LEGISLATIVE BACKGROUND TO THE TREATMENT OF CHILDREN AND YOUNG PEOPLE LIVING APART FROM THEIR PARENTS

Report for the Scottish Child Abuse Inquiry

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Contents

PART ONE: THE STATUTORY FRAMEWORK 1

SECTION A: THE PERIOD BEFORE 1908 1

i. The Poor Law 1

ii. Reformatory and Industrial Schools 2

iii. The Early Statutes Allowing State Intervention 4

a. The Prevention of Cruelty to, and Protection of, Children Act, 1889 4

b. The Prevention of Cruelty to Children Act, 1894 7

c. Prevention of Cruelty to Children Act, 1904 8

SECTION B: THE CHILDREN ACT, 1908 10

i. Introduction 10

ii. Committal to a "Fit Person" 11

iii. Sending Child to a Reformatory or Industrial School 13

iv. Juvenile Offenders and Juvenile Courts 15

SECTION C: THE CHILDREN AND YOUNG PERSONS (SCOTLAND) ACTS, 1932 AND 1937 19

i. The Lead up to the Children and Young Persons (Scotland) Act, 1932 19

ii. The Children and Young Persons Bill 1932 21

iii. The Children and Young Persons (Scotland) Acts, 1932 and 1937 23

iv. Juvenile Courts 24

i. Rules and Procedure at Juvenile Courts 28

v. Jurisdiction of Juvenile Courts 31

vi. Outcomes Available to Juvenile Courts 35

a. Sending the Child or Young Person to an Approved School 35

b. Committal to the Care of a Fit Person (Boarding Out) 37

c. Boarding Out Under the Poor Law 40
d. Supervision by Probation Officers 42
e. Other Disposals for Offenders 43
SECTION D: THE CHILDREN ACT, 1948 45
i. Introduction 45
ii. The Clyde Report 1946 45
iii. The Children Bill 1948 51
iv. The Children Act, 1948 54
a. Introduction 54
b. Structural Matters 55
c. The Boarding-Out Preference 57
d. Local Authority Duty to Receive Children into their Care 61
e. Local Authority Assumption of Parental Rights 65
SECTION E: THE SOCIAL WORK (SCOTLAND) ACT 1968 68
i. Introduction 68
ii. The Genesis of the 1968 Act 68
a. The Kilbrandon Report 69
b. The White Paper 71
iii. The Major Changes Contained in the Social Work (Scotland) Act 1968 74
a. *Working With and not Against Families* 74
b. Clarifying and Enhancing the Role of the Local Authority 79
c. Creation of the Children's Hearing System 82
iv. Amendments to the 1968 Act in the Children Act 1975 84
v. Criticisms and Proposals for Change 86

a. The Skinner Report on Residential Care in Scotland 87

b. The Fife Inquiry (the Kearney Report) 88

c. The Orkney Inquiry (the Clyde Report) 88

d. The White Paper: “Scotland’s Children: Proposals for Child Care Policy and Law” .. 90

e. Local Government etc (Scotland) Act 1994 92

SECTION F: THE CHILDREN (SCOTLAND) ACT 1995 94

i. Introduction 94

ii. Substantive Provisions in the 1995 Act 96

a. Increased Participation Rights for Children 96

b. The Concept of, and Duties Towards, the “Looked after Child” 99

c. Duties of Local Authorities 102

d. New Orders 105

iii. Changes Since the 1995 Act 107

a. The Changing Face of “Family” 108

b. Constitutional Changes 109

c. A Shift of Focus in Child Protection Legislation 110

iv. Limitations on Who May Work with Children 111

v. New Oversight Institutions 115

a. Regulation of Care (Scotland) Act 2001: The Care Commission 116

b. Public Services Reform (Scotland) Act 2010, Part 5: The Care Inspectorate 120

c. Public Services Reform (Scotland) Act 2010, Part 6: Healthcare Improvement Scotland 124

ii. Protection Against Sexual Exploitation 125

SECTION G: THE CHILDREN AND YOUNG PEOPLE (SCOTLAND) ACT 2014 129

i. Introduction 129

ii. The “Named Person” Scheme 132

a. Summary 132

b. Information Sharing: The Challenge to the Scheme 133

iii. Corporate Parenting 136

PART TWO: REGULATORY STRUCTURES GOVERNING PARTICULAR TYPES OF ACCOMMODATION 140

SECTION A: BOARDING OUT AND FOSTERING OF CHILDREN 140

i. Introduction 140

ii. Children and Young Persons (Scotland) Care and Training Regulations, 1933 141

iii. Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947 145

a. SCHEDULE: Boarding-Out Children with Foster-Parents: Principles to be Followed 153

iv. The Boarding-out of Children (Scotland) Regulations, 1959 156

a. Suitability of foster parent 158

b. Suitability of foster home 158

c. Boarding-out of children of same family 160

d. Boarding-out outside Scotland 160

e. Limitation of Boarding-out 160

f. Notification of Boarding-out 161

g. Medical and dental treatment 162

h. Visits by children’s officer or visitor 162

i. Supervision by area authority 163

j. Misadventure to a boarded-out child 163

k. Termination of boarding-out 164

l. Records 165

v. Boarding-Out and Fostering of Children (Scotland) Regulations 1985 166
a. Application of Regulations 167
b. Fostering Panels and Approval of Foster Parents 168
c. Information and Agreements 169
d. Placement Decisions 170
e. Notice 172
f. Monitoring and Termination of Placement 172
vi. Fostering of Children (Scotland) Regulations 1996 173
a. Approval of Foster Carers 174
b. Foster Care Agreements 176
c. Placement Decisions 177
d. Arrangements Made by Voluntary Organisations 178
vii. Looked After Children (Scotland) Regulations 2009 178
a. Registered Fostering Services 181
b. Kinship Care 182
SECTION B: PRIVATE FOSTERING 185
i. Infant Life Protection Before 1932 185
ii. Amendments in 1932 186
iii. Child Protection in the Children Act, 1958 188
iv. Private Fostering Since 1985 191
a. Meaning of "foster child" 192
b. Disqualification from acting as foster carer 193
c. Visiting of foster children 195
d. Control by local authorities of private fostering 195

e. Removal of foster children 196

SECTION C: CHILDREN'S HOMES AND RESIDENTIAL ESTABLISHMENTS 198

i. Introduction 198

ii. Voluntary Homes Prior to 1948 198

iii. Voluntary Homes After 1948 200

iv. Local Authority Homes 203

v. Administration of Children's Homes (Scotland) Regulations, 1959 203

vi. Residential Establishments Under the Social Work (Scotland) Act 1968 207

a. Registration and Visiting of Residential Establishments 208

vii. Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987 210

viii. Residential Establishments – Child Care (Scotland) Regulations 1996 215

a. Duties of Managers; Statement of Functions and Objectives 215

b. Duties of Local Authority 216

SECTION D: REFORMATORY, INDUSTRIAL AND APPROVED SCHOOLS 219

i. Reformatory and Industrial Schools Before 1932 219

ii. Approved Schools under the Children and Young Persons (Scotland) Acts, 1932 and 1937 222

iii. Children and Young Persons (Scotland) Care and Training Regulations, 1933 226

iv. The Approved Schools (Scotland) Rules, 1961 232

a. Management 232

b. Premises and Accommodation 233

c. Staffing 233

d. Care of Pupils 235

e. Education 235

f. Employment 235

g. Recreation and Privileges 235

h. Discipline and punishment 236

i. Parents 238

j. Medical 239

k. Release and After-Care 239

l. General 240

m. Supervision after Release 240

v. Approved Schools After the Social Work (Scotland) Act 1968 241

SECTION E: SECURE ACCOMMODATION 243

i. Introduction 243

ii. Criteria for Placing Child in Secure Accommodation 244

iii. Secure Accommodation (Scotland) Regulations 1983 246

iv. Secure Accommodation (Scotland) Regulations 1996 and 2013 249

SECTION F: REMAND HOMES, BORSTALS AND YOUNG OFFENDERS INSTITUTIONS............252

i. Remand Homes 252

a. Origins of Remand Homes 252

b. Remand Homes, Remand Centres and Detention Centres 253

c. The Remand Home (Scotland) Rules, 1933 254

d. The Remand Home (Scotland) Rules 1946 257

e. The Remand Home (Scotland) Rules 1964 260

f. The End of Remand Homes 264

ii. Approved Probation Hostels and Probation Homes 264

iii. Borstal Institutions 265

a. Borstal (Scotland) Rules, 1950 267
iv. Young Offenders Institutions 272
a. Young Offenders (Scotland) Rules 1965....................274
b. Prisons and Young Offenders Institutions (Scotland) Rules 1994, 2006 and 2011.277
SECTION G: PLACES OF SAFETY....................281
i. The Concept of "Place of Safety" 281
ii. Places of Safety Defined 281
iii. The Orkney Case and its Aftermath for Places of Safety 283
iv. Places of Safety After 1995 285
SECTION H: ACCOMMODATION UNDER THE MENTAL HEALTH LEGISLATION....................286
i. Introduction 286
ii. The Early Years....................286
iii. The Mental Deficiency and Lunacy (Scotland) Act, 1913....................287
iv. The Mental Health (Scotland) Act, 1960 293
a. Registration 294
b. Detention 295
c. Special Offences in Relation to Mental Health Patients 297
v. The Mental Health (Scotland) Act 1984....................302
a. Special Offences in Relation to Mental Health Patients 305
vi. The Mental Health (Care and Treatment) (Scotland) Act 2003 305
a. The Mental Welfare Commission....................306
b. Duties of Health Boards and Local Authorities 307
c. Monitoring and Inspection of Mental Health Facilities 308
d. Special Offences in Relation to Mental Health Patients 309

SECTION I: INDEPENDENT BOARDING SCHOOLS 313
i. The Coming of Compulsory School Education 313
ii. Boarding Schools as Private Foster Care Providers 314
iii. Registration of Independent Schools 318
a. Under the Education (Scotland) Acts, 1946 and 1962 318
b. Under the (Original) Education (Scotland) Act 1980..320
c. Amendments to the 1980 Act in the Standards in Scotland's Schools etc Act 2000 323
d. Restructuring of the 1980 Act by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 324
iv. Inspection of Independent Schools..329
a. Under the Education (Scotland) Act, 1946..329
b. Under the Education (Scotland) Act 1962..331
c. Under the Education (Scotland) Act 1980..331
v. Administration of Independent Boarding Schools 333
APPENDICES..335
APPENDIX ONE: Emigration of Children 336
i. Introduction 336
ii. Scottish Statutory Authority to Emigrate Children..338
a. 1891 – 1932..338
b. 1932-1969 340
c. 17th November 1969 to 1st April 1997..344
APPENDIX TWO: Corporal Punishment of Children..346
i. The Parental Right of Chastisement 346
ii. School Teachers 349

iii. Others Acting In Loco Parentis 351
a. Foster Carers 351
b. Residential Establishments: General 352
c. Voluntary and Local Authority Homes 352
d. Approved Schools 353
e. Remand Homes 353
f. Borstals and Approved Probation Hostels 354
iv. Abolition of Corporal Punishment 354
a. Schools 354
b. Residential Establishments 355
c. Foster Carers 356
d. Children (Equal Protection from Assault) (Scotland) Bill 2017 356
APPENDIX THREE: International Law Relating to Children 358
i. The Position of International Law in Scotland 358
a. The European Convention on Human Rights 360
ii. Children's Rights in International Law 362
a. The Declarations of the Rights of the Child 363
b. Other International Treaties 366
c. The United Nations Convention on the Rights of the Child 368
d. The European Convention on Human Rights 372
APPENDIX FOUR: Remedies 378
i. Criminal Liability 378
a. At Common Law 378
b. The Statutory Offence of Neglect or Ill-treatment of Children 379

c. Case Law on Section 12 of the 1937 Act 383

ii. Criminal Injuries Compensation 389

iii. Civil Liability in Delict 391

a. Direct Liability 394

b. Vicarious Liability 396

c. Standard of Care 399

d. Assessment of Damages 401

iv. Damages for Breach of Statutory Duty 401

v. Compensation Under the European Convention on Human Rights 405

PART ONE: THE STATUTORY FRAMEWORK

SECTION A: THE PERIOD BEFORE 1908

i. The Poor Law

The earliest legal mechanism in Scotland by which the state took responsibility for accommodating children was the Poor Law, which offered some limited support to individuals unable to earn a living and their dependants. Institutions for the poor, originally run by the Church of Scotland, were brought under national control by the Poor Law Amendment (Scotland) Act, 1845, which established parochial boards to run poor houses and a central Board of Supervision based in Edinburgh,[1] whose role included the investigation of the running of poor houses. Most children accommodated in poorhouses were there as dependants of their parents, but the Poor Law authorities also had an obligation to care for orphans and deserted children.[2] The practice developed, from an early stage and without statutory sanction before 1934, of boarding out such children with foster families rather than keeping them in institutions.[3] "The Poor Law", as a distinct legal doctrine, was abolished in 1948.[4]

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[1] For a description of the operation of the Board of Supervision, see S. Blackden, "The Board of Supervision and the Scottish Parochial Medical Service 1845 – 95" (1986) 30 *Medical History* 145 at pp. 147-148.

[2] H.J. Macdonald, "Boarding-Out and the Scottish Poor Law, 1845 – 1914" (1996) 75 *Scottish Historical Review* 197 at p. 198.

[3] Macdonald, op. cit. She draws attention to a precedent in a much earlier statute, the Beggars and Poor Act 1579 (APS. c 7) which as well as increasing the penalties for begging, contains this curious provision: "And if any beggar's child being above the age of 5 years and within 14, male or female, shall be liked by any subject of the realm of honest estate, the said person shall have the child by order and direction of the provost and bailies within burgh or judge in landward parishes, if he be a boy to the age of 24 years and if she be a girl to the age of 18 years".

[4] National Assistance Act 1948, s. 1.

ii. Reformatory and Industrial Schools

Reformatory schools were originally designed for children who had committed offences and were direct alternatives to prison; industrial schools, on the other hand, were primarily schools for poor and vagrant children who were perceived to be at risk of falling into life-long indigence and were designed to divert them from a life of indolence to one of productive usefulness. In opening the Second Reading debate on the Children and Young Persons Bill 1932, Oliver Stanley, Under-secretary at the Home Office said this:

> [The reformatory] was a voluntary home, and it got its first connection with the state by a practice which had grown up of granting a pardon to a young convicted criminal on condition that he entered a home of that kind. The industrial school, in its origin, had nothing to do with crime whatsoever. It originated with the ragged school, the object being to provide some kind of education, not for the criminal, but for the poor.[5]

Both types of school found their origins in a developing 19th century consciousness that juvenile delinquency was as much a social as a criminal problem, traced frequently to the harmful influences surrounding many children's upbringing, and from the consequences of which they could with some state intervention be saved. The connection between crime, immorality and poverty may have been overstated but making that connection led to the belief that, as a victim of circumstances, an appropriate response to the juvenile offender was to remove him or her from his or her existing circumstances and replace them with a safe and secure environment which, through education in useful trades, would provide the opportunity to develop skills necessary to allow the child to become a productive member of society. Macdonald suggests that the same thinking was applied to justify removing poor children from parents "unfit" by reason of poverty "in the interests of controlling future pauperism".[6] Receiving into state care children who had committed no crime originally required parental consent but it came to be accepted that the aim of breaking cycles of both poverty (caused by parental indolence) and delinquency (caused by parental immorality)

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[5] HC Deb. 12th February 1932 vol. 261 col. 11.

[6] Macdonald op. cit. at pp. 201-202.

could be achieved fully only by permitting the state the power of compulsory removal of children from influences perceived to be harmful to their social development. Reformatory schools were based on the assumption that youthful offenders were more amenable to rehabilitation than older offenders: they too could be "saved".

Ralston[7] has shown that industrial and reformatory schools were mostly established at the behest of philanthropic individuals, often connected to but by no means representing the state. He also explains that they were designed, particularly in the early period with day industrial schools, to prevent (as opposed to being responses to) juvenile delinquency, and that the distinction between inmates who had committed offences and those perceived to be at risk of committing offences was not clearly drawn until legislation in 1854. The schools were put onto a statutory, and country-wide, basis by the Reformatory Schools (Scotland) Act, 1854,[8] the Youthful Offenders Act, 1854,[9] and the Industrial Schools Act, 1861.[10] It is from this point that we can understand these schools as being compulsory institutions, but Government certification for their running was not required until the Reformatory Schools Act, 1866[11] and the Industrial Schools Act, 1866,[12] which permitted the sending of juvenile offenders, as well as children "who have no guardian or whose guardians are neglecting them",[13] to such institutions. "This was a prime example of philanthropic effort being co-opted by the state".[14] These schools tended to operate on a residential as

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[7] A. Ralston, "The Development of Reformatory and Industrial Schools in Scotland 1832 to 1872", (1988) *Journal of Scottish Historical Studies* 40.

[8] 17 and 18 Vict. c. 74.

[9] 17 and 18 Vict. c. 86.

[10] 24 and 25 Vict. c. 132.

[11] 29 and 30 Vict. c. 117.

[12] 29 and 30 Vict. c. 118.

[13] Per Lord Trayner in *McKenzies v McPhee* (1889) 16 R(J) 53.

[14] C. Kelly, "Continuity and Change in the History of Scottish Juvenile Justice" (2016) 1 *Law Crime and History* 59, at p. 64.

opposed to a day basis, a tendency furthered, as Ralston points out,[15] by the fact that Government funding was available for certified institutions to which children could be compulsorily sent for keeping. By 1896, it was reported that there were 5,500 children kept as "inmates" in 43 such institutions in Scotland.[16] Throughout this period, there was debate as to the advisability of schools taking both categories of children,[17] but the practice remained endemic and may well help to explain the ease with which Scots law later came to deal together both offenders and those offended against.

iii. *The Early Statutes Allowing State Intervention*

a. The Prevention of Cruelty to, and Protection of, Children Act, 1889[18]

The 1889 Act was the first UK statute expressly designed to respond to parental mistreatment or neglect of children (beyond either the criminal law or the poor law). The protection offered was, however, dependent on the child being the victim of a criminal offence. Section 1 rendered liable to punishment "any person over 16 years of age having the custody, control, or charge of a child, being a boy under the age of 14 years, or being a girl under the age of 16 years, [who] wilfully ill-treats, neglects, abandons or exposes such child …. in a manner likely to cause such child unnecessary suffering, or injury to its health", though this replaced an existing common law offence.[19] The real innovation in the 1889 Act was that it permitted the court to remove the child from any perpetrator convicted of the crime under s. 1. The *patria potestas* which inhered in the father of a child had already been modified by the Conjugal Rights (Scotland) Amendment Act, 1861 and the

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[15] Ralston, n. 7 at p. 48.

[16] *Report of the Departmental Committee on Reformatory and Industrial Schools*, Cmd 8204 (1896), pp.8 and 132 (quoted in Kelly, n. 14 at p. 64).

[17] Ralston, n. 7.

[18] 52 and 53 Vict. c. 44.

[19] The history and meaning of this provision, and its final manifestation in s. 12 of the Children and Young Persons (Scotland) Act, 1937, is explored in Appendix Four to the present Report.

Guardianship of Infants Act, 1886, though only to the extent of permitting custody disputes to be resolved by taking into consideration the welfare of the child rather than on the basis of the father's absolute rights over his children. These Acts removed any claim of the parent based on the *patria potestas* in an absolutist sense, and so set the scene for the 1889 Act authorising the state, on its own initiative, to take steps if the child's welfare was shown to be at risk. (Shortly thereafter was passed the Custody of Children Act, 1891[20] which allowed persons bringing up – and poor law authorities keeping – children to resist claims for their return by their parents: the effect was to place the onus on the parents to prove, "having regard to the welfare of the child", their fitness to resume the custody of their own children). Section 2 of the 1889 Act authorised a constable to take into custody without warrant any person committing an offence under the Act, and taking a child against whom an offence had been committed to a "place of safety" where the child could be detained until "dealt with" by a court of summary jurisdiction. In addition and more importantly, s. 5 provided that if a person with custody or control of a child was convicted, committed for trial, or bound over in relation to any offence under s. 1 the court "may order that the child be taken out of the custody of such a person and committed to the charge of a relation of the child, or some other fit person named by the court". This later came to be known as a "fit person order"[21] and was the origin of boarding out of children beyond the Poor Law.

None of this authorised the state to act to prevent foreseeable future harm: rather, it was designed to respond to harm that had already been suffered. Nor was the process one in which the child was taken "into care" as it later came to be understood, for it did not justify the removal of the child to an industrial school (which retained its focus on "vagrant" children): rather it was a mechanism for the transference of custody of a child from harmful parents to others who could provide the child with a decent (and safe) upbringing. It was in essence state-mandated fostering of children, primarily with relatives in the context of what

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[20] 54 and 55 Vict. c. 3.

[21] The Children Act 1958, s. 17 defined "fit person order" to mean an order made under the 1937 Act committing a child to the care of a fit person.

today would be called "kinship care". There were, however, no limitations expressed as to who would be a "fit person" for these purposes:[22] the matter was one for the court to judge and there seems to have been no prior approval provisions. Nor was there any provision to oversee the relative or fit person into whose charge the child was committed, by visiting, inspection and the like. The person to whom the child was committed was to have "the like control over the child as if he were its parent" and was made responsible for the child's maintenance.[23] So the state accepted no more responsibility for how the child was treated by the person to whose charge he or she was committed than it had for children being brought up by their own parents.

The 1889 Act also permitted the sheriff (or sheriff substitute) to issue a warrant to a "superior officer of police" to search for the child, to enter any premises (including by force), to remove the child, and to detain the child in a place of safety.[24] The test for the issuing of such warrant was that the court had "reasonable cause to suspect that such child … has been or is being ill-treated or neglected … in a manner likely to cause the child unnecessary suffering, or to be injurious to its health". Again, this power was exercised only on suspicion that harm was being or had been caused to the child and did not encompass likely future harm. "Place of safety" was defined to include "poor house and any place certified by the local authority by byelaw under this Act for the purposes of this Act".[25] There was, therefore, some state regulation of the places to which a child suspected of being ill-treated or neglected could be taken, but it was left to each local authority to determine how it operated its certification powers – in any case the "place of safety" provisions could offer only temporary accommodation to children.

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[22] Other than a requirement on the court to select a person "if possible" who was of the same religious persuasion as the child: 1889 Act, s. 5(2).

[23] 1889 Act, s. 5(2).

[24] 1889 Act, s. 6.

[25] 1889 Act, s. 17. See further, below at **2.G.ii**.

b. The Prevention of Cruelty to Children Act, 1894

The 1889 Act was amended by the Prevention of Cruelty to Children Amendment Act, 1894[26] to add "assault" to the acts prohibited by s. 1, and to equalise at 16 the age for both boys and girls protected under the terms of the offence in s. 1. The 1889 Act was then replaced by the Prevention of Cruelty to Children Act, 1894,[27] which included a number of significant developments in the law. Within the s. 1 offence, mental harm (or "mental derangement") was for the first time explicitly recognised in addition to bodily harm. Section 5 dealt with detention of children in places of safety and added in a right of the child to seek refuge in such a place. Section 6 dealt with committal of the child who was a victim of the crime under s. 1 to the custody of "a relative of the child, or some other fit person", and s. 7 provided that the person to whose custody the child was committed would "have the like control over the child as if he were its parent". That such committal was becoming a common feature of Scottish child protection law is shown by s. 9 which provided that if any child were brought to court in circumstances authorising the court to deal with a child under the Industrial Schools Acts the court "in lieu of ordering that the child be sent to an industrial school, may make an order for the committal of the child to the custody of a relative or person named by the court". This provision illustrates a characteristic feature of child protection law in Scotland since the earliest days - the overlap between the various mechanisms of state intervention in children's family lives, and the utilisation of existing institutions and processes. A similar phenomenon is shown in s. 23(2), which provided that a failure to provide for the child by seeking maintenance under "the Acts relating to relief of the poor" was to be encompassed within the concept of "neglect" of the child for the purposes of s. 1 of the 1894 Act. These provisions indicate an early realisation that a child's needs are seldom determined by the route through which he or she comes to the attention of the authorities.

[26] 57 & 58 Vict. c. 27.

[27] 57 & 58 Vict. c. 41, s. 28(2).

Section 23, interestingly, stated that "the provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression 'parent' when used in relation to a child includes guardian and every person who is by law liable to maintain the child". It may well have been assumed that the person cohabiting with the parent of the child would be the (unrecognised, because unmarried) father,[28] but the terms are clearly wide enough to include cohabitants who had neither legal nor genetic relationship with the child.

A well-known case decided under the 1894 Act is that of *R v Senior*,[29] which involved a charge under s.1 when a child died due to the parent's failure, for religious reasons, to seek medical care for his sick child.[30] It was held that the provision of medical aid was implicit in s. 1, which indicates a willingness on the part of the courts to give expansive scope to the provision.[31]

c. Prevention of Cruelty to Children Act, 1904[32]

The 1894 Act was repealed, but substantially re-enacted, by the 1904 Act,[33] which came into force on 1st October 1904. The offence in s.1 of the earlier Acts was re-enacted in s. 1 of the 1904 Act (later to reappear as s.12 of the Children Act, 1908 and the Children and Young Persons (Scotland) Act, 1937). Perhaps the most significant development in the 1904 Act was in s. 6(1) which included "any society or body corporate established for the reception of

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[28] See *Liverpool Society for the Prevention of Cruelty to Children v Jones* [1914] 3 KB 813.

[29] [1899] 1 QB 283.

[30] A similar case, though the reason for failure to provide medical care was psychological inadequacy, is *HM Adv. v Clarks* 1968 JC 53, discussed below in Appendix 4 at **1.c**.

[31] Failure to provide medical aid was explicitly included in the formulation of the offence as it appeared in s. 12 of the Children Act, 1908, and appears today in s. 12 of the Children and Young Persons (Scotland) Act, 1937.

[32] 4 Edw. VII, c. 15.

[33] Schedule 2.

poor children or the prevention of cruelty to children" within the concept of "fit person" to whose care of a child might be committed.

SECTION B: THE CHILDREN ACT, 1908[34]

i. Introduction

The 1908 Act constitutes a significant turning point in the legislative history of child protection and juvenile justice throughout the United Kingdom. It was substantially amended by the Children and Young Persons (Scotland) Act, 1932, though it remained the principal Act until its repeal in large part by the Children and Young Persons (Scotland) Act, 1937.[35]

The 1889, 1894 and 1904 Acts were written in general terms, and had a narrow (and necessarily retrospective) focus on the criminal law: children could be removed from their parents and committed to the care of others (not the state) if the person with their care or control was shown to have committed one of various specified offences against them. This was in addition to, though overlapped with, the reformatory and industrial schools legislation that allowed for state-supported accommodation for young offenders and child vagrants. A more unified approach was taken in the Children Act, 1908, the first Act to deal in the same statute with destitute children, children who were victims of cruelty and neglect and children who had committed offences. It is no coincidence that this Act was passed during the Liberal Administration that lasted from 1906 until the outbreak of the First World War, and which had set fundamental social reform as one of its main priorities. The 1908 Act may be seen as part of a series of Acts[36] that both laid the foundations of the modern welfare state and at the same time normalised the notion that the state's obligations to protect citizens might also involve significant interference in their lives. The Bill that

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[34] 8 Edw. 7, Ch. 67.

[35] Its remaining sections were repealed by the Children Act, 1958.

