FROM PARENTAL CO-OPERATION TO PARENTAL PARTICIPATION: EXPLORING THE DEVELOPMENT OF "RELEVANT PERSON" STATUS IN THE CHILDREN'S HEARINGS SYSTEM AND IMPLICATIONS FOR REFORM*

ABSTRACT

In 2023 the most recent review of the children's hearings system, carried out by the Hearings System Working Group, reaffirmed the centrality of parental involvement in decision making that has always characterised children's hearings. Alongside this, the Group highlighted the "increasingly complex legislative and rights-based environment" of a modern children's hearing. This article explores the connection between these two conclusions and their implications for future practice within, and reform of, the children's hearings system. It is concluded that while parental involvement in decision-making has always been a feature of the children's hearings system there has been a shift from that involvement being about co-operating with the decision maker to address the child's needs towards a recognition of the participation rights of the parent. This shift has contributed to increased legal technicality in the children's hearings system; something which places more onus on the skills of children's panel members and children's reporters to practice in a manner that does not compromise the inquisitorial and less formal atmosphere characteristic of the children's hearings system. While significant, this increased onus does not necessitate law reform. Rather it can be responded to by greater consideration of how the non-legally qualified actors in the system can be supported under the current legislation to enhance their knowledge and skills to implement the technical legislation more fully in practice.

A. INTRODUCTION

The children's hearings system in Scotland was introduced in 1971[1] and is the legal process to determine the involvement of the State when a child needs care and protection.

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[1] Social Work (Scotland) Act 1968 Part III came into force on the 15 April 1971. Social Work (Scotland) Act (Commencement No 5) Order SI 1971/184.

Intervention may be necessary for the child because of abusive or neglectful behaviour towards them, or the risk of that happening, and/or because of the child's own behaviour including behaviour that may amount to a criminal offence.[2] The children's hearings system was conceived by a Committee established in 1961, that reported in 1964,[3] and which has become known as the Kilbrandon Committee after its Chair, Lord Kilbrandon. The system is steeped in its history to the extent that through societal and legal change since 1971 stated adherence to the 'Kilbrandon principles' has remained a constant feature.[4] Part of these principles was to secure the co-operation of the child's parents to address the child's needs.[5]

Over the last 20 years the children's hearings system has been the subject of a succession of consultations, reviews and resultant legislative changes.[6] The most recent of

[2] The current grounds for referral to a children's hearing can be found in the Children's Hearings (Scotland) Act 2011 s67(2). For an analysis of the s67 grounds in practice, see M Donnelly "A Tripartite Analysis of the Grounds of Referral to Children's Hearings" 2019 JR 117-135. For a full exploration of the operation of the children's hearings system see K McK Norrie, *Children's Hearings in Scotland*, (4th ed) (2022).

[3] Scottish Home and Health Department; Scottish Education Department *Report of the Committee on Children and Young Persons, Scotland* (Cmnd 2306: 1964). Hereinafter 'the Kilbrandon Report'.

[4] For example, in February 2020 the Scottish Government commissioned Independent Review of Care reported that there was "significant support for, and commitment to, the underlying principles of Kilbrandon". Independent Care Review *The Promise* (2020) 40. This modern reference to simply "Kilbrandon" is illustrative of the status the Committee report from 1964 still has. Similarly, there are a number of references to "Kilbrandon" in the Policy Memorandum to the Children (Care and Justice) Bill, at the time of writing recently passed by the Scottish Parliament. Scottish Government *Children (Care and Justice) (Scotland) Bill Policy Memorandum* (Scottish Parliament, 2022) paras 20 (quoting from *The Promise*), 82 and 343.

[5] Kilbrandon Report para 35.

[6] For example, in advance of the enactment of the current legislation, the Children's Hearings (Scotland) Act 2011, there were four consultations - *Consultation Pack on the Review of the Children's Hearings System* (Scottish Executive, 2004); *Getting it Right for Every Child: Proposals for Action* (Scottish Executive, 2005), the responses to which were published in *Getting it Right for Every Child: Proposals for Action. Analysis of Consultation Responses* (Scottish Executive, 2006); *Strengthening for the Future: A consultation on the reform of the children's hearings system* (Scottish Government, 2008), the responses to which were summarised in *Strengthening the Future: A consultation on the reform of the children's hearings system: Consultation Responses* (Scottish Government, 2009); the *Draft Children's Hearings (Scotland) Bill* (Scottish Government, 2009) the responses to which can be found in the *Draft Children's Hearings Bill – response to initial engagement with*

these reviews started in 2016 when the then First Minister commissioned an independent "root and branch" review of the care system for children in Scotland.[7] The Independent Care Review reported in February 2020 and made what became known as *The Promise*.[8] While the Review identified that there remained significant support for the children's hearings system as the appropriate legal forum for decision making about children in need of compulsory intervention, it highlighted a number of difficulties that had arisen in recent years.[9] As a result of this finding, the Hearings System Working Group was established to consider reform.[10] In its final report published in May 2023, the Working Group reaffirmed the central role of a child's parent or carer to decision-making within children's hearings, but at the same time the Group highlighted the "increasingly complex legislative and rights-based environment"[11] of a modern children's hearing.

stakeholders. Overview (Scottish Government, 2009). An Independent Enquiry on Youth Justice in Scotland was commissioned by the Children and Young People's Commissioner Scotland and Action for Children in 2018 entitled 'Kilbrandon Now' and most recently see Independent Care Review *The Promise* (2020) and Hearings for Children: Hearings System Working Group's Redesign Report (The Promise Scotland) (May 2023).

[7] Independent Care Review *The Promise* (2020) 4.

[8] Ibid

[9] Ibid 39-44.

[10] Chaired independently by Sheriff David Mackie, the Hearings System Working Group comprised representatives from the Scottish Children's Reporter Administration and Children's Hearings Scotland, as the two public bodies charged with operating the children's hearings system, alongside representatives of The Promise Scotland, the organisation established to support the implementation of the recommendations of the Independent Care Review and with representatives of the Scottish Government as observers. Hearings for Children: Hearings System Working Group's Redesign Report (The Promise Scotland) (May 2023) available at https://thepromise.scot/resources/2023/hearings-for-children-the-redesign-report.pdf

[11] Ibid 169. Although most of the recommendations made within the report to address the current challenges identified are not fundamentally new to the children's hearings system, the strength and focus on whether the current structures are capable of delivering what is expected in the modern children's hearings system is of particular note.

