⁸⁹ said the police should inform the court (p.91).

The prosecutor could not suggest the sentence and once the social workers or probation officers, at the invitation of the bench, had given their reports, magistrates frequently whispering between each other, and only the chairman speaking to the court, the bench would ‘retire’ to make a decision. The people in the courtroom would have no idea how long those discussions might take, from five minutes to perhaps an hour. The clerk usually joined them at some point.

Both the parent and juvenile could appeal to the Crown Court, or the High Court in specific cases, but had to enter into a recognizance beforehand and “pay such costs as that court may award” (Pain 1982:88). For many years the MA opposed the idea of giving reasons, believing it could stigmatize some witnesses and “provide gratuitously the grounds for a successful appeal” (Young and Clarke 1980:38). The juvenile court was not obliged to inform the juvenile or parent that there was a right of appeal. This, coupled with the fear of the cost and the possibility of an increased penalty, were major disincentives.

²⁸⁹ HOC 49/1978

7.1.3 ‘Disposals’

The aims of sentencing were much discussed at the time. Fundamental among these was the primary duty of the bench to protect the public. By which of the methods could this best be achieved? The public were obviously safe while the offender was in custody – all the better if some training could be incorporated. But on release without such support they often regressed”²⁹⁰

I have lately been perturbed at what I consider to be the increasing tendency to ‘understand’ the motives of the delinquent, rather than to assist in stamping out delinquency itself. (Mag.1979:54²⁹¹)

Retribution and the protection of society are often at odds with what is best for the offender and this difficult equation is not made easier to solve by outbursts suggesting that punishment presents no problems if only there were enough of it. (Mag.1974:155²⁹²)

Because of the partial implementation of the 1969 Act, the court still had full discretion as to the response to the offender and the offence, ranging from an absolute discharge to committing a 15 year old to the Crown Court for borstal training. As local authorities, at their expense, brought in the new ‘welfare’ measures, supervision and care orders and especially ‘intermediate treatment’ (IT), the use of the punitive measures, attendance centres, detention centres and borstal, all funded by the Home Office, would cease.

Deciding the order was extremely complex, with different magistrates attaching different weight to the evidence presented and the persons presenting it (Burney 1979:141; Shapland 1987:80-5; Morris & Giller 1987:200; NACRO 2000). Magistrates were much influenced by their local ideology: “Privately we believe the 1969 Act a disaster” (Anderson 1978:20; Parker et al.1989). As well, their training (Lemon 1974: 48), their sentencing aim, even working part-time could lead to inconsistencies (Thomas 1987:13). There was the added pressure of, and response to, public opinion (Ashworth 1987: 237), much of that gleaned from newspapers in a circulation war, with “crime reporting an integral component of Murdoch’s sensationalist formula” (Chibnall 1977:74), while a “single banner headline in the Sun carrie[d] more weight” than Home Office Research Studies (Downes 1988:203). Other opinions came from magistrates’ own social groups, “reports back from

²⁹⁰ (Lady) Enid Ralphs, CBE, JP, DL, BA, Chairman MA Council 1981-4, interviewed by Ravenscroft, Norwich, 23.x.2006

²⁹¹ D King JP

²⁹² Mrs RV Andrews, JP

various people...different organisations in which you were involved”²⁹³, and views held by “right-thinking members of the public” (Lawton LJ²⁹⁴).

Children should be punished for their wrongdoings. It’s the level of the punishment, the level of reparation, the level of activity that helps the child not to repeat that offence but I still think the child should be punished.²⁹⁵

Magistrates “frequently” wanted corporal punishment back as a judicial punishment, “Haven’t we all smacked our children?”²⁹⁶ Several articles in the ‘Magistrate’ reported uncritically on the use of corporal punishment in other jurisdictions.

Magistrates were able to continue using the old determinants of sentencing, previous convictions (Priestley et al. 1977; Cohen 1985) and gravity of the offence over-ruling the best interests of the child, conflicting with any social work-based decisions (Morris A. 1976; Freeman 1981). Whilst lawyers for both prosecution and defence emphasised the offence, social workers, probation officers and teachers, mostly through written statements, gave the court advice on the juvenile’s background. In some areas more weight was placed on reports from school teachers, perhaps because there were teachers on juvenile panels, or because teachers spent more time with the children, while social workers relied on information from the parents. Some teachers expressed their frustration about children (NACRO 1984:24), others relied on unsubstantiated allegations (Ball 1981:482). As Anderson (1978:25) observed, it was “difficult to uncover the parameters of decision-making” by the magistrates.

Courts still had discretion to choose a probation officer rather than a social worker for young persons, but the under 13s were not transferred to local authorities from the probation service until 1974, and then not if the family was already involved with probation (Mag.1974: 113). This brought into focus magisterial attitudes to the two different services. Probation officers were seen to have:

²⁹³ Interview Rose 2006

²⁹⁴ *Bradburn (1985) 7 Cr App Rep (S) 180*

²⁹⁵ Interview FM 2007

²⁹⁶ Interview PH 2007

an even keel, a balance, they could see the good and the bad... with the social workers, they were heavily biased towards the client, not all of them... they were 'way out' with all the 'Sixties Thing', with no apparent respect for the court whatsoever...²⁹⁷

Social workers "were certainly very much anti-punishment"²⁹⁸ and "thought of themselves as god's gift to the law and we were getting in the way"²⁹⁹. They were dolly birds of 22 fresh off their social studies courses...go to Keele for two years, have their brains removed, get a plastic card with their picture on and think they're a social worker (Parker et al 1989:94-5).

Communications were often strained: "she didn't quite think I was the devil with horns and claws, but jolly nearly"³⁰⁰, and Stacpoole³⁰¹ of the DHSS thought "Social workers could be offensive and were not very helpful at times. The Act was deliberately compromised by many of them". Magistrates³⁰² even protested when they heard probation officers were being trained alongside social workers. A contrary view, by a senior social worker³⁰³, thought joint training might have been very helpful:

I was appalled by how many people were recommending custody...some probation officers had the very strange idea that people would stop offending if you threatened them. They had no idea about maturation or adolescence. (Rutherford 1992:25)

Later, probation officers also became the object of magistrates' criticism, and for reasons similar to that meted out to social workers (Mag. 1976, 1977). A Stipendiary warned magistrates:

[not]... to interfere, or even want to interfere, with what happens to an offender following the court's decision. Judges and adult court magistrates do not tell prison governors nor probation officers how they should deal with people.³⁰⁴ (Mag.1978:162)

The real problem was that social workers were outside magisterial control, and seen to be "sentencing' the juveniles" (Mag.1978:123). This loss of control over the fate of their 'orders' was to be a major source of magisterial resistance to the working of the 1969 Act.

²⁹⁷ Interview HG 2007

²⁹⁸ Interview Romanes 2007

²⁹⁹ Interview FM 2007

³⁰⁰ Interview PH 2007

³⁰¹ Interview Stacpoole 2006

³⁰² Interview Romanes 2007

³⁰³ Sue Wade, Hampshire Social Services

³⁰⁴ David Hopkin, Metropolitan Stipendiary Magistrate

There was a legal obligation³⁰⁵ on magistrates to explain the reports to the children and the parents and give them an opportunity to challenge critical comments. This varied “from scrupulous adherence to total non-compliance” (Ball 1983:198), such that “collusion of clerks and juvenile panel justices... could, on good grounds, be open to charges of administering ‘secret justice’.” (p.203). Before announcing the order, the court was obliged to ask the parents and children their views on the proposed action³⁰⁶. The influential Justices’ Clerk B.T. Harris advised differently:

The aggressive father and the hysterical mother are characters who regularly put in an appearance in most juvenile courts and the effect of asking them what they think of the proposal to send their son to a detention centre is at best to interrupt the proceedings dramatically, at worst to give rise to yet a further prosecution. Faced with such an extreme situation, most chairmen, very sensibly, disregard the strict letter of the law. (Mag.1979:42)

The lightest order that could be imposed was a conditional discharge, which meant no further action unless the juvenile was reconvicted within a maximum period of three years. There was little change in the percentage of such orders made after the 1969 Act, about 21%.

Welfare Measures

These included supervision, IT, and care orders. All gave the responsibility for the nature of the order to the professionals, those with “the day to day intimate knowledge of the character of that young person, of his problems,” more able to take into account any development which might have taken place over some months (Hansard SC 1968-9 V: 332), rather than assessment by magistrates during a court appearance. This premise was not accepted by magistrates who, aided by reports, were expected to make rapid judgments about the character of the young defendant:

³⁰⁵ Rule 10

³⁰⁶ Rule 11 “Before finally disposing of the case the court must inform the parent or guardian how it proposes to deal with the juvenile and allow him to make representations. It must do the same with the juvenile unless this appears undesirable. The effects of all orders except a parental bind-over must be explained to the child.”

You do a juvenile no favours if you let him pull the wool over your eyes... There are youngsters who know the law perfectly well, who decide to defy it, and there are others who are really totally the victim of their circumstances, and it is those who would come under care proceedings. The others must be dealt with quite firmly³⁰⁷.

Of the 'welfare' based orders, the basic supervision order replacing the probation order was the least intrusive but could last up to three years, and in fact, 73% of supervision orders for 14-16 boys were by probation officers in 1978. The supervising officer gave advice and guidance for constructive leisure and education (Jones 1983). However, "only a miniscule proportion" (Harris & Webb 1987:118) of the boys were persistent offenders and virtually all were in education, training or work. Additionally, 30% of supervision orders were for thefts or damage of value less than £10 and common assault, which suggested supervision was being used unnecessarily (Bowden & Stevens 1986), and could lead to "an inappropriate escalation" of orders (ACC 1984 para 5.4.13). The Criminal Law Act 1977 added requirements to supervision orders, with fines or even attendance centre orders for breaches, quite contrary to the view that "refusal to participate may mean needs should be met in another way" (PSSC 1977:44). The MA asked ministers for penalties for parents (JCC 1977:553).

Social workers and the like were called by their Christian names by the young delinquents. Interesting and expensive hobbies – boating and even horse-riding – which prompted the observation – 'Is there not a possibility of youngsters offending so that these luxuries are available to them?' (Mag.1979:175)

We really believed in the possibility of rehabilitation, but it had to be for real and there had to be sanctions³⁰⁸.

IT schemes³⁰⁹ for "the enrichment of the child's environment to aid his development as an 'individual and member of society'" (DHSS 1972) were programmes between supervision at home and residential provision. To avoid any stigma, they were for "the benefit of boys and girls generally, not for the minority who have been before a juvenile court", using residential facilities like adventure holidays, and non-residential local youth centres (Watson and Austin 1975:114-7).

³⁰⁷ Interview Ralphs 2006

³⁰⁸ Interview Ralphs 2006

³⁰⁹ S.19(6)

The court authorised the requirement for treatment but the supervisor “set the wheels in motion and then, only if he thinks fit to do so”³¹⁰ (Mag.1972:34), a discretion resented by magistrates (Mag.1970:141). Financial restrictions meant that by early 1973, only 6/11 regions had submitted IT schemes: the MA suggested that members should lobby their MPs and social services’ directors (MAC 1973:2100). Later, charities became involved in projects (JCC 1978:617, 662).

Magistrates criticised the “recreational content of IT” (JCC 1976:547). By 1976/7 only about 8000 children were involved, of whom only a small minority were subject to court orders, and had not been “in serious danger of entering the care or custody system” (Pitts 1988:35). Where IT was used as an alternative to custody it was cost effective³¹¹, particularly important at this time of severe financial stringency (1988:34). Statutory circulars, such as those explaining IT (DHSS 1977), were “sometimes felt to be an unacceptable addition to the circulars received by the courts...” (Mag.1978:7).

More and better programmes were needed as realistic alternatives to custody: magistrates weren’t getting a real chance to do anything because Social Services themselves were not coming up with real strategies... What they were missing was the scope of the supervision order. That was the key to it, the expansion of that.³¹²

‘Treatment’ varied widely: 90 day residential courses for “intensive work with the child and incidentally [to] help the family”; Birmingham provided a 24 hour service, meeting “the full range of needs without removing a child from home”; while “Dorset did little more than list youth clubs and voluntary organisations” (Mag.1977:201-2). Magistrates were seriously concerned at the non-implementation of their orders (JCC 1978:617), often still for lack of funding (1979:692). Many successful IT schemes were the product of local juvenile panel initiatives, with the “uncompromising objective of reducing the number of custodial and residential sentences in the juvenile court to zero” (Rutherford 1992:113). They were

people who had a deep interest in the future of the children they were dealing with... prepared to be a bit innovative, to take a chance, not to accept the dogma they were being fed...³¹³

³¹⁰ S.12(2)

³¹¹ £34,000 for 100 doing IT, £2 million for 700 in residential care

³¹² Interview Gibson 2009

³¹³ Interview Gibson 2009

Other areas merely “had a flirtation with Intermediate Treatment... No, I never went to one...It just faded, it came and went, faded away”³¹⁴.

The care order³¹⁵ replaced the approved school and fit person orders and was designed for “cases presenting more serious problems and giving rise for greater concern” (Ford 1975:26). The rights and responsibilities of parents of a juvenile until 18 were transferred to the local authority, which was obliged to review all care orders every six months. All parties could apply for a discharge. Some magistrates were concerned that decisions taken administratively rather than in a court “undermined the rights of people” (Mag.1972:183; 181). The local authority had total discretion to choose the treatment, whether the juvenile remained at home or “in the residential establishment best able to meet his or her need” (Tutt 1974:41). These included foster homes and the new CHEs (community homes with education). Many felt these were little changed from the approved schools with their difficult task of providing a caring home and the control needed within a school environment (Cawson 1978).

Only one month after implementation of the 1969 Act, the JCC (1971:325) received complaints about the lack of experience and accountability of social workers because they:

didn't have the same views as magistrates, there wasn't a meeting of minds as there was and is with the Probation Service. They were always suspect... You had the care orders, and more care orders and these kids kept coming back, and there was nothing you could do about it³¹⁶.

Barely six months after implementation, the JCC was “compiling a dossier with a view to making representations when the Act had been in operation for a full year” (MAC 1971:2049) of general complaints about care orders. Courts said they were ‘powerless’ when juveniles in care committed a further offence³¹⁷, which “looked very bad both to the press and the public; busy people were not going to give their time to sit in the juvenile court under these conditions” (JCC 1972:342). Callaghan (1987:235), who had introduced the Bill, felt “there was substance in such complaints.” Previously, if magistrates wished to remove a child from home they

³¹⁴ Interview FM 2007

³¹⁵ S.7(7)

³¹⁶ Interview Rose 2006

³¹⁷ Appendix 7.4

made an approved school order, often some distance away and, as Otton³¹⁸ explained, if the boys re-offended they appeared before a different juvenile court, the original unaware of their reoffending, and there was as much secure accommodation as before the Act (JCC 1972:351). In the new CHEs with the emphasis on openness and community involvement there were doubtless greater “opportunities for absconding...” (Tutt 1974:45). Otton recommended meetings with social services, a plea necessarily repeated by magistrates over the decade (MAC 1975:2194) as knowledge varied from “total misunderstanding to an appreciation of each other’s roles” (Mag.1979:157³¹⁹).

Magistrates had expected, erroneously, that any order for ‘care’ would result in removal from home (Mag.1972:130, 155,181). This led to a sustained campaign throughout the decade demanding, from Conservative or Labour governments, for ‘care’ to mean removal to “Community Homes, purpose built, for the satisfactory containment of children in care” (JCC 1974:413). Two DHSS surveys (1972 and 1973) revealed that children had not been “wrongly allowed to remain at home instead of being placed in residential accommodation” (Mag.1974:173). But, averages were meaningless to magistrates who “only knew what was happening to their care orders, not what was happening in other areas”³²⁰: there was no mechanism for them to find out. Their objection was about “a tough minority (particularly in large urban communities) where this approach [was] inadequate and ineffective” (Mag.1974:84).The situation was not helped by grave shortages of staff (JCC 1973:382) and “closure of the remaining CHE... was resulting in the courts sending more children unnecessarily to custody...”³²¹ A major, multi-agency conference run by the MA was addressed by Sir Keith Joseph³²² who promised more secure accommodation but told the magistrates,

Please don’t spoil your admirable record of public service by, in any part of the country, making it difficult for the social service department to consult with you, to explain to you, and to co-ordinate with you, when they seek to do so. (Mag.1973:38)

³¹⁸ Sir Geoffrey Otton, at the time observer from the DHSS to the JCC

³¹⁹ Philippa Hussey JP

³²⁰ Interview Rose 2006

³²¹ Interview Faulkner 2006

³²² Secretary of State DHSS

For the next five years the MA instigated regular meetings with government departments, often at ministerial level, joint working parties with national agencies, and numerous resolutions, mostly demanding more powers, especially residential and secure custody (JCC 1976:534; 1977:553; 1978:635). The MA was not satisfied with the government's White Paper (HMSO 1976) arising from the House of Commons (1975) review of the working of the Act, which it considered more favourable to its view. By 1977 there were 300 places and a further 200 planned, from just 60 in 1969. Magistrates seemed confused about the terms, residential and secure care. The latter meant solitary confinement, a decision only for the principal of the CHE, who was "in the best position to judge what the requirements of the situation demand" (Mag.1979:83). Professionals found it "costly and ineffective to lock children up except for strictly limited periods..." (p.110). By 1979 Labour's guidelines assumed that the court expected the juvenile to be removed from home, with exceptions (Mag.1979:11). The care order was popular with magistrates, some 19,000 thought to be subject to s.7 (7) in 1978 (Parker et al.1981:6).

Punitive Measures

Do you let them just run riot in the community? How do you contain them? ³²³

Nothing (other than the admirable remedy of corporal punishment) is more calculated and likely to make a young offender see the error of his ways than a short time in custody... (Mag.1978:135³²⁴)

During the Parliamentary debates, the MA had felt "very strongly indeed that the court should retain power to order payment" of compensation and fines (Mag.1969:45). Both these measures were retained (Mag.1976:164), and often reflected a somewhat hostile attitude to the parents:

In far too many cases parents display complete indifference to the anti-social behaviour of their children...Would it not be possible and desirable for legislation to provide that where juveniles cause damage of any kind the parents, unconditionally in every case, could be ordered to pay up to a maximum of, say £100? (Mag.1974:11³²⁵)

³²³ Interview Rose 2006

³²⁴ Sir Ivo Rigby, Metropolitan Stipendiary Magistrate

³²⁵ EP Fisher, JP

Table 7.2 - Maximum Financial Penalties 1971 and 1977

Penalty	CHILD		YOUNG PERSON	
	1971	1977	1971	1977
Fines	Maximum: £10	£50	£50	£200
Costs	If juvenile pays = less than fine If parent = maximum actual costs incurred			
Damages and Compensation	Max £400		Max £400	
Parental recognizance	Max.£50	£200	n/a	n/a

Of all available disposals, fines were the “most frequently used” (Cavenagh 1976:17). They reflected the seriousness of the offence and the lack of financial resources of juveniles, the latter relevant to the payment of compensation too. Parents had to pay any financial orders against a child, and for a young person, unless the parent or guardian proved that they had exercised their parental responsibilities. The same rules applied to the local authority if the juvenile was in care. The Criminal Law Act 1977 gave magistrates the power to order the juvenile to an attendance centre for default on payment, as well as raising the maximum financial orders.