[36] Notable social achievements of the Liberal Government other than the Children Act, 1908 included the Education (Scotland) Act, 1908 (introducing free school meals and medical inspection of pupils), the Old Age Pensions Act, 1908 and the National Insurance Acts, 1911 and 1913.

became the 1908 Act was introduced by the Under-Secretary of the Home Office, Herbert Samuel;[37] and moved at Second Reading by the Lord Advocate, Thomas Shaw.[38]

The Lord Advocate accepted that the Act represented an increase in the power of the state over family life, but dismissed this as of little real concern: “There may be in some persons' minds a doubt as to the advisability of the State interfering with the responsibility of the parents: but that is an argument more familiar in former days than now”.[39] The Act also embraced a recognition, first accepted in an official report from 1896, that “Nothing has been more certainly demonstrated in the practical development of the reformatory system than that juvenile crime has comparatively little to do with any special depravity of the offender, and very much to do with parental neglect and bad example”.[40] It was this insight that provided a foundation for the 1908 Act – and indeed for much of Scottish juvenile justice law ever since. The 1908 Act, interestingly, changed the terms we use and for the first time the law talked of “children and young persons” instead of, as before, “children” (defined in the earlier statutes as boys under 14 and girls under 16, then all persons under 16). Section 131 of the 1908 Act defined “child” to mean “a person under the age of fourteen years” (the school leaving age) and “young person” to mean “a person who has attained the age of fourteen years and is under the age of sixteen years”.[41]

ii. Committal to a “Fit Person”

Part Two of the Act (headed “Prevention of Cruelty to Children and Young Persons”) replaced and expanded the provisions (described above) from the 1889 to 1904 Acts. The

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[37] Later Leader of the Liberal Party between 1931 and 1935.

[38] Later Lord Shaw of Dunfermline, Lord of Appeal in Ordinary.

[39] HC Deb. 24 March 1908, vol. 186, col. 1259.

[40] *Report of the Departmental Committee on Reformatory and Industrial Schools*, 1896 (Cmd 8204), p. 22 (quoted in Kelly, n. 14 above at p. 76).

[41] Section 64 of the 1932 Act subsequently raised the age of “young person” to those under the age of 17. There it has remained ever since, because the same definition of “young person” for the purpose of the still-extant s. 12 of the 1937 Act is still used (s. 110).

power of the court to commit a child victim of specified offences to the care of “a relative of the child or young person, or some other fit person, named by the court”, first introduced in 1889, was replicated in s. 21 of the 1908 Act.[42] The offence in s. 1 of the 1889, 1894 and 1904 Acts appeared as s. 12 of the 1908 Act, and various other actions that had come to be recognised as harmful to children were explicitly made offences that also justified the removal of children from the perpetrator’s custody, charge or care, most noticeably “overlaying” of children (suffocating children who were sleeping in the same bed as the adult, when the adult was “under the influence of drink”[43]), and exposing children to the risk of burning by allowing a child under seven to be “in a room containing an open fire grate not sufficiently protected”.[44] Questioning whether criminalising bereaved parents was an effective response to family tragedies, Stewart[45] suggests that what was described as “overlaying” was really the phenomenon of unexplained deaths given a name,[46] which in the mind of the Government created worries about the alcoholic working class and showed an attitude of official distrust of working class mothers’ ability to bring up children fit to defend the Empire. Indeed much of the Act is about improving children's health for that reason - a major concern in Edwardian society, and providing a justification for the state’s interest in family life afflicted by poverty. Other offences that could activate protective mechanisms included allowing children or young persons to be in brothels, and causing or encouraging the seduction, prostitution or unlawful carnal knowledge of a girl under 16.[47]

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[42] This was explicitly subject to the power of the court, instead of making a fit person order, to send the child to an Industrial school where authorised to do so under Part IV of the Act: s. 21(7).

[43] 1908 Act, s. 13. The Lord Advocate, Thomas Shaw, MP, made the scarcely believable claim that in London alone there were 1600 infant deaths attributable to this cause: HC Deb. 24 March 1908, vol. 186 col. 1255.

[44] 1908 Act, s. 15. The Lord Advocate also stated than in one (unspecified) year there had been 1600 infant deaths for this reason: HC Deb. 24 March 1908, vol. 186 col. 1254.

[45] J. Stewart , “Children, Parents and the State”, (1995) 9 *Children and Society* 90 at 95-96.

[46] The name we might use today is “cot death”.

[47] 1908 Act, ss. 16 and 17, as amended by the Children Act (1908) Amendment Act, 1910 (which added the reference to unlawful carnal knowledge).

When a child was committed to the care of a fit person under these provisions, that person would, while the order was in force, "have the like control over the child or young person as if he were his parent".[48]

iii. Sending Child to a Reformatory or Industrial School

Part Four of the 1908 Act furthered the blurring of the distinction between the reformatory and industrial schools (which, it has been suggested,[49] always had been a characteristic of the Scottish system), a process subsequently completed by the Children and Young Persons (Scotland) Act 1932, discussed below. The distinction was clear in concept, though less so in practice. The primary aim of the 1908 Act was to bring these schools under better state control and, in the Lord Advocate's words, to "link together the whole scheme of reformatory and industrial schools in the most useful manner".[50]

Though the aims of, and regulatory mechanisms for, both types of school were the same, the grounds upon which a child could be sent to each school were different. A child over the age of 12 but under 16 convicted of an offence punishable by penal servitude or imprisonment could be sent to a reformatory school in lieu of prison.[51] In modern language, one might refer to this as "the offence ground". "Care and protection grounds", which justified the sending of the child to an industrial school, were more numerous.[52] Any person "apparently under the age of 14" could be sent by a court to an industrial school if the court considered it expedient to do so, on the satisfaction of one or more of the following conditions: the child

(a) Had been found begging

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[48] 1908 Act, s. 22(1).

[49] Ralston, n. 7 above.

[50] HC Deb. 24 March 1908, vol. 186, col. 1257

[51] 1908 Act, s. 57.

[52] 1908 Act, s. 58.

(b) Had been found wandering without a settled home,[53] or had no parent or guardian, or had no parent or guardian who exercised proper guardianship
(c) Had been found destitute, its parent(s) being in prison
(d) Had been under the care of a parent or guardian who by reason of criminal or drunken habits was unfit to have the care of the child
(e) Was the daughter of a father convicted of specified offences against any of his daughters
(f) Frequented the company of any reputed thief or prostitute (unless the prostitute was the child's mother[54])
(g) Was residing in a house used for prostitution or otherwise in circumstances calculated to encourage or favour the seduction or prostitution of the child.[55]

In addition, parents unable to control their own child, or the poor law authorities, or the local education authority, could ask the court to send the child to a reformatory school.[56] That reformatory and industrial schools were perceived as performing substantially overlapping functions is shown by the fact that youthful offenders, if under the age of 12, could be sent to an industrial as opposed to a reformatory school.[57] The court retained the power to commit the child to the care of a relative or other fit person instead,[58] and if it did so the court could also order that the child be placed under the supervision of a probation officer:[59] this was the origin of state supervision of neglected children.

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[53] The problem of "vagabond tramp creatures" who evaded local authorities' attempts to ensure the education of their children was a matter that particularly exercised the Lord Advocate: HC Deb. 24 March 1908, vol. 186 col. 1258-9.

[54] 1908 Act, s. 58(1) proviso.

[55] 1908 Act, s. 58(1). Little of this is new and, as Kelly pointed out (n. 14 above at pp. 70-71), only (d) and (e) were additions to what had earlier appeared in the Industrial Schools Act 1866.

[56] 1908 Act, s. 58(4) and (5).

[57] 1908 Act, s. 58(2) and (3).

[58] 1908 Act, s. 58(7).

[59] 1908 Act, s. 60.

The period of detention was for not less than three nor more than five years in the case of a youthful offender sent to a reformatory school (or until the child reached 19 years of age), and for such period as the court thought proper in case of a child sent to an industrial school (or until the child reached 16 years of age).[60] These long periods were ameliorated to some extent by the power to licence the child to live with "any trustworthy and respectable person named in the licence" after 18 months detention, or at any time with the consent of the local education authority or the Secretary for Scotland.[61] The Secretary for Scotland had the power to discharge the child or young person from the school.[62]

An interesting provision concerns what we would now refer to as "aftercare" for "care leavers". Even after release from the school, the young person until the age of 19 remained under the "supervision" of the managers of the school.[63] And any child detained in a certified school who "conducts himself well" could (with the child or young person's consent) be apprenticed to any trade or calling, including service in the Army or Navy, or by emigration, before the period of detention ended.[64]

iv. Juvenile Offenders and Juvenile Courts

Part Five of the 1908 Act provided special rules for juvenile offenders in the criminal process. The primary objective of this Part of the Act was to ensure that children and young persons were not sent to prison, either on conviction or on remand (they could be sent to a remand home.[65]) Instead, on conviction the child could be sent to an industrial or

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[60] 1908 Act, s. 66.

[61] 1908 Act, s. 67.

[62] 1908 Act, s. 69.

[63] 1908 Act, s. 68(1).

[64] 1908 Act, s. 70. On emigration generally, see Appendix One to the present Report.

[65] 1908 Act, s. 97. If a child was deemed so unruly that he could not safely be so committed, or was considered so depraved that he was not a fit person to be so detained then in these circumstances only could he be committed to prison (s. 97(1) proviso): "fitness" may have included in respect of the safety of others.

reformatory school, or be whipped.[66] Their parent or guardian was required to attend the court hearing the case[67] and the court had the power to order the parent or guardian to pay any fine, damages or costs in place of the child.[68] If the child was fined or ordered to pay damages or costs, default could not be met with imprisonment.[69] The death penalty was no longer to be available for any person under the age of 18 years.[70] Provision was also made to ensure that juvenile courts sat in different court buildings, or on different days, or at different times, from adult trials.[71] And the child's privacy was protected: "In a juvenile court no person other than the members and officers of the court and the parties to the case, their solicitors and counsel, and other persons directly concerned in the case, shall, except by leave of the court, be allowed to attend. Provided that bona fide representatives of a newspaper or news agency shall not be excluded".[72]

It is important to note that, notwithstanding the references to the "juvenile court" there was no structural difference between such courts and the normal criminal courts. Juvenile courts were simply courts of summary jurisdiction (in Scotland, the sheriff or the Justice of the Peace court, or the Police or burgh court) dealing with juvenile offenders, to which the above special arrangements applied. They were not specialist courts staffed by specially qualified judges.[73] It was stated 24 years later in the House of Commons:

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[66] 1908 Act, s. 107.

[67] 1908 Act, s. 98.

[68] 1908 Act, s. 99.

[69] 1908 Act, s. 102.

[70] 1908 Act, s. 103.

[71] 1908 Act. s. 111(1).

[72] 1908 Act, s. 111(4).

[73] As late as 1928 the Morton Committee reported that "In no Scottish town, so far as we are aware, have arrangements been made to delegate the work of the juvenile court to one or perhaps two Magistrates specially chosen because they have experience of the difficulties of youth and understand the problem of juvenile delinquency" (p. 42) (quoted in C. Kelly "Continuity and Change in the History of Scottish Juvenile Justice" (2016) 6 *Law, Crime and History* 59, at p. 69).

> The setting up of a different court to deal with the offences of children and young persons from the court which deals with the crimes of adults was one of the novel features of the 1908 Act. It was in principle revolutionary, but in form it was rudimentary. The only practical difference that was made was that the juvenile court should sit either at a different time or in a different place from the ordinary adult court. They were the same magistrates in the juvenile and the adult court. It was the same procedure in the two courts, and in many cases it was the same place. In addition, the rights of the juvenile court were by no means unlimited. It was possible for the parent of a child charged before a juvenile court on an indictable offence to claim the right to have the child removed to an adult court, and it was the right of any young persons between 14 and 16 to claim the same right on his own behalf.[74]

Nevertheless, the Children Act, 1908 might be said to represent a radical reimagining of how the phenomenon of youth offending was to be responded to and so it is from the year 1908 that it is appropriate to talk of "juvenile justice" as a process for dealing with young offenders that was separate from the process for dealing with adult offenders. And there was more to this change than simply dealing with children separately: the outcomes were deliberately designed to be different since it was recognised that the special position of children in society required a different response to that appropriate for adult offenders. The Lord Advocate in the Parliamentary debates declared that the objective of the juvenile courts was "to treat these children not by way of punishing them – which is no remedy – but with a view to their reformation".[75] Stewart reports the Bill's sponsor, Herbert Samuel, Under-secretary at the Home Office, as expressing the view that the very fact of a child committing a crime was "an indictment of his upbringing by his parents".[76] The Kilbrandon Committee said this: "The 1908 Act proceeded on the footing that young offenders should be treated differently from adults, and that the aim should be to seek to educate and reform, rather than to punish".[77] The 1908 Act is, therefore, the precursor to all subsequent substantial Children Acts in Scotland dealing with both young offenders and victims of abuse and neglect with the recognition that these children are often the same, and that their

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[74] HC Deb. 12th February 1932, vol. 261, cols. 1170-1171.

[75] HC Deb. 24th March 1908, vol. 186 col. 1257.

[76] J. Stewart, "Children, Parents and the State: The Children Act 1908" (1995) 9 *Children and Society* 90 at p. 95.

[77] Kilbrandon Committee Report, at para. [41].

difficulties usually stem from their upbringing. That children are properly treated differently from adults had been accepted far earlier in the Victorian period, with (for example) special rules for the employment of children,[78] but the 1908 Act marked the first occasion in which the proposition was made a central feature of criminal justice.

[78] An issue frequently dealt with in the Prevention of Cruelty Acts.

SECTION C: THE CHILDREN AND YOUNG PERSONS (SCOTLAND) ACTS, 1932 AND 1937

i. The Lead up to the Children and Young Persons (Scotland) Act, 1932

In 1925 the Government established a committee under the chairmanship of Sir George Morton, KC, which in 1928 produced *Protection and Training*, "being the Report of the Departmental Committee appointed by the Secretary of State for Scotland to enquire into the treatment of young offenders and of young people whose character, environment or conduct is such that they require protection and training, and to report what changes, if any, are desirable in the present law or its administration".[79] The "present law" of course was contained primarily in the Children Act, 1908 and it was quickly established by the Morton Committee that the aspirations of that legislation had not fully come to pass. The later Kilbrandon Committee summarised the findings of the Morton Committee Report as follows:

> The Committee found that throughout Scotland the general pattern was for juvenile cases to be heard by the Sheriff Courts or the Burgh Courts, and that, except in Lanarkshire, juvenile courts attached to the Justice of the Peace Courts were not functioning to any extent. The Committee recommended transfer of jurisdiction in the case of children and young offenders to specially constituted Justice of the Peace juvenile courts – the members of the court to be drawn from a panel of justices, appointed by the body of justices as a whole from their own number, and comprising persons who by knowledge and experience were specially qualified to consider juvenile cases.[80]

The central recommendation therefore was the proper establishment of separate tribunals, to be called juvenile courts. But the Morton Committee Report contained many other recommendations, including that the nomenclature of "reformatory school" and "industrial school" should no longer be used but that some neutral term such as "training school" be

[79] Morton Committee Report (HMSO, 1928).

[80] Kilbrandon Committee Report *Children and Young Persons Scotland* (1964) at para [42].

used instead.[81] Staffing of schools was to be considered carefully since the work “demands self-sacrifice, sympathy, unflagging energy and broad outlook”.[82]

Other Government Reports on related matters appeared around the same time. In 1926 the Government published its *Report of the Departmental Committee on Sexual Offences against Children and Young Persons in Scotland*.[83] The 1908 Act had focused its concern in this area on girls being brought up in brothels, or otherwise in circumstances that exposed them to immorality, but an increasing awareness of sexual abuse in non-sexualised environments was manifest in the 1926 Report. Writing in 1933, Cowan stated that the 1926 Report recognised “the heinous nature of some of the offences involved, and the psychological and moral effect even of those of a less serious character on the whole future of the child”.[84] It is sometimes thought that our concern for the long-term emotional consequences arising from sexual abuse of children, apart from the moral considerations, developed only in the latter part of the 20th century, but both the Report and the commentary cited reveal that an awareness of the psychological damage such abuse might cause existed far earlier. Though the recommendations of this Committee for increased penalties for sex offenders did not find a place in the Children and Young Persons (Scotland) Act, 1932 (which was more concerned with victims than offenders), the concerns were widely held. Lady Astor in the House of Commons debate on the 1932 Act said this:

> It is deeply disappointing that the Home Secretary has not seen fit to incorporate some of the findings of this committee in the Bill. The cases of indecent assault on young children are increasing, but we do not hear much about them. I suggest that if one of these assaults was made upon a child of any hon. Member there would be a great outcry. These cases are happening all over the country—and what do the men get? There was a case which was fought twice, and the man got six months. Surely we

[81] Morton Committee Report, pp. 94-95.

[82] Morton Committee Report, pp. 90-91.

[83] Cmd 2592, 1926. Cmd 2593 is an equivalent report looking at the situation in England.

[84] MG Cowan, *The Children Acts (Scotland)* (W. Hodge & Co, 1933) at p. 4.

> value the lives of our children more than our property. Month after month these cases occur, and the offenders are let off with light sentences.[85]

Though greater penalties were not enacted, sexual offences against children did receive a greater prominence in the 1932 Act, as indicators of the need for compulsory care or protection.

ii. The Children and Young Persons Bill 1932

The bill that became the 1932 Act received its Second Reading on 12th February 1932. The Debate was led for the Government by Oliver Stanley, then Under-secretary in the Home Department,[86] who emphasised that the bill's major purpose was to amalgamate the treatment of juvenile offenders with that of neglected and deprived children. The underlying philosophy, which had been foreshadowed by the 1908 Act and subsequently reached its apotheosis thirty years later in the Kilbrandon Report, was that the similarities between the two classes of children far outweighed any differences, that deprivation and neglect are the main causes of juvenile criminality and that tackling the former is the most efficient way to reduce the latter. Stanley said this:

> But the habitual criminal is often not born but made. His persistence in crime is far less due to inherent vices than to the circumstances of his life…We recognise that other conditions than mere inherent vice may have entered into an offence; that the child's upbringing at home, the discipline he receives in the home circle or the lack of it, the economic conditions under which he lives, the squalor and misery of his life, even the companions with whom he associates in school [...] or out of it, may have had much more to do in turning that child into an offender than any spirt of natural evil.[87]

He went on:

> Let me turn from the case of the young offender to that of the neglected child, which forms the other branch of the duties of the Juvenile Court. It was one of the most

[85] HC Deb. 12 Feb 1932, vol. 261, cols. 1225-6.

[86] Later Secretary of State for the Colonies in Churchill's wartime Cabinet.

[87] HC Deb. 12 Feb. 1932, vol. 261, cols. 1167-1168.

> revolutionary proposals of the Act of 1908 which for the first time allowed a court in this country to entertain and consider cases in which no offence had been committed, but in which the circumstances made it desirable that the child should receive protection. The right was given to the Court in respect of children up to 16, under specific categories of home circumstances—begging, destitution, drunken parents, sexual offences, prostitution, or being found wandering without any parental control—to look into the circumstances of such children, and either send them to an industrial school or commit them to the care of a fit person. By this Measure we extend that principle. In the first place, we extend the age from 16 to 17, and we abolish these special categories, substituting one wide definition which we believe will be sufficient to bring in a number of cases which today are brought in only by greatly straining the law. I should like hon. Members to realise that when we are dealing with cases of this kind there is no question of ignoring the facts as regards substituting the State for the parents, or breaking up family life, because the fundamental basis in a matter of this kind is that parental control should be adequate, and that such action is legitimate when the proper parents or guardians are either unwilling or unable to exercise that parental control…[88]

It logically followed from the recognition that the two classes of children were the same that so too the two classes of residential accommodation to which they could be sent (industrial schools and reformatory schools) should be the same.

> After all, both classes of children, the neglected and the offenders, have had to suffer a withdrawal of their liberty, in the one case as a species of punishment, in the other purely for their own protection. The fact remains that they are both inside and, when they are inside, the object is the same in dealing with both, namely, when they get outside, to give them a good chance of making decent citizens. We have decided to abolish the distinction between these two types of schools, and to put them together in future under one heading of approved schools, to which the distinction which now exists will no longer apply.
>
> I know that some people feel that it is unwise, and perhaps unfair, to mix up in the same school those who are there as punishment for an offence and those who are merely there for their own protection— that it means that the poor neglected child is contaminated by the bad young offender. *The fact is that the distinction between the two is largely accidental.* The neglected child may only just have been lucky enough not to have been caught in an offence. The character of the child who has been suffering from a long period of neglect at home, or a long period of evil surroundings, is much more likely to have been seriously affected than the character of the young

[88] HC Deb. 12 Feb, 1932, vol. 261, col. 1178.

> offender who is perhaps in the school as the result of one short lapse into crime. We do not believe that either will suffer from being in the same school.[89]

With surprising modernity, Stanley also described the overall aim of the reforms as an "increased simplicity, to make [the court process] much more intelligible to the young person, and by being more intelligible, less frightening".[90]

iii. The Children and Young Persons (Scotland) Acts, 1932 and 1937

The 1932 Bill was passed as a UK statute,[91] but applied to Scotland with some modifications (found in the fifth schedule) and, under s. 89 (not printed in the "Scotland" version of the Act), the UK Act with these modifications was to be printed "as if it were a separate Act which had received the Royal Assent on the same day as this Act" and cited as the Children and Young Persons (Scotland) Act, 1932,[92] which mostly came into force on 1st November 1933.[93] This Act amended rather than replaced the 1908 Act, which remained the Principal Act. The 1932 Act and the 1908 Act were in large part repealed[94] by the consolidating Children and Young Persons (Scotland) Act, 1937,[95] which came into force on 1st July 1937.[96] However, the 1937 Act (unlike the 1932 Act) represents no conceptual shift in how children and young persons in legal processes were to be treated and it made few substantive changes to the law as it existed after the coming into force of the 1932 Act. The following

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[89] HC Deb. 12 Feb. 1932, vol. 261, cols. 1179 – 1180 (emphasis added).

[90] HC Deb. 12 Feb. 1932, vol. 261, col. 1172.

[91] 22 & 23 Geo. V, c. 46.

[92] 22 and 23 Geo. V, c. 47. A detailed and valuable commentary on the 1932 Act is to be found in MG Cowan *The Children Acts (Scotland)* (W. Hodge & Co, 1933). This may have been the first Scottish legal textbook to have been written by a woman.

[93] S,R&O 1933 No 783 (S.41) (some other dates were set for specific matters).

[94] A provision from the 1908 Act that survived was s. 122, which dealt with the cleansing of "verminous children". See now s. 58 of the Education (Scotland) Act 1980.

[95] For a detailed description of this Act, see T. Trotter, *The Law as to Children and Young Persons* (W. Hodge & Co Ltd, 1938).

[96] 1937 Act, s. 113(2).

paragraphs will therefore deal primarily with (and follow the structure of) the 1932 Act, with references to the 1937 Act added for the period subsequent to 1st July 1937.

The definitions of "child" and "young person", originally found in the 1908 Act, were amended in the 1932 Act[97] (primarily by increasing the age at which a "young person" reached adulthood from 16 to 17), and these definitions were replicated in the 1937 Act:[98] "child" since 1932 has been a person under 14 (at that time the school leaving age) and "young person" has been a person between the ages of 14 and 17.[99]

iv. Juvenile Courts

As we have seen, the 1908 Act established the notion of "juvenile courts" but only in the very limited sense that slightly different processes were to be followed by courts dealing with juveniles, and different outcomes were possible. Part One of the 1932 Act attempted to give substance to juvenile courts, thereby fulfilling the true aspirations of the 1908 Act, and it did so in the following three ways.

First, the 1932 Act sought to ensure that the personnel of juvenile courts were specially suited to deal with children. The (English) *Departmental Committee on Treatment of Young Offenders*, reporting in 1927, had stated (with a startling mix of idealism and complacency) that what was needed in every magistrate who sat in a Juvenile Court was "a love of young people, sympathy with their interests, and an imaginative insight into their difficulties. The rest is largely common sense".[100] This was accepted by the Morton Committee, which saw juvenile courts as a place where persons with special knowledge and understanding of children would be invested with the necessary judicial powers to take suitable action in each

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[97] 1932 Act, s. 64.

[98] 1937 Act, s. 110(1).

[99] These remain the definitions for the purposes of the 1937 Act that survive today, notwithstanding that the school leaving age has changed.

[100] *Report of the Committee on the Treatment of Young Offenders* (the Molony Committee), 1927, Cmd 2831 at p.25.

case brought before them. Section 2 of the 1932 Act[101] therefore provided that "a panel of justices specially qualified to deal with juveniles" was to be set up (progressively) in each district in Scotland.[102] The reason why juvenile courts could not be immediately established as separate entities throughout Scotland was explained by the Under-Secretary of State for Scotland:[103] unlike in England where the vast majority of juvenile cases were dealt with by justices of the peace, only a small proportion were so dealt with in Scotland, so there was not the bank of justices from which specially qualified judges could be chosen.[104] This was a serious practical inhibition to achieving the aim of the 1932 and 1937 Acts as envisaged by the Morton Committee, and thirty years later the Kilbrandon Committee reported that progress in establishing qualified panels was minimal and never covered much of the country:

> The Children and Young Persons (Scotland) Act, 1932 (later consolidated in the Children and Young Persons (Scotland) Act, 1937), provided for the setting up of such courts in any area where an order to that effect has been made by the Secretary of State. Only four such orders have been made – all prior to 1940 – applying to the counties of Ayr, Fife, Renfrew and the city of Aberdeen.[105]

Even where juvenile court panels were established, there was no statutory requirement that women should be included on the panel of justices. An amendment to secure such had been defeated (by a large margin)[106] but an assurance was given that in the framing of the

[101] Subsequently re-enacted as s. 51 of the 1937 Act.

[102] But no criteria were laid down to determine whether any justice was "specially qualified".

[103] HC Deb, 12 Feb, 1932, vol. 261, cols. 1218 – 1219.

[104] This remained the case in 1964: Kilbrandon Committee Report at para. [47].

[105] Kilbrandon Committee Report at para [42].

[106] HC Deb. 12th May 1932 vol. 265, col. 2230.

rules due regard would be given to this question.[107] And in the areas where juvenile court panels existed the sheriff court retained concurrent jurisdiction.[108]

Secondly, juvenile courts were to be physically separated from adult courts, and privacy of the proceedings was to be assured. The 1908 Act had required that the court be held either in a different building or room from ordinary sittings of the court, or on different days, or at different times. Section 1(4) of the 1932 Act[109] removed the possibility of juvenile courts sitting merely at different times from adult courts, and required that juvenile courts be held either in separate buildings entirely or at least in separate rooms from adult courts. In this way it was hoped that children would not be brought into contact, in the corridors and waiting rooms of court buildings, with hardened criminals. Cowan[110] draws attention to another aspect of the physicality of the court.

> One of the main purposes of a separate Court is to secure in so far as possible an atmosphere in which the child can talk naturally, and to this end the presence of a large number of persons is to be avoided. Accordingly, under section 3(2), admittance is strictly limited to those directly concerned. The Court may, however, specially authorise others. … The question of the presence of the press was debated at great length.

The child's privacy and confidentiality had received some protection in the 1908 Act, with s. 114 thereof allowing the court to be cleared (except for "bona fide representatives of a newspaper or news agency") whenever a child was giving evidence. More importantly, s. 111(4) of the 1908 Act[111] provided that no person could be present at any sitting of a juvenile court except members and officers of the court, the parties to the case and their

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[107] HC Deb. 12th May 1932 vol. 265, col. 2228. See Rule 13 of the Juvenile Courts (Constitution) (Scotland) Rules 1933, set out below at **1.C.iv.a**.

[108] *Weir v Cruickshank* 1959 JC 94. Paras 44-46 of the Kilbrandon Report contain details of the various types of court in different parts of the country that could be constituted as juvenile courts, and of the distribution of business between them.

[109] Subsequently re-enacted as s. 52(1) of the 1937 Act.

[110] Cowan, n. 92 at pp. 17-18.

