

Research Briefing

A STUDY ON CHILDREN'S REPORTER DECISION-MAKING

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Introduction

This briefing presents findings from a study on children’s reporter decision-making. The study comprised part of Ph.D. research, which was undertaken by the author at the University of Strathclyde. The research examined – doctrinally, theoretically and empirically – adherence to the Kilbrandon ethos of the children’s hearings system (CHS).¹ This ethos rests on the characteristically unitary and welfarist nature of the CHS, which essentially involves dealing with all children “in trouble” alike. That is, according to the same unitary process and welfarist principles. The research considered how such children come to be differentiated and questioned whether that leads to differences in process and practice between different referral types. The role of the children’s reporter was focussed on in order to do so. The research identified three major referral types in current practice, namely: care and protection², conduct³ and offence⁴. A central argument was that reporters have discretion to choose the *single* most appropriate ground of referral to found upon⁵ and, in so doing, designate cases as belonging to one of the three identified types at the gatekeeping stage. The research sought to explore the ways in which this designation of referral types plays out in practice.

Research Methods

A qualitative investigation, involving semi-structured interviews with 25 practising children’s reporters, was carried out in 2014 and 2015. The aim of the study was to examine how reporters exercise discretion and professional judgment at the gatekeeping stage. The objectives of the study were as follows:

1. To investigate how children’s reporters perform their gatekeeping decision-making functions under the Children’s Hearings (Scotland) Act 2011;
2. To examine the ways in which children’s reporters apply, and make decisions related to, the grounds of referral (the s. 67 grounds);
3. To explore whether differences in practice apply to different referral types.

The study was granted ethical approval by the University of Strathclyde Ethics Committee, in accordance with which the anonymity of interview participants was protected. Interviews were

¹ M. Donnelly (2017) *The Kilbrandon Ethos in Practice: The Antinomy of Care and Conduct in the Scottish Children’s Hearings System* (Ph.D. Thesis: University of Strathclyde).

² Based on the “care” grounds contained in ss. 67(2) (a) – (i) & ss. 67(2) (p) – (q) of the Children’s Hearings (Scotland) Act 2011.

³ Based on the “conduct” grounds contained in ss. 67(2) (k) – (o) of the Children’s Hearings (Scotland) Act 2011.

⁴ Based on the “offence” ground contained in s. 67(2) (j) of the Children’s Hearings (Scotland) Act 2011.

⁵ SCRA (2013) *Practice Direction 7: Statement of Grounds – Decision Making and Drafting* (Stirling: SCRA) at p. 4.

conducted either in person (21) or over the telephone (4), digitally recorded and transcribed. Interview data was analysed using NVivo, a software package for qualitative thematic analysis.

Six research participants were male and 19 were female. Most participants (15) had a legal background, although a background in social work was also common (6). Participants had different levels of experience as children's reporters, with most having served between 6 and 15 years (18). Participants were drawn from different areas of the country so that the sample was reasonably geographically spread: at least 2 participants from each of the 9 SCRA Locality Areas were interviewed.

I. The Scheme of Reporter Decision-Making

The study explored the general scheme of children's reporter decision-making by examining the processes and practices adopted by reporters upon receipt of referrals. All participants characterised their gatekeeping practices as being directed towards two key tasks: first, an assessment as to whether a ground of referral applies in respect of the child; and, second, an appraisal as to the perceived need for compulsory measures of supervision to be imposed in relation to that child. These tasks follow directly from the statutory tests for referral to a children's hearing, under ss. 66(2) (a) – (b) of the Children's Hearings (Scotland) Act 2011.

Registration of Referrals

Participants explained that the starting point in the gatekeeping process involves the registration of referrals on SCRA's Case Management System. The study found that this is a largely administrative process, whereby referrals are processed by children's reporters (or, in some cases, administrative support staff). Once processed, the reporter undertakes an assessment as to what further action, if any, needs to be taken in relation to the referral.

The study suggested that, from the outset, reporters are firmly focussed on the statutory tests. The vast majority of participants described a similar initial process, whereby a *prima facie* judgment is made about the perceived application of the statutory tests, with a particular focus on whether the circumstances of the referral might fall within a particular s. 67 ground. Whilst most participants described their practice as being directed towards the identification of an appropriate ground of referral at the registration stage, many explained that they are not bound by the ground under which the referral is registered and emphasised that their choice of s. 67 ground could change in light of further investigations.

Some participants expressed strong views about the need to think carefully before registering a referral and proceeding to the investigation stage. Adopting a minimalist interventionist approach, these participants voiced caution about registering referrals and stressed the need for evidence to suggest this was appropriate in the first place. The study thus indicated that the registration of referrals involves a superficial evaluation of evidence. In so evaluating, reporters must satisfy themselves that there is enough evidence to proceed in the first instance. However it seems that much of this initial assessment is dependent on information contained in the referral itself.

