CHILDREN'S PANELS: A STRATHCLYDE MEMBER'S VIEW

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I stopped being a member of Strathclyde Children's Panel less than a month after the Secretary of State published his long awaited proposals for changing the system.(1) The timing was entirely coincidental. But I can't escape the fact that after six years of meeting children in trouble across a hearing room table and wrestling with their problems, I chose to give in just as Mr Younger was redeeming his manifesto promise.(2) As I try to bring order to the welter of impressions I've amassed I can't ignore his outstretched finger pointing along a new road. It's not quite at a hundred and eighty degrees to the route I've been travelling, but, were I still involved, I don't think it's a path I'd want to follow. In what follows I want to explain why.

Children's Hearings, which replaced juvenile courts in Scotland in 1971, form one of two deviant outgrowths on the tree of Scottish justice. The other is a modest, but radical attempt at penal reform in the Special Unit at Glasgow's Barlinnie prison. Both were grafted onto the unwelcoming tree in the seventies...and surprisingly they've survived. Although there's no shortage of judicial gardeners standing by with the pruning shears, their survival is significant. Here in Scotland, where we turn, almost as a reflex action, to institutional solutions; here where we imprison a higher proportion of our adult population than any other comparable country, these two alien species have established themselves in the same thin air that once filled John Knox's lungs.

The reforms in juvenile justice that were contained in Part III of the Social Work (Scotland) Act 1968 were a sharp break with tradition.(3) In future, in dealing with people under the age of 16 (and in some cases 18) the judicial keystones of determination of guilt and allocation of punishment were to be, at least officially, relegated to

a secondary role. The main purpose of the new system would be to explore the causes of deviant behaviour and seek remedies. Although, as I shall argue later, hearings are still seen by many who appear before them as punitive, this leap in official thinking was one of breath-taking audacity, quite out of keeping with the conservative nature of most of our social reforms.

Now, as the system enters its tenth year, the Secretary of State for Scotland has published his proposals for review in the form of a consultative document. His plans have been widely attacked by those who have tried to make the existing arrangements work. The chairwoman of the Strathclyde Panel, herself a former Conservative parliamentary candidate, has called them "frighteningly superficial" and sees them as "a move towards a more punitive system".(4) It appears that the shears have finally passed into Mr Younger's hands and he's not afraid to use them. But before we decide whether this is so, I want to look at the system as it's developed so far.

Children's Hearings to Date

Hearings have been attacked on two levels. Firstly the new arrangements have been criticised for failing to cut juvenile crime. Many people think the panels are too soft. "A Ned's Charter"...the charge levelled by one Tory district councillor...is typical.(5) Leading the attack have been the police and the legal establishment. Sir David McNee(6) then Chief Constable of Strathclyde and now the Metropolitan Police Commissioner and Lord Cameron(7), the High Court judge, were two early critics. Even a lawyer with an otherwise progressive pedigree like Professor Ian Willock of Dundee, has called for changes, such as the power to fine, to bring panels more into the mainstream of judicial practice.(8)

More subtly the validity of the founding principles of the hearing system has been questioned. Borrowing from a debate that's raged on the other side of the Atlantic, critics argue that to try primarily to treat the causes of deviant behaviour, is for all its liberal intent, a more insidious invasion of the liberty and privacy of the individual than any alternative that seeks merely to punish the manifestations of that deviance.(9) I want to look at the development of children's hearings in the light of these two critiques.

Interpreting criminal statistics is an exercise fraught with uncertainty. The seeming objectivity of figures turns to dust when anyone with a trace of intellectual honesty launches into interpretation. But such niceties have been cast aside in attempts to prove that children's hearings have failed. Detractors who think the stern retributive hand of justice has been replaced by the soft pat on the head of the do-gooder instinctively reach for the latest volume of criminal statistics to prove not only that hearings have failed but also that they are letting young tearaways run riot.(10) Look at the upward curve on the graph, they'll say, encouraging the listener to think that the trend began on April 15 1971 when the panels were inaugurated. But, of course, it didn't. And the sustained attacks on the panels in the early years were based on expectations that would never have been applied to the juvenile courts had they continued. It is naive to expect any judicial procedure to have a dramatic effect on the incidence of activities that are susceptible to so many other factors. People don't just obey the law because of what will happen to them if they're caught. And they don't just break it on a cool calculation of the price they might have to pay.