[111] And then s. 3(2) of the 1932 Act, subsequently re-enacted as s. 52(1) of the 1937 Act.

solicitors, counsel, witnesses and other persons directly concerned in the case, bona fide representatives of newspapers or news agencies, and such other persons as the court may specially authorise to be present. A significant innovation in the 1932 Act was that reporting restrictions were introduced for the first time. The Morton Committee[112] had drawn attention to a resolution made by the Institute of Journalists urging "all newspapers to withhold the names of juvenile offenders tried or convicted in children's courts, as well as those of children innocently involved in criminal cases", but there was no statutory requirement to this effect until s. 75 of the 1932 Act. That provided that "No newspaper report or any proceedings in a juvenile court shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in those proceedings … nor shall any picture be published in any newspaper as being or including a picture of any child or young person so concerned in any such proceedings as aforesaid". This was replaced by s. 46 of the 1937 Act which both widened the scope of the earlier legislation and narrowed its focus. The rule under the later statute was applied to "any proceedings in any court" (as opposed to only "a juvenile court") but at the same time limited to proceedings involving "any offence against, or conduct contrary to, decency or morality".[113] The 1937 Act also allowed for a wider exception (that the court permitted publication) than the 1932 Act (under which the court or Secretary of State could allow publication if satisfied that it was in the interests of justice to do so).

Thirdly, the 1932 Act expanded substantially the types of case that could be dealt with by the juvenile court under the 1908 Act. By s. 1(1) and (5),[114] the court was given jurisdiction over:

[112] Morton Committee, p. 55.

[113] That limitation was eventually removed by s. 57 of the Children and Young Persons Act 1963, which also extended the prohibition to sound and television broadcasts.

[114] Subsequently re-enacted as s. 50 of the 1937 Act.

(a) Juvenile crime. Section 14 of the 1932 Act raised the common law age of *doli incapax* from 7 to 8[115] (a recommendation of the Morton Committee),[116] and s. 64 increased the court's overall jurisdiction from 16 to 17 (a matter that had to overcome some significant political opposition.[117])

(b) School attendance cases. The transference of responsibility for education to local authorities by the Local Government (Scotland) Act 1929 had the effect, according to Cowan,[118] of removing school attendance cases from the Police Courts to the JP courts and the sheriff courts.

(c) Care and protection cases. The criteria for "care or protection" were substantially widened and are discussed below.

(d) Adoption orders.[119] Though adoption is not within the remit of this Report, it is nevertheless interesting to note that both the legislation and the commentaries of the time included adoption within their conception of child protection mechanisms. (Adoption was only marginally more permanent as an outcome and did not at that time have the radical and comprehensive effects it has today. The major difference between it and long-term fostering – where similarly the child was to be embraced into the substitute family – was that adoption removed the case from the public to the private sphere).

i. Rules and Procedure at Juvenile Courts

The Juvenile Courts (Constitution) (Scotland) Rules, 1933[120] provided in part as follows:

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[115] And this age was re-enacted in s. 55 of the 1937 Act, to be repeated in the Criminal Procedure (Scotland) Acts 1975 and 1995.

[116] It is interesting to note that an amendment to raise the age to 14 was debated by the House of Commons but defeated by 168 to six votes: see HC Deb. 12th May 1932, vol. 265, cols. 2234 – 2240.

[117] HC Deb. 12th Feb 1932 vol. 261, col.1173; 12th May 1932 vol. 265, col. 2207.

[118] Cowan, n.92 at pp. 12-13.

[119] 1937 Act, s. 50(3).

[120] SR&O, 1933 No. 984 (S. 54). (Reproduced in Trotter at pp. 323 – 325).

4: "The justices for the county … shall, in accordance with these Rules, appoint from among their number justices specially qualified for dealing with juvenile cases to form a panel, hereinafter called the juvenile court panel."

13: "Every juvenile court shall be constituted of not more than three justices from the juvenile court panel, of whom so far as practicable one shall be a man and one shall be a woman".

15(1) "…[T]he members of the juvenile court panel for each area shall immediately after their appointment select one of their number to act as chairman of the juvenile court throughout the period for which the panel is appointed."

Irrespective of the fact that juvenile court panels were established in only a few areas in Scotland, it is easy to see from this the blueprint for children's panels later adopted by the Kilbrandon Committee. Likewise, the Juvenile Courts (Procedure) (Scotland) Rules, 1934[121] provide a precursor for procedure at children's hearings.

Rule 8(1): "The Court shall, except in any case where the child or young person is legally represented, allow his parent or guardian in assist him in conducting his defence to the complaint or opposition to the Petition including the cross-examination of witnesses for the prosecution or Petitioner.

(2) Where the parent or guardian cannot be found or cannot in the opinion of the Court reasonably be required to attend, the Court may allow any relative or other responsible person to take the place of the parent or guardian for the purposes of these Rules".

Rule 9: "In any case where a child or young person is brought before a Court charged with an offence the following procedure shall be followed, viz:- (1) The Court shall explain to the child or young person the substance of the charge in simple language suitable to his age and understanding, and shall then ask the child or young person whether he admits the charge… (3) If the child or young person does not admit the

[121] SR&O, 1934 No 641 (S.36), and continued in force under Sched 3 para 1 to the 1937 Act. (Reproduced in Trotter, at pp 263 et seq.)

charge the court may adjourn the case for trial to as early a diet as is consistent with the just interests of both parties… (4) if, in any case where the child or young person is not legally represented or assisted in his defence [the Court shall ask witnesses questions on behalf of the child]".

Rule 9(6)(b): "The Court shall, except in cases which appears to it to be of a trivial nature, obtain such information as to the general conduct, home surroundings, school record and medical history of the child or young person as may enable it to deal with the case in his best interests, and shall if such information is not fully available consider the desirability of remanding the child or young person for such enquiry as may be necessary". Then followed rules to ensure that the child or young person and the parent or guardian were fully informed of the substance of these reports and to allow them to challenge the information contained therein. By Rule 9(6)(e) the court could require the parent or guardian to withdraw from the court. This rule related to child offenders.

Rule 9(7) "The Court shall, thereupon, unless it thinks it undesirable to do so, inform the parent or guardian, or other person acting in accordance with these Rules, of the manner in which it proposes to deal with the child or young person and allow the parent or guardian, or other person acting in accordance with these Rules, to make a statement".

Rule 10(4)(a): The court could exclude the child or young person from evidence if it was in their interests that it not be given in their presence.

Rule 10(7)(a) "The Court shall obtain such information as to the general conduct, home surroundings, school record and medical history of the child or young person as may enable it to deal with the case in his best interests; and shall, if such information is not fully available, consider the desirability of continuing the case for such enquiry as may be necessary". "Provided that the child or young person shall be told the substance of any part of the report bearing on his character or conduct which the Court considers to be material to the manner in which he should be dealt

with; the parent or guardian … shall be told the substance of any part of the report which the Court considers to be material as aforesaid and which has reference to his character or conduct, or the character, conduct, home surroundings or health of the child or young person". This rule related to "proceedings commenced by petition" – that is to say in cases other than where the child was charged with an offence. It also required notice to be given to the parent or guardian in "care or protection" cases, but there was no equivalent in respect of children charged with an offence.[122]

Rule 11: "The Court may from time to time and at any stage of a case remand a child or young person for information to be obtained in respect to him".

v. *Jurisdiction of Juvenile Courts*

Part One of the 1932 Act having sought to establish a proper juvenile court, Part Two then went on to deal with both whom the court had jurisdiction over and the potential outcomes open to the court. These rules applied throughout Scotland and not only in the few areas in which juvenile courts were constituted separate from other courts of summary jurisdiction. Putting it in contemporary terms (which would not have misrepresented the position in 1932), s. 12[123] set out the offence ground, while s. 6[124] set out the grounds that needed to be established before a child could be held to be "in need of care or protection". The

[122] See *McKenzies v McPhee* 1889 16R (JC) 53, where committal of a child under the Industrial Schools Act 1866 was held to be incompetent in the absence of any intimation (to the parents); and cf. *Dunn v Mustard* (1899) 1 F(J) 81 where in criminal proceedings for child cruelty against a father a child was removed without notice and this was held to be competent since the legislation then in force (the 1894 Act) authorised the sheriff to make an order for custody of the child on his own initiative without notice to anyone.

[123] Subsequently re-enacted as s. 61 of the 1937 Act.

[124] Subsequently re-enacted as s. 65 of the 1937 Act.

offence ground was limited to offences punishable by imprisonment.[125] Three categories of child were identified as being in need of care or protection:

(a) Child or young person "having no parent or guardian, or a parent or guardian who is unfit to exercise care and guardianship or is not exercising proper care and guardianship, is falling into bad associations or is exposed to moral danger or is beyond control". The structure of this paragraph indicates that "bad associations or moral danger" or being "beyond control" were not separate grounds, but rather were conceived as the inevitable consequences of the child having no parent or guardian or of that parent or guardian being unfit or unable to exercise care.[126]

(b) Child or young person in respect of whom certain specified crimes had been committed, or was a member of the same household as the victim or perpetrator of such offence or, being female, was a member of the same household as a female in respect of whom an offence of incest has been committed by a member of that household.[127] The specified crimes were those in Part II of and the Schedule to the 1908 Act and subsequently Schedule 1 to the 1937 Act (including the offence of cruelty or neglect under s. 12 of both these Acts, residence in a brothel, begging, and specified sexual offences).[128] These

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[125] It was not until 1968 that non-imprisonable offenders could be dealt with under the child protection legislation. The design of the legislation in the 1930s was still aimed (as it had been in 1908) at avoiding child imprisonment, and child offending was not in itself conceptualised as demanding a "care" response until the Kilbrandon Committee Report and the enactment of its recommendations in the Social Work (Scotland) Act 1968.

[126] Parental unfitness or failure to exercise proper care and guardianship became separate grounds in themselves, of course, in the Social Work (Scotland) Act 1968.

[127] This last was a late addition by the House of Lords: HL Deb. 9th June 1932 vol. 84 col. 710 to ensure the age of the female victim did not matter (the other scheduled offences being limited to victims under 16).

[128] All of these related to persons under 16 notwithstanding that the general jurisdiction of the juvenile court was now to extend to age 17.

provisions followed the recommendations of the *Report of the Departmental Committee on Sexual Offences*[129] and ensured a substantial extension of protection from the 1908 Act: the earlier Act had required a definite conviction[130] while in the 1932 and 1937 Acts that requirement was retained only in relation to residence in the household of the offender. The special provision excluding from the jurisdictional ground children of prostitute mothers in the 1908 Act was removed, in order to allow such children to be brought to a juvenile court – this recognised that the harm might not come directly from the parent but from the sexualised environment in which the parent lived.

(c) Children of vagrants who were not receiving efficient elementary education.[131] This replaced the vagrancy ground that, under the Industrial Schools legislation, permitted children to be sent to such schools, and is the pre-cursor to the more general "failure to attend school regularly" ground under the 1968 Act and subsequent legislation.

If a child or young person was found to fall into any of these three "care" categories, then the possible outcomes were that the child or young person could be (i) sent to an approved school (as reformatory and industrial schools became under the 1932 Act), or (ii) committed to the care of any fit person, whether a relative or not, or (iii) made subject to the supervision of a probation officer.[132] The potential outcomes for any child or young person found guilty of an offence punishable in the case of an adult with imprisonment were the same as the "care" case outcomes, except that probation for offenders was available only in

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[129] Cmd 2593 (1926).

[130] 1908 Act, s. 21(2), following s. 5(1) of the 1889 Act.

[131] An offence created by s. 118 of the 1908 Act.

[132] 1932 Act, s. 6 and 1937 Act, s. 61 for juvenile offenders; 1932 Act, s. 12 and 1937 Act, s. 66 for children in need of care or protection. The court could alternatively order the parent or guardian to enter into a bond to exercise proper care and guardianship (not wholly dissimilar to the "parenting order" created seven decades later by the Antisocial Behaviour etc (Scotland) Act 2004, s. 102).

conjunction with committal of the child or young person to the care of a fit person and not as an outcome on its own.[133] Other than that relatively minor difference, however, the two groups of children and young persons were treated the same. A welfare test applied explicitly in respect of both groups: "Every court in dealing with a child or young person who is brought before them, either as needing care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person, and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training".[134] Also applicable to both groups was the rule that the education authority had to be notified of the child or young person being brought before a juvenile court[135] and (importantly) once notified was obliged to supply the court with such information about the child or young person's home surroundings, school record, health, character and of available approved schools as appeared to the authority as "likely to assist the court".[136]

There was one other way in which a child or young person could be brought before a juvenile court, and this was at the instance of his or her own parent or guardian, on the ground that the parent or guardian was unable to control the child or young person.[137] In such a case the only outcomes available to the court were that (with the consent of the parent or guardian who understands this outcome) the child or young person could be sent to an approved school or be placed under supervision of a probation officer or some other person for a specified period not exceeding three years. But the court could not send the

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[133] 1932 Act, s. 12; 1937 Act, s. 61.

[134] 1932 Act, s. 16; 1937 Act, s. 49(1). See also rules 9(6)(b) and 10(7)(a) of the Juvenile Courts (Procedure) Rules, set out above at **1.C.iv.a**, which require the Juvenile Court to deal with the case "in the child's best interests".

[135] Failure to notify risked rendering the proceedings incompetent: *AB v Howman* 1917 JC 23 (dealing with the Education Authority's right to be heard under s. 74(6) of the 1908 Act).

[136] 1932 Act, s. 15; 1937 Act s. 43(2).

[137] 1932 Act, s. 7; 1937 Act s. 68. This happened only very rarely: see Kilbrandon Report at para.130 (which recommended the repeal of the provision).

child or young person to an approved school under this provision without the consent of the Education Authority because, as Trotter tartly comments, "A child in an approved school is a burden on the rates":[138] a parent could not therefore simply ask the court to relieve him or her of the burden of bringing up his or her child.

vi. Outcomes Available to Juvenile Courts

a. Sending the Child or Young Person to an Approved School

One of the major policy objectives of the 1932 Act (which had far more practical effect than the establishment of specially qualified benches of justices) was the abolition of the distinction between reformatory and industrial schools: instead, there were to be schools approved under the terms of the First Schedule to the Act,[139] thereafter known as "approved schools". Cowan said this:

> Changing social circumstances, an inspectorate, in touch with the general education of the country and a new nomenclature,[140] have gradually tended to lessen, if not almost to obliterate, the distinction between the reformatory and the industrial school… No doubt it is true that the industrial schools contain many neglected children committed, under s.58(1) of the Children Act [1908], through no fault of their own, but solely owing to the unsatisfactory condition of their homes, while all those in reformatories have been convicted. But the two categories very often overlap, for the connection between neglect and delinquency is distressingly close.[141]

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[138] Trotter, n.95 at p. 126.

[139] And subsequently under the terms of s. 83 of the 1937 Act. See also s. 80(5) of the 1932 Act and s. 110(3) of the 1937 Act to the effect that any reference in any Act or other document to reformatory schools or industrial schools and to youthful offenders and children sent thereto or detained therein was to be construed as including references to approved schools and to children and young persons sent thereto and detained therein.

[140] Cowan reproduces in her book (n. 92) at pp 327 – 332 SED Circular No 80, 16th January 1929 (issued to industrial and reformatory schools) indicating the SED's intention to cease using "industrial" and "reformatory" in its official correspondence, and suggesting that school managers should adopt the same course, describing their establishments with neutral names such as "Aberdeen Oakbank School".

[141] Cowan (n. 92) at pp. 22-23.

Only children over the age of ten years could be sent to an approved school, except where the court was satisfied that the child under that age could not suitably be dealt with otherwise (including through "the want of a fit person of his own religious persuasion who is willing to undertake the care of him").[142] The school selected was required to be (where practicable) a school for persons of the religious persuasion to which the child or young person belonged.[143] It was necessary for the order sending the child or young person to an approved school to specify the age and religious persuasion of the subject of the order,[144] and an error could, at least in some cases, amount to a fundamental nullity vitiating the order.[145] The order also had to specify the Education Authority of the area where the child or young person was resident, or if that was not known the Authority in whose area the offence was committed or the circumstances that led to protective remedies arose:[146] on that identification depended the question of liability for the maintenance of the child in the approved school.[147] In determining the child or young person's residence, the court should

[142] 1932 Act, s. 18; 1937 Act, s. 49(2).

[143] 1932 Act, Sched. 1 para. 26; 1937 Act, s. 72.

[144] 1932 Act, s. 23(4) and (5); 1937 Act, s. 74(1).

[145] See *Dunn v Mustard* (1899) 1 F (J) 81. Here the error consisted in the interlocutor bearing to proceed under the wrong statute (admittedly a mere clerical, but fatal, error).

[146] 1932 Act, s. 23(6); 1937 Act, s. 74(2).

[147] In *Edinburgh EA v Perth and Kinross EA* (1942) 58 Sh Ct Rep. 27 different offences were committed in different local authority areas and it was held that liability to maintain inhered in the authority in whose area the child resided when the first offence was committed. Section 74(7) of the 1908 Act and s. 94(2) of the 1937 Act dealt with appeals to the sheriff if the local authority wished to challenge the child's residence for this purpose: see for example *Fife EA v Lord Provost etc of Edinburgh* (1934) 50 Sh Ct Rep. 245. In *Magistrates of Edinburgh v Stirling County Council* 1947 SLT (Sh Ct) 58 it was held that, though a child discharged from an approved school remained subject to the supervision of the managers thereof, this did not make the managers liable for his maintenance if he was, in fact, living outwith the area of the local authority in which the school was located. And in *Dundee Corporation v Stirling County Council* (1940) 56 Sh Ct. Rep. 189 a boy ran away from the residence in Stirlingshire in which his parents had placed him and committed offences in Dundee: the sheriff held that he was resident in Stirlingshire and not Dundee for the purposes of the local authority's liability to contribute to his maintenance.

ignore any period in which the child was an "inmate of a school or other institution, or while boarded out under this Act".[148] And it was provided that "all rights and powers exercisable by law by a parent shall as respects any person under the care of the managers of an approved school be vested in those managers".[149]

Additionally, any person under 18 in a Borstal institution or otherwise detained could, on the order of the Secretary of State, be transferred to an approved school.[150]

Under the 1908 Act children sent to reformatory or industrial schools could be kept there until they achieved a stated age. The 1932 Act placed substantial limits on the time a person could be sent to an approved school and the basic period became three years.[151] That length (substantial to modern eyes but usually less than under the 1908 Act) was mitigated substantially by the power of the authorities to allow the child out on licence. This meant, in Cowan's words, that "The length of stay does not depend on the gravity of the case, but on the progress made. The discretion is thus taken from the magistrate and given to those who can watch the pupil's progress under training".[152] The operation of the licensing system therefore required school managers to keep each child's progress under regular review. But there was no provision to allow either child or parent to participate in any review of progress.

b. Committal to the Care of a Fit Person (Boarding Out)

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[148] 1932 Act, s. 23(10); 1937 Act, s. 74(2) proviso (a). Cf (under today's legislation) *East Renfrewshire Council, Appellants* 2015 GWD 35-564 and *East Renfrewshire Council, Appellants* [2016] SAC (Civ) 14.

[149] 1932 Act, Sched 1, para 17(1); 1937 Act, Sched. 2 para 12(1). The "managers" were defined in s. 110 of the 1937 Act as the Education Authority or the joint committee (of two or more Education authorities) and in relation to approved schools not run by Education Authorities meant the persons for the time being having the management or control thereof.

[150] 1932 Act, s. 31; 1937 Act, s. 62.

[151] 1932 Act, s. 25(1); 1937 Act, s. 75(11).

[152] Cowan, n. 92 pp. 42 – 43.

The Morton Committee had pointed out that under the 1908 Act there already existed committal powers, though only for specified types of cases, and only to "fit persons" who were relatives or friends of the child: the Committee also pointed out that these powers were seldom used.

> This may have been due to the reluctance of a relative or other friend to undertake the responsibility, particularly when no financial assistance was available. Perhaps this is not altogether to be regretted – since direct financial assistance of this nature, without the intervention of any local authority, might attract relatives or friends who are not suitable for the task. In any case, machinery for finding a fit person was not provided under the Act.[153]

The 1932 Act transformed committal to the care of a fit person from a form of kinship care, as it had been under the 1908 Act (with its reference to committal to "a relative … or some other fit person"), into fostering as a major component of state care. It allowed the juvenile court to commit a far wider group of children and young persons than had been possible previously to the care of an Education Authority: instead of only the victims of an offence under the 1908 Act, committal to a fit person was possible for any child or young person who was in need of care or protection or who had committed an offence. Every Education Authority was deemed a "fit person" for the purpose,[154] with the Treasury bearing the cost,[155] but Education Authorities could not exercise their powers of caring for children or young persons by accommodating them in either approved schools[156] or voluntary homes:

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[153] Morton Committee Report, at p. 116.

[154] 1932 Act, s. 20(1), subsequently re-enacted as s. 80 of the 1937 Act, provided that education authorities shall be deemed to be a fit person for this purpose and authorised them to undertake the care of children and young persons so committed.

[155] 1932 Act, s. 79(1)(i)(b); 1937 Act, s. 107(1)(a)(ii) (repealed by the Children Act 1948, sched. 4). Cowan n. 92 at p. 44, pointed out that while education authorities were not bound to accept the committal to their care, the fact that they would have to bear the costs of the alternative (sending the child to an approved school) gave them a "financial interest" in accepting such committals.

[156] Education Authorities could, however, apply to a juvenile court to send a child in their care to an approved school, on the basis that "it is desirable in his interests to do so": 1932 Act, s. 20(4); 1937 Act, s. 88(8).

rather, the only mechanism they had to fulfil their obligations towards children committed to their care was to board them out with private families[157] – in other words, fostering. And that fostering was to be outwith the wider family circle, the references to committal to "a relative" being dropped.[158] "The person[159] to whose care a boy or girl is committed …. Shall have the same rights and powers, and be subject to the same liabilities in respect of his maintenance, as if he were his or her parent, and the boy or girl shall continue to be in his care notwithstanding any claim by a parent or any other person".[160] The Secretary of State had the power to discharge a child or young person from the care of the person to whose care he or she had been committed, either absolutely or conditionally.[161] The Secretary of State could also empower the person to whose care a child or young person had been committed to arrange for his emigration; such arrangements could only be made with the Secretary of State's authority.[162] With both of these provisions, however, the Secretary of State's powers were in practice exercised by an Education Authority.[163]

The power to board out had to be exercised in accordance with the rules (set out in Part Two of the present Report) and if possible the person with whom the child or young person was boarded out was to be of the same religious persuasion, or willing to give an undertaking that the child or young person would be brought up in accordance with that

[157] 1932 Act, s. 20(3); 1937 Act, s. 88.

[158] The terms "foster-parent" and "foster-home" were used in the Care and Training Regulations, 1933, set out below.

[159] This is likely to refer both to the natural person with care – the foster carer – and (if different) the institutional "fit person" named as such in the court order.

[160] 1932 Act, s. 20(4); 1937 Act, s. 79(4). The fact that the fit person acquired parental power did not in itself remove parental rights from the parent: *Browne v Browne* 1969 SLT (Notes) 15.

[161] 1932 Act, s. 19(6); 1937 Act, s. 88(4).

[162] 1932 Act, s. 19(7); 1937 Act, s. 88(5). On emigration generally, see Appendix One to this Report.

[163] 1932 Act, s. 81; Children and Young Persons (Scotland) Act 1932 (Transfer of Powers) Order 1933, SR&O 1933 No. 821 (S. 44).

religious persuasion.[164] Since children under ten could be sent to approved schools only in exceptional circumstances,[165] the result was that committal to the care of an Education Authority (i.e., boarding out in foster homes) was the normal outcome for children of that age. For older children also, boarding out was the norm: the Clyde Report[166] indicated that in March 1945 of the 1561 children committed to the care of an education authority, 1077 were boarded out with foster parents. That Report also described the provisions under the War Pensions (Administrative Provisions) Act 1918 and the War Orphans Act 1942, under which a small number of children who had lost parents during the two World Wars were boarded out by the Minister of Pensions – including 23 who had been committed under the 1937 Act to the care of the Ministry of Pensions.[167]

c. Boarding Out Under the Poor Law

Though not an outcome of the juvenile court process, it is convenient to deal here with boarding out as a mechanism under the Poor Law (Scotland) Act 1934. This allowed public assistance authorities[168] – without court order – to "make arrangements for the lodging, boarding, or maintenance otherwise than in a poorhouse of children under the age of sixteen years[169] who are orphans, or who have been deserted by, or are separated from, their parents, so however that any arrangements so made shall be subject to such

[164] 1932 Act, s. 22(1); 1937 Act, s. 88(3). The court was obliged to revoke or vary the committal order if, on an application by any person to do so, it was shown that the child was not being brought up in accordance with his or her religious persuasion: 1932 Act, s. 22(2); 1937 Act, s. 88(7).

[165] 1932 Act, s. 18; 1937 Act, s. 49(2). Under the 1908 Act there had been a power to board out children under 10 who had been sent to a certified school but now the statutory expectation was that they would be boarded out.

[166] *Clyde Report on Homeless Children* (1946, Cmd 6911) at para [23].

[167] Clyde Report at paras [34] – [35].

[168] That is to say, the poor law authorities who were quite separate from local authorities.

[169] It is to be noted that children boarded out under the 1932 or 1937 Acts could remain committed to the care of a fit person until they reached the age of 18. Anyone boarded out by the poor law authorities was freed from that control when they reached 16.

regulations as the Department may make with respect thereto."[170] This regularised a long-established (and near universal[171]) practice of the poor law authorities in Scotland.[172] In introducing the Bill, Lord Strathcona said the following of this provision:

> Clause 10 contains an important provision dealing with the boarding-out of children. The system of boarding-out with private persons children who have come under the control of authorities has long been a feature of poor law administration in Scotland, and it is generally recognised that the system has been amply justified by results. The system has developed without specific statutory authority. This clause is intended to give that authority and to secure that boarding-out will in all cases be under the best possible conditions. To that end it is proposed that all arrangements for boarding-out shall be made subject to regulations made by the Department of Health.[173]

Public assistance (poor law) authorities were not "fit persons" to whose care a child could be committed under court order, but the 1934 Act allowed them to board children out with anyone they themselves deemed suitable. Indeed the Clyde Report[174] pointed out that education authorities (which were "fit persons") tended to delegate the functions of identifying suitable foster carers to the public assistance authorities. However, children boarded out under the Poor Law (Scotland) Act 1934, not being committed by court order,

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[170] Poor Law (Scotland) Act 1934, s. 10 (repealed by the National Assistance Act 1948, 11-12 Geo 6, c. 29).

[171] Clyde Report at para [13].

[172] See H.J. Macdonald, "Boarding-out and the Scottish Poor Law, 1845-1914" (1996) 75 *Scottish Historical Review* 197, who reports at p. 198 that "Between 1845 and 1914, 80-90% of children who came under the long-term care of the Scottish Poor Law were boarded-out". She suggests as reasons why the practice developed (i) the fact that few poorhouses had been built and (ii) boarding-out was a cheaper option than "indoor support" (at p. 199).

[173] HL Deb. 12 July 1934 vol. 93 col. 563. Regulations were made by the Secretary of State for Scotland: Poor Relief Regulations (Scotland) 1934 (SR&O 1934, No. 1296 (S.69). The Children (Boarding-Out etc) (Scotland) Rules and Regulations, 1947 (set out below at **2.A.iii**) replaced both these and the Boarding Out Rules in the Care and Training Rules 1933 (set out below at **2.A.ii**), and explicitly covered children boarded out under the Poor Law (Scotland) Act 1934 as well as those boarded out under the 1932 and 1937 Acts. On which Government department was responsible for visiting children boarded out under the poor law, see Clyde Report at paras [18] – [21].