Source of Referrals

The study suggested that the registration of referrals and subsequent action taken by reporters is largely dependent on the level of detail contained in the initial referral. A majority of participants highlighted the varying levels of information that referrals could contain and this was found to be linked closely to the referral source. The police, social work, and education departments were cited as the major sources of referral to the reporter. A correlation was identified between the source of referral, level of detail contained within it and subsequent level of investigation undertaken by the reporter. The study thus suggested that referral source has a direct impact on the decision-making and, in particular, investigative practices of reporters.

Some participants explained that they generally find referrals from common referrers, such as the police or social work, to be more detailed and targeted towards their decision-making. Such referrals were generally said to require less subsequent investigation. However, other participants indicated that they treat referrals from frequent referrers more seriously, giving rise to a presumption in favour of further investigation. By contrast, referrals from uncommon referring agencies or private individuals were said to be less detailed and specific, and so were generally perceived to require more extensive investigation. Some participants suggested that knowledge and understanding of the CHS was key to targeted referrals. Knowledge of the system on the part of referrers was thus perceived to aid reporter decision-making.

All participants explained that, once a referral has been registered, the children's reporter is responsible for making an initial and final decision in relation to it. The initial decision refers to the level of investigation required in relation to the referral. The final decision relates to the reporter's application of the statutory tests in light of those investigations. This two-stage decision-making process originates from SCRA's Decision Making Framework⁶, suggesting that reporters follow practice guidance implemented by SCRA. Although reporters appear to view initial and final decisions as discrete stages within their decision-making process, participants were clear that both stages are directed towards the reporter's application of the statutory tests in relation to the child.

The Initial Decision

The study served to underline the broad investigatory powers of reporters and suggested that, at the initial decision stage, the source and detail of the referral plays an important role in determining the degree of further investigation required. Participants explained that, in general, initial decisions are based on the nature and gravity of the referral and any information held by SCRA about previous referrals to the reporter and/or any prior or on-going involvement with the child and family.

Reporter investigations can be broad in scope and the study supported a view that reporters enjoy wide discretion as to the form and intensity of any investigation undertaken. Some participants appeared to adopt a broad approach at the investigatory stage, casting the net wide and requesting information from a range of sources in order to identify clearly the potential range of concerns about the child's welfare. By contrast other participants felt bound by the

⁶ SCRA (2013) *Framework for Decision Making By Reporters: Changing for Children and Young People* (Stirling: SCRA).

principle of minimum intervention and so indicated a preference for a narrower investigative approach so as to avoid disproportionate investigations.

The study underscored the broad range of potential sources from which reporters can seek information during the course of their investigations. Commonly, this was found to involve gathering information from primary sources in social work, education and health. To a lesser extent, the police were cited as a valuable source of information, especially where the referral related to the alleged commission of an offence by or against a child. Reporters can seek information from any source that may aid their decision-making and the study found that this might include voluntary services working with the family or adult professional services associated with the child's parents. Furthermore, the study emphasised that the investigative functions of the reporter are crucially dependent on information sharing between relevant agencies. There must, therefore, be co-operation and co-ordination between such agencies in order to ensure that reporters are both well-placed and well-equipped to make final decisions in relation to referrals.

The Final Decision

The initial decision of the reporter is targeted towards the making of a final decision. The whole point of reporter investigations is to equip them with enough information to form a view about the perceived application of the statutory tests in respect of the child. Without exception, participants explained that their final decision involves an assessment of the sufficiency of evidence required to support the application of at least one ground of referral, and an evaluation as to whether measures of supervision are required on a compulsory basis.

The study highlighted that reporters value their gatekeeping role, which centrally involves ensuring that there is a sound evidential basis to justify compulsory state intervention in the child's life. Participants emphasised that clear, detailed and objective facts are required to provide sufficiency of evidence and support reporter decision-making. However, the study suggested that there can be a lack of clarity and specificity within the information acquired during the course of reporter investigations: not least since this information is often based on the subjective concerns of other professionals, such as social workers. The study emphasised that, above all else, reporters are focussed on securing sufficient evidence to sustain grounds of referral, particularly since the grounds are open to challenge in the sheriff court.

The second part of the reporter's final decision involves an evaluation as to the perceived necessity for compulsory measures of supervision to be imposed in respect of the child. Notably, the views of most participants suggested that sufficient evidence is required not only to support the application of a s. 67 ground but also to support the reporter's view that a compulsory supervision order is necessary. A key finding is therefore that sufficient evidence is required to support the application of *both* statutory tests. The assessment as to the perceived need for compulsory measures of supervision was recognised by the vast majority of participants as involving a strict test of scrutiny. Most participants regarded the question of compulsion as imparting a particularly high standard. Some participants viewed the requirement for compulsion as a practical expression of the no-order principle⁷ and many

⁷ The Children's Hearings (Scotland) Act 2011, ss. 28 – 29.

participants referred to the principle of minimum intervention, which was cited as being particularly relevant to final decisions. Beyond this, the study suggested that myriad factors are taken into account by reporters at the final decision stage.