Parental involvement[12] in decision-making has always been central to the children's hearings system but yet, somewhat surprisingly, it has not been the subject of an in-depth analysis in the legal academic literature.[13] This is a particularly important omission given the range of rights and obligations that parents have in the modern children's hearings system and the significant influence they can have on the process of a children's hearing and decisions made for their child. For example, they have the right to receive information from the children's reporter about any referral,[14] to receive all the information about a children's hearing beforehand,[15] to attend and take part in the children's hearing,[16] to agree or disagree with the statement of grounds[17] and to appeal any appealable decision of the children's hearing.[18] This article addresses the gap in the literature by considering how parental involvement in decision-making in the modern children's hearing system has evolved from the outset of the system and the implications of this for current and future practice within

[12] In this article the words 'parents' or 'parental' are used as a shorthand to describe those individuals who are in a parental or quasi parental role in respect of a child in fact and/or by operation of law. This can include, for example, birth parents, step-parents, adoptive parents, long-term foster carers, kinship carers or any other person who can be considered to be a primary care-giver to the child.

[13] The major text for any aspect of the children's hearings system is Professor Norrie's *Children's Hearings in Scotland* (4th ed.) (2022). This text explains the current law surrounding parental involvement in decision-making and is an invaluable resource in that respect, especially for practitioners. Individual judgments in respect of parental involvement have been considered by way of case reviews and comments, for example J Aitken 'AR, Appellant – Case Comment' Fam LB 2016 6-8; A Evans 'Children's Hearings and Deemed Relevant Persons: T v Locality Reporter' Edin LR 2015 19(2) 244-248; K McK. Norrie 'Children's Hearings, Relevant Persons and the Welfare of the Child' Fam LB 2014 128 (Mar) 4-7; B Kearney 'Children's Hearings, Relevant Persons and the Welfare of the Child – some thoughts on Professor Norrie's comments' Fam LB 2014 129 (May) 2-4; B Kearney 'Unmarried Fathers as "Relevant Persons" – Principal Reporter v K (Case Comment)' 2011 SLT 18 115 – 123; J Thomson 'Defining Parents' SLG 2008 76(3/4) 71-73.

[14] Children's Hearings (Scotland) Act 2011 ss68(3)(a), 68(4)(b) (where a children's hearing is not being arranged); Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, SSI 2013/194 R22(2)(b) (where a children's hearing is being arranged).

[15] Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, SSI 2013/194 R22(2)(b).

[16] Children's Hearings (Scotland) Act 2011 s78(1)(c).

[17] Children's Hearings (Scotland) Act 2011 s90(1)(b).

[18] Children's Hearings (Scotland) Act 2011 s154(2)(b).

the system. It will be argued that the original principles underpinning the children's hearings system had the co-operation of parents in decision-making at their core. However, in more recent times the justification for parental involvement in decision-making has moved from co-operation with the decision-maker towards specific recognition of parental rights of participation, something that has resulted in more legally technical legislation. This legally technical legislation places greater onus on the skills of children's reporters and children's panel members to practice in a manner that does not compromise the inquisitorial and less formal atmosphere characteristic of the children's hearings system. While significant, this onus does not necessitate law reform. Rather it can be addressed through greater consideration as to how the non-legally qualified actors in the system can be supported to enhance their knowledge and skills to implement the technical legislation more fully in practice. This support can be delivered within the terms of the current legislation and therefore can be pursued without the need for further law reform and the resultant delay that would follow.

B. THE KILBRANDON REPORT AND THE CO-OPERATION OF PARENTS WITH THE "NEW ALTERNATIVE"

(1) The Kilbrandon Report

The children's hearings system is rooted very firmly in its history. The Committee that designed the system was established in May 1961 by the then Secretary of State for Scotland, under the chairmanship of Lord Kilbrandon, with a remit

> to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care and protection or beyond parental control and, in particular, the constitution, powers and procedure of the courts dealing with such juveniles.[19]

[19] Kilbrandon Report para 1.

In setting out a "new alternative"[20] to what went before, the Committee recommended that Scotland have a legal decision-making system based on the primacy of the child's welfare for *all* children in need, regardless of whether it was the behaviour of the child or the behaviour of others towards the child that was in issue.[21]

Within this new system, the Committee saw a child's parents as having a key role in helping the decision-making body to assess the child's needs and determine the measures best suited to meet those needs. The Committee identified that the fundamental issue that would bring a child within the new system would be "short-comings in the normal 'bringing up' process in the home, in the family environment and in the schools."[22] Therefore, the co-operation of the child's parent was viewed as an essential element of the Committee's proposed "social educational" approach to resolving the issues in the child's upbringing.[23] The Committee stated that the decisions should

> be arrived at after extensive consideration and discussion with the parents as a result of which it would be apparent to all concerned that the measures applied were determined on the criterion of the child's actual needs.[24]

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[20] Kilbrandon Report para 72.

[21] A decision-making system with the child's welfare as a primary or paramount consideration was not new to Scots law. Private law matters had been decided in this way since the Guardianship of Infants Act 1925 s1(1) and the welfare of the child accused of a criminal offence had been an explicit factor for decision-makers since the Children and Young Persons (Scotland) Act 1932 s21. See K McK Norrie, *A History of Scottish Child Protection Law* (2020) pages 34-35.

[22] Kilbrandon Report para 87.

[23] Kilbrandon Report para 35. The Committee was at pains to point out that punitive sanctions against parents for the behaviour of their child, such as fines or placing parents under supervision, did not foster such a co-operative approach, para 19.

[24] Kilbrandon Report para 76. This focus upon parental co-operation and responsibility was considered even earlier than the Kilbrandon Committee, for example in earlier reform proposed by a committee under the chairmanship of Sir George Morton that reported in 1928: 'Protection and Training being the report of the departmental committee appointed to enquire into the treatment of young offenders and to report what changes, if any, are desirable in the present law or its administration.' (Scottish Office, 1928). Subsequently, the

Such an approach, it was said, would allow decision makers to consider the "needs of the individual child as the test for action" and, where the child had committed an offence, this would be preferable to a sanction by way of punishment.[25] It was this element of parental involvement and co-operation that the Committee argued was particularly lacking in the existing legal process at the time.[26] In short, the co-operation of parents was fundamental to taking decisions in the best interests of the child: "[w]herever possible the aim must be to strengthen and develop the natural influences for good within the home and family, and likewise to assist the parents in overcoming factors adverse to the child's sound and normal upbringing."[27]

The process in which the co-operation of parents was secured within the new system was something also recognised as important by the Committee

> we do not consider that it is either necessary or desirable to seek to lay down any rigid framework governing the panel's proceedings. The questions arising are in our view likely to emerge most clearly only in an atmosphere of full, free and unhurried discussion, as a result of which the underlying aim and intention is made apparent to all concerned. We would expect that in many cases it would be possible to enlist the co-operation of the parents from the outset, and as a result adopt appropriate measures informally and by agreement without resort to an order by the panel.[28]

Children and Young Persons (Scotland) Act 1937 s42 provided for the compulsory attendance of a parent or guardian at the Juvenile Court, unless the court considered it unreasonable that they attend.

