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# A Tripartite Analysis of the Grounds of Referral to Children's Hearings\*

**Abstract:** This article is concerned with the grounds of referral to the children's hearings system: Scotland's integrated juvenile care and justice system. The article posits a tripartite analysis of the grounds upon which children can be referred to hearings and, in so doing, rejects the traditional dualism between "offence" and "care and protection" grounds. Drawing upon empirical research, the article identifies three categories of grounds in current practice, namely: "care and protection", "*conduct*" and "offence". Qualitative data is presented in support of this original tripartite classification, which highlights the role of age in influencing the appropriate category of ground and suggests that children can move through the different categories as they get older. The article concludes by exploring the practical significance of the tripartite nature of the grounds of referral and argues that increased use of diversion could prevent children from progressing through the three categories of grounds over time.

**Keywords:** children's hearings; grounds of referral; conduct; welfare

## Introduction

The children's hearings system ("CHS") is a unitary tribunal system which deals with both children who offend and children who require care and protection, in accordance with their best interests<sup>1</sup>, up to the age of 16 years<sup>2</sup>. Children "in trouble"<sup>3</sup> can be referred to a children's hearing on a range of grounds, set out in section 67 of the Children's Hearings (Scotland) Act 2011 ("2011 Act"), so that the hearing can consider whether compulsory measures of supervision should be imposed. This article explores the grounds upon which children can be so referred. It is presented in three parts.

The first part considers the role of the grounds of referral and reflects on the traditional dualist analysis of those grounds; comprising an offence/non-offence binary and linked to the characteristically unitary nature of the CHS. The second part presents an original tripartite analysis of the grounds of referral, identifying a discrete category of "*conduct*" grounds in current practice. This analysis draws attention to the significance of the child's age in determining the likely category of ground, and suggests that children can move through the three identified categories over time: entering the system on care and protection grounds, progressing to conduct grounds and graduating to offence grounds. The third part

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<sup>1</sup> Children's (Hearings) Scotland Act 2011, s. 25.

<sup>2</sup> The jurisdiction of the CHS generally extends to the age of 16 years. Section 199 of the Children's Hearings (Scotland) Act 2011 defines children as: (i) those who are under 16 years; (ii) those who are referred to the children's reporter prior to their 16th birthday but who attain the age of 16 before the reporter has decided what action to take in response to the referral; and, (iii) those who are 16 and 17 years old but are already subject to a compulsory supervision order.

<sup>3</sup> C.J.D. Shaw "Children in Trouble" (1966) Br. J. Criminol. 6(2) 112 – 122.

considers the practical significance of the tripartite analysis, exploring the relevance of age to the categories of grounds identified, the child's movement through the grounds of referral over time and the capacity of the CHS to respond to the identified progression from care to conduct to offence referrals, as children who remain in contact with the system get older.

The article is based on a qualitative study of children's reporter decision-making, which comprised part of doctoral research on the unitary nature of the CHS<sup>4</sup>. The study involved semi-structured interviews with practising children's reporters who are the system's gatekeepers. Children's reporters decide, following investigations, whether a children's hearing requires to be arranged for a child and, if so, on the basis of which ground(s) of referral<sup>5</sup>. Although children's reporters are central to the referral process, very little is known about the nature of reporter decision-making. There is a dearth of empirical research; with only three studies, mainly adopting quantitative methods, having specifically examined the reporter role.<sup>6</sup> There is, therefore, a need to examine reporter practice in its current context, independently from the Scottish Children's Reporter Administration ("SCRA"), and to better understand the qualitative nature of reporter decision-making.

Interviews were conducted with 25 children's reporters during 2014 and 2015<sup>7</sup>. This represented a sample size of over 20% of all children's reporters employed by SCRA at that time. Interviewees were recruited on the basis of a single selection criterion: that they were practising children's reporters. However an effort was made to draw interviewees from different areas across Scotland to investigate potential geographical variance in decision-making practices. At least two children's reporters were therefore interviewed from each of the 9 SCRA "locality areas"<sup>8</sup>, although no significant geographical differences were identified.

Six interviewees were male and 19 were female. Most interviewees (15) had a legal background, although a background in social work was also common (6). Interviewees had different levels of experience as children's reporters, with most having served between 6 and 15 years (18). Interviews examined the ways in which children's reporters apply and make decisions related to the grounds of referral and explored differences in process and practice between offence and care and protection

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<sup>4</sup> M. Donnelly, *The Kilbrandon Ethos in Practice: The Antinomy of Care and Conduct in the Scottish Children's Hearings System* (PhD Thesis: Glasgow, University of Strathclyde, 2017).

<sup>5</sup> 2011 Act, s. 66, discussed further below.

<sup>6</sup> See, F.M. Martin, S.J. Fox & K. Murray, *Children Out of Court* (Edinburgh: Scottish Academic Press, 1981) 64 – 92; C. Hallett et al, *The Evaluation of Children's Hearings in Scotland, Volume 1: Deciding in Children's Interests* (Edinburgh: The Scottish Office Central Research Unit, 1998); I. Kurlus, L. Hanson & G. Henderson, *Children's Reporter Decision Making* (Stirling: SCRA, 2014).

<sup>7</sup> The study was approved by the University of Strathclyde Ethics Committee; in accordance with which informed consent was obtained from all interviewees and their anonymity protected. Interviews were conducted either in person (21) or over the telephone (4), digitally recorded and transcribed. NVivo was used to manage interview data which were analysed thematically; such that common themes across the dataset were identified and comments from interviews categorised by reference to those themes. Elements of "grounded theory" were applied, allowing for inductive interplay between data collection, analysis and theory development: B.G. Glaser & A.L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine, 1967); D. Walker & F. Myrick "Grounded Theory: An Exploration of Process and Procedures" (2006) Q.H.R. 16(4) 547 – 559.

<sup>8</sup> This includes: Highlands and Islands; Grampian; North Strathclyde; Glasgow; Tayside and Fife; South East; Central; Lanarkshire/Dumfries and Galloway; and, Ayrshire.

referrals. In so doing, a third referral type was identified; based on a discrete category of conduct grounds, which fall between offence and care and protection concerns.

## The Traditional Dualist Analysis

The grounds of referral to children's hearings are of central importance to the practice of the CHS. This section explores the grounds of referral and links the traditional dualist analysis of "offence" and "care and protection" grounds to the unitary nature of the CHS.

