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Young People in Conflict with the Law in Scotland- 50 Years after the Kilbrandon report. What does contemporary policy and practice tell us about our progress since and about the legacy of Kilbrandon?

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Abstract

I would like to thank the Sutherland Trust for the invitation to give this lecture. It provides an opportunity to celebrate two great figures in recent Scottish history whose contribution to human service has been significant – Jock Sutherland and Lord Kilbrandon on the 50th anniversary of the Kilbrandon Committee report.

Keywords

Young people, law in Scotland, Kilbrandon legacy, Sutherland Trust

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Introduction

I would like to thank the Sutherland Trust for the invitation to give this lecture. It provides an opportunity to celebrate two great figures in recent Scottish history whose contribution to human service has been significant – Jock Sutherland and Lord Kilbrandon on the 50th anniversary of the Kilbrandon Committee report (SHHD, 1964, Cmnd 2306). I suspect there are many crossovers between Jock Sutherland's thinking and the influence of the Kilbrandon report in relation to young people in conflict with the law. I will try to address the question, 50 years on: 'What does contemporary policy and practice tell us about our progress and the legacy of Kilbrandon?'

While not a practising psychoanalytic psychotherapist, nor an expert in Jock Sutherland's work, I am aware that Sutherland's final years as medical director at the Tavistock Institute and his return to Scotland overlapped with major changes in social legislation and

in human service practice. Both Sutherland and the Kilbrandon Committee were of their time. For me they typified optimism in the developing social sciences at a time when issues of cultural identity were emerging in post-war Scotland.

Jock Sutherland's work can be viewed as founded on a basic tenet or belief in the healing power of social groups and on the importance of social relatedness -*man as person is sustained by social relatedness* (Sutherland, 1966 p.343) – which I suspect is reflective of his view of the importance of collective responsibility for children's upbringing. Whilst best known for his psychoanalytical thinking, Sutherland was also well known for his systemic thinking. Social systems were part of a central organising principle in his work so that while his psychoanalytic perspective might have led him to recognise the impact of early environmental failure impacting on a person's internal world, his systemic view supported an optimism that these failures could be counteracted by a healthily functioning family and having a positive social group system (Holmes, 1996). In many ways Sutherland's ideas promote holistic approaches to the development of a positive self and reflect a vision of understanding notions of the 'whole' child or person and ideas of 'whole systems' approaches which were central to the promotion of individual and collective wellbeing that underpinned the Kilbrandon Committee's thinking. These are also key concepts in current policy through *Getting it Right for Every Child* (Scottish Government, 2008).

Sutherland's ideas resonate with key principles emerging from Kilbrandon. The committee was established (in 1961 and reported in 1964) to look specifically at ways of dealing with juvenile delinquency – children and young people in conflict with the law. The committee concluded that it made little sense to do this without looking at the upbringing of all children, particularly all children in adversity whose:

> *…distinguishing factor is their common need for special measures of education and training, the normal upbringing processes for whatever reasons having failed or fallen short* (The Kilbrandon Report 1995, p.77).

Kilbrandon's optimistic vision for future provision was viewed as having application for all social and human service aimed at the promotion of social wellbeing for all citizens. This presumption was indeed adopted in the reorganisation of social work services and in the provisions of the *Social Work (Scotland) Act 1968* which placed a broad, all-encompassing duty on local authorities to *promote social welfare* (Section 12) which is still in force today. Kilbrandon's ideas reflected a wider 'spirit of the age' in respect of welfare and collectivist thinking in post war Britain and, in particular, in respect of a cultural stirring within Scotland.

The 1964 Kilbrandon report is well remembered and valued to the point that it was re-issued in 1995. However, I suspect most have forgotten the subsequent Kilbrandon Commission report. Harold Wilson's government set up a Royal Commission on the constitution in 1969, initially chaired by Lord Crowther, and following his death chaired to its completion by Lord Kilbrandon. This committee was established in response to growing demands for Scottish independence or home rule, which had come into public focus after

the ground-breaking by-election wins of the Scottish National Party's Winnie Ewing in Hamilton in 1967.

In many ways Kilbrandon was a crucible of ideas and influences of its time and the subsequent developments could be described as a cultural project on the nature of Scottish society. In this sense there appear to be many parallels between the 1960s and 1970s and the period from 2007 to the present time. We are again in the midst of what can be described as a cultural project aimed at developing a vision for Scotland in the modern world. Whatever follows the referendum in September 2014, the same questions feature strongly today as then:

- What kind of society do we want to live in?
- What kind of upbringing and future do we want for our children?

