Welfare in Crisis? Key Developments in Scottish Youth Justice

9

Lesley McAra

Introduction

From the 1970s until the mid-1990s, the Scottish juvenile justice system exhibited a high degree of stability, both in terms of its institutional framework and policy ethos. Based on the welfare values enshrined in the Kilbrandon philosophy, the 'children's hearings system' became emblematic of a distinctively Scottish approach to youth crime and justice. This commitment to welfarism was in direct contrast to developments in many other Western jurisdictions (not least the system south of the border in England and Wales).

The stability of the Scottish system has, however, been somewhat shaken by a series of recent policy developments, set in train by the Children (Scotland) Act 1995 and culminating with the anti-social behaviour legislation, which came into force during 2004. These policies are predicated on a broad set of competing and somewhat contradictory rationales (they are variously punitive, managerialist, actuarial and restorative in orientation, as well containing some vestiges of older style penal welfarism). They have also created a wider range of audiences to whom the youth justice system now speaks (including victims of youth crime, 'failing' parents and local communities). Taken together, these developments are indicative of a degree of policy convergence with the youth

justice system in England and Wales, as successive Justice Ministers in Scotland have gradually embraced the New Labour crime agenda (McAra, 2004a). A particular irony is that the pace of change has gathered momentum in the period since devolution (1999 onwards), with the reinstatement (after almost 300 years) of the Scottish Parliament.[1]

The history and development of youth justice in Scotland

Prior to the implementation of the hearings system in 1971, the juvenile justice system in Scotland was underpinned by an ambiguity in penal aims between concerns to 'rescue' children and also to punish them. Children were dealt with by the same types of criminal court as those which dealt with adults, although court officials were obliged to have regard to the welfare of the child (McAra, 2002). The tension that beset the courts between the requirement to look after the needs of the child and also act as formal courts of law, precipitated a major review of juvenile justice conducted by the Kilbrandon committee in the early 1960s. The recommendations of this committee were enshrined in the Social Work (Scotland) Act 1968, the preamble to which gave an explicit commitment to the promotion of 'social welfare'. The act, *inter alia*, abolished the existing juvenile courts and established a new institutional framework for youth justice, the children's hearings system.

Ethos

The children's hearings system was based on (what became known as) the Kilbrandon philosophy. According to this philosophy, the problems of children who were involved in offending or who were in need of care and protection (as a consequence of factors such as victimisation from sexual or violent offending or parental neglect) stemmed from the same source, namely failures in the normal upbringing process and/or broader social malaise (Kilbrandon, 1964). The system advocated early and minimal intervention based on the needs of the child, with the best interests of the child to be paramount in decision-making. It aimed to be as destigmatising as possible, a central principle being to avoid the criminalisation of children.

Key institutions

A characteristic feature of the new system was the separation of the judgment of evidence from the disposition of a case. The former lay in the hands of the

---

1. Prior to devolution, Scotland was wholly subject to the rule of the UK national Parliament at Westminster, although Scotland did have its own legal and education system. Policy specific to Scotland was administered by the 'Scottish Office' – a government department which had its headquarters in St. Andrew's House in Edinburgh.

Reporter whose principal task was to investigate referrals and decide if there was a prima facie case that one of the statutory grounds of referral to the system had been met[2] *and* whether the child was in need of compulsory measures of care. The principal task of a hearing was to consider the measures to be applied.

Before a hearing could take place both the child and his/her parents had to accept the grounds for referral (in the case of an offender there had to be an admission of guilt). If the grounds were disputed, the case would be referred to the sheriff court for a proof hearing.[3] Participants at a standard hearing were: the lay panel, who were the principal decision-makers (panels comprised three members drawn from the wider panel in each local authority area); the child and his/her parents; the Reporter (to advise on legal and procedural matters and to record the reasons for the decision); a social worker (to provide expert advice and assessment); and, where relevant, a range of other professionals (for example, a teacher, psychologist or psychiatrist). While the child and/or their parents could be accompanied by a lawyer (or indeed another supporter) no legal aid was available for this in the early years of the system.

The hearing aimed at participatory and consensual decision-making. The main disposals available to the panel were (and continue to be) residential and non-residential supervision requirements – both of which ensured statutory social work supervision based on needs of the child.[4] Supervision requirements normally lasted up to one year but were subject to review and could be extended up until the child's 18th birthday.

While it was possible for anyone to refer a case to the reporter, in practice the overwhelming majority of referrals always came from the police (McAra, 2002). Children could be referred to the system from birth until age 16 on care and protection grounds and from age 8–16 on offence grounds (8 currently being the age of criminal responsibility in Scotland). While most offenders aged 16–18 were dealt within the adult court system, the courts did have the power (little used, see McAra, 1998) to remit such cases back to the hearings system for advice or disposal.

Although the aim of the system was to focus on the needs of the child, it is important to remember that the Crown did reserve the right to prosecute children

---

2. Initially there were nine grounds for referral: (a) beyond the control of a relevant person, (b) moral danger, (c) lack of care, (d) and (dd) victim of or living in household of victim or perpetrator of schedule 1 offence (sex offence or one involving cruelty to children), (e) female child in same household as incest victim, (f) failed to attend school regularly without reasonable excuse, (g) committed an offence, (h) a child who has moved to Scotland from England, Wales or Northern Ireland whose case has been referred to the Reporter by the juvenile court (see Murray, 1982). These grounds have now been extended to include substance misuse (drugs, alcohol or volatile substance) and being in the care of the local authority.