[25] Kilbrandon Report paras 77, 80.

[26] Kilbrandon Report para 36. References to legal rights of participation were not completely absent from the Committee's recommendations, especially those rights of a discrete procedural nature. For example, it was expected by the Committee that both the child and at least one parent would be present at a hearing, with representation if required, that the parent would be notified of the hearing and reasons for it and that the child, with their parents present, would be asked if they understood and "admitted" the allegation (paras 73 and 140). The parent's right to appeal was also viewed by the Committee as an important protective measure against "unwarranted interference in the liberty of the individual" (paras 76 and 111).

[27] Kilbrandon Report para 140.

[28] Kilbrandon Report para 109.

This atmosphere would be best achieved, in the Committee's view, by the proceedings taking place in private with as few people present as possible.[29]

Securing a parent's co-operation to determine how to best meet the child's needs is somewhat different to a parent having a legal right to participate in the decision-making on their own account and by virtue of being a child's parent. Co-operation to assist the decision-maker is suggestive of a one-way transaction of benefit to the decision-maker, whereby the parent provides information to the decision-maker in advance of the decision made and then has some responsibility surrounding the implementation of the hearing decision thereafter. Whereas a legal right to participate shifts the emphasis away from the decision-maker towards the individual and their rights; and promoting an individual's legal rights leads to more specific procedural requirements to be fulfilled to ensure the individual's legal rights are indeed promoted by the decision-maker. As will be suggested below, more specific procedural requirements in this respect have led to more legally technical legislation within the modern children's hearings system.

(2) "Parents and Guardians" under the Social Work (Scotland) Act 1968

The Kilbrandon Committee proposals were, to a large extent,[30] enacted through the Social Work (Scotland) Act 1968 and the first children's hearings were held in April 1971. Under the 1968 Act, and in line with the Committee's proposals, "parents and guardians"[31] were involved in children's hearings, for example by having the right to attend, to be represented

[29] Kilbrandon Report para 109.

[30] The most significant omission was the decision not to implement the recommendations related to "a matching fieldwork organisation"; a recommendation which attracted a great deal of criticism at the time from those with childcare and social work backgrounds. For example, in its submission to the Government following publication of the Kilbrandon Report, the Association of Child Care Officers was receptive to the proposals related to lay panels but was deeply critical of the new "matching fieldwork organisation" sitting within Education Departments and questioned the need for the new terminology of 'social education'. The National Records of Scotland: ED39/541 'Memorandum on the Report prepared by the Association of Child Care Officers (Scottish Region) and approved by the National Association' (undated).

[31] Social Work (Scotland) Act 1968 ss30(2), 94(1).

if they wished, to receive a very limited form of disclosure of information, and to appeal.[32] Perhaps illustrative of less complexity in family law generally at the time, there was comparative simplicity in the definition of "parent" as it was enacted under the 1968 Act. A "parent" was defined to include a "guardian" and meant "either or both parents", including adoptive parents to the exclusion of the birth parents.[33] The word "guardian" introduced a factual, as well as legal, aspect to the definition by stating that a "guardian" "includes any person who … has for the time being the custody or charge of or control over the child."[34] In a legal position that would become increasingly scrutinised, where the child's parents were not married the child's father was specifically excluded from being a "parent."[35]

There was very limited judicial scrutiny of these provisions at the time. The position of unmarried fathers formed the basis of three of the four reported cases under the 1968 Act, two determined by the Scottish courts and the third by the European Court of Human Rights.[36] The two cases determined by the Scottish courts both concerned a father who was not married to the child's mother but who lived with the child. From a modern perspective, the interesting feature of the cases is that they were based on whether the father could meet the factual definition of "guardian" as a matter of literal statutory construction as opposed to

[32] The 1968 Act s41(1) provided a right of attendance at a children's hearing and s41(2) set out an obligation to attend. Limited disclosure of information to a parent was provided for through The Children's Hearings (Scotland) Rules 1971, SI 1971/492 which in R17(3) required the chairman to inform the child and the parent of

> the substance of any reports, documents and information … if it appears to him that this is material to the manner in which the case of the child should be disposed of and that its disclosure would not be detrimental to the interests of the child.

A parent also had the right to be represented via R11(1) (although not for this to be publicly funded) and to appeal decisions made by a children's hearing under the 1968 Act s49(1).

[33] s30(2).

[34] s94(1).

[35] 1968 Act s94(1) as amended by the Law Reform (Parent and Child) (Scotland) Act 1986.

[36] *C v Kennedy* 1991 SC 68 (Inner House); *S v Lynch* 1997 SLT 1377 (Inner House); *McMichael v UK* (1995) 20 EHRR 205 (European Court of Human Rights). The fourth case reported under the 1968 Act concerned the status of a half sister and her husband, *Kennedy v H* 1988 SC 114.

questioning the appropriateness of his exclusion from the definition of the word "parent."[37] Revealing of the narrow rights framework of the time before the Human Rights Act 1998, the Scottish judgments made little mention of individual rights and when they did they did not stray from defined procedural rights of appeal, attendance and representation. It follows that the involvement of parents in children's hearings was not yet viewed by the Scottish courts as being about parents having a right to participate.[38]

In what remains the only case directly from the children's hearings system to be considered by the European Court of Human Rights, this narrow approach to the legal rights of an unmarried father was confirmed not to be inconsistent with the European Convention on Human Rights at the time.[39] The European Court held that the provisions as regards the status of the unmarried father were justified since the child's father had not taken the requisite steps under domestic law to secure legal recognition of his parenthood and thus there was no breach of Article 14 in conjunction with Article 6 and/or 8 of the Convention.