Every generation has to learn or relearn the values, policies and practice of previous generations: whether to own, endorse and progress them, or indeed to challenge, change or abandon them or even to reinvent them. A culture of progressive learning, however, is not guaranteed and it could be argued, particularly in relation to social work, that a culture of 'forgetfulness' has prevailed since the late 1970s with stop-start policies that have seen progression and regression. So the 50th anniversary of Kilbrandon marks an appropriate time to take stock and review the kind of system we have today for dealing with vulnerable yet difficult young people, particularly those involved in serious and harmful crime and what our current response to young people in conflict with the law tells us about the legacy of Kilbrandon and contemporary thinkers like Jock Sutherland and about Scottish society today.

Youth Justice in Scotland: A Distinct Philosophy?

The *Social Work (Scotland) Act 1968,* it was argued, introduced a distinctive approach to youth justice in Scotland in 1971 which has lasted for over 40 years (Lockyer and Stone 1998). Scottish youth courts were disbanded and replaced by lay decision-making tribunals – Children's Hearings – to deal with children at risk of abuse and neglect and children who offend, within a unified welfare system. A general principled duty of promoting wellbeing, individual and collective was incorporated within the 1968 Act.

In regard to young people in trouble with the law, Kilbrandon recommended an extra-judicial system of Children's Hearings (with the intention of decriminalising young people) and the re-organisation of social services under the umbrella of all-purpose integrated departments with responsibility for child care and protection and youth justice alongside responsibilities previously undertaken by the national probation service, which was also disbanded. Commentators described the proposed changes not simply as a reorganisation of provision but as paradigmatic change (Bruce, 1995)[1].

Kilbrandon took the view that the criminal justice paradigm was unsuccessful in its attempts to compromise between crime, individual responsibility and punishment on one

[1] Paradigm - a model or set of assumptions, concepts, values and practices that constitutes a way of viewing social reality.

hand and the best interests of the young person and shared responsibility on the other and that a new approach or a new paradigm was needed. It viewed the criminal process as having two fundamental functions: the adjudication of the legal facts - whether or not an offence had been established beyond reasonable doubt - requiring the skills of a professional judge, and decisions concerning disposal once the facts had been established, for which criminal judges, it suggested, had no particular claim on expertise. Accordingly, in what Lord Hope was later to describe as the 'genius of Kilbrandon' (The Kilbrandon Report,1995:vii) the new Scottish system separated adjudication from disposal – the former continued as the responsibility of criminal courts and the latter the responsibility of the welfare tribunal of trained community representatives (panel members). If the young person and their family accept the 'grounds', i.e. that an offence has been committed, there is no need for legal adjudication. Consequently, acceptance of the offence at the opening of a hearing allows it to deal with the disposal – the 'What should we do about it?' part as a welfare tribunal geared to acting in the best interests of the young person, on the assumption that this *is* in the best interests of the community as a whole. As a consequence, a children's hearing has no power to determine questions of innocence or guilt. The ambition of decriminalising children and young people through the system resulted in a low age threshold for entry for offence reasons at age eight which remains the current age of criminal responsibility in Scotland, one of the lowest in the world.

It was proposed that the new system should operate within a social education rather than criminal justice paradigm, with a clear commitment to positive upbringing and the best interest of the child as 'paramount' principles up to the age of 16 and to a lesser extent up to 18. The idea was that each local authority would establish an all-purpose Social Education Department to support integrated provision. The promotion of social education – better known as social pedagogy in Northern Europe - as a new paradigm for practice was considered to draw directly from Scotland's European traditions and connectedness. This is also reflective of a very clear 'cultural' dimension and a determination to do something 'different', something Scottish, where youth courts and probation departments were considered Anglo-American institutions and the search was on for Scottish solutions.

Another critical theme running through the report was the issue of responsibility. Nowhere does Kilbrandon suggest that children and young people should be seen to have no responsibility for their actions and its consequences, for themselves or others, nor that they should avoid being held to account as if they had no moral reasoning. Kilbrandon simply argued that responsibility for the behaviour of children has to be a matter of partnership between the young person, their parents and the state – in other words child upbringing is a collective responsibility – and failure in upbringing, represented by criminality, is a collective failure. Similarly, in regard to the response of the system, the report did not rule out the possibility of punishment as an appropriate response, but simply argued that there would need to be evidence that state punishment could be applied in ways that promoted the best interest of the child. Kilbrandon concluded that the concept of shared responsibility for the upbringing and behaviour of children is incompatible with criminal justice principles which demand individual accountability and responsibility – individuals as singly, solely and fully responsible for their actions.

The social education approach, often described as visionary, was certainly well ahead of its time in public policy in the UK and in many respects was a forerunner to the provisions of the *United Nations Convention on the Rights of the Child* (UNCRC) (1989) and its associated guidance which focus, among other things, on wellbeing as a paramount consideration; extra-judicial solutions and socio-educational rather than punitive interventions.