3. The standard of proof in the case of an offence referral was 'beyond reasonable doubt' and for other non-offence referrals 'on the balance of probabilities'.

4. A residential supervision requirement specified some form of local authority residential care which in the early years of the system could include residence in a List D school. If a child was made subject to a non-residential supervision requirement, they would remain in their own home.

who had committed the most serious offences (such as rape or homicide) as well as certain motor vehicle offences[5] in the courts. While some commentators have argued that this went against the grain of key tenets of the Kilbrandon philosophy (that the more serious the offending the more deeper seated the needs), the decision to retain prosecution was justified on the grounds that such cases raised matters of public interest (McAra, 2004a). Moreover, it was a necessary compromise to ensure the support of key elites (including the police, the prosecution service and the judiciary) for the children's hearings system (Morris and McIsaac, 1978). In practice such prosecutions were (and continue to be) extremely rare (around 140 in a typical year, a high proportion of which are remitted back to the hearings for disposal) and require the express and personal permission of the Lord Advocate (the head of Scotland's prosecution service).

Assessment of early years

The implementation of the children's hearings system placed Scottish youth justice on a completely different trajectory from youth justice in England and Wales. During the 1980s and early 1990s England and Wales underwent what Hall has termed, 'the great moving right show' (with skilled working-class voters abandoning traditional Labour party politics to realign with new conservatism and the concomitant election of the Thatcher Government in 1979 on a monetarist and law and order ticket) (Hall, 1979). By contrast Scotland sustained a commitment to left-of-centre politics and a civic culture underpinned by communitarian values (see Paterson, 1994). This disjuncture between Scotland and Westminster resulted in a growing constitutional crisis within Scotland and pressures for home rule. In such a contested political arena, core institutions such as the children's hearings system became inextricably linked to a sense of Scottishness, with a foundational element of national identity being 'other-to England' (McAra, 2004a).

Critique of ethos and practice of system

While the distinctive nature of the children's hearings system was a source of national pride (see Morris and McIsaac, 1978), the practice of the system in its early years points to a number of the more pernicious tendencies to which welfare systems are prone: paternalistic decision-making; overzealous and indeterminate intervention; and greater levels of social control (see Allen, 1981).

For example, while the new institutional arrangements were intended to increase community participation in the system (through the lay panel), in practice panel membership was dominated by those from more affluent social

---

5. This relates only to children aged 15 or over for offences which would involve a penalty of disqualification from driving (see Moore and Whyte, 1998).

backgrounds (Moody, 1976; Hallet et al. 1998). A key concern of early commentators on the system, was that panel members would attempt to impose middle-class notions of morality on an unreceptive and socially distant client group (Martin and Murray, 1981). Concerns were also expressed about the high level of influence which social workers appeared to have on lay panels and the highly discretionary nature of decision-making at both the referral (reporter) and hearing stage (see Hallet et al. 1998).

The system also had a major potential for net-widening. By viewing offending as a symptom of need rather than as an end in itself, this provided the scope for large-scale intervention in the case of very trivial offences, as well as referral of children whose offending may formerly have been seen as too minor as to be in the public interest to prosecute. Official criminal justice statistics provide some evidence that net-widening may have occurred. Over the four years prior to the implementation of the hearings system, there had been an increase of 11% in the numbers of children coming to the attention of official agencies by virtue of their offending. By contrast, over the four years following implementation there was an increase of 45% (HMSO, 1974).

Concerns were also expressed that the system was better at tackling the problems posed by children referred on care and protection grounds rather than those posed by offenders (especially older repeat offenders) (Hallett et al., 1998; Waterhouse et al., 1999). There was, however, limited hard evidence for this. Indeed, very little research was undertaken on the process and outcome of supervision and in the early years no information systems were in place which would allow cases systematically to be tracked and monitored. Where research did identify shortcomings in the existing system, these tended to be failures of implementation (such as gaps in services, social work shortages and failure to allocate cases) rather than a failure of ethos (see Murray et al., 2002; Hallett et al., 1998).

Recent developments

In the period from 1995 until the present, the youth justice system in Scotland has undergone major transformation, particularly in respect of its policies and procedures for dealing with child offenders.[6] One of the main catalysts for change has been the transformation of early anxieties about system effectiveness into a full blown moral panic about the problems posed by persistent offenders and a perceived increase in anti-social behaviour amongst young people (a panic which runs counter to all published indicators which suggest stable or falling levels of youth crime over the past decade, see McAra 2004b). A further contributing factor has been the greater ideological congruence between the Labour/Liberal Democratic coalition governments in Scotland and

---

6. The chapter does not deal with major changes made to the system in respect of care and protection cases. For a detailed overview see Edwards and Griffiths, 2006.