General Decision-Making Determinants

The study identified a number of general considerations that were highlighted as being particularly relevant to the reporter's assessment of the need for compulsion. Importantly, these decision-making determinants were found to be general in their application: that is, relevant to all referral types. This suggests that there is a degree of unity between different types of referrals in relation to the ways in which reporters make gatekeeping decisions.

The study found that the major factor considered by reporters is the appropriateness of voluntary support as an alternative to compulsory supervision. A potential outcome of the referral process is that the reporter can refer the child to the local authority for advice, guidance and assistance.⁸ This referral route is voluntary in nature and can be pursued by the reporter where, in his or her view, a child falls short of requiring intervention on a compulsory basis. The suitability of voluntary support, as an alternative to compulsory measures, lies in the need to *compel* the child and family in the provision of those measures. The study identified a number of overlapping considerations, which feed into this assessment and are potentially capable of negating the need for compulsion. In particular, the study suggested that the following factors are influential to gatekeeping decisions:

- Cooperation and engagement;
- Acceptance and/or resolution of the problem;
- Response to the referral;
- Nature and gravity of the referral;
- History and outcome of previous referrals.

II. The Nature of Reporter Decision-Making

An objective of the study was to explore the extent to which reporters exercise discretion and professional judgment in making gatekeeping decisions. Interviews thus explored the nature of reporter decision-making, with a particular focus on the manner in which reporters consider and apply the statutory tests.

The Role and Importance of the Grounds of Referral

The study explored the role of the grounds of referral. Findings reflect the significance of those grounds to gatekeeping decision-making. There was fairly clear consensus amongst participants that accepted/established grounds provide the legal basis for intervention in the child's life. Many participants described the s. 67 grounds, underpinned by sufficient evidence, as providing the requisite justification for pursuing compulsory measures of supervision in relation to the child. One interviewee described the grounds of referral as a "vehicle,"

⁸ The Children's Hearings (Scotland) Act 2011, s. 68(5) (a).

suggesting that they are the mechanism through which reporters are able to bring cases to hearings.

Some participants linked their discussion of the grounds to issues around procedural fairness and legal formalism. These participants were keen to stress the evidence-based approach towards gatekeeping that is supported by the grounds of referral. Other participants raised issues around fair notice, suggesting that the statement of grounds communicates to the child and family the concerns held about the child and sets out the reasons for which the child requires to attend a hearing. One participant regarded the s. 67 grounds as providing accountability for reporter decision-making, so that the referral process is transparent and open to challenge. Another interviewee raised ideas about the grounds reflecting a form of public interest. In this way, the s. 67 grounds were viewed as providing a benchmark: specifying a set of standards or thresholds which, if applicable, legitimise compulsory state intervention.

Many participants regarded the grounds of referral as providing a framework for decision-making. Some stressed the role of the grounds in establishing factual consensus. In this way, the statement of grounds was said to clearly outline the nature of concerns held about the child and determine the principal issues to be addressed by the children's hearing. Most participants regarded the framework set out by the grounds as one which provides clarity and specificity about the nature of concerns about the child, as well as transparency about the need to intervene in the child's life on a compulsory basis. Given the perceived role of the grounds of referral in providing a specific legal basis for intervention and a clear and transparent framework for decision-making, it is unsurprising that all participants recognised their inherent prominence within the children's hearings process. Without exception, participants acknowledged and stressed the centrality of the grounds of referral to decision-making practice. Whilst all participants acknowledged the importance of the grounds to their own decision-making practice, some emphasised their importance to *all* decision-making practice within the CHS. In particular, those participants highlighted the significances of the grounds to all decisions about the child, whether made by the reporter or the hearing.

Choosing the Single, Most Appropriate Ground

An implicit aim of the study was to determine whether reporters select the single ground of referral that they deem to be most appropriate, in line with SCRA's practice guidance which directs them to do so.⁹ The study revealed that most participants had adapted their practice in line with this direction, so that they generally state a single ground of referral only. This points strongly to the exercise of discretion by reporters in choosing the s. 67 ground that is considered to be most appropriate.

The study suggested that the practice of stating multiple grounds is generally rare, arising only where distinguishable facts exist to support different s. 67 grounds. Whilst the study highlighted that stating multiple grounds is very much the exception rather than the rule, some participants expressed the view that multiple grounds are sometimes necessary to facilitate proof in the sheriff court or indicate the range of concerns held about a child. The study drew out mixed views as to the optimum approach, with some participants inclined towards the focus

⁹ SCRA (2013) *Practice Direction 7: Statement of Grounds – Decision Making and Drafting* (Stirling: SCRA) at p. 4.

and simplicity of a single ground only. Others appeared to find it difficult, or even superficial, to capture the nature and full range of concerns as to the child's welfare under a single ground of referral. However the study clearly supported a view that, by and large, reporters select and state a single ground of referral only.