No, many critics who attacked the hearings by accusing them of triggering off a crime explosion among the young had other motives. Firstly they were worried that the treatment orientated approach took juvenile justice outwith the seemingly rule-bound world of the courts, the world they controlled. If juveniles could go that way...what else might follow? And secondly, in the new system, lay panel members had a central role to play which was a direct threat to their professional authority. So, conveniently overlooking the same upward trends in crime statistics for the adult population for whom they retained full responsibility, many lawyers and policemen set about the panels with destructive gusto. What really concerned them was the fact that every day the hearing system survived, increased currency would be given to the judgements of panel members about the treatment of a section of the population. And these were judgements where the professionals couldn't claim any superior expertise.

Unfortunately, but understandably, panel members reacted to this early criticism in a defensive way. Many members, conscious of the scepticism and bewilderment being generated outside, acted more punitively to their clients than the old juvenile courts had done. There were incessant calls for more (and to be fair, more varied) residential places to which children could be sent. If it hadn't been for the fortuitous parsimony of the local authorities, hearings would have filled as many List D school places as were made available. In that way they would be doing something decisive. There was, and still is, much finger wagging and lecturing on morality. Some panels even tried to formalise their surroundings, as if they were trying to recreate the world of the courts...for example by keeping the child and his parents standing while the grounds of referral were read out.

Nor did panels seek to challenge professional authority. On the contrary, they hung slavishly on "expert" advice. Social work recommendations were usually followed, school reports were believed implicitly and, in difficult cases, where behaviour defied explanation, more reports were ordered. In my early days there was a touching faith in the ability of psychiatric assessments to "get to the bottom of things". Happily there are signs that the panels are beginning to assert their independence and develop a belief in themselves and the task they've taken on. Members are questioning the mystique and jargon that sometimes pass for expertise in the professions. Being compelled to read reams of "expert" case reports is often an unproductive and chastening experience.

Hearings have even bounced back in the numbers game. Total referrals to Reporters (the officials responsible for running the system) have dropped, from 31,876 in 1974 to 27,330 in 1977.[11] Of course it's just as difficult to interpret these figures as it is to deal with crime statistics. For example, the Reporter has considerable discretion over which reported cases to refer to a hearing. So this steady fall in referrals to Reporters may tell us nothing about changes in the volume of juvenile crime. Arguably it could indicate an unwillingness in the population at large or in the police to report cases to an agency they regard as ineffective. But on the other hand, the decline in referrals has been paralleled by a fall in the number of children prosecuted in

the courts (for serious crimes or because they are alleged to have been involved in an offence with someone over 16). The total dropped from 3192 in 1973 to 1727 in 1977.[12] The merits of children's hearings are not going to be decided on a piece of graph paper.

Of more significance is the attack on the panel system mounted by what is known as the "right to punishment" lobby. With its origins in the United States, as a reaction against the excesses of the treatment approach, the refurbished right-to-punishment philosophy has brought together liberals and arch-conservatives. The reactionaries see it as a way of reasserting the case for punishment. For some radicals it is an opportunity to articulate their doubts about what may be perpetrated in the name of treatment. Punishment, according to this approach, is well defined and precise in its effects. Once inflicted sixty days behind bars, a £20 fine or eighty lashes can encroach no further on the liberty of the individual. But treatment is open-ended giving wide discretion to authority. It justifies plundering an offender's family for information, any information, that might shed light on why the evil deed was done. At the end of the treatment road, it is claimed, lie behaviour modification programmes employing drugs and electric shock therapy. I believe there is some force in these doubts, when applied to children's panels. The new system could easily become a more subtle and pervasive mechanism of social control wrapped up in a veneer of liberal intentions. But with the fall in the numbers of cases being disposed of by means of residential supervision orders and the growing experience of panel members, it's a danger that can be controlled.

Although the "right to punishment" lobby has given an important warning about where hearings could end up, this hardly amounts to an argument for a wholesale return to the punishment approach. Even if an act of punishment is quantifiable, it can still be extended. The sixty days can become two years, the eighty lashes can become execution. As defenders of the liberty of the individual, those who argue for the punishment approach stand on flimsy ground, especially when in the next breath they call for harsher sentences. But of course punishment isn't precise in its effects anyway. Is the stigma of a court appearance, that loses a man his job, well defined in its conse-

quences? How do we evaluate a period of imprisonment that wrecks a marriage?