[174] At para [22].

could be retrieved by their parents at any time.[175] There seems to have been no provision conferring upon foster parents receiving children under the poor law any parental powers, and the withholding from public assistance authorities of "fit person" status probably allowed them to avoid any parental responsibility.

d. Supervision by Probation Officers

The concept of probation, which avoided the removal of the child from his or her home environment, had been introduced by the Probation of First Offenders Act, 1887, which was replaced by the Probation of Offenders Act, 1907.[176] The probation service was put on a national basis by the Probation of Offenders (Scotland) Act, 1931,[177] and during the debates on the 1932 Act the Earl of Feversham may be found saying:

> Probation, very simply stated, means discipline and reclamation of the young offender in his own home, but under the supervision of a probation officer. The whole work naturally falls into two parts: first, the preliminary investigation which shows why the offender has got into trouble, and then the important and often tedious and lengthy job of reclaiming the offender. *The success of the second part is dependent upon the efficiency of the first.*[178]

Probation committees were established to oversee the system, which included both salaried and voluntary probation officers.[179] A major change in the 1932 Act[180] was to extend the role of probation officers beyond the case of juvenile offenders to include as well children

[175] Though under the Custody of Children Act, 1891, s. 3, the parent would have to satisfy the court "that, having regard to the welfare of the child, he [the parent] is a fit person to have the custody of the child".

[176] A history of probation in Scotland is found in the Morton Committee Report at pp. 62 – 77.

[177] The duties of probation committees and probation officers were governed by the Probation (Scotland) Rules 1907 (SR&O 1907 No. 1034); the Probation (Scotland) Rules 1931 (SR&O 1931 No. 1023 (S.53)); and the Probation (Scotland) Rules 1951 (SI 1951 No. 1261).

[178] HL Deb. 26th May 1932 vol. 84 col. 482 (emphasis added).

[179] See Probation (Scotland) Rules, 1931, SR&O 1931 No 1023 (S.53) (reproduced in Cowan, pp. 349 – 369).

[180] 1932 Act, ss. 6 and 7.

and young persons in need of care or protection[181] and this remained the case under the 1937 Act.[182] The probation officer appointed to supervise the child was required to "visit, advise and befriend [the child or young person] and, when necessary, endeavour to find him suitable employment."[183] Employment, it was hoped by the Morton Committee, was to be better than "blind-alley occupations and the higher wages offered them":[184] in other words what probation officers ought to seek were skilled apprenticeships.

e. Other Disposals for Offenders

The 1932 Act did not prohibit any other disposals for offenders and so it remained possible for the court to order that the child be whipped (if male and under the age of 16), pay a fine, damages or costs,[185] or be committed to a remand home.[186] The last mentioned was very uncommon[187] and, according to Cowan, used mainly to enforce a fine against a young person in paid employment who was not willing to pay the fine.[188] The Bill as originally introduced in the House of Commons in 1932 had contained a provision for the abolition of whipping, but the House of Lords (twice) removed the provision and the Commons (after

[181] Subjecting children in need of care and protection to the "supervision of a probation officer" was the origin of compulsory supervision of children: see *Social Work and the Community* (SED, 1966, Cmnd 3065) at paras 27-29. The Kilbrandon Report recognised (at para 140) that the distinction in the 1937 Act between supervision and probation would cease on the implementation of its own proposals.

[182] 1937 Act, ss. 66 and 68.

[183] 1932 Act, s. 10(1); subsequently re-enacted as s. 70 of the 1937 Act.

[184] Morton Committee Report, p. 112.

[185] 1908 Act, s. 99(1); 1937 Act, s. 59(1). If the offender was a child (i.e. not yet a young person and so still at school) the fine, damages or costs had to be paid by the parent or guardian. The Kilbrandon Committee found in 1964 (at paras. 23-33) that such outcomes were ineffective and in most cases impracticable.

[186] 1908 Act, s. 106, replaced by s. 58 of the 1937 Act. Remand homes are discussed below at **2.F.i**.

[187] Morton Committee Report, p. 177.

[188] Cowan, n. 92 p. 51.

long debate and against the wishes of the National Government) eventually conceded the point.[189] The matter did not re-emerge in the 1937 debates.[190]

[189] See HL Deb. 9th June 1932, vol. 267 cols. 2069 – 2095. Whipping had long been recognised as a legitimate form of punishment (see *Macdonald's Criminal Law* 3rd edn at p. 17) and was competent for boys below the age of 16: *Mackay v Lamb* 1923 JC 16.

[190] Whipping was eventually abolished as a criminal punishment by the Criminal Justice Act, 1948, s. 2. The Kilbrandon Committee, somewhat surprisingly, discussed (at para 34) corporal punishment as a potential outcome but only, it seems, to dismiss it as a public treatment measure.

SECTION D: THE CHILDREN ACT, 1948

i. Introduction

The lead-up to the Children Act, 1948 from the perspective of English law, including the political decisions behind it, has been carefully traced by Professor Steven Cretney in "The State as Parent: The Children Act 1948 in Retrospect".[191] The route was a little different in Scotland, but the end result – a UK statute applicable in both England and Wales, and Scotland[192] – was much the same.

ii. The Clyde Report 1946

As will be apparent from the above discussion, by the outbreak of the Second World War the provisions in Scotland under which children and young people could be accommodated away from home by state action were multifarious, and the regulations governing the various types of accommodation diverse and, in places, inconsistent. In the dying days of the War in April 1945, the British Government established two committees of inquiry, one for Scotland and one for England and Wales. The Scottish Committee on Homeless Children, under the chairmanship of James L. Clyde, KC,[193] was given a remit (rather wider than its title suggests) "to inquire into the existing methods of providing for children deprived of normal home life, and to consider what further measures should be taken to compensate them for lack of parental care". The last eight words, curiously formulated, are to be noted: they do not of course refer to monetary compensation, but (as we will see) presage the artificial replacement of "normal home life" as the main aim of state intervention in family life. The Clyde Committee produced its Report[194] in 1946, at the same time as the English

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[191] 1998 *Law Quarterly Review* 419. See also, by the same author, "The Children Act 1948: Lessons for Today?" (1997) 9 *Child and Family Law Quarterly* 359.

[192] Northern Ireland was excluded from the operation of the 1948 Act: 1948 Act, s. 62(3).

[193] Later Lord Advocate and then Lord President of the Court of Session.

[194] *Report of the Committee on Homeless Children*, hereinafter "the Clyde Report", (1946, Cmd 6911).

equivalent, the *Report of the Committee on the Care of Children* (the Curtis Report),[195] was published and both Reports made substantially similar recommendations. These recommendations to a large extent formed the basis of the Children Act, 1948. This Act did not amend the law relating to juvenile courts, as contained primarily in the Children and Young Persons (Scotland) Act, 1937, nor indeed the outcomes available under that Act (discussed in the immediately preceding section). Its major aim was to simplify the regulatory mechanisms under which children and young persons were accommodated away from their parents, whether under court order or otherwise. It achieved this by replacing the multifarious forms of governmental control over such accommodation with unified control by local authorities; in addition it imposed a positive obligation on local authorities to be proactive and to seek out children in need of care and protection.

The Clyde Report had drawn attention to the variety of mechanisms by which children in Scotland who were homeless could be looked after, either by the state in its various manifestations or by private institutions (religious or philanthropic), each mechanism having different regulatory oversight, and there being a bewildering range of different Government departments with ultimate responsibility. The Committee identified the "three main solutions at present adopted in Scotland to meet the problem" (of children and young persons who cannot reside with their parents): (i) boarding out the children with foster parents, (ii) sending the children to homes run by charities ("voluntary homes"), and (iii) maintaining the children in homes run by local authorities. The mechanisms (governed by the statutes and processes discussed above) by which children and young persons were brought into these environments were different, as were the regulatory provisions governing the care offered children in these different environments. Children with similar needs might therefore be dealt with very differently depending upon the legal route by which they came to be accommodated away from their parents, and the oversight of their care – even the level of protection offered – differed according to the accident of the form

[195] 1946, Cmd 6922.

of accommodation provided. And of course different local authorities provided their services to children and young persons under a diversity of local structures.

The Clyde Committee concluded:

> We consider that the time has now come to sweep away the existing anomalies and to recognise the importance of the welfare of children as a distinct function of the Local Authority, and not as an incidental function of a group of separate committees of different Local Authorities primarily concerned at present with other functions.[196]

To achieve this, the Report recommended:

> [T]hat in each County and large Burgh there should be established a Children's Care Committee which would administer the whole of this field. This Committee should have transferred to it all the functions at present exercised by the Public Assistance and Public Health Committees regarding these children. This would no longer then be regarded as an incidental matter in Poor Law or Local Health administration. Further, to the Town Councils of large Burghs and to the County Councils of Counties, and through them to their respective Children's Care Committee, would be transferred all the functions at present exercisable by Education Authorities in relation to care and protection cases under the Children and Young Persons (Scotland) Act, 1937.[197]

Underpinning that structural simplification was a need to focus on the importance of "family", but the Clyde Committee understood by this concept not "family life" as we today, steeped in the language of Article 8 of the ECHR,[198] understand that term but simply as an environment away from "the large institution". In a paragraph headed "Value of the Family",[199] the Clyde Report said this:

> The lesson which above all else the war years have taught us is the value of home. It is upon the family that our position as a nation is built, and it is to the family that in trouble and disaster each child naturally turns. It is the growing awareness of the importance of the family which has largely brought into prominence the problem of

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[196] Clyde Report, para [80].

[197] Clyde Report, para [80].

[198] "Everyone has the right to respect for his private and family life, his home and his correspondence".

[199] Clyde Report, para [43].

> the homeless child. How then is the family to be re-created for the child who is rendered homeless?

"Re-creation" of the family was not seen, as it would be today, in terms of maintaining contact between the child and his or her birth family in order to work towards rehabilitation of the child with that family – rather, it was seen in terms of ensuring that a *substitute* family, in a private home, was provided for the child who could not remain with his or her parents. In the words of the Clyde Report:

> The answer is certainly not to be found in the large Institution. That is an outworn solution, and some of them have left a bad impression upon the Members of the Committee who have visited them. The uniformity, the repression,[200] the impersonality of these cold and forbidding abodes afford no real consolation to the children who grow up in them, and constitute a sorry preparation for entry into a world where the child must ultimately fend for itself.
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> Undoubtedly the solution of the problem is the good foster parent. By this means the child should get the nearest approximation to family life, and receive that individual treatment whereby it secures the necessary opportunity to build up its own personality and equip itself for the transition to independence and self-reliance in later years.[201]

State provision of substitute families, which would replace the unsatisfactory families from which children or young persons had been removed, was therefore seen as the primary solution to lack of parental care. The Report's preference for foster parents over institutional care was underpinned by a belief, which may strike the modern reader as naïve, that "parental affection"[202] would always be an inherent part of the care offered by those fostering children. In addition to this, the assumption permeates the Report that a child once "homeless" (including through state removal of the child from its home due to parental inadequacy) will require to remain in the care of the state until adulthood. It is striking that there is so little in the Clyde Report about working with the child's own family to allow its return, other than the sole, and substantially qualified, assertion that "every

[200] Frustratingly, this sinister word is given no further elaboration.

[201] Clyde Report, paras [44]-[45].

[202] Clyde Report, para [83].

encouragement should be given to … a reunion of the family (if the parents are satisfactory)”.[203] Nor is there anything about parental contact with children accommodated away from their parents: the aim is plainly to insulate the child from the harmful environment from which he or she has been removed. This also explains why there is no indication in the Clyde Report that care with the child's wider (natural) family was a strategy to be considered, far less preferred. The sea-change in attitudes towards kinship care had come about rather earlier than the Clyde Report. While boarding out with “fit persons” had originally been conceived as being with other members of the child's own family,[204] that had disappeared with the enactment of the Children and Young Persons (Scotland) Act 1932, and was not to reappear (in the slightly different guise of “kinship care”) until the 21st Century. The aim of the 1932, 1937 and 1948 Acts was to ensure that the child would be provided with family life by the state: just not with their own family. Many of the Clyde Committee's recommendations focus, therefore, on ensuring the highest quality of foster parents, and subjecting foster parents to appropriate (by which they meant not intrusive) state supervision.[205]

The Report did, however, recognise that the system of boarding out as it presently operated had its risks, especially when children were sent to unfamiliar environments which, due to underlying poverty, required them to work for their keep. The Report identified one particular environment as being especially problematical:

> Many of the Local Authorities board out children on crofts. Some witnesses have condemned such a practice as unsuitable and we feel there is substance in their

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[203] Clyde Report, para [105].

[204] As was seen above at **1.A.iii,** the Prevention of Cruelty to, and Protection of, Children Act, 1889 created the “fit person” order that committed the child to the care of “a relation of the child, or some other fit person named by the court”. This was repeated in the Prevention of Cruelty to Children Acts, 1894 and 1904, and finally in s. 21 of the Children Act 1908.

[205] Under the Care and Training Regulations, 1933 (discussed below at **2.A.ii**) the education authority had to visit each boarded-out child every three months: the Clyde Report recommended this be reduced to every six months.

> criticism. While fully appreciating what has been accomplished in the past through this valuable service, and the opportunity for home life which has been afforded to homeless children on some crofts, we think that, under modern conditions, radical changes are necessary. We strongly deprecate the boarding out of city children on crofts in very remote areas where they have no real contact with other children, where they have no facilities for learning a trade which is congenial to them, or where the living conditions are bad… Investigation of conditions in Highland crofts has shown that the lack of sanitation and the absence of facilities for training the children in cleanliness and personal habits make it inadvisable to board out children in remote crofts in the Highlands, where economic conditions are such that the practice of taking children seems to be regarded as an industry, and the labour obtained therefrom often enables the guardians to maintain their crofts. Instances were found where children on crofts were overworked by their foster parents.[206]

The Clyde Report also accepted that boarding out with foster parents, while the main, could never be the only, solution.

> However great the response to the improvement of [the foster parent] service, there will always be cases in which the foster parent or the adopted parent is not the best solution. It is for these cases primarily that Voluntary and Local Authority Homes will be required. Apart altogether from the group of children who fall into the category of offenders … there will always be a certain number of children who, owing to their past treatment or environment, are specially difficult, and with whom for that reason a foster parent cannot effectively cope. There may be children belonging to a large family which, because of its size, cannot be boarded out in one foster parent's home… Further, there will always be a certain number of homeless children who need special medical or other treatment before they can be boarded out with foster parents, or whose condition may require their being retained under constant medical supervision for some time. For all these cases the Voluntary or Local Authority Home will be required. Apart from all other considerations, there will in every locality be need of a Home or Institution temporarily to house and protect children for whom foster parents are not immediately available and to which children may be sent in the first instance for medical examination prior to being placed with foster parents.[207]

Irrespective of whether the child is placed with foster parents or in an institution, the Clyde Report was clear that the child should be protected from arbitrary removal by their parents:

[206] Clyde Report, para [73].

[207] Clyde Report, para [82].

> The Committee consider that the boarding out Authority or the Authority in charge of the Home should have a discretion to retain the child, subject always to a right of appeal to the Secretary of State or to the Sheriff against a decision to retain.[208]

In sum, the main recommendations made in the Clyde Report were (i) that there should be a single government department with oversight of the whole system, (ii) that the functions of the poor law authorities, education and health authorities should be transferred to a children's committee of each local authority, (iii) that "a good foster parent system" should be encouraged as the best solution, with better selection and inspection of foster parents, (iv) that the boarding-out (local) authority should be ultimately responsible for the child, (v) that boarded-out children be visited (by officials)[209] every six months, (vi) that the existing control of voluntary homes be extended to all institutional homes in which children may reside, and (vii) that large institutions be divided into smaller units.[210]

iii. The Children Bill 1948

The Children Bill was introduced in the House of Lords, and at Second Reading[211] the Debate was led by the Lord Chancellor (Viscount Jowitt), who commenced his speech with the recognition, which had underpinned the 1908, 1932 and 1937 Acts, that the child's environment was a primary factor in both neglect and delinquency cases.[212] The question then became: "how can we so arrange matters as to save those children who have not the benefit of a normal home life from suffering that disadvantage throughout their whole lives?"[213] The two main recommendations of the Curtis and Clyde Committees, (i) that the local authority should be the primary state body for dealing with all such children, with each

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[208] Clyde Report, para [105].

[209] Parental visitation of boarded out children or children accommodated in institutions was not considered in the Clyde Report.

[210] Clyde Report, para [113].

[211] Curiously, forty years to the day after the introduction (in the House of Commons) of the Bill that became the Children Act 1908.

[212] HL Deb. 10 February 1948, vol. 153, col. 917.

[213] HL Deb. 10 February 1948, vol. 153, col. 914.

local authority being required to establish a children's committee and to appoint a children's officer and (ii) that boarding-out of children and young persons in foster homes should be statutorily recognised as the preferred solution for children and young persons requiring to be accommodated away from their parents, were both accepted. In relation to the structural reforms, the Lord Chancellor painted this attractive picture:

> The children's committee are to appoint a children's officer for the area of each local authority, with a possible right of combination of more than one area. The children's officer is to be employed on no other duties except looking after children, save with the express consent of the Secretary of State. It is for the local authorities to give the children's officer adequate staff. I should suppose that in many cases—I think I might say in most cases—the children's officer would be a woman, and she would require not merely academic qualifications, skill and administrative capacity but, beyond everything else, enthusiasm, fondness for children, and the type of personality which would enable her to be looked upon by the children as a real friend. Then she will be able to restore to the children the sense of being real members of the community and not unwanted members, as these children are so apt to feel they are. Of course, she cannot know all the children in care, and she must, therefore, have officers under her who will be allocated to specific groups.[214]

In relation to boarding-out in foster homes as the primary solution, the Lord Chancellor (and other speakers) followed the Clyde Report in assuming that this would provide the child with a substitute family and all the benefits that flow from family life:

> I am glad to say that the conclusion has been reached, which I feel sure is right, that, of all the methods, the best is that of boarding the child out, if only a suitable home can be found in which the child can become a member of the family. So long as a suitable family is found, I feel quite certain that that method is a better one than placing the child in even the best form of institution. But if such a home cannot be obtained, then the local authority can use either their own residential homes or the homes of voluntary associations. As things are to-day, I am afraid that residential establishments will remain necessary for a long time. I think it regrettable, because I do not believe one can do better than arrange for the children to become members of an ordinary family, sharing the normal life of the community.[215]

[214] HL Deb. 10 February 1948, vol. 153, cols. 917-918.

[215] HL Deb. 10 February 1948, vol. 153, cols. 919-920.

The benefits of boarding out were accepted in the House of Commons, with the Under-Secretary of State for the Home Department saying:

> Special emphasis is laid on boarding out in private households, because this is a method which gives the nearest equivalent to a normal home background. The extension of this system under adequate safeguards will probably be the first major task of the newly appointed children's officers. Where boarding out does not seem appropriate or practicable for the time being, the local authority may provide homes of their own or place children in voluntary homes. In any event, whether the children are boarded out in public authority homes or with voluntary organisations, my right hon. Friend the Secretary of State will make regulations governing the treatment of the children under those conditions.[216]

And a Scottish MP, Thomas Galbraith,[217] said this:

> Every child is entitled to a home. No matter how good an institution may be, it cannot supply the atmosphere and freedom which a home can give—where one can feel that one really has a place of one's own and an intimate place in the life of the family. It may be that I am wrong, but so far as my researches have gone, it appears that the system of boarding out has been practised more freely in Scotland and been more fully developed there than in England. If I am right in my contention, the House will perhaps be interested to know that that system has been in existence in Scotland for over 170 years and that it is 103 years since, by the passing of the Poor Law (Scotland) Act, 1845, it received official recognition. It may also be of interest if I quote a few figures from my native city of Glasgow to show how much the system of boarding out is relied on in Scotland. At present the welfare committee of the Corporation of Glasgow has some 3,000 children under its care. No fewer than 2,600 of them are boarded out with foster parents and the remaining 400 are accommodated in children's homes.[218]

However, not all speakers quite bought into this ideal. The Earl of Scarbrough, for example, may be found saying:

> The only other point I wish to touch upon in the general provisions of the Bill concerns the problem of boarding out. I agree with the views of the Curtis Committee up to a point, that at its best this is far and away the best method of caring for these children. But I think that "at its best" is a very important qualification. Once you begin to get

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[216] *HC Deb 7 May 1948 vol. 450 col.* 1614.

[217] MP for Hillhead, Glasgow between 1948 and 1982 (and father to the present Lord Strathclyde).

[218] HC Deb 7 May 1948 vol. 450 cols. 1619-1620.

> below the best, you are exposing the child to very serious dangers…I do not place very great hopes on a sufficient number of the right type of families being found.[219]

Much of the debate in the House of Commons concerned the structural provisions and the question (of minimal relevance in Scotland) of whether the Home Office was the appropriate Government department to have central oversight.[220] Another issue discussed extensively at Committee Stage in the House of Commons was how to ensure that children were placed in homes of their (or their parents') religious persuasion.[221] There was however this troubling acknowledgement:

> [T]here has been, on the part of too many voluntary bodies and public authorities, a failure to give to those under their care the personal sympathy and human understanding so necessary to the wellbeing of children who lack the love and affection of their parents.[222]

Legal provision can seldom, if ever, guarantee personal sympathy and human understanding and, even when they are shown, they are no substitute for an effective mechanism to identify and prevent neglect and abuse.

iv. The Children Act, 1948[223]

a. Introduction

The Children Act, 1948 Act did not replace the Children and Young Persons (Scotland) Act, 1937. Rather, it amended that Act in minor respects only: the processes whereby children and young persons could be accommodated away from home, and the options available – state-provided institutions, voluntary homes or foster homes – remained as before. The 1948 Act nevertheless represents a substantially increased involvement by the state in the

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[219] HL Deb. 10 February 1948, vol. 153 col. 960.

[220] See the Second Reading Debate at HC Deb. 7 May 1948 vol 450 cols 1609 – 1692; Report Stage at HC Deb. 13 April 1948, vol. 155 col. 42.

[221] See, for example, *HC Deb. 28 June 1948 vol. 452 col. 1850.*

[222] HC Deb 7 May 1948 vol. 450 col. 1611.

[223] 11 & 12 Geo. VI, c. 43.

running of the institutions, homes and placements utilised in these processes and, though by no means did it "nationalise" child care, the Act can still be seen as belonging to a group of measures introduced by the immediate post-War Government predicated upon the acceptance that the state itself has responsibility for the wellbeing of its citizens, including the National Insurance Act, 1946, the National Health Service (Scotland) Act, 1947, the National Assistance Act, 1948, and the Legal Aid and Solicitors (Scotland) Act, 1949. As Professor Cretney put it:

> The notion that the community should charge itself with specific responsibility to provide care for all children deprived of a normal home life – and not merely to secure the subsistence of the destitute and, at the other extreme, to provide through the wardship jurisdiction for the affairs of the wealthy – was wholly novel; and in this respect the Children Act 1948 surely deserves to be remembered as one of the cornerstones of the post-war welfare State.[224]

b. Structural Matters

While the structural amendments made in the period before 1948 mostly concerned decision-making processes (particularly within the court system) the structural reforms in the 1948 Act, contained primarily in Part VI thereof, related more to how the services required as a result of court and other administrative decisions were to be organised and delivered. Section 39 obliged all local authorities[225] to establish "a children's committee for the purposes of their functions under Parts I (infant life protection), IV (offences) and V (approved schools, remand homes and committal to care) of the Children and Young Persons (Scotland) Act, 1937" and under the 1948 Act itself.[226] These committees were to have no function other than these (except with the consent of the Secretary of State).[227] A

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[224] "The Children Act 1948: Lessons for Today?" (1997) 9 *Child and Family Law Quarterly* 359, at p. 360.

[225] In Scotland then defined as "the councils of counties and large burghs": 1948 Act, s. 38(2).

[226] 1948 Act, s. 39(1). Two or more local authorities could organise a combined committee to serve each: s. 40(5).

[227] 1948 Act, s. 39(2).

"children's officer"[228] was also to be appointed by each local authority,[229] and that person was not to be employed by the local authority in any other capacity.[230] The children's committees, in the event, operated for only 20 years, before being subsumed into the wider social work departments of local authorities required to be set up in 1968;[231] the children's officers' role was at the same time taken over by the new Directors of Social Work.

In addition, there was established, for the purpose of advising the Secretary of State, an Advisory Council on Child Care for Scotland.[232] The Under-Secretary of State for the Home Department had said this:

> The Bill contains a number of interesting and important administrative provisions which we shall no doubt have an opportunity to examine at a later stage. The only one which I think I ought to mention to the House at this stage is the appointment of Advisory Councils on Child Care for England and Wales and for Scotland. These Councils will be widely representative of all interests, including local authorities and voluntary organisations, and will serve to keep the Secretary of State in the closest touch with the realities of the work and with the latest developments in child care.[233]

These Advisory Councils produced valuable reports that led to further changes in law and practice.[234]

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[228] A history of the development of children's officers, and the early difficulties they found in establishing their position and fighting for resources in the austere post-war world, is offered by R. Parker in "Getting Started with the 1948 Act: What Did we Learn?" (2011) 35 *Adoption and Fostering* 17.

[229] 1948 Act, s. 41. The Secretary of State could approve the appointment of a person as children's officer to more than one local authority: s. 41(3).

[230] 1948 Act, s. 41(4). This is reminiscent of the rule subsequently applied to children's reporters: Social Work (Scotland) Act 1968, s. 36(5).

[231] Social Work (Scotland) Act 1968, s. 2(4) repealed the 1948 Act provisions on children's committees, with s. 2(2) requiring each local authority to have a social work committee to perform their functions.

[232] 1948 Act, s. 44. (An English Advisory Council was established under s. 43).

[233] HC Deb. 7 May 1948, vol. 450 col. 1617.

[234] See, for example, the Scottish Advisory Council's *Memorandum on the Boarding Out of Children* (1959), *Memorandum on Children's Homes* (1959) and *Remand Homes: A Report of a Special Committee* (1961).

Monies were to be made available by Parliament for training in child care,[235] and for voluntary organisations[236] and local authorities[237] carrying out child care functions.

c. The Boarding-Out Preference

Parker[238] has suggested that "foster care was to be advanced because it was considered better for the children but also because the unit costs were less than residential care. There was, it seemed, the marvellous coincidence that what was best was also the cheapest." The extent to which financial considerations influenced policy development cannot be determined precisely, but these considerations are unlikely to have been ignored entirely. Boarding-out with foster parents had, as we have already seen, long been the most common means of accommodating children and young persons whose care fell to the state, though there had never been a statutory requirement that this be treated as the preferred solution. The Clyde Report suggested that there ought to be such a requirement, and this recommendation was followed in the 1948 Act, which provided that "a local authority shall discharge their duty to provide accommodation and maintenance for a child in their care - (a) by boarding him out", or "(b) *where it is not practicable or desirable for the time being to make arrangements for boarding-out*, by maintaining the child in a home provided under this Part of this Act or by placing him in a voluntary home the managers of which are willing to receive him".[239] Boarding out was therefore the first aim, and placing a child in a home, whether local authority or voluntary, was to be an option only when boarding out was considered to be not practicable or not desirable.[240] The Secretary of State was given the

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[235] 1948 Act, s. 45.

[236] 1948 Act, s. 46.

[237] 1948 Act, s. 47.

[238] "Getting Started with the 1948 Act: What Did we Learn?" (2011) 35 *Adoption and Fostering* 17 at p. 27.

[239] 1948 Act, s. 13(1).