However, this attempt at a paradigmatic shift was dealt a major blow from the outset. The proposal to establish a Social Education Department was shelved in favour of social work departments as distinct and separate from education. Some have argued that there was insufficient confidence, at the time, that a radical European approach to child rearing and upbringing would be well nurtured by Scottish educational institutions. More damaging in relation to the young people in conflict with the law, however, was that within a matter of a few years of the system's introduction, a key principle at the heart of the approach was undermined by UK legislation, the 1974 *Rehabilitation of Offenders Act*, which introduced a provision that offence grounds accepted at a children's hearing for the purpose of the Act would be treated as a criminal conviction:

> *…the acceptance, establishment (or deemed establishment)] of that ground shall be treated for the purposes of this Act (but not otherwise) as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence* (RoO, 1974 section 3).

At the time, those in the know in Scotland may have considered this a technical change rather than a fundamental change in principle. I can find no commentary from the time. However, my own experience as a practitioner, manager and academic was that for over 20 years young people continued to be informed that there would be no recorded conviction associated with their acceptance of an offence ground and the understanding was that all records would be subsequently expunged. This was not the case. It was really only in the risk-averse world of the 1990s with its growth in demand for police checks, that many adults discovered they had recorded previous convictions, some from as young as eight, when they had understood they had no criminal record. I suspect this particular change marked, not simply the undermining of, but the beginning of the end of the cultural project.

The evidence for this might lie with the *Children (Scotland) Act 1995* which was introduced by a Conservative administration to bring Scotland closer in line with UNCRC. The fact that the Scottish system based on Kilbrandon principles needed to be brought in line with UNCRC suggests a major drift from those principles. The Act, incidentally, introduced a provision at Section 16 to over-ride the best interests of the child in the public interest.

By 2002, following a review of the children's hearing system, the Scottish 'New Labour' administration in the Scottish Parliament re-introduced criminal youth courts and made provision for anti-social behaviour orders (ASBOs) and criminal antisocial behaviour orders (CRASBOs) for children, compulsory parenting orders, and opened consultation on the

option of re-establishing a national probation service. Did this mark the death of the Kilbrandon legacy?

I would argue 'not quite' but Scottish policy was becoming further distanced from Kilbrandon and indeed from the principles of UNCRC and much more aligned with other jurisdictions in the UK. While the principles espoused by Kilbrandon and the 1968 *Social Work Scotland Act* continued to hold some sway over the policy discourse and claims of a distinctive Scottish approach to young people in trouble with the law, this was not matched by reality and was more often rhetorical than substantive. The social educational or social pedagogic practice paradigm remained undeveloped.

By 2006 Scotland had gained an unenviable international reputation as having one of the lowest ages of criminal responsibility in the world, among the highest detention rates for young people under 18 in the western world, and the highest in Scotland for a generation. It was a country that locked female children in secure accommodation because of their risky, but not necessarily criminal, behaviour and routinely prosecuted young people from the age of 15 in adult criminal proceedings. It is difficult to see the Kilbrandon legacy in these practices and outcomes.

The development of international and European standards have changed the landscape of youth justice since 1989 and have set explicit benchmarks for policy and practice for young people in conflict with the law and a baseline for considering what our response to young people tells us about Scotland. International standards set by the UNCRC and its associated guidance and more recently *European Rules on Juvenile Offenders subject to Sanctions and Measures* (CM/Rec 2008 11E) (Council of Europe, 2009) and European *Guidelines on Child-Friendly Justice* [CJ-S-CH (2010) 3 E] (Council of Europe, 2010) have highlighted global challenges that apply to all jurisdictions in establishing 'child-centred' policy and practice for dealing with young people under the age of 18 years who are in conflict with the law.

The near-universal ratification of the UNCRC has placed importance on establishing a level playing field for all children and young people with its emphasis on the need to deliver progressive universal provision and early social intervention measures aimed at positive upbringing. In relation to youth crime, the UNCRC and its associated guidance, the *Beijing Rules,* 1985 (United Nations General) Assembly, 1985); *Directing Principles of Riyadh*, 1990 (United Nations General Assembly, 1990a); the *Havana Rules,* 1990 (United Nations General Assembly, 1990b); the *Tokyo Rules,* 1990 (United Nations General Assembly, 1990c); and the *Vienna Guidelines,* 1997 (United Nations General Assembly, 1997), stress the importance of

- wellbeing as a paramount consideration;
- an age of criminal responsibility based on maturity;
- socio-educative interventions rather than punitive ones,
- extra-judicial solutions;
- deprivation of liberty only as a last resort; and
- safeguards for the use of alternatives to custody.

This is almost a replica, 25 years later, of the Kilbrandon agenda, and the requirements of UNCRC and its associated guidance promote a social education practice paradigm. Despite this there seems limited evidence of a consensus or shared paradigm for (social work) practice across jurisdictions and few, if any jurisdictions, have achieved the ambition set by UNCRC and its associated standards. As a consequence (social work) youth justice practitioners find themselves operating between shifting and often conflicting paradigms and systems within their locality, which is equally true of Scotland as elsewhere.