### *The Practical Significance of the Grounds of Referral*

A child can be referred to a children's hearing where a children's reporter determines that: (i) one or more of the grounds of referral applies in relation to the child; and, (ii) a compulsory supervision order is necessary in respect of that child<sup>9</sup>. If the children's reporter considers that a ground of referral applies *and* compulsory measures of supervision are necessary, then a children's hearing must be arranged for the child<sup>10</sup>. The children's reporter is obliged to prepare a "statement of grounds"<sup>11</sup>, which effectively communicates to the child and family *why* a hearing has been arranged. The children's reporter selects and states the applicable ground(s) of referral, which must be accepted by the child and family before a children's hearing, comprising three lay panel members, can consider and dispose of the case<sup>12</sup>. If the stated grounds are not accepted or understood, then an application is made to the sheriff to determine, by way of proof, whether the grounds of referral are established<sup>13</sup>. If the sheriff finds the grounds established, the case is sent back to a children's hearing for disposal<sup>14</sup>. Otherwise, the case must be dismissed<sup>15</sup>.

The grounds of referral provide the legal basis for compulsory state intervention in the child's life. The acceptance or establishment of the grounds confirms the jurisdiction of the children's hearing<sup>16</sup>. If the grounds are neither accepted nor established, then the referral *must* be discharged: the children's hearing having no authority to consider the case and impose a compulsory supervision order under such circumstances. In this way, the grounds of referral can be thought of as "threshold criteria"<sup>17</sup> which must be satisfied before any compulsory measures of supervision can be imposed. The grounds of referral are thus fundamental to the practice of the CHS.

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<sup>9</sup> 2011 Act, ss. 66(2)(a)-(b).

<sup>10</sup> 2011 Act, s. 69(2).

<sup>11</sup> 2011 Act, s. 89(2).

<sup>12</sup> 2011 Act, s. 90(1).

<sup>13</sup> 2011 Act, ss. 93(2) & 94(2).

<sup>14</sup> 2011 Act, s. 108(2).

<sup>15</sup> 2011 Act, s. 108(3).

<sup>16</sup> K. Norrie, *Children's Hearings in Scotland*, 3<sup>rd</sup> edn (Edinburgh: Sweet & Maxwell, 2013) 3.02.

<sup>17</sup> See, Kurlus, Hanson & Henderson, *Children's Reporter Decision Making*; K. Norrie, "Appellate Deference in Scottish Child Protection Cases" (2016) EdinLR 20(2) 149 – 177.

## *The Offence/Non-Offence Binary*

The grounds upon which children can be referred to hearings are diverse. There are seventeen such “section 67 grounds”<sup>18</sup>, which broadly relate to the standard of care afforded to the child, the risks posed to the child and the behaviours exhibited by the child. In 2017/18, 13,240 children and young people were referred to the children’s reporter<sup>19</sup>. Within that, 11,268 were referred on non-offence grounds (85.1%) and 3,060<sup>20</sup> were referred on offence grounds (23.1%)<sup>21</sup>. During that period, the most commonly-used grounds<sup>22</sup> were that: the child was suffering from a lack of parental care<sup>23</sup>; the child had committed a criminal offence<sup>24</sup>; and, the child had a close connection with a person who had carried out domestic abuse<sup>25</sup>.

The grounds contained in subsections 67(2)(a)-(i) & (k)-(q) of the 2011 Act are collectively referred to as “non-offence” or “care and protection” grounds, whereas the ground contained in section 67(2)(j) is singularly referred to as the “offence” ground. The offence ground stands alone in a procedurally distinct category, since a number of technical features apply uniquely to its operation. First, proof of the offence ground is required on the criminal standard<sup>26</sup>; whereas the civil standard of proof applies to all other care and protection grounds. Second, any application for proof of the offence ground must be made to a sheriff who would have jurisdiction if the offence allegedly committed were being prosecuted<sup>27</sup>. Third, the offence ground applies only to children who are of the age of criminal responsibility, currently set at 8 years<sup>28</sup>. This means that only those children aged 8 or over can be referred to a hearing on the ground of having committed a criminal offence<sup>29</sup>. These features constitute due process protections, intended to promote the civil rights of children and young people accused of committing criminal offences. Nonetheless, the technical peculiarities of the offence ground place it in a procedurally unique category<sup>30</sup>.

Technically, then, there is one “offence” and sixteen “non-offence” or “care and protection” grounds of referral. However, the designation of the grounds is a matter of some debate. A distinction is commonly drawn between “offence” and “non-offence” or “offence” and “care and protection” grounds. These terms are adopted interchangeably in official statistics<sup>31</sup>, literature<sup>32</sup> and research<sup>33</sup> to reflect the dualist

<sup>18</sup> 2011 Act, ss. 67(2)(a)-(q), discussed further below.

<sup>19</sup> SCRA, *Statistical Analysis 2017-18* (Stirling: SCRA, 2018) 5.

<sup>20</sup> This figure includes 1,088 children and young people referred on both offence and non-offence grounds.

<sup>21</sup> SCRA, *Statistical Analysis 2017-18*, 5.

<sup>22</sup> SCRA, *Statistical Analysis 2017-18*, 9.

<sup>23</sup> 2011 Act, s. 67(2)(a).

<sup>24</sup> 2011 Act, s. 67(2)(j).

<sup>25</sup> 2011 Act, s. 67(2)(f).

<sup>26</sup> 2011 Act, s. 102(3).

<sup>27</sup> 2011 Act, s. 102(2).

<sup>28</sup> Criminal Procedure (Scotland) Act 1995, s. 41.

<sup>29</sup> See, however, the Age of Criminal Responsibility (Scotland) Bill, which proposes to raise the age of criminal responsibility to 12 years.

<sup>30</sup> For discussion of the procedural distinctiveness of the offence ground, see, M. Donnelly, “The Kilbrandon Ethos in Practice: Contradictions in Scots Child Law” (manuscript submitted for publication).

<sup>31</sup> See, for example, SCRA, *Statistical Analysis 2017-18*.

<sup>32</sup> See, for example, Norrie, *Children’s Hearings in Scotland* (2013).

<sup>33</sup> See, for example, L. Waterhouse et al, *The Evaluation of Children’s Hearings in Scotland, Volume 3: Children in Focus* (Edinburgh: Scottish Office Central Research Unit, 2000).

analysis of the grounds of referral, as elucidated above. Kearney has observed that these terms are widely deployed in practice: albeit that they have no accepted legal definition or statutory basis<sup>34</sup>. Nevertheless, the offence/non-offence binary has emerged as the dominant analysis of (or way to describe) the dualist nature of the grounds of referral.

