

# Scottish Youth Justice and the Legacy of Kilbrandon

A provocation paper

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# ■ Scottish Youth Justice and the Legacy of Kilbrandon

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## ■ Introduction

Although consolidated under the same political union, the four nations of the United Kingdom take different legal approaches in response to youth offending. Scotland has, since the 1970s, followed a distinctly welfare-based approach through its unique tribunal system of children's hearings: where decisions are made in the best interests of children who commit criminal offences.<sup>1</sup> The children's hearings system (CHS) was established on the basis of the Kilbrandon Report<sup>2</sup>, which remains influential to its current operation. The Report determined that all children in need of compulsory state intervention, for whatever reason, should be subject to the same system and treated on the same welfare basis, in light of common adversities, circumstances and (unmet) needs. The wisdom of Kilbrandon in this regard has since been vindicated by a wealth of empirical evidence on the lived experience of children subject to state intervention, which confirms the links between adversity, vulnerability, and offending behaviour.<sup>3</sup> Although the Kilbrandon Report has a lasting legacy in Scots law and policy, not all children enjoy similar treatment in practice. There are contradictions in approach towards some children, particularly those who offend. This provocation paper explores the uniquely Scottish approach to youth justice by reflecting on the legacy of Kilbrandon and highlighting inconsistencies towards the treatment of some children who come into contact with the Scottish youth justice system. It concludes by arguing that the identified contradictions could be resolved by raising the age of criminal responsibility to the cusp of adulthood.

## ■ The Kilbrandon Origins of the Children's Hearings System

The CHS originates directly from the Kilbrandon Report. In 1961, a committee chaired by Lord Kilbrandon<sup>4</sup> was set up to review legal responses to children 'in trouble.'<sup>5</sup> The committee reported in 1964 and recommended far-reaching changes of both principle and procedure, which would ultimately lead to the replacement of the juvenile courts with a national system of children's hearings in Scotland. The justification for doing so was that the Kilbrandon Report identified children

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who offend as being equally in need of care and protection as those who have been abused or neglected. Any legal distinction between the groups of children under enquiry was thought to be artificial when their underlying realities were taken into account.<sup>6</sup> Offending behaviour was thought to indicate a failure in upbringing, and the difficulties of all children who come to the attention of the state were attributed to shortcomings in the home, family or school environments.<sup>7</sup> The Report described offenders and non-offenders as ‘hostages to fortune’<sup>8</sup> and concluded that both groups should be subject to the same integrated youth care and justice system.

Central to Kilbrandon’s recommendations was the rejection of the courts as the appropriate forum for dealing with children’s cases<sup>9</sup>, and the dismissal of the crime-punishment concept for responding to children who offend.<sup>10</sup> The Report concluded that a relatively informal tribunal system made up of children’s hearings was more appropriate than the courts, and that lay decision-makers could best represent society’s views about the welfare and needs of children. Related to this was the primacy afforded to the child’s welfare: decisions should be made and interventions dictated by an informed assessment of the individual child’s needs.<sup>11</sup> In this way, children were to be responded to on the basis of their needs, not deeds. However, the welfare orientation of the system was compromised in that it was recommended that the common law power to prosecute serious offences in the criminal courts be preserved.<sup>12</sup> Although Kilbrandon envisaged that this would happen in a minority of exceptional cases<sup>13</sup>, it nevertheless served to distinguish the way that some children who offend came to be dealt with in practice.

The vast majority of Kilbrandon’s recommendations were given effect by the Social Work (Scotland) Act 1968 and the CHS began operating in 1971. It has since been functioning largely unchanged for almost 50 years: there has been system modernisation, but not transformation, in the intervening period. The CHS is currently governed by the Children’s Hearings (Scotland) Act 2011, which upholds its underlying principles. In particular, the 2011 Act endorses a single, integrated process (with the same procedural rules and available disposals) for all children identified as being in need of intervention.<sup>14</sup> The welfare of the child is the paramount consideration of the children’s hearing<sup>15</sup>, regardless of whether the child has been referred on offence<sup>16</sup> or care and protection (non-offence)<sup>17</sup> grounds. And legally binding decisions are made by volunteer panel members, drawn from the local community, who are appointed to sit on children’s hearings.<sup>18</sup>