The Conservative government announced in August 1972 that it “intended to defer, until it can be seen what alternative facilities are available” the removal of the penal custodial and attendance centre measures (Mag.1972:135).

An attendance centre order could be made for boys³²⁶ aged 10-17, for 12 hours, unless considered excessive for a child, to a maximum 24 hours. Breaching rules could mean being re-sentenced. The main purpose was to impose punishment through loss of leisure, but “physical training [was] a normal part of the regime” (Mag.1977:143). Most were run by the police. The activities ranged

from tedious, if useful, fatigues... to crafts like carpentry, leather work and basket making... the ideal [should fall] between so much drudgery that the boys become resentful and embittered, and such agreeable occupations that they enjoy themselves too much. (Watson & Austin 1975:136)

This suggests the doctrine of ‘less eligibility’, nowhere mentioned in the Act,

³²⁶ But not if they had already served a term in prison, borstal or detention centre

the age-old conundrum of how appropriately to deal with delinquents: there must be enough kindness to motivate them, to catch their interest, but not enough to reward misbehaviour. (Harris & Webb 1987:18)

It applied even more to IT schemes.

There were calls for more attendance centres (JCC 1977:578), even places for girls, although Stacpoole (DHSS) considered that IT powers should be adequate, yet two centres were later opened (JCC 1979:694). Some magistrates wanted the maximum time increased to 36 hours. In 1978, a proposal for “certain junior attendance centres to include 17 and 18 year old offenders”³²⁷ attracted no comment about mixing adults and juveniles (Mag.1978:146), rather, the MA members who met the Home Secretary were “delighted” (JCC 1978:640). Instead of their proposed abolition, by 1979, there were 10 new junior centres, making 70 in total (Mag.1978:191).

When a young thug came into court with a grin on his face it was very salutary that he should leave that court immediately in a police van where he would have a spell of discipline (Mag.1972:183³²⁸)

Bag snatching – “even in cases of youths under 15, detention centre orders should be made”³²⁹ (Mag.1976: 91)

It was an avuncular feeling that I got from the chaps who ran it. I think they cared...it was kinder than a boys’ boarding school... There probably was a bit of bullying, that’s human nature, you get that in the office”³³⁰.

Youngsters in detention centres have quite openly admitted that they are better clothed, fed, housed and quite prefer their hardly restricted way of life there, to that at home. (Mag.1977:188³³¹)

A detention centre (DC) order was available for boys 14-17, for whom the court had found that no other form of treatment was appropriate, and they had not previously been sent to an approved school or borstal. Such boys, the “wrong type”, were being sent, causing “acute dismay” to the BOV³³² (Mag. 1972:42). Magistrates sent boys because generally they lacked confidence “in the efficacy of care orders” and wanted more community homes with secure provision (Watson & Austin

³²⁷ HOC 95/1978

³²⁸ Lady Burman, JP JCC and MA Council

³²⁹ Lawton in R v Campbell, ‘The Times’, 9th April 1976

³³⁰ Interview HG 2007

³³¹ Maureen Smith JP

³³² Board of Visitors

1975:160-1). The period of detention was for three months with automatic remission of one third, followed by a maximum of 12 months supervision.

The report (ACPS 1970³³³) on DCs said the earlier regime had been seen as “a short sharp shock” a warning to boys to “change their habits and behaviour” (ACPS 1970: para 71). But, until their proposed closure, there would be an “increased emphasis on remedial and general education³³⁴, and firm but less rigid discipline” (Mag.1970:46). This “horrified and surprised” one magistrate: “a further example of the ‘soft approach’ which is so clearly undermining discipline and encouraging the general increase in crime and violence ...” (Mag.1972:170³³⁵). An academic and professional social worker found detention centres “overtly punitive... hard work, physical education and militaristic discipline” (Tutt 1974:39). The ACPS (para 71) was “entirely opposed to the routine cropping of hair as a depersonalising and punitive measure”, while an influential magistrate felt “it really wasn’t very important was it?”³³⁶

The regime was “unsuited to those... seriously handicapped physically or mentally” (HMSO 1969: para 28), yet two boys arrived with

infectious hepatitis and a form of dysentery... Out of 226 receptions, only ten had been medically examined at court. Trainees have been received walking on crutches.

An editorial asked:

Why are courts not arranging for a medical examination...Are they saying that because it is not a legal requirement they will not comply with what appears to us a reasonable request, and to those running the centres, an essential pre-requisite? (Mag.1978:99)

Even before the Act was operational the JCC (1970:301; 1971:331) had repeatedly warned the Home Office of the serious shortage of places. The MA chairman wrote to the Home Office, “It would be wrong if I did not impress upon you the seriousness with which my Council views this situation”, and received the logical reply that it was

not easy to invest a significant amount of public funds... for the benefit of junior detention centres at a time when Parliament had recently enacted provisions for their abolition (JCC 1972:351).

³³³ Its members included Lady James and Lady Rothschild, former members of the JCC and MA Council, and Baroness Wootton JP

³³⁴ HOC 159/1972

³³⁵ IC Malcolm, JP

³³⁶ Interview Romanes 2007

Undaunted, the AGM, with about 650 present, voted unanimously for more. Six months later the JCC (1973:379) repeated that request. Two resolutions, from individual Council members, calling for a halt until an evaluation of the comparative successes of DCs and other treatment, failed (MAC 1973:2117). By March 1974, the chairman of the JCC reported that “largely as a result of the Association’s pressure... places had been increased by about 70%” but “might still not meet all requirements” (Mag.1974:78). This was the period of miners’ strikes, the ‘three-day week’ and “severe recession after the 1973 oil-price hike” (Whitehead 1985:182), and a change of government back to Labour, with no overall majority. The Conservatives now in Opposition, kept in contact with the MA, which responded “with details of recent complaints” (JCC 1974:430).

A simultaneous argument had been taking place over the requirement to check for a vacancy before making a DC order. An AGM resolution in 1971 called for its removal: one member, to applause, claimed he “sent young men to detention centres and had them well on their way before remembering to inquire about vacancies” (Mag. 1971:184). The Conservative Home Office minister Viscount Colville warned that failure to make enquiries “might result in the detention centre system ceasing to be made available to the offending courts” (Mag.1972:142). To which “Council members took strong exception ... Parliament made the law, not Home Office circulars”³³⁷; and accused the Home Office of ignoring “the paramount obligation of every magistrate” to do justice (p.145), one spoke of blackmail. A resolution sought “the support of the Lord Chancellor”, Hailsham (MAC 1972: 2074), an old ally of the MA and its President. The courts continued to ignore “the understanding” (JCC 1973:387; 1974:408): magistrates were unrepentant, “...if detention was the only appropriate way to deal with them, then Detention Centre it is, and you find a place.”³³⁸ If not available, the courts were more likely to commit for borstal training, with juveniles held on remand in prison (JCC 1972:342).

The second general election in 1974 returned Labour with a miniscule majority. No doubt aware of the resistance being shown to the principles of the 1969 Act, the new Labour Lord Chancellor Elwyn-Jones, who had been a member of the Longford Committee, in an attempt to introduce some small measure of guidance if

³³⁷ Professor W. Cavenagh, JP. She was wrong: it had been in s.3 1961 Criminal Justice Act

³³⁸ Interview Ralphs 2006, and interviews Brook 2007 and HG 2007

not control, declared unequivocally in the first ‘Handbook for Newly Appointed Justices’ issued in 1974:

Magistrates cannot choose which laws to enforce and which not to enforce. ...it would be wrong for a judge or a magistrate to continue to sit and adjudicate if he conscientiously felt that he could not apply the law as it was.

A similar injunction was repeated by Lord Hailsham when Lord Chancellor in 1985 (Mag.1985:16).

The MA wanted one month detention centre orders, although one member³³⁹ warned of the danger that this “tough measure” would be used for minor offences (Mag.1974: 181). The HOC (148/1975) reported an increase from 347 places in 1972 to some 600 and, most significantly, confirmed the government’s original intention to phase out junior DCs as soon as “local authorities have developed adequate alternative forms of treatment.” The MA deplored the increase in remission to one half, as “undiscriminating Executive interference” (1977:160). Stacpoole, observing the JCC from 1973-1979 said that “the majority tried to convince me to have the power to make life more unpleasant for young offenders.”³⁴⁰

Table 7.3 -% of Juvenile Offenders Sentenced and Cautioned in 1970 and 1979

Sanctions	1970	1979
Cautioned	38	50
Conditional Discharge	13	10
Fined	20	17
Attendance centre	5	6
Probation/Supervision	15	9
Approved/Fit Person/Care Order	5	3
S28 remit to Crown Ct [Borstal]	1	1
Detention Centre	1	3
Other	1.5	1

(Morris & Giller 1987 p.96).

Far from espousing the welfare of the juvenile, these statistics demonstrate the punitive response, “although magistrates argue that they have no alternative in

³³⁹ Dilly Gask, JP

³⁴⁰ Interview Stacpoole 2006

view of the offences committed by a persistent minority of the children in care” (Anderson 1978:14). Others said the magistrates were circumventing social workers’ discretion (Parker 1980; Farrington 1984; Pitts 1988), or, conversely, social workers were responsible for the increase, not “an unsympathetic magistracy or judiciary”, owing to their equivocal or even punitive report recommendations (Morris and Giller 1983:151; Morgan 1981:57; Thorpe et al. 1980:3; Jones 1983:100). The situation was compounded by the unnecessary, early use of community-based treatment. On reappearance in court, this led to “an assumption often implicit in the reports and certainly in the mind of magistrates” that treatment had failed and thus “hoisted up the sentencing tariff” (Thomas H. 1982:94).

Of those discharged from DC in 1974, 73% were reconvicted within two years (Muncie 1984:167). It could hardly be said that the public had been protected, but most magistrates “have never seen any research or statistics to know about reoffending rates,”³⁴¹ nor what other benches were doing, the discrepancies producing “major inequities” (Parker et al. 1981:242).

It seems that being in borstal is becoming more and more like attending one of our splendid holiday camps... When we do send them there we want them to be taught a lesson and a lesson they should be taught. (Mag. 1972:169³⁴²)

The juvenile court could only commit to the Crown Court with a recommendation for borstal those aged 15-16 for an indeterminate sentence of 6-24 months, on average nine months. The governor, not the judge, chose the release date. The MA wanted magistrates to order borstal training directly, despite its intended abolition (Mag. 1972:184), and Council members repeatedly pressed for its retention (MAC 1974:2163, 2181). Borstal, originally designed as constructive training, was changed in the 1961 Act, “to increase the severity of the penalty” (Hood 1965:76), and seen as punishment, with officers back in uniforms. Not all magistrates visited borstals³⁴³.

They really believed they were sending people away to be trained to learn a craft or trade... It was a great shock to many magistrates to learn that just being sent to custody was more damaging than what you might learn whilst in there (Tutt 2000:7).

³⁴¹ Interview HG 2007, Interview Rose 2006

³⁴² S/Ldr. F Holman, JP

³⁴³ Interviews FM and HG 2007

DCs had not been phased out but that ultimate goal had not been abandoned unambiguously by either Party, until Labour's Green Paper 'Youth Custody and Supervision' (1978). This suggested "there might be a new single junior custodial sentence for 14 and 15 year old boys" and 16 year olds to the new youth custody sentence (Mag.1979:18), proposals supported by the MA (JCC 1979:738).

7.1.4 Conclusion to the 1970s

The fate of the compromise 1969 Act was sealed six months after Royal Assent by the General Election in 1970. The Conservatives, backed and briefed by the MA did not implement the radical proposals to remove under 14s from the courts, to restrict prosecution for those aged 14-16, or to abolish penal custody. The least intrusive welfare orders declined, while the MA maintained constant communication with ministers of each government, demanding greater restriction on juveniles in care. Custody was still used extensively because of

lack of faith in treatment in the community. Firstly there was a bit of resistance and secondly, because they did not feel that those people who were supposed to be in control and in charge were able to do their job properly...³⁴⁴

Labour's Green Paper in 1978 recommending junior youth custody showed that the architects of the 1969 Act were no longer committed to a welfare-based system of juvenile justice.

A decade after the passing of this radical Act, no part had been repealed by Parliament. Yet, the juvenile courts were still staffed and run and used powers of punishment across the juvenile age range as if there had been no Act, bar the additional use of new orders of control and care. Neither the spirit nor the letter of the law had been embraced by the vast majority of juvenile panels, with huge variations between them, and many of the children and families were befuddled and belittled. Academics and practitioners concerned with due process and the encroachment of criminal justice into welfare (Morris et al 1980; Taylor et al 1980), called for rejection of the 1969 Act, and lobbied for a 'justice' based approach with more openness, accountability and proportionality of sanction to the offence. Far from an increasing use of 'welfare' measures, there had been a decrease and an increase in 'punitive' ones: "the opposite to that intended by the Act had occurred"

³⁴⁴ Interview Rose 2006

and “paradoxically, the Act was blamed for this” (Morris and Giller 1987:97). But there was a “real danger that over-reaction to the failure of the welfare model” could “lead to a highly punitive system being introduced in the name of ‘justice’” (Ball 1983:204).

7.2 The 1980s: Political Surprises

‘Six of the best’ is now considered an affront to human dignity, largely because it shamed the recipients – many of them not into offending again.³⁴⁵ (Mag.1985:23)

The Conservative government elected in 1979 partly on a ‘law and order’ platform announced it would amend the 1969 Act “to strengthen the powers of the courts” (Mag.1979:174). Whitelaw’s 1982 Criminal Justice Act, its principles based on the offence not the needs of the offender, largely met most of the demands made by the MA with ministers (JCC 1980: 791; 813). However, in a deliberate attempt to reverse the expensive, almost 100% increase in custody for 14-16s during the 1970s, it introduced custody criteria³⁴⁶, made more restrictive by the campaign of the Parliamentary All-Party Penal Affairs Group, not the government (Windlesham 1993:168-172).

The detention centre order was reduced to three weeks with a maximum of four months, which the government hoped would reduce its use, others feared magistrates would be tempted “to use custody on a much wider scale” (Cavadino 1983:31). By 1985 all centres had the tougher regime, parades, inspections, and minimal “privileges and association” (Mag. 1985:64). “I have no idea whether it worked but it seemed to me it was worth trying.”³⁴⁷ Borstal was replaced by determinate ‘youth custody’ for the 15-20 year olds, to be ordered directly by the magistrates, another long-standing request, and parents could be held legally responsible for fines and compensation³⁴⁸. The latter was rarely awarded, even by 1995 only 2245 compensation orders out of 67,000 findings of guilt (O’Doherty 1997), although Hailsham³⁴⁹ had said compensation should be paid before costs and fines (Mag.1985:16). Despite the MA welcoming the new curfew orders, ‘night restriction’ in supervision orders, and wanting them as a separate order (JCC 1982:893), they were also little used (Ashworth 1995:275).

³⁴⁵ HP Bee, JP

³⁴⁶ Appendix 7.5

³⁴⁷ Interview PH 2007

³⁴⁸ S.26

³⁴⁹ As Lord Chancellor

The statutory custody criteria, introduced without comment by the JCC, “one panel ...claimed never to have heard of the Act” (Parker et al 1989:41), were largely ignored by magistrates, and often with the connivance of their clerks (Burney 1985; Reynolds 1985), as had happened before (Windlesham 1993:168). Magistrates filled the youth custody centres rather than detention centres, probably in the mistaken belief that youth custody was like the old training borstals (Newburn 1995:140). In 1987, 82% of the 3,090 young persons discharged were reconvicted within two years (Windlesham 1996:110).

Supervision orders were made more rigorous with ‘specified activities’, returning some discretion from social workers to magistrates (Burney 1985:4). In 1983, the DHSS (LAC 1983) provided £15 million for IT in 62 areas for alternatives to care and custody. It worked: where magistrates were given the opportunity to use constructive methods custody dropped to 7.7% in these areas, the national figure 11%, with no evidence of net-widening. But, “other areas of the country, often with long histories of punitive justice, [have] remained largely untouched by these developments”, hence ‘justice by geography’ (Parker 1989 et al.:18). Often, the radical ideas came from social workers rather than senior management (Rutherford 1992:20-1) and enlightened benches: “if anybody had gone against the idea and started making detention centre orders, they would have had all Hell coming down on them.”³⁵⁰

School reports, in terms of their confidentiality, continued to be used in diametrically different ways by courts (JCC 1984:990, 1004). A multi-agency working party, with MA representation, looked at the Scottish hearings, which were “strongly opposed by the Association” (1008).

All the available evidence suggests that juvenile offenders who can be diverted from the criminal justice system at an early age in their offending are less likely to re-offend than those who become involved in judicial proceedings. (White Paper ‘Young Offenders’ HMSO 1980)

Cautioning was officially encouraged³⁵¹ and increased from 49% in 1980 to 82% in 1992. Although the majority of the JCC felt cautioning was not the business of magistrates, others “expressed concern about the establishment of the Juvenile

³⁵⁰ Interview Gibson 2009

³⁵¹ HOC 14/1985 and HOC 59/1990

Bureau Panels (JCC 1985:1039), and the danger of their “assuming the court’s role” (1051). Some schemes such as in Northamptonshire, arising from multi-agency co-operation including the magistracy, were very successful in diverting young offenders from formal proceedings, from custody and in reducing offending, saving considerable public funds, and reducing court time by 80% (Bowden and Stevens 1986). The 1987 AGM of the MA voted substantially to restrict cautioning (Mag.1988:4), supported by other magistrates (Mag.1989:55, 111) but not the JCC (1988:1214). Academics criticised cautioning for the quite different reason of its discriminatory use (Parsloe 1978; Harris and Webb 1987; Evans and Wilkinson 1990; Rutherford 1992; Ashworth 1994), and its use instead of informal cautions (Sarri 1983:54-8).