### *A False Dichotomy?*

The dualist understanding of the grounds of referral is inextricably linked to the unitary nature of the CHS, which deals in the same way with children who offend and children who require care and protection. The CHS was introduced in Scotland in 1971, under the Social Work (Scotland) Act 1968, as a result of recommendations made in the Kilbrandon Report<sup>35</sup>. The Kilbrandon Report's central normative finding was that the legal distinction between children who offend and children who require care and protection was artificial<sup>36</sup>, since the basic underlying similarities between such children "far outweighed" any relevant differences between them<sup>37</sup>. Offending behaviour was regarded as symptomatic of a failure in upbringing and the difficulties of all children "in trouble" were attributed to inadequacies in the home, family or school environments<sup>38</sup>. Offenders and non-offenders were thought to be "hostages to fortune"<sup>39</sup>. The conclusion was that both should be equally subject to a unitary and welfarist system of children's hearings<sup>40</sup>.

The reasoning of the Kilbrandon Report has since been vindicated by a wealth of empirical evidence<sup>41</sup>. For example, a key finding from the longitudinal Edinburgh Study of Youth Transitions and Crime, involving a cohort of 4,300 children and young people, is that their involvement in serious offending is strongly linked to prior experience of multiple aspects of vulnerability and social adversity<sup>42</sup>. More recently, Henderson et al. examined the cases of 100 children referred to the reporter on offence grounds<sup>43</sup>. Key findings were that: there were recorded concerns about the educational achievement, school attendance or behaviour of 53% of those children; 39% had disabilities and physical and/or mental health problems; and, 25% had been victims of physical and/or sexual abuse<sup>44</sup>. Such findings provide empirical support for the adoption of a unitary approach towards children who offend and

<sup>34</sup> B. Kearney, *Children's Hearings and the Sheriff Court* (London: Butterworths, 1987) 17.

<sup>35</sup> S. Asquith (ed) *The Kilbrandon Report: Children and Young Persons Scotland*, Children in Society Series (Edinburgh: HMSO, 1995). Hereinafter the 'Kilbrandon Report'. See also, C.J.D. Shaw, *Report on Children and Young Persons (Scotland)* (Edinburgh: HMSO, 1964) Cmnd. 2306.

<sup>36</sup> Kilbrandon Report, para.13.

<sup>37</sup> Kilbrandon Report, para.15.

<sup>38</sup> Kilbrandon Report, para.13.

<sup>39</sup> Kilbrandon Report, para.251.

<sup>40</sup> Kilbrandon Report, para.12.

<sup>41</sup> See, L. Waterhouse et al, *The Evaluation of Children's Hearings in Scotland, Volume 3: Children in Focus*; L. Waterhouse & J. McGhee "Children's Hearings in Scotland: Compulsion and Disadvantage" (2002) J. Soc. Wel. & Fam. L. 24(3) 279 – 296; L. Waterhouse, J. McGhee & N. Loucks, "Disentangling Offenders and Non-Offenders in the Scottish Children's Hearings System: A Clear Divide?" (2004) Howard J. Crim. Justice 43(2) 164 – 179; I. Gault, *Study on Youth Offending in Glasgow* (Stirling: SCRA, 2005).

<sup>42</sup> L. McAra & S. McVie, "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime" (2010) Criminol. Crim. Justice 10(2) 179 – 209.

<sup>43</sup> G. Henderson, I. Kurlus & G. McNiven, *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the children's reporter for offending* (Stirling: SCRA, 2016).

<sup>44</sup> Henderson, Kurlus & McNiven, *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the children's reporter for offending*, 4 – 5.

children who require care and protection: not least since the evidence suggests that they are often the very same children.

Today, the CHS reflects (or at least aspires to reflect) a unitary response to all children “in trouble”, regardless of the grounds upon which they are referred to children’s hearings. The need to safeguard and promote the welfare of the child throughout the child’s childhood is the paramount consideration of the children’s hearing<sup>45</sup>. However, as Norrie observes: “the unusual feature lies in the fact that it is the same tribunal, operating under the same procedural rules and having the same available disposals, that deals with all children identified as being in need of help”<sup>46</sup>. Arguably, the dualist analysis of the grounds of referral has developed in recognition of the integrated nature of the system: it is one which deals, in a unitary manner, with “offence” and “non-offence” referrals.

However, dualism refers to conceptual division. It assumes that there are two fundamental categories of things (in this case, grounds of referral) that oppose each other. In the philosophy of mind, dualism is the theory that body and mind are radically different kinds of things<sup>47</sup>. However, the theory and practice of the CHS suggests that children referred on offence and care and protection grounds are not fundamentally different kinds of children. Rather, the unitary nature of the CHS recognises that there is often more to unite than to distinguish such children. This challenges a dualist understanding of the grounds of referral which is underpinned by a (false) dichotomy between offence and non-offence concerns. Moreover, in light of the diversity of the grounds of referral contained in section 67 of the 2011 Act, the offence/non-offence binary is over-simplistic and is thus here rejected.

## The Tripartite Analysis

This article moves to present an original tripartite analysis of the grounds of referral to children’s hearings. In so doing, it identifies a discrete category of “conduct” grounds and argues that there are three major referral types in current practice, namely: care and protection, conduct and offence. An exploration of the tripartite nature of the grounds of referral highlights the significance of age and suggests that children can move through the three identified categories of grounds, as they get older. This section begins by adopting doctrinal analysis so as to identify the conduct grounds under the 2011 Act. Qualitative data in support of the tripartite analysis and child’s progression through the categories of grounds over time is subsequently presented.

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<sup>45</sup> 2011 Act, s. 25(2).

<sup>46</sup> Norrie, *Children’s Hearings in Scotland* (2013) para.1.04.

<sup>47</sup> See, Plato “Phaedo” in J. Cooper (ed) *Plato: Complete Works* (Indianapolis: Hackett, 1997); Aristotle in D.W. Hamlyn (trans) *De Anima* (Oxford: Clarendon Press, 1968); Descartes in J. Cottingham (trans) *Meditations on the First Philosophy* (Cambridge: Cambridge University Press, 1995).

## *Between Care & Protection and Offence: The Conduct Grounds*

A doctrinal reading of the seventeen grounds of referral, laid down in section 67 of the 2011 Act, reveals a natural division between those which relate to the care and protection of the child and those which relate to the conduct of the child. Indeed, it is possible to identify a discrete category of “conduct” grounds: all of which directly refer to the behaviour of the child him or herself. This includes the grounds of referral that: the child has committed an offence<sup>48</sup>; the child has misused alcohol<sup>49</sup>; the child has misused a controlled, or uncontrolled, drug<sup>50</sup>; the child’s conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another<sup>51</sup>; the child is beyond parental control<sup>52</sup>; and, the child has failed to attend school regularly without reasonable excuse<sup>53</sup>.