The CHS thus represents a genuine attempt to respond to all children ‘in trouble’ in a similar manner, regardless of *why* they have been referred to a children’s hearing. However there is evidence to suggest that the CHS does not operate in a strictly unitary manner.<sup>19</sup> Not all children are subject to similar treatment in practice. There are contradictions in approach towards some children, particularly those referred on offence grounds. This disparity suggests that the CHS is not immune to the contradictions and compromises which have been said to characterise Western youth justice systems.<sup>20</sup> Three inconsistencies, resulting in the differential treatment of some children within the Scottish youth justice system, will now be examined.

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## ■ Inconsistency 1: The Upper Age-Limit of the System

The first inconsistency relates to the upper age-limit of the CHS and the definition of ‘child’ under Scots law. ‘Children’ are defined differently in various pieces of legislation; with 12<sup>21</sup>, 16<sup>22</sup> and 18<sup>23</sup> years being legally significant for different reasons. For the purposes of children’s hearings proceedings, ‘children’ are defined as both: those under 16 years; and, those under 18 years who are already subject to measures of intervention imposed by a children’s hearing.<sup>24</sup> Consequently the upper age-limit of the CHS is generally 16 years; with some additional protection given to 16 and 17-year-olds, with ongoing involvement, who can be retained until the age of 18. This leads to the differential treatment of 16 and 17-year-old young offenders with no ongoing involvement, who are prosecuted in the adult criminal courts as a matter of course.<sup>25</sup> There is no justification for this difference in treatment.

Article 1 of the United Nations Convention on the Rights of the Child (CRC) defines ‘children’ as those below the age of 18 years. In addition, Article 2 prohibits all forms of discrimination. The Scottish Government has pledged to incorporate the CRC directly into Scots law.<sup>26</sup> A public consultation on CRC incorporation was carried out in 2019<sup>27</sup> and a Children’s Rights Bill is expected to be introduced (and passed) within the current Parliamentary term. If the commitment to CRC incorporation is to be fulfilled, then the upper age-limit of the CHS should be raised to 18 years, in all cases, in line with the CRC definition of ‘child’. This would promote the consistent treatment of children in Scotland and allow all young offenders to benefit from support and intervention within the CHS until adulthood.

## ■ Inconsistency 2: The Criminalisation of Children within the System

The CHS has been described as ‘one of the few bastions of a welfare-based youth justice system throughout the world.’<sup>28</sup> As Kearney observes: ‘The hearing cannot impose a fine, disqualification from driving or the like: its sole concern is to decide what is ‘in the best interests of the child’ and not to consider directly any wider public interest.’<sup>29</sup> Despite this clear welfare orientation, some children are criminalised within the CHS. Children who appear at hearings on offence grounds acquire criminal records.<sup>30</sup> This is because accepted or established offence grounds<sup>31</sup> are treated as ‘convictions’ for the purposes of disclosure, under section 3 of the Rehabilitation of Offenders Act 1974.

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Recent reforms have relaxed the operation of the Rehabilitation of Offenders Act 1974 as it applies to childhood criminal convictions in Scotland, in order to give young people a better chance to move on from past offending.<sup>32</sup> Whilst these are welcome developments, they largely maintain the status quo: not least since accepted/established offence grounds continue to be designated as ‘convictions’. The problem is one of principle: appearing at a children’s hearing on offence grounds should not be treated as a ‘conviction’ in the first place. This position is entirely inconsistent with the welfare ethos of the CHS.

Criminal convictions obtained in childhood can have far-reaching consequences for later life chances. Research has shown that childhood criminal convictions can: endure throughout adulthood; cause stigma and discrimination; affect employment and educational opportunities; and impact on housing, insurance and travel.<sup>33</sup> Children referred to hearings on offence grounds typically have a background of care and protection referrals within the CHS.<sup>34</sup> Care-experienced young people are more likely to be criminalised than their non-looked-after peers, and those with a background in care are disproportionately represented in the Scottish prison population.<sup>35</sup> As such, it has been noted that looked-after children experience a form of ‘double jeopardy’ – by being placed in care, they are exposed to further risk factors which make them more vulnerable to criminalisation.<sup>36</sup> These problems are compounded by treating offence grounds as ‘convictions’. In this way, the CHS is a wolf in sheep’s clothing for children who offend.