The Conversion of Referral Types

The study suggested that reporter investigations contribute significantly to the reporter's selection of grounds. Participants indicated that their choice of ground could change, following investigations. Interestingly, the study indicated that this could result in the "conversion" of one type of referral made to the reporter to another type of referral made by the reporter to the hearing. Differences in approach towards the selection of grounds were highlighted, with some participants appearing to adopt a broad approach and others a narrower one.

Some participants described casting the net particularly wide at the investigatory stage so as to discover if there were any concerns about the child that were broader than those presented within the initial referral to the reporter. In this way, these participants generally did not restrict their decision-making process to consideration of the ground under which the referral had initially been registered. Rather, they explained that they could seek out evidence to potentially support the application of a different type of ground. This proactive approach towards evidence gathering seemed to apply particularly to offence referrals. Some participants described tailoring their investigations specifically to discover whether there were wider concerns about the child, beyond the offence allegedly committed, that could be captured under an alternative ground of referral.

However other participants adopted a much narrower approach towards offence referrals and felt bound by *Constanda*¹⁰, which was perceived by them to prohibit the conversion of offence referrals to the reporter, into care and protection or conduct referrals to the hearing. Such an approach was viewed by those participants as one which undermines the requisite standard of proof for offence grounds. One participant felt strongly that referrals involving criminal offences must accurately reflect the factual commission of those crimes and ought not, therefore, be captured under alternative grounds. However not all participants agreed and some felt it was within their discretion to convert an offence referral into a care and protection or conduct referral, where wider concerns could be evidenced. It appears that the distinction, which follows directly from *Constanda*, lies in whether the facts relied upon by the reporter relate solely to the alleged commission of an offence by the child or whether additional facts can be presented to indicate broader welfare concerns. This was understood by some participants who appeared to support the conversion of referral types on this basis.

Judging the Need for Compulsion

The study underlined the evaluative nature of the reporter's assessment of the perceived need for compulsion. As such, the study supported the view that reporters exercise discretion *and* professional judgment in applying the statutory tests. Many participants emphasised the reliance of reporters on information from agencies, such as social work, in applying the

¹⁰ *Constanda v. M* (1997) S.L.T. 1396.

statutory tests. The relationship between reporters and relevant professionals, particularly social workers, was discussed by the vast majority of participants. By and large, participants reported having good working relationships with such professionals and this was perceived to assist their decision-making. Where good relationships existed, participants seemed inclined to rely more heavily on the information and opinions provided by such professionals. Some participants discussed their experience of working with the same professionals over time, which was said to engender good working relationships and facilitate effective decision-making. The study suggested that where reporters have good working relationships with other professionals, they have both confidence and trust in the information and recommendations provided.

The extent to which reporters take into account recommendations made by other professionals was explored by the study. Whilst reporters are not bound to follow any such recommendations, participants appeared to take them into consideration to varying degrees. Some participants indicated a general preference to follow recommendations made by social workers, particularly where trust and confidence in those professionals was said to exist. However others particularly valued the independent and autonomous nature of their role. Most participants believed it was important that reporters have the ability to depart from the recommendations of other professionals.

Linked to this is consistency in the application of thresholds for intervention: an issue that was discussed by the vast majority of participants. The study clearly indicated that reporters view the requirement of compulsion as involving a high standard or threshold. However, it was suggested that this view did not necessarily translate across other agencies. This was found to be a source of frustration for a majority of participants. Some felt that other professionals did not fully understand the role of the reporter. Others believed that other professionals lacked specific knowledge and understanding about what is required to justify compulsory state intervention. The inconsistent application of thresholds was perceived to lead to professional disagreements and delays in decision-making, thereby having a largely negative impact on reporter practice. Overall, participants strongly valued their independence and autonomy from other agencies, particularly social work. A view of reporters as both gatekeepers and guardians of evidence was thus supported by the study.

III. Differences in Practice Based on Referral Type

Although the study identified a number of general decision-making determinants applicable to all referral types, findings suggest that some differences in decision-making practice could apply to different types of referrals. Most differences in gatekeeping practice were found to emanate directly from the statutory scheme itself: that is, being related to procedural features that apply uniquely to the offence ground, such as the criminal standard of proof.¹¹ Nevertheless, the study identified a number of differences in practice towards offence referrals, which set them apart from care and protection and conduct referrals.

¹¹ The Children's Hearings (Scotland) 2011, s. 102(3).