Few would deny today that there is an environmental dimension to why people commit crimes. If we concentrate our system exclusively on determining who committed a criminal act, and punishing the offender... we turn our backs on these environmental influences, whether they lie in the family, the community or the society in which we have to live. The hearing system is an attempt to explore these wider influences on deviant behaviour while at the same time exercising what can only be described as social control over children. Hearings are charged with deciding whether a particular child's circumstances are such that he or (less commonly) she requires "compulsory measures of care".(13) Care is defined in the Act as including "protection, control, guidance and treatment".(14)

In fulfilling their protection and treatment functions hearings are, I think, hamstrung by their own procedures. Even when a good hearing explores the family background carefully to discover why a particular child is behaving in a particular way...the panel members only have power to do things to the child. That is the system's biggest weakness. The average client on the other side of the table is a juvenile truant who thieves while he's roaming the streets. Beyond these two admitted facts there's, as often as not, a child caught in a crumbling family riven by any number of family and social problems... unemployment, illness, bad housing, poverty, marriage break-up, and alcohol. The child's stopped going to a school that allocates failure as surely as it allocates success. And in a society where material success is a twenty-four hours a day religion, he indulges these same values in petty thieving.

Even after six years of facing such cases, my first reaction when meeting a new one was often that the only answer would be to wave a wand and have the child born again. It may seem a one sided picture, but making a decision about whether that undernourished survivor across the table needed "protection, control, guidance and treatment" often left me feeling that the remedies would be better applied elsewhere. It's a cruel delusion to suppose that when the causes of deviance that lie outwith the offender have been opened up...the cure can be effected

by treating only the child. Of course you can affect the family obliquely...by sending a social worker into their lives or taking the child away from them for a while. But even the smallest administrative change in the school system or the housing department is beyond your reach. Giving a sixteen year old failure some self respect or a job when he leaves school is something you daren't even contemplate.

In my own area, panel members have started to monitor more closely the social work back-up in cases they handle. When dissatisfactions arise, an appointed member takes up the points of contention with senior social workers and reports back. It can be seen as interference. But with the right kind of handling, it can have an effect. But of course it's only a start. Teachers seldom turn up at hearings. I've yet to see a housing official.

For me the most significant danger to the child in the treatment approach as practised in children's hearings is not that it will play well intentioned havoc with children's lives in the name of care, but that the real ingredients of a cure lie outwith the hearing's powers. Panel membership gives one a unique opportunity to look closely at the ugly fissures in society down which some children fall. Occasionally you can haul one of them back up...but you can do nothing to fill in the holes.

For that, you have to rely on the professional groups that assist the hearing process. And there, I'm afraid, professional rivalry all too often vitiates the collective effort. There is a growing, and potentially damaging tension between two groups....social workers and reporters. They make their decisions about the need for compulsory measures of care at different stages in the process. The Reporter makes that judgement when deciding whether to send a case (which has usually been passed to him by the police) to a hearing at all. As a result of Reporters' decisions only about half the cases referred end up at a hearing. The social worker makes an equivalent judgement when writing a recommendation into the social background report that is produced for each hearing. The panel members needn't follow either recommendation...but the system has already created a potent source of conflict.

It is the hearing members who are charged with the legal duty of deciding whether a particular child is in need of compulsory measures

of care. Every child they consider is there because the Reporter has decided there is a prima facie case for such measures. Yet sometimes the social worker will recommend discharge (i.e. no further action). In such cases the hearing members cannot avoid overruling the judgement of either the Reporter or the social workers. It's interesting that the lay panel members are less likely to be the butt of the conflicts so produced. It's more likely to be a direct clash between the two professional groups. If the number of disposals available to the hearing is greatly increased in future the potential for conflict may also increase.

The two groups obey different sets of rules and operate on differ ent assumptions. They bring these different backgrounds to the hearing room where only one decision can be made in any particular case. It's in this area of overlap...what's actually going to happen to a child.. that conflict is sometimes generated. Reporters are required to make sure that hearings abide by quite complex rules and procedures. They'r the ones who have to take disputed cases to the Sheriff Court. Inevitably their outlook is deeply coloured by such obligations. The social workers who appear at hearings are usually fieldworkers. They judge cases as people who have to win the confidence of clients if supervision is to have any effect. It can begin to look like a struggl between two groups for the ear of the arbiter, the hearing member.