[37] In the first case decided by the Inner House, *C v Kennedy* 1991 SC 68, it was confirmed that the father of a child who was not married to the child's mother although excluded from the meaning of "parent" could meet the definition of "guardian" under the 1968 Act if, as a matter of fact, he had custody or charge of or control over the child. In 1997, in *S v Lynch* 1997 SLT 1377, the Inner House considered the situation where the unmarried father was a "guardian" at the time of the initial children's hearing but had been excluded from subsequent court proceedings a few weeks later by virtue of having had the child removed from his care by the mother. The court refused the appeal on the basis

> that Parliament has deliberately framed the definition of 'guardian' in a way which makes it inherently unstable so that it is liable to cover different people from week to week and even from day to day, depending on the circumstances of the child. (p1380).

[38] The decision of the Inner House in *S v Lynch* 1997 SLT 1377 is illustrative of this approach. It was not considered problematic by the Inner House that Mr S had been recognised as "a guardian" at the children's hearing, had denied the grounds of referral that narrated concerns about the care he gave to his child, but by the time the matter was before the sheriff he was no longer considered to be "a guardian". This was because the mother had forcibly removed the child from the father's care in between times. Thus, Mr S was not able to participate in the proceedings to consider the establishment of the grounds of referral, an inherently unfair position when viewed from a modern legal rights based perspective.

[39] *McMichael v United Kingdom* (1995) 20 EHRR 205.

Therefore, the key role of parents envisaged by the Kilbrandon Committee was reflected in the legislation which created the children's hearings system in a comparatively simple and straightforward way. Although the provisions attracted little by way of judicial scrutiny when judged by modern standards, when the courts did consider the concept of "parent or guardian" under the 1968 Act this was approached as a matter of statutory construction, with no real consideration of participation by virtue of being a parent. This comparative simplicity in the legislation and its interpretation began to shift, however, with the first legislative reform of the children's hearings system through the Children (Scotland) Act 1995 and a subsequent move towards recognition of parental participation driven in large part by the enactment of the Human Rights Act 1998. It is at this point that we begin to see the gradual introduction of more legal technicality to the legislation that underpins the operation of the children's hearings system and in its interpretation.

C. A MOVE TOWARDS "PARTICIPATION": THE INTRODUCTION OF "RELEVANT PERSON" TO THE CHILDREN'S HEARINGS SYSTEM

(1) An upward trend in the case law: recognising legal rights to participate in children's hearings

The Children (Scotland) Act 1995 introduced the term "relevant person" to the language of the children's hearings system to replace "parent or guardian" under the 1968 Act. Following on from the 1968 Act definition, the new definition of "relevant person" retained both a factual and legal element

> "relevant person" in relation to a child means –
>
> (a) any parent enjoying parental responsibilities or parental rights under Part I of this Act
>
> (b) any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act; and
>
> (c) any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child. [40]

[40] Children (Scotland) Act 1995 s93(2)(b).

The term "relevant person" is an unfortunate one when viewed in the context of a child's understanding, especially when approaching the issue of why a trusted adult to them is not considered "relevant" by a children's hearing or why a person who is not involved in their day-to-day life is "relevant" with all the rights and obligations that this attracts. It is all the more unfortunate that the opportunity has not yet been taken to replace the term in any subsequent legislative amendments to the system.[41]

The 1995 Act, and the new definition of "relevant person", entered into force on 1 April 1997.[42] Initially, the trend established under the 1968 Act of few cases exploring the definition continued. However, as the first decade of the twenty first century wore on the court jurisprudence interpreting the definition gradually increased in frequency, driven in large part by the enactment of the Human Rights Act 1998. This resulted directly in a shift towards the involvement of parents in decision-making at children's hearings being recognised as a matter of protecting and promoting a legal right to participate in matters concerning their child, rather than the hitherto priority of co-operating with the decision-maker.

In the initial years of the 2000s a handful of cases were reported that turned on their own facts, circumstances and application of the law.[43] In these early cases there are some explicit references within the judgments to rights of participation, albeit on the periphery. For example, in *S v N* as well as an emphasis on relevant persons being individuals who could assist the children's hearing in a similar vein to what the Kilbrandon Committee envisaged, [44]

[41] In February 2023 young people involved in the children's hearings system, alongside a small group of professionals, identified that "relevant person" is one of the terms that they would like to see "binned" from the children's hearings system. Our Hearings Our Voice 'Language Leaders – Because what we hear in Hearings matters' (2023) 2 available at https://www.ohov.co.uk/wp-content/uploads/2023/02/Language-Leaders-Because-what-we-hear-in-Hearings-matters-February-2023.pdf

[42] The Children (Scotland) Act 1995 (Commencement No. 3) Order 1996 SI 1996/3201.

[43] For example, in *S v N* 2002 SLT 589 the Inner House had "no difficulty" in holding that foster carers could come within the factual definition of relevant person and in *M v Irvine* 2005 Fam LR 113 the case of a grandfather and whether he met the factual definition in light of his level of involvement with the child was considered.

[44] *S v N* 592

the court also referenced relevant persons having "a right to intimation" and "a right to be heard."[45] The reference to a right to be heard attracted little emphasis in the judgment but the inclusion of this language is significant since it was the start of the sustained development of a body of case law examining the concept of relevant person in the context of individual legal rights, specifically under Article 8 of the ECHR setting out the right to respect for private and family life.[46]

(2) Unmarried fathers as "relevant persons": recognising rights to participation

Not long into the 21st century, against the background of the now incorporated European Convention on Human Rights by the Human Rights Act 1998, the status of unmarried fathers in the children's hearings system was back before the courts, this time challenged when a contact order had been made to regulate contact between father and child.[47] The definition of relevant person within the 1995 Act was problematic for unmarried fathers who did not live with their child since they would not have parental responsibilities and rights, unless they

> there was no reason to think that in enacting the 1995 Act Parliament intended to make any radical alteration to the definition so as to exclude the very individuals who might be in the best position to assist the children's hearing, or the court, in determining where a child's best interests lay.

[45] *S v N* 591.

[46] By this time, the European Court of Human Rights had already placed strong emphasis on procedural aspects when a question in relation to Article 8 was being considered. For example, in 1987 the European Court held that there was a violation of Article 8 when the parents of the child were not involved in child protection decision-making about their child "to a degree sufficient to provide them with the requisite protection of their interests." W *v United Kingdom* (1988) 10 EHRR 29 para 64.