Evidential Issues

The major difference discussed by participants was the criminal standard of proof and rules of evidence that apply to offence grounds.¹² A majority of participants acknowledged that the higher standard of proof could be challenging and, at times, difficult to discharge. However, most participants accepted the differences in evidential standard and rules as necessary aspects of the children's hearings process for offence referrals. Some were strongly in favour of the requirement that offence grounds be proven beyond reasonable doubt. These participants regarded this burden as a necessary procedural safeguard, since accepted/established offence grounds are treated as "convictions" and so result in the child acquiring a criminal record.¹³

A majority of participants described having a much sharper focus on evidence when making gatekeeping decisions about offence referrals. Some suggested that they were generally more likely to take no further action with offence referrals, than any other referral type, due to insufficient evidence. This was perceived to sometimes result in no action being taken when compulsory measures of supervision were thought to be required. Others explained that they did not find the criminal standard of proof itself to be a challenge but, rather, the evidential requirements that flow from it: particularly the requirement for corroboration. Some saw evidential issues as less challenging for offence referrals than for care and protection and conduct referrals. They explained that since offence referrals are received in the form of a police report, there could often be sufficient evidence to support the application of the offence ground inherent within the referral itself. However, most participants believed that gathering sufficient evidence was easier for care and protection and conduct referrals, given the relaxation in evidential burden and rules to the civil standard. Crucially, findings on evidential issues highlight that reporters generally have a keener focus on evidence for offence referrals, indicating one way in which gatekeeping decision-making differs on the basis of referral type.

Decision-Making Focus

Another way in which gatekeeping decision-making was found to differ lies in a shift in focus from parent to child in respect of offence referrals. Notably, there was found to be a similar shift in decision-making focus for conduct referrals, discussed further below. By contrast, the focus for care and protection referrals was found to be largely directed towards the child's parents. Many participants suggested that care and protection referrals typically relate to patterns of parental behaviour and, thus, generally refer to courses of conduct over a period of time. By contrast, offence referrals were said to generally relate to a discrete incident, resulting in a narrower decision-making focus on the offence allegedly committed.

The shift in decision-making focus from parent to child was said to be linked to the age of children typically referred to hearings on offence grounds. A number of consequences appear to flow from the fact that children referred on offence grounds are generally older, and this was found to affect the emphasis of reporter decision-making. Most participants said that they were particularly interested in the reaction of the child to the offence committed, the response of the child to the referral, and the willingness and ability of the child to cooperate and engage with

¹² The Children's Hearings (Scotland) Act 2011, s. 102(3).

¹³ The Rehabilitation of Offenders Act 1974, s. 3.

any measures of supervision put in place. This was found to contrast with care and protection referrals, for which reporters appear to assess these criteria primarily by reference to the child's parents. This shift in decision-making focus and emphasis appears to recognise the potential autonomy of children who have the capacity to commit criminal offences. A few participants were of the view that children referred on offence grounds had made a personal choice to engage in offending behaviour. As such, the referral was said to be assessed in light of the child's autonomy to make such choices.

Justice-Orientated Considerations

Another clear divergence in the gatekeeping approach towards offence referrals is the consideration of certain justice-orientated factors by reporters. Participants consistently said that an assessment of the seriousness of the offence committed and the child's prior record of offending would be undertaken when evaluating the perceived need for compulsion. Such factors are more readily associated with a justice-based system than a welfare-based one. Furthermore, it appears that considerations relating to recidivism and public protection could also be taken into account. This was discussed by a few participants who explained that decision-making for offence referrals involves an assessment about the likelihood that the child will reoffend and that the child's offending will escalate. The study additionally suggested that the impact of the child's offending behaviour on the public might also be considered. Some participants discussed issues around risk management and public protection. Although these participants were quick to point out that such considerations were subordinate to the welfare and needs of the child, the study clearly indicated that reporter decision-making takes on a different quality in relation to offence referrals.

Some participants explicitly acknowledged this and discussed certain tensions and compromises inherent within the approach towards offence referrals within the CHS. A majority of participants expressed discomfort with the fact that the child acquires a criminal record, should offence grounds be accepted or established. This was perceived to conflict with the ethos of the CHS. The vast majority of participants acknowledged the potentially far-reaching consequences of offence referrals. Participants demonstrated a particular appreciation that disclosure requirements could have a negative impact on the child's future opportunities. However, the study suggested that the extent to which reporters take those consequences into account varies. Partially, it appears that this is because SCRA's practice direction expressly precludes reporters from doing so.¹⁴ Although the study suggested that reporters generally comply with practice guidance implemented by SCRA, this was an area in which levels of compliance were found to vary. A few participants appeared to wholly conform to SCRA's practice direction, reporting that they do not take into account the disclosure consequences of accepted/established offence grounds. These participants tended to emphasise that their decision-making was characterised by the perceived necessity for compulsory measures of supervision: the wider consequences arising from the referral being an irrelevant consideration.

However, a majority of participants admitted that their decision-making is influenced, to varying degrees, by the disclosure consequences of offence referrals. Some adopted an

¹⁴ SCRA (2013) *Practice Direction 7: Statement of Grounds – Decision Making and Drafting* (Stirling: SCRA) at p. 6.

intermediate position, conceding that they do consider the consequences of the referral but that the perceived need to bring the child within the statutory system is the determinative factor. Although these participants did say that they would take into account the fact that the child would acquire a criminal record, they made clear that those consequences would not prevent them from arranging a hearing on offence grounds, if compulsory measures of supervision were deemed to be required. Other participants suggested that the punitive consequences of offence referrals were more influential and could, in fact, be determinative to their decision-making. Some participants suggested that they might use their discretion to “convert” an offence referral into a care and protection or conduct referral, in light of potentially stigmatising consequences of accepted/established offence grounds. A majority of participants suggested that they generally try to avoid arranging hearings on offence grounds. As such, a key finding is that offence grounds are pursued by reporters as a measure of last resort.