Where a decision goes against the advice of the social worker, that can be just the start of the problem. For even where supervision requirements are imposed, a social worker has considerable discretion in deciding what that actually means in terms of contact with the child and activities embarked on. An overloaded fieldworker, who dislikes legally imposed intervention in clients' lives, responsible for a child on supervision who's not reoffended, will progressively give the case a lower and lower priority over the life of the supervision order. But that doesn't meet the requirements of supervision as interpreted by many Reporters. And so the tensions develop.

Tensions affect other groups too. In my experience social workers in general dislike handling truancy cases. They see them as the responsibility of teachers, schools and parents. Teachers and schools tend to disagree with them. The police have never conquered their

initial suspicion of the new system and there is marginal evidence from the annual Criminal Statistics published by the Scottish Home and Health Department that they are trying to refer more cases involving children directly to the Procurator Fiscal, although fewer and fewer of these cases are ending up in court. They are also making more use of their own juvenile liaison and police warning schemes.(15)

In the midst of these professional rivalries, the lay panels could easily have become the butt of everyone's dissatisfactions. But after a tentative start they're beginning to stand their ground, and some panels are even taking steps to sort out some of the difficulties they see around them. As I explained earlier most of the effort so far is concentrated on social work back-up, but as panels mature one hopes they will try to extend their field of influence.

They have of course many problems of their own to surmount. Sitting three independent lay members down at a table, furnishing them with reports in advance and giving them half an hour with an inarticulate and possibly intimidated fourteen year old and his parents,in the hope that they will uncover the root causes of that boy's problems, is asking quite a lot. Despite the informality of the hearing process, there are still a considerable number of procedures to be observed. Recent research by a team at Glasgow University, led by Professor F M Martin, indicates that, at many hearings, some of them are not observed correctly. Out of a sample of 301 hearings, 27 per cent were "below average" on procedure and in only 10 hearings were all the procedures strictly adhered to. Common errors included failure to explain the purpose of the hearing, failure to spell out the reasons for the decision, and failure to explain to the family their legal rights.(16)

Furthermore members are beginning, at least in some areas, to show a reluctance to attend some of the training sessions arranged for them.(17) Add to these the long established difficulty that panels have had in recruiting working class members, especially men, and the outlook begins to seem quite bleak. The upshot can be a hearing that consists of three uncoordinated homilies being delivered by secure members of the middle class who've found time for the session between morning coffee and a meeting of the community council.

Of course that's unfair to many panel members trying hard to make

the system work. But hearings can, and do, degenerate into a verbal assault on a silent child and bewildered parents mounted by a panel whose main collective thought is "why can't they be more like me and my children?" Training sessions can help but, to be effective, they need to be closer to the hearing process. Collective self assessment at the end of a session, or, with the help of an observer, is worth a hundred lectures at college on a Saturday morning on "The Art of Communication". It's not surprising that attendance at such sessions is dwindling, but despite all the worries over the effectiveness of training, it's worth pointing out that there's still a considerable commitment, to it and that some is obligatory. There's no equivalent concern among those who man our courts.

It is, of course, disturbing when panels do not abide fully by laid down procedures, and while it's important that training should try to remedy this, there is also scope for simplification. A small example: the standard proforma that lays out a ground of referral citing truancy is couched in such arcane terms that I doubt whether any child could truthfully and accurately admit to it as it stands.(18) The legal rights of those referred to a hearing must be protected, but I am sure that simplification is possible.

That leaves the experience of hearings themselves. I suppose I've considered about 500 individual cases in six years. They've been of all sorts from the trivial to the deeply serious. In some, a measure of success has been won. In others, I saw myself sitting at a staging post on the road to borstal, Young Offenders Institution and Prison. I've had the opportunity to discover how some people in our society have to live. At times it's left me in bleak despair. But I'm totally convinced that panels must survive, even if all they do is bring home to one group in society (the panel members) some kind of realisation of the problems others have to face. Hearings demonstrate every day to those taking part the fact that very few of those whose behaviour we label deviant are in some simple, self-contained, psychological sense "bad".