[47] The Children (Scotland) Act 1995 s11(2)(d) defines a contact order as "an order regulating the arrangements for maintaining personal relations and direct contact between a child … and a person with whom the child is not, or will not be, living." Challenges were not exclusively related to contact orders, however. For example, in *RD v Children's Reporter, Stranraer*, unreported, Stranraer Sheriff Court, 3 December 2008, an unmarried father of a child whose birth was registered in Wales a month before the change in law in Scotland in 2006 was held not to be a relevant person since he did not hold parental responsibilities and rights in Scotland. This was held not to be a breach of Convention rights since a father in Scotland who had registered the birth in the Scottish Registers on the same date would be in the same position.

had taken legal steps to acquire them,[48] nor would they be a person "who ordinarily …has charge of, or control over, the child" within the meaning of s93(2)(b)(c). As had been the case under the 1968 Act, a father in such a position would therefore have no legal rights to participate within a children's hearing about their child as a relevant person. This is all the more relevant in the situation when a contact order had been made given the settled legal position that a Supervision Requirement regulating contact between the child and their father made by a children's hearing under the 1995 Act would supersede any pre-existing contact order.[49] In considering the issue, the Inner House held that that an ordinary reading of s93(2)(b)(a) did not mean that an unmarried father with a contact order was included in the definition but where contact was then the subject of determination by a children's hearing, such a determination could be an interference with the father's Convention rights.[50] Therefore, the provision in the 1995 Act needed to be read down so that "or a right of contact in terms of a contact order" was inserted into s93(2)(b)(a).[51]

In 2010, the same issue reached the Supreme Court, which in a unanimous decision gave a clear judicial statement that who is a relevant person is not simply about the decision maker securing the co-operation of the individual in order to make the best possible decision

[48] Amendments to the law were made in 2006 enabling an unmarried father who was registered as the father on the child's birth certificate, subsequent to the date of commencement, to be conferred parental responsibilities and parental rights for the child without the need for further action. Children (Scotland) Act 1995 s3(1)(b)(ii) as inserted by the Family Law (Scotland) Act 2006 s23(2)(b). Prior to these amendments, a father would only hold parental responsibilities and rights for a child if he was married to the child's mother or had taken legal steps to acquire them through signing an agreement with the mother or seeking an order from the court. These amendments were not, however, retrospective and therefore there remained a significant number of unmarried fathers who were not conferred parental responsibilities and rights by virtue of being named as the father on a child's birth certificate where the child's birth was registered before the commencement date of 4 May 2006.

[49] *Dewar v Strathclyde Regional Council* 1985 SLT 114.

[50] *Knox v S; L v Ritchie* [2010] CSIH 45, 2010 SC 531.

[51] The provision in s93(2)(b)(a) therefore was read down to include "any parent enjoying parental responsibilities or parental rights under Part I of this Act or a right of contact in terms of a contact order." (Emphasis added). For further discussion of this case, see A Evans, "Unmarried Fathers, Contact and Children's Hearings: exploring Authority Reporter v S" 2011 Edin LR 15(1) 106 – 111.

for the child.[52] Early in its judgment the court drew attention to the principles of natural justice, specifically fairness and the right to be heard,[53] and these principles are threaded throughout the judgment. On the facts of this particular case, if the father was not considered a relevant person then he would not be permitted to have a say in the establishment of the grounds of referral, notwithstanding that they were based in part on his behaviour, nor on the subsequent decision to restrict contact between himself and his daughter and these were considered to be matters of fairness. A Convention issue arose because father and child had established family life with each other within the terms of Article 8, with which the children's hearing may (and indeed did) interfere; and yet in not allowing the father to take part in the proceedings the legislation did not provide the minimum procedural protections relating to participation in the decision-making process that are required. In direct contrast to the earlier position of the European Court in *McMichael*, the Supreme Court held it was not sufficient to say that the father could make an application to the Sheriff Court for parental responsibilities and rights to enable him to acquire relevant person status, since timeous decisions could not be guaranteed and this application would come at a cost should legal aid not be available. Pending a Sheriff Court decision, the children's hearing could proceed and make life-altering decisions: as Lord Rodger memorably put it, "the train may have left the station while the father is still waiting at the barrier."[54] In other words, the procedural protections require that someone with established family life is enabled to participate in the process *that leads to* the decision of the children's hearing to interfere in their family life: only then can the right to participate in the process be said to be properly guaranteed.[55]

From the perspective of the judiciary, the sea-change from co-operation as part of the decision-making process to a parental right of participation in the children's hearing was now

[52] *Principal Reporter v K* [2010] UKSC 56, 2011 SC (UKSC) 91.

[53] *Principal Reporter v K* paras 14 and 15.

[54] *Principal Reporter v K* para 33.

[55] *Principal Reporter v K* para 41. Ultimately the Supreme Court held that the defect could be cured by reading down the definition of relevant person in s93(2)(b)(c) of the 1995 Act so it then read

> any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child or who appears to have established family life with the child with which the decision of a children's hearing may interfere. (emphasis added).

readily apparent. This parental right of participation required procedural protections to be in-built to the children's hearings system and this has had implications for the operation of the children's hearings system and its reform, which will now be explored.

(3) The Children's Hearings (Scotland) Act 2011: Increasingly technical legislation

At the same time as the children's hearings system was receiving the judicial scrutiny discussed in the previous section, Scottish politicians[56] were also becoming increasingly active with the publication of several consultations related to the future of the system.[57] What became the current legislation, the Children's Hearings (Scotland) Act 2011, was the culmination of these various proposals and consultations which centred primarily on how the children's hearings system should be structured and whether there should be a national body in some form to replace the largely local arrangements that had characterised the children's hearings system since its inception. By the time the Bill that subsequently became the 2011 Act[58] was introduced in the Scottish Parliament in early 2010, the policy drivers for new legislation had become much more explicitly based on individual legal rights, particularly of the child.[59] In a continuation of language from the 2008 consultation on the reform of the children's hearings system, "Strengthening the Future",[60] the overall aim of the Bill was said to be to "strengthen and modernise" the system.[61] It is unclear what is meant explicitly by

[56] The creation of the Scottish Parliament through the Scotland Act 1998 s1(1), and the children's hearings system falling within its legislative competence defined under s29, meant change was being considered by the Scottish Parliament as opposed to the Westminster Parliament, which had passed the children's hearings system legislation to date.

[57] See note 6 above.

[58] The Bill was introduced by the Scottish Government to the Scottish Parliament on 23 February 2010. It received Royal Assent on 6 January 2011 and entered into force (largely) on 24 June 2013.