Table 9.1   Key developments in youth justice 1995–2005

1995	●	Children (Scotland) Act; decisions do not have to be taken in best interest of child where child poses risk to public; sheriffs empowered to substitute own decision for that of panel in contested decisions.
1998	●	Scotland Act (Devolution)
1999	●	Partnership for Scotland
	●	Safer Communities in Scotland
2000	●	Response to report of Advisory Group on Youth Crime ('It's a Criminal Waste'):

  – National strategy based on core objectives
  – Local multi-agency Youth Justice Teams
  – Focus on persistent offending (expanded range of programmes based on 'what works' principles for young people up to age of 18 for use in hearings and courts)
  – Expand bail information/supervision and diversion schemes for all 16/17 year olds
  – National resource to disseminate best practice

  ● Communities that Care pilots (early intervention programmes to diminish risks of school failure, teenage pregnancy; sexually transitted disease; drug misuse; violence and other crime)

| 2001 | ● | Grant for SACRO to develop pre-hearing diversion based on restorative principles |
| 2002 | ● | Action Plan to Reduce Youth Crime |

  – Reiterating focus on persistent offending and effective practice
  – Increase public confidence (building on community and neighbourhood safety programmes to reduce offending)
  – Victims as stakeholders (information sharing, restorative justice programmes)
  – Easing transition between hearings and adult system
  – Enable young people to fulfil potential (promotion of educational, cultural sporting activities, social inclusion programmes)
  – Early intervention (parenting skills, education, etc.)

  ● National Objectives and Standards for Youth Justice focus on:
  – Methods of assessment and quality of information (to ensure uniformity in use of assessment tools; action plan etc.)
  – Range and availability of programmes aimed at tackling offending
  – Timescales
  – Information provided to victims and local communities
  – Appropriate targeting of secure care and its effectiveness at tackling offending
  – Management and organisation of youth justice services (annual reporting by youth justice strategy teams)
  – Local Youth Justice Strategy Groups: to ensure progress in meeting standards

  ● Intensive Support Fund (to develop residential and community based programmes for persistent offenders and additional secure care places)

2003	●	Pilot fast track hearings (persistent offenders)
	●	Pilot Youth Court (persistent offenders)
	●	Youth Crime Prevention Fund (supports voluntary sector projects for those at risk of offending and their parents)
	●	Support and Information for Victims of Youth Crime (pilot projects)
	●	Criminal Justice (Scotland) Act 2003 provisions for Principal Reporter to give information to victims
	●	Police restorative cautioning (full roll out Summer 2004)

Table 9.1   (Continued)

	• Glasgow Restorative Justice Initiative (multi-agency early intervention initiative, to raise victim empathy and awareness)
2004	• Anti-social Behaviour etc. (Scotland) Act 2004:
	– Extend use of ASBOs to 12–16 year olds (implemented from October 2004)
	– Police powers to disperse groups (implemented from October 2004);
	– Community Reparation Order (via courts for those aged 12+)
	– Extension of remote electronic monitoring (tagging) to under 16s (implemented from April 2005)
	– Parenting Orders (implemented from April 2005)

the Blairite, New Labour governments at Westminster. It is also arguable that the fledgling Scottish Parliament has been using crime control and penal practice more generally as a means of building political capacity (see Cole, 2005), reconstructing social solidarity and mobilising communities (see below). One of the fall-outs from this has been a gradual erosion of the child-centred ethos of Scottish youth justice policy.

Limitation of space prevents detailed consideration of each of the recent changes (which are summarised in Table 9.1). Rather, this section of the chapter focuses on five key themes which underpin these developments:

1   Managerialism and accountability
2   Public protection, risk management and effective practice
3   Social inclusion and crime prevention
4   Individual rights and responsibilisation
5   Restorative justice and victims as stakeholders.[7]

1   *Managerialism and accountability*

The period since devolution has seen a major overhaul in the organisation and management of youth justice in Scotland. Local multi-agency youth justice teams (which include representatives from social work, the police, the local community, health services, the voluntary sector and the reporter) are now involved in strategic planning, setting targets and expanding the range of services for offenders. New national objectives and standards have been developed to improve the efficiency and effectiveness of the system and to ensure evenness of service provision across Scotland. The standards set targets in respect of timescales, risk assessment and reductions in the number of persistent offenders. With regard to the latter, the Scottish Executive has now produced a base-line

---

7. This section of the paper is drawn from an article first published in the Cambrian Law Review 2004, Vol. 35 (McAra, 2004a).

figure of 1,201 persistent young offenders which the system is required to reduce by 10% by 2006 and a further 10% by 2008 (see PA Consulting 2004).[8]

In recent years too the range of institutions to which the youth justice system is accountable has grown in complexity. The Scottish Parliament has added new layers of scrutiny – particularly through the work of the two justice committees (which can scrutinise bills before Parliament, conduct enquiries and call on expert witnesses, etc.). Moreover the policy developments (described in more detail below) have together created a diverse set of audiences for the institutions of youth justice, including victims of crime, parents and local communities, whose needs the system must now satisfy.

2   Public protection, risk management and effective practice

The increased levels of managerialism have also been accompanied by a shift in the underlying ethos of the system.

The Children (Scotland) Act 1995 enabled the hearings to place the principle of public protection above that of best interests in cases where the child posed a risk to others. This led to the beginnings of a bifurcated discursive framework within the hearings – with the panel considering issues of public protection in high risk cases and welfare needs in the case of low risk offenders and those referred on care and protection grounds.

The bifurcated framework gained momentum in the early months of the Scottish Parliament (in 1999) with the publication of a major review of the youth justice system which took the problems posed by persistent offenders as its central focus (*It's a Criminal Waste: Stop Youth Crime Now*, 2000). A key recommendation of the review (taken forward in the subsequent *Action Plan to Reduce Youth Crime*, 2002) was that 'what works' principles should be incorporated into an expanded range of social work programmes for persistent offenders and that a national centre be established to disseminate best practice.