[240] In the event, this preference lasted in statutory form for only 20 years, with s.21(1) of the Social Work (Scotland) Act 1968 simply listing as alternatives "boarding out" and "maintaining the child in a residential establishment".

power to make regulations "for the welfare of children boarded out by local authorities".[241] An important addition to the existing law was that these regulations were permitted to include provisions for ensuring that the household into which a child was boarded was approved.[242] The earlier Care and Training Regulations of 1933 had merely listed types of person with whom a child could not be boarded out: now all foster households were to be positively vetted. Vetting had indeed been introduced very shortly before the 1948 Act was passed, when Part C of the Care and Training Regulations, 1933 was replaced by the Children (Boarding-out, etc.) (Scotland) Regulations, 1947.[243]

The Boarding-Out Committee of the Scottish Advisory Council on Child Care produced a Report on Boarding-Out in 1950,[244] which affirmed that "there has been a long tradition in Scotland in favour of the boarding out of children who, having been deprived of a home life of their own, have become the responsibility of the local authorities". But the Committee repeated some of the concerns earlier identified in the Clyde Report:

> It has long been the practice of local authorities in Scotland to board out almost entirely in rural areas. In the past there was no doubt good reason for this … It is no longer possible to say that the advantage in this regard necessarily lies with the country… We feel that in future local authorities should not assume that boarding-out should be confined to country districts but should endeavour to secure suitable foster parents in urban areas as well… In several areas in Scotland the number of boarded out children may approach, or even exceed, the number of local children. We do not think it is desirable that any area should become a colony of boarded out children, since the aim of boarding out is to have the child absorbed into the community.[245]

One of the issues that exercised the Committee[246] was the appropriate frequency of official visitation of boarded out children. Noting that differing views had been offered to them,

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[241] 1948 Act, s. 14.

[242] 1948 Act, s. 14(2)(b).

[243] Details are given below at **2.A.iii**.

[244] Scottish Advisory Council on Child Care *Report of the Boarding Out Committee* (HMSO 1950) ar para [4].

[245] At paras. [8] and [9].

[246] At paras. [12] et seq.

they concluded that "four visits a year to each boarded out child should not be necessary", if the foster parents "have been wisely chosen in the first place". The major concern was to protect the privacy (and thereby, it was thought, willingness to serve) of foster parents, and very little attention was paid to the role of visitors investigating the wellbeing of the children being fostered. The Committee also concluded that "the possibility of returning the child to his parents, provided it is consistent with his welfare to do so, must always be present in the mind of the children's officer",[247] but it is to be noted that this was said in the context of a discussion on the desirability of parental visits: such visits were not perceived by the Committee as particularly helpful and it was recommended that visits by parents or relatives or friends to a boarded out child should not be allowed except at the discretion of the local authority acting through its children's officer.[248] How that discretion was to be exercised was not discussed.

The 1947 Regulations were replaced by the Boarding-out of Children (Scotland) Regulations, 1959, partly taking account of the recommendations of the 1950 Report. Shortly thereafter the Scottish Home Department published a *Memorandum on the Boarding Out of Children*[249] in which it examined whether more changes were required. Many of the themes of the 1946 Clyde Report and the 1950 Scottish Advisory Council Report were repeated, suggesting that little on the ground had changed in the preceding decade. At para 6 of the 1959 Memorandum it was made manifest that fostering continued to be considered a long-term family replacement:

> 6. Boarding-out is a great deal more than the finding of a house in which the child may be given bed and board, kept reasonably clean, and sent regularly to school. It is, in its essential meaning, the creation of a home for the child. While by happy chance a foster home may sometimes so suit a particular child that the foster home quickly replaces, or largely replaces, his own, the normal experience is that the creation of a home is a slow, deliberate process in which child, foster-parent and boarding-out officer all play their different parts. It is not an easy task for any one of the three, and

[247] At para. [31].

[248] Ibid.

[249] HMSO, 1959: available at https://archive.org/stream/op1266365-1001/op1266365-1001_djvu.txt.

> least of all for the child, whose reactions in a strange and bewildering situation must be understood sympathetically by the other two.

There remained a fear of inappropriate motivations in those seeking to become foster-parents:

> 15. When a boarding-out officer is considering whether particular persons would make good foster parents, the first question which will arise in his mind is: "Why is a child wanted in this home?" The answer to that question is vital. If the boarding-out officer has reason to believe that the desire of the foster parents is to help a child by giving him a real home in which his life may develop naturally, then there already exists the basic condition from which a satisfying relationship of mutual affection and trust will grow. But if the boarding-out officer suspects that the potential foster parents have been prompted by a transient enthusiasm or by purely financial motives or by the idea of benefiting ultimately from the help a child might give in the house, on the farm or in the shop, he should exercise the greatest caution in coming to a decision. A foster child may be expected to help in the home or shop to the same extent as a child born in the home, but not to any greater extent. It would be an unwarranted risk to accept an offer of a home from foster parents whose uppermost thought was to make use of the child's services. A child exists in his own right and not as a means to an easier life for the foster parents.

The continued preference for boarding out needs, therefore, to be seen within the context of repeated warnings of misuse of the system, but these fears do not appear to have been directly addressed in legislation.

The 1959 Memorandum also reveals a continuing distrust of maintaining relations with parents and, as before, the primary viewpoint presented is that of the foster-parent:

> 26. The relationship of the boarded-out child to natural parents and relatives will present the boarding-out officer and the foster parent with delicate and difficult problems. In the light of the circumstances of the child, agreement will have to be reached between the boarding-out officer and the foster parents as to whether regular contact with the natural parents and relatives should be encouraged. It is frequently the impression of foster parents that, if contact is encouraged between the child and his parents and relatives, the child is likely to become unsettled and less responsive to their authority. It is vital that the foster parent should be guided by the boarding-out officer in this matter: such guidance should result in an understanding that their relationship to the child need not necessarily be impaired by the natural relationship to parents and relatives, which relationship is fundamental. It is recognised that in many cases it will be undesirable that the child should receive letters from his parents; but, wherever there is no reason for preventing this, such

> correspondence should be encouraged and the child trusted to maintain it. The boarding-out officer and the foster parent should exercise their discretion in scrutinising letters received and sent.

The 1959 Memorandum did, however, recognise that the situation would be different with short-term fostering:

> 28. Where the boarding-out is likely to be for a comparatively short period, and the return of the child to his own home almost certain, it is most desirable that regular contact with the natural parents and relatives should be maintained. It should be remembered that the parent of a child in care under section 1 of the Children Act, 1948, in respect of whom a resolution under section 2 has not been passed, continues to have all the rights of a parent and that a local authority have no power to keep such a child in care against the wishes of a parent. Section 1(3) of the Act also requires a local authority to endeavour to secure the return of the child to the care of parents or relatives where that appears consistent with the welfare of the child.
>
> 31. An increasing proportion of children are received into care for short periods only, often until the mother returns from hospital or other domestic difficulties are overcome. These are normal children who have not been neglected. On coming into care they may be upset at first but will quickly recover their confidence if tactfully and sympathetically handled, and to this end suitable short-term foster homes, if they can be found, could make a very valuable contribution.

As a snapshot at the end of the period governed by the 1948 Act, the Secretary of State for Scotland reported that, on 30th November 1968, "6,207 children were boarded-out with foster-parents (i.e., about 58 per cent of those in care)".[250]

d. Local Authority Duty to Receive Children into their Care

In many respects, the developments described above did no more than build upon existing policies and simplify existing structures: they did not represent a major sea-change in child care practice. But right at the start of the Children Act, 1948 there is just such a sea-change, because the effect of Part I of the Act was to impose on local authorities a wholly unprecedented duty to be proactive and not simply reactive in respect of vulnerable children. The state (through the offices of each local authority) was for the first time placed

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[250] *Child Care in Scotland, 1968* (Cmnd 4069) at para 24.

under a statutory obligation to receive into their care any child[251] who appeared to have no parents or guardians or who had been lost or abandoned, or whose parents or guardians were "prevented" for any reason from providing for the child's accommodation, maintenance and upbringing: in any of these cases, the intervention of the local authority was required whenever it was "necessary in the interests of the welfare of the child",[252] (as assessed by the local authority). This duty was significantly enhanced 15 years later when the Children and Young Persons Act 1963[253] imposed on local authorities for the first time the duty to take *preventative* action: local authorities were required "to make available such advice, guidance and assistance as may promote the welfare of children by diminishing to need to receive children into and keep them in care".[254] In 1968 it was reported:

> This preventive aspect of child care work has developed steadily and now forms an important function of local authorities.
>
> Close co-operation in preventive work continues to develop between local authorities, the Department of Health and Social Security, and the voluntary organisations. Co-ordination between different social services provided by local authorities has also increased; the practice of housing departments informing children's departments of families liable to eviction orders is spreading …[M]ore gas and electricity authorities are informing children's departments when there is a danger that gas or electricity supplies will be cut off because of non-payment of bills. Children's departments have thus been given more opportunities to investigate cases … and to help the families concerned.[255]

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[251] That is to say a person who appeared to the local authority to be under the age of 17.

[252] 1948 Act, s. 1(1). The duty under s. 1 was later held by the Court of Appeal to impose a duty to examine each case individually – it was an unlawful fettering of discretion to make policy decisions as to when such advice and assistance was and was not to be offered: *Attorney General ex rel. Tilley v Wandsworth London Borough Council* [1981] 1 WLR 854.

[253] Children and Young Persons Act 1963 (c. 37).

[254] 1963 Act, s. 1.

[255] *Child Care in Scotland, 1968* (Cmnd 4069) at paras 20-21.

Liaison between different parts of local authorities (and between local authorities and other service providers) has been a recurring theme in legislation since 1968, suggesting that effective co-operation has never been fully realised.

Once the child was in the care of the local authority, that authority was obliged to keep the child in its care so long as his or her welfare – in the opinion of the local authority – appeared to require it or until the child attained the age of 18 years.[256] This did not, however, authorise the local authority to keep the child if the parent or guardian wished to take over the care of the child and they were obliged "where it appears to them consistent with the welfare of the child so to do" to endeavour to secure that the care of the child was taken over either by a parent or guardian or by a relative or friend.[257]

Local authorities were also, instead of education authorities, deemed to be "fit persons" for the purposes of committal of children and young persons to the care of fit persons under the Children and Young Persons (Scotland) Act 1937:[258] this meant that local authority consent to such committal was no longer necessary.[259]

Another major development was the way the duty of the local authority towards children in their care was formulated in the 1948 Act. Previously, those looking after children under statutory authority would be vested with the rights and powers of a parent,[260] but parents were not (and, it is often forgotten, are not) under any statutory obligation always to act in their child's best interests. Under the 1948 Act, for any child in the care of a local authority,

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[256] 1948 Act, s. 1(2). Interestingly, the age of 18 as the limit of local authority obligation had been suggested by the Clyde Committee while the (English) Curtis Committee had suggested the age of 16: see HC Deb 7 May 1948, vol. 450 col. 1685, per Thomas Fraser, Under-Secretary of State for Scotland. In general under the Act, "child" was defined as a person under the age of 18 years: s. 59(1).

[257] 1948 Act, s. 1(3).

[258] 1948 Act, s. 5, amending s. 80 of the 1937 Act.

[259] That consent remained necessary in respect of children and young persons currently subject to probation orders or supervision orders.

[260] Children and Young Persons (Scotland) Act, 1937, s. 79(4).

"it shall be the duty of that authority to exercise their powers with respect to him so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities."[261] The courts, since at least 1925, had been required to regard the welfare of any child before them as their first and paramount consideration, but local authority decision-making was not subject to that requirement until the 1948 Act. The requirement to further the child's best interests imposed on local authorities a higher level of duty than the general law imposed on parents, and this may well have been the mechanism by which the Clyde Report's aim to "compensate" the child for lack of a normal upbringing was addressed. Development of character and abilities was further enhanced by the provision that permitted local authorities to meet the expenses of education and training of young persons under 21 who had previously been in the care of the local authority[262] and, later, to visit, advise, "befriend" and exceptionally give financial assistance to anyone between the ages of 17 and 21 who had previously been in their care.[263] All these provisions amounted to a fundamental shift in state responsibility: local authorities, since the 1948 Act came into force, have been obliged to seek to further the child's best interests in all the decisions they make in respect of the child. This obligation suffered one limitation in its application: children subject to approved school orders – who would under such orders no longer be considered in the care of the local authority (either under s. 1 or after a parental rights resolution, which came to an end on the making of such an order)[264] – were excluded. The duty owed to the child or young person by the managers of the school remained as it always had been, that is to say based on parental duty.[265] Local authority

[261] 1948 Act, s. 12(1).

[262] 1948 Act, s. 20, amended by s. 46 of the Children and Young Persons Act 1963. Section 47 thereof authorised local authorities to guarantee deeds of apprenticeship and articles of clerkship.

[263] Children and Young Persons Act 1963, s. 58.

[264] 1948 Act, s. 6(3).

[265] 1937 Act, s. 79(4). See further, Appendix Four to the present Report.

care also ended if the care of the child was taken over by the Minister of Pensions, or the child became subject to the provisions of the mental health legislation.[266]

e. Local Authority Assumption of Parental Rights

A not altogether welcome development in the 1948 Act – and one that reflected that distrust of parents previously seen in the Clyde Report – was the creation of a process whereby parental rights in respect of any child in the care of a local authority (originally, under s.1 of the 1948 Act[267]) could be assumed by that local authority simply on its passing a resolution to this effect (the so-called "parental rights resolution"). There were antecedents in English law, but none in Scots law, to institutions taking over parental rights without court process.[268] The Poor Law Act, 1889 had allowed guardians of poor law unions (which did not exist in Scotland) who maintained a deserted child to "resolve that such child shall be under the control of the guardians until it reaches the age, if a boy, of 16, and if a girl of 18 years". Parents could seek the overturning of this resolution by making a "complaint" to a court and showing that the child was not deserted or that "it is for the benefit of the child that it should be either permanently or temporarily under the control of such parent, or that the resolution of the guardians should be determined", and if so the court "may make an order accordingly … and the guardians shall cease to have the rights and powers of the parent as respects the child". This process, re-enacted as s. 52 of the (English) Poor Law Act, 1930 which transferred the power to pass such resolutions to local authorities, is clearly the model used for the parental rights resolution, which was applied to Scotland as well as

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[266] 1948 Act, ss. 7 and 8.

[267] And later under other statutory provisions also: see A Wilkinson and K Norrie *Parent and Child* (1st edn. 1993) at p. 420. Children committed to the care of a fit person under the 1937 Act could not be subject to a parental rights resolution: 1948 Act, s. 6(3)(b).

[268] See S. Cretney, "The Children Act 1948: Lessons for Today?" (1997) 9 *Child and Family Law Quarterly* 359. Parliament was fully aware that it was imposing an English process on Scotland: HL Deb. 10 Feb 1948 vol. 153 cols. 919 and 982; HC Deb. 7 May 1948 vol. 450 col. 1691.

England and Wales in the UK Children Act, 1948. Interestingly, it was not a model that had found favour with the (English) Curtis Committee:

> We do not favour the assumption of parental rights by a local authority under Section 52 of the Poor law Act, 1930, by mere resolution, without an initial application to a Court. We think it objectionable (even though in practice the Section may have worked satisfactorily or at any rate without criticism) that the rights of a parent or other guardian should be extinguished by a mere resolution of a Council. Even if extra publicity and work were involved in court proceedings, we are of opinion that they would be more than counterbalanced by the value of an impartial and detached judicial inquiry at the outset directed to the paramount welfare of the child.[269]

The matter, unsurprisingly, was not discussed by the Clyde Committee and the rejection of the Curtis objections in the debates on a UK statute meant that a process, conceptually indefensible in England,[270] became part of Scots law in the Children Act, 1948. For almost fifty years, therefore,[271] all local authorities in Scotland had the power to assume parental rights over children in their care simply by making a resolution to that effect. Parents could oppose this resolution, though only subsequent to its passing, and on parental opposition being intimated in writing (within one month) the resolution (which took effect immediately it was made) would fall 14 days after that intimation unless the local authority sought the sheriff's authority for the resolution to continue. The sheriff could allow the resolution to continue only if he were "satisfied that the child had been, and at the time when the resolution was passed remained, abandoned by the person who made the objection or that that person is unfit to have the care of the child by reason of unsoundness of mind or mental deficiency or by reason of his habits or mode of life."[272] If the parents consented to the resolution, or did not challenge it on time, parental rights were transferred to the local

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[269] Curtis Committee Report, para [425(ii)].

[270] See also the rather muted criticism by EL Younghusband, "The Children Act 1948" (1949) 12 *Modern Law Review* 65.

[271] The process was re-enacted, with only minor modifications, in the Social Work (Scotland) Act 1968, s. 16, before being abolished by the Children (Scotland) Act 1995.

[272] 1948 Act, s. 2(3).

authority even in the absence of any court order, and the parents lost the right to resume the care of their child under s. 1(3) (and indeed the right to claim custody).[273]

[273] *McGuire v McGuire* 1969 SLT (Notes) 36 (OH); *Beagley v Beagley* 1984 SC(HL) 202.

SECTION E: THE SOCIAL WORK (SCOTLAND) ACT 1968[274]

i. Introduction

Another major change of direction in child care law and policy was heralded by the passing of the Social Work (Scotland) Act 1968. The primary aims of this legislation were set out by Lord Hughes when he introduced the Bill in the House of Lords on 21st March 1968:[275]

> [The Bill] seeks to do two broad things. One is to integrate all the existing services of local authorities which are concerned with the social support of individuals and of families. This is to be achieved by bringing together the existing welfare and child-care services and by giving the new organisation powers which are more general and a little wider than those which they possess under existing legislation. The new organisation will also include the probation service.[276] The other main effect of the Bill will be to set up a new kind of body to deal, under some measure of compulsion, with children who, because they are delinquent or for some other reason, are in need of care and protection. This body is closely based upon the recommendations of the Kilbrandon Committee, although we have decided to call it a children's panel rather than a juvenile panel as the Kilbrandon Committee recommended.[277]

ii. The Genesis of the 1968 Act

The aims identified above can be traced to two main sources: (i) the Kilbrandon Report *Children and Young Persons Scotland*,[278] already mentioned, which recommended the creation of new decision-making structures and built upon the major changes to the available outcomes under the Children Act, 1908 and the Children and Young Persons (Scotland) Acts, 1932 and 1937, and (ii) the White Paper *Social Work and the Community*[279] which sought improvements to the implementation structures governed until then by the Children Act, 1948. The two are closely interlinked and the Kilbrandon Report itself

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[274] 1968 Act, c. 49.

[275] HL Deb*. 21 March 1968 vol. 290 cols. 792-849.* See also HL Deb 9 April 1968 vol. 291 cols. 117 – 321 (Committee) and 23 April 1968 vol. cols 471- 490, 498-548 (Report).

[276] This was a matter of sustained criticism throughout the parliamentary passage, in both Houses, of the Bill, but since probation officers had long had responsibilities for supervising children needing care and protection as well as those who had committed offences, the Government's position was entirely logical.

[277] HL Deb. 21 March 1968 vol. 290 col. 793.

[278] HMSO, 1964.

[279] SED/SHHD, Cmnd 3065 (1966).

recognised that its proposals on decision-making would not work without a "matching field organisation" being put in place.[280]

a. The Kilbrandon Report

The continuing influence today of the Report produced by the Kilbrandon Committee cannot be overstated, and the literature it has generated has made it, without doubt, the single most studied document in Scottish child care law and practice.[281] Its recommendations, especially in relation to the establishment of the children's hearing system, are too familiar to require detailed exposition here: indeed, concentrating on its role as progenitor of that system risks overlooking other crucial shifts in thinking that it represents. In particular, the Kilbrandon Report presaged a change in the way in which residential care was perceived. Previously, the relevant legislation had been based on the view that, since children were affected by their home environment, the best way to resolve the problem of children whose development was being inhibited or harmed was by removing them from that environment. Indeed, as we saw earlier, much of the statutory regulation was predicated on the assumption that such removal would be for the long-term. The Kilbrandon Committee identified serious drawbacks to this approach: in particular, it focused on the child without tackling the underlying familial difficulties.

> Further, where the child's removal from home for residential training has to be ordered, the result in many cases at present cannot, it was suggested to us, fail to appear to the parents as extinguishing their responsibility. With the child's removal from the scene they are still too often left largely to their own devices; and, while it is accepted that in most cases the child must eventually return to the home, official contact where maintained with the parents tends at best to be tenuous and intermittent. In such circumstances it is in many cases almost impossible, in the

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[280] Kilbrandon Report, paras 91 and 232.

[281] As representative of that literature, see A. Lockyer and F. Stone, eds, *Juvenile Justice in Scotland: Twenty-Five Years of the Welfare Approach* (T&T Clark, 1998); C. Hallett, "Ahead of the Game or Behind the Times? The Scottish Children's Hearing System in International Perspective" (2000) 14 *International Journal of Law, Policy and the Family* 31; L. Waterhouse and J. McGhee "Children's Hearings in Scotland: Compulsion and Disadvantage" (2002) 24 *Journal of Social Welfare and Family Law* 279. The Report itself was republished by HMSO, with an insightful Introduction by Professor Fred Stone (one of the members of the Kilbrandon Committee), in 1995 and is available at http://www.gov.scot/Resource/Doc/47049/0023863.pdf.

> absence of any really close continuing relationship with the parents, to assist them to any informed understanding of the processes at work for their child; to persuade them that they have any immediate or future part in them; or to assist them in making the personal adjustments necessary either to overcome those factors, personal or external, which led to the child's removal, or which in the changed situation will equally be necessary if he is to settle down satisfactorily on his eventual return… [T]he parents for their part [are] reduced to the role of passive spectators.[282]

The key change in mind-set may be traced to the Committee's finding that children were, in practice and irrespective of the statutory assumptions, usually returned home before adulthood and the Committee recognised that society continued to rely on parents to resume the care of their children. At the same time, social work practice had developed since the 1948 Act and there was a far greater emphasis than before on working with families to allow children to remain at home: this was especially the case after the move towards preventative strategies was given statutory impetus by the Children and Young Persons Act 1963. Yet the legal process for dealing with children found to be in need did little or nothing to address parental behaviour and it seemed instead actively to discourage social services from working with the parents to effect change. To the Kilbrandon Committee, the solution was to see residential care not as a permanent solution to the difficulties faced by a child or young person but rather as a temporary measure during which intensive training could be given to the child or young person with the aim of increasing the chances that their eventual return home would be successful. Seeing matters that way required close contact to be maintained not only with the child's parents but also with the social work staff who had supervised the child before (and would do so after) the period in residential care.

> Throughout the period of residential training there should, it seems to us, be the closest contact with the staff of the social education department concerned, who will have reported on the child before the period of residential training was decided upon, and under whose supervision the child may already have been at an earlier stage. These officers should in our view throughout maintain contact with the child's home in preparation for his eventual return. In that way the period of residential training would be seen simply as a continuation of an existing process, to be followed naturally

[282] Kilbrandon Committee Report, para 38.

> by a return to the same supervising agency on the child's release into the community. The existing arrangements, owing to the variety and division of statutory functions over the whole field of treatment of children, and the separate services created as a result, seem to us to militate unnecessarily against that continuity of treatment.[283]

b. *The White Paper*

Most of the recommendations contained in the Kilbrandon Report were accepted by the Government, in particular those relating to the establishment of children's panels to take over the dispositive role of juvenile courts. However, responsibility for implementation of the decisions of children's hearings was, in the Government's view, better placed on local authority departments with responsibilities far wider than had been envisaged by the Kilbrandon Committee. Instead of the "social education departments" with an exclusive focus on children favoured by Kilbrandon, the White Paper suggested that every local authority should establish a broad social work department which would be responsible for a wide range of social functions, including but by no means limited to children. The social work skills needed in dealing with children were not considered substantially different from the skills needed in dealing with adults in difficulties, and in any case children could not be seen in isolation from their families and communities.

> In order to provide better services and to develop them economically it seems necessary that the local authority services designed to provide community care and support, whether for children, the handicapped, the mentally and physically ill or the aged, should be brought within a single organisation. As it would be undesirable to separate the administration of support in the community from that of residential care, this organisation should be responsible also for residential establishments which are intended to provide personal care, support and rehabilitation.[284]
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> The Kilbrandon Committee recommended that the child care services should be amalgamated with other services for children. They thought that the resulting new service could be the "centre and core" of a wider service in the future which might cater "for the needs of adults of all ages as well as those of the children in the family".

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[283] Kilbrandon Committee Report, para 167.
[284] *Social Work and the Community* (1966), para 10.

> It is just such a wider service that is now proposed, and child care seems to be an appropriate function for it to have. The present duties and powers of the local authority in regard to deprived children, including the duties of providing advice, guidance and assistance to children and parents who seek it, will therefore become the responsibility of the social work department. This department will undertake also the supervision and care of children who are subject to decisions of the children's panel which is to be set up.[285]

The White Paper followed Kilbrandon in accepting that care away from the family should not be the default response to children (or others) in difficulties, but where it was still necessary its nature should be determined by need and not administrative convenience.

> It is increasingly recognised that for most people in social or emotional difficulty the best form of help, whatever their age and particular problem, is support in their own homes if that is practicable…. [However,] residential care on a short-term or long-term basis will continue to be necessary, and suitable establishments must be provided. There is scope for much improvement in this provision. More accommodation is needed over the whole range of establishments, from homes for old people to facilities for the care of babies and young children. More variety of types of establishment is also needed; for example, a child is sometimes placed in a home or school because nothing better is available, although all concerned recognise that the regime may not be entirely fitted to his particular needs. There is too little flexibility of use between the various categories of establishment… The different forms of provision should be fitted to the needs of the users and not the other way round and, within the limits of administrative possibility, unnecessary or out-dated barriers between one form of provision and another should be taken down.[286]

It followed that maintaining different categories of residential accommodation, each subject to different rules and regulations, achieved no real benefit.

> Certain formal changes affecting residential establishments for children will be necessary. It is proposed to abolish existing statutory distinctions between certain types of such establishment and to have a continuous and varied range of establishments available to children who need residential care or training. Approved schools, which will no longer be known by this generic name,[287] will form part of this range. Those remand homes which are suitable will become assessment centres, and their principal function will be to make available a full range of assessment facilities for all children sent to them. They will provide residential accommodation for the

[285] *Social Work and the Community* (1966), para 19.
[286] *Social Work and the Community* (1966), para. 46.
[287] A recommendation also traced to the Kilbrandon Committee Report, para 185.

> minority of children who cannot be assessed while living in their own homes and who cannot satisfactorily be accommodated for this purpose in a children's home or hospital.[288]

In future, therefore, there would be one set of rules governing all residential establishments in which the state accommodated children (other than for mental health reasons).[289]

The White Paper's proposals on the implementation structures are not in fact wholly inconsistent with Kilbrandon. For one thing, it was the clear view of the Kilbrandon Committee that all the various outcomes possible for children in need should be the responsibility of a single agency:

> The evidence before us has led us to the conclusion that the need for residential training facilities can be met only by a comprehensive approach by a single agency exercising statutory responsibility both for children's homes and residential schools of all kinds provided within the public field.[290]

Indeed, it could be argued that making the single agency responsible both for children and for all others in need of social assistance better reflected the Kilbrandon approach of seeing the child within the context of his or her own family and society, allowing better the development of services to tackle the family's problems rather than those of the child in isolation. And it built upon the acceptance by the Kilbrandon Report that removal of the child from his or her home and the creation of a substitute home should not be seen as the primary (and long term) solution, but should instead be regarded as an option that would be suitable only in some cases and even when used should be seen as one (temporary) part of an integrated process rather than the whole solution in itself. This was all the more reason, the White Paper concluded, to ensure that all aspects of state support for families fall within the responsibility of one agency.

> The proposal to merge the children's department into a new local authority department with much wider responsibilities will be a departure from the

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[288] *Social Work and the Community* (1966), para 47.
[289] In the event, however, the existing separate rules continued to govern approved schools and children's homes for another twenty years after the passing of the 1968 Act.
[290] Kilbrandon Committee Report, para 187.