Many western countries pursued youth crime policies during much of the 20th Century which eroded the distinction between the young person or child in need and the delinquent youth. In the early 21st Century, welfare-oriented approaches were often superseded by punitive law and order ideologies driven by politicians under pressure to be seen to be tough on crime (Brown, 2005). The predominance of punishment as a cultural response, for example, has often meant that the public framing of provision for responding to youth crime has been dominated by a language of punishment without consideration of how best to respond to the characteristics and circumstances of the young people in ways that are likely to result in positive change and as a consequence to the wellbeing and safety of the young person, their victims and the community as a whole (Whyte, 2009).

Youth Justice in a Global Context: Justice and Welfare - Children First?

The combination of two concepts, special responses to children and young people and equal rights under the law create tension in practice on how best to reconcile the competing claims of the law, judicial process and punishment with the need to consider the best interests and the rights of the child or young person, while at the same time responding effectively to the needs of victims and communities and to reducing offending. Systems dealing with young people who offend are often differentiated along the broad dimensions of justice and welfare. As with all ideal-types, models are seldom found in a pure form. All countries remain uncomfortable with a rigid distinction between youth justice and child welfare/protection and, in practice, most combine elements of the different approaches based on age thresholds that have little empirical foundation. Legislation tends to maintain a separation between systems dealing with the care and protection of children and young people (child welfare) and responses to offending by children and young people (youth justice).

The United Nations, for statistical purposes, defines ‘youth’ as those persons between the ages of 15 and 24 years, without prejudice to other definitions by member states (United Nations Department of Economic and Social Affairs, 1981). The philosophy of child care and protection (safeguarding and upbringing) and a strong sense of collective responsibility for the positive upbringing of children and young people continue to hold sway in Northern European countries up to mid-teens, in some states to 18 and, exceptionally until 21.

However, with respect to young people in their teens in conflict with the law, the second half of the 20th Century saw, particularly in English-speaking jurisdictions, a swing away from welfare approaches despite the growing evidence, over generations, that the differences between children in need and young people coming to the attention of

authorities for breaking the law are, as Kilbrandon asserted 'far outweighed by their similarities' (Kilbrandon, 1964; Whyte, 2009). System responses were more associated with access to due process, directed by principles of proportionality and individual responsibility and accountability, and with greater recognition of the place of victims.

The legitimacy of criminal justice and public conviction can only exist if the person is viewed, in principle, as singly, solely and fully responsible for his/her actions and the criminal justice paradigm, no matter how it's modified, as Kilbrandon asserted, remains incompatible with the objectives of prevention and of shared responsibility for dealing with children and young people up to age 18, the age 'norm' for children's legislation and international standards. The criminal justice paradigm requires no adult or other party to accept any share in the responsibility/guilt for a young person's action. Indeed it can be argued that the criminalisation and conviction of children and young people, in effect, absolves adults, service providers, the community and the state as a whole from collective responsibility and accountability for the 'failure' in the young person's upbringing reflected by their criminality.

In this regard, many, if not most, jurisdictions stand accused by the UN Committee on the Rights of the Child (UNComRC) of poor child-centred and children's rights approaches to youth crime, and of high levels of criminalisation and detention of young people, many of whom have a public care background (Whyte, 2009).

International Standards

Benchmarks for professional practice have, in effect, been set by international agreements and regulations. UNCRC requires that in:

> *…all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration* (Article 3).

The qualification of the key principle as *a* primary rather than *the* primary consideration can find expression in quite different practices in different jurisdictions, often invoking the public interest as 'trumping' and over-riding the interests of the child when it comes to criminal matters even for relatively minor or persistent offending.

The principle of universal human rights was consolidated by the creation of the United Nations and the adoption of the *Universal Declaration of Human Rights* in 1948 but it was not until UNCRC (1989) came into force that a universal instrument focused specifically and exclusively on protecting and promoting children's rights. At the heart of UNCRC is Article 1 which provides that the term 'child' refers to 'every human being below the age of eighteen years'; something to which English-speaking jurisdictions, in particular, have paid scant recognition until recently.

UNCRC sets out the terms in which children and young people 'by reason of physical and mental immaturity, need special safeguards and care, including appropriate legal protection' (preamble, 1989). The associated guidance has gradually over the years clarified the policy and practice expectations and set standards for signatory countries.

These include the *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules') 1985 which provide guidance and set standards for the protection of children's human rights through the development of youth justice systems separate from adult systems, with a minimum age of criminal responsibility based on 'emotional, mental and intellectual maturity' (Rule 4.1 United Nations General Assembly, 1985); and the adoption of socio-educative responses to youth crime rather than punitive (criminal) ones, 'within a comprehensive framework of social justice for all juveniles' (Rule 1.4 United Nations General Assembly, 1985). As with Kilbrandon, the rules do not suggest or imply that children and young people should be seen to have no responsibility for their actions. It recognises that accountability and responsibility should be modified according to their maturity implying that, at least up to the age of 18, their responsibility should be shared by adults and that the community/state is responsible for positive upbringing.