These discrepancies added further ammunition to the ‘Children’s Rights Movement’ (Hendrick 1994). Systematic appeals were encouraged against custodial sentences, resulting in 86% being given a lower sentence in Kent (Stanley 1988), and magistrates generally heeded the Court of Appeal guidance. The 1988 Criminal Justice Act tightened the custody criteria still further and abolished the distinction between detention and youth custody, for pragmatic reasons, creating detention in a young offender institution (YOI). Additionally ‘supervision plus specified activities’ was to be used explicitly as an alternative to custody, with up to six months detention if breached; and community service orders for 16 year olds. All the new measures were supported by the MA.

Between 1985-1990 custody rates for male juveniles dropped 81%. Several factors may have contributed to this remarkable reversal: the expansion of IT, with influential magistrates and multi-agency teams who disseminated knowledge nationwide (Gibson 1992; Rutherford 1992; Newburn 1996); the rigorous appeal programme challenging the custodial criteria applied by the magistrates (Stanley 1988); the increase in cautioning backed by new guidelines; the new Crown Prosecution Service exercising its independent powers, which included the welfare principle, to decide on prosecution (Mag.1992:109); suggestions of malpractice (Home Office 1987) and allegations of brutality in institutions; and the 20% decline in the general population of this age group (Allen 1991:35-8).

Table 7.4 – Boys Aged 14 – 16 years sentenced to Immediate Custody

Year	Total	% of Sentenced
1980	7,400	12
1981	7,700	12
1982	7,100	12
1983	6,700	12
1984	6,500	12
1985	5,900	12
1986	4,300	11
1987	3,900	11
1988	3,200	11
1989	1,900	9
1990	1,400	7

(Rutherford 1992:12)

During this period, public inquiries involving allegations of serious sexual abuse of children in the care of the local authorities led the Lord Chancellor to reform completely the procedures for the care and protection of the young. The Children Act 1989 transferred all care proceedings to the new Family Proceedings Court, and ‘criminal’ care orders (s.7[7]) were no longer available. The troubled and the troublesome children, found as one and the same by successive public inquiries throughout the century, were now separated completely, ironically by a Scottish Lord Chancellor.

“Many high quality magistrates with considerable commitment to both young offenders and care cases” (Ball 1992:285/6) transferred to the more intellectually demanding work of complex child abuse and family breakdown cases in the Family Proceedings Court. It had been feared by the Home Office:

We cannot afford to lose their valuable knowledge and experience in dealing with young offenders. They have made an immeasurable contribution to the success of juvenile justice policies in recent years, and are irreplaceable.” John Halliday³⁵² (Mag.1992:33)

This was to have a profound effect on the next decade of youth justice.

³⁵² Deputy Under-Secretary Home Office

7.3 The 1990s: Moral Panics to Revolution?

Youth crime is now at the centre of public concern and is lavishly covered in the tabloids³⁵³ (Mag.1996:208)

The last decade of the 20th century saw a plethora of reports and statutes³⁵⁴ from both Conservative and Labour governments proposing radical changes in the criminal justice system at national and local levels. There was a particular focus on youth offending with an emphasis on inter-agency co-operation; and the appointment, management and administration of the magistrates and their courts, with inspections and some measure of accountability.

The Conservatives passed two more Acts affecting juvenile offenders, the first firmly based on a due process, proportionate model, the second a punitive rather than welfare model and emphasised parental responsibility. The Criminal Justice Act 1991 renamed the juvenile court a youth court, now included 17 year olds, a decision supported by the MA (Mag. 1989:126), but retained the statutory ‘welfare principle’ of the 1933 and 1969 Acts. However, it finally repealed the unused clause raising the age of criminal responsibility from 10 to 14, and 16 and 17 year olds were to be treated as ‘near adults’ according to their maturity rather than their age, leaving them vulnerable to adult sentences, including a curfew with electronic tagging. Attendance centre orders could be served alongside those aged up to 20 years, with no objections by the MA to mixing juvenile and adult offenders, despite the strictures of the recently ratified UN Convention on the Rights of the Child (van Beurán 1998). The maximum age for magistrates in the youth court was raised from 65 to 70, supported by the AGM of the MA, and no restriction on the age at which the many now required could be appointed. All magistrates received specific training on this Act, some “dismayed at the extent of training deemed necessary” (Mag.1991:59; 1992:141).

For the first time, “persons engaged in the administration of criminal justice” (s.95 CJ Act 1991) were to be aware of the financial implications of orders, and to act without discrimination on improper grounds. Sanctions were to be proportionate to the seriousness of the offence, progressing to ‘serious enough’ for a community

³⁵³ Rosemary Thomson, CBE, OBE, JP, DL, MA, Chairman MA Council 1994-97

³⁵⁴ Appendix 7.6

penalty or the new criterion for custody, ‘so serious’. Courts could not take more than one other offence into account, which definitely reduced custody until that “ill-fitting strait jacket... incomprehensible to right-thinking people generally”³⁵⁵ (Mag.1993: 151) and to the magistracy (p.85), was repealed only six months after implementation.

Media coverage of riots, joy-riding, persistent offenders, and the demonization of ‘persistent’ young offenders (Cavadino 1997; Campbell, B. 1993, Newburn 1996), the murder of a toddler by two children aged ten³⁵⁶ (Fionda 1998), and a Home Secretary believing ‘prison works’ (Newburn 1995), all gradually led to demands for severer sentences (Ashworth 1995). Penal custody, abolished for children in 1991 was reinstated in the Criminal Justice and Public Order Act 1994, with Secure Training Centres (STC) for the 12-14 age group: “Whether or not it will do him good has little to do with the consideration magistrates must apply to sentencing” (Mag.1993:74³⁵⁷). These powers, opposed by almost every child welfare organisation, local authorities, penal reformers and some senior Conservatives (Windlesham 1996:111-2), were nonetheless supported by the MA, with letters of relief or disbelief in the Magistrate (1993;1995), and calls for the resignation of the editor for her opposition. Remand to prison of boys aged 15 and 16 was due to stop in 1991: by 1992, there were 1,100 and by 1995, 1,900 so remanded. The MA with NACRO issued a Code of Practice showing available alternatives (Mag.1996:200).

The differences between adult and juvenile defendants were further minimized in the 1994 Act. The 10-13 year olds were brought into regulations for grave offences³⁵⁸ (Fionda 1998), 10-15 year olds could be convicted of indecent assault on a woman, and the right of silence was removed from young persons³⁵⁹ (Howard League 1999). Additionally, detention in a YOI was doubled from 12 to 24 months³⁶⁰. Cautioning was now restricted by new guidelines³⁶¹ but the MA regretted the abandonment of the presumption not to prosecute juveniles (Mag.1994: i). Parental bind-overs had been opposed by the MA (Mag.1991:130) as they might

³⁵⁵ Taylor, LCJ

³⁵⁶ Whose public trial was severely criticised by the ECtHR and led to procedural changes

³⁵⁷ Tom Craig, JP

³⁵⁸ S.16

³⁵⁹ S.34

³⁶⁰ S.17

³⁶¹ HOC 18/1994

“exacerbate a potentially volatile situation” (JCC 1991:1337). Some magistrates expressed contrary views, “...tired of apologists for ‘stressed’ parents”³⁶²(Mag.1991:78) and another, despite learning of the serious dangers to the child if the parents were punished (p.33) considered, “If it means, at first, a little more burden or fragmentation of families, it might be worthwhile long term” (p.78).

Bingham LCJ (1997) admitted that the judiciary was being influenced by the media, and Appeal Court guidelines reduced magisterial discretion for ‘grave’ proceedings: many more cases were sent to the Crown Court (Campbell, Q. 2000). This led to a dramatic rise in custody because of the greater powers of punishment.³⁶³

Table 7.5 Number of Juveniles in Penal Custody

	30 June 1993		30 June 1999	
	Boys	Girls	Boys	Girls
Aged 15	126	2	218	7
Aged 16	279	7	639	22
Aged 17	870	20	1,479	57
Total	1,274	29	2,336	86

Source: Table 3.2, Prison Statistics England and Wales, 1993 and 1999

The Chief Inspector of Prisons (1997:6) produced a critical report on the damage done to “immature adolescents” by the conditions of prison service establishments, further endorsed by a Howard League Report (2002); and another report by the Social Services Inspectorate (1998:8.8) found that STCs “seemed to strengthen the criminogenic behaviour and outlook of the trainees”.

In 1996 the Labour Opposition demanded changes to youth justice, accusing the system, particularly the courts, of “making a bad situation worse”, more concerned with “judicial process than with finding solutions that might break offending habits” (Straw and Michael 1996:2-5). The report noted the Scottish hearings, and although chose to keep youth courts, these were to be more inquisitorial and informal, and, as in Scotland, disputed cases to be heard in private by a stipendiary or judge (p.11). It did not, however, suggest any move towards a

³⁶² DB Price, JP

³⁶³ Appendix 7.3

welfare rather than punishment-based system. Two more reports were both highly critical of the ineffectiveness of youth justice, the Audit Commission's 'Misspent Youth' in November 1996 and the government's 'Review of Delay in the Criminal Justice System' (Narey Report 1997).

Labour won the general election in 1997, with a Manifesto commitment to reform youth justice, and Straw, now Home Secretary, produced the emotively named White Paper 'No More Excuses'. This was considered to be influenced by the Audit Commission report, which Jones D. (2001:364) claimed had been simplistic, with a "cavalier use of crime statistics". The proposed reforms were based on prevention of offending; both parents and juveniles taking responsibility; earlier intervention; more concern for victims and less for protecting the identity of young offenders; and "partnership between all youth justice agencies to deliver a better faster system" (Home Office 1997:1). These led to the Crime and Disorder Act 1998 with the "principal aim of the youth justice system to prevent offending by children and young persons"³⁶⁴, which was applicable to all the relevant agencies.

The age range remained from 10-18 but removed almost all remaining differences between adult and juvenile courts. Cautioning was severely curtailed. For children, the doctrine of *doli incapax*, which the MA had argued to keep (Mag.1998:258), and the right to silence were abolished: children of ten were now as culpable as any seasoned adult criminal. Somewhat paradoxically, parenting orders were mandatory unless the court gave reasons for not ordering them. This dual responsibility of child and parent was to be criticised in a major report on the wellbeing of families (Rutter 2005).

The one-hour restriction between the sittings of an adult and youth court was removed³⁶⁵; as was the requirement not to use the words 'conviction' and 'sentence'³⁶⁶; and written pleas of guilty were available for 16 and 17 year olds for summary offences³⁶⁷. Earlier Acts had encouraged juvenile courts to keep jurisdiction for those reaching 18 during the proceedings, but this was now reversed³⁶⁸. Another Act³⁶⁹ removed the restriction on publication of names "where it

³⁶⁴ S.37 1998 Act

³⁶⁵ S.47

³⁶⁶ Schedule 10

³⁶⁷ S.69

³⁶⁸ S.47

is seen to be in the public interest.” Over the years, letters to the ‘Magistrate’ had repeatedly called for such publication.

More non-custodial sanctions were introduced including those of reparation, either to the victim or society as a whole. The Conservatives’ Secure Training Centres, not yet operational, were absorbed into ‘Detention and Training Orders’ for the persistent offender, from 2-24 months, half served in secure accommodation. This led to a 10% increase in custody in the first year to 6,401, with great variations between courts (Bateman and Stanley 2002). A letter from the Youth Justice Board (YJB 2001) to each court emphasised this and suggested a community penalty rather than a short custodial sentence, “an action that was resented by some magistrates... as an attempted executive interference in judicial functions” (Bottoms and Dignan 2004:107). A new order, the ASBO (Anti-Social Behaviour Order³⁷⁰), applied to all aged 10 and above, and was processed in the adult magistrates’ court, on an application from the police or local authority with the civil burden of proof, a balance of probabilities. If granted, the court prohibited certain action, and the Home Secretary, Jack Straw declared “there should then be a presumption in favour of publicising the defendant” (Mag.2001:45). On breach, it became a criminal matter and could, and usually did, warrant a custodial sentence.

Straw had also demanded changes to the conduct and ethos of the juvenile courts, not on the grounds of the defendants’ welfare but rather to engage the juveniles and parents and might involve “all participants in the case, including the magistrates, sitting around a single table” (Home Office 1997:30). It would seem that the 1992 Rules³⁷¹ to “require the court to assist the juvenile in putting forward his or her case and to understand the proceedings” had not been applied. Lawyers often made that situation worse, with children “non-speaking except to give their name, address, age and eventually to plead guilty or not-guilty... talked over as if they were invisible and dumb” (Curtis 1999: 186/188). A plea for better communication and explanations in court was made by the new chairman of the YCC³⁷² (Mag.1998:42³⁷³) and a further government document emphasised the

³⁶⁹ Crime (Sentences) Act 1997

³⁷⁰ S.1-4 1998 Act

³⁷¹ Magistrates’ Courts (Children and Young Persons) Rules 1992

³⁷² Youth Courts Committee MA Council formerly JCC

³⁷³ Lynne Ravenscroft, JP

continuing failure to do so (Government Departments 1998:11). The Lord Chancellor (1998) also wrote to all Youth Panel chairmen explaining ‘demonstration projects’, which were to show that:

72% of magistrates felt that they should sit on a different level to maintain the formality they considered necessary (Allen, Crow and Cavadino 2001: 34/5)

and most magistrates had neither been encouraged to, nor thought it appropriate to talk to the defendants or their parents (p.15), indeed the YCC, under yet new leadership, spoke of the “change...illustrated by the recommendation that the chairman should address directly the defendant and his parents” (Mag. 2000:304³⁷⁴).

This was followed by formal guidance (HO and LCD 2001), compulsory training and a special Handbook for all panel members, which still did not include anything on child development and claimed an “over-emphasis in the past on welfare ...has contributed to the loss of public confidence in the youth justice system” (JSB 2001:7.6). Meanwhile, the Youth Justice and Criminal Evidence Act 1999 effectively removed all first offenders pleading guilty at a court appearance, to a new ‘youth offending panel’, two lay members and a professional social worker. They would decide a restorative justice programme with the parent and juvenile, in a round-table discussion, quite removed from the court, although magistrates retained control of the order as they decided the length of time and breaches would be referred back to the youth court. This was the only attempt to separate judicial fact finding from treatment, as proposed in ‘Tackling Youth Crime’ (Straw and Michael 1996). The ‘Magistrate’ appears to have made no comment on this new approach, but the YCC (1999:1618)

was concerned about the power the panel would have, which should be reserved for the court; that the young person would be entering a contract without legal representation; and about what powers the panel could exercise over members of the young person’s wider family.

Parallel to these reforms over the decade were radical changes to the whole structure and management of the magistracy and its courts. The recruitment of all magistrates was totally reformed, beginning with publicizing the names of all Advisory Committee members by 1993 (Mag.1990: 116) and ending with

³⁷⁴ Alex Kilpatrick, JP

advertisements for candidates on hoardings, not universally popular (Mag.1999:241) and a structured, open procedure for choosing candidates (LCD 1998). A national syllabus³⁷⁵, supported by the MA, for training, mentoring and appraisal for all chairmen, was regarded with “a mixture of enthusiasm, trepidation and scepticism”, (Mag. 1994:189), even “an impertinence”³⁷⁶, “we did not take kindly to it”³⁷⁷.

I learn my craft from the judicious placings between two magistrates of various experience and knowledge... there’s no need to clone us, where will it all end?³⁷⁸ (Mag.1993:89)

By 2000 the practice, Magistrates’ National Training Initiative (MNTI) was universal for all magistrates, although appraisal was done by bench colleagues, albeit after some training.

It would be difficult to think of any arrangements less likely to deliver value for money than the present ones. (Mag.1989:133)

The Le Vay (1989) Scrutiny had produced a highly critical report on the management of the magistrates’ courts by the senior magistrates serving on the 105 MCCs (Windlesham 1996; Auld 2001). By 1994, the independent Majesty’s Courts Service Inspectorate had begun its inspection of MCCs throughout the country, looking at the resources and “the quality of service” to court users. The inspectors were “a bit disappointed by how much hasn’t been done in the 18 months since inspection” (Mag.1996:58-9). Managerial reforms were proposed in the Police and Magistrates Courts Bill 1994, much of it resisted by the MA, which mounted a campaign using its Parliamentary contacts. Nonetheless, most reforms were enacted in the Justices of the Peace Act 1997. For more than 30 years, small juvenile panels had been asked to combine with neighbouring ones to provide sufficient experience, yet even in 1999, 30/229 youth panels dealt with less than 100 juveniles a year, some less than 20 (HO Criminal Statistics 2000). The Access to Justice Act 1999 would enforce amalgamations.

Soon after 2000, the administration of magistrates’ courts was under a national service with independent inspections (and magisterial complaints about court closures and the loss of local justice (Mag.2002:177)); their training was

³⁷⁵ Magisterial Committee, Judicial Studies Board (JSB)

³⁷⁶ Lady Mansell Lewis, JP, BBC Radio 4 – ‘Lord Lieutenants’, 20.i.2001

³⁷⁷ Interview PH 2007

³⁷⁸ T Gilbert, JP

designed and monitored nationally; their appointments were transparent and made within strict, published criteria. In courts, their reasons were not only given but recorded (Human Rights Act 1999); but their decisions, as ever, taken within the framework of judicial discretion that the Statutes and Appeal Court tolerated. Despite their new training in creating a less formal atmosphere in the youth court, “this has proved to be more of a challenge to some magistrates than others...it will take a little time to adjust”³⁷⁹ (Mag.2002:181).

³⁷⁹ Anne Foot, JP, Chairman YCC, MA Council

7.4 Conclusion

The Children and Young Persons Act 1969 was passed under a Labour government, and, although much altered from its incarnation in the Longford Report, remained essentially a welfare-based model for juvenile justice for those aged 10-17. Its fundamental tenet was the belief in individualised treatment to change the criminal behaviour by social work intervention, often through programmes in the local community, which had previously only been accessible to those with money or knowledge. Parental co-operation was considered essential, and only when that failed would the local authority seek parental responsibilities through the ‘care order’.

We had no idea that it is possible that the restriction of liberty for children and young people could be actually something that needs to be scrutinised for its legal status. We thought you did not need to prove that somebody is ‘ill’ in the same way that you need to prove that somebody is guilty of an offence. (Professor T Morris, JP, Longford Committee ³⁸⁰)

This reasoning of a member of the Longford Committee perhaps gives an explanation as to why even before the 1969 Act was partially implemented, there were radical groups claiming it was “retrograde, dysfunctional and an assault on the rights of the child” (NCCL 1971p.7).