[59] Scottish Government *Children's Hearings (Scotland) Bill Policy Memorandum* (Scottish Parliament, 2010) paras 11, 15, 16, 17 and 33. Hereinafter 'the policy memorandum'.

[60] *Strengthening for the Future: A consultation on the reform of the children's hearings system* (Scottish Government, 2008)

[61] *Strengthening for the Future* para 13

> The changes to the Hearings system proposed in the Bill are designed to protect those [Kilbrandon] principles at the same time as modernising and strengthening the system to enable it to continue to work well both now and in the future.

"strengthen and modernise" but it would seem to encompass both a desire to achieve more consistency in practice and to respond to newly emerging needs of children and families[62] as well as ensuring that the children's hearings system is "robust against future legal challenge."[63] In seeking to ensure this robustness the Children's Hearings (Scotland) Act 2011 added a layer of technicality that was not part of the preceding legislation, seen especially in the provisions related to relevant persons.

Building on the 1995 Act definition, the 2011 Act provides a twin track to the identification of relevant person and thus to the conferral of full participation rights.[64] First, the Act provides a definition of relevant person in s200 that is notably more limited and more status-determined than the somewhat looser definition in s93(2) of the 1995 Act. A person will be recognised as a relevant person if they are (1) the parent of a child, unless they have had their parental responsibilities and rights removed by a court;[65] (2) a child's guardian or other person who has parental responsibilities or rights under s11(2)(b) or s11(12) of the 1995 Act; (3) a person in whom parental responsibilities or parental rights are vested by virtue of a permanence order; or (4) persons in analogous positions by virtue of broadly similar provisions surrounding parental responsibility within the terms of English, Welsh and Northern Irish laws. Coming within the s200 definition enables a person to be recognised as a relevant person automatically. However, two particular issues still arise: the interpretation of the word "parent", which may still cause problems particularly for the child's father given

[62] Scottish Parliament Education, Lifelong Learning and Culture Committee, *Stage One Report on the Children's Hearings (Scotland) Bill* (Scottish Parliament, 2010) para 283.

[63] Policy Memorandum para 16.

[64] Alongside relevant persons who have full participation rights, later amendments also created a new category of individuals with rights to participate – a "person with an opportunity to participate" in a children's hearing. Children (Scotland) Act 2011 s79(2)(ba), inserted with effect from 26 July 2021 by the Children (Scotland) Act 2020 s25. Persons with an opportunity to participate are not entitled to the full range of rights afforded to a relevant person, the most notable difference being in the right to appeal. At present, this category of individuals is confined to brothers and sisters and is outside of the scope of this article.

[65] The Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 Art. 3. The specification resulting in all parents being considered as relevant persons did not feature in the 2011 Act as passed, but rather was provided for by virtue of secondary legislation shortly before the 2011 Act entered into force on 24 June 2013.

the inherent scope for uncertainty about paternity as opposed to maternity, and the meaning of the concept of "parental responsibilities or parental rights" which leaves unclear whether holding one, or a limited range, only of these responsibilities and rights in relation to the child will be sufficient. Neither has been definitively addressed in judicial discussion since 2013.

Secondly, the 2011 Act creates a wholly new process to be "deemed" a relevant person for those who do not fall within the s200 definition.[66] A person must be deemed to be a relevant person by a children's hearing or pre-hearing panel if the factual test set out in s81(3) is met and similarly must have that status removed by the hearing or pre-hearing panel on a finding that the factual test is no longer satisfied; the imperative in both respects is to be noted. The factual test is that "the individual has (or has recently had) a significant involvement in the upbringing of the child."

The previous approach whereby the one legislative definition of relevant person in the 1995 Act covered both legal and factual involvement in a child's life, with the children's reporter applying the definition to the individual in advance of the children's hearing, was eliminated by the 2011 Act. By contrast, the approach of the 2011 Act is to separate out those who are relevant persons by virtue of their legal relationship with the child and those who are relevant persons through being involved in the child's upbringing in fact. This separation is reinforced by the provision, felt necessary, that a deemed relevant person is for all intents and purposes of the children's hearings system treated as if he or she is a relevant person.[67] The added legal technicality arises from separating individuals into classes of "relevant person" and "deemed relevant person" and from the mechanism that has been created for decisions to be made about deeming relevant persons by pre-hearing panels and children's hearings, including how the test has been interpreted in practice. These provisions add layers to the current legislation not seen previously in the 1968 or 1995 Acts.

Almost immediately after the 2011 Act entered into force in June 2013 the more legally technical relevant person provisions were the subject of a plethora of judicial scrutiny,

[66] Children's Hearings (Scotland) Act 2011 s79(2)(a).

[67] 2011 Act s81(4).

much more so than the equivalent provisions under the previous 1968 and 1995 Acts. The issue of deemed relevant person status in particular has been given attention by the courts, with courts at Sheriff, Sheriff Appeal Court and Court of Session levels being asked to consider the meaning of the deemed relevant person test; and this judicial scrutiny is revealing of the technicality of the provisions. For example, what is meant by the words "significant", "involvement" and "upbringing"?[68] How recent must the "involvement" have been?[69] What of situations where the individual's involvement has been curtailed by state intervention?[70] What place do the views of the child have?[71] Is the welfare of the child to be considered in the determination of relevant person status?[72] The protection and promotion of a relevant person's legal rights to participate has been very much at the forefront of judicial thinking, either directly in terms of addressing an argument made or as background to the need for a relevant person determination.[73]

Thus, the underlying justification for parental involvement in the children's hearings system is now firmly to protect their legal right to participate in decisions made about their child. In seeking to ensure this protection there is now more legally technical legislation

[68] See, for example, *MT and AG v Gerry* [2014] CSIH 108, 2015 SC 359; *AR, Appellant*, unreported, Extra Division, Inner House, 17 December 2015; *Esther Brooke v Reporter to the Children's Panel* [2018] SC Ham 3, 2018 SLT (Sh. Ct.) 17.

[69] See, for example, *DH v Scottish Children's Reporter* 2014 Fam LR 63.

[70] See, for example, *CC v Manns* [2016] SAC (Civ) 13, 2016 GWD 38-680.

[71] See, for example, *CF v MF and JF and Scottish Reporter* [2017] CSIH 44, 2017 SLT 945.

[72] *M, Appellant* 2014 Fam LR 55; *AG v Principal Reporter* 2013 SLT (Sh Ct) 125 and discussed by K McK Norrie 'Children's Hearings, Relevant Persons and the Welfare of the Child' Fam LB 2014 128 (Mar) 4-7 and B Kearney 'Children's Hearings, Relevant Persons and the Welfare of the Child – some thoughts on Professor Norrie's comments' Fam LB 2014 129 (May) 2-4.