Note that the locus of these grounds is the child, whereas the locus of the care and protection grounds is generally the child’s parent(s) or some other adult(s). Compare, for example, the ground that the child has misused alcohol with the ground that the child has a close connection with a person who has carried out domestic abuse<sup>54</sup>. Alternatively, compare the ground that the child has failed to regularly attend school with the ground that the child is exposed to persons whose conduct is such that the child is likely to be abused or harmed<sup>55</sup>. Whilst it follows that the offence ground be included within the category of conduct grounds (since its locus is the child and it refers to his or her behaviour) the offence ground stands alone in a legally distinct category; due to the procedural features, outlined above, that apply uniquely to its operation. It is, therefore, more appropriate to class the conduct grounds as a sub-set of the care and protection grounds since, procedurally, their operation is identical. The conduct grounds are thus here defined as those grounds of referral contained in subsections 67(2)(k)-(o) of the 2011 Act.

In some jurisdictions, particularly those in North America, the conduct grounds would be regarded as status offences. Garlock describes status offences as: “those unique forms of deviant behaviour which are illegal only for minors”<sup>56</sup>. Status offences relate to behaviours which are technically non-criminal but are subject to criminal sanctions (or other forms of compulsory state intervention) due to the status of the child as a non-adult. Classic examples of status offences include underage drinking, truancy and absconding from home. Children are subject to status offences because the behaviours associated with them are regarded as “risky” and symptomatic of deeper underlying difficulties. Research has shown that engaging in such conduct can contribute to later offending and put children and young people at

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<sup>48</sup> 2011 Act, s. 67(2)(j).

<sup>49</sup> 2011 Act, s. 67(2)(k).

<sup>50</sup> 2011 Act, s. 67(2)(l).

<sup>51</sup> 2011 Act, s. 67(2)(m).

<sup>52</sup> 2011 Act, s. 67(2)(n).

<sup>53</sup> 2011 Act, s. 67(2)(o).

<sup>54</sup> 2011 Act, s. 67(2)(f).

<sup>55</sup> 2011 Act, s. 76(2)(e).

<sup>56</sup> P.D. Garlock “Wayward Children and the Law, 1820 – 1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court” (1979) Ga. L. Rev. 13(2) 341 – 447, 341.

increased risks of victimisation and mental health issues<sup>57</sup>. Moreover, there is evidence to support the notion that less serious forms of “delinquency” can precede the onset of more serious delinquent acts<sup>58</sup>. Equally, there is evidence to suggest that those who engage in status offending do not necessarily progress to more serious offending behaviour<sup>59</sup>.

Nevertheless, the conduct grounds largely resemble status offences. The key difference, in the context of the CHS, is that being referred to a children’s hearing on conduct grounds is not a criminal intervention and does not give rise to any criminal sanction or penalty. For the CHS is widely regarded as a welfarist system<sup>60</sup> and the Scottish courts have long denied that children’s hearing proceedings and their outcome are in any way criminal in nature. Rather, children’s hearings proceedings have consistently been classified as civil *sui generis*<sup>61</sup>. Notwithstanding the civil character of children’s hearings proceedings, it is doctrinally apparent that there exists a discrete sub-set of conduct grounds, which fall between care and protection concerns and offending behaviour.

In addition to the care-conduct divide identified within the grounds of referral, there is an interesting correlation between the age of the child and the three identified categories. The correlation is that younger children are typically referred to hearings on care and protection grounds, whereas older children and young people are typically referred on conduct and offence grounds. This general analysis is supported by statistical trends<sup>62</sup>. For example, in 2016/17 the average age was 6.4 years for those children referred on the lack of parental care<sup>63</sup> ground, 6.2 years for the close connection with a person who carried out domestic abuse<sup>64</sup> ground and 8.9 years for the victim of a Schedule 1 offence<sup>65</sup> ground<sup>66</sup>. By contrast, children referred on conduct grounds were more likely to be older. For example, in 2016/17 the average age was 13.3 years for the truancy ground, 14 years for the beyond parental control ground and 14.4 years for the misuse of alcohol ground<sup>67</sup>. Young people referred on the offence ground during that period were slightly older still: the average age being 14.6 years and 15 years being the modal age<sup>68</sup>.

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<sup>57</sup> J.P. Mersky, J. Topitzes & A.J. Reynolds “Unsafe at Any Age: Linking Childhood and Adolescent Maltreatment to Delinquency and Crime” (2012) *J. Res. Crime Delinq.* 49(2) 295–318; K.L. Henry, K.E. Knight & T.P. Thornberry “School Disengagement as a Predictor of Dropout, Delinquency, and Problem Substance Use During Adolescence and Early Adulthood” (2012) *J. Youth Adolesc.* 41(2) 156–66.

<sup>58</sup> D. Huizinga, R. Lober & T.P. Thornberry, *Urban Delinquency and Substance Abuse: Initial Findings* (Washington: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 1995).

<sup>59</sup> B.T. Kelley, R. Lober, K. Keenan & M. DeLaMarte, *Developmental Pathways in Boys’ Disruptive and Delinquent Behaviour* (Washington: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 1997); C. Sutton, D. Utting & D. Farrington, *Support from the Start: Working with Young Children and their Families to Reduce the Risks of Crime and Anti-Social Behaviour*, Research Brief 524 (London: Department of Education and Skills, 2004).

<sup>60</sup> C. Hallett & N. Hazel, *The Evaluation of Children’s Hearings in Scotland, Volume 2: The International Context: Trends in Juvenile Justice and Welfare* (Edinburgh: Scottish Office Central Research Unit, 1998); C. Hallett “Ahead of the Game or Behind the Times? The Scottish Children’s Hearings System in International Context” (2000) *Int. J. Law Policy Family* 14 31 – 44; C. McDiarmid “Welfare, Offending and the Scottish Children’s Hearings System” (2005) *J. Soc. Wel. & Fam. L.* 27(1) 31 – 42.

<sup>61</sup> *McGregor v. D* (1977) S.L.T. 182 at 185; *W v. Kennedy* (1988) S.L.T. 583 at 585; *S v. Miller* (2001) S.L.T. 531, per Lord President Rodger at paras.19-20.

<sup>62</sup> See, SCRA, *Statistical Analysis 2014-15* (Stirling: SCRA, 2015); SCRA, *Statistical Analysis 2015-16* (Stirling: SCRA, 2016); SCRA, *Statistical Analysis 2016-17* (Stirling: SCRA, 2017); SCRA, *Statistical Analysis 2017-18*.

<sup>63</sup> 2011 Act, s. 67(2)(a).

<sup>64</sup> 2011 Act, s. 67(2)(f).

<sup>65</sup> 2011 Act, s. 67(2)(b).

<sup>66</sup> SCRA, *Online Statistics 2016-17* (Stirling: SCRA, 2017) 10.

<sup>67</sup> SCRA, *Online Statistics 2016-17*, 10.