The welfare approach to criminal behaviour was an attempt to relieve social injustice and deprivation, with treatment based on the pathology of the individual child (Longford 1964, Rutherford 1992; Hughes 2001). In practice this could lead to injustice, discrimination and lack of proportionality (Morris and McIsaac 1978; Morris et al 1980), because children, for minor offences, could be subject to compulsory measures for their care, often for very lengthy periods (Taylor et al.1980). Others argued that as juvenile delinquency was patently widespread, it should be seen as part of the development of adolescence and that treatment would make the behaviour abnormal (Morris and Hawkins 1970); and an appearance in court itself could be criminogenic (Bacon 1963; Wootton 1968; Kilbrandon 1965; Christie 1974; ACC 1984). Some felt it was wrong that children should have to go to court to get treatment (NCCL 1971), whilst others considered that only courts should

³⁸⁰ Interview Morris 2006

take decisions that impinged upon a child's freedom or time (Cavenagh 1959; NAPO 1965; MAC 1965; Morris and Giller 1987). The magistracy had found police cautioning suspect on this account.

Cohen (1985:98) has argued that "It is by making the system less harsh, that people are encouraged to use [it] more often...making each consecutive decision easier to take": if the juvenile did not respond to the supervision order, a more controlling one was necessary. Magistrates had constantly argued for sanctions for failure, more powers to control through the welfare measures. But, too often the juvenile received "an effectively more severe sentence than that warranted by the offence... what was properly criticised was the misapplication of welfare, not the concept" (Mag.1991:29³⁸¹). Indeed, it is thought that the movement to protect children's rights from the expanding social work departments, with their preventive work (Thorpe 1983; Morris and Giller 1987), enabled the proponents of punishment to advance their cause in the guise of the due process model (Hudson 1987:165), as happened until the restrictive custody criteria of the 1980s were enforced.

The principles behind the Act had been powerfully opposed before implementation in April 1971 by the Conservatives and the magistracy, both nationally and locally, and to some extent by lawyers and police. By then, the Conservatives had been returned to govern the country facing major social and financial disruption, a serious challenge for those responsible for law and order. Costly reforms of juvenile justice would not be the priority of any government, let alone one which had resisted those reforms. It did not implement the clauses that it had opposed, leaving the juvenile court with its traditional dual role of the separate care and criminal proceedings; its personnel, buildings and procedures all too essentially unchanged, apart from the new, welfare-based orders, which, once operational, were additional and not instead of attendance centres and punitive custody. Crucially, the age of criminal responsibility remained the same, as did the court's duty to consider the public interest.

The recruitment of magistrates remained secretive until the 1990s: no one without knowledge of the system would have known how to apply. The juvenile panel magistrates were still elected, on a three yearly cycle, from the adult criminal bench with which they did the majority of their sittings. The majority were middle

³⁸¹ Caroline Ball, JP, MA, Editor of the 'Magistrate' 1990-99

aged and most remained until they chose to leave the panel, and after the 1991 Act could stay until aged 70. Many magistrates were largely untrained and certainly not taught anything about child development. They often showed an inability to communicate in the courtroom with juveniles and their parents, nor provided an environment to foster their support, with proper timetabling, information and help with travelling expenses. There is little evidence to suggest that the rights of the parents or juveniles, all at different stages of development (Adler 1985; Rutherford 1992), were protected in the juvenile court. Juveniles and parents were minimally involved, they did not understand the procedures (Pitts 1988; Wootton 1978; Jones 1983), and were unaware of appeal procedures, or fearful of their financial implications. Far from seeking the co-operation of parents, courts were more ready to punish them by overt as well as covert means. But, the compulsory parenting orders of the 1998 Act did enable parents to access help rather than condemnation.

Magistrates, guided and controlled by their justices' clerk, were not shown research and did not know the results of their sentencing; some never visited the custodial institutions and most did not know the long-term effects of incarceration. There was no training on child development and adolescence at any time. There was no system of appraisal, much resisted, until the end of the century, and even then it was an internal matter, bench colleagues appraising each other. There was little accountability through the appeal system until the late 1980s, when lawyers became pro-active and clerks were alerted to binding Appeal Court judgments and advised their magistrates accordingly. A national syllabus with a structured training programme was introduced with monitoring in the late 1990s, although some magistrates still resisted new methods.

Many magistrates had resented changes within their own working domain, many small panels refusing to combine to provide greater experience. They made little concession to organisations struggling to provide and maintain the services expected of them, implementing the three new welfare measures of the 1969 Act, during major reorganisation of local government and their own multi-functioning social services departments. Many social workers and probation officers were new, young and inexperienced, but social workers were not accountable to the magistrates. Their professional viewpoint, concern with the child's welfare, was diametrically opposite to that of most magistrates, who were concerned with the offence committed and the protection of the public, albeit also with regard to the

welfare of the child. With notable exceptions, many areas made little attempt to discuss, let alone mitigate these differences, sometimes not the fault of magistrates.

By not being fully implemented, the 1969 Act failed in all its intentions. The broad range of sanctions enabled the magistrates to exercise extensive discretion. As the press increasingly reported crime, magistrates, using their valued commonsense, interpreted public opinion as demanding more protection, more children under severe control and needing custody as a deterrent, as plain punishment, or to change deep-rooted, criminal behaviour, perhaps unaware, unlike the government, of the 82% reconviction rate. Custody was virtually always available, unlike its 'alternatives' which required local authority expenditure: failing to find a placement, magistrates looked to custody. The MA, from before the 1969 Bill was passed, had fought a highly organised campaign against the measures it disliked, mobilising its membership at local level to lobby MPs, and at national level, bringing influence to bear on its many contacts in government and Parliament, regardless of party affiliation and of the financial and other restrictions that national and local politicians had to take into account.

At the end of the 1990s, almost all the differences between adult and juvenile courts had been removed. Diversion from the formal system was greatly restricted despite recognition of its efficacy in reducing re-offending. The Conservatives had accepted that juveniles diverted, not only from the formal system but from any institutions, were less likely to re-offend (Bowden and Stevens 1986:327). It was Labour who reduced diversion by restricting cautioning in the 1998 Act and blurred the boundaries again with the ASBO, with criminal sanctions, including custody, for breaching the order. The new tier for referral orders, created for dealing with first offenders with restorative rather than punitive measures, left the more serious and persistent offenders with the magistrates. As yet, there is little evidence to suggest that the new training initiatives or the sanctions available are reducing penal custody or that welfare measures are being more readily used to rehabilitate juvenile offenders within their own communities, the ambition of the ill-fated Children and Young Persons Act 1969. As with offending juveniles in Scotland, research indicated that the less formal intervention, the less likely re-offending, and for the persistent or serious offender, punishment was an expensive and spectacular failure as a means to reform.

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CHAPTER 8

CONCLUSIONS: KEY FINDINGS AND REFLECTIONS ON THEORY AND POLICY

Neither the police nor the courts, nor prisons, can solve the problem of rising crime rate. By the time the criminal falls into the hands of the police, and more particularly, by the time he reaches court, it is too late. (Lane, LCJ 1982)

The rights of children and parents to be heard, to participate fully in decisions affecting the child's future and to do so in an atmosphere which does not intimidate them through its excessive formality, are in practice much better protected in the children's hearings system than in our juvenile courts. (Baroness Faithfull³⁸² 1984)

There really were cultural differences between England and Scotland, not least the long history of the independent prosecution service, such that diversion from courts has been an accepted part of the criminal justice system. (Lord Advocate Elish Angiolini, QC³⁸³)

This thesis is a comparative, criminal justice narrative of two jurisdictions, England/Wales and Scotland, concerned with the application of the welfare principle in juvenile justice, specifically from the judicial perspective. It is based on a review of the literature and enhanced, when possible, by interviews. It aimed to discover why three countries under the same national government, Scotland and the single jurisdiction of England and Wales moved to a welfare-based system of juvenile justice in the late 1960s, and thereafter, the paths appeared to take radically different routes. More generally, it tried to discover the influences and circumstances that lead to a welfare-based system of juvenile justice, where the needs rather than the deeds of the juvenile offender are the paramount consideration, although the response may neither have been seen, nor at times, been proportionate and indeed could have been a great restriction on the liberty of the individual. It could also bring juveniles into the criminal justice system because they were at risk of becoming, rather than being already delinquent, or because of the inadequacy of their parents.

³⁸² Baroness Lucy Faithfull, Conservative Life Peer, former Director Oxford City Social Services

³⁸³ Rt.Hon. Elish Angiolini, QC, Lord Advocate, ad hoc interview with Ravenscroft, Peebles, Scotland, 14.xi.2009

This is in contrast to the justice, due process model, where the punishment or sanction was proportionate to the seriousness of the offence and of a determinate nature, although ignoring the social and economic disadvantage of some juveniles challenged that sense of fairness. Additionally, following strict procedural rules could be confusing if not incomprehensible to the juveniles, their families and even social workers. It could also be an extremely punitive system when the rights of the public took precedence over those of the juvenile and the sanction was harmful to the long term interests of the juvenile.

Much has been written on the theory of the welfare versus due process, just deserts debate, and of the role of the various criminal justice agencies in these reforms. Bottoms (in 1974) and with Dignan (in 2004) made a lengthy comparison of the different systems and organizations in the two jurisdictions, covering the theoretical, administrative and legal aspects in great detail. They found, despite the overtly welfare system in Scotland, based on prevention of harm to the child, and the 'correctionalist' system in England/Wales, based on prevention of crime, there was a convergence post-devolution, with Scots MSPs answerable to their local electorate, concerned about crime, the English/Welsh expanding diversion from court with reparation and restorative justice.

This research has drawn heavily on their work but quite differently, has concentrated on the effects of the culture and role of the lay judiciary and panel members in the two jurisdictions; and the constraints upon them of the particular system under which they operated, all in their application of the welfare principle, both before and after the 1960s reforms. This final chapter seeks to relate the critical findings to the broader literature, the limitations of the methodology; and to suggest some implications for future policy, both in the substantive issues and the constraints arising from the theory of public policy formulation and implementation.

8.1 Key Findings

This section examines the research findings and explains their significance in the punishment and welfare dichotomy of juvenile justice.

Chapter Two described the socio-political and legal differences in the two jurisdictions which, this thesis argues, had a profound bearing on the later course of events. Cowperthwaite (1988), aware of the Scots need for their separate identity, and Bottoms (1974) have both compared the different political /administrative situation in the two jurisdictions; the different structure of juvenile justice at the beginning of the 1960s; and the role but not the culture of the procurator fiscals or, indeed, the legal profession. Social historians, Devine (2000), Marwick (1990) and Murphy (1992) have described the culture of Scotland but not necessarily linked that to juvenile justice, while Skyrme (1991) and Findlay (2000) covered both legal systems, but not linked them to the culture.

A history of Scotland reveals that it was a poor country compared to its immediate neighbour and financial efficiency in all matters was considered essential. Consequently, money should not be spent on expensive punishments when cheaper, more humane methods would suffice and, coupled with pragmatism, there was a readiness to consider diversion from formal responses. The early belief in universal education, reinforced by state provision, was such that 98% of Scots children attended state schools in 1964 leading to a more egalitarian society than in England/Wales, where 9% were educated privately. This division of children was exacerbated by the development of comprehensive schools in the late 1960s and 1970s, when Scotland had completed the conversion, only half had done so in England/Wales and several counties permanently retained the selective grammar schools. Generally, those who had the time and financial security to give to voluntary work, in this instance passing judgment in juvenile courts, were almost by definition drawn from a narrow sector of society. A disproportionate number was from private schools, or of retirement age, compounding the distance between the judges and the judged. This was certainly true when there were no obvious means of knowing how to become a magistrate, save by knowing existing members, as largely remained the case in England/Wales until the 1990s.

In England/Wales, the legal system was based on common law and an adversarial system, its jurisprudence practised in the countries of its old Empire and not in most of Europe. With thousands of lawyers and a legal history of its own, the profession had no need to look abroad for its training or ideas; and had shown great reluctance to embrace any changes to its structure, as the Streatfield Committee had found in 1961, or to suggestions for specialist training for the judiciary, as the Bridge Committee had found in the 1970s.

Scots law whilst essentially Roman was seen as different by English politicians and by lawyers, the former taking little interest in Scots legislation as a result, although the relevant 1960s legislation was mostly about systems to enable the reform of juvenile delinquents. However, more significantly Scots law was much more inquisitorial. Historically, Scots lawyers were trained on the Continent, especially in Holland, which had a history of more humane treatment towards prisoners, and where the fiscals learnt the rules of the inquisitorial approach, the duty to protect the rights of the accused, act in a non-partisan manner, and have knowledge of sentencing options. It is this historical, cultural difference of attitude that is likely to have influenced the approach to juvenile offenders, where there was a legal duty 'to have regard to the welfare of the child'. This wider legal training enabled a greater insight into offending behaviour and its causes, and the possibilities for reform through co-operation with the parents by help and treatment rather than punishment. Fiscals also had the power, guided by that same culture, to choose the venue for trial; while in England/Wales that right rested with the magistrates, usually guided by their clerks, and could and did escalate the juvenile into the higher penalty range.

The description of childhood explained the long-term dangers to a significant number of children from their own families, often leading to delinquency as a symptom of their malaise. Such histories were often not appreciated in the courtroom when the seriousness of the offence became the dominating factor, reflecting the theories around the welfare and punishment dichotomy, as seen in the other models within the UK, and the USA and other western democracies at the time of the 1960s reforms. Additionally, this exercise of judicial discretion was made more complex by the diverse, autonomous and dispersed nature of some 800 juvenile courts with 10,000 JPs, and their lack of training and accountability.

Kingdon's (1995) theory of political processes in creating new legislation illuminated how the progress of the Kilbrandon reforms fitted exactly that optimum model; and explained the methods of pressure groups, particularly in relation to the role of the MA, with its remarkable access to the government, as Wilkinson (1992) and the MA minutes and the 'Magistrate' had revealed.

Many observers have described the covert, self-appointing, class-biased system of the judicial decision makers in England/Wales, and in Scotland the mixture of JPs and bailies, local authority councillors, and all lacking training; and the inappropriate nature of the juvenile courts until the early 1960s. However, the minutes of the MA revealed how the attitudes of the ruling body, the Council, had changed radically following the debacle of its internal and rather secretive 'corporal punishment' debate. From its well-informed, largely positive, progressive attitude to juvenile offenders it became much more concerned with control, punishment and deterrence by its newly-elected membership. It would seem that the Labour opposition was unaware of this crucial change and had no reason to think the MA as a body would or was capable of mounting a nationwide, highly public, politicised campaign.

The main research was divided into three chronological parts. Chapter Three followed the development of juvenile justice in both Scotland and England/Wales from its tentative beginnings in the 19th century to those parts of the 1961 and 1963 Acts arising from Ingleby (1960). Chapters Four and Five examined the proposals of the Kilbrandon and Longford inquiries and their subsequent passage or translation into legislation. The final part, Chapters Six and Seven gave a detailed description of the implementation of the respective legislation in the two jurisdictions, until the end of the century.

The most obvious finding from the juvenile justice reforms of the first half of the 20th century was that even the Acts of Parliament appeared virtually irrelevant to the juvenile courts: in both jurisdictions there was chronic institutional failure to implement virtually all aspects of them. Wherever discretion allowed no change to take place, nothing did change. There was, at best, complete system inertia, probably resulting from financial constraints by local authorities responsible for the administration. This research has revealed an added impetus for the English/Welsh magistrates: from 1949, it had been the responsibility of their local leaders to provide their training and special juvenile court buildings. Most had not chosen to provide

either, nor change the ethos and environment to reflect the different requirements for juveniles. It could be reasonably construed from official inquiries (Morton, Molony, Ingleby) Parliamentary debates, the 'Magistrate' and the literature (Cowperthwaite, Elkin, McCabe & Treitel, Parker et al., Skyrme) that the juvenile justices saw no need to improve their courts and provide a less confusing, less hostile environment: for many it was seen as part of the punishment. Yet, these courts were the same ones for children appearing as victims in need of care and protection, some as young as five, their cases often interspersed with those for criminal matters. Additionally, the magistrates also controlled the probation service, historically choosing not to appoint such officers in some places, or leaving them ill-equipped or under-staffed. Under the 1960s reforms, they were to see their 'officers of the court' replaced by social workers, who were not within their control.

The historical research revealed marked cultural differences between the two jurisdictions: Scotland had demonstrated an early dislike of purely negative punishment and abandoned cruel punishments long before England/Wales. Scotland had not allocated money to provide the expensive and punitive detention centres. Its residential options had been two months in a remand centre, and approved schools, with only fines as pure punishment, which by early statute were related to income. The Scots had shown a greater concern to work with rather than castigate the parents of erring children. Familiar with the discretion exercised by the fiscals, they were equally ready to accept the discretion and diversionary practices of the police, which were resisted, even resented by English/Welsh magistrates.

The diverse system of juvenile courts operating by the early 1960s in Scotland meant there was no single body to formulate a response or campaign to defend its status, JPs rarely sat in court and the bailies were foremost local councillors. England/Wales basically had one system, excluding Inner London, although spread through some 800 Petty Sessional Areas, with little knowledge or contact between areas. However, by the early 1960s, the majority of magistrates, about 12,000, belonged to the MA, a highly influential and politicised national body able to campaign on behalf of its countrywide membership.

Chapters Four and Five chronicled the deliberations of the Kilbrandon and Longford committees and their eventual passage through Parliament. Many researchers have commented on the suitability of Kilbrandon, his intellect, respected legal authority, his campaigning zeal, including proselytizing, and the outstanding

quality of his report. This research has revealed the influence of other key individuals, especially the role of Professor Stone, the psychiatrist with an expertise in children and adolescents, able to advise the receptive Kilbrandon and his committee on what caused delinquent children and how best to deal with them.

Additionally, a fortuitous confluence of agency and events enabled the remarkably smooth passage of the Scots juvenile justice reforms, aided by the press. The trio of senior Scots Conservative politicians, Elliot, Maclay and Noble, were all progressive Conservatives, and Elliot was key in having the knowledge of child development, criminal justice, a strong, independent character and the political influence to see the reforms through had it been necessary. While Maclay and Noble were ready for a uniquely Scots solution, even more pressing when the report was published, with the Scots Conservative party in disarray and the fortunes of the SNP and the Liberals rising. The 'Scotsman' welcomed this penal reform, and 'The Times' passed no opinion, other than that Kilbrandon presented a 'new vein of argument'. Having accepted the main proposals of the report when in office, the Conservatives were happy to support the Bill, largely untouched by Labour, when it came before Parliament. The contentious matters did not affect the original Kilbrandon proposals, save the administrative unit was to be based in the social work departments and not education. The very few MPs critical of the proposals were politically divided.