The study, however, suggested that there is a direct link between the seriousness of the offence allegedly committed by the child and the extent to which reporter decision-making is influenced by the disclosure consequences of offence referrals. It appears the more serious the offence, the less likely the reporter will be influenced by those consequences and the more likely a hearing will be arranged. In fact, a few participants regarded some form of disclosure necessary when a serious violent offence was committed by a child. Under such circumstances, some participants felt duty bound to arrange a hearing on offence grounds due to the gravity of the offence committed. A few of these participants talked about “sending a message” to the child, introducing justice-orientated notions of responsibility and accountability to decision-making practice.

Between Care & Protection and Offence: Conduct Referrals

In exploring differences in gatekeeping decision-making based on referral type, participants confirmed the existence of a discrete sub-category of “conduct grounds”, within the broader umbrella of care and protection grounds: specifically those under ss. 67(2)(k) – (o). As such, the study confirmed that there are three major referral types within the current practice of the CHS, namely: care and protection, *conduct* and offence. Some participants were of the view that there was a clear divide within the s. 67 grounds between those relating to the care of the child and those relating to the conduct of the child. However, others did not think that issues of care and conduct could be meaningfully separated out and, rather, thought that any divide within the grounds of referral more appropriately referred to age.

The vast majority of participants 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. On analogy with offence referrals, it appears that a similar shift in decision-making focus and emphasis could apply to conduct referrals. A few participants indicated that, primarily due to the age of the child, reporters are concerned with the child’s reaction and response to the referral, and the child’s willingness to cooperate and engage with measures of supervision when assessing the perceived need for compulsion in relation to conduct referrals.

Whilst the study identified a discrete category of conduct grounds, the majority of participants regarded any practical divide or distinction between issues of care and conduct as artificial and inappropriate. Although a slight shift in decision-making focus and emphasis was detected, most participants rejected such an approach and emphasised the inherent contradictions within it. Participants generally advocated a holistic gatekeeping approach and stressed the need for a unitary response to care and conduct referrals in practice.

Perceived Differences in Dispositive Approach

The study suggested that the assigned referral type is also capable of influencing the decision-making and disposal practices of panel members. Whilst the study primarily focussed on gatekeeping practices, participants offered views about the extent to which referral type was perceived to impact upon dispositive practices. These findings ought to be treated with caution since they are based entirely on the views of reporters. Nevertheless, the study suggested that the assigned referral type could potentially have a big impact at children's hearings.

Whilst the general treatment of the referral (and, by extension, the child and family) was perceived to be largely dependent on individual panel members, most participants believed that referral type could significantly influence the tone of the hearing. Punitive attitudes were perceived to apply, a more direct approach was deemed to be taken, and responsibility (or even blame) was thought to be imposed on the child by hearings in relation to both offence and conduct referrals. Whilst some participants were of the view that significant improvements in the training of panel members had been made so as to avoid a punitive justice-orientated approach, most believed that more training was required so that offence and, in particular, conduct referrals are dealt with more appropriately by hearings.

Although the decision-making practices of panel members were thought to be influenced by the assigned referral type, the vast majority of participants did not believe that this, in itself, affected the disposal of the case. Rather, most participants were of the view that disposal could be influenced by the supporting facts within the statement of grounds and by the gravity of the referral, irrespective of referral type. Different interventions were perceived by some participants to be better suited to, or more likely for, certain referral types. As such, different conditions and measures were thought to be attached to compulsory supervision orders based on the type of referral. Overall, findings here suggest that divergences in approach may apply to different types of referrals at children's hearings. This was generally thought to be characterised by a toughening in approach towards both offence and conduct referrals.

IV. A Perceived Escalation in Referral Type

The study drew attention to the significance of age in terms of influencing the appropriate category of ground of referral. A key finding is that younger children are typically thought to be referred on care and protection grounds, whereas older children and young people are thought to be referred on conduct and offence grounds, discussed above. A further key finding relates to the movement of children through these three categories of grounds over time. 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 CHS get older.

The Shift from Care to Conduct Referrals

A strong referral pattern was identified by participants as to this perceived trajectory, which was typically said to involve a progression from care grounds to conduct grounds to offence grounds over time. This shift (or escalation) from referrals relating to the care of the child to referrals relating to the conduct of the child was thought to be directly related to age. In this way, the study found that referral type generally escalates with age. The views of participants here served to underscore the similarities between children referred to hearings on the basis of different grounds of referral. In fact, most participants suggested that they are often exactly the same children who are simply at a different developmental stage and chronological age. As such, participants generally regarded the different types of referral as indicating different manifestations of similar unmet needs; the only salient difference being that children's needs present themselves in different ways as they get older.