<sup>68</sup> Adapted from SCRA, *Online Statistics 2016-17*, 14.

A key finding of a study involving 482 children and young people with prior involvement in the CHS was that the grounds of referral changed over time: with the majority of those children being referred on offence and non-offence (or both) types of grounds at different points in their contact with the system<sup>69</sup>. This raises the potential that children move through the grounds of referral as they get older: entering the system on care and protection grounds, progressing to conduct grounds and graduating to offence grounds. The ideas here presented about the existence of a discrete class of conduct grounds and progression through the three categories of grounds over time are supported by qualitative data collected for the study on children's reporter decision making.

### *Three Referral Types: Empirical Support for the Tripartite Analysis*

The findings of the study on children's reporter decision making support the tripartite analysis of the grounds of referral. Interviewees confirmed the existence of a discrete sub-set of conduct grounds, under the broader umbrella of care and protection grounds. As such, the study supports the argument that there are three major referral types in the current practice of the CHS:

“Well, we colloquially call some of them the conduct grounds so we already naturally do that. You know, the new (m) ground specifically about the child’s conduct, the offence ground would obviously come under conduct and beyond control is in there too. Misuse of alcohol and drugs too – anything that kind of portrays a behaviour pattern.” (Reporter 2)

Some interviewees were of the view that there is a clear divide within grounds of referral between those that relate to the care of the child and those that relate to the conduct of the child:

“... I think there’s definitely a care/conduct divide.” (Reporter 23)

“I think there is a clear divide between care and conduct within the grounds... I mean I think there is a divide in them...” (Reporter 4)

“I think there probably is a divide in the grounds, yeah. There are the ones that more obviously focus on the child’s behaviour and the ones that obviously focus on the care of the child and what the child is being exposed to.” (Reporter 14)

However, in light of the unitary nature of the CHS, some interviewees did not think that issues of care and conduct could be meaningfully separated out. Rather, they believed that any divide within the grounds of referral more appropriately related to age.

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<sup>69</sup> Waterhouse, McGhee & Loucks “Disentangling Offenders and Non-Offenders in the Scottish Children’s Hearings System: A Clear Divide?” (2004) Howard J. Crim. Justice 43(2) 164, 170 – 171.

### *The Role of Age*

“Is there a divide? I wouldn’t say there’s a divide between behaviour and care... because it’s often the case that what was at 5 years a lack of parental care is now at 14 years an out of control child. So it’s all related.” (Reporter 9)

The vast majority<sup>70</sup> of interviewees agreed that care and protection grounds are typically applied to younger children, whereas conduct and offence grounds are typically applied to older children and young people:

“I think the divide is around about age. You’re talking about children under the age of 8 say would be more in terms of the care and protection grounds – lack of care, exposure to risk in terms of other people’s behaviour. And then beyond that, you’re looking at the child’s own behaviour – beyond control, school attendance, their own conduct whether they’re misusing substances or offending. There is a very clear divide.” (Reporter 6)

“I suppose depending on the age of the child there is perhaps a divide because when you’ve got smaller children it’s clear that a lot of it is a lack of care... but when you get them older then the presenting issues are more likely to be that they are beyond control or they are offending or they are taking drink and drugs. And then the focus tends to be on the child and their behaviour.” (Reporter 24)

Some interviewees indicated that, due to the age of the child, there could be a shift in decision-making focus from parent to child when reporters decide whether or not to arrange a children’s hearing based on grounds relating to the child’s own behaviour:

“So we do draw, to some extent, distinctions because normally by the time you’re specifically considering which ground to go forward with you’ve got sufficient information to be directing it. You usually know which way the referral’s going and where the emphasis is – is this a short fall in the parenting or is this perhaps a product of parenting in the past but a conduct issue by the child which needs to be dealt with at the moment?” (Reporter 2)

However, many interviewees stressed that care and protection concerns typically underlie conduct issues and, so, regarded it as inappropriate to draw any distinction between care and conduct referrals in practice. They generally viewed the child’s conduct as a manifestation of underlying issues relating to the child’s care. The study therefore suggested that depending on the child’s age, similar (or even identical) concerns could be dealt with under different types of grounds:

“I mean one example would be a child of 6 years old who’s referred to you from school for failing to attend school. Now a 6 year old, in most reporters’ opinions, will not be brought to a

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<sup>70</sup> 23/25 interviewees (92%).

hearing [on this ground] because you would expect a parent to ensure that the child is attending school. So you would bring that child on a lack of parental care. But if that child is then 12 years of age and the same thing's happening, you would take that child on a failure to attend school because they should be able to get ... to school without their mum or dad driving them there or whatever. So there is an age division." (Reporter 6)

In exploring these issues, some interviewees raised ideas about the location of responsibility within the grounds of referral themselves. It appears that responsibility for care and protection referrals is generally regarded as being located with parents, whereas responsibility for conduct referrals is regarded as being located with children:

"The ones mainly that I use are lack of care grounds and school attendance grounds. My view is always that if a child is young then it's a lack of care, whereas if the child is older and voting with their feet then it's school attendance...Because it's your responsibility as a parent to get your child to school up to the age of, probably I would say maybe 13 or 14 but thereafter it takes on a different quality." (Reporter 21)

"I always struggle with beyond control and lack of care. In those cases where a child is demonstrating behaviours which are indicative of a lack of care but you can't get the evidence to link it, I often feel very uncomfortable bringing a child to a hearing for being out with parental control. It's as though you're blaming the child and you know perfectly well it's not the child's fault." (Reporter 18)

Some interviewees directly addressed this interface between care and conduct, stressing that children's needs simply manifest differently with age:

"That divide is something that comes up quite regularly and I find it as well with out with parental control. If young people don't come to our attention until they're 14 and by that point they're out with parental control – four years earlier they could've been a lack of parental care. So sometimes you feel you're playing a bit of a blame-shifting game, which isn't always comfortable." (Reporter 7)

"The sad thing is that quite often, by the time you're dealing with a teenager, the need is so entrenched... The behaviour of the child is so extreme that it's completely shadowing the fact that, underneath, this is just a needy child." (Reporter 9)

Interestingly, one interviewee described conduct issues on the part of the child as amounting to a "grown-up" lack of parental care:

"There definitely is a correlation between the age of the child and the grounds. I mean if you're looking at a 14-year-old who's told his head teacher to F-off – he's beating up his fellow

students, he's vandalising in the community, he's told his mother she's a mad cow – then you're going to be bringing him to a hearing on out with control or behaviour grounds. Whereas, really, you could look at it all and think – this is a lack of care. But a 14-year-old will never be brought on a lack of care, which is sad. But the reporter will normally think – well, this is just a lack of care but a grown-up lack of care, that's all." (Reporter 24)