The *UN Guidelines on the Prevention of Delinquency* (the 'Riyadh Guidelines'), 1990 stress the value of child-centred early intervention, shared responsibility for the upbringing of young people; and the promotion of non-criminogenic attitudes through multidisciplinary approaches to crime prevention. The Guidelines stress that 'the successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents' (para. 2), utilising formal agencies of social control only as a 'last resort' (para 6). The guidelines focus on collective responsibility ('the entire society') for the whole child, which includes children and young people who may or may not be in conflict with the law and 'who are abandoned, neglected abused, exposed to drug abuse, in marginal circumstances and who are at general social risk' (Marshall, 2007, p. 7). They promote a progressive universalism signalling a major overlap in provision between children and young people in adversity and for those in conflict with the law, and that meeting needs and building human and social capital is a priority to avoid escalating offending.

The *UN Rules for the Protection of Juveniles Deprived of their Liberty* (the 'Havana Rules') 1990 identify core principles including the independence of prosecutors and their role in promoting diversion from criminal proceedings for young people up to 18. Deprivation of liberty should be a 'last resort' and only 'for the minimum necessary period' (para. 19.1). It is very difficult to conclude from available data, particularly in English-speaking jurisdictions, that these rules hold much sway over prosecution practice. The *UN Standard Minimum Rules for Non-Custodial Measures* (the 'Tokyo Rules') 1990, are intended to promote greater community involvement, responsibility and community based responses to crime, again reinforcing youth crime as a collective and shared rather than simply an individual responsibility.

The *UN Economic and Social Council Guidelines for Action on Children in the Criminal Justice System* (Vienna Guidelines) 1997, stress the 'indivisibility and interdependence of all rights of the child' (Guideline 10) outlined in UNCRC. Guideline 11 specifically encourages the development of 'a child-oriented youth justice system'. Guideline 15 explicitly supports prevention, the diversion from criminal systems and the importance of dealing with underlying social causes. It requires countries to provide 'a broad range of alternative and educative measures' at all stages. One of its operating tenets in youth

crime prevention and youth justice is that long-term change is brought about 'when root causes are addressed' (Guideline 41).

The preamble to UNCRC stresses the dynamic nature of the framework and that it expects it to be continually developed on the basis of research and practice-related evidence. The international practice model recommended is one of diversion, as far as possible, from criminal proceedings up to the age of 18, stressing the value of early preventive intervention. Whether or not UNCRC is incorporated into local legislation, international law requires that signatories should adhere to the spirit and principles of the Convention and the UNCRC should represent the standard for measuring any appropriate system of youth justice.

UNICEF (2013) notes that Article 40 of UNCRC requires that 'a child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society' (United Nations General Assembly, 1989, p. 3), and that this, in turn, requires 'tailored support' for each child and his/her family throughout the different stages of youth justice including after release in the case of detention. As a consequence, social work and other professionals are challenged to use these international standards to direct practice and also to mobilise its influence in local jurisdictions. In most instances, it is difficult to argue on the basis of UNComRC concerns over the levels of criminalisation and detention of young people up to the age of 18 that international obligations have featured greatly as a priority in regard to young people who break the law in Scotland until around 2007.

A Dilemma for Social Work?

Two years after a 'State Party' ratifies the UNCRC, the country is obliged to submit an initial report to the UNComRC outlining how it is applying the convention, and each state is required, thereafter, to provide periodic reports at five-yearly intervals. The Committee, which monitors the application of the UNCRC into law, policy and practice within national borders, meets around three times a year in Geneva, Switzerland and has two principal functions, firstly, to issue 'General Comments' on the application of UNCRC and secondly, to examine how each 'State Party' is implementing the convention and complying with it in law, policy and practice. On both counts the Committee attempts to identify institutionalised obstructions to the implementation of the UNCRC in general and, more specifically, serious breaches and violations of the human rights of children within particular youth justice systems (Goldson and Muncie, 2012).

In the vast majority of jurisdictions, the Committee's 'General Comment' in respect of youth justice concludes that implementation of the UNCRC is often piecemeal and that the human rights obligations frequently appear as little more than afterthoughts (UNComRC, 2007, para.1). The repetitive nature of the Committee's findings stem at least in part from the fact that the UNCRC is ultimately permissive and breaches attract no formal sanction. In this sense, Goldson and Muncie (2012) suggest it may be the most ratified of all international human rights instruments but it also appears to be the most violated, particularly with regard to youth justice. Jurisdictions have tended to respond to the Committee's reports through partial reforms, often by bolting on apparent 'child-

friendly' responses and other informal methods such as restorative approaches onto otherwise retributive and punitive youth justice systems, with little direct impact on the dominant practice paradigm.