It was the Labour Opposition in England/Wales which wanted to overhaul the criminal justice system and appointed Longford, a penal reformer and career politician. This alone would have raised alarms amongst some of the magistracy, aided by a biased, pre-election article in the 'Magistrate', let alone a proposal to abolish the juvenile courts in favour of a new family service and family courts. Longford's conclusions for juvenile justice were broadly similar to Kilbrandon, although there had been an astonishing lack of communication between the two jurisdictions, but, as juvenile justice was a minor part of the main report, the proposals in Longford were far less detailed and lacked a protagonist.

Longford referred to a class bias in the system, which, perhaps unwittingly by the authors, challenged the fundamental tenet of the magistrates' court, to act "without fear or favour, prejudice or ill will." This assault to the very core of the magistracy, perhaps especially vulnerable given its own narrowly class-based membership, was misappropriated by them when the second White Paper was

published in 1968. As in Scotland, juveniles before the court had to be in need of compulsory measures of care in addition to their offending behaviour: this was seen as discriminatory and class-based, defining children by their 'good' or 'bad' homes. The MA, with the nationwide backing of its membership, mounted a ceaseless campaign, in league with the Conservatives in Opposition until the very end of the Parliamentary process.

This all took place during a period of great social change, particular towards the end of the decade when the English White Papers were published. The institution of the magistracy itself was being reformed and its powers curtailed in other legislation, while the liberalising social reforms on divorce and homosexuality could not apply to it, and therefore its membership was even more narrowly selected, unaware of the difficulties others may face. For many magistrates the abolition of the death penalty was yet another example of too liberal a society, and their professional equilibrium was rocked by revelations of police corruption at the highest levels. As Bottoms and Stevenson (1992) commented, traditionalists would not wish to try untested new methods at this time.

Through Parliament, with a large government majority, the Bill's basic premise remained the same, despite the bitter debates, and the persistent lobbying by the MA, benches and individual magistrates. Many MPs made reference to their local benches or their own experience as magistrates or lawyers. Labour members, with a few exceptions, were very critical of existing juvenile courts, the Conservatives content, expecting prosecution and punishment for all ages. Hogg, QC echoed the letter of the MA in 'The Times' and raised the emotive threat of the injustice the Bill created. The Lords, with its inbuilt Conservative majority, defeated the government on the crucial clause but despite rigorous further lobbying by the MA, the Commons restored it. Surprisingly, the government conceded to the Opposition allowing benches to select their own juvenile panel as before, with the proviso that where there were difficulties the Lord Chancellor would intervene. Given the system inertia or deliberate magisterial resistance for decades, this seemingly minor concession was to ensure the status quo and the culture that went with it.

Despite both Acts sharing the same philosophy, that the needs rather than the deeds of juveniles were the problem to be solved, there were notable differences. Scotland had a completely new system: any disputed matters were dealt with by

professional judges in a different forum, as were very serious crimes. New decision-makers were recruited specifically to a welfare-oriented tribunal, the 'hearing', with a responsibility to seek co-operation with parents, and notify them at the end of their rights to appeal; and to review the effectiveness of their decisions on at least an annual basis. The maximum age range was 16, but could be extended to 18 if the child was still under their supervision at a later referral.

In England/Wales, the same magistrates and same courts would be used, with the same traditions and culture and other court personnel. However, their powers were altered to those of care proceedings for all under 14, and only fines as a punitive measure once IT schemes were in place and borstals, DC and attendance centres removed as a power. The age range for offenders was 10-17 and in 1991 raised to 18. Given the determined campaign by the MA and, it would seem the magistracy's general resistance to the reforms and history of non-compliance with legislation, any discretion would be manipulated to its fullest. The change of government was fortuitous for them, along with the death of the civil servant who was expected to galvanise the local authorities into developing the important IT schemes.

Chapters Six and Seven followed the implementation of the two Acts from their beginning in 1971 until around 2000, after further major Acts on juvenile justice in the mid 1990s. In both jurisdictions the early reforms took place parallel to major changes to local government, and social services reorganised as generic services, with their new legal requirements for juvenile offenders an additional strain. These potential problems had featured in the Parliamentary debates. This led to lengthy preparatory work before the Acts were implemented and against a background of severe financial constraint. Most of the financial burden of the 1960s reforms fell on the local authorities.

There is a wealth of literature on the implementation of the Acts, some comparing one aspect in each, others concentrating on the results or actions in one jurisdiction. This thesis has sought throughout, by a comparative narrative, using that literature and aided by the 'Magistrate', the archives of the MA and interviews of some key players, to highlight the different approaches, powers, expectations and behaviour of the decision-makers in the two systems, the new children's panel in Scotland and the juvenile justices in England/Wales.

The Scots reforms started with a clean slate, new local authority organisations, quite separate from any courts or police services, new professionals, new premises, new decision-makers and new approaches. Openness and accountability were foregone prerequisites, and once the basic structures were in place, recruitment began for the new 'panel' members of the 'children's hearings' through wide advertising campaigns. Once appointed, and after initial training, members were obliged to undergo monthly training programmes and continuous appraisal. Whilst turn-over of membership was higher than might have been desired, some through frustration at the lack of resources for children, it meant that many more citizens were made aware of the difficulties faced by juvenile offenders. The hearings were held in buildings quite separate from any courts; cases were properly time-tabled at times more convenient to working parents, some in the evenings. All discussions and decisions were taken in front of the parents and all decisions could be appealed, the parties being clearly informed of that right on each occasion. The only power of the hearing was to decide whether compulsory measures of care were necessary and whether that supervision should be residential or not. Unlike any previous judicial system, where an order had been made, the hearing had continual oversight with a duty to review the case within 12 months.

The hearings system was not hide-bound by tradition, history, or convention. It was specifically set up to promote the welfare of juveniles before it. Enormous discretion was vested in the role of reporter, regularly diverting 50% of referrals from formal action, with no objection sufficient to lead to any calls for change. Some academics were critical of lapses of procedural correctness by hearings, but families were largely satisfied by their experience. Some observers felt parents were not held to account for their unacceptable parenting skills.

Such was the lack of serious opposition to the hearings, the Scots Conservative administration in 1981 resisted moves to include punitive or any other powers. There was much frustration, as in England/Wales, at the lack of community resources and some panel members, despite their rationale and training, certainly would have ordered punitive powers had they the opportunity, which their English/Welsh counterparts had, and exercised.

However, not all juvenile offenders were dealt with by the hearings. 10% went to the sheriff or High Court, about 25% being fined, the only punitive order bar motoring disqualification. Those who were sent by the hearings or the courts to List

D schools were likely to see it as punishment, but this was done on the basis of the needs of the child. The new system dealt with juveniles mostly under the age of 16. Some, already subject to hearings' orders aged under 18 could still be dealt with by the hearing, but most were sent to the sheriff court. There, with less knowledge of the effects of child abuse and neglect which the hearings dealt with increasingly, adult punishment was meted out with no regard to the welfare of the juvenile. The culture, the emphasis and the training were geared to adult court reasoning and law, so much so that as a percentage of the total numbers under 18, those receiving punitive custody were nearly as great as those in England/Wales. Where the power to punish was available, the sheriffs exercised it in the hope, largely illusory, of either protecting the public or as a deterrent to that young offender or others.

Quite against the trend in England/Wales for more punitive action, the Conservative's Children (Scotland) Act in 1995 enabled more 'jointly-referred' cases to be referred back to the hearings; and the new clause allowing 'public interest' to be considered was sparsely invoked. Scotland had kept its separate identity, resisting the political and media-led moral panic around juvenile justice. With its very high diversionary rates, 60% by the end of the century, and no public outcry demanding more punishment, the hearings dealt with 90% of those referred on the basis of their needs. That those same juveniles, on reaching 16, became subject to punitive disposals, particularly penal custody, reflected the different perspective and knowledge of the sheriffs, rather than a failure of the hearings. These more damaged juveniles required specialist and often expensive treatment, hard to provide when penal custody was available.

The situation in England/Wales was complicated by the change of government from Labour to Conservative only six months after the 1969 Act was passed. It brought MPs to power who had been lobbied by the MA and had fought on its behalf to resist the legislation. In any event, key parts of the Act were expected to be introduced on a sequential basis as provision in the community became available. Now, there was no political will to see that happen. Magistrates had demanded more DC places after publication of the Bill to abolish them, ignored the rules to check availability of places, and continued to use DCs at a much greater rate until they were absorbed into 'youth custody' in the 1980s, when the regime had become progressively more punitive. They also used orders when the offence was not serious enough to warrant them. The magistrates had ignored the spirit of the law, the

Conservatives allowed them to ignore its letter by not putting sufficient resources into alternative welfare measures.

The magistracy in the courts had not changed: their selection procedures remained the same, as did their culture, their courts and their attitudes. Two thirds were aged over 50, double that of Scots panel members of whom 50% were under 40, only 6.5% in England/Wales. The magistrates' training was still based on the law and procedures. Despite hearing 'care' cases in the juvenile courts, there was no training on child development, and schooled in the mantra that they were appointed as lay people for their 'commonsense' relied upon their personal experiences of childhood. Most magistrates would expect these children, most suffering at best unsatisfactory childhoods, to respond positively to a punitive sentence, as they would expect their own children being deprived of their pocket money or forbidden a long-awaited treat. Even the more enlightened magistrates, who really believed in the possibility of rehabilitation, would balk at failure: "We give them every opportunity and it must be for real. I was really strict on that. We have given them a chance."³⁸⁴

Kilbrandon had refused to consider fining parents as counterproductive to their co-operation, and gave them their travelling costs. The Longford reforms relied on parental support and help, but senior magistrates on the MA Council, with few exceptions, displayed patronising and even hostile attitudes to parents. It was practitioners themselves, mostly social workers and in notable cases, magistrates, who initiated IT schemes, and were then aided by the boost of funding in 1983 by the Conservatives desperate to reduce the use of expensive custody. As ever, even neighbouring courts varied for "... they were so deeply schooled in the existing dogma about sending to custody."³⁸⁵ However, lawyers and social workers appealed the failure of courts to observe the custody criteria, providing the first real measure of accountability of the magistrates, and led to the drop in custodial sentences in the 1980s.

Some notorious and extensive child abuse cases occurring in state institutions led to legislation removing care cases from the juvenile court. The effect in many cases was to deprive that court of its most experienced and knowledgeable magistrates, and those who remained were joined by new magistrates with no

³⁸⁴ Interview Ralphs 2006

³⁸⁵ Interview Gibson 2009

experience of 'care' cases and still neither received training on child development (Mag. 1992:81), unlike those in the new Family Court. It is not coincidental that juvenile custody rose, along with a change in the political climate to a more punitive stance, motivated by a media-fuelled moral panic about juvenile justice. The magistrates resorted to their 'protection of the public' emphasis and throughout the 1990s custody rose again. Their wide discretion allowed such a reversal, even though they had been successfully using IT schemes to treat the majority of young persons. The Conservatives gave them new powers of custody for children, 12-14 year olds, and with a change of government back to Labour elected with a manifesto pledge to deal with youth crime, the scheme was extended and could even include 10 year olds.

Over the next few years Labour instigated a plethora of reports and statutes relating to juvenile justice, which it considered had been incompetent and inefficient, and a review of the magistracy generally. Acts removed virtually all differences between juvenile and adult offenders and ordered changes to the ethos of the youth courts, making specific demands on the inquisitorial skills of magistrates, an appeal after a 1998 directive appeared not to have been heeded, as history had showed throughout the 20th century. A further one in 2001 was accompanied by a compulsory training programme. Perhaps reflecting the magisterial inability to engage with juvenile offenders, another Act created a new forum for all first offenders, a 'referral panel', another lay body, quite separate from the court, chaired by a youth justice professional, with the aim of restorative justice.

The reforms to the administration and training of magistrates included inspections of courts and appraisal of magistrates, the success of such measures in changing the culture of youth courts is not yet known. What is clear is that over nearly a century of dealing with juvenile offenders, there is very little evidence that the juvenile/youth courts in England/Wales have had any significant effect on reforming the juveniles before them, nor in involving the parents in a constructive dialogue to further that aim. Some courts have no doubt achieved both, and some will have failed lamentably and exacerbated situations for both victims and families, and the vast majority have made very little positive difference. Some of this will not have been the fault of the magistrates but rather that of a system that allowed inertia, indifference or incompetence to prevail.

No government in England/Wales succeeded in implementing a welfare-based system of juvenile justice: when Labour was returned to office four years after the initial implementation of the 1969 Act, it did not abolish punitive measures or provide training and appraisal to encourage greater use of welfare disposals. Furthermore, the evidence would suggest that the rights of children and parents were as well protected, if not more so, by the legal procedures of the hearings in Scotland and the accountability through regular training and appraisal of its panel members. There was a significant percentage of juveniles in both jurisdictions who were subject to penal custody, where there was evidence of greater harm rather than reform. This would suggest that if the welfare principle, the belief in the reform of the individual, is to have any relevance, the professional judiciary in both jurisdictions and the magistracy in England/Wales need specific and regular training and appraisal on the complexities of child development leading to serious delinquency. A humane criminal justice system must involve the exercise of judicial discretion but experience would indicate that to achieve the intended result, as Thomas D. (1974:147) has argued, the “most effective device is that of the required disposition subject to excepting circumstances”, defined precisely and reinforced by appellate review and accountability.

8.2 Limits of Methodology

This study has been based on the extensive existing literature enriched by a detailed examination of the extremely lengthy archives of the MA, in particular the minutes and the magazine, the 'Magistrate', both from 1921 to 2000. It has also drawn on political memoirs, diaries and biographies, and some 25 interviews, mostly with the few remaining players of the time of the 1960s reforms, in order to throw further light on the situation. These usually lasted at least two hours and were transcribed by the researcher. The original plan of research had started with the appointment of the Kilbrandon and Longford inquiries, but it soon became clear that the two jurisdictions even at that stage were not similar, so the research was extended right back into the 19th century and earlier to establish what could have created the difference and would that explain later variations. Such research could only be based on documentary evidence.

The events around the Kilbrandon and Longford reforms were in the living memory of a few people, and the researcher has endeavoured to interview most of the key players still available, although many were elderly and their original reactions may have been coloured by the passage of time. Several politicians refused on the basis that they had absolutely no memory of the events whatsoever, not unnaturally given their careers as politicians which required them to sit through months of debates. No Labour politician of the time has been located to ask why no one sought advice from the Scots, nor a Conservative to explain why they supported the Scots reforms and not the English and did not propose amendments to remedy the perceived fault. Parliamentary voting indicates that tribal loyalties to political party needs at a given time over-ride any other considerations, although neither of the two main political parties over the entire 20th century maintained a consistent welfare or punitive approach to juvenile justice.

The most important sources for the England/Wales jurisdiction have been the minutes of the MA and the 'Magistrate' magazine. The minutes are the official records and as such do not record the discussion, often not the opposing views, very rarely the voting figures, and sometimes not even the argument for the decision. It is therefore very difficult to know the level of dissent on any specific issues by Council members. Letters and articles in the 'Magistrate' may indicate areas of concern and interest but not the level of support or otherwise. Occasionally, by articles or

statements, a chairman might express views not supported by the Committee, but would have been obliged to accept the majority decision. The AGM of the MA was most likely to reveal different viewpoints, but with meetings held only in London until the late 1990s, may not have been an adequate reflection of the magistracy as a whole. Given that this thesis is concerned with the responses of 10-15,000 decision-makers in the courts and hearings only very broad conclusions can be claimed. Overall, this specific comparative research would indicate a far greater acceptance by the Scots hearings, the politicians and the public to treat the needs of the juvenile offenders rather than respond to their deeds, than their English/Welsh counterparts.

8.3 Challenges and Implications for Policy

Policy is implemented via individuals. The less clearly defined the policy objectives the greater is the scope for individual discretion in the interpretation of what the policy is all about. Within organizations scope exists for communication failures and the distortion of information. (Jackson 1985:15)

This narrative of juvenile justice in England/Wales and Scotland throughout the 20th century has demonstrated the severe difficulties governments face in producing policies that are translated into actions commensurate with the intentions of the legislation. In some circumstances the law may not be implemented at all, in others the exact opposite from that which was intended may occur, as it was claimed happened in the case of the 1969 Children and Young Persons Act in England/Wales.

Jackson (1985) considered that to minimise the risk of the intentions of a policy being distorted, the policy must not only be financially, technically and legally feasible, its objectives must also be unambiguous and clearly defined. Without such safeguards, there will be greater scope for misinterpretation or re-interpretation to suit local interests.

In 1908 the different treatment of juvenile from adult offenders in and by the courts was deemed sufficiently important that legislation was passed to require it, reinforced by further substantive legislation in the 1930s. By 1960, however, little had changed. The lack of clarity in the legislation regarding “special juvenile courts” and the lack of any provision for inspection or accountability enabled the judiciary, both lay and professional, and the various tiers of local authorities to resist any major structural changes. Whether this was due to bureaucratic inertia, changed priorities, or “organizational sclerosis...organized interests which act collectively to undermine the implementation of new arrangements or new policies” (Jackson 1985:17), it would have been more efficacious for Parliament to circumscribe the discretion allowing such inaction in the first place, and to provide some measure of control to ensure and monitor compliance.

Consistent with Kingdon’s theory (1995) of the three streams converging for political agenda setting, the identification of a problem, the workings of the ‘policy

primeval soup', and the change of political administration, radically reforming juvenile justice legislation was passed separately in the late 1960s for England/Wales, and Scotland. However, Kingdon also identified an optimum timescale of between two and six years, giving time for officials "to reason their way through problems" (1995:126-7) and for a policy entrepreneur to create the right climate for the civil servants and politicians to get behind the new policy and, when necessary, able to challenge any articulate opponents and powerful organisations with vested interests. Additionally, there would be the inevitable element of chance, "considerable doses of messiness, accident, fortuitous coupling, and dumb luck" (1995:206).