These ideas are notable because, in principle, children can be brought to hearings on any ground of referral.<sup>71</sup> Yet the findings of the study indicate that, in practice, children are referred to hearings on the basis of "age-appropriate" types of grounds. Whilst interviewees indicated that teenage children can be referred to hearings on care and protection grounds and that care issues generally underlie all referrals to the reporter, conduct grounds were perceived to be more common and, indeed, more appropriate due to the age and autonomy of the children concerned:

"Often a lack of parental care, the kind of causative agent for the child coming to the attention of services, might be more difficult to prove when a child is a teenager because the child at that point has some autonomy – they can vote with their feet or argue back or whatever. And therefore how do you bring that child into the system if they have significant needs and compulsion might be required? And so you're then left looking at beyond control, for example. But you can take that right back to – well, he's beyond control only because he didn't have the appropriate boundaries and provision of care in the early years." (Reporter 3)

Some interviewees linked these ideas to the "visibility" of concerns about older children and young people; supporting the general view that children's needs simply present themselves in different ways, as they get older:

"I suppose it's different manifestations of probably the same problems and it's to do with the visibility of those problems. So when children are younger it's health visitors and primary schools that are reporting concerns. Once they get a wee bit older, it's the police that are bringing them home every other night but it's the same underlying issues – you're just getting a different manifestation." (Reporter 7)

"I think the conduct grounds possibly do become more relevant because that's what children's services are seeing in adolescents who aren't already known to the system. And it may be that the home is something that people haven't had sight of, they haven't been near." (Reporter 4)

The study suggested strongly that issues of care and conduct cannot, and should not, be separated out within the practice of the CHS. Without exception, interviewees highlighted the perceived underlying similarities between children referred on the basis of care and conduct grounds. In fact, interviewees

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<sup>71</sup> Except the offence ground which is limited to children of the age of criminal responsibility and the truancy ground which is limited to children of school age.

indicated that they can be exactly the same children, simply at a later developmental stage and older chronological age:

"I think there's a division between older children and younger children but I wouldn't say that necessarily relates to behaviour and care. Because I think that in our work, those things go hand-in-hand – it's the essence of what we do. And quite often beyond parental control and lack of parental care go hand-in-hand... They're the flip side of each other and are mutually causative." (Reporter 13)

"Well I suppose a lot of the time I link care to conduct, and know my other colleagues do as well. So the reason that the child is behaving in a particular way... is because of the lack of care stuff." (Reporter 21)

Interviewees appeared to adopt a holistic approach towards conduct referrals and highlighted the artificial nature of any care/conduct divide. Such division was viewed as arbitrary in light of children's common underlying needs and prior experiences. Some interviewees cited the ethos of the system to support the adoption of a unitary approach between care and conduct referrals in practice:

"I suppose in one reading there can be a divide in the grounds but I think that the whole ethos of the system is that it's all about addressing the child's needs – whether their needs are being presented because of their own behaviour or because of someone else's behaviour. It's still all about addressing that child's particular needs at the particular time, regardless of the ground." (Reporter 19)

Whilst the study identified a discrete category of conduct grounds, most interviewees regarded any practical divide or distinction between care and conduct referrals as artificial and inappropriate. Interviewees generally acknowledged that there is a divide within the grounds of referral relating to age, whereby younger children are typically referred on care and protection grounds and older children and young people on conduct grounds. Reliance on conduct grounds was said to be related to the age and autonomy of children: a slight shift in focus and emphasis was also detected in relation to reporters' treatment of conduct referrals. However, most interviewees rejected any shift in focus and imputation of responsibility from parent to child, emphasising the contradictions inherent within such an approach. Rather, interviewees advocated a holistic approach and stressed the need for a unitary response to all referrals in practice. These findings suggest that reporters observe and uphold the Kilbrandon ethos of the CHS. However, simultaneously, findings indicate that children's reporters can struggle to navigate the autonomy of older children and young people who present with behavioural problems that are fundamentally rooted in historic, or on-going, care and protection concerns.

## *An Escalation in Referral Type over Time: The Progression from Care to Conduct Grounds*

A further key finding relates to the movement of children through the three categories of grounds over time. A majority<sup>72</sup> of interviewees identified a typical referral pattern or trajectory, which was perceived to involve a progression from care grounds to conduct grounds to offence grounds:

“You can see quite clearly that the parenting hasn’t been good, in which case it can go from lack of parental care quite quickly to beyond control and ultimately into offending... Sadly it’s a common progression.” (Reporter 17)

“You see the young person growing up and you see that they’ve been brought into the system on care and protection grounds and they’ve progressed to not attending school, which degenerates into out with control, which degenerates into abusing alcohol or other controlled substances, which degenerates into criminal offences. So I can absolutely see that pattern and it’s a crying shame.” (Reporter 8)

The study thus suggested that “vulnerable” children (initially referred on care and protection grounds) can transform into “troublesome” children (later referred on conduct and offence grounds) during their contact with the CHS. Interviewees suggested that the progression from care to conduct to offence grounds was directly related to age. In this way, the study found that referral type generally escalates with age:

“I think that for the vast majority of children who are offending, the care grounds were there when they were younger, maybe at 2, 3 or 4. And now at 13, 14 or 15, the same young person is breaking into houses or stealing cars.” (Reporter 24)

“The kids that offend quite often will come from the families that are well known to you and they’ll quite often be the same kids who were referred to you 5 or 6 years ago on care and protection grounds. And now, here they are as teenagers being referred to you on offence grounds – so it’s quite clear that there’s a direct correlation between care and protection and offending.” (Reporter 6)

The views of interviewees here served to underscore the similarities between children referred to children’s hearings on the basis of different grounds of referral. As elsewhere, the study suggested that they can be exactly the same children who are simply at a different developmental stage and chronological age. As such, interviewees generally regarded the different types of referral as merely

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<sup>72</sup> 13/25 interviewees (52%).

indicating different manifestations of the similar problems: the only salient difference being that children's needs present themselves differently as they get older:

"When children are older it's more likely that they are presenting as beyond control, or they are failing to attend school or they need extra special measures or they are misusing drink and drugs or they are offending. The unfortunate thing is that if you've got children who've been in the system for a lack of care for ages and then they've morphed into that, you've got to ask yourself – why?" (Reporter 24)

These findings raise fundamental questions about the capacity of the CHS to respond effectively to children "in trouble." The prevailing view, that the same children who were originally referred on care and protection grounds are later referred on conduct and offence grounds, indicates that the system did not effectively intervene and meet the needs of those children in the first place. The mere fact that children are perceived to remain in contact with the CHS throughout their childhood, and are thought to be subject to repeated referral cycles over time, further calls into question the system's capacity to improve outcomes for such children.