What works programmes are focused on tackling criminogenic needs rather than generic welfare needs (as per the former supervision requirement). They involve careful calibration of programme intensity to level or risk posed and advocate the use of cognitive behavioural methods (see McGuire, 1995). A core task of social work is now to provide risk assessments for all hearings referrals, using standardised assessment tools (ASSET/YLS-CMI) (Scottish Executive, 2002a). Although what works programmes are aimed at behavioural change (and thus can be regarded as rehabilitative in orientation), by making offending, rather than the offender, the focus of intervention they have the potential to undermine the holistic and child-centred approach traditionally adopted by social workers.

---

8. This has been based on the definition of persistence set out in the national standards, namely five or more offending episodes in a six month period (an offending episode comprises one referral to the Reporter with an offence component).

The drive to deal more effectively with persistent offenders has culminated with the pilot fast track hearings (2003) and pilot youth court (2003) initiatives. Fast-track hearings are targeted on offenders with a record of five or more offence referrals to the reporter in a six month period. The pilots place strict time targets for the various stages in the referral process (police to Reporter, Reporter to panel), with the aim of bringing persistent offenders before a hearing within a maximum of 53 working days.[9] As part of the pilot schemes, resources are also being directed to the further expansion of specialist community programmes for these offenders. Although the fast track hearings should comprise experienced panel members only and are required to take a holistic view of the child, for the first time deeds rather than needs have become the core driving force behind the hearings referral process.

The pilot youth court in Hamilton (and now Airdrie) is aimed principally at older persistent offenders (charged with summary offences), aged 16–17 who normally would be dealt with in the adult courts, as well as children aged 15 who would otherwise have been dealt with in the sheriff summary court. The criterion for referral to the Youth Court is three or more police referrals to the procurator fiscal (prosecutor) in a six month period. As with the fast-track hearings, timescales have been set for the referral process[10] and local authority social work departments have been charged with developing a portfolio of specialist community-based programmes for these offenders. An important element of the new court procedures is the review hearing, in which certain offenders are required to return to court some time after the initial sentence, to discuss progress in addressing offending with the sheriff.

Arguably the Youth Court is underpinned by somewhat ambivalent penal aims. On the one hand the pilot is explicitly aimed at the promotion of social inclusion, citizenship and personal responsibility as well as enhancing community safety and reducing harm to victims (see McIvor et al., 2004). On the other hand it functions to divert older children away from the adult court system and thus could be seen as a more humane way of dealing with them. However, a key recommendation of the *Youth Crime Review* (2000), was that 16 and 17 year old offenders should be dealt with by the hearings system rather than the courts and a bridging pilot was proposed as a means of facilitating this. That Ministers opted for a court-based setting instead, serves to reinforce the more robust, punitive approach which has now been adopted towards persistent offenders. Indeed when the Youth Court pilot was launched, Cathy Jamieson, currently Minister for Justice, commented that 'punishment is a key part of the youth justice process' (Scottish Executive, 2003a).

---

9. Timescales as follows: police referral to Reporter within 10 days; Reporter decision within 28 days of receiving police referral (Local Authority Initial Assessment Reports and Social Background Reports to assist Reporter decision-making to be made available within 20 days); once decision made to have hearing this should be held within 15 days.

10. Youngsters should make their first appearance in court, 10 days after being charged.

3 Social inclusion and crime prevention

Policy documents produced in the earliest days of the Scottish Parliament: *Partnership for Scotland* (Scottish Executive, 1999a) and *Safer Communities in Scotland* (Scottish Executive, 1999b) contained proposals to reduce youth crime through promoting safer, more empowered communities as well as to confront the causes of crime as linked to unemployment and social isolation (see Hogg, 1999). These policy aims were also taken forward in the *Action Plan to Reduce Youth Crime* which reiterated the need for: more developed neighbourhood and community safety programmes; early intervention to promote parenting skills; and pro- grammes to enable young people to fulfil their potential through the promotion of educational, cultural and sporting activities (see Scottish Executive, 2002b).

Specific initiatives which have come on-stream in recent years include: addi- tional funding for Community Safety Partnerships (2003) to improve access to sports and leisure facilities for young people; the action plan for youth football to divert youngsters away from the streets and into meaningful, structured activity (2004); and the Youth Crime Prevention Fund (launched 2003) which has funded projects such as the Aberlour National Parenting Project (to improve parent–child relationships, prevent or reduce offending and assist parents with problems such as drug use, domestic abuse or mental illness) and the NCH Renfrewshire project (which works with youngsters under the age of 12 and their families where the child shows signs of anti-social or violent behaviour or where there are concerns about parenting skills).

In tandem with these inclusionary policies, however, the emphasis on commu- nity safety has recently been give a more punitive edge. This is exemplified, in par- ticular, by a number of the proposals contained in the Anti-Social Behaviour Act 2004. This Act, inter alia, extends the use of anti-social behaviour orders to chil- dren aged between 12 and 15 (previously only available in Scotland to people aged 16 or over), gives the police additional powers to disperse groups in designated areas where behaviour is causing or likely to cause alarm and distress to others, and introduces electronic tagging for children (in cases where the child has a his- tory of absconding, where there is evidence that the child's mental, moral or phys- ical welfare is at risk, or where the child is likely to injure him/herself or others).