Children have the right to privacy under Article 16 of the CRC. Furthermore Article 40(1) recognises the right of children in conflict with the law to be treated in a manner consistent with promoting their sense of dignity and worth, and reintegration in society. It follows that offence grounds should not be treated as ‘convictions’. This punitive and stigmatising consequence ought to be removed as a matter of priority. Section 3 of the Rehabilitation of Offenders Act 1974, as it applies to children’s hearings proceedings, should therefore be repealed.<sup>37</sup> This would allow the concepts of responsibility and criminalisation to be separated within the Scottish youth justice system<sup>38</sup> and ensure that children are properly treated according to their needs, rather than deeds.

## Inconsistency 3: The Prosecution of Children in the Criminal Courts

The CHS is the primary forum for children who offend in Scotland: the vast majority of offences are dealt with in the CHS, rather than the criminal justice system. Nevertheless, it remains possible for serious offences to be prosecuted in the adult criminal courts.<sup>39</sup> The power to do so has been retained by the Lord Advocate<sup>40</sup> since the inception of the CHS. Therefore the jurisdiction of the CHS sits (in the author’s view, rather uncomfortably) alongside the jurisdiction of the criminal courts when it comes to children who offend; meaning that some children are treated on a welfare basis, whereas others are dealt with on a justice basis.

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In practice, certain offences<sup>41</sup> (like murder and rape) are ‘jointly reported’ to the procurator fiscal<sup>42</sup> and children’s reporter<sup>43</sup>, so that a decision can be made about whether the offence should be processed in the CHS or prosecuted in the criminal courts. A joint decision-making agreement applies, which suggests that all jointly reported offences should be passed to the children’s reporter so that they can be addressed in the CHS.<sup>44</sup> However, this position can be reversed if the procurator fiscal concludes that it is in the public interest to prosecute.<sup>45</sup> In 2018/19, 1,147 children were jointly reported: 77% of whom were subsequently passed to the children’s reporter.<sup>46</sup> Whilst it is accepted that the majority of these children were dealt with in the CHS, and it is acknowledged that jointly reported offences constitute a minority of the total offences committed by children<sup>47</sup>, up to 263 children were nevertheless prosecuted in the adult criminal justice system during that period.

The whole purpose of having a dedicated youth justice system is undermined by prosecuting children in the adult criminal courts. Article 40(3)(b) of the CRC promotes dealing with children in conflict with the law without resorting to judicial proceedings. Scotland falls short of this obligation by allowing children to be prosecuted in the criminal justice system. Scottish children needn’t be exposed to prosecution when the CHS is in place and is capable of addressing the needs of children who offend. At the very least, the decision-making agreement for jointly reported offences should contain a clear direction, stipulating that the prosecution of children is a measure of last resort.

## Provocation: Raising the Age of Criminal Responsibility

This paper has identified three contradictions, which result in the inconsistent treatment of children who come into contact with the Scottish youth justice system. These inconsistencies could be individually resolved by: (i) raising the upper age-limit of the CHS from 16 to 18 years; (ii) getting rid of the punitive disclosure consequences of offence grounds; and, (iii) using the CHS, rather than the adult criminal justice system, to deal with offences committed by children. A more provocative way to collectively address the identified contradictions would be to raise the age of criminal responsibility in line with the upper age-limit of the CHS.