These ideas were directly addressed by some interviewees, who suggested that those children who end-up being referred on offence grounds are the ones who have been "missed", or for whom prior interventions have failed:

"I think there are a lot of similarities. I think a lot of children who offend were children who needed care and guidance earlier on and who perhaps, unfortunately, have been missed or it's been attempted and it hasn't been successful." (Reporter 5)

Some interviewees discussed the availability of resources and suggested that the capacity of the CHS to intervene successfully, in order to prevent the transformation of care referrals into conduct referrals, was generally undermined by a lack of resources:

"I mean I think the frustration is that those of us who work in the system are very proud of it and feel very strongly about it. It is so unique to Scotland and it is one of the few things that we should be able to hold our heads up high about. But I don't think that it's well-resourced and I think there's a real problem with that. A lot of things depend upon the integrity of the system and we can't ensure that unless it's properly resourced." (Reporter 11)

Other interviewees questioned the ability of the system to respond effectively to children whose needs manifest through their own conduct. In particular, a few interviewees were of the view that the CHS was unable to change patterns of behaviour and improve outcomes for children who offend:

"I think as a reporter perhaps offence grounds are more pessimistic... because, to generalise, they'll normally be older boys and there's normally a string that's just reached a limit. And the

difficulty is in knowing what it's achieving because if you keep bringing offence grounds – what change is it making to the child, the service that the child's receiving, to the child's engagement and to changing patterns of behaviour?" (Reporter 23)

Interestingly, these interviewees linked the perceived trajectory from care to conduct directly to the Kilbrandon ethos of the CHS:

"I think there's a very, very strong trajectory. And I think it's all part of the same picture, which I suppose goes right back to Kilbrandon and identifies that nothing has changed... The baby who is born to a chaotic family is so likely to end up the child sitting in a hearing for offences..." (Reporter 11)

"Oh, there's absolutely a link. I mean I think that's where Kilbrandon is still hugely relevant and I think it's great that this system has stuck with that because there were times we thought... things might move away from that. So I think the fact that the new Act still endorses that one process is a good thing and I think it's absolutely right." (Reporter 23)

The aspiration of the Kilbrandon Committee was to eliminate juvenile offending<sup>73</sup>. It is clear that this aim has not been fully realised in practice. Rather than resolving children's difficulties and addressing their needs, the system appears to be perpetuating them; resulting in different manifestations of similar underlying issues as children get older. As such, the study suggested that referral to the CHS has a largely reinforcing effect, whereby care referrals can evolve into conduct referrals, which can ultimately escalate into offence referrals. This, in turn, questions the ability of the CHS to effectively intervene in order to change the course of the child's trajectory from care to conduct.

## Why the Tripartite Analysis Matters

This article has posited a tripartite analysis of the grounds of referral to children's hearings. It has presented qualitative data in support of this analysis, which (amongst other things) confirms the existence of a discrete category of conduct grounds; and, thus sustains the proposition that there are three major referral types in current practice. It is crucially important that children and young people's experiences of the CHS are accurately recognised and reported. Statistics, literature and research tend to approach the system in terms of a simplistic offence/non-offence binary. This article has rejected the traditional dualistic understanding of the grounds of referral and shown that there are, more accurately, three categories of grounds: care, conduct and offence.

The tripartite analysis of the grounds of referral is practically significant for a number of reasons. First, it highlights the role of the child's age in influencing how reporters reach their decision on the

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<sup>73</sup> Kilbrandon Report, para.12.

appropriate ground of referral on which to proceed. Second, it suggests that children can move through the different categories of grounds over time such that referral type generally escalates with age. Third, in light of that escalation, it calls into question the capacity of the system to effectively intervene and address the needs of children and young people who come into contact with the CHS. Fourth, it identifies the need for future research to quantitatively investigate the perceived trajectory from care to conduct to offence referrals over time.

### *The Significance of the Child's Age*

The study established a correlation between the appropriate type of ground and the age of the child. The vast majority of interviewees confirmed that young children are typically referred on care and protection grounds, whereas older children and young people are typically referred on conduct and offence grounds. These general trends are reinforced by statistics collected by SCRA, discussed above.

Findings here suggest that the issue is perhaps not one of care versus conduct but, rather, younger children and older children. Findings indicate that children's reporters apply different types of grounds to children of different ages. This was found to be rooted in an effort to reconcile the simultaneous vulnerability and autonomy of older children and young people who come into contact with the CHS. It was also said to be linked to the visibility of concerns about children in adolescence, as well as the different ways in which children's needs manifest as they get older. Findings thus support the idea of "age-appropriate" grounds of referral and suggest that similar concerns can be dealt with under different grounds, depending on the age of the child concerned. This is exemplified by the interface between the lack of parental care and beyond parental control grounds and the lack of parental care and truancy grounds, discussed by a number of interviewees above.

Findings ultimately support a unitary approach towards all referrals types in that most interviewees rejected any practical distinction between care and conduct. The only relevant difference was said to be that children referred on conduct and offence grounds are at an older age and later stage than those referred on care and protection grounds. However, the study supports a theoretical distinction in that the existence of a discrete category of conduct grounds was empirically confirmed. Even those interviewees who did not accept any care/conduct division within the grounds of referral themselves, informally referred to "conduct grounds" during their interviews. Explicitly and implicitly, then, findings are supportive of the tripartite analysis of the grounds of referral.

### *The Child's Movement through the Grounds over Time*

In light of the tripartite analysis, the study suggested that children can move through the different categories of grounds over time. In this way, referral type was generally found to escalate with age. A majority of interviewees identified a typical referral pattern or trajectory, which was perceived to involve a progression from care to conduct to offence referrals, as children in contact with the system

get older. This suggests that referral patterns within the CHS are not static, echoing Waterhouse et al.'s finding, discussed above, that children can be referred on different grounds at different points in their contact with the system<sup>74</sup>.

Crucially, however, the perceived escalation in referral type presupposes that children remain in contact with the CHS for prolonged periods during their childhood; entering the system on care and protection grounds, progressing to conduct grounds and ending up on offence grounds. This perception is supported by findings from Henderson et al.'s research, introduced above.<sup>75</sup> Of the 100 offence cases examined, 75% of children had been involved with services for at least 1 year and over 50% had service involvement for at least 5 years. In addition, 75% had previous referrals to the reporter; the vast majority on non-offence grounds<sup>76</sup>. Taken together, these findings question the ability of the CHS to effectively intervene before care issues experienced by the child manifest as conduct issues exhibited by the child.