4 Individual rights and responsibilisation

Recent policy changes have also led to increased focus on both 'rights talk' and responsibilisation. This has been given particular momentum with the incorpo- ration of the European Convention on Human Rights into Scots Law (ECHR) (through the Human Rights Act, 1998).

Major concerns have been expressed by some commentators that ECHR could pose a number of challenges to the youth justice system both of substance and of principle (see Edwards, 2001). One of the earliest tests of compatibility occurred in the *S* v. *Miller* case 2001 (SLT 53). A central aim of this case was to test whether the hearings complied with procedural guarantees set out in article 6 and in particular

whether it was unfair that a child had no access to legal aid at the hearing. (Article 6 states that everyone charged with a criminal offence has the right to legal assistance and to be given it free of charge if he/she does not have sufficient means to pay for it.) The court affirmed the right of children to legal representation. A key justification for the decision was that legal aid would enhance the participation of young people in the proceedings (participation being a key element of the Kilbrandon ethos), especially those who were extremely young and those who had limited intelligence or poor social skills. Now a legal representative (from a panel of suitably experienced lawyers, safeguards and curators *ad litem*) can be appointed free of charge in cases where the disposal is likely to involve restriction of liberty, where the case is of unusual complexity, or where the child is not able to understand proceedings (for example due to lack of maturity).

A ruling was also sought in *S* v. *Miller*, as to whether the detention of children in secure care was compliant with the child's right to liberty. (Article 5 states that the only lawful detention of a minor is for the purpose of educational supervision or for the purpose of bringing him before the competent legal authority.) The court held that educational supervision included 'the exercise … of parental rights for the benefit and protection of the person concerned'. Where a child is detained in secure care these rights are exercised by the local authority, thus in the view of the court, secure care has an educational purpose.

The ruling in *S* v. *Miller* is testimony to both the pliability of the principles underpinning the hearings system and to the reasoning skills of the judges who contrived both to enhance the rights of the child while at the same time upholding the central ethos of the system (ensuring that decision-making is both participatory and in the best interests of the child.) Many commentators are of the view, however, that greater legal input into hearings decision-making will lead to tensions within the system, rendering the hearings process more adversarial in the longer term, and that the status of secure care as an educational disposition may yet undergo further challenge (see for example Edwards, 2001).

The corollary to the increasing emphasis on rights talk has been an increased focus on responsibility, both in respect of child offenders and their parents. This is exemplified in the continued Scottish Executive stalling over raising the age of criminal responsibility within Scotland. At the time of writing the age of criminal responsibility continues to be 8, one of the lowest in Europe. Both the Scottish Law Commission (SLC, 2001) and the youth justice review group (2000) recommended that consideration be given to raising the age of criminal responsibility to 12. Although this recommendation was accepted in principle by the Scottish Executive it has yet to act upon it. The low age may only be tolerated because so few children under the age of 12 are actually prosecuted in court (see McAra, 2004c). Nonetheless, the age of criminal responsibility has enormous symbolic significance, suggesting that extremely young children know right from wrong and are capable of taking full responsibility for their own wrongdoing: an ethos which is slightly out of kilter with the model of offending informing the Kilbrandon philosophy.

Parents are also included within central government's responsibilisation strategy. The Anti-Social Behaviour Act 2004 has introduced parenting orders for the first time in Scotland. These are aimed at parents who 'deliberately and recklessly fail' their children (Scottish Executive, 2004). An order will require parents to take action to deal with their child's offending or anti-social behaviour (although it will still be possible for an order to be sought on welfare grounds, such as extreme neglect). While parenting orders are civil orders, a breach will constitute a criminal offence.

5   *Restorative justice and victims as stakeholders*

Finally, victims of youth crime are increasingly being seen as key stakeholders in the youth justice system. Indeed pilot schemes were introduced in 2003 aimed at providing support and information to victims of youth crime, reinforced by the Criminal Justice (Scotland) Act 2003 which empowered the Principal Reporter to give information to victims.

The victim focus has been given particular momentum by an increased emphasis on restorative principles in youth justice policy. SACRO has been at the forefront of this – receiving grant aid from central government in 2001 to develop pre-hearing diversion schemes. These schemes offer a range of programmes including restorative conferencing, face-to-face meetings with victims and shuttle mediation (see Brookes, 2004 for an overview). In addition there are now plans to roll out restorative police cautioning across Scotland (initially introduced in a small number of police divisions in 2003, with full roll out by April 2006). Restorative cautioning is delivered by specially trained police officers, in front of the child's parents, and aims to explore why the offence occurred and the impact of the offence on victims and the wider community.

The restorative theme also frames the new community reparation orders, introduced by the Anti-Social Behaviour Act 2004 (and currently being piloted). These orders are a sentence of the court (not a hearings disposal) and involve the offender in some work of benefit to either the victim or the community.

Future prospects

The final part of this chapter turns more briefly to an assessment of the future prospects for the system as they relate to its key audiences: persistent offenders; victims; failing parents; local communities and the wider public.

Persistent offenders

The system may find it difficult to meet the newly specified targets for reductions in persistent offending, not least because it is sending out a set of rather

mixed messages to children. Policy is aimed at restoring/building citizenship among young people and reintegrating offenders back into the community, at the same time as it is aimed at the exclusion of youngsters for 'anti-social' behaviour (a form of behaviour which has no legal definition other than that which causes alarm and distress to others, and this may of course vary according to culture, location and individual tolerance levels).