The successful 1960s Scots reforms closely fitted Kingdon's pattern. It was a little over six years from the deliberations of the Kilbrandon Committee to publication of the Parliamentary Bill, with the vital acceptance of the radical new principles after three years. This was after close co-operation between the policy-making body and Scottish officials, whose role was more pro-active in policy-making than their English counterparts. There was a policy entrepreneur, the energetic, highly motivated and respected Lord Kilbrandon, who was well able to confront any articulate opponent, in this particular case his own legal profession, and keep control of the policy. One fortuitous factor was the parlous state of the Scottish Conservative Party, which needed to be identified with a 'Scots solution' to counteract the rise of the SNP: the Kilbrandon Report readily supplied that. A second fortuitous factor was that at the appropriate time, the three leading Conservative politicians closely involved were all on the progressive wing.

After much consultation and Parliamentary discussion, the Scots legislation clearly defined the authorities responsible for the administration of the new system and the channels through which accountability could be ensured. The discretion of panel members was severely limited: they could only apply constructive measures aimed at the welfare and the rehabilitation of the juvenile, with no powers of punishment whatsoever. Their general accountability was defined through a transparent appellate system, and personal accountability through regular training and appraisal, with reappointment based on a review of their performance.

The failed English/Welsh reforms conformed to the reverse of Kingdon's theoretical model for success. The radical juvenile justice proposals were produced within just four months. They were one small part of a major review of criminal

justice and initially lacked a ‘policy entrepreneur’. They aroused strong reaction from several ‘articulate opponents’ within the criminal justice system, “devoted to negative, blocking activities” (Kingdon 1995:49). Most vociferous was the MA prepared to challenge the new proposals through the public arena of the press, and to lobby MPs throughout the country. The proposals in the second White Paper and the eventual Bill also met considerable resistance from the earlier antagonists, with whom the Conservatives in Opposition had allied themselves. Ill chance then played a significant role: the ‘policy entrepreneur’ appointed to drive through the revised proposals, particularly with the local authorities, died unexpectedly. The final, crucial factor was the change of government before the implementation date to the political party that had actively campaigned to resist the reforms.

In order to improve legislative compliance, governments need to examine with particular caution the responses to consultation papers from vested interests, whose recommendations are likely to be weighted in their own favour. They need to take account of any available academic research, especially given the high turnover of civil servants, for research may indicate why measures in the past were or were not implemented; and to tailor the policy and frame the Parliamentary Bills in the light of this knowledge. Once enacted, all measures require proper funding and resources, and an inspection programme within a given timeframe, with a hierarchy of accountability that is public knowledge, so that when officials change their role, the chain of responsibility does not break. It was not until the 1990s that an independent, national inspectorate of the magistrates’ courts in England/Wales was appointed to ensure compliance with administrative matters stemming from 1908.

(Residential staff) “often have their own deeply felt personal views on the discipline and control of children. To question these is to hit at a very fundamental aspect of the individual’s personality. This must be overcome, for a truly professional approach...It is extremely difficult to accept criticism...it attacks very basic personal attitudes.” (Tutt 1974:.212)

Magistrates were specifically recruited with no defined qualifications save for their ‘commonsense’ and a broad expectation that they would demonstrate or acquire a ‘judicial mind’. Without any knowledge or training on the particular difficulties facing children suffering at best deprived childhoods, magistrates naturally fell back on their own experiences of family life and the way they

disciplined their own children, as Tutt had found with residential social workers. Magistrates' training was not designed to change their attitudes but to inform them about legal issues. That should be changed to include training on child and adolescent development, so that magistrates and judges can choose the most promising sentencing/ treatment options to break the cycle of recidivism.

The findings of this thesis indicate that, where long-established, powerful and largely unaccountable institutions resist legislative change, the only way to overcome that resistance is by removing their discretion, in this case the discretion to use punishment in a welfare-based system. If the option to punish is removed, not only does it relieve the magistracy of the responsibility to punish and the dilemma to choose, it also puts a responsibility on the legislature to provide a wider range of treatment options. This has wide implications for policy throughout the field of penal reform since the closure of existing, expensive penal institutions would be a financial prerequisite for establishing more welfare options.

Equally important are the stability and continuity of innovative reform programmes, which should not be subject to short-term tests of 'success' for their survival. Otherwise, there is a strong risk that 'easier' clients will be selected to ensure the viability of a programme, rather than those with more demanding problems. This also increases the number on programmes who would not have been considered for such intensive treatment beforehand, as happened in England/Wales in the 1970s.

If the exercise of discretion by the magistracy is clearly circumscribed, and shown to be reasoned; if the necessary resources and programmes for treatment are provided; and if there is a clear system of accountability, through regular, independent appraisal, backed by appellate review, it is possible that the welfare principle might prevail. However, this research suggests that discretion exercised in favour of the welfare principle, when punitive responses are available, is extremely fragile, and highly susceptible to pressure from the public and the media. This happened after the statutory criteria were loosened in 1991, despite their demonstrable success in the later 1980s, and punishment for serious offences was propounded by politicians and vehemently supported by the media. Even Scotland with its distinct penal history and culture, with panel members recruited specifically to decide welfare measures, and with no powers of punishment, had members who favoured a punitive response.

Throughout the 20th century reports on juvenile delinquency indicate that matters largely external to the child are the key factors in later serious offending behaviour. Providing early, non-stigmatising, supportive intervention particularly in families with difficulties, and especially providing escape routes for those suffering domestic violence, is expensive but eventually cost effective. As Tuck suggests, “it could be the most important crime prevention that society could undertake” (Mag.1992:131). Continuing to punish juveniles who themselves have been punished by their personal circumstances is not only profoundly and unacceptably unfair, it is also counter-productive. Research throughout the 20th century supported this view yet a small but influential sector of society, the largely lay judiciary and politicians have continued to deny that evidence, to the long-term detriment of future victims and society as a whole.

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APPENDIX 1.1 INTERVIEWEES AND QUESTIONS

England and Wales

Interviews with members of the Magistrates' Association Council

Chairmen of the MA: Lady (Enid Ralphs) CBE, JP, DL; Mrs Joyce Rose, CBE, JP, DL

Deputy Chairman of the MA: Mrs Margaret Romanes OBE, JP, DL

Chairmen of the JCC: Brian Worster Davis, OBE, JP; Dr. Rachel Brooks JP

JCC and Council Members, Mrs PH, OBE, JP; Mrs Patience Marshall, OBE, JP

Two JPs, former chairmen of panels, Mrs FM and Mrs HG

Editor, the 'Magistrate' 1990-1995: Caroline Ball, JP, MA

Justices' Clerk – Bryan Gibson, Basingstoke PSD. Hampshire

Inner London Juvenile Panel Members in 1970s –

Mrs Annabella Scott, OBE, JP; Mrs Anne Weitzman OBE, JP

Interviews with key civil servants around the period of the 1969 Act:

David Faulkner, CB Home Office; Alec Gordon-Brown, Children's Dept. Home Office; Sir Geoffrey Otton, DHSS; John Stacpoole, DHSS

Longford Committee

Professor Terence Morris JP

Scotland:

Hearings:

Mrs Margaret Dobie, OBE, Children's Hearings and Chair Advisory Committee

Mrs Joanne Findlay, Panel Member, Justice of the Peace

Mrs Janet Parkes, Panel Member

Alan Finlayson – Reporter to Children's Hearings, Edinburgh

John McFadden – First Reporter to Dumfries and Galloway

Politicians:

Sir Tam Dalyell MP; Rt. Hon. Bruce Millan

Ad Hoc Interviews or Correspondence:

Niall Campbell, former Under-Secretary for Scotland

Professor Andrew Coyle, CMG, former Scots prison governor;

Lord Sanderson, former Scots Conservative Minister of State

William Stuart, prison officer and Hearing panel member late 1990s

Kilbrandon Committee

Professor Fred Stone, Adolescent and Child Psychiatrist

INTERVIEW QUESTIONS

This format was a general guide followed for most of the semi-structured interviews with English/Welsh magistrates.

ADMINISTRATION

1. When and how were you appointed to the Bench?
2. Was there any training? Reading?
3. How many magistrates were on your Bench?

JUVENILE PANEL

When did you go on the Juvenile Panel?

What were your 'special' qualifications for doing so? Were you asked them?

Do you remember when women stopped wearing hats in the juvenile court?

How big was the Juvenile panel?

How often did you sit in the Juvenile Court?

What criteria do you think the police used in deciding which juveniles should be prosecuted, formally cautioned or just 'told off' ?

Did the press ever attend the court? Were cases reported in your local papers?

Where was the juvenile court? What was it like?

Were social inquiry reports read out in court, read before court, or shown to parents?

MAGISTRATES' ASSOCIATION

When and how did you get on the Magistrates' Association Council?

Can you remember the burning issues at the time?

Who were the movers and shakers?

1969 CHILDREN AND YOUNG PERSONS ACT

The first White Paper, "The Child, the Family and the Young Offender" proposed to abolish the juvenile court. Do you remember that?

Were you on the Bench when the 1969 Act and the reforms were going through Parliament. Were you aware of all that? Were you aware of the Longford Report?

Discussions on your Bench as the Bill was going through Parliament?

Letter from Sec. of MA in the Times, on the day of the debate in Parliament on the 2nd Reading of the 1969 Act, saying that anybody who valued the principle of equality before the law, this was at risk if the Bill were passed. Would you have supported that view?

Were you aware of the Scottish reforms in juvenile justice happening at the same time? Were you aware of the Kilbrandon report?

The philosophy of the Children and Young Persons Act 1969 was that children who were committing offences were in need of treatment rather than punishment. Did you and your Bench accept that philosophy?

It was going, effectively, to raise the age of criminal responsibility to 14, = care and protection issues?

Intermediate Treatment to replace borstals and detention centres.

CUSTODY

Abolition of punitive custody was never introduced because of the change of Government, and when Labour returned in 1974, never enacted that power

What did you think of borstals? Which did you visit? Was it like a boys' boarding school?

Did you want more Detention Centre places?

Home Office said should not make a Detention Centre Order without consulting whether or not there was a place. Did you?

What Detention Centre did you visit? Was it like a boys' boarding school?

Did you agree with the idea of a 'short, sharp shock'?

Did you know that the % of sentences of borstal or detention centre more than doubled?

The 1982 Criminal Justice Act abandoned most of the 1969 Act and introduced 'custody criteria'.

The custody criteria had to be recorded in the court register, the reasons why you had chosen a custodial sentence.

Appealing the decisions - reversal of the custody numbers.

Do you think you were influenced by the newspapers, the media, the television?

CARE ORDERS – SUPERVISION – INTERMEDIATE TREATMENT

Approved Schools – did you visit one? What did you think of them?

Did You know about IT schemes going on in your area, visit them?

Did you feel Care Orders should mean the child was removed from home?

What were your relationships with probation officers?

What were your relationships with social workers?

There could have been a possibility that Prince Charles could have backed I.T. Do you think that would have made any difference?

What did you think of Attendance Centres, which were also going to be abolished?

PARENTS

Did parents need help or punishment?

What powers would you have liked? Either for parents or their children?

Compensation? Restitution?

Corporal punishment – NB - still available in schools.

Did you ever know how effective your sentences were?

APPENDIX 2.1 - AGE OF CRIMINAL RESPONSIBILITY

EUROPE - c1995

Country	Age
Ireland, Liechtenstein, Switzerland	7
Scotland	8
England & Wales	10
France	13
Austria, Bulgaria, Croatia, Germany, Hungary, Slovenia	14
Estonia	15 may be lowered to 13
Czech Republic Scandinavian countries Slovak Republic	15
Latvia, Macedonia Moldova, Russia Ukraine	16 may be lowered to 14
Portugal, Spain	16
Poland	17 may be lowered to 16
Belgium	18

(Lockyer & Stone 1998:245)

Great variety but further East, higher the age

In Japan, no one prosecuted under 14, even for murder

APPENDIX 2.2 – INNER LONDON AND OTHER CITY

JUVENILE/YOUTH COURTS

The following six tables provide a comparison between the juvenile court disposals of the major urban conurbations of England. If the Metropolitan Police District includes more than the Inner London Juvenile Court area, the percentage figures will be distorted to some degree by the sentencing practices of those other juvenile courts. The Tables for 1980 and 1985 are by Police Force areas, the table for 1988 by 'Commission of the Peace' area, and the tables for 1989, 1999 and 2000 are by Juvenile Courts.

It is not surprising that three of the four areas show above the national rate for custodial disposals, (this includes committal to a higher court for sentence) given their urban nature. For 1980 and 1985, statistics based on Police areas, London did not differ for custodial disposals to a significant degree from other areas, though Nottinghamshire is consistently lower than the other urban conurbations, over the five tables. London was consistently higher than all the areas for ordering fines, a purely punitive measure, and ordered marginally more care and supervision orders, welfare oriented disposals. From these statistics, it cannot be concluded that the London Metropolitan Area passed significantly more welfare than punitive disposals from other urban areas.

TABLE 2.1**1980 - Disposals by Police Force Areas****Aged 10 - 17 years for Indictable Offences**

DISPOSAL	London Met. Police Dist.	Greater Manchester	Notts.	Merseyside	National
Committed for Borstal s.28 MCA 1952	401 3.3%	275 3.3%	73 3.3%	156 4%	2,358 2.6%
Total Guilty	12,026	8,137	2,161	3,896	89,192
Detention Centre Order	725 6%	555 6.8%	118 5.5%	319 8.2%	5,823 6.5%
Care Order	700 5.8%	332 3.9%	112 5.2%	159 4.1%	4,291 4.8%
Supervision	1,769 14.7%	1,239 15.2%	310 14.3%	597 15.3%	16,163 18.1%
Attendance Centre Order	1,126 9.4%	1,486 18.2%	534 24.7%	699 17.9%	12,300 13.8%
Fines	4,169 34.6%	1,993 24.5%	617 28.5%	1,024 26.3%	29,187 32.7%
Abs./ Cond. Discharge	3,043 25.3%	2,237 27.5%	386 17.8%	903 23.2%	19,274 21.6%
Other	83 0.7%	20 0.2%	11 0.5%	41 1.1%	336 0.4%

Data taken from Tables S3. 3 (B) & (C) 'Criminal Statistics England and Wales 1980', Home Office: London (1981)

% calculated on total guilty = includes those committed for borstal training

TABLE 2.2 - 1985 - Disposals by Police Force Areas**Aged 10-17 years for Indictable Offences**

DISPOSAL	London Met. Police Dist.	Greater Manchester	Notts	Merseyside	National
Total Guilty	6,673	5,619	1,571	2,007	61,507
Ctted. for Sentence	10 0.15%	18 0.32%	9 0.57%	22 1.09%	172 0.28%
Youth Custody	227 3.4%	159 2.83%	24 1.53%	88 4.38%	1,481 2.41%
Detention Centre	537 8.05%	388 6.9%	78 4.96%	158 7.87%	3,745 6.09%
Care Order	177 2.65%	116 2.06%	14 0.89%	47 2.34%	1,334 2.17%
Supervision	1,270 19%	682 12.1%	197 12.5%	330 16.4%	11,146 18.1%
CSO	203 3.04%	114 2.03%	8 0.51%	63 3.13%	1,830 2.97%
Attendance Centre O.	752 11.3%	1,235 21.9%	451 28.7%	391 19.5%	10,068 16.4%
Fines	3,038 45.5%	1,065 18.9%	327 20.8%	379 18.8%	14,968 24.3%
Abs./ Cond. Disc.	1,656 24.8%	1,819 32.4%	452 28.7%	534 26.6%	16,559 26.9%
Other	103 1.54%	25 0.44%	11 0.7%	3 0.15%	394 0.64%

Data taken from Vol.3 Tables S3. 2 (B) & (C) 'Criminal Statistics England and Wales 1985', Home Office: London (1986)

% calculated on total guilty = includes those committed for borstal training

TABLE 2.3 - 1988 - Disposals by 'Commission of the Peace' Areas**Aged 10-17 years for Indictable Offences**

DISPOSAL	Inner London & City	Greater Manchester	Notts	Merseyside	National
Total Guilty	2,097	3,459	1,077	1,219	34,801
Ctted. for Sentence	3 0.14%	12 0.34%	11 1.02%	1 0.08%	106 0.30%
Y.O.I.	174 8.29%	318 9.19%	48 4.46%	108 8.86%	2,630 7.55%
Care Order	31 1.47%	22 0.63%	3 0.28%	18 1.47%	429 1.23%
Supervision	370 17.6%	445 12.8%	131 12.2%	241 19.8%	6,193 17.8%
CSO	47 2.24%	93 2.68%	10 0.93%	30 2.46%	1,266 3.64%
Attendance Centre O.	227 10.8%	704 20.3%	275 25.5%	222 18.2%	5,550 15.9%
Fines	539 25.7%	567 16.4%	192 17.8%	226 18.5%	7,706 22.1%
Abs./ Cond. Disc.	623 29.7%	1,275 36.3%	381 35.4%	369 30.3%	10,506 30.1%
Other	83 3.96%	23 0.66%	26 2.41%	4 0.33%	415 1.19%

Data taken from Vol. 3 Tables S5. 2 & 3 'Criminal Statistics England and Wales 1988', Home Office:
London (1986)

% calculated on total guilty = includes those committed for borstal training

TABLE 2.4 - 1989 - Disposals by Juvenile Courts**Aged 10-17 years for Indictable Offences**

DISPOSAL	ILJP	Gt.Man.	Notts	B'ham	Merseyside	National
	10 areas	15 areas	5 areas	1 area	6 areas	
Total Guilty	1,051	2638	1021	509	900	25,015
Ctted for Borstal	0 0%	9 0.34%	6 0.58%	2 0.39%	1 0.1%	90 0.36%
Immediate Custody	79 7.5%	198 7.5%	37 3.6%	31 6.1%	43 5.3%	1,521 6.08%
Supervision	270 25.7%	345 13.1%	94 9.2%	117 22.9%	173 19.2%	4,448 17.8%
CSO	16 1.5%	70 2.65%	7 0.68%	20 3.92%	29 3.22%	820 3.3%
Attendance Centre Order	86 8.9%	504 19.1%	239 23.4%	128 25.1%	152 16.8%	3,802 15.2%
Care Order.	18 1.7%	14 0.5%	0	4 0.78%	3 0.33%	228 0.9%
Fines	301 28.6%	399 15.1%	147 14.4%	59 11.6%	185 20.5%	4,974 19.9%
Abs./ Cond. Disc.	344 32.7%	899 34.1%	453 44.4%	136 26.7%	327 36.3%	8,702 34.8%
Other	53 5.0%	35 1.3%	37 3.62%	2 0.39%	5 0.55%	520 2.1%

Data taken from Tables S5. 7 & 8 'Criminal Statistics England and Wales 1989', Home Office:
London (1990)