### *The Capacity of the System to Effectively Intervene*

The perceived escalation in referral type and trajectory from care to conduct calls into question the capacity of the CHS to effectively intervene and address the needs of children and young people "in trouble". The study suggested that referral to the CHS is thought to have a reinforcing effect, whereby care referrals can progress to conduct referrals, which can escalate to offence referrals. Some interviewees were sceptical about the ability of the system to change patterns of behaviour and improve outcomes for children and young people whose (unmet) needs manifest through their own behaviour, including but not limited to offending behaviour.

Findings here suggest that it might be better not to formally intervene at all. McAra and McVie have undertaken the only major longitudinal study of children and young people dealt with in the CHS, discussed above.<sup>77</sup> Using data from the Edinburgh Study of Youth Transitions and Crime, McAra and McVie found that certain categories of children who offend (specifically those classed as "persistent offenders") were "recycled" within the CHS by being made subject to repeated cycles of referral over time<sup>78</sup>. The outcome for these children was that their desistance from offending was inhibited<sup>79</sup>. In other words, the study found that referral to the CHS perpetuates, rather than resolves, offending behaviour. As McAra and McVie point out:

"Taken together, our findings indicate that the key to addressing offending may lie in minimal intervention and maximum diversion: doing less rather than more in individual cases may

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<sup>74</sup> Waterhouse, McGhee & Loucks "Disentangling Offenders and Non-Offenders in the Scottish Children's Hearings System: A Clear Divide?" (2004) *Howard J. Crim. Justice* 43(2) 164, 170 – 171.

<sup>75</sup> Henderson, Kurlus & McNiven, *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the children's reporter for offending*.

<sup>76</sup> Henderson, Kurlus & McNiven, *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the children's reporter for offending*, 4 – 5.

<sup>77</sup> See, McAra & McVie, "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime" (2010) *Criminol. Crim. Justice* 10(2) 179.

<sup>78</sup> McAra & McVie "The Impact of System Contact on Patterns of Desistance from Offending" (2007) *Eur. J. Criminol.* 4(3) 315, 339.

<sup>79</sup> McAra & McVie "The Impact of System Contact on Patterns of Desistance from Offending" (2007) *Eur. J. Criminol.* 4(3) 315, 339.

mitigate the potential for damage that system contact brings... More significantly, our findings provide some support for the international longitudinal research... in particular, they confirm that repeated and more intensive forms of contact with agencies of youth justice may be damaging to young people in the longer term...Such findings are supportive of a maximum diversion approach.”<sup>80</sup>

A similar process of perpetuation was perceived to apply by interviewees in the present study, whereby it was suggested that the same children could be “recycled” through the CHS over time. Rather than effectively addressing the needs of such children, it appears that those underlying needs can persist but manifest differently as the children concerned get older. This was found to be characterised by an escalation in referral type and progression from care to conduct to offence grounds over time. The perceived trajectory suggests that an approach based on minimum intervention and maximum diversion may well be appropriate, not least to prevent the transformation of care referrals into conduct referrals over time.

Findings are thus supportive of strategies which aim to divert children and young people away from the CHS, wherever possible, so as to avoid the damage caused by system contact. This is largely in keeping with the wider policy context in Scotland. Of particular relevance is the Whole System Approach for Children and Young People Who Offend (“WSA”)<sup>81</sup>. The WSA was introduced in 2011 and aims to provide timely and effective intervention so as to minimise the number of children and young people who come into contact with formal processes, such as the CHS. This is reflected by Early and Effective Intervention (“EEI”).

EEI is a national framework for working with children and young people involved in offending behaviour<sup>82</sup>. It seeks to divert such children and young people away from the statutory system and reduce referrals to the children’s reporter. The total number of children and young people referred to the children’s reporter has been declining for the past 10 years<sup>83</sup> and the number of children referred on offence grounds has reduced by 63% over the past 5 years<sup>84</sup>. As Lightower et al. note, the reduction in offence referrals may reflect broader falls in young people being charged with offences, as well as the influence of policy and practice initiatives like EEI.<sup>85</sup>

An evaluation of the WSA found that there had been significant falls in referral to the children’s reporter on both offence and non-offence grounds in three case study areas examined, with the reduction in

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<sup>80</sup> McAra & McVie “The Impact of System Contact on Patterns of Desistance from Offending” (2007) Eur. J. Criminol. 4(3) 315, 336 – 338.

<sup>81</sup> See, Scottish Government, *Preventing Offending by Young People: A Framework for Action* (Edinburgh: Scottish Government, 2008).

<sup>82</sup> See, Scottish Government, *Early and Effective Intervention – Framework of Core Elements* (Edinburgh: Scottish Government, 2015).

<sup>83</sup> SCRA, *Statistical Analysis 2017-18*, 5.

<sup>84</sup> Henderson, Kurlus & McNiven, *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the children’s reporter for offending*, 11.

<sup>85</sup> C. Lightower, D. Orr & N. Vaswani, *Youth Justice in Scotland: Fixed in the past or fit for the future?* (Glasgow: Centre for Youth and Criminal Justice, 2014) 4.

offence referrals being most pronounced<sup>86</sup>. However, the evaluation also found that diversion outcomes varied across the three case study areas<sup>87</sup>. It is unlikely that the effects of policy initiatives like the WSA and EEI will be fully known for a number of years. Nevertheless, there has been a clear policy shift towards diversion from formal systems and processes in Scotland.

Whilst it is true, then, that the policy scheme facilitates the diversion of children who offend from the CHS, the present study promotes the broader use of diversionary strategies when children and young people first come into contact with the system as a result of care and protection concerns. Findings indicate that children and young people should be diverted from the CHS at the earliest possible opportunity, in order to prevent a progression from care to conduct to offence grounds over time. Crucially, the study suggests that early diversion (perhaps more so than early intervention) is key to disrupting the child's trajectory from care to conduct referrals within the CHS.

### *The Need for Future Research*

Finally, the tripartite analysis of the grounds of referral highlights the need for further research. In particular, the child's movement through the three identified categories of grounds over time merits closer examination. Findings here presented are qualitative in nature in that they are based entirely on the views of children's reporters. The identified progression from care to conduct to offence grounds over time ought to be investigated using quantitative research methods. Such research would add to the limited evidence-base on outcomes for children and young people in the CHS and develop greater knowledge and understanding of the tripartite nature of the grounds of referral.

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<sup>86</sup> K. Murray, P. McGuiness, M. Burman & S. McVie, *Evaluation of the Whole System Approach to Young People who Offend in Scotland* (Edinburgh: Scottish Government/Scottish Centre for Crime and Justice Research, 2015) 18 – 21.

<sup>87</sup> Murray, McGuiness, Burman & McVie, *Evaluation of the Whole System Approach to Young People who Offend in Scotland*, 32 – 33.