> recommendations of the Committee on Homeless Children (the Clyde Committee) in 1946 that deprived children should be the responsibility of a separate local authority department. But there have been many developments in social work since then, and some of the most important of these have stemmed from the work done and experience gained by the children's departments set up then. At that time, the care of deprived children was seen as mainly concerned with the provision of substitute homes. In the last fifteen years increasing emphasis has been placed on efforts to prevent deprivation by securing adequate care of the child in his own home whenever that is practicable**.** This change of emphasis has involved child care workers to an increasing extent in work with the parents, relatives and communities to which the children belong, and the nature of this work has developed into the provision of guidance and support for a wide range of people who are in emotional or social difficulty. Largely from this experience has grown the recognition that this kind of support and guidance is of the essence of social work, for deprived children as for other members of the community.[291]

The single agency became the social work departments which the 1968 Act required local authorities to establish.

iii. The Major Changes Contained in the Social Work (Scotland) Act 1968

a. *Working With and not Against Families*

It has justly been said of the Children Act, 1948 that it:

> provided a new administrative structure and a new sense of purpose in dealing with deprived children, but it had little to say about the families they came from, or about ways in which the deprivation might be prevented.[292]

The first statutory preventative, as opposed to responsive, measures were contained in s. 1 of the Children and Young Persons Act 1963,[293] but it was the Social Work (Scotland) Act 1968 that made addressing the root causes of child deprivation a central feature of child care law and practice. While the 1948 Act's imposition of a general duty on local authorities to receive children into their care when this was necessary in the interests of their

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[291] *Social Work and the Community* (1966), para 57 (emphasis added).
[292] J. Packman, *The Child's Generation: Child Care Policy in Britain* (2nd edn, 1981) at p 52.
[293] This imposed on local authorities the duty to give "such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care".

welfare[294] was re-enacted as s. 15 of the 1968 Act,[295] a major enhancement of that, building upon the preventative approach from the 1963 Act, may be found in s. 12, which created a duty on local authorities "to promote social welfare" by providing advice, assistance and facilities "on such a scale as may be appropriate in their area".[296] "Though this was a duty on the local authority as a whole, it was interpreted, and indeed enacted, as a duty that rested heavily on the shoulders of the social work department. The social work profession has used the statute imaginatively – at times pushing it to the limit by relying on it to support families experiencing enforced poverty."[297] Section 12(1) remains in force today. One of the most important judicial discussions of s. 12 (if in a context far removed from child care) is to be found in Robertson v Fife Council where in the Inner House Lord President Rodger said this:

> Subsection (1) is really the foundation for the provision of community care by local authorities, such as the respondents. It imposes on them a general duty to make available advice, guidance and assistance on such a scale as may be appropriate for their area. In executing that duty they are to make arrangements and they are also to provide, or secure the provision of, such facilities as they may consider suitable and adequate. One form which the provision of facilities may take is the provision of residential and other establishments and arranging for the provision of these establishments. But Parliament has not contented itself with this general statement of the responsibilities of local authorities. Rather, it has gone on in Part II to enact a series of further provisions. In some of them the local authority are given a specific

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[294] Children Act, 1948, s. 1.

[295] Receiving a child into care under s. 15 was done without sanction of any court or tribunal and was therefore often presented as "voluntary care". Section 16 of the 1968 Act, however, maintained the local authority's power to assume parental rights in respect of children in their care under s. 15, just as s. 2 of the 1948 Act had allowed the local authority to assume parental rights in respect of children in their care under s.1: and while care became compulsory thereby it would be wrong to see lack of compulsion as the equivalent to voluntariness. The Kearney Report (*Report of the Inquiry into Child Care Policies in Fife* (HMSO 1992) pointed out at pp.213-218 that the relationship between s. 15 and the children's hearing system was always somewhat ambiguous.

[296] 1968 Act, s. 12(1).

[297] I. Gilmour and D. Giltinan, "The Changing Focus of Social Work" in A. Lockyer and F. Stone, *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (1998) at p. 153.

> power to provide a particular form of assistance… Other provisions take the form of duties.[298]

"Community care" became a general trend, and not only with troubled children, in the 1970s. It had obvious attractions for resource-constrained local authorities but if treated as a policy without due regard to the needs of individuals then its pursuit risked authorities being found in breach of their statutory duties, such as that in s. 59, which required them to "provide and maintain such residential and other establishments as may be required for their functions under this Act".[299]

Also repeated from the Children Act, 1948[300] was the provision that "where a child is in the care of a local authority under any enactment, it shall be the duty of that authority to exercise their powers with respect to him so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities";[301] this was subsequently replaced in 1975 by a somewhat stronger requirement to focus on the child's welfare:

> Where a child is in the care of a local authority under any enactment [or of a voluntary organisation, they][302] shall, in reaching any decision relating to the child, give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and

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[298] 2001 SC 849 at para. 5. Though the House of Lords reversed the Inner House (2002 SC(HL) 145), this statement of principle was not disapproved.

[299] The *Report of the Inquiry into Child Care Policies in Fife* ("The Kearney Report"), HMSO 1992 explored the extent to which a local authority (Fife Regional Council) was acting inconsistently with its statutory duties by having adopted and given effect to a policy of closing children's homes and encouraging social workers to recommend home supervision to children's hearings in preference to any residential outcome.

[300] 1948 Act, s. 12.

[301] 1968 Act, s. 20, as originally enacted.

[302] These words were added by the Health Social Services and Social Security Adjudications Act 1983, sched 2 para 5(a).

> feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.[303]

That focus was sharpened further by the imposition of a new requirement on local authorities to review the child's case at least every six months.[304] Also carried over from the 1948 Act were the provisions allowing the local authority to make educational grants or guarantee indentures and apprenticeships.[305] The duty to "advise, guide and assist" until 18 persons no longer in their care[306] replaced the provision to that effect in the Children and Young Persons Act 1963,[307] while at the same time dropping the reference to "befriending" the young person, which had come to be seen as professionally inappropriate.

Prevention, and an enhanced focus on the child's welfare, was therefore central to local authority duties under the 1968 Act (as originally enacted and as subsequently amended). However, that was never seen as a one-off action, but as an on-going service providing potentially long-term support for troubled families. This was made explicit in s. 15(3) of the 1968 Act, which required local authorities to endeavour (so long as consistent with the welfare of the child) "to secure that the care of the child is taken over either (a) by a parent or guardian of his, or (b) by a relative or friend of his".[308] The result of all of this was that the aim of child protection (where the child was removed from his or her home) after 1968 was no longer the creation of an ersatz family to replace the harmful influences of the child's own family: rather the aim was to be to work with the child's own family to effect sustained change and thereby improve the child's life chances and, if the child had to be removed, to enhance the chances of a speedy return home. Both the decision-making and

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[303] 1968 Act, s. 20, substituted by Children Act 1975, s. 79.

[304] 1968 Act, s. 20A, inserted by Children Act 1975, s. 80.

[305] 1968 Act, ss. 24 and 25.

[306] 1968 Act, s. 26.

[307] Children and Young Persons Act 1963, s. 58.

[308] This was later enhanced somewhat by s. 22(1) of the Children Act 1995, which required the local authority *"so far as is consistent with [the duty to safeguard and promote the welfare of children in their area who are in need, to] promote the upbringing of such children by their families".*

the implementation structures put in place by the 1968 Act made that aim the central feature of child care practice, as it has been ever since.

Consistent with this new focus on families, and in a substantial (if unremarked at the time) shift in policy from what had gone before, the boarding out preference that had so marked the 1948 Act disappeared. Instead, s. 21 of the 1968 Act simply listed as alternatives the ways by which the local authority could discharge its duties to provide accommodation and maintenance for children in their care: by boarding the child out or by maintaining the child in a residential establishment, or by other unspecified means. It was then left to either the local authority or the children's hearing to determine which option better served the individual child's interests, without any official preference one way or the other. The children's hearing in making a supervision requirement (later "compulsory supervision order") could choose either to require the child to "submit to supervision in accordance with such conditions as they may impose" (colloquially referred to as a "home supervision requirement", even although it could include accommodating a child with foster carers) or "to reside in a residential establishment named in the requirement and be subject to such conditions as they may impose" (colloquially referred to as a "residential supervision requirement").[309] It is worth noting, however, that some local authorities adopted their own policies which had the effect of re-establishing an institutional preference for one outcome over another (including in respect of the recommendations their employees were encouraged to make to children's hearings). Sheriff Kearney's *Report of the Inquiry into Child Care Policies in Fife*[310] reproduces the stated policy of Fife Regional Council in the 1980s which gave first preference to placements with foster parents.[311]

The focus on families also had implications for the way parental contact with children removed from their families ("access", in the pre-1995 language) was to be managed. We

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[309] 1968 Act, s. 44(1).
[310] (HMSO 1992) at p. 175.
[311] At p. 280 of this Report, Sheriff Kearney concluded that it was a "gross-oversimplification" to see either home or a substitute home as in all cases better than residential care.

saw in Part Two of this Report that parental contact was previously actively discouraged, and the 1968 Act itself said nothing about access (though arguably the focus on working with families carried an implication that access would be looked on favourably). However, the Health and Social Services and Social Security Adjudications Act 1983[312] inserted into the 1968 Act a new s. 17E,[313] which required the Secretary of State to prepare, and keep under revision, "a code of practice with regard to access to children who are in care or who are subject to a supervision requirement under section 44 [of the 1968 Act]".[314] The Code of Practice Access to Children in Care or Under Supervision in Scotland was laid before Parliament on 16th December 1983 and it stated as a general principle:

> [A]uthorities should put a high priority on arranging and maintaining close links between the child and his parents (and other close members of his family) while he is in care. This aim should be modified only where there are clear signs that restriction of contact is necessary either to protect the child from real physical or emotional harm, or to ensure the success of a longer-term plan for the child's future which has been agreed, after the most careful consideration, as being in his best interests.[315]

Monitoring of the implementation of the proposed access arrangements was considered necessary, as was effective record-keeping.[316]

b. Clarifying and Enhancing the Role of the Local Authority

Lord Hughes in the Second Reading Debate on the Bill said this:

> As I have said, the duties and powers of local authorities will be in more general terms than in current legislation. That legislation has been built up over the years mainly by identifying from time to time various groups of people who were in need of a particular form of help. For this reason the legislation was couched in terms of

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[312] 1983 Act, c. 41 s. 7(2).

[313] See also ss. 17A to 17D which dealt with parental access to children subject to parental rights resolutions under s. 16.

[314] See the explanation of this new provision by the Under Secretary of State for Scotland (John MacKay) at HC Deb. 11th May 1983, vol. 42 cols. 854-855.

[315] *Code of Practice*, para 4.

[316] *Code of Practice*, para 17.

categories of situation or categories of people. It has been very valuable, but our experience shows that to try to cover the field by defining people who need help implies frequent legislation to extend the powers of local authorities as new kinds of need are recognised. To realise this makes clear the need to legislate for welfare purposes in a rather different way. Our great need now is to create an effective organisation and to give it a wide power to help where it is needed and to develop services as new needs are recognised.[317]

On 6th May 1968 the Bill's Second Reading in the House of Commons[318] was introduced by the Secretary of State for Scotland, Mr William Ross, who elaborated on the Government's thinking:

> As the House knows, in 1964 the [Kilbrandon] Committee recommended that juvenile courts should be replaced by new juvenile panels with continuing responsibility for the children brought before them. The Committee recommended, also, that all the public services for children should be formed into one social education department as part of the education authority.
>
> In June, 1964 it was decided to accept the recommendation on juvenile panels. A little later it was accepted that the services for children should be reorganised but it was thought that the Committee's recommendation did not necessarily offer the best way of doing it. This doubt about the form of reorganisation came from the second stream of opinion. There was an increasing feeling that the various welfare services—those for elderly people, for the handicapped and for the support of the sick as well as for children—should be reorganised in a more coherent way.
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> These services were set up and developed in a piecemeal way at different times and, apparently, in response to different needs. We can see now that they have a great deal in common, because they draw on the same groups of people for their staff, and these staffs are trained in similar ways. In addition, they are often concerned with members of the same families. I think that the same can be said of the probation service.[319]

The children's committees established under the 1948 Act were therefore replaced by the new social work committees, which had far wider responsibilities than children alone. The 1968 Act required local authorities to establish social work committees to carry out their

[317] HL Deb. 21 March 1968 vol. 290 cols. 793–794.
[318] HC Deb. 6 May 1968 vol. 764 vols. 49-150. See also 17th July 1968 HC Deb 17 July 1968, vol. 768 cols. 1449 – 1580 (Committee) and cols 1583 – 1604 (Third Reading).
[319] HC Deb 6 May 1968, vol. 764 cols. 49-50.

functions not only under the 1968 Act itself but also under the Children and Young Persons (Scotland) Act, 1937, the Matrimonial Proceedings (Children) Act, 1958, Part 1 of the Children Act, 1958 (private fostering), the Adoption Act, 1958 and the Housing Act 1964, together with existing functions of local health authorities which were transferred to local authorities.[320] Just as the 1948 Act had required local authorities to appoint children's officers, so the 1968 Act required them to appoint, instead, directors of social work.[321]

As well as the creation of a single agency within local authorities to perform functions that different local authority departments had previously performed, the 1968 Act also effected a significant shift of responsibility from central to local government. Local authorities had long been responsible for identifying, vetting and overseeing foster carers with whom children could be boarded out, but prior to the 1968 Act it was the Secretary of State who "approved" schools for children sent to them and who vetted and registered voluntary homes. That approval and registration, with consequent monitoring duties that involved inspecting and visiting homes and those accommodated therein, now largely passed to local authorities.[322]

The creation of the children's hearing system also carried with it new obligations for local authorities. Most obviously, it was on local authorities that the duty to "give effect" to supervision requirements made by a children's hearing was imposed,[323] a duty they have had ever since.[324] Local authorities also became central to the investigations carried out by the reporter, and not only because of the various sources of information under their control (within their social work and education departments). From 1st January 1976,[325] local

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[320] 1968 Act, s. 2 and s. 1(4), referring to the Nurseries and Child-Minders Regulation Act, 1948, the Mental Health (Scotland) Act, 1960 and the National Health Service (Scotland) Act, 1947. Section 1(5) also transferred to the local authority the functions of education committees in relation to what were until then called approved schools.

[321] 1968 Act, s. 3.

[322] 1968 Act, ss. 61-62. Under s. 63 registration was sometimes required with the Secretary of State.

[323] 1968 Act, s. 44(5).

[324] Children (Scotland) Act 1995, s. 71; Children's Hearings (Scotland) Act 2011, s. 144(1).

[325] The date of commencement of s. 83 of the Children Act 1975: 1975 Act, s. 108(4).

authorities became obliged to cause enquiries to be made in relation to any child they considered might be in need of compulsory measures of care (that is to say, required to be subject to a supervision requirement) and to pass on the information they discovered thereby to the reporter.[326] This, together with local authorities' preventative obligations, rendered them a central player in the identification and prevention of and responding to all forms of child abuse, neglect and offending. Indeed, it has been suggested that the 1968 Act marked the start of an important shift in the very nature of social work: "Child and family welfare has moved from being concerned with the provision of services to individuals and families to a powerful interventionist authority with the law placing limits on its actions".[327]

c. Creation of the Children's Hearing System

The dispositive role of the juvenile courts was transferred by the Social Work (Scotland) Act 1968 to the newly created children's panels. This may well be what the 1968 Act is best known for today, and the new processes require no examination here. But the comment of Wilkinson and Norrie is worth repeating.

> The changes introduced by the 1968 Act … were less radical than is sometimes represented. The measures of care actually available under the 1968 legislation, although different in form, were not materially different in substance from their predecessors. Even the use of compulsory supervision, rather than of punishment, in relation to children who have committed offences is not a major innovation in principle. It was implicit in the obligation, previously laid upon courts dealing with offences committed by juveniles, to have regard to the welfare of the child. The radical changes were in the personnel and machinery of administration, the composition of the decision-making tribunals, and procedures.[328]

While the power to decide on outcomes was transferred from the juvenile courts to the children's hearing, the outcomes available to that tribunal remained much as they were

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[326] 1968 Act, s. 37(1A), as inserted by s. 83(a) of the Children Act 1975.

[327] I. Gilmour and D. Giltinan, "The Changing Focus of Social Work" in A. Lockyer and F. Stone, *Juvenile Justice in Scotland: 25 years of the Welfare Approach* (1998) at p. 144.

[328] Wilkinson and Norrie, *Parent and Child* (1st ed, 1993) at p. 445 (references omitted).

before: a child in appropriate circumstances might either be accommodated away from home with foster carers or in a residential establishment ("approved" school or local authority or voluntary home), or remain at home and be placed under supervision (previously of a probation officer[329] and now of a local authority[330]). Similarly, most of the grounds upon which the hearing had jurisdiction over any individual child can be traced to the earlier legislation (in particular the Children and Young Persons (Scotland) Act, 1932). And the focus on the child's welfare, though enhanced,[331] was by no means new.[332] Even procedure at the children's hearing was modelled on procedure designed for juvenile courts in the early 1930s.[333]

However, the role of the children's hearing itself was far greater than that of the juvenile court which, once it had made its decision, dropped out of the picture. The children's hearing, on the other hand, has always retained jurisdiction over the child even after its order is made: the hearing was (and is) required to review the child's case regularly, until the supervision order is discharged or the child reaches the age of 18. Another change – perhaps the most important of all – was the substantially increased emphasis that the children's hearing system placed on the child and family participating in the decision-making process.

Given the increased recognition that accommodating children away from home was in many (if not most) cases by no means the best way to address the difficulties that had been

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[329] Children and Young Persons (Scotland) Act, 1937, ss. 66(2)(d) and 68.

[330] Social Work (Scotland) Act 1968, s. 44(5).

[331] Hearings had to make decisions "in the best interests of the child": 1968 Act, s. 43(1).

[332] The Children and Young Persons (Scotland) Act, 1937, s. 49(1), had required juvenile courts to "have regard to the welfare of the child or young person" and the Juvenile Courts (Procedure) (Scotland) Rules, 1934 (SR&O, 1934 No. 641 (S. 36)), rules 9(6) and 10(7) had required juvenile courts to "deal with the case in [the child's] best interests".

[333] See Juvenile Courts (Constitution) (Scotland) Rules, 1933 (SR&O, 1933 No. 984 (S. 54)) and Juvenile Courts (Procedure) (Scotland) Rules, 1934, both described above at **1.C.iv**.

identified, what came to be called "home supervision" of children subject to the jurisdiction of the children's hearing[334] (the successor to supervision by probation officers under the 1937 Act[335]) very quickly established itself as the most common outcome imposed.[336] But it did (and does) have limitations. "The Social Work (Scotland) Act 1968 was revolutionary in the emphasis it placed on the importance of supervision as a means of providing help to families. However, there was not at that time, nor has there evolved since, a satisfactory understanding of what this concept of supervision really meant. It was ill-defined and was explained in simple terms of advice and welfare support, and its effectiveness seemed to be dependent on avoiding too narrow or precise a definition".[337] If home supervision were not considered appropriate or sufficient to tackle the difficulties presented by the family then the supervision requirement could require the child either to be boarded out with foster carers or to be accommodated in a residential establishment. These two options were subject to separate regulation, to be discussed in Part Two of the present Report.

iv. Amendments to the 1968 Act in the Children Act 1975

The 1968 Act was significantly amended by the Children Act 1975, in a variety of ways (some of which are mentioned elsewhere in this Report[338]).

> The Act started life as a modest Private Member's Bill designed to give effect to the recommendations of the Houghton committee.[339] In the course of its precarious

[334] 1968 Act, s. 44(1)(a).

[335] The 1937 provisions on supervision by probation officers (ss. 66, 68 and 70) were repealed by sched. 9 to the 1968 Act.

[336] See A. Kendrick, *A History of the Legal Framework and the Implementation of Foster Care, Including Private Fostering, in Scotland 1945 to 2014* (Report submitted to Scottish Government, May 2016) at p. 27.

[337] Gilmour and Giltinan, in A. Lockyer and F Stone, *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (1998) at p. 147.

[338] In particular see above at 1.E.iii.a where the obligation in s. 20 of the 1968 Act on local authorities to further the child's best interests was tightened by s. 79 of the 1975 Act to an obligation to give first consideration to safeguarding and promoting the welfare of the child throughout childhood.

[339] *Report of the Departmental Committee on the Adoption of Children* (1972, Cmnd 5107).

> parliamentary career, it picked up a mass of subordinate clauses, but the main aim, as its sponsor, Dr David Owen, made clear, was "to provide more and better chances of a secure substitute home for children whose parents cannot give them a home".[340]

The 1975 Act gave title to foster parents to apply for the custody of children of whom they had had "care and possession" for stated periods, or on cause shown.[341] Making a custody order would have the effect, similar to that of an adoption order, of transferring responsibility for the child from the local authority to the foster parent.

The children's hearing system was amended by the insertion of a new s. 34A into Part 3 of the 1968 Act, which allowed the hearing to appoint a person for the purpose of safeguarding the interests of the child in the proceedings under Part 3 because of a potential conflict of interests between the child and the parent.[342] This came into effect on 30th June 1985 and the person appointed quickly became known as a "safeguarder"[343]). And a new s. 36A permitted the Secretary of State to make regulations authorising any reporter to conduct proceedings in the sheriff court irrespective of whether or not he or she was a solicitor or advocate.[344]

The 1968 Act had re-enacted the provisions from the 1948 Act allowing local authorities to pass a resolution assuming parental rights and powers in respect of a child in their care,[345] and the 1975 Act gave local authorities the power to pass a resolution vesting in voluntary organisations (so long as they were either incorporated bodies or trusts) parental rights and

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[340] S. Jackson: "The Children Act 1975: Parents' Rights and Children's Welfare" (1976) 3 *British Journal of Law and Society* 85.

[341] Children Act 1975 (c. 72), s. 47. "Cause" had to relate to the welfare of the child: *Osborne v Matthan (No. 3)* 1998 SC 682. See also *R v R (Parent and Child: Custody)* 1994 SCLR 849.

[342] Children Act 1975, s. 66.

[343] See *The Role of the Safeguarder in the Children's Hearing System* (Report submitted to the Scottish Government, June 2017).

[344] Children Act 1975, s. 82. See Reporters (Conduct of Proceedings before the Sheriff) (Scotland) Regulations 1975 (SI 1975 No. 2251).

[345] 1968 Act, s. 16. See above at **1.D.iv.e**.

powers in respect of any child being cared for by the organisation.[346] A resolution vesting parental rights and powers in a voluntary organisation could only be passed if the voluntary organisation requested it and the child was living in the area of the local authority either in a residential establishment or with foster parents with whom he or she had been boarded out by the voluntary organisation.[347] The power of local authorities to pass any such resolution disappeared, unmourned, with the coming into force of the Children (Scotland) Act 1995.[348]

(Another pertinent change traced to the Children Act 1975 is to be found in s. 99 thereof, which empowered the Secretary of State for Scotland to cause Inquiries to be held into any matter relating to the functions of a local authority or voluntary organisation under the 1968 Act, with the power to require people to attend and give evidence. This had been found necessary after the Inquiry into the death of Maria Colwell at the hands of her step-father while under local authority supervision[349] realised to its dismay that it had no statutory power to compel witnesses.)

v. Criticisms and Proposals for Change

The early 1990s saw a number of policy developments and, in particular, of official reports that suggested that the whole system for looking after children unable to be cared for by their parents required a substantial overhaul.

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[346] 1968 Act, s. 16(1)(b), as substituted by Children Act 1975 (c. 72), s. 74. Where it subsequently appeared to be necessary in the welfare of the child that parental rights and powers should no longer be vested in a voluntary organisation the local authority had to pass a resolution vesting such rights and powers in themselves: 1968 Act, s. 16A, as inserted by the 1975 Act, s. 75.

[347] 1968 Act, s. 16(4), as substituted by Children Act 1975, s. 74.

[348] Children (Scotland) Act 1995, sched. 5.

[349] *Report of the Committee of Inquiry into the Care and Supervision Provided in Relation to Maria Colwell* (HMSO 1974).

a. The Skinner Report on Residential Care in Scotland[350]

The then Chief Inspector of Social Work Services, Mr Angus Skinner, carried out a review, at the behest of the Secretary of State for Scotland, of residential care in 1991. This

> focused on the need for good-quality residential care in smaller units with specialised functions. It also addressed key areas such as the training and qualifications of staff, the rights of children, the need to safeguard children who were in residential care, the compatibility of a residential care regime and individual children's care plans, and the improvement of practice. The report recognised the central role of the local authority in providing residential care for children, but such recognition was not reflected in the allocation of guaranteed or ring-fenced resources… However, the place of residential care as an essential element in a comprehensive child-care provision became re-established.[351]

Skinner reported that the number of children and young people in homes or schools run by or registered with local authorities had fallen from 6336 in 1976 to 2161 in 1990, or from 4.2 per thousand to 2.0 per thousand,[352] though there were regional variations.[353] There were noticeable shifts, both from voluntary to compulsory care[354] and towards shorter stays in residential accommodation.[355]

Among the many recommendations the Skinner Report made were: (1) that local authorities' policy statements explicitly identify residential care as part of a fully integrated child care strategy; (2) that residential care should not be seen as a last resort but as an option to be considered positively; (3) that the opportunity for confidential complaints to be made should be given, and dealt with appropriately; (4) that children over 12 should have the right to attend case reviews; (5) that children's educational needs should be met; (6)

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[350] *Another Kind of Home* (Scottish Office, HMSO, 1992).

[351] I. Gilmour and D. Giltinan, "The Changing Focus of Social Work" in *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (1998) at p. 152.

[352] Skinner Report, para. 2.2.

[353] Skinner Report, para. 2.6.

[354] Skinner Report, para. 2.9.

[355] Skinner Report, para. 2.10.

that parents should be informed of their rights, be able to have confidential discussions with their child and be kept informed about developments in their child's life; (7) that salaries and conditions of service for staff at residential establishments should be improved in order to attract and retain high quality staff and that higher percentages of staff with Social Work Diplomas should be sought; and (8) that inspection procedures should always include interviewing children and young people, and their parents.

b. The Fife Inquiry (the Kearney Report)[356]

Cleland briefly summarises the Fife Inquiry as follows:

> Fife Regional Council had a policy that, where possible, children should be placed on home supervision. That seemed fine, but the suggestion was that the effect of the policy was that no residential placements were available for children who might benefit from such a placement. The allegation was that the social work department was effectively undermining the authority of the hearing, by refusing to make recommendations for such placements. The Inquiry concluded, inter alia, that the implementation of the region's policy to place children at home was characterised by over-simplification of the issues affecting children and their families and that 'this approach was dangerous and inimicable to good social work practice'.[357]

A number of important recommendations were made in Part J, chapter IX of the Kearney Report, relating to the sharing of information, the use of place of safety orders, and the introduction of minimum qualifications for reporters. Some of these recommendations were given effect to in subsequent legislation, but the bulk of the Report related to practice in one region only.

c. The Orkney Inquiry (the Clyde Report)[358]

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[356] *The Report of the Inquiry into Child Care Policies in Fife*, (HC Papers 1992-93, No. 191).

[357] A. Cleland, Stair Memorial Encyclopaedia, *Child and Family Law Reissue* (2004) at para 293, referencing Kearney Report at pp. 612-613.

[358] *Report of the Inquiry into the Removal of Children from Orkney in February 1991* (HC Papers 1992-93, No. 195).