UNComRC published a list of concerns and criticisms regarding the UK's performance, firstly in 1995, along with a comprehensive set of recommendations on how better to meet practice obligations and protect children's rights. In revisiting these concerns in 2002, UNComRC remained highly critical of UK practices and expressed disappointment that the majority of the recommendations from 1995 had not been acted on (Harvey, 2002). The UK delegation continued to argue, in 2002, that the low age of criminal responsibility in all UK jurisdictions allowed for early intervention while recognising children's responsibility for their crime. It also argued that children's legislation, although providing protection and guarantees of services for children up to the age of 18, did not apply to children in detention through the criminal justice system. Signal judgments by the High Court in England, following judicial reviews instigated by the Howard League in 2002 and, subsequently in 2007, confirmed that English, and by extension other UK jurisdictions (or for that matter any) cannot designate young people under 18 as 'ex' children simply by their entrance into the criminal justice system and detention. The High Court held that the *Children Act 1989* did apply to children held in custody and indicated that the Howard League had 'performed a most useful service in bringing to the public attention matters which, on the face of it, ought to shock the conscience of every citizen' (*R v Secretary of State*, 29 November 2002; Case No CO/1806/2002, para 175).

In July 2007 a judicial review supported by the Howard League confirmed that the *Children Act 1989* applied to children in prison. The appeal decision resulted in three English Law Lords confirming that local authorities should provide the young person with the care due under s20 of the *Children Act 1989*, in effect confirming that local authorities have the same duties to children up to 18 who leave custody as to 'children in need'. The judgment noted that 'local authorities across the country were failing to provide proper assessments and care plans for vulnerable children' (Howard League Press release, 26 July 2007, p.1) entering and leaving detention, particularly where children are in danger of returning to precisely the same situations that led to their crimes and imprisonment in the first place.

In 2006 K vs Manchester (Case Number CO/8742/2006) established important details about the ways in which children leaving custody should be assessed, namely, that assessments should be carried out by local authority social (children's) services departments and not by Youth Offending Team workers or probation, and that the assessments should explicitly cover the future needs of the child on release. These decisions confirm that young people under 18 involved in serious crime, even if dealt with in criminal processes, continue to fall within the responsibility of local authority children's services and child protection social work, and have a right to aftercare support to ensure their personal and social wellbeing, integration and long-term desistence from crime.

A recent contribution to this discussion (Moses April 2013: EWHC 982) saw an English High Court confirm that young people up to the age of 18 (not under 17 as in certain circumstances in England and Wales) are entitled to special protection or measures for

similar reasons. The decision, which was not appealed by the UK government, clearly states that young people under 18 are entitled to special consideration and cannot be treated as adults. The basis for the judgement was, in large measure, because of the duties conferred on young people by ratification of the UNCRC. The Court ruling highlighted that 'there can, accordingly, be no question but that the treatment of 17 year-olds as adults when arrested and detained….is inconsistent with the UNCRC and the views of the United Nations Committee of the Rights of the Child' (Moses April 2013: EWHC 982, para. 47). This reiterated previous judgements, e.g.

> *Ignoring the special position of children in the criminal justice system is not acceptable in the modern civil society.* (*R v G* [2003] UKHL 50 [2004] 1)

These decisions confirm that local authorities, at least in England (and probably applicable to all UK jurisdictions) retain a statutory duty to safeguard the welfare of children even if they are in criminal justice/detention, no matter what harm they may have done. Most notably the court decision of 2002 stressed that this should 'result in more child protection investigations inside prisons and greater involvement of social services in assessing the needs of the most vulnerable children' (*R v Secretary of State*, 29 November 2002; Case No CO/1806/2002, para 175).

There have been no equivalent challenges or 'tests' to the law or practice in Scotland and generally speaking these decisions from 'elsewhere' have been conveniently ignored. A key principle emerging from the growing body of tests cases, even if most relate directly to England and Wales, is that entering the criminal justice system may itself be grounds for referral to a children's hearing and/or child protection, even if alongside rather than as an alternative to criminal processes for young people up to the age of 18. The reason for Scottish acquiescence can only be a matter for speculation. It may be due to complacency and a belief that the Scottish system is so much better than others; possibly it's the nature of the Scottish legal establishment who are unwilling to rock the boat; maybe it's the political and media attitude to this group of difficult young people; or possibly, it is because of some collusion 'justified' by concern and anxiety that exposing major limitations within the current Scottish system may actually undermine the hearing system and result in a worse outcome – a return to youth courts as proposed and piloted by Scottish New Labour from 2002. Whatever the reason, it is worth noting that the wording of the 1989 Act in England and Wales is almost identical in Scots law to the wording of the *Children (Scotland) Act 1995*, yet there is little evidence that this growing number of test cases has been acknowledged or acted on in Scotland.