[73] See, for example, M*T and AG v Gerry* 2015 SC 359 at para 14 where the Inner House said that the focus

> should be on whether the individual in question has had an involvement in the upbringing of the child of such significance as to give rise to a relationship between the individual and the child which calls for the procedural protection of constituting the individual as a party to the proceedings …

and *F v F* 2014 Fam LR 57 para 39 the sheriff said that "participation in a decision-making process is a crucial element in the protection of a person's right to a fair hearing" under Articles 6 and 8 of the European Convention on Human Rights.

underpinning the operation of the children's hearings system than has ever been the case to date. The question follows, therefore, about what this legally technical legislation means for the children's hearings system in practice. This is an important question which has not yet been addressed in the legal academic literature[74] and is especially timely as the future of decision-making within the children's hearings system is being assessed through the work of the Hearings System Working Group.[75]

D. IMPLICATIONS FOR PRACTICE AND FUTURE REFORM OF THE CHILDREN'S HEARINGS SYSTEM

(1) The practical implications of legally technical legislation

Any consideration of the implications of legally technical legislation for the children's hearings system must be situated in the specific context of the system itself and its underlying principles. As discussed above, the atmosphere in which discussions about the child's needs takes place was seen as crucial when the children's hearings system was conceived: the best atmosphere being one of "full, free and unhurried" discussion, free of rigid legal procedure and centred on the child's needs.[76] More recently a young person involved in the children's hearings system described a children's hearing as being "a conversation not a confrontation"[77] and the Hearings System Working Group described the ethos of a hearing as

[74] As set out above in note 13, to date the concept of "relevant person" has itself not been the subject of an in-depth examination in the legal academic literature. The implications arising from the development of the concept, therefore, equally have not yet been considered.

[75] Against the identified background of the "increasingly complex legislative and rights-based environment" of a children's hearing, the Hearings System Working Group considered whether the current structures are capable of delivering what is expected in the modern children's hearings system, ultimately concluding that the current model of lay, volunteer, panel members as decision-makers should be replaced. Hearings for Children: Hearings System Working Group's Redesign Report (The Promise Scotland) (May 2023) available at https://thepromise.scot/resources/2023/hearings-for-children-the-redesign-report.pdf

[76] Kilbrandon Report para 109.

[77] Children's Hearings Improvement Partnership (CHIP) 'Our Vision and Values for the Children's Hearings System in Scotland' (CHIP)(2016) 1.

being "inquisitorial" in nature.[78] Despite spanning nearly 60 years, what these descriptions have in common is the importance of discussion at a children's hearing, with the input of the child and those most closely involved in their life, to arrive at the best outcome that ensures the needs of the child are met. Enabling this discussion to take place between all parties relies on the practical skills of children's reporters and panel members to create and maintain an atmosphere conducive to an open discussion. For example, before the children's hearing it is the responsibility of the children's reporter to schedule the hearing, allowing enough time for consideration of the relevant issues, and to invite those who need to be there to take part in the discussion. At the children's hearing itself the chairing member, supported by their two fellow panel members, must ensure that the relevant issues are discussed and that those present are given the opportunity, and feel able, to contribute to the discussion. In this respect, it must be considered that the panel members in a children's hearing are lay people and children's reporters who, although deal with many of the legal aspects of the children's hearings and can provide panel members with a view on legal matters during a children's hearing, are not necessarily legally trained professionals; children's reporters may come from a variety of relevant professional backgrounds most notably social work.

It is against this background that the implications of more legally technical legislation in respect of relevant person status, and the procedural requirements inherent within it, needs to be considered. This relates especially to creating and maintaining an atmosphere conducive to "full, free and unhurried" exploration of the child's needs with the understanding and involvement of those closest to the child but all the while ensuring that the child's own understanding and participation in their hearing is not inhibited.[79] This requires a set of skills that enable the rights of the child and, separately, the rights of the parent to be protected and promoted during the same hearing. That several people may meet

[78] Hearings for Children: Hearings System Working Group's Redesign Report (The Promise Scotland) (May 2023) 84-85 available at https://thepromise.scot/resources/2023/hearings-for-children-the-redesign-report.pdf

[79] As summarised in the National Child Protection Guidance, first published in 2021 and updated in 2023,

> research has consistently made clear that children want the number of people in their hearing to be limited to those who are strictly necessary. Research also indicates that having a high number of people present in a hearing can impede participation by children and relevant persons.

Scottish Government, 'National Guidance for Child Protection in Scotland 2021 – updated 2023' 64 para 2.61.

the relevant person definition is a natural consequence of the Supreme Court advocating an expansive approach to its interpretation when the court said "in a borderline case, it would be safer to include him and let others argue than to leave him out."[80] This gives potential for a large group of people who, along with the child, have the right to attend a children's hearing,[81] with representation if they wish,[82] and to receive information about the child.[83] Managing children's hearings in these circumstances calls for careful, skilful practice by children's reporters and children's panel members since, left unmanaged, the consequences could create tension with the child's right to participation, to privacy, to protection from further harm and impact on their understanding of the proceedings. For example, the presence of a number of adults, who may be barely known to the child if they are an estranged parent, could inhibit the child's ability to speak at the children's hearing itself; permitting access to information to individuals who have harmed or demonstrated a risk of harm to the child or others in the past could give rise to further risk of harm to the child; and there is potential for conflict with a child's right to privacy where information is provided to a relevant person who may not be aware fully of the child's current circumstances, thoughts and feelings. These risks are manageable within the terms of the current legislation and without impacting negatively on the child, so long as they are given due consideration in advance.

Careful management of hearings is especially necessary when a parent attending the hearing poses a risk of harm to the child or another person, such as a previous partner. There are a range of practical measures at the children's hearings system's disposal to manage a risk of harm to the child so that an individual can participate as a relevant person but the onus for applying these measures appropriately rests on the knowledge and skills of the children's panel members and children's reporters as well as on careful advance planning. The measures can include, for example, a decision by the children's hearing or children's reporter to

[80] *Principal Reporter v K* 2011 SC (U.K.S.C.) 91 para 69.

[81] Children's Hearings (Scotland) Act 2011 s78(1)(c).

[82] Children's Hearings (Scotland) Act 2011 s78(1)(d).