The high profile (and, it was subsequently established, flawed) removal of children from their homes in Orkney in February 1991, and the procedures both before and after that removal, were subject to a detailed inquiry chaired by Lord Clyde, who made a number of recommendations for improvements. Any future reform of the law should, he concluded, take full account of the UK's obligations under both the European Convention on Human Rights and the UN Convention on the Rights of the Child;[359] allegations made by a child of sexual abuse should be treated seriously though not necessarily accepted as true;[360] agencies should share with each other the whole information relevant to their areas of responsibility;[361] local authorities should draw up guidelines for the management of cases of child abuse consistent with national guidelines;[362] the legal process for removal on an emergency basis of children to places of safety should be completely restructured,[363] and placed under the control of sheriffs rather than children's hearings;[364] reasonable access by parents and family should be allowed to children in places of safety, restrictions being imposed only when there are compelling reasons to do so;[365] interviewing of children should be planned and executed with the greatest of care;[366] a three year qualification course for social workers should be introduced as quickly as possible;[367] no social work department should be without a sufficient proportion of its staff adequately skilled and knowledgeable in the identification, investigation and management of problems of child protection.[368] Perhaps most importantly, Lord Clyde recommended that local authorities should have the same responsibilities towards children removed to places of safety as they

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[359] Clyde Report, paras 15.2 – 15.3. Both Conventions are considered in Appendix Three to the present Report.

[360] Clyde Report, para. 15.23.

[361] Clyde Report, paras. 15.30 – 15.31.

[362] Clyde Report, paras. 15.57 – 15.66.

[363] Clyde Report, paras. 16.1 – 16.42.

[364] Clyde Report, paras. 18.8 – 18.38.

[365] Clyde Report, paras. 17.23 – 17.24.

[366] Clyde Report, paras. 17.47 – 17.78.

[367] Clyde Report, para. 19.8.

[368] Clyde Report, para. 19.14.

have to other children in their care.[369] Many of the recommendations in the Clyde Report, including the last-mentioned, were given effect to by the Children (Scotland) Act 1995; a two-year post-graduate course in social work remains sufficient qualification for those who do not undertake a full undergraduate programme in social work at University.

d. The White Paper: "Scotland's Children: Proposals for Child Care Policy and Law"[370]

The increasing diversity of family forms, in Scotland no less than elsewhere, was recognised by the UK Government, though "family" remained central to the appropriate development of children.

> The more traditional images of the family are being challenged by the very fact that many of our children now experience very diverse forms of family life as their parents cohabit, separate, marry and remarry. Increasingly, children are being asked to adjust to living in a family with one parent absent, usually the father, or to living with a step parent, again usually a stepfather. Despite these changes families remain and will remain the foundation of care for children and the development of young people. In this changing world families will need support in ensuring a consistently high quality of care.[371]

The White Paper went on to recommend that the local authority duty under s. 12 of the 1968 Act to "promote social welfare" be replaced with a duty to support the care of the child in the community, to assist in keeping families together, and to provide advice, services and assistance for rehabilitation after a period in care.[372] The form and content of child care reviews were to be prescribed.[373] While family placement was to remain the "preferred option for most young people", the changing role of foster carer was recognised:

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[369] Clyde Report, paras. 17.1 – 17.2.

[370] Scottish Office, HMSO 1993, Cm 2286.

[371] *Scotland's Children*, para. 1.10.

[372] *Scotland's Children*, para. 3.3.

[373] *Scotland's Children*, para. 3.19.

> The role of foster carers has evolved and the demands and expectations have increased. The task is no longer simply to provide a caring and nurturing environment for a child. While this remains the primary contribution, foster parents are now often expected to observe and record a child's behaviour and note aspects of the child's development. They are regularly involved in child care reviews and children's hearings. For many carers their role is a much more explicit and contractual one of partnership, not only with the local authority but also with parents. Increasingly, they have an important role in informing the planning for children.[374]

This recognises foster care as part of a process towards the resolution of the child's difficulties, and not as a solution in itself. And it sees foster parents as performing a quasi-professional role.

Acknowledging the findings of the Skinner Report, the White Paper accepted that "the quality of care experienced by young people in many residential homes and schools needed to be improved".[375] But they still had an important role to play.

> Residential homes and schools can offer special advantages in providing care and education by bringing together special skills to help young people, children and parents and by offering flexibility and creativity, for instance, in meeting the social and educational needs of older children through independent living schemes. Furthermore, it should be possible to develop shared care with families, and provide them with a wide range of support.
>
> Residential care, with or without education, will continue to meet important needs. Homes and schools need to be equipped to provide a good standard of care and education, looking after young people in a sensitive and positive manner, not least because some young people in care will continue to choose residential care, in preference to family placement, and their choice should be respected.
>
> …The Government accept the recommendation in the [Skinner Report] that any agency providing residential care should prepare a statement or charter setting out the key points about the running of the home and that each child should receive a copy on, or preferably before, admission to the home…
>
> It is essentially a management responsibility to improve the quality of the current provision of much residential child care… The Government have launched a far-

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[374] *Scotland's Children*, para. 3.21.

[375] *Scotland's Children*, para. 3.24.

> reaching programme for quality improvement in collaboration with local authorities and voluntary organisations.[376]

Children living away from home, other than within the care system, should also be subject to protective mechanisms. Children in hospitals who had not been visited by a parent or guardian should be notified to the local social work authority for their welfare needs to be assessed.[377]

> The Government also accept the recommendation that a duty should be placed, within the Education (Scotland) Act 1980, on proprietors of independent schools to safeguard and promote the welfare of children accommodated there. The Secretary of State will be responsible for ensuring that the duty is properly carried out. Powers will be extended to enable Her Majesty's Inspectors of Schools to review the welfare of children resident in independent schools in Scotland.[378]

e. Local Government etc (Scotland) Act 1994[379]

It is as well here to mention local government reorganisation effected under the Local Government etc (Scotland) Act 1994 which, amongst many other things, removed the requirement for local authorities to have a social work committee.[380] Section 3 of the 1968 Act, which had required every local authority to appoint an officer "to be known as the director of social work", was replaced in the 1994 Act by a requirement that each local authority appoint an officer "to be known as the chief social work officer".[381] Though the 1994 Act did not list "social work" as one of the functions of the new unitary authorities,[382]

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[376] *Scotland's Children*, paras. 3.25 – 3.29.

[377] *Scotland's Children*, para. 3.30. This recommendation was given effect to by s. 36 of the Children (Scotland) Act 1995.

[378] *Scotland's Children*, para. 3.31. This recommendation was given effect to by s. 35 of the Children (Scotland) Act 1995: see below at **2.I.iv.c**.

[379] 1994 Act, c. 39.

[380] Local Government etc (Scotland) Act 1994, sched. 14, repealing s. 2 of the 1968 Act.

[381] Local Government etc (Scotland) Act 1994, s. 45, inserting a new s. 3 into the 1968 Act.

[382] Local Government (Scotland) Act 1973, s. 161, which had so listed "social work functions", was repealed by sched. 14 of the 1994 Act.

most of the responsibilities that local authorities had under the 1968 Act (and other Acts) remained. The 1994 Act also removed from local authority control the children's reporter and, building upon some of the recommendations in the Finlayson Report,[383] established a Scotland-wide body to take over the functions of reporters: the Scottish Children's Reporter Administration.[384] (The children's hearings themselves remained tied to local authority areas until the Children's Hearings (Scotland) Act 2011 established the national body, Children's Hearings Scotland.)

[383] *Reporters to Children's Panels: Their Role, Function and Accountability* (Scottish Office, 1992)

[384] Local Government etc (Scotland) Act 1994, Pt III.

SECTION F: THE CHILDREN (SCOTLAND) ACT 1995[385]

i. Introduction

Gilmour and Giltinan say this:

> The longevity of the [Social Work (Scotland) Act 1968] is a testament to its strength and to the forward thinking of its creators. However, by the late 1980s there was beginning to be a radical rethinking of the way the social work profession specifically and society in general were responding to the needs of children and families. From the later 1970s child protection became a central activity of the social work profession, with a high priority being given to the initial investigation of allegations of child abuse… The evolution of knowledge and the growth of experience relating to child protection, combined with the changing economic environment and a greater emphasis on the rights of children arising out of Britain's commitment to the United Nations Convention on the Rights of the Child, led to the need for a redefinition of the public and private law relating to children in Scotland. The Children (Scotland) Act 1995 is not a retuning of previous law. It is a major new body of law and reflects the values and principles of the society it serves.[386]

The Children (Scotland) Act 1995 is in two substantive parts.[387] Part One deals with private law matters (residence, contact and the like) and was based on the recommendations of the Scottish Law Commission in its 1992 *Report on Family Law*.[388] Part Two, based at least partly on the recommendations in *the White Paper Scotland's Children: Proposals for Child Care Policy and Law,*[389] deals mostly with public law matters such as local authority responsibilities towards children in need and the children's hearing system and is therefore the Part of relevance to the present Report. At the Second Reading Debate on the Children

[385] 1995 Act, c. 36.

[386] I. Gilmour and D. Giltinan, "The Changing Focus of Social Work" in A. Lockyer and F. Stone, *Juvenile Justice in Scotland: 25 Years of the Welfare Approach* (1998), at p. 155.

[387] Its third part amends the then-extant adoption legislation and is outwith the terms of this Report.

[388] Scot Law Com No. 135 (1992).

[389] Scottish Office, HMSO 1993, Cm 2286. See above at **1.E.v.d.**

(Scotland) Bill in the House of Lords, Lord Fraser of Carmyllie[390] summarised Part Two as follows:[391]

> This part contains the public law provisions concerning children. It both introduces new provisions and provides a substantial restatement, with amendment, of existing areas of child care law. Local authorities, courts and children's hearings will be required to have regard to the welfare of the child as the paramount consideration in any decisions which they make, subject, of course, to the need to take account of any risk of serious harm to others. They will also be required to take the child's views into account when reaching those decisions. That will relate also to the needs of children with disabilities. I am referring not only to children who themselves have disabilities but to those who are affected by disabilities within their families. Their needs are addressed in Clause 21, which imposes a responsibility and duty on local authorities. The new provision is designed to minimise the effect of the disability on the child and to give that child the opportunity to live a life which is as normal as possible.
>
> Local authorities will be given special duties and powers in relation to children who have been in local authority care. We know all too well that such children need good support after they leave care if they are not to become homeless or encounter a wide range of other problems – and too often descend into criminality. Local authorities will have a duty to assist all young people who were in their care at the time of leaving school up to and including the age of 18. This is an extension of their present duty. Local authorities will additionally have the power to provide assistance to young people up to the age of 21 who were in care at the time of leaving school if they consider this necessary.
>
> Chapter 2 and part of Chapter 3 of Part II of the Bill deal with the distinctive children's hearing system in Scotland. The children's hearings retain their central place in the provisions for child welfare and juvenile justice in Scotland. This part of the Bill is substantially a restatement of the 1968 Act and remains firmly based on the principles in Lord Kilbrandon's report that children who offend and children who are offended against may be equally in need of help. However, we are introducing a number of important changes which will strengthen the hearings and clarify their powers.
>
> One of the main forms of action open to a children's hearing is to make a supervision requirement in respect of a child. New provisions in the Bill will clarify the effect of a supervision requirement and allow the hearings to specify important matters such as

[390] Then Minister of State at the Scottish Office.

[391] HL Deb 9th May 1995 vol. 564 cols. 15-16.

> the responsibility for determining parental contact with children, giving authority for a child's medical examination and disclosing a child's whereabouts.
>
> Chapter 3 of Part II of the Bill is principally about the protection of children, and here we are introducing important changes following very largely on the recommendations made by Lord Clyde after his extensive Orkney inquiry. What is presently called a place of safety order will be given a new name: the child protection order. The procedure for obtaining such an order will be changed to introduce new safeguards for parents and children.
>
> Particularly important is the introduction of a new direct appeal to the sheriff, available to both parents and the child in situations where a child has been removed from home to a place of safety.

ii. Substantive Provisions in the 1995 Act

a. Increased Participation Rights for Children

Though some new orders (discussed below) were created for the better protection of children, it may well be that the most radical change in Part Two of the 1995 Act was its much increased focus on listening to children. This had been required when the United Kingdom ratified the United Nations Convention on the Rights of the Child,[392] Article 12 of which provides:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This obligation was given effect to for Scots law in Part One of the 1995 Act by s. 11(7)(b), and in Part Two by ss. 16(2) and 17(4). Section 16(2) provide that a children's hearing or a court "taking account of the age and maturity of the child concerned, shall so far as practicable (a) give him an opportunity to indicate whether he wishes to express his views; (b) if he does so wish, give him an opportunity to express them; and (c) having regard to

[392] For more detail of the UNCRC, see Appendix Three to the present Report.

such views as he may express".[393] It had since 1968 been a central feature within the children's hearing system that children would have an opportunity to speak, and so the innovation was its extension to the court system. More radical, indeed, was s. 17(4), which provides that local authorities in making decisions with respect to any child whom they are either looking after or proposing to look after must have regard so far as practicable to the views (if the child wishes to express them) of the child concerned, taking account of his or her age and maturity. Neither s. 16(2) nor s. 17(4) qualifies the paramount consideration for courts, children's hearings and local authorities exercising their functions under the Act: the welfare of the child.[394] The obligation is for decision-makers to take the child's views into account in seeking to identify what the child's welfare requires, not to follow these views irrespective of the effect on welfare.

The imposition of an obligation to listen to children was intended to be more than a simple statement of principle. It was given practical effect in the 1995 Act, for one of the very few substantive "rights" granted by the Act to children was a right to attend at all stages of their children's hearing.[395] The children's hearings rules made provision for children giving their views in person, through a representative or by audio or visual recording.[396] Nevertheless there remain practical difficulties in ensuring to every child that their right to give views is effective in every case. Research commissioned by the Scottish Executive and published in 2006[397] identified a number of issues that children and young people found acted to restrict their ability to participate fully, including the use of language that they did not understand, the tendency to talk over rather than directly to the children and young people, as well as

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[393] This three stage structure is explained by the Earl of Lindsay and Lord Hope of Craighead at HL Deb 5th July 1995 vol. 565 cols. 1124-1125.

[394] 1995 Act, ss. 16(1) and 17(1)(a).

[395] Children (Scotland) Act 1995, s. 45(1)(a). See now Children's Hearings (Scotland) Act 2011, s.78(1)(a).

[396] Children's Hearings (Scotland) Rules 1996 (SI 1996 No. 3261 (S. 25), r.15(4)).

[397] C. Creegan, G. Henderson and C. King: *Big Words and Big Tables: Children and Young People's Experience of Advocacy Services and Participation in the Children's Hearing System*, Scottish Executive 2006.

unavoidable personal feelings such as fear of the unknown, embarrassment and suspicion of adult motives. It called for an advocacy service for children and young persons which it saw as complementary to participation rights: this recommendation found legislative endorsement in the Children's Hearings (Scotland) Act 2011[398] but the provision has not (at the time of writing) yet been brought into force.

The 1995 Act made no change to the position that legal aid, though available when grounds of referral were being established before a sheriff and when decisions of the hearing were appealed to the sheriff, was not available at children's hearings themselves. This position was held, at least in some circumstances, to be contrary to the child's rights under Article 6 of the European Convention on Human Rights[399] and, subsequently, to be contrary to the parents' equivalent rights.[400] In the latter case, indeed, lack of any statutory provision for legally aided attendance at hearings of solicitors was described by the Inner House as "an inbuilt systemic flaw in the legal aid scheme as it applied to the children's hearing system".[401] An "interim" scheme, outwith the legal aid scheme, to provide paid legal representation for children at hearings was established in 2002[402] and this was extended in 2009 to paid legal representation for relevant persons.[403] The interim scheme was repealed and replaced by Part 19 of the Children's Hearings (Scotland) Act 2011 and the Children's Legal Assistance (Scotland) Regulations 2013,[404] which amend the Legal Aid (Scotland) Act 1986 so that the child and relevant person (and some others) may in specified circumstances access legal aid funds to pay for a solicitor to attend hearings with them.[405] This is dependent, of course, on the child having capacity to instruct a solicitor but if he or

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[398] Children's Hearings (Scotland) Act 2011, s. 122.

[399] *S v Millar* 2001 SLT 531 and 1304.

[400] *K v Authority Reporter* 2009 SLT 1019.

[401] 2009 SLT 1019 at [56].

[402] Children's Hearings (Legal Representation) (Scotland) Rules 2002 (SSI 2002 No. 63).

[403] Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009 No. 211).

[404] SSI 2013 No. 200.

[405] For details, see K. Norrie, *Children's Hearings in Scotland* (3rd edn) at pp 8 – 12.

she does so then his or her wishes are likely to be more efficiently communicated by the legal representative than before the provisions came into effect.

b. The Concept of, and Duties Towards, the "Looked after Child"

The language commonly used prior to the Children (Scotland) Act 1995 was that of children "in care", that is to say in the care of the local authority. So for example the general obligation of local authorities to further a child's best interests found in (the original) s. 20 of the Social Work (Scotland) Act 1968 applied to children "in the care of a local authority under any enactment"; s. 15 obliged local authorities to "receive the child into their care" in certain circumstances; and s. 16 allowed the local authority to assume parental rights and powers in respect of children in their care under s. 15 (and later under other statutory provisions also). But there was no universal definition of children "in care", for the phrase was not a term of art, and little in the way of general duties to all children "in care": the duties were severally to be found in the rules and regulations governing the particular type of care to which the child was made subject. The 1995 Act changed the language from "child in care" to "looked after child" and by providing a universal definition made that a term of art; in addition the Act lays down general duties on local authorities to all children they look after, under whatever provision, which duties are enhanced, rather than determined, by the particular rules and regulations governing their placement. A child is to be regarded as being "looked after" by a local authority in the following circumstances:

(i) The child is provided with accommodation by the local authority under s. 25 of the 1995 Act (which obliges the local authority to provide accommodation to any child who needs it because no-one has parental responsibility for him or her, because he or she has been lost or abandoned, or because the person who was caring for the child is prevented for whatever reason from providing suitable accommodation or care).

(ii) The child is subject to a supervision requirement (later, compulsory supervision order or interim compulsory supervision order) in terms of which the local authority is the "relevant local authority", or later "implementation

authority" (i.e. the local authority with the responsibility to give effect to the order). (Before the Children's Hearings (Scotland) Act 2011 the child was a looked after child whenever subject to any order, authorisation or warrant under Part 2 of the 1995 Act. After the 2011 Act, warrants were (mostly) replaced by interim orders and a child subject to a child protection order granted under that Act, though not technically a "looked after child", is treated as such with the result that the local authority has the same duties towards the child as if the child were "looked after" by it.[406])

(iii) The child is subject to an order made outwith Scotland under which the local authority has responsibilities as respects the child.

(iv) (After the coming into force in 2009 of the Adoption and Children (Scotland) Act 2007) the child is subject to a permanence order.[407]

Section 17(1) sets out the duties that local authorities have towards children looked after by them: they must (a) safeguard and promote the child's welfare (which shall be their paramount concern), including preparing the child for the time when he or she is no longer a looked after child, (b) make use of such services available for children cared for by their own parents as appears reasonable, and (c) take steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities and parental rights.[408] Contact, which before 1968 was actively discouraged and since 1983 was encouraged in terms of a Code of Practice[409], now became a statutory component of the care provided by local authorities to children they look after.

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[406] Children's Hearings (Scotland) Act 2011, s. 44.

[407] 1995 Act, s. 17(6), as variously amended.

[408] 1995 Act, s. 17(1) and (2).

[409] *Access to Children in Care or Under Supervision in Scotland issued by the Secretary of State for Scotland and laid before Parliament on 16th December 1983: see above at* ***1.E.iii.a****.*

All these duties were fleshed out by the Arrangements to Look After Children (Scotland) Regulations 1996,[410] and subsequently the Looked After Children (Scotland) Regulations 2009,[411] both of which deal with children looked after or about to be looked after by a local authority irrespective of whether the child is placed in a residential establishment or with foster carers (or, under the 2009 Regulations, kinship carers). The local authority must make a care plan to address the immediate and longer-term needs of the child with a view, under the 1996 Regulations, to safeguarding and promoting his or her welfare[412] and including, under the 2009 Regulations, an assessment of how these needs can be met.[413] In doing so, they are required to take account (amongst other things) of the nature of the services to be provided, alternative courses of action, and the arrangements to be made when the child will no longer be looked after by a local authority.[414] The care plan has to include the matters specified in Schedule 2 to both the 1996 and 2009 Regulations.[415] The local authority is required to review the case of each child being looked after by them, within six weeks of the placement, then three months thereafter and then at six-monthly intervals.[416] Appropriate records have to be kept, until the seventy-fifth (under the 1996 Regulations) or the hundredth (under the 2009 Regulations) anniversary of the child's birth (or twenty-fifth anniversary of his or her death before the age of 18), and confidentiality has

[410] SI 1996 No. 3262, coming into force on 1st April 1997.

[411] SSI 2009 No. 210, coming into force on 28th September 2009.

[412] Arrangements to Look After Children (Scotland) Regulations 1996, reg. 3.

[413] Looked After Children (Scotland) Regulations 2009, regs. 4 and 5.

[414] Arrangements to Look After Children (Scotland) Regulations 1996, reg. 4; Looked After Children (Scotland) Regulations 2009, reg. 4.

[415] Including details of any service to be provided to meet the care, education and health needs of the child and the respective responsibilities of the child, person with parental responsibility and any other relevant person as well as (under the 2009 Regulations) the local authority, the foster carer and the manager of any residential establishment accommodating the child.

[416] Arrangements to Look After Children (Scotland) Regulations 1996, regs. 8 and 9, giving effect to the obligation under s. 31 of the 1995 Act; Looked After Children (Scotland) Regulations 2009, reg. 45.

to be maintained.[417] Once a child had been placed (either in a residential establishment or with a foster carer) the local authority has to ensure that the child is visited on its behalf (i) within one week of the placement, (ii) thereafter at three monthly intervals, (iii) on such other occasions as the local authority considers necessary or appropriate in order to safeguard or promote the child's welfare (and, under the 1996 Regulations, if the child is fostered, to give support and assistance to the person caring for him), and (iv) where reasonably requested to do so by the child or any foster carer; written reports of these visits have to be produced and considered at any review of the child's case.[418] Where for any reason it appears to the local authority that it is no longer in the child's best interests to remain in the placement the local authority has to make arrangements to terminate the placement as soon as is practicable in the interests of the child.[419]

Before making any decision in respect of a child they are looking after, the local authority must, so far as reasonably practicable, ascertain the views of the child, the child's parents, any other person who has parental rights, and any other person whose views the authority considers relevant;[420] in coming to its decision, the local authority must have regard to these views, and to the child's religious persuasion, racial origin and cultural and linguistic background.[421]

c. Duties of Local Authorities

Part II of the Children (Scotland) Act 1995 is entitled "Promotion of Children's Welfare by Local Authorities and by Children's Hearings etc". Chapter One of Part II is headed "Support

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[417] Arrangements to Look After Children (Scotland) Regulations 1996, regs. 11 and 12; Looked After Children (Scotland) Regulations 2009, regs. 42 and 43.

[418] Arrangements to Look After Children (Scotland) Regulations 1996, reg. 18; Looked After Children (Scotland) Regulations 2009, reg. 46

[419] Arrangements to Look After Children (Scotland) Regulations 1996, reg. 19; Looked After Children (Scotland) Regulations 2009, reg. 47.

[420] 1995 Act, s. 17(3).

[421] 1995 Act, s. 17(4).

for Children and their Families", which support is to be provided by each local authority. As well as the duties to "looked after children", considered above, the local authority has various other obligations.

Section 19 of the 1995 Act requires local authorities to prepare and publish, and keep under review, their plans for the provision of relevant services for or in respect of children in their area.[422] In preparing and reviewing this plan, local authorities must consult with local health and housing services, voluntary organisations, and the children's hearing.[423] The 1995 Act also imposed a new obligation on local authorities to co-operate with each other: whenever a local authority considers that another local authority could help it carry out its functions under the Act it can request that help, which then has to be provided unless the provision of help would unduly prejudice the other local authority's own functions.[424]

The duty of local authorities under s. 12 of the Social Work (Scotland) Act 1968 to promote social welfare by providing assistance remains in place today, but it was enhanced in the 1995 Act which imposed additional duties on local authorities both to safeguard and promote the welfare of children in their area who are in need and also (so far as consistent with that duty) to promote the upbringing of such children by their families.[425] So the focus is even more on helping children within their own families than under the 1968 Act, but the fact that the duty to do so exists only so far as is consistent with the overarching duty to safeguard and promote the welfare of children recognises that sometimes a child's welfare will require its removal from its family.

Local authorities are obliged to provide accommodation for children in their area who require it because no-one has parental responsibility over the child, the child has been lost or abandoned, or the person who has been caring for the child is prevented from providing

[422] 1995 Act, s. 19(1) and (3).

[423] 1995 Act, s. 19(5).

[424] 1995 Act, s. 21.

[425] 1995 Act, s. 22. Both "family" and "children in need" are defined in s. 93(1).

suitable accommodation; in any case the local authority is entitled to provide accommodation to any child in their area if to do so would safeguard or promote the child's welfare.[426] Accommodation may be provided with "a family" (ie with foster carers), with a relative or any other suitable person, in a residential establishment, or by making other appropriate arrangements.[427]

After-care has always been an important duty, and under the 1995 Act local authorities must continue to advise, guide and assist (in cash or in kind) young people who were looked after by a local authority at the time they ceased to be of school age (or, later, reached the age of 16[428]) until the age of 19; and they are empowered to do so until the young person reached the age of 21 (or, later, 26).[429] And the power under s. 25 of the Social Work (Scotland) Act 1968 to guarantee indentures and apprenticeships was replaced by a power to make grants to any young person under 21 (subsequently 26) who had been a looked after child to help them meet training and education expenses.[430] Also, since 1st April 2015 local authorities have had a duty to provide "continuing care" for all young people over 16 who have ceased to be looked after by a local authority, that is to say to provide the same accommodation and other assistance as was being provided immediately before the young person ceased to be looked after by the local authority, this until the age of 17, then from

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[426] 1995 Act, s. 25. "Child" for these purposes means a person under 18 (see *A v Angus Council* [2012] CSOH 135 and *AU v Glasgow City Council* [2017] CSOH 122), though the local authority is entitled to accommodate any person under the age of 21 if they consider that would safeguard or promote the young person's welfare: s. 25(3).

[427] 1995 Act, s. 26.

[428] Children and Young People (Scotland) Act 2014, s. 66(2)(a)(i).

[429] 1995 Act, s. 29, amended from 1st August 2014 by Children And Young People (Scotland) Act 2014, s. 66. The increase in age was designed to reflect the fact that "ordinary families" in modern society tend to continue to provide support to young adults: see *Policy Memorandum* attached to the Children and Young People (Scotland) Bill, paras 108-110.

[430] 1995 Act, s. 30, subsequently amended by Children and Young People (Scotland) Act 2014, s. 66.

1st April 2016 for all young people up to 18 and then from 1st April 2017 for all young people up to 19.[431]

d. New Orders

Amongst the most substantive changes made by Part II of the 1995 Act was to the various orders that could be made over children.

The child protection order[432] replaced (more or less) the old "place of safety order" and is designed to be a short-term protective order allowing a child who is at imminent risk to be removed from the source of harm and kept in a place of safety, up to a maximum of eight working days, until a children's hearing can sit to determine more long-term matters. A child protection order may only be made by a sheriff and although there are opportunities for its review during its currency, it cannot be renewed at the end of the eighth working day.[433]

The "parental responsibilities order", also introduced by the 1995 Act,[434] replaced the old parental rights resolutions under which a local authority could assume to itself, without court process, the parental rights of a parent whose child was in local authority care.[435] The new order required to be made by a sheriff and had the effect of transferring to the local authority all parental responsibilities and parental rights except the right to agree (or decline to agree) to the making of an adoption order. Parental agreement was required, though it could be dispensed with on the same grounds as parental agreement to adoption

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[431] 1995 Act, s. 26A, as inserted by Children and Young People (Scotland) Act 2014, s. 67; Continuing Care (Scotland) Order 2015 SSI 2015 No. 158, as amended by SSI 2016 No. 92 and SSI 2017 No. 62.