The age of criminal responsibility was recently raised from 8 to 12 years under Scots law.<sup>48</sup> This means that no child under 12 can be referred to a children’s hearing on offence grounds<sup>49</sup> or be prosecuted in the criminal courts.<sup>50</sup> The age of criminal responsibility was examined in another provocation paper in this series: needless to say that the relatively low ages of criminal responsibility in Scotland and the other UK jurisdictions are challenged by international human rights standards, as well as research evidence from criminology, sociology, psychology and neuroscience.<sup>51</sup>

This paper has argued that the upper age-limit of the CHS should be raised to 18 years, in line with the definition of ‘child’ under the CRC. A concurrent proposal to raise the age of criminal responsibility to 18 years would serve to address the identified contradictions. The consequence would be that no child in Scotland could be referred to a children’s hearing on offence grounds or

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be prosecuted in the criminal courts because *children* would be incapable of committing crimes. Thereafter, children who engage in harmful behaviour could be referred to hearings on alternative non-offence grounds<sup>52</sup> – for example, that the child is beyond parental control<sup>53</sup> or that the child's conduct has had an adverse effect on the health, safety or development of the child or another person<sup>54</sup>.

Whilst this may seem like a radical proposal, it was foreshadowed in the Kilbrandon Report itself. Kilbrandon considered, although ultimately rejected, an alternative option to proceed in all cases on care and protection grounds:

“The basis of action in all cases would be the child's need for protection and training... irrespective of whether [the] facts consisted of delinquent acts, or comprised other general facts and circumstances showing a clear need for protective and training measures. On that basis, children below the specified age-limit would be deemed to be incapable of committing crimes or offences.”<sup>55</sup>

In the end, Kilbrandon was unwilling to transfer youth offending entirely from the criminal to civil sphere. However the alternative proposal is more in keeping with the reasoning of the Kilbrandon Report and would have allowed the doctrine of criminal responsibility, as it applies to children, to have been properly set aside.<sup>56</sup>

Although there might be concerns about removing children from the scope of the criminal law, the CHS has claimed to have done so for almost 50 years. It is fundamentally inconsistent to accept that the CHS embodies a welfare approach, whilst some children are subjected to criminal justice processes, principles and penalties within and alongside that system. Raising the age of criminal responsibility to 18 years would allow Scotland to lead the way in the UK and internationally by strengthening the Scottish youth justice system in a manner which gives fuller effect to children's rights. This would build on the legacy of Kilbrandon by ensuring children are treated consistently: no child in Scotland could obtain a criminal record or be prosecuted in the criminal courts. Serious consideration ought to be given to this proposal in light of the imminent incorporation of the CRC into Scots law.

*Postscript: Since the time of writing, Stage 2 amendments to the Disclosure (Scotland) Bill have been brought forward, which propose to use the term children's hearings 'outcome' rather than 'conviction' on disclosure certificates. Whilst this is a welcome change in terminology, it does not alter the consequences for the child and therefore falls short of the position advocated in this paper: namely, that offending behaviour addressed in the CHS should not be subject to disclosure under the Rehabilitation of Offenders regime. It remains to be seen whether the Bill will be passed in its current form and whether amendments relating to childhood offending will ultimately be enacted and brought into force.*

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<sup>1</sup> Children's Hearings (Scotland) Act 2011, s. 25.

<sup>2</sup> *Report on Children and Young Persons (Scotland)*, Cmnd. 2306 (HMSO, 1964); *The Kilbrandon Report: Children and Young Persons Scotland, Children in Society Series* (HMSO, 1995). Available from: <https://www.gov.scot/publications/kilbrandon-report/>

<sup>3</sup> See, for example, L. Waterhouse & J. McGhee, 'Children's Hearings in Scotland: Compulsion and Disadvantage' (2002) 24 *Journal of Social Welfare & Family Law* 279; L. Waterhouse, J. McGhee & N. Loucks, 'Disentangling Offenders and Non-Offenders in the Scottish Children's Hearings System: A Clear Divide?' (2004) 43 *Howard Journal of Criminal Justice* 164; L. McAra & S. McVie, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime' (2010) 10 *Criminology & Criminal Justice* 179.

<sup>4</sup> Lord Kilbrandon was a judge in the Scottish Court of Session who later sat on the Appellate Committee of the House of Lords.