As in the early years of the system, there is also major potential for netwidening, given the expanded range of interventions now available at each stage in the system, from police restorative cautioning and pre-hearings diversion to the recent expansion in the secure estate (see Table 9.1 on pages 132–3). There is also some evidence that the cumulative effects of system contact are as likely to amplify as diminish offending. Research has found that early experience of hearings contact predicts later and more intense referral on offence grounds and that early experience of adversarial police contact amplifies serious offending in later years and inhibits desistence from it (see Waterhouse et al., 1999; McAra, 2005, Smith, 2005).

Furthermore, policy targets take no cognisance of the highly discretionary nature of police decision-making practices which currently have a key role to play in shaping the client group of the hearings system. Research has found that the police tend to target certain categories of youngsters – those who have 'previous form' (being known to the police in previous years) and, of the children who regularly hang out in the street, those who live in a low socio-economic status household (importantly this is a selection effect at the individual level, *not* the result of police targeting of specific areas) (McAra and McVie, 2005). These youngsters become propelled into a repeat cycle of adversarial contact, not always warranted by their current level of offending. Consequently they are more at risk of referral to the reporter than other, sometimes, more serious offenders.

Finally, there is evidence that policy-makers may have made over-optimistic assumptions about what specialist programmes, based on 'what works' principles, will be able to deliver. The research on which 'what works' principles were based (namely meta-analytic studies) only ever claimed that offending could be reduced by a small amount. Given that there are no guarantees that all (or indeed any) of the identified persistent offenders in Scotland will participate in the new specialist programmes, the current targets (of a 20% reduction in the number of persistent offenders by 2008) may be over ambitious.

Victims

A major challenge facing the system is to engage victims in the youth justice process, both in terms of encouraging high levels of participation and ensuring that any involvement has a positive rather than damaging effect. Research suggests that the system, to date, has not been wholly effective in this regard (see Sawyer, 2000;

Skellington et al., 2005). Indeed victim participation may be increasingly difficult to achieve because of the manageralist principles which frame the youth justice process. Lessons from other jurisdictions (see Newburn et al., 2002) would indicate that the current emphasis within Scotland on speed through the system and the reduction of delay (through fast tracking and the introduction of time limits) could minimise the time available to contact victims, to prepare them for involvement in restorative or support initiatives and to follow-up cases.

A more fundamental problem posed by the victim strategy in youth justice, however, is that victims and offenders are generally conceptualised as discrete groups, with the former comprising a more 'morally deserving' group. Research evidence from a range of sources suggests that this may be rather short-sighted, principally because it is young offenders who are most likely to be the victim of youth crime (see Smith, 2004a; Hayward and Sharp, 2005). The close relationship between victimisation and offending means that when the system is addressing offenders it is more often than not speaking to victims (and vice versa) and this of course muddies the principles upon which many restorative programmes are based.

Failing parents

The youth justice system also faces a number of challenges in engaging with 'failing' parents. This is primarily because of tensions between the punitive and preventative dimensions of current policy. On the one hand social inclusion policies are aimed at destigmatising problem families and reintegrating them into the community, whereas the newly implemented parenting orders have the potential to restigmatise families – and increase the risks of criminalisation (given that a breach of a parenting order will constitute a criminal offence). The challenges posed by these mixed messages are compounded by research on parenting and offending which indicates that the most effective model of parenting in terms of controlling offending, works least well in the context of neighbourhood deprivation (Smith, 2004b). Unless the environmental and cultural context is propitious, then attempts to teach parenting skills or indeed force parents to take greater control over their children (through measures such as parenting orders) are likely to fail.

Local communities

Turning to communities, a major difficulty facing the youth justice system is that the conception of community which underpins recent policy is inherently an elastic one. To borrow Clarke's classification (2002), community is variously invoked as a site of governance (through efforts to police the physical space within which a community is located as exemplified in the new dispersal orders); a mode of governance (as exemplified by the efforts to involve the

community in the youth justice process, through youth justice teams and the lay panel), and an effect of governance (with many interventions aimed at mending fractured and impoverished communities). Arguably there are major tensions here – for how can a community function as a site or mode of governance if it is not already an effect of governance, in other words if it is not already mobilised as a functioning entity?

The mobilisation of a community is of course an enormously difficult challenge in the face of the concentration effects of poverty and social exclusion in some areas. Currently around 14% of the population in Scotland live in the top 10% most deprived wards, areas blighted by poor health and housing and fragmented by high crime levels and sectarian violence (NFO Social Research, 2003a; Scottish Executive, 2003b). That such areas lack the capacity to mobilise themselves is evident from the recent evaluation of the 'Communities that Care' pilot projects. These projects were implemented in three areas of high social deprivation across Scotland and were intended to involve local residents along with statutory and voluntary agencies in the planning and development of risk prevention programmes for young people. However, the evaluation found that while the programmes had promoted some degree of partnership working, they had been impeded by a 'lack of a fully inclusive and consistent range of contributors' (Bannister and Dillane, 2005: 3). A particular concern was the low number of local residents who took part in the programmes, especially young people.

The wider public

The wider public is invoked as an audience of youth justice policy in two ways: as audience for the mechanisms for audit which now pervade the youth justice process and as audience for pronouncements about serious and persistent offending, when policy is at its most punitive and exclusionary (with ASBOs, electronic tagging and risk management being justified as mechanisms better to protect the public). These invocations arguably play against each other: the rational and bureaucratic language in which audit is conducted contrasting strongly with the more emotional and expressive language of punitiveness.