Many families still see hearings as a kind of court, talk about a period in a List D school as "doing time"...and they're right in so far as the new system is still attempting social control. But a hearing

can also, besides its judicial functions, evolve a trouble shooting role. One that, taking the ground of referral on a child as its starting point, does what it can to put a family back on a firm footing, steering it through the tangle of groups in officialdom whose overlapping concerns can further complicate existing problems. They could be given more powers to require information and action from agencies that are involved in particular cases. They could harness the efforts of people like welfare rights officers. That's a long term goal, and there will always be limits to what a hearing can do. There will always be causes of family distress far beyond their power to remedy. But an ombudsman role could be built up, if the will were there. But when one turns to the Government's proposals there's a very different motive at work.

The Government's Proposals for Reform

The consultative memorandum published on April 30 1980 contains a number of proposals aimed at "strengthening the powers" of hearings. It also advocates some changes in procedure. The contents are, in large measure, second hand. The previous Labour Government published a similar memorandum in November 1975, and, in a written reply in the Commons on February 14 1979,(19) the former Scots Secretary Bruce Millan announced some of his conclusions. The General Election intervened and stopped any of them being implemented. But now some have been resurrected, including contentious matters like giving panels the power to fine, a course explicitly rejected by Mr Millan.

While in opposition, the Conservative Party's Scottish wing developed a new policy on crime. A working party under Charles MacArthur produced a report entitled "Crime and its Remedies" in April 1978.(20) The conclusions on Children's Hearings were brief and must have disappointed many Tories. The group were convinced the original basis of the hearings "looking only at treatment and help" must be corrected. For them the paramount concern was the public interest. But they came up with no proposals for increasing the powers of hearings. Indeed they almost came out against such a course, arguing that it would require panels to be given "all the machinery of a court". They knew a cheap thing when they saw one. The compromising continued.

The committee's members were not prepared to say that children's hearings had failed...but they were convinced that as at present constituted they were doing little to prevent offences. There followed only two specific recommendations for change. All police reports should go in the first instance to the Procurator Fiscal, and reporters should be accountable to some central body, as Procurators-Fiscal are to the Crown Office. The report can't have pleased Teddy Taylor or Malcolm Rifkind, who was, at that time, in hot pursuit of 91 panel members in Scotland who had criminal records.(21) I was one of the 64 with Road Traffic offences, mine being a case of speeding many years before.

And so when the 1979 Conservative manifesto promised a review of the system it was hard to know what to expect. The only clue was that panels might be allowed to impose community service orders. In the event the memorandum continues the studied ambivalence of the 1978 Tory report. On the first page we are told the Secretary of State thinks "the hearings are performing a valuable function". Much of their success "can be attributed to the skill and dedication of panel members". Mr Younger makes it clear he doesn't plan any "fundamental" changes. But having got the bromide over, the tone changes on page two. There are public doubts, it is claimed, that hearings have "sufficient measures of discipline and punishment (my emphasis) available to them to deal purposefully with the persistent and generally older offender who apparently thinks he can flout the law".

So Mr Younger's main question is this. Is there a need for the system "to be seen (my emphasis) to have adequate regard to the protection of society from the delinquent activities of children"? It's clear that Mr Younger thinks there is, for he goes on to suggest that it can be satisfied by giving panels "specific powers of punishment" (my emphasis) to be applied in "a sensitive and understanding way". The civil servant who drafted that has caught with savage accuracy the anodyne approach of the present incumbent in St. Andrew's House. Panels are being told, in one breath, there'll be no change in their fundamental role...and in the next, to punish more. And, in the approach now perfected by Mr Younger in spelling out the consequences of the Government's industrial and economic policies...panel members are being advised to lean across the table as they dole out the fines and

repeat again and again "This is hurting me much more than it's hurting you".

The power to fine children, together with plans to enable panels to ask a court to impose caution (a financial security) on parents for the good behaviour of their child are the most contentious of the new proposals in the consultative document. There are others that have been widely welcomed. Solvent abuse may be made a specific ground of referral, and changes are proposed to make it easier to intervene early in cases of suspected non-accidental injury. There is also a worthwhile suggestion that panels might be able to suspend a disposal in a particular case for up to six months.