<sup>5</sup> This group was broadly defined as including 'juvenile delinquents and juveniles in need of care and protection or beyond parental control': The Kilbrandon Report, at para. 5.

<sup>6</sup> The Kilbrandon Report, at para. 13.

<sup>7</sup> The Kilbrandon Report, at paras. 13-15.

<sup>8</sup> The Kilbrandon Report, at para. 251.

<sup>9</sup> The Kilbrandon Report, at paras. 35-36 & 40-49.

<sup>10</sup> The Kilbrandon Report, at para. 80.

<sup>11</sup> The Kilbrandon Report, at paras. 77-81.

<sup>12</sup> The Kilbrandon Report, at paras. 124-126.

<sup>13</sup> The Kilbrandon Report, at paras. 124 & 125.

<sup>14</sup> K. Norrie, *Children's Hearings in Scotland* (3rd edn, Sweet and Maxwell, 2013) at para. 1.04.

<sup>15</sup> 2011 Act, s. 25.

<sup>16</sup> 2011 Act, s. 67(2)(j).

<sup>17</sup> 2011 Act, ss. 67(2)(a)-(i) & (k)-(q).

<sup>18</sup> 2011 Act, s. 4 & Sch. 2.

<sup>19</sup> M. Donnelly, *The Kilbrandon Ethos in Practice: The Antinomy of Care and Conduct in the Children's Hearings System* (PhD Thesis, University of Strathclyde, 2017).

<sup>20</sup> J. Muncie, 'The 'punitive' turn in juvenile justice: cultures of control and rights compliance in western Europe and the USA' (2008) 8 *Youth Justice* 107.

<sup>21</sup> The age of criminal responsibility: Age of Criminal Responsibility (Scotland) Act 2019, s. 1, amending s. 41 of the Criminal Procedure (Scotland) Act 1995.

<sup>22</sup> The age of legal capacity: Age of Legal Capacity (Scotland) Act 1991, s. 1.

<sup>23</sup> The age of majority: Age of Majority (Scotland) Act 1969, s. 1.

<sup>24</sup> See, 2011 Act, s. 199.

<sup>25</sup> It is worth noting that 16 and 17-year-olds who are in need of intervention on care and protection grounds, and do not have ongoing involvement, also experience differential treatment because they do not satisfy the definition of 'child' and thus fall outside the scope of the CHS.

<sup>26</sup> Scottish Government, *Protecting Scotland's Future: The Government's Programme for Scotland 2019-20* (Scottish Government, 2019) at p. 18. See also, Scottish Government, *News: Strengthening children's rights* (Scottish Government, 2019). Available from: <https://www.gov.scot/news/strengthening-childrens-rights/>

<sup>27</sup> Scottish Government, *Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland* (Scottish Government, 2019).

<sup>28</sup> J. Muncie, G. Hughes & E. McLaughlin (eds) *Youth Justice: Critical Readings* (Sage, 2002) at p. 8.

<sup>29</sup> B. Kearney, 'Children's Hearings in Scotland: Justice, Discretion and Civil Procedure Sui Generis' (1985) *Civil Justice Quarterly* 137, at p. 140.

<sup>30</sup> Due to the interaction between the Rehabilitation of Offenders Act 1974 and the Police Act 1997, as amended.

<sup>31</sup> Grounds of referral have to be accepted by the child and family or, if disputed, established in the sheriff court before a children's hearing can consider the case. An important practical difference is that offence grounds are proven on the criminal standard (beyond reasonable doubt), whereas the civil standard of proof (on balance of probabilities) applies to non-offence grounds: 2011 Act, s. 102(3).

<sup>32</sup> For example, section 29 of the Management of Offenders (Scotland) Act 2019 provides that 'convictions' obtained within the CHS are 'spent' automatically and therefore do not appear on basic or standard disclosure checks. Certain 'spent' convictions continue to be revealed on higher-level checks, such as enhanced disclosure. However, the Disclosure (Scotland) Bill proposes to end the automatic disclosure of 'spent' childhood convictions on higher-level checks; by introducing a new process through which Disclosure Scotland must determine that a

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'conviction' is relevant and ought to be disclosed before it can be revealed to a third party, subject to rights of independent review and appeal.