The Capacity of the System to Respond to the Child's Needs

Findings about the perceived escalation in referral type over time 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 to hearings on care and protection grounds are later referred on conduct and offence grounds, indicates that the CHS did not effectively intervene and meet the needs of those children in the first place. The mere fact that children are thought to remain in contact with the CHS throughout their childhood and be subject to repeated referral cycles over time further calls into question the capacity of the system to improve outcomes for such children.

These ideas were directly addressed by some participants, who suggested that those children who end up being referred to hearings on offence grounds are the ones who have been "missed", or for whom previous attempts at intervention have failed. A few participants discussed the availability of resources and suggested that the capacity of the system to intervene successfully, in order to prevent the perceived escalation, was generally undermined or limited by a lack of resources. Others questioned the ability of the CHS to respond effectively to the needs of children, specifically where those needs manifest through conduct or behavioural issues. In particular, a few participants were of the view that the CHS was unable to successfully change patterns of behaviour and thus improve outcomes for children who offend.

The study suggested that contact with the CHS has a largely reinforcing effect, whereby care referrals can progress to conduct referrals, which can ultimately escalate into offence referrals. These findings suggest that it might be better not to formally intervene at all. This reflects McAra and McVie's finding that the key to addressing juvenile offending lies in minimal intervention and maximum diversion.¹⁵ The perceived escalation in referral type over time suggests that an approach based on minimum intervention and maximum diversion may well be appropriate to prevent the transformation of needs into deeds.

¹⁵ L. McAra & S. McVie (2007) "The Impact of System Contact on Patterns of Desistance from Offending," *European Journal of Criminology*, 4(3): 315 – 345, at pp. 338 – 339.

Diversion from Offence Referrals

Another option might be to “divert” children from offence referrals *within* the CHS. Whilst the study identified a general lack of unity between care and conduct referrals, differences in approach were found to be most pronounced for offence referrals. One way to address this might be to effectively convert juvenile offending into an entirely civil welfare issue. There is support for such an approach within the findings of the study. The study explored the general views of participants as to whether offences could, in principle, be dealt with under alternative s. 67 grounds. In particular, the study explored whether the ground introduced by s. 67(2)(m) of the Children’s Hearings (Scotland) Act 2011, that 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 person, could be used as an alternative to the offence ground.

The vast majority of participants had referred a child to a hearing on the basis of the bespoke conduct ground at the time of the study. All participants were positive about the relatively recent introduction of this ground of referral. The study suggested that reporters generally favour broad grounds that are capable of capturing a range of issues and concerns; underlining the fact that children referred to hearings have complex and multi-faceted needs. The bespoke conduct ground was perceived by many participants as capable of reflecting a breadth of concerns and promoting a holistic approach towards the child’s needs. Many participants believed that the bespoke conduct ground was particularly helpful in relation to referrals involving patterns of behaviour exhibited by the child, *including* offending behaviour.

Most participants were supportive of the potential use of the bespoke conduct ground as an alternative to the offence ground where there are a range of concerns about the child’s welfare of which offending behaviour is part. However, a majority of participants referred to *Constanda* and considered that it would be both inappropriate and contrary to precedent to use the conduct ground instead of the offence ground where the referral solely related to offending behaviour. That being said, the vast majority of participants indicated that it is generally uncommon for referrals to relate exclusively to offending behaviour, since welfare concerns are typically thought to underlie conduct issues.

However not all participants invoked *Constanda* when discussing the potential use of the bespoke conduct ground as an alternative to the offence ground. In fact, some were supportive of a broader use of the bespoke conduct ground in order to avoid the negative, and potentially stigmatising, consequences of offence referrals. A few participants linked these ideas to the minimum age of criminal responsibility; suggesting that, if it was formally raised, offending behaviour could be converted into a civil welfare issue and legitimately dealt with on the basis of the bespoke conduct ground. These participants were of the view that such an approach would reflect the Kilbrandon ethos more appropriately in practice.

Key Findings and Conclusions

The study provided a comprehensive account of reporter decision-making under the Children's Hearings (Scotland) Act 2011. It examined the structure and content of gatekeeping decisions and explored the nature of reporter decision-making in light of the Kilbrandon ethos. The study supported the view that reporters exercise discretion and professional judgment in applying the statutory tests. In particular, reporters exercise discretion to choose the s. 67 ground that they deem to be most appropriate and largely follow SCRA's practice direction to select and state a *single* ground only. The study substantiated the existence of a discrete category of "conduct grounds". It thus suggested that there are three major referral types in practice: those relating to the care and protection of the child; those relating to the conduct of the child; and, those relating to the child's offending behaviour. The study found that, in exercising their discretion, reporters designate referrals as being associated with one of the three identified types and might "convert" an offence referral into a care and protection or conduct referral, if there is evidence of wider concerns beyond the commission of an offence. In fact, the study suggested that reporter's generally avoid referring children to hearings on offence grounds: a key finding being that offence grounds are pursued by reporters as a last resort.