% calculated on total guilty = includes those committed for borstal training

TABLE 2.5 - 1999 - Disposals by Juvenile Courts**Aged 10-18 years for Indictable Offences**

DISPOSAL	ILJP	Greater Manchester	Nott'shire	B'ham	Merseyside	National
	4 areas	11 areas	5 areas	1 area	6 areas	
Ctted for Trial Cn.Ct	256 6.8%	384 6.14%	212 7.5%	224 9.4%	86 3.25%	5,284 6.6%
Total Sent.	2,059	3,086	1,183	1110	1,384	45,926
Immediate Custody	159 7.7%	274 8.88%	77 6.51%	131 11.8%	103 7.44%	3,539 7.7%
Av.length	3.6 mths	3.4mths	3.3 mths	3.7 mths	3.9 mths	3.4 mths
Community Sentences:-	811 39.4%	1,528 49.5%	582 49.2%	446 40.2%	455 32.8%	19,996 43.5%
Probation	76	103	51	77	20	2,065
Supervision	421	471	168	146	200	8,387
CSO	92	239	35	39	65	2,924
Att C.O.	191	481	306	147	152	5,205
Repar. O.	-	-	-	-	-	-
Fines	451 21.9%	263 8.52%	105 8.87%	157 14.1%	252 18.2%	5,995 13.1%
Abs./ Cond. Discharge	507 24.6%	988 32%	406 34.3%	371 33.4%	560 40.5%	14,739 32.1%
Other	131 5.32%	33 1.32%	13 1.68%	5 0.5%	14 0.95%	1,657 3.6%

Data taken from Vol.3 Table S4 1(B) 'Criminal Statistics England and Wales 1999', Home Office National Statistics: London (2000)

% calculated on total sentenced

TABLE 2.6 - 2000 - Disposals by Juvenile Courts**Aged 10-18 years for Indictable Offences**

DISPOSAL	ILJP	Greater Manchester	Nott'shire	B'ham	Merseyside	National
	4 areas	11 areas	5 areas	1 area	6 areas	
Ctted for Trial Cn.Ct	306 6.8%	969 18.5%	124 4.2%	309 11%	126 3.8%	5,336 6.6%
Total Sent.	2288	2422	1260	1,316	1,426	45,355
Immediate Custody	232 10.1%	321 13.2%	121 9.6%	168 12.8%	145 10.1%	3,867 8.5%
Ave. length	5.9 mths	3.1 mths	5.2 mths	6.2 mths	5.9 mths	6 mths
Community Sentences:-	1085 47.4%	844 34.8%	686 54.4%	632 48%	562 40.1%	22,565 49.8%
Probation	83	248	20	78	16	1,558
Supervision	401	-	137	167	167	7,385
CSO	116	304	48	71	97	3,019
Att C.O.	147	65	192	191	143	4,013
Repar. O.	87	-	123	36	30	2,253
Fines	538 23.5%	616 25.4%	63 5 %	225 17.1%	254 19.5%	6,042 13.3%
Abs./ Cond. Discharge	371 16.2%	608 25.1%	258 20.5%	280 21.3%	451 31.4%	11,373 25.1%
Other	62 2.7%	37 1.5%	132 10.5%	11 0.8%	14 1.2%	1,508 3.3%

Data taken from vol. 3 Table S4 1(B) 'Criminal Statistics England and Wales 2000', Home Office National Statistics: London (2001)
% calculated on total sentenced.

APPENDIX 2.3 - JPS AND LAWYERS IN 1969 IN PARLIAMENT

HOUSE OF COMMONS

NAME	LAW/ JP	PARTY	NAME	LAW/ JP	PARTY
Abse L	Sol	Lab	Evans Gwynfor	Sol	Lab
Alldritt WH	JP	Lab	Evans I L	JP	Lab
Anderson D	Bar	Lab	Ewing Mrs W (S)	Sol	SNP
Archer PK	Bar	Lab	Eyre RE	Sol	Cons
Awdrey DE	Sol	Cons	Fitch EA	JP	Lab
Barber APL	Bar	Cons	Fletcher EGM	Sol	Lab
Barnett J	JP	Lab	Fletcher Cooke	Bar	Cons
Baxter (S)	JP	Lab	Foot Sir D	Bar	Lab
Bell RM	Bar	Cons	Ford BT	Ex.JP	Lab
Bennett, Sir F.	Bar	Cons	Foster Sir G	Bar	Cons
Bennett J (S)	Ex.JP	Lab	Fraser JD	Sol	Lab
Berry Hon A	JP	Cons	Galpern Sir M (S)	JP	Lab
Bishop ES	JP	Lab	Gilmour IHJL	Bar	Cons
Black Sir CW	JP	Cons	Gilmour Sir J (S)	JP	Cons
Blaker PAR	JP	Cons	Glover Sir D (S)	JP	Cons
Body R	Bar	Cons	Glyn Sir RH	Bar	Cons
Boston TG	Bar	Lab	Goldsmid Sir H d'A	JP	Cons
Boyd-Carpenter	Bar	Cons	Gourlay HPH (S)	Ex.JP	Lab
Boyden HJ	Bar	Lab	Gower HR	Sol	Cons
Brewis HJ (S)	Bar	Cons	Grant JA	Sol	Cons
Brown HD(S)	JP	Lab	Grant Ferris W.Cmd	Bar	Cons
Brown RW	JP	Lab	Greenwood AWJ	JP	Lab
Brown Sir E	JP	Cons	Grieve WP	Bar	Cons
Buchanan R (S)	JP	Lab	Grimond J	Bar	Lib
Buck PAF	Bar	Cons	Harmer-Nicholls Sir	Bar	Cons
Carlisle M	Bar	Cons	Harper J	JP	Lab
Clegg W	Sol	Cons	Harris RR	Bar	Cons
Corbett Mrs FK	JP	Lab	Harrison W	JP	Lab
Corfield Capt.F	Bar	Cons	Hay JA	Sol	Cons
Craddock Sir G	Bar	Cons	Hazell B	JP	Lab
Crawshaw LtCol	Bar	Lab	Heald Sir LF	JP	Cons
Crowder FP	Bar	Cons	Hogg Q	Bar	Cons
Cunningham Sir	Bar	UU	Hooson HE	Bar	Lib
Currie GBH	Bar	UU	Howarth H	JP	Lab
Davidson A	Bar	Lab	Hutchison AMC (S)	Bar	Cons
Davies EA	JP	Lab	Hynd JB	JP	Lab
De Freitas Sir G	Bar	Lab	Irvine Sir AJ	Bar	Lab
Dempsey J (S)	JP	Lab	Irvine BG	Bar	Cons
Digby KSDW	Bar	Cons	Jackson FC	Bar	Lab
Dunnett JJ	Sol	Lab	Janner Sir B	Sol	Lab
Eadie A (S)	JP	Lab	Jenkin CPF	Bar	Cons
Edwards WH	Sol	Lab	Johnson J	Sol	Lab
Ellis J	Ex.JP	Lab	Jones Sir FE	Bar	Lab
Ensor D	Sol	Lab	Joseph Sir KS	Bar	Cons
Errington Sir E	JP	Cons	Kenyon C	JP	Lab

NAME	LAW/ JP	Party	NAME	LAW/ JP	Party
Kershaw JA	Bar	Cons	Percival WI	Bar	Cons
Lee JMH	Bar	Lab	Peyton JWW	Bar	Cons
Lever LM	JP	Lab	Pink RB	JP	Cons
Lever NH	Bar	Lab	Prentice RE	JP	Lab
Lipton M	JP	Lab	Quennell Ms JM	JP	Cons
Lloyd JSB	Bar	Cons	Rawlinson Sir P	Bar	Cons
Lomas K	JP	Lab	Renton Sir DLM	Bar	Cons
Lyons E	Bar	Lab	Richard IS	Bar	Lab
MacDermot N	Bar	Lab	Rippon AGF	Bar	Cons
Mackenzie JG(S)	JP	Lab	Roebuck RD	Bar	Lab
Maclean Sir F(S)	JP	Cons	Rose PB	Bar	Lab
MacLennan R (S)	Bar	Lab	Rossi HAL	Sol	Cons
Maginnis JE	JP	UU	Scott NP	JP	Cons
Mahon P	JP	Lab	Shaw MN	JP	Cons
Mallalieu EL	Bar	Lab	Silkin JE	Sol	Lab
Manuel AC (S)	JP	Lab	Silkin SC	Bar	Lab
Mapp C	JP	Lab	Silverman J	Bar	Lab
Marten HN	Sol	Cons	Small WW (S)	JP	Lab
Maudling R	Bar	Cons	Spriggs L	JP	Lab
McMaster SR	Bar	UU	St.John Stevas N	Bar	Cons
McMillan T (S)	JP	Lab	Taverne D	Bar	Lab
Miller MS (S)	JP	Lab	Temple JM	JP	Cons
Mills WS	Sol	UU	Thatcher Mrs M	Bar	Cons
Miscampbell NA	Bar	Cons	Thornton E	JP	Lab
Monro HSP (S)	JP	Cons	Thorpe JJ	Bar	Lib
More J	JP	Cons	Tilney JDRT	JP	Cons
Morgan D Elystan	Bar	Lab	Tuck RH	Bar	Lab
Morgan WGO	Bar	Cons	Turton RH	JP	Cons
Morris J	Bar	Lab	Van Straubenzee	Sol	Cons
Moyle RD	Bar	Lab	Vaughan-Morgan	JP	Cons
Mulley FW	Bar	Lab	Waddington D	Bar	Cons
Munro-L-Tooth	Bar	Cons	Walker-Smith D	Bar	Cons
Murton Col HO	JP	Cons	Ward Dame Irene	JP	Cons
Neave AMS	Bar	Cons	Weitzman D	Bar	Lab
Nott JWF	Bar	Cons	Wells WT	Bar	Lab
Oakes GJ	Sol	Lab	Whitaker BCG	Bar	Lab
Page AJ	Sol	Cons	Willey FT	Bar	Lab
Paget RT	Bar	Lab	Williams AC	JP	Lab
Pearson A	JP	Lab	Williams WT	Bar	Lab
Pearson Sir FF	JP	Cons	Worsley Sir M	JP	Cons
Peart TF	Bar	Lab	Wylie NR (S)	Bar	Cons

Total MPs	Conservative	Labour	Liberal	SNP	Ulster Union.
172/630				(Scot)	
27.3%	(76)	(86)	(4)	(1)	(5)
JP (65)	20 + 4 Scots	27 + 13 Scots	0		1
Bar (84)	39 + 3 Scots	34 + 1 Scot	3 + 1 Scot		3
Sol (23)	10	11	0	1	1

Justices of the Peace in the House of Lords 1969

Result 120 peers - Scots and England and Wales plus another 9 married to JPs

NB List includes Scots JPs who might have had an interest in the 1969 Act, given the passing of the Social Work Scotland Act – very similar to the proposal in the Child the Family and the Young Offender. England/Wales peers who became JPs after the Bill went through Parliament are listed here but not included in the total.

Dukes - 4

Scots [1]

Buccleuch (JP 1975, former Cons MP)

England and Wales [3]

Beaufort; Northumberland; Westminster

Marquesses - 6

Scots [2]

Bute, Lansdowne

England and Wales [4]

Abergavenny, Bath, Camden, Northampton

Earls - 29

Scots [5]

Balfour; Dundee, Elgin, Galloway, Minto

Northern Ireland [2]

Antrim, Erne

England and Wales [22]

Ancaster; Avon (JP Hon.); Aylesford; Beauchamp; Bradford; Cranbrook, Cromartie, De La Warr, Fitzwilliam, Gainsborough, Guildford, Halifax, Harrowby, Howe, Lanesborough, Malmesbury, Mexborough, Middleton, St Aldwyn, Shrewsbury, Stamford, Yarborough

Viscounts - 8Scots [1]

Thurso

England and Wales [6]

Allenby, Ashbrook, Boyne, Bridgeman, Gort (IOM), Monck, St Vincent

Barons – 64Scots [3]

Forbes, Lovat, MacAndrew

England and Wales [61]

Aberconway, Ailwyn, Ashbourne, Ashburton, Ashton, Barnard, Belstead, Bolton, Brassey, Braybooke, Braye, Brecon, Brownlow, Burnham, Burton, Carnock, Carrington, Chorley, Clitheroe, Clwyd, Cohen of Birkenhead, Cornwallis, Crathorne, Crook, Digby, Douglas of Barloch, Fisher, Fitzwalter, Forester, Hamilton, Harris, Hazlerigg, Hemingford, Hives, Hollenden, Inman, Luke, Lyle, Macpherson, Merthyr, Middleton, Morris of Borth-y-Gest, Morris of Kenwood, Newton, Northbrook, Nugent, Raglan, Ravensworth, Rea, Rennell, Riverdale, Roborough, Rollo, Rusholme, St. Levan, Savile, Trevor, Vernon, Westwood, Wigram, Willoughby de Broke.

Life Peers 9

Champion, Chelmer, Hughes (Scot), Peddie, Shawcross, Walston, Williamson
women - Elliot (Scots), Wootton

Wives were JPs (9)

V. De L'Isle, E of Rochdale, B. Brabourne, B. Kilmany, B. Ogmorie, B. Rothschild
B. Lucas (husband of...); Life Peers - James and Plowden,

Succeeded or JP after Bill through Parliament (6)

E. of Mansfield (s1971), E. of Selborne (s1971), E. of Mar & Kellie (JP 1971)
E. of Enniskillen (JP 1972); E. of Morley (1972), E. of Swinton (1971)

APPENDIX 3.1 - JUDICIAL STATISTICS, SCOTLAND

1907-1925

	1907	1909	1913	1915	1917	1919	1921	1923	1925
Convictions of 16-u21	17,905	16,574	15,879	7,896	9,503	12,133	14,906	13,921	16,488
Convictions of u16	9,974	9,991	10,975	11,044	11,572	9,501	8,873	8,502	8,741
Convictions of 14-u16	5,070	5,109	5,646	4,054	4,486	4,227	4,308	4,073	4,265
Convictions of u14	4,904	4,882	5,329	6,990	7,086	5,274	4,565	4,429	4,476
Borstal	-	-	77	54	112	114	107	87	88
Industrial School (offence charged)	130	133	254	295	356	194	136	98	151
Reformatory	213	200	233	235	278	161	131	135	120
Whipped	371	328	407	562	925	400	255	316	265
*Caution for Good Behaviour	713	673	590	452	235	333	260	113	289
*Probation of Offenders Act 1907 – after conviction	1,863	49	39	27	22	13	11	8	22
Probation of Offenders Act 1907 –without proceeding to conviction a- dismissed b- bond	a.	795	985	1494	1204	993	1038	763	964
	b.	548	605	346	745	516	213	296	231
s.2 Probation of Offenders Act 1907	und.14		427	478	602	385	374	418	477
	14-u21		824	693	751	613	508	635	767

* All ages (Data from Morton 1928:14)

APPENDIX 3.2 – JUVENILE STATISTICS 1913-1948 (E/W)

Children and Young Persons Guilty of Indictable Offences England/Wales

1913-1948

YEAR	1913	1917	1920	1930	1934	1938	1948
AGE	7-16	7-16	7-16	7-16	8-17	8-17	8-17
GUILTY	12,915	22,670	12,919	11,137	20,428	27,875	43,706
*Custodial	1880 14.6%	3032 13.4%	1414 10.9%	1114 10%	2062 10.1%	2884 10.3%	4437 10.1%
Probation	3541 27.4%	5587 24.7%	4041 31.3%	6159 55.3%	11158 54.6%	14175 50.9%	18221 41.7%
Fines	1287 10%	3452 15.2%	2218 17.2%	423 3.8%	871 4.3%	1678 6%	6037 13.8%
Whipping	2072 16%	4875 21.5%	1273 9.9%	134 1.2%	130 0.6%	43 0.2%	0 0
Nominal Penalties	4121 31.9%	5605 24.7%	3890 30.1%	3263 29.3%	6027 29.5%	8613 30.9%	14,021 32.1%
Fit Person Order	0 0%	0 0%	0 0%	0 0%	65 0.3%	198 0.7%	418 1%
Otherwise	14 0.1%	119 0.5%	83 0.6%	44 0.4%	115 0.6%	284 1%	572 1.3%

*Custodial includes reformatory, approved school, remand home, imprisonment

(Parliamentary Papers)

APPENDIX 5.1 – MA LETTER IN ‘THE TIMES’ 11.iii.1969

“The Times” - Tuesday, 11th March 1969

Sir – Equality before the law is one of our fundamental freedoms. And it is in peril. It is the pride of English law that all are treated alike – Briton or foreigner, black or white, rich or poor. But this will be breached if Parliament passes, unamended, a Bill now before it. This provides that if children offend, only some of them will be brought before a juvenile court while others go scot-free.

The Bill is the Children and Young Persons Bill which has its Second Reading on Tuesday. Its first clause says that a child (up to 14) or young person (up to 17) may be brought before a court on various grounds, including an offence against the law. But in each case he must *also* be in need of care or control which he is unlikely to receive unless the court makes an order.

This means that if a boy comes from a “good” home he cannot be brought to court at all, but if he comes from a “bad” home he will be brought to court.

Suppose George from a “good” home and Bert from a “bad” home are both 13 and they jointly break into a shop and steal. George cannot be brought to court but Bert will be, because his “bad” home means that he is in need of care or control.

The well-meaning Home Office argument is that only one of them needs the treatment which the court can secure for him. This is the intention. It is not at all how it will seem to the two boys or their parents. Children have a well-developed idea of what is fair, They will be quick to recognize that this is not fair at all. The whole idea of equality before the law is flouted when, for the same offence, one child is brought to court and the other is not. This is the thin edge of a very dangerous wedge.

Emotional and moral factors are the most important in making good homes; and this is quite different from the amount of money in the home. But parents who are

emotionally inadequate are also often poor providers. So that in many cases (by no means all) emotionally insecure homes are also economically poor homes.

The proposed discrimination will certainly be regarded as one law for the rich and another for the poor, which is highly objectionable. If this becomes law it is only a matter of time before it is popularly (if inaccurately) believed that the grammar school boy will not be brought to court for the very things which a secondary modern schoolboy is brought.

What is to happen under the new proposals, when Jim (aged 13) cycles at night without lights along the pavement and knocks over an old lady who goes to hospital with a broken femur? At present Jim would probably be fined. But there are to be no more fines for children under 14, because they are to be brought to court under civil procedure and no longer under criminal procedure.

If Jim has a “good” home he will not be brought to court at all. What will the old lady think of that? What will her family or neighbours think? Or Jim’s friends? If he has a “bad” home he will be brought to court, which can order various forms of treatment, none of which seem very appropriate.