European *Guidelines on Child-Friendly Justice* [CJ-S-CH (2010) 3 E] and *European Rules on Juvenile Offenders subject to Sanctions and Measures* [CM/Rec (2008) 11E] have attempted to further strengthen the need for a child-centered approach to practice with young people involved in offending. In particular, they further stress avoiding (adult) criminal proceedings irrespective of the gravity of the crime, and, with some exceptions for serious crimes, that records should not be disclosed on reaching the age of majority, none of which is the case in Scotland at present despite an emphasis on supporting desistence from crime and social integration. These illustrations provide clear indicators

of how far Scotland had drifted from UNCRC standards and from the original intentions of the Kilbrandon Committee by 2007.

The evidence raises paradigmatic questions and presents practitioners with real practice dilemmas. It challenges those responsible for child welfare and child protection, in particular social work, to consider how to respond when the 'older' young person under 18 is caught up in criminal processes and, in particular, in detention even for very serious crimes. It is difficult to get accurate or systematic information on Scottish practice. Anecdotally, I am aware of many cases where practitioners have tried to maintain young people within the hearing system because they have been appearing in adult criminal court only to have the supervision requirement terminated. It is difficult to imagine that there can be better evidence for the need for 'compulsory measures' - the legal test - than a child or young person under 18 likely to be made subject to compulsory measures in an adult criminal court. Even the 'no order' principle is unlikely to apply as retaining a young person in such circumstances on supervision is hardly likely to make things worse than an adult conviction and detention or a community payback order.

There are also perverse incentives within the Scottish system. For example, if a young person under 18 is detained in custody, the state will pick up the bill. If a young person is admitted to secure accommodation on summary proceedings, the local authority has to pick up the bill – not a situation likely to make local authority managers want to pull out all the stops to maintain a young person within the children's system. It would seem that the Scottish cultural mindset, public and professional, seems uncomfortable with the idea of young people involved in crime, particularly serious crime, being viewed as children, despite international standards that no-one under 18 should be dealt with by adult criminal justice.

Giving practice expression to such duties is a difficult matter without political/public will; Crown Office priorities, coherent financial systems, and, in professional terms, local multi-disciplinary protocols and shared resources between criminal justice social work, youth justice, children's services, housing, education and employment, leisure and health-related provision. In other words, what is required is an integrated 'whole' systems approach to child care, child protection and to youth justice, all of which sounds rather familiar to the ideas promoted by Kilbrandon but still to find fulfillment in practice although Scottish government has, since 2012, promoted a whole-systems approach to youth crime as part of *Getting it Right for Every Child*.

However, without an established practice paradigm such as a social educational/ social pedagogic paradigm, practice is likely to remain an ongoing challenge. Since 2007 a new cultural project has been underway which offers, if not a speedy resolution to the challenges, then some promise that the direction of travel is again consistent with the Kilbrandon legacy and, more importantly, with international standards.

Future Directions: Social Education – a paradigm for social work practice?

The growing pressure following the UNComRC report of 2007 and the development of European standards and rules has resulted in some serious attempts in all UK jurisdictions

to find an appropriate practice expression for young people involved in crime and to recognise children's rights alongside considerations for victims and the community. In Scotland these have been reflected in a variety of ways including:

- The Scottish Government response in its own right to the UNComRC report and its statement that 'UNCRC applies to all young people' – there were no qualifications;
- Explicit support for *Getting It Right for Every Child* (The Scottish Government, 2008) is `changing practice, albeit slowly, and the promotion of a whole-systems approach is giving direction to that change;
- No child under 12 can now be prosecuted in a criminal court although the age of criminal responsibility remains embarrassingly low at eight;
- Legal provision now exists to decriminalise offence grounds accepted at a hearing, but has still to be implemented;
- There has been a strong emphasis in policy on maintaining young people within the hearing system until they are 18 and the development of early and effective practice;
- Child Protection guidance now recognises that young people in conflict with the law including 16-and 17-year-olds have the right to protection – though there is little evidence of practice to date.

Changes implemented in policy and law since 2007, if nothing else, have set a better climate for trying to respond to the needs of young people alongside responding to their criminality and its consequences for victims and communities. Along with these changes there has been growing support for the exploration and application of a socio-educative or pedagogical paradigm (Smith and Whyte, 2008), through the promotion of a whole-systems approach to youth crime, as part of Scotland's national child development strategy.

The launch of the whole-system approach led mainly by social work and the police has been associated with a substantial reduction in the prosecution and detention rates of young people under 18 in the last few years, now the lowest for a decade. This includes a sharp fall in prosecutions for under 18s and a sharp fall in under 18s in custody to around 60 daily from around 200 – though still over 500 for under 21s (The Scottish Government, 2013).