The study found that the designation of referral types by reporters gives rise to differences in gatekeeping decision-making practice. However there is a degree of unity between different referral types in that a number of general decision-making determinants were found to apply to all referrals when reporters assess the need for compulsion. This assessment was found to involve consideration of whether voluntary, as an alternative to compulsory, measures of supervision are sufficient to meet the child's needs – based primarily on the cooperativeness, or otherwise, of the family and their willingness and ability to meaningfully engage with any such measures put in place.

Identified differences in gatekeeping practice were found to be most pronounced in relation to offence referrals. Reporter decision-making was found to take on a justice-style quality: considerations around the seriousness of the offence, the child's prior record of offending, the likelihood of reoffending, risk management and public protection were found to be uniquely taken into account. There was held to be an additional shift in decision-making focus and emphasis, from parent to child, in relation to offence referrals. This shift was found to be linked to the age, autonomy and capacity for responsibility of children referred on offence grounds. There was some indication that there could be a similar shift in focus, from parent to child, in relation to conduct referrals but this was not nearly as clear as with offence referrals, and was found to be largely dependent on the age of child. Most reporters understood and identified conduct issues as manifestations of underlying care issues at a later stage and older age and so considered it largely artificial to separate or distinguish care from conduct in practice.

There was perceived to be a broader tension between care and conduct at children's hearings. A perceived shift in decision-making focus and emphasis, from parent to child, was identified in relation to the treatment of both offence and conduct referrals by children's hearings. Punitive attitudes were perceived to apply, and responsibility was generally thought to be imposed on the child in relation to both offence and conduct referrals. Whilst the assigned referral type was perceived to influence the content of compulsory supervision orders made by

hearings, the gravity of the referral (rather than its type) was thought to be more influential to disposal.

Additionally, the study suggested that children move through the s. 67 grounds over time, typically involving a shift from care to conduct to offence referrals. This perceived escalation in referral type was thought to be directly linked to the child's relative age; suggesting that there could be a perpetuation, rather than a resolution, of children's problems and associated needs as they get older. Findings here thus called into question the capacity of the CHS to respond to the child's needs and address the underlying causes of the child's conduct. Most participants were supportive of the potential diversion of children from offence referrals via alternative use of the bespoke conduct ground to avoid stigmatisation, especially where wider welfare concerns were thought to exist.

Overall, findings are indicative of a general lack of unity between different referral types in practice. The research identified a number of procedural and discretionary disparities between different referral types, which challenge the Kilbrandon ethos. These differences were found to be most stark for offence referrals but a broader tension between care and conduct referrals was also identified. This antinomy of care and conduct was found to be rooted in a toughening of approach towards referrals relating to the child's own behaviour and centrally linked to the age, autonomy and capacity for responsibility of children typically referred to hearings on offence and conduct grounds. The research thus identified a departure from a strictly unitary approach and suggested that the grounds of referral are not entirely interchangeable as access points to the CHS.

As such, the research indicated that the practice of the CHS is characterised by two related dichotomies between: welfare and justice philosophies; and, care and conduct referrals. The research served to highlight a number of practical tensions arising from the treatment of referrals related to the child's own behaviour, including but not limited to offending behaviour. Whilst the research identified widespread support for the Kilbrandon ethos, it suggested that the CHS struggles to reconcile the simultaneous vulnerability and autonomy of older children and young people referred on offence and conduct grounds. The research highlighted the influence of the criminal law and criminal justice notions of accountability and responsibility within an ostensibly civil welfarist system. Moreover, the research raised questions about the ability of the CHS to effectively respond to the child's needs and address the underlying causes of the child's conduct. In these ways, the research contributes to broader discourses around behaviour and age within the CHS. Whilst the research identified many areas of good practice, it also suggested that more could be done to strengthen the Kilbrandon ethos of the CHS.

Key areas of interest and potential development for policy and practice arising from this research include: the interface of issues of care and conduct within the practice of the CHS; the relationship between the age of the child and the three major categories of grounds of referral identified; the nature and extent of the reporter's discretion to choose the ground of referral considered to be most appropriate; the (weak) limitation to that discretion arising from the *Constanda* precedent; and, the potential diversionary use of the bespoke conduct ground as an alternative to the offence ground where wider welfare concerns exist.

Future Research

The study highlighted various issues which merit further investigation and could form the basis of future research. In particular, the perception of reporters that referral type influences dispositive practices should be directly examined. Research investigating the extent to which the assigned referral type influences the decision-making and disposal practices of panel members should therefore be undertaken. Moreover, the perceived escalation in referral type over time, involving a shift from care to conduct to offence referrals, ought to be tested using quantitative research methods. The author intends to undertake these research projects in conjunction with SCRA and Children's Hearings Scotland.

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