The court will not be able to order any compensation either. A primary school was recently broken into by 12 year old children who did a lot of damage, including pouring paint and ink over other children’s shoes in the cloakroom. The parents of these other children will have to buy them new shoes. But under the new Bill the offending children and their parents cannot be ordered to pay a penny-piece in restitution. Is this not outrageously unfair?

The Ingleby Committee on Children and Young Persons recommended in 1960 that the commission of an offence should itself be sufficient ground for bringing a child before the juvenile court. This is the sensible answer, retaining equality before the law.

As it now stands, what will the Children and Young Persons Bill do to children? It will encourage them to believe that they are not answerable for their actions, nor

have to pay any penalty for wrong-doing. It will tell them that they may break windows or cause them damage in the certainty that they cannot be made to pay for any part of it. Instead of an even-handed law, they will know that some favoured, children are never brought to court when others are.

If we want law-abiding citizens in the future we must show children and their parents that the law is fair and just. And that it applies – in the words of the Justices' oath – to all manner of people after the laws and usages of the realm without fear or favour, affection or ill-will.

Yours truly, Joseph Brayshaw, Secretary, the Magistrates Association
28, Fitzroy Square, W.1., March 10.

APPENDIX 6.1 –UNRULY CERTIFICATES

Sections 24 and 297 of the Criminal Procedure (Scotland) Act 1975 provide that where a child over the age of 14 appears before a court charged with a crime or offence and the court considers that, because of the child's unruly character, release on bail or detention by a local authority is not appropriate, the child may be detained in the prison system on the authority of the court.

Scottish Office, Statistical Bulletin, Criminal; Justice Series, Scottish Office

Home Department: Edinburgh

Prison Statistics 1995

Table 22 Unruly Certificates by Sex and Age – Scotland

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
TOTAL	59	45	31	8	30	30	19	21	39	86
MALE	59	43	31	8	30	30	19	21	39	84
AGE										
14	4	8	5	-	3	2	4	1	5	12
15	46	33	23	7	23	22	5	12	23	55
16	7	4	3	1	4	6	8	6	11	18
17	2	-	-	-	-	-	2	2	-	1

may have been undercounting before 1994

APPENDIX 6.2 - REFERRAL GROUNDS TO THE REPORTER

(as at 2001)

Anyone may refer a child to the Reporter, although the majority of referrals come from the police, followed by education and social work sources. A child may be referred on more than one ground and these may include both offence and non-offence grounds:

- (a) the child is beyond the control of his parents: or

- (b) the child is falling into bad associations or is exposed to moral danger: or

- (c) lack of parental care is likely to cause the child unnecessary suffering or seriously to impair his/her health or development: or

- (d) any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975 has been committed in respect of the child or in respect of a child who is a member of the same household: or

- (dd) the child is, or is likely to become, a member of the same household as a person who has committed any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975: or

- (e) the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes the crime of incest has been committed by a member of that household: or

- (f) the child has failed to attend school regularly without reasonable excuse: or

- (g) the child has committed an offence: or

(gg) the child has misused a volatile substance by deliberately inhaling, other than for medicinal purposes, that substance's vapour: or

(h) the child is a child whose case has been referred to a Children's Hearing in pursuance of Part V of this act: or

(i) the child is in the care of a local authority and his/her behaviour is such that special measures are needed for his/her adequate care and control.

The Reporter, after investigating all relevant matters of the child's situation, may make one of the following decisions:

- take no further action
- refer the case to the local authority, for the advice, guidance and assistance of the child and his/her family
- arrange a Children's Hearing if it appears to the Reporter that the child is in need of compulsory measures of care
- may refer the child to the police for a warning

APPENDIX 6.3 - GUIDANCE TO CHILDREN'S PANEL

ADVISORY GROUPS

**SWSG (1969) Guidance to Children's Panel Advisory Groups, SW7/69, The
Scottish Office: Edinburgh**

Social Work Services Group Circular No. SW7/1969 –

Appendix A para.1

"Essential to the success of the system of children's panels and hearings is the finding of sufficient suitable members of the community to serve on them. They should have knowledge and experience in dealing with children and families and should be drawn from a wide range of occupation, neighbourhood, age group and income group. They require the right personal qualities, including the absence of bias and prejudice, and a genuine interest in the needs of children in trouble and their relationship to the community. Moreover, the success of the children's hearings will depend to a large extent on the ability of their members to get through to the children and their parents; and a capacity to communicate with them, and an understanding of their feelings and reactions so that they gain their confidence will be of great importance. It is hoped that the new system will attract suitable people whose occupations or circumstances have hitherto prevented them from taking a formal part in helping and advising young people or who might not have previously thought of themselves as candidates for public service."

APPENDIX 6.4 - INTERMEDIATE TREATMENT

DHSS (1977) *IT – Planning for Action* Report of Two Study Groups, Social Work Service Development Group, London: HMSO

Includes the “specific aims which are likely to apply to intermediate treatment activities...

1. to assist with the acquisition of personal living skills;
2. to give the children pleasurable experiences;
3. to assist with the development of literacy and numeracy;
4. to increase communication with peers and with adults;
5. to help prevent or reduce delinquent behaviour in individuals
6. to assist with the development of new interests and hobbies
7. to provide a challenging experience which may lead to a sense of achievement, and thereby increase the child’s sense of self-respect and self-worth;
8. to compensate for deprivation, by pushing out horizons, meeting new people and enhancing the quality of life;
9. to promote personal development and maturation;
10. to give the child the opportunity to do new things and to enable adults to spend time with children
11. to assist in developing the ability to resolve difficulties by verbal rather than physical means;
12. to learn to abide by group and societal decisions;
13. to learn to accept structure, discipline, limits;
14. to provide protection and nurture for those in need of care.”

APPENDIX 6.5 - RESIDENTIAL SUPERVISION

REQUIREMENTS (Scotland)

Residential Supervision Requirements (RSR) 1973

Region	RSRs as % of all disposals
Highland	7.3
Grampian	12.7
Tayside	18.6
Fife	23.7
Lothian	11.4
Borders	4.2
Central	5.7
Strathclyde	10.1
Dumfries & Galloway	37.0
Scotland	11.6

(Martin 1976:39)

APPENDIX 6.6 – JUVENILES PROSECUTED in SCOTLAND**1994-99****Children under 16 Prosecuted in Scottish Courts 1994-1999****A - By year**

Year	Number
1994	246
1995	243
1996	203
1997	189
1998	179
1999	105
TOTAL	1,165

B – Type of Offence

Offence	Number	%
Homicide	11	0.9
Violent crimes incl. robbery	182	15.6
Offences of violence (simple assault, breach of peace)	168	14.4
Sexual crimes	31	2.7
Housebreaking and theft by opening lock-fast places	121	10.3
Theft, fraud, shoplifting	129	11.1
Fire raising and damage	95	8.2
Theft and unlawful taking of motor vehicles	291	25.0
Other motor vehicle offense	32	2.7
Other offences inc. drug offences	105	9.0
TOTAL	1,165	100.0

Scottish Law Commission 2002 (Bottoms & Dignan:129)

APPENDIX 6.7 - PRISON CUSTODY U.18 IN EUROPE 1998

Prison Custody under 18

Young Offender Profile of Prison Population 1.ix.1998

Council of Europe

Country	Under 18 pre-trial and sentenced	%
Austria	199	2.6
Belgium	187	2.3
Denmark	15	0.4
Finland	7	0.3
France	822	1.5
Greece	387	7.3
Hungary	148	1.0
Ireland	126	4.8
Netherlands	59	0.5
Norway	12	0.5
Portugal	243	1.7
Romania	2,327	4.5
Spain	163	0.4
Turkey	2,188	3.4
England & Wales	2,353	3.6
Scotland	215	3.5

[From Bottoms and Dignan 2004:144-5]

APPENDIX 7.1 - PROSECUTING JUVENILES

Chief Inspector I.T. Oliver LLB, Metropolitan Police

(The Magistrate 1974:55)

BEFORE the Act, all juveniles arrested or reported for joint offences were treated the same, but there was a fear that this was “operating contrary to the principles of the CAYP 1969... from June 1973 each case would be dealt with on its merits and although certain difficulties were foreseen it was thought that the problems to be overcome were small compared with the possible unfairness that could stem from what would otherwise amount to an abdication of discretion.

...there have been instances where magistrates have criticised the change in police procedure. The main objections seem to be that ‘justice is not seen to be done’ and that it is unfair for one offender to go to court when another has been dealt with by way of caution.... there are a number of reasons why a juvenile may not be before the court. It is more important that justice is in fact done to the individual than to support the impression that it ought to appear to be done to the group.

One of the objectives of the 1969 Act is to consider individuals and to decide which is the best course of action for each person - not to adopt blanket decisions which could result in the stigma attached to a court appearance and the disadvantage of a criminal record.

It is extremely difficult to see any merit in the argument that advocates group prosecution under a system geared to the principle that the interests of the individual juvenile are of paramount importance. The underlying aim of the Act is to keep the juvenile out of court as far as possible and the Commissioner’s declared policy in this matter is in line with the spirit and intention of the statute.”

APPENDIX 7.2 – COMBINING JUVENILE PANELS

Home Office Circular No. 136/1976

In areas where juvenile court business is small, and a very small panel would not enable its members to sit regularly or would make for practical difficulties in arranging juvenile courts, the justices are requested to consider the possibility of combining their panel with that of one or more of the neighbouring divisions. A combination order provides greater flexibility in the arrangements for juvenile courts, enables the justices to acquire the necessary experience, facilitates the appointment to the panel of justices whose age and personal qualities make them particularly suited to the juvenile courts, and makes it possible for juvenile courts to sit more often than they are able to do in many rural areas. The effect of a combination order is limited to providing that for juvenile court purposes only the petty sessional divisions concerned are deemed to be one and that the justices for these areas are deemed to be the justices for a single area. In all other respects the petty sessional divisions continue to exist as separate areas. Any bench which considers that it would be desirable to combine its panel with that of one or more neighbouring divisions should approach the Magistrates Courts Committee with a view to their recommending a combination order.

APPENDIX 7.3 - 'GRAVE CRIMES'

From 1933 special provision was made under 'Grave Crimes' proceedings, s53 (2) of the 1933 Children and Young Persons Act for certain offences, murder and attempted murder always, to be tried in the Crown Court if they satisfied the criteria required, namely that a longer custodial sentence was required than that available in the Juvenile/Youth Court. Originally, this only included three specific offences, attempted murder, manslaughter and wounding with intent to do grievous bodily harm but S2 of the Criminal Justice Act 1961 deleted the three original offences and substituted the words "any offence punishable in the case of an adult with imprisonment 14 years or more". At that time, just three more offences were added to the list, rape, robbery and firearms offences, but as subsequent legislation increased the penalties for other offences, they were brought within the ambit of section 53(2), with the addition of three offences where the maximum penalty for an adult was 10 years, indecent assault on a man or woman (applicable to 10-17 year olds); and causing death by dangerous driving and careless driving whilst under the influence of drink or drugs (applicable to 14-17 year olds).

The extent of the use of section 53 (2) has largely reflected the prevailing philosophy of the courts rather than of the legislation, sometimes being in accordance and at other times contradictory to it. Whilst the 1961 Criminal Justice Act added rape, robbery and firearms offences and the 1968 Theft Act added burglary, there was no significant rise in the numbers. At that time, during the 1960s, social welfare, the needs of the young offender took precedence over a retributive, just deserts philosophy.

Use of section 53 (2)

1962	1963	1964	1965	1966	1967	1968	1969	1970	1971
2	0	3	1	2	2	3	6	4	6

The 1971 Criminal Damage Act added arson to the list of offences capable of being dealt with under s53 (2). The rapid increase in use during the 1970s was thought to

reflect the rising juvenile crime rate, the increasing numbers of juveniles in court and the general increase in the use of custody (Dunlop & Frankenberg 1982:44).

Use of section 53 (2) – 1971-1981

1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981
6	18	42	3	39	47	58	79	56	65	76

(Sharon King 1998³⁸⁶)

s.6(1) Children and Young Persons Act 1969 a magistrates' court may not commit a young person to the Crown Court for trial unless (i) the charge is homicide, (ii) he is jointly charged with an adult and his committal is considered necessary, or (iii) the offence is one to which s.53(2) of the Children and Young Persons Act 1933 applies.”

If convicted of an offence where if adult would get 14 years, and “none of the other methods available is suitable, it may sentence him to be *detained* for such period not exceeding the maximum term of imprisonment applicable to an adult... in such place and on such conditions as the Secretary of State may direct. ” (Mag.1979:151).

In 1978, sentences for S53 offences varied from community homes, youth treatment centres, special hospitals to life. A successful AGM Resolution called for more facilities for juveniles convicted of grave crimes, claiming the Scots “had been able to find the resources and the courage to create a special unit to reclaim their most dangerous and aggressive men... we could consider doing the same for a handful of children” (Mag.1979: 187).

1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993*	1994	1995	1996
72	108	152	156	152	175	114	125	101	85	315	387	391	609

Discretion and variance by juvenile courts – the guidance by Court of Appeal

1986 – R v Fairhurst LCJ & 1996 R v Wainfur

³⁸⁶ Sharon King, PhD student, Kings College, London. Unpublished Paper presented 1998, MSc Seminar

1982 CJ Act restricted custody to 12 months: judges made relatively shorter s53

Decrease in custody during 1980s – emphasis on alternatives

1991 CJ Act – length commensurate with seriousness except for sexual and violent offences, when the court had a duty to protect the public from serious harm

* 17 year olds were brought into the ambit of s53.

eligible for early release and parole - Crime Sentences Act 1997 – removed parole

1994 Criminal Justice and Public Order Act – STO and YOI 24 months - doubled

1990s

Table 12 - Juveniles u18 at Crown Court for Trial 1991-2001

Year	Number	Year	Number
1991	5,200	1992	4,700
1993	2,700	1994	2,700
1995	3,300	1996	4,300
1997	5,200	1998	5,000
1999	4,900	2000	5,000
2001	4,600		

Criminal Statistics, England/ Wales (Bottoms & Dignan 2004:132)

Data to nearest 100

NB October 1992 – maximum age in Youth Court raised to u18, hence *marked drop in the period 1991-93.*

APPENDIX 7.4 – ‘POWERLESSNESS OF COURTS’

The New Dilemma

Clerk to Scarborough Borough Justices (JCC 1972:332)

- The juvenile could not be fined because s/he had no means and the parent could not be ordered to pay; a supervision order was inappropriate;
- a care order served no purpose;
- a bind over was not applicable;
- there were no detention centres for girls, no vacancies for boys;
- an attendance centre was not available to that court;
- and borstal was only for those aged 15+ (an action supported by the local authority).
- The only choice for the court was an absolute or conditional discharge.

APPENDIX 7.5 - 1982 AND 1988 CUSTODY CRITERIA

Custody was only to be used only where the defendant was:

- a) unable or unwilling to respond to non-custodial penalties
- or b) custody necessary for the protection of the public
- or c) so serious that NON-custody could NOT be justified

The reasons had to be stated and recorded in the court register. The last criterion had been introduced as an amendment to cover the comparatively rare occasions of the one off serious offence, and the protection of the public referred to that individual defendant rather than a general deterrence of others (Burney 1985:55).

Thoughts on the Criminal Justice Act 1988 – HH Judge Michael Astill

Detention in YOI (Young Offender Institution)

Offenders	Minimum Period	Maximum Period
17-21	21 days	Maximum for offence by adult
15-17	21 days	Maximum 12 months Girls – 4 months
14 males only	21 days	Maximum 4 months

“It is a check list and the sentencer must on each occasion run through the statutory criteria in deciding whether any other method of dealing with the offender is appropriate.”

Once decided the court must explain “in a way which will be easily understood by him why the sentence of detention is being passed. These provisions are clearly aimed at making the sentencer stop, hesitate and ponder before committing to custody an offender in these age brackets.”

This Act adds more restrictions to 1982 criteria – under 21, must have legal representation or refused it; SIR unless unnecessary – likely to be Crown Court only where serious crime.

1. court satisfied that if over 21, would pass a custodial sentence
2. within criteria of 1982 Act

In (a) “perhaps rarely only will one previous non-custodial penalty be considered ‘a history’.”

In (b) definition of ‘serious harm’

Suggest “persistent and cumulative violence to the person or damage to property even though any one of those offences standing alone may not reasonably be described as ‘serious harm’.”

In (c) “the nature of the ‘serious’ offence...will rarely arise in magistrates’ courts.”

“...then state in open court before a sentence of detention in a young offenders institution is passed:”

- (i) under what ground court is satisfied
- (ii) give the reasons
- (iii) explain reasons in language ‘easily’ understood

12 months or less = 50% release; time spent on remand in custody or secure accommodation will be deducted.

Should still order compensation where appropriate, and give reasons if not

Only if able to pay “Courts should not ‘make a guess’ but should investigate carefully.”

(Mag.1989:71)

APPENDIX 7.6 – REPORTS AND STATUTES IN THE 1990s

‘Tackling Youth Crime: Reforming Youth Justice’, (Straw & Michael 1996)

‘Misspent Youth’ (Audit Commission 1996)

‘A Review of Delay in the Criminal Justice System’, (Narey 1997)

‘Directions for Advisory Committees’ (Lord Chancellor’s Department 1998)

Morgan Report (2000)

Auld Review of the Criminal Courts (2001)

Justices of the Peace Act 1997

Crime and Disorder Act 1998

Human Rights Act 1998

Youth Justice and Criminal Evidence Act 1999

Access to Justice Act 1999

Criminal Justice and Court Services Act 2000

Powers of Criminal Courts (Sentencing) Act 2000

Directions for Advisory Committees on Justices of the Peace (Ld. Chancellor 1998).

The Judicial Studies Board introduced the Magistrates’ New Training Initiative (MNTI) in 1999 and the Narey Reforms also came into use in the same year, whilst the Youth Court Demonstration Project (Allen 2001) led to a new, compulsory training programme for all Youth Court justices. Each one of these statutes, regulations, publications and projects had far-reaching implications for the role and function of the Youth Court magistrates, amongst others.

As a result of an adverse ruling from the European Court of Human Rights in “V” and “T”, the Lord Chief Justice issued a practice direction for the conduct of youth trials in the Crown Court, where there should be less formality, using ordinary language with explanations of what is happening. Under the 1998 Human Rights Act, magistrates can be held accountable for the conduct of the proceedings in their courts, particularly in relation to the understanding of the child (JSB 2001).