Recent legislation (*Children's Hearings Act 2011 and the Children and Young People Act 2014*) support an attempt to return to a fundamental principle that the default position should be to decriminalise all young people up to age 18 appearing at a children's hearing for offending. However, no steps have been taken to allow young people over 15.5 to be referred to the hearing system if they are not already subject to measures, which remain a fundamental flaw and weakness in the system. Major changes have occurred to the hearing system itself and it remains to be seen how, if at all, the establishment of Children's Hearings Scotland as an independent body will impact on young people in conflict with the law.

Similar trends are emerging in other jurisdictions which may reflect the impact of the UNCRC or other local political and economic factors. The re-emergence of support for a socio-educative approach to youth crime in Scotland may be less reflective of a major shift in public or political attitudes towards the UNCRC or youth crime and much more part of a government-driven cultural project re-emphasising Scottish identity and its

distinctive traditions in the run-up to a referendum on Scottish independence in September 2014. Clearly, September may mark a watershed and, whatever the outcome, it remains to be seen if the direction of travel established since 2007 will see its fulfillment thereafter.

In essence, a socio-educative paradigm is viewed as a means to individual improvement and social cohesion driving a 'well developed sense of human mutual obligation' (Paterson, 2000, p.9). At its foundation is a collectivist belief that educational success and failure cannot be understood only in formal educational terms, but must be related to the social and economic circumstances faced by children and young people. Contemporary writers have similarly suggested that social education 'has a key role in tackling a range of social problems and in promoting cohesion in a growingly diverse society' (Bloomer, 2008, p. 32). The paradigm is by definition collective and social, i.e. society's policy and practices reflect collective responsibility for the upbringing of children as at the core of a mature civil society. Social education or pedagogy, in this European sense, is grounded in opposition to individualistic approaches that fail to consider the social dimensions of human existence (Smith and Whyte, 2008), and is consistent with the objectives of youth justice practice based on international standards and international principles. It offers possibilities for the development of practice methods within an integrative approach to social wellbeing consistent with research on desistence from crime, without over-focusing on the young person as an offender or denying the young person's shared responsibility to the community as a whole and to individual victims, which may require adjudicated control mechanisms. Social education provides a positive alternative to deficit-based and/or correctional models of practice that often serve only to highlight tensions in the philosophies of justice and welfare and amplify difficulties.

Social and educational perspectives are rooted in education and social sciences respectively, which in coming together can provide a better integrated theoretical framework for youth justice practice directed by the UNCRC principles, children's services and children's rights (Hämäläinen, 2003). The language of social education, if somewhat underdeveloped, has found its way into children's policy discourses (Moss and Petrie, 2002; Cameron, 2004; Petrie, 2004). In some jurisdictions the return to systemic family work and wraparound approaches reflect this notion of locating a young person within a positive community of interest to support personal and social change on behalf of the community and victims.

There is limited scope within this paper to outline or rehearse the growing body of literature on effective practice in youth justice, from the 'what works?' movement of the 1990s through to a greater understanding of pathways to desistence (Whyte, 2009), save to note that specialist social workers in this field need to have criminological and child development knowledge. They need to exercise authority in ways that acknowledge and address, in so far as is possible, the harm done to victims. They equally need skills in working with young people and their families in a systemic way as well as mobilising more traditional skills of social work as brokers and advocates in assisting young people and their families to overcome structural barriers and achieve their change goals through co-productive means.

Theoretical and empirical developments point to the need for a paradigmatic shift ultimately aimed at social wellbeing - social and individual integration - that supports young people to view themselves, not as criminal, but to have a sense of personal agency/control, and to gain opportunities to establish social bonds which will help them develop a positive personal identity to the future benefit of the community. The question of what the practice paradigm should look like is part of a longstanding debate in the world of youth and adult criminal practice.

The wider social context of behaviour and the impact of structural factors such as poverty and community fragmentation have become marginalised in human service, particularly in social work and youth justice practice. The role of social work is to promote wellbeing and safety through broadly-based social education strategies and to find educational solutions to social problems (Hämäläinen, 2003). While practice is generally concerned with direct work with children and young people and their families, socio-educative principles can be applied to wider questions of social integration in different phases of the lifespan. This is based on the belief that social circumstances and social change can be influenced through social education, not as an alternative but as a complement to political action to affect the external 'power', issues of society structures, institutions and legislation. Socio-educative action aspires to change society by influencing social relatedness, with collective responsibility for the personal in society: people, morals and culture.

I think it is reasonable to conclude that the legacy of Kilbrandon and of people like Jock Sutherland live on and remains strong in Scotland though progress has been slow in regard to practice standards with young people in conflict with the law. Recent developments since 2007 alongside the cultural project, have seen the principles underlying Kilbrandon and Sutherland's ideas, if not rediscovered, then given an impetus to be re-explored in practice. It now needs a new generation of practitioners, managers and policy makers to own, maintain and develop this legacy in line with international standards. Hopefully today there are people coming into, or who are newly into, practice who will carry this legacy into the future.

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