A fundamental difficulty the system faces in *demonstrating* that it can protect the public is that many of the factors which feed into public perceptions of safety are outwith the control of youth justice agencies. A number of commentators argue, for example, that certain so-called 'signal crimes' (often low level incivilities such as graffiti or burnt-out cars – not always committed by children) can magnify a person's perception of risk. Thus people living or working in a low street-crime area may be erroneously more fearful of attack if some of the surrounding buildings are covered in graffiti (see Murray, 2004).

The construction of the persistent offender as a contemporary folk-devil allows politicians to tap into public fears and use these to justify a tougher

stance on young offenders. However this is a strategy which risks the further exclusion and alienation of young people from the neighbourhoods within which they live, with damaging consequences in terms of both community cohesion and the more inclusive and nurturing elements of the youth justice policy frame.

Conclusion

The Scottish youth justice system has undergone significant transformation in recent years. Formerly predicated on a welfare-based ethos it is now under-pinned by a more complex set of penal rationales. As Scottish Ministers have embraced the New Labour crime and justice agenda, so too have institutions of youth justice begun to lose their distinctive Scottish identity. Many of the changes have been driven by a moral panic about persistent offending and anti-social behaviour not based on particularly strong evidence. There is, however, a danger that this moral panic may turn into a self-fulfilling prophecy as a result of police gate-keeping practices (which serve to recycle the usual suspects back into the system time and again) and the potential for deviancy amplification which system contact brings.

Research continues to be supportive of core elements of the Kilbrandon philosophy and in particular its holistic approach to troubled and troublesome children, the links made between social malaise and offending and the need for support to be offered in ways which do not stigmatise recipients. This philoso-phy is now under threat as a new range of services and programmes are grafted on to existing institutions which uncouple the victim from the offender and which have begun to place deeds rather than needs at the forefront of decision-making processes.

Youth justice has become a central plank in the new Scottish Executive's efforts to build political capacity and regenerate communities. In doing so the Executive has created a broader set of audiences whose needs the system must satisfy: persistent offenders; victims; failing parents; local communities; and the wider public. The evidence would suggest that the youth justice system is a rather risky mechanism through which to carry forward any vision of polity building: predicated as it now is on both inclusionary and exclusionary forms of practice, which work against each other in complex ways. Carrying the weight of political expectation, undergoing a process of 'de-tartanisation', the Scottish system of youth justice faces an uncertain future.

References

Allen, F. (1981) *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*. New Haven: Yale University Press.

Bannister, J. and Dillane, J. (2005) *Communities That Care: An Evaluation of the Scottish Pilot Programme Crime and Criminal Justice Research Findings No. 79* www.scotland.gov.uk/ Publications/2005/06/01163534/35373.

Brookes, D. (2004) 'Restorative Justice in Scotland's Youth Justice System', in J. McGhee, M. Mellon and B. Whyte (eds) *Addressing Deeds: Working with young people who offend*. London: NCH.

Clarke, J. (2002) 'Reinventing Community? Governing in Contested Spaces', paper delivered at Spacing for Social Work Conference (Bielefeld, November 14–16).

Cole, A. (2005) *Beyond Devolution and Decentralisation: Building Regional Capacity in Wales and Brittany*. Manchester: Manchester University Press.

Edwards, L. (2001), '*S* v. *Miller*: The End of the Children's Hearing System as We Know It', *Scots Law Times* 41, 23 May.

Edwards, L. and Griffiths, A. (2006) *Family Law*. Edinburgh: W. Green, Sweet and Maxwell.

Hall, S. (1979) 'The Great Moving Right Show', *Marxism Today* 23.

Hallet, C. Murray, C. Jamieson, J. and Veitch, B. (1998) *The Evaluation of the Children's Hearings in Scotland, Volume 1 'Deciding in Children's Interests'.* Edinburgh: The Scottish Office Central Research Unit.

Hayward, R. and Sharp, C. (2005) *Young People, Crime and Anti-Social Behaviour: Findings from the 2003 Crime and Justice Survey*, Home Office Research Findings no. 245.

Hogg, K. (1999) *Youth Crime in Scotland. A Scottish Executive Policy Unit Review* http://www. scotland.gov.uk/library3/law/youth.pdf

Kilbrandon Committee (1964) *Report on Children and Young Persons, Scotland.* Edinburgh: HMSO.

Martin, F., Fox, S. and Murray, K. (1981) *Children out of Court*. Edinburgh: Scottish. Academic: Press.

McAra, L. (1998) *Social Work and Criminal Justice Volume 2: Early Arrangements*, Edinburgh: The Stationery Office.

McAra, L. (2002) 'The Scottish Juvenile Justice System: Policy and Practice', in J. Winterdyk (ed.) *Juvenile Justice Systems: International Perspectives*, second edition. Toronto: Canadian Scholars Press.

McAra, L. (2004a) 'The Cultural and Institutional Dynamics of Transformation: Youth Justice in Scotland and England and Wales' Cambrian Law Review 35: 23–54.