But it's the possible introduction of financial penalties that's caused all the resentment. Mr Younger says the power to fine won't fundamentally alter the work of hearings but many in the system think otherwise. Of course some panel members will succumb to the temptation to be seen by the public to be doing something with deviant children. And many of their clients will be reinforced in their view that hearings are just courts dressed up to look like something else. But the introduction of fines and a punishment mentality will crush out the seeds of understanding slowly developing on both sides of the hearing table that this is a genuine attempt at a fresh approach.

It wouldn't be so bad if Mr Younger...like the Cabinet monetarists...was philosophically committed to a complete change in direction for juvenile justice. But all he can offer is a half-hearted hope that cosmetic changes will appease hostile elements of public opinion. For the use of financial penalties will almost certainly have only a cosmetic effect as far as crime rates among the young are concerned. The average child at a hearing hasn't the wherewithal to pay a fine anyway...and if the parents have to cough up, as like as not, the money will come from the public purse since so many of the families are in the present economic climate dependent on social security. The effect will be to drive these families further into the poverty trap which is a root cause of their problems. The deterrent effect on their children is questionable, but the possible effect on the hearing system is incalculable.

At this moment the work of hearings depends on the willingness of

a child (and his parents) to accept the grounds of referral before the hearing can start. That's tantamount, to a prior admission of guilt and in at least nine cases out of ten at present it happens. If fines are to be widely imposed in future, how many children, encouraged by their parents, will resort to denying the grounds on the off-chance that a sympathetic Sheriff will find in their favour when the case goes for proof? If the practice becomes common, because parents have nothing to lose and a few pounds to gain by denying the grounds, the judicial log jam it will set up will undermine the whole panel system. And when fines are seen to be ineffective the calls for more punitive measures will start again and a valuable experiment will be destroyed.

There is another road that panels could be following. I've already mentioned the possibility of hearings acting as trouble shooters to extract children and their families from the bureaucratic travails in which their lives are enmeshed. That's a distant dream. But panels could move in that direction if their role in helping children who've done nothing wrong were strengthened. I've said nothing so far about the minority of cases that come to panels because the children are, through no fault of their own, at risk. The Royal Scottish Society for the Prevention of Cruelty to Children has recently called for an expansion of the panels' role in such cases.(22) There was a suggestion in the report of the Royal Commission on Legal Services in Scotland that the hearing system might have a role to play in divorce and other cases where child custody is at question.(23)

These are pointers to a very different future for hearings from that sketched out by Mr Younger and his advisers. Other countries have evolved family courts. In general their first task is still to identify the guilty or the wronged. But they can call on an array of interventionist agencies, aiming to help families once the court appearnace is past. Some form of 'help' is often the sentence of the court. So far Scotland's panels have tried to relegate judicial objectives to a secondary role. It's been done in the belief that 'help' would be more acceptable and effective if questions of guilt could be settled without full-blown procedures. There's some evidence that that message is getting across. For example in Professor Martin's latest research, there is evidence that parents and children who appear at hearings

see the panel as "interested in their well-being". The biggest danger now is that hearings will forfeit that growing support because they are unable to translate the promise of help into reality. What they need now are some of the powers of family courts elsewhere.

Panels need to be able to harness the efforts of interventionist agencies. To treat a father's drink problem, to guide families through the maze of welfare and social security benefits, to offer employment advice, to sort out a school problem....at present these are responsibilities assigned to a bewildering variety of agencies and pressure groups. In the competition to offer assistance, it's not surprising that some families get overlooked. Others are positively harmed in the scrum.

Panel members quickly get used to peeling off the wrapper on a case...the initial ground of referral...to reveal a complexity of family problems. An effective family hearing would be able to command coordinated back-up resources to treat these underlying causes of the child's delinquency. In appropriate cases it could call to account agencies whose actions had exacerbated the problems. The three year old girl whose case is dealt with because her body is covered in bruising and the fourteen year old thieving truant who sits sullen and silent throughout a hearing are both in their own way symptoms of what is wrong not just with a family unit but with society as well. If we have the courage, the imagination, we can build a system that tries to deal with that uncomfortable fact. But if we choose Mr Younger's road, we might as well go back to the single minded retributive world of the courts.

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