[83] Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, SSI 2013/194 R22(2)(b).

withhold information from the relevant person, for example the child's whereabouts,[84] and/or excluding the relevant person from part of the hearing to enable the child to provide their views to the hearing.[85] It should be noted that managing risks of harm between attendees has always been a factor within the children's hearings and is not a *direct* result of modern legislation; what the current focus within the legislation brings is the potential for these issues to be magnified as the hearing contends with different people with different needs and provisions that can be complex in implementation.

A greater onus on the hearing management skills and knowledge of children's panel members and children's reporters is a challenge not faced by the children's hearings system until recent years. This places strong additional emphasis on the recruitment, training and support offered to these individuals from whom much is expected, by both Children's Hearings Scotland (in respect of panel members) and the Scottish Children's Reporter Administration (in respect of children's reporters). Recent reviews, however, have highlighted that the knowledge and skills required to implement the more legally technical legislation have not always been evident in the experience of attending children's hearings.[86] The question therefore arises whether the consequences of more legally technical legislation in practice are capable of being addressed within the children's hearings system as it has been operating for the last 50 years? Or, does the children's hearings system needs to be reformed to take account of 21st century legal imperatives such as highlighted in relation to relevant person status?

(2) The need for future legislative reform

There is no doubt that increasing legal technicality in legislation and its implementation pose challenges to the modern children's hearings system. This is evident from some of the issues

[84] Children's Hearings (Scotland) Act 2011 s178(1) and Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, SSI 2013/194 R16.

[85] Children's Hearings (Scotland) Act 2011 s76(1), (2).

[86] Independent Care Review *The Promise* (2020) 39-44; Hearings for Children: Hearings System Working Group's Redesign Report (The Promise Scotland) (May 2023) where, for example, it was found that experiences of children's hearings can be "characterised by conflict and animosity." 84.

highlighted in relation to the operation of the modern children's hearings system, most recently by the Hearings System Working Group.[87] While this may result in a temptation to change the children's hearings system fundamentally to meet modern legal imperatives driving technicality in legislation, such change is unnecessary. The challenges are not insurmountable, and solutions are readily available within the existing legislation without the delay that would ensue from further and fundamental legislative change to the children's hearings system, especially in the context of the children's hearings system having been under almost constant change, and threat of change, since 2004.[88] Rather, redoubled efforts on how the central actors are supported to implement the legislation available currently would provide a more immediate response to the issues arising.

The current legislation can facilitate the careful management of a children's hearing to ensure it remains the forum conducive to the child and their family's participation within the ethos of the children's hearings system. Provisions include, for example, alternative methods for enabling the child or relevant persons to attend a children's hearing,[89] managing the attendance of individuals who do not have the right to attend the hearing,[90] formal exclusion of relevant persons from the children's hearing,[91] and non-disclosure of information to those relevant persons entitled to it.[92] There is, therefore, little need for legislative change in this regard: rather the matter is one of practical implementation of these provisions and the creation of an atmosphere to enable the characteristic discussion, an intangible matter of practice that cannot be legislated for. It follows that to respond to the increased legal technicality in the legislation, focus must be placed on supporting the continued development of knowledge and skills needed in practice, and the power to do this already rests with the National Convener and Principal Reporter. The National Convener has the power to train and

[87] Ibid.

[88] See note 6 above.

[89] Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, SSI 2013/194 R20B, R20C.

[90] Children's Hearings (Scotland) Act 2011 s78(2).

[91] Children's Hearings (Scotland) Act 2011 s76.

[92] Children's Hearings (Scotland) Act 2011 s178(1) and Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, SSI 2013/194, R16.

monitor panel members[93] and in respect of children's reporters the Principal Reporter may delegate their functions to an employed person and may issue direction in the carrying out of those functions.[94] There is no publicly available information on the monitoring of the Principal Reporter's delegated functions. However, the most recent Annual Report from Children's Hearings Scotland reveals that only 12% of children's hearings were observed under the National Convener's panel member monitoring function, which clearly demonstrates scope for improvement in this crucial area.[95]

The children's hearings system has been through almost constant reform in the last 20 years, with a series of reviews and reforms to legislation that take time in their consultation, drafting and implementation.[96] This naturally causes delay and so where possible existing legislation should be utilised to its fullest effect before reaching for the Statute book once again. In the context of the legally technical legislation caused by the move towards parental participation in the children's hearings system there are still opportunities within the current legislation to be explored to ensure the current legislation is implemented to the maximum extent possible in practice.

E. CONCLUSION

The children's hearings system has always been predicated on the child's parents having a crucial role in decision-making about their child. Securing the co-operation of parents was seen by the Kilbrandon Committee as vital to address the issues in the child's upbringing that had led to State intervention. That this involvement be in private, with as few people as possible present and within a process free of rigid legal rules, was considered necessary to enable an inquisitorial and discursive atmosphere to determine the child's needs. Over time the justification for the involvement of the child's parents in decision-making has shifted from

[93] Children's Hearings (Scotland) Act 2011 s4 and Sch 2.

[94] Children's Hearings (Scotland) Act 2011 s16 and Sch 3.

[95] Annual Report and Accounts 2022-23 (Children's Hearings Scotland, 2023) 16 available at https://www.chscotland.gov.uk/media/0fidscts/annual-accounts-2022-23-v2-3.pdf

[96] For example, the consultation that led to the 2011 Act began in 2004, with the legislation ultimately entering into force (largely) in June 2013. See note 6 above.

the need to engage the support of parents to bring about change in the child's upbringing to recognising parents as individuals with legal rights of participation in relation to the child by virtue of their own status in the child's life. However, to enable this shift towards explicit promotion of the participation of relevant persons, a new layer of legal technicality has been introduced to the operation of the children's hearings system by the Children's Hearings (Scotland) Act 2011 of the like not seen within the system previously. This is stark from a basic comparison between the provisions setting out who a child's parents, or "relevant persons" in the words of the modern legislation, are in the 1968 Act, the 1995 Act and, especially, the 2011 Act, as well as the modern judicial interpretation of it. The increased legal technicality has practical consequences for the operation of the children's hearings system, most notably a stronger onus on the knowledge and skills of children's panel members and children's reporters in the arrangement and management of children's hearings, which have not always been evidenced successfully to date. These consequences can be addressed through the practice support provided to children's panel members and children's reporters, which does not require legislative reform. Full, complete and proper implementation of the legislation already available by the existing actors in the children's hearings system can ensure that the child centred ethos that has characterised the system since its inception can remain without the resulting delay that further legislative reform would produce.