McAra, L. (2004b) 'Youth Crime and Justice in Scotland: Perception and Reality', *Children, Young People and Crime in the United Kingdom and Ireland, Fourth Biennial Conference: Perception and Realties, Conference Report.*

McAra, L. (2004c) *Pre-Inquiry Seminar on Youth Justice in Scotland: Report and Recommendations* http://www.scottish.parliament.uk/justice2/inquiries-04/yji/yji-seminar.htm

McAra, L. (2005) *Patterns of Referrals to the Children's Hearings System for Drug or Alcohol Misuse*, Edinburgh Study of Youth Transitions and Crime, Research Digest No. 6.

McAra, L. and McVie, S. (2005) 'The Usual Suspects? Street-life, Young Offenders and the Police', *Criminal Justice*, 5(1): 5–35.

McGuire, J. (ed.) (1995) *What Works Reducing Offending: Guidelines from Research and Practice*. Chichester: Wiley.

McIvor, G., Brown, A., Eley, S., Malloch, M., Murray, C., Piacentini, L. and Walters, R. (2004) *The Hamilton Sheriff Youth Court Pilot: The First Six Months*, Scottish Executive, Social Research Findings No. 77 www.scotland.gov.uk/socialresearch

Moody, S. (1976) *Survey of the Background of Current Panel Members*. Mimeo: Scottish Home and Health Department.

Moore, G. and Whyte, B. (1998) *Social Work and Criminal Law in Scotland*, third edition. Edinburgh: Mercat Press.

Morris, A. and McIsaac, M. (1978) *Juvenile Justice? The Practice of Social Welfare*, Cambridge Studies in Criminology, Cambridge: Heinemann.

Murray, C., Hallett, C., McMillan, N. and Watson, J. (2002) *Home Supervision*, Scottish Executive Social Research, Research Findings No. 4.

Murray, K. (1982) 'Structure and Operation' in F. Martin and K. Murray (eds.) *The Scottish Juvenile Justice System*. Edinburgh: Scottish Academic Press.

Murray, P. (2004) *Signal Crimes: Risk Perception and Behaviour*, Working Paper No. 5. www.odpm.gov.uk/stellent/groups/odpm_science/documents/page/odpm_science_028389.hcsp

MVA (2002) *The 2000 Scottish Crime Survey Overview Report*, The Scottish Executive, Central Research Unit.

Newburn, T., Crawford, A., Earle, R., Goldie, S., Hale, C., Hallam, A., Masters, G., Netten, A., Saunders, R., Sharpe, K. and Uglow, S. (2002) *The Introduction of Referral Orders into the Youth Justice System, Final Report, Home Office Research Study 242*. London: Home Office.

NFO Social Research (2003) *Sectarianism in Glasgow* http://www.glasgow.gov.uk/NR/rdonlyres/DA614F81-4F1B-4452-8847-F3FDE920D550/0/sectarianism03.pdf

PA Consulting Group (2004) *Scottish Youth Justice Baseline* http://www.childrens-hearings.co.uk/pdf/Scottish%20Youth%20Justice%20Baseline.pdf

Paterson L. (1994) *The Autonomy of Modern Scotland*. Edinburgh: Edinburgh University Press.

Sawyer, B. (2000) *An Evaluation of the SACRO (Fife) Young Offender Mediation Project Edinburgh*, The Scottish Executive Central Research Unit.

Scottish Executive (1999a) *Partnership for Scotland* www.scotland.gov.uk/publications.

Scottish Executive (1999b) *Safer Communities in Scotland* www.scotland.gov.uk/publications.

Scottish Executive (2000) *It's a Criminal waste: Stop Youth Crime Now: Report of Advisory Group on Youth Crime* http://www.scotland.gov.uk/youth/crimereview/docs/agyc-00.asp

Scottish Executive (2002) *Scotland's Action to Reduce Youth Crime*. Edinburgh: HMSO.

Scottish Executive (2002a) *National Standards for Scotland's Youth Justice Services* http://www.scotland.gov.uk/library5/justice/nssyjs.pdf

Scottish Executive (2002b) *Scotland's Action to Reduce Youth Crime*. Edinburgh: Her Majesty's Stationery Office.

Scottish Executive (2003a) 'Scotland's First Youth Court Opens', Press Release www.scotland.gov.uk/pages/news

Scottish Executive (2003b) *Scottish Indices of Deprivation 2003* www.scotland.gov.uk/library5/social/siod-07

Scottish Executive (2004) *Putting our Communities first: A Strategy for Tackling Anti-social Behaviour* http://www.scotland.gov.uk/consultations/social/pocf-00.asp

Skellington Orr, K. McCaig, E. and Leven, T. (2005) *An Assessment of the Support and Information for Victims of Youth Crime Pilot Scheme*, Scottish Executive www.scotland.gov.uk/publications/2005/04/11105447/54484

Smith, D. J. (2004a) *The Links between Victimisation and Offending*, Edinburgh Study of Youth Transitions and Crime, Research Digest No. 5.

Smith, D. J. (2004b) *Parenting and Delinquency*, Edinburgh Study of Youth Transitions and Crime, Research Digest No. 3.

Smith, D. J. (2005) 'The Effectiveness of the Juvenile Justice System', *Criminal Justice* 5(2): 181–195.

Waterhouse, L., McGhee, J., Loucks, N., Whyte, B. and Kay, H. (1999) *The Evaluation of the Children's Hearings in Scotland, Volume 3 Children in Focus*. Edinburgh: The Scottish Executive Central Research Unit.