<sup>33</sup> C. Stacey, *A Life Sentence for Young People: A report into the impact of criminal records acquired in childhood and early adulthood* (Unlock, 2018); C. Williams, 'The Growth and Permanency of Criminal Records with Particular Reference to Juveniles' (2011) *The Police Journal* 84 pp. 171-182; House of Commons Justice Committee, *Disclosure of Youth Criminal Records*, First Report of Session 2017-19 HC 416.

<sup>34</sup> G. Henderson, I. Kurlus & G. McNiven, *Backgrounds and outcomes for children aged 8 to 11-years-old who have been referred to the children's reporter for offending* (SCRA, 2016); L. Waterhouse, J. McGhee & N. Loucks, 'Disentangling Offenders and Non-Offenders in the Scottish Children's Hearings System: A Clear Divide?' (2004) 43 *Howard Journal of Criminal Justice* 164.

<sup>35</sup> R. Broderick, S. McCoard & J. Carnie, *Prisoners who have been in care as 'looked after children'* (Scottish Prison Service, 2014) R. Broderick & J. Carnie, *Young People in Custody 2015* (Scottish Prison Service, 2016).

<sup>36</sup> Centre for Youth and Criminal Justice, *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018* (CYCJ, 2017).

<sup>37</sup> An alternative approach could involve the disclosure of 'non-conviction' information resulting from children's hearings proceedings in exceptional circumstances, as under the Age of Criminal Responsibility (Scotland) Act 2019 for children who are below the age of criminal responsibility.

<sup>38</sup> Child Rights International Network, *Stop Making Children Criminals: Policy Paper* (CRIN, 2013).

<sup>39</sup> Criminal Procedure (Scotland) Act 1995, s. 42(1).

<sup>40</sup> The chief legal officer in Scotland.

<sup>41</sup> As set out in the *Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurator Fiscals of Offences Alleged to have been Committed by Children* (Crown Office and Procurator Fiscals Service, 2014).

<sup>42</sup> The gatekeeper to the criminal justice system in Scotland.

<sup>43</sup> The gatekeeper to the CHS.

<sup>44</sup> Crown Office and Procurator Fiscal Service & Scottish Children's Reporter Administration, *Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter* (COPFS/SCRA, 2019) at para. 33.

<sup>45</sup> Crown Office and Procurator Fiscal Service & Scottish Children's Reporter Administration, *Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter* (COPFS/SCRA, 2019) at paras. 30 & 33.

<sup>46</sup> Scottish Children's Reporter Administration, *Statistical Analysis 2018/19* (SCRA, 2019) at p. 7.

<sup>47</sup> In 2018/19, 2,824 children were referred to the children's reporter on offence grounds for less serious crimes, whereas 1,147 children were jointly reported to the reporter and fiscal for more serious offences.

<sup>48</sup> Age of Criminal Responsibility (Scotland) Act 2019, s. 1, amending Criminal Procedure (Scotland) Act 1995, s. 41.

<sup>49</sup> Age of Criminal Responsibility (Scotland) Act 2019, s. 3.

<sup>50</sup> Age of Criminal Responsibility (Scotland) Act 2019, s. 2, repealing Criminal Procedure (Scotland) Act 1995, s. 41A.

<sup>51</sup> For discussion see, H. Pierpoint, *Age of Criminal Responsibility: A provocation paper* (The British Academy, 2020). Available from: <https://medium.com/reframing-childhood-past-and-present/age-of-criminal-responsibility-1e7714db9c1c>

<sup>52</sup> This would require legislative change since case law currently prohibits using alternative care and protection grounds where the whole referral relates to the child's offending behaviour: *Constanda v. M* (1997) S.L.T. 1396.

<sup>53</sup> 2011 Act, s. 67(2)(n).

<sup>54</sup> 2011 Act, s. 67(2)(m).

<sup>55</sup> The Kilbrandon Report, at para. 68.

<sup>56</sup> A. Lockyer & F. Stone, *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (T&T Clark, 1998) at p. 24.