[432] 1995 Act, ss. 57-60; thereafter Children's Hearings (Scotland) Act 2011, ss. 37-54.

[433] For details of the child protection order, see K. Norrie, *Children's Hearings in Scotland*, 1st ed, pp. 195-213 (CPOs made under the 1995 Act); 3rd ed, paras 15.01-15.40 (CPOs made under the Children's Hearings (Scotland) Act 2011).

[434] 1995 Act, ss. 86 – 89.

[435] See above at **1.D.iv.e**.

could be dispensed with. The local authority could allow the child to reside with a parent, guardian, relative or friend of the child or could otherwise accommodate the child, and any person who held parental rights before the making of the order was to be allowed reasonable contact with the child. The provisions relating to parental responsibilities orders were repealed on 28th September 2009 by the Adoption and Children (Scotland) Act 2009,[436] which created (partly in place of that order) the new "permanence order", which is an order made by either the sheriff or the Court of Session vesting in local authorities the responsibility to provide the child with guidance and the right to regulate the child's residence,[437] and may additionally vest other parental responsibilities and parental rights in either the local authority or other persons while at the same time extinguishing those of the parents.[438]

A wholly new type of order created by the 1995 Act is the child assessment order, which authorises (i) an assessment to be made of a child's health or development or of the way in which he or she has been treated even in the absence of parental consent to that assessment, and (ii) the removal of the child to the place where the assessment is to be carried out.[439] As Lord Fraser of Carmyllie put it, this order

> will enable an authority to obtain access to a child where it is concerned about the child's welfare. That may make unnecessary the removal of the child from home under a child protection order by providing a statutory right of access for purposes of that assessment.[440]

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[436] Adoption and Children (Scotland) Act 2009, sched. 3.

[437] Adoption and Children (Scotland) Act 2009, s. 81.

[438] Adoption and Children (Scotland) Act 2009, s. 82. For a detailed description of the law governing permanence orders, see Wilkinson and Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edn. 2013), chap. 20.

[439] 1995 Act, s. 55; thereafter Children's Hearings (Scotland) Act 2011, ss. 35-36.

[440] HL Deb 9th May 1995 vol. 564 col. 16.

Another wholly new order created by the 1995 Act was the exclusion order,[441] which, in Lord Fraser's words:[442]

> would allow a sheriff on the application of a local authority to make an order to exclude a suspected abuser from the family home as an alternative to removing the child from that home. That is an important new power which has been widely welcomed in Scotland.

If they were indeed welcomed at the time (though not by the present author[443]), in the event exclusion orders have been used only rarely and have proved of little real consequence in child protection practice.

iii. Changes Since the 1995 Act

And yet: for all the changes that the Children (Scotland) Act 1995 made, it is difficult to regard it as representing a significant change of direction in the way that the Children Act, 1908, the Children and Young Persons (Scotland) Act, 1932, the Children Act, 1948 and the Social Work (Scotland) Act 1968 were. Part Two of the 1995 Act builds upon models that were already there rather than creating new structures and it provides oil to established mechanisms helping them to operate efficiently in face of new challenges such as the increased recognition of children's rights and a greater focus on due process. The 1995 Act is, with hindsight, better seen as marking the end of an era in which traditional understandings of family life held sway within an established legal framework rather than as a radical restructuring of the law. (The changes in respect of private law matters contained in Part One were far more revolutionary, but are only of tangential relevance to this Report). A number of much more significant structural changes occurred within a very few years of the coming into force of the 1995 Act, with many things changing almost out of recognition, including the refocusing of child protection legislation towards its regulatory

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[441] 1995 Act, ss. 76-80.

[442] HL Deb 9th May 1995 vol. 564 col. 16.

[443] See K. Norrie *Greens Annotated Acts: Children (Scotland) Act 1995*, annotations to s. 76.

framework, the constitutional background against which child protection operates, and the very concept of "family" itself.

a. The Changing Face of "Family"

The 1993 White Paper *Scotland's Children: Proposals for Child Care Policy and Law*[444] had acknowledged that family life was changing, and was in fact being led in Scotland in a great diversity of forms. However, the Children (Scotland) Act 1995 (passed at the tail-end of a long period of Conservative government) did little to reflect that diversity and, as originally passed, continued to make a distinction between families based around marriage on the one hand, and non-marital families on the other;[445] the question did not even arise of giving any recognition to families based around same-sex couples. In the twenty years following the 1995 Act, legislation has transformed the law's understanding of family, as the law began to eschew any attempt at providing a model for family life as it should be led: family law today aims to reflect how family life actually is led, with no political or moral preferences to one form of "family" over another. So the Civil Partnership Act 2004 allowed same-sex couples to register their relationship and acquire thereby virtually all the rights and responsibilities open to opposite-sex couples through the institution of marriage (including the establishment of "step" relationships). The Family Law (Scotland) Act 2006 finally abolished the status of "illegitimacy"[446] and at last allowed unmarried fathers to have full parental responsibilities and parental rights from the birth of their children,[447] provided new remedies to unmarried couples, and extended all existing cohabitation rules to same-

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[444] Scottish Office, HMSO 1993, Cm 2286, at para 1.10.

[445] So for example the unmarried father was excluded from the definition of "relevant person" for the purposes of participation in children's hearings: s. 93(2)(b).

[446] Family Law (Scotland) Act 2006, s. 21.

[447] This change was deliberately not retrospective so applies only to children born after the date of the coming into force of the 2006 Act, 4th May 2006. It was not until the regulations passed under the Children's Hearings (Scotland) Act 2011 came into force that all fathers, together with all mothers, were regarded as "relevant persons" for the purpose of participation in children's hearings.

sex cohabiting couples. The Adoption and Children (Scotland) Act 2007 allowed unmarried couples and same-sex couples to make joint applications for adoption; the Human Fertilisation and Embryology Act 2008 extended parental orders after surrogacy to unmarried couples and same-sex couples; and the Looked After Children (Scotland) Regulations 2009 removed the prohibition on placing children for fostering with anyone other than a man and a woman acting together or a man or a woman acting alone. Finally, of course, the Marriage and Civil Partnership (Scotland) 2014 sought to make marriage itself gender-neutral.

b. Constitutional Changes

Another reason why the 1995 Act can be seen as belonging to an earlier era is that it was passed in the twilight of a constitutional settlement that had seemed at the time immutable. Yet within three years of its passing – and only one year after the majority of Part Two was brought into force – there occurred two hugely significant constitutional developments that rendered the background structures against which the law must operate very different from what had gone before. First, the Scotland Act 1998 (re-)established the Scottish Parliament and virtually all the matters considered in this Report were brought within the legislative competence of that devolved institution. Any existing reference to "the Secretary of State" has required, since the Scotland Act came into force on 1st July 1999, to be read as a reference to "the Scottish Ministers".[448] Secondly, the Human Rights Act 1998 "incorporated" into Scottish domestic law the European Convention on Human Rights, with the result that from 2nd October 2000[449] both the interpretation and the application of the law of child protection (and much else) has required to be consistent with that Convention. The concepts of children's rights, proportionality of interference and participation in process, both in domestic and international law, have thereby acquired a far higher profile in legal disputes.

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[448] Scotland Act 1998, s. 117.

[449] Or from 1st July 1999 if the question could be structured as a "devolution issue".

c. A Shift of Focus in Child Protection Legislation

From its earliest days in the 19th century the law of child protection has primarily been a reaction to that most unhappy of truths, that children are most vulnerable where they ought to be safest, that is to say within the care of their own families. The mechanisms of child protection were originally designed to allow the removal of children who had been harmed within their own families to an environment perceived to be safer; indeed, as we have already seen, that removal was until the Social Work (Scotland) Act 1968 usually intended to be long-term, in order to insulate children from the bad influences they would otherwise be exposed to during their impressionable years. The 1968 Act changed the emphasis towards working with families to prevent such harm, and that emphasis remained evident in the Children (Scotland) Act 1995.

Subsequent legislation, however, has shifted attention from children at risk within the family setting to children at risk in wider society – both in respect of children subject to no state involvement in their private lives and in respect of children already being looked after by the state. It has become recognised – belatedly, many will doubtless think – that "places of safety" are not safe because we call them so but because they are staffed by properly trained, suitably motivated and robustly vetted individuals. Writing in 2004, Cleland points that "the early law was concerned with 'unsuitable' parents. The modern law is beginning to develop the concept of 'unsuitable adults', adults whose access to children should be restricted, as they pose a danger to children".[450] She refers[451] to the Child Protection Review published by the Scottish Executive in 2002,[452] which identified as the first of the hallmarks of an effective child protection strategy the incorporation of preventative strategies.[453] Since Cleland wrote, a whole new body of law has been enacted to ensure

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[450] Stair Memorial Encyclopaedia, *Child and Family Law (Reissue)* (2004), para. 299.

[451] Stair Memorial Encyclopaedia, *Child and Family Law (Reissue)* (2004), para. 497.

[452] *It's Everyone's Job to Make Sure I'm Alright*, Scottish Executive, 2002, accessed at http://www.gov.scot/Publications/2002/11/15820/14009.

[453] *It's Everyone's Job*, para. 8.10.

that children are protected not only from their own families but also from those charged with their care in any other context. There are two interrelated but distinct streams to this legislation: (i) new rules have been designed to identify individuals who ought not to be allowed to work with children because of the risk, established from previous behaviour, that they might abuse their position; and (ii) new institutions have been created to take over the registration and inspection of services for vulnerable children. Both of these are considered immediately below. Completing this section is an examination of new sexual offences that were created in respect of those in a position of trust in relation to children: the origins of these may be traced to the decade before 1995 but it is convenient to consider them here as they too reflect this shift in the law's attention away from parents and towards carers.

iv. Limitations on Who May Work with Children

The Protection of Children (Scotland) Act 2003[454] came into force on 10th January 2005, though it remained extant for only six years, before being repealed and replaced by the rather wider Protection of Vulnerable Groups (Scotland) Act 2007,[455] which covered vulnerable adults as well as children. The 2007 Act came into force on 28th February 2011 and remains the law today. The Explanatory Notes attached to the 2003 Act describe its effects as follows:

> 3. The Act provides for a list of individuals considered unsuitable to work with children ("the list") to be established and maintained by the Scottish Ministers and for those on the list to be banned from working with children. An individual who

[454] 2003 ASP 5.

[455] 2007 ASP 14.

knows that he or she is listed commits an offence if he or she works in a child care position (within the meaning of schedule 2[456]) whilst listed.

4. Organisations are required to refer people who are or have been working in child care positions for inclusion in the list if they harm a child or put a child at risk of harm and, as a consequence, are dismissed or transferred from those positions or where their employment is otherwise terminated in such circumstances. Individuals convicted of an offence against a child (within the meaning of section 10(9)(b)) may also be placed on the list at the discretion of the courts.

5. An organisation commits an offence if it offers work in a child care position to an individual whom it knows is listed or does not move such an individual from a child care position. The information that an individual is on the list will be released as part of a disclosure check carried out by Disclosure Scotland (part of the Scottish Criminal Record Office) under Part V of the Police Act 1997 (c. 50).

Subsequent secondary legislation dealing specifically with foster carers, and managers and employees in residential establishments, made reference to these new rules within their definitions of who was fit to act as such. These are considered in more detail in Part Two of the present Report.

The Explanatory Notes attached to the 2007 Act describe its effects as follows:

Functions of the Scottish Ministers in the Act

8. Many of the functions allocated to the Scottish Ministers will be undertaken on behalf of them by civil servants in an executive agency. The agency will be divided, administratively, into two separate elements: a Vetting and Disclosure Unit and a

[456] That included working in an institution exclusively or mainly for the detention of children, homes exclusively or mainly for children, health care and educational establishments (and their supervisors); managers, charity trustees and children's panel members, and many others.

Central Barring Unit. The Central Barring Unit will exercise most of the functions allocated to the Scottish Ministers in Part 1 and the Vetting and Disclosure Unit will exercise most of the functions in Part 2 as well as the criminal record checks and other functions allocated from the Police Act. For the sake of clarity, these notes refer to the Central Barring Unit and the Vetting and Disclosure Unit, where appropriate, instead of the Scottish Ministers.

OVERVIEW

9. Part 1 sets out the provisions for the operation of the lists of those individuals who are barred from working with children and protected adults respectively. It provides for the Scottish Ministers (as the Central Barring Unit) to maintain the lists and to determine an individual's unsuitability to undertake regulated work with children or protected adults. Part 1 also provides the courts with duties or powers, in different circumstances respectively, to refer individuals for consideration by the Scottish Ministers for inclusion on the relevant list(s). Criteria for the automatic inclusion of individuals on the lists can be specified by order, made under powers in Part 1. Part 1 also makes provision for appeals and the process for removal from the list.

10. Part 2 sets out provisions for the vetting element of the new vetting and barring scheme, creating three new forms of disclosure certificate as well as making provisions for a scheme detailing all those individuals working in regulated positions with children and/or protected adults. Mechanisms for obtaining and reviewing new information in relation to individuals on the scheme are also set out.

11. Part 3 makes amendments to Part 5 of the Police Act other than for the immediate purposes of Parts 1 and 2. It provides for additional information to be included on criminal record (disclosure) certificates, allows application forms to be completed electronically, allows the Scottish Ministers to pay police forces for information provided and makes a number of technical amendments to provisions relating to registration.

Inclusion in the list of persons unsuitable to work with either children or vulnerable adults means that all "regulated work"[457] is closed to them, and a number of challenges have been made on the basis that the system is disproportionate since it does not allow for any assessment to be made of the suitability of the individual in respect of the type of work that the individual intends to follow. Judges have not been persuaded that a system cannot be developed that eschews a blanket ban approach in favour of one that allows for some degree of judgment and discretion to be exercised. The Supreme Court in 2014[458] held the equivalent disclosure scheme in England and Wales to be incompatible with Article 8 of the European Convention on Human Rights because it failed to draw any distinction on the basis of the nature of the offences to be disclosed, the disposal of the case and the time elapsed between when the offence took place and the employment was sought.[459] Though primarily concerned with disclosure certificates rather than inclusion on lists for the purposes of regulated work, the issues are clearly closely linked and the Scottish Government, accepting that the Scottish system was vulnerable to challenge on the same grounds, made the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015[460] under which certain spent convictions need not be disclosed but which gave no right to challenge the inclusion of convictions that continued to require disclosure. The Outer House subsequently held that even the amended disclosure scheme was not a reasonable balance of competing interests since it contained no safeguards to allow the proportionality of the interference in Article 8 to be evaluated objectively and fairly.[461] A similar decision was reached a few months later by the Court of Appeal in England.[462] In one earlier case in the sheriff court, the sheriff simply removed a

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[457] Specified in Schedule 2 to the 2007 Act.

[458] *R (On the Application of T) v Chief Constable of Greater Manchester* [2014] UKSC 35.

[459] See especially Lord Reed at [119].

[460] SSI 2015 No. 423.

[461] *P v Scottish Ministers* [2017] CSOH 33.

[462] *R (On the Application of P) v Secretary of State for the Home Department* [2017] EWCA Civ 321.

person from the list since her conviction for dishonesty created no risk to her acting as a kinship carer.[463] This area of regulation is likely to be subject to further amendment.

v. New Oversight Institutions

By the end of the 20th Century it had become clear that the oversight of social care in Scotland was fragmented and inconsistent. Some but not all forms of social care required to be registered, with either the local authority or the Secretary of State (the Scottish Ministers); the duty of inspection would often lie with the local authority, but sometimes it lay with health boards or the Social Work Services Inspectorate – and sometimes was not required at all. There was clear potential for conflict of interest, with local authorities having duties both to provide services and at the same time to monitor how well they were run, often in comparison (and in financial competition) with similar services provided by voluntary organisations. Different local authorities across Scotland were able to adopt different practices, and there were serious regulatory complications when a service user required both social care and health service input. There was no single body responsible for ensuring standards of care across the range of services that the state might provide to children (and others). There was, in the words of the Policy Memorandum attached to the Bill that became the Regulation of Care (Scotland) Act 2001,[464] "widespread agreement that new legislation [was] needed to bring together and modernise these existing arrangements, to introduce a stronger user focus and to expand the scope of regulation to include those care services that are not currently regulated." The Act established a national regulatory body to undertake this work and to take account of new national care standards in its registration, inspection and enforcement work. It also restructured the whole system of registration and inspection of all care services in Scotland, repealing what had gone before, including in particular ss. 60-68 of the Social Work (Scotland) Act 1968 under which local authorities registered and inspected residential establishments.

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[463] *G v The Scottish Ministers* 2015 GWD 36-577, Sheriff Jamieson at Dumfries.

[464] SP Bill 24, introduced in the Scottish Parliament on 20 December 2000, Policy Memorandum at para. 6.

The relevant provisions of the 2001 Act came into force on 1st April 2002.[465] Subsequently, in 2007, the Scottish Government published the *Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland* ("the Crerar Review")[466] which emphasised the unique role that independent external review plays in the proper monitoring of public services. Though the Crerar Review suggested that a single scrutiny body could be established to provide external review of health, education and social work and social care, the Scottish Government preferred to keep these separate and, in part implementation of the recommendations in the Crerar Review, Part Five of the Public Services Reform (Scotland) Act 2010 replaced, from 1st October 2010,[467] many (but not all) of the structures established under the 2001 Act.

a. Regulation of Care (Scotland) Act 2001: The Care Commission

The 2001 Act established the Scottish Commission for the Regulation of Care[468] ("the Care Commission") which had the duty to register and inspect all care services, including residential child care and fostering,[469] offender accommodation services, care and welfare in boarding schools, as well as independent (i.e. non-NHS) health care services.[470] Any person seeking to provide a care service was required to apply to the Care Commission for registration of that service: this included local authorities (though local authorities providing adoption and fostering services were registered under Part Two of the 2001 Act, which had separate enforcement mechanisms).[471] Registration would be granted if the requirements

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[465] Regulation of Care (Scotland) Act 2001 (Commencement No. 2 and Transitional Provisions) Order 2002 (SSI 2002 No. 162), art. 2.

[466] Scottish Government, 2007, available at http://www.gov.scot/Resource/Doc/198627/0053093.pdf.

[467] Public Services Reform (Scotland) Act 2010 (Commencement No. 1) Order 2010 (SSI 2010 No. 221).

[468] Regulation of Care (Scotland) Act 2001, s. 1 and Sched. 1.

[469] Fostering services subject to the Act include the functions assigned to local authorities under the Foster Children (Scotland) Act 1984 (private fostering): s. 2(14).

[470] Regulation of Care (Scotland) Act 2001, s. 2.

[471] Regulation of Care (Scotland) Act 2001, s. 7.

contained in the Regulation of Care (Requirements as to Care Services) (Scotland) Regulations[472] were satisfied. These required that a care service be provided "in a manner which promotes and respects the independence of service users and, so far as it is practicable to do so, affords them choice in the way in which the service is provided to them."[473] Providers were required to prepare a written statement of the aims and objectives of the care service,[474] to make provision for the health and welfare, and privacy and dignity, of service users,[475] and to prepare a personal plan for each service user setting out how the service user's health and welfare needs would be met.[476] The Regulations specified persons who were not fit to provide,[477] manage[478] or be employed in[479] a care service,[480] and made provision as to fitness of premises[481] and the equipment and facilities to be provided in a care home service.[482] Providers had to ensure that "suitably qualified and competent persons are working in the care service in such numbers as are appropriate for the health and welfare of service users", as well as ensuring that suitable training was

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[472] SSI 2002 No. 114.

[473] 2002 Regulations, reg. 2.

[474] 2002 Regulations, reg. 3.

[475] 2002 Regulations, reg. 4.

[476] 2002 Regulations, reg. 5.

[477] 2002 Regulations, reg. 6: persons would be unfit to provide a care service because they were not of integrity or good character, had been convicted of an offence punishable by imprisonment for more than three months or had been recently insolvent.

[478] 2002 Regulations, reg. 7: A person would be unfit to manage because they were not of integrity or good character, had been convicted of an offence punishable by imprisonment for more than three months, were not physically and mentally fit to manage a care service, did not have the necessary skills, knowledge or experience, or were not registered to do so.

[479] 2002 Regulations, reg. 9: A person would be unfit to be employed in a care service because they were not physically and mentally fit to manage a care service, did not have the necessary skills, knowledge or experience, or were not registered to do so.

[480] Breaching these regulations was an offence: 2002 Regulations, reg. 26.

[481] 2002 Regulations, reg. 10.

[482] 2002 Regulations, reg. 12.

given.[483] No person having a financial interest in a care home service could act as a medical practitioner for any user of that service.[484] Records had to be kept and returns made to the Care Commission.[485] Providers were required to establish and operate a complaints procedure.[486]

The 2001 Act further provided that the Care Commission could issue improvement notices to any care service provider[487] and if the provider was a local authority the Care Commission had to notify the Scottish Ministers.[488] Registration could then be cancelled if the improvements were not made, or a person had been convicted of a relevant offence, or regulations had been breached.[489] In addition, the Care Commission could make summary application to the sheriff for an order immediately cancelling registration or imposing or varying conditions for registration if it appeared that there was a serious risk to some other person's life, health or wellbeing.[490] It was an offence to provide a care service while not being registered.[491]

Local authority adoption and fostering services were registered under Part Two of the 2001 Act.[492] For this purpose, "fostering service" included both local authority fostering and local authority functions under the Fostering of Children (Scotland) Act 1984 (private fostering).[493] Since local authorities have a statutory duty to provide these services,

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[483] 2002 Regulations, reg. 13.

[484] 2002 Regulations, reg. 14. Doing so was an offence: reg. 26.

[485] 2002 Regulations, regs. 19 – 24.

[486] 2002 Regulations, reg. 25.

[487] Regulation of Care (Scotland) Act 2001, s. 10.

[488] Regulation of Care (Scotland) Act 2001, s. 11.

[489] Regulation of Care (Scotland) Act 2001, s. 12.

[490] Regulation of Care (Scotland) Act 2001, s. 18.

[491] Regulation of Care (Scotland) Act 2001, s. 21.

[492] Regulation of Care (Scotland) Act 2001, ss. 33 - 42.

[493] Regulation of Care (Scotland) Act 2001, s. 2(14)(a) and (c).

cancellation of registration was not possible: the enforcement mechanisms lay in the hands of the Scottish Ministers rather than the Care Commission.

Inspection of care services was required under ss. 25 to 27 of the 2001 Act. The Care Commission was given the power to require the provision of information and to enter and inspect premises.[494] Residential services were to be inspected at least twice a year, at least one of these being without any prior notification,[495] and fostering services were to be inspected at least once a year.[496] Inspection could include interviewing in private managers and employees, and service users.[497] It was an offence to obstruct inspection.[498] The Care Commission and School Inspectors had to collaborate in relation to the registration and management of school care accommodation services and secure accommodation services.[499] Documents could be seized and removed.[500]

Part 3 of the 2001 Act, which was not replaced by the 2010 Act and remains in force today, established the Scottish Social Services Council, through which the education and training of social service workers is regulated, and by which practice codes and codes of conduct are produced.[501] The Council is required to maintain a register of social workers and social service workers,[502] and persons can be removed from that register.[503] The use of the title

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[494] Regulation of Care (Scotland) Act 2001, s. 25(2).

[495] Regulation of Care (Scotland) Act 2001, s. 25(3).

[496] Regulation of Care (Scotland) Act 2001, s. 25(5).

[497] Regulation of Care (Scotland) Act 2001, s. 25(6).

[498] Regulation of Care (Scotland) Act 2001, s. 25(13).

[499] Regulation of Care (Scotland) Act 2001, s. 26.

[500] Regulation of Care (Scotland) Act 2001, s. 27.

[501] Regulation of Care (Scotland) Act 2001, Part Three and Sched 2. The Council maintains a detailed website including links to all its Codes of Practice at www.sssc.uk.com.

[502] Regulation of Care (Scotland) Act 2001, s. 44.

[503] Regulation of Care (Scotland) Act 2001, s. 49.

"social worker" or "social service worker" while not registered as such was made an offence.[504]

The Scottish Ministers and the Social Services Council are, and the Care Commission was, required to exercise their functions in accordance with the following principles: the safety and welfare of all service users are to be protected and enhanced; the independence of service users is to be promoted; and diversity of provision is to be promoted in order to afford service users choice.[505] The Commission had, and the Council has, to have a complaints procedure.[506]

b. Public Services Reform (Scotland) Act 2010, Part 5: The Care Inspectorate

The Care Commission was replaced[507] by Social Care and Social Work Improvement Scotland (SCSWIS), commonly known as "the Care Inspectorate", established under Part 5 of the Public Services Reform (Scotland) Act 2010, which remains in force today. The range of care services subject to regulation by the Care Inspectorate includes care home services; school care accommodation in a place in or outwith a public, independent or grant-aided school; secure accommodation; offender accommodation services; local authority fostering, and local authority functions under the Foster Children (Scotland) Act 1984 (private fostering).[508] (This range does not include independent health care services, as the 2001 Act did: these are dealt with in Part 6 of the 2010 Act.) In carrying out its functions the Care Inspectorate must act in accordance with the following principles: (i) the safety and

[504] Regulation of Care (Scotland) Act 2001, s. 52.

[505] Regulation of Care (Scotland) Act 2001, s. 59, as amended by the Public Services Reform (Scotland) Act 2010.

[506] Regulation of Care (Scotland) Act 2001, s. 64, as amended by the Public Services Reform (Scotland) Act 2010. Guidance is provided on the website mentioned at n.501 above.

[507] Public Services Reform (Scotland) Act 2010, s. 89.

[508] Public Services Reform (Scotland) Act 2010, s. 47 and Sched. 12.

wellbeing of service users are to be protected and enhanced, (ii) the independence of service users is to be promoted, (iii) diversity of provision is to be promoted with a view to affording service users choice and (iv) good practice in the provision of social services is to be identified, promulgated and promoted.[509]

All providers of care services are required to register with the Care Inspectorate,[510] and registration can be refused, granted, or granted subject to conditions.[511] Regulations specify persons who are deemed unfit to make an application for registration and any application made by such persons will be refused as incompetent. This includes anyone convicted of an offence punishable by imprisonment for at least three months, anyone involved in insolvency proceedings, anyone removed from being concerned in the management or control of a charity, and anyone disqualified from being a company director.[512]

The Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011[513] set out the requirements that must be complied with by service providers. The service has to be provided in a manner that promotes quality and safety and respects the independence of service users, and affords them choice in the way in which the service is provided to them.[514] Service providers must make proper provision for the health, welfare and safety of service users, respecting their privacy and dignity and, in relation to care home providers, ensuring health care services are provided.[515] Each provider is required to prepare a personal plan for each service user setting out how the service user's

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[509] Public Services Reform (Scotland) Act 2010, s. 45. See their website at www.careinspectorate.com.

[510] Public Services Reform (Scotland) Act 2010, s. 59. The information to be included in the application is set down in the Schedule to the Social Care and Social Work Improvement Scotland (Applications) Order 2011 (SSI 2011 No. 29).

[511] Public Services Reform (Scotland) Act 2010, s. 60.

[512] Social Care and Social Work Improvement Scotland (Registration) Regulations 2011 (SSI 2011 No, 28), reg, 3.

[513] SSI 2011 No. 210 (hereinafter “the 2011 Regulations”).

[514] 2011 Regulations, reg. 3.

[515] 2011 Regulations, reg. 4.

health, welfare and safety needs will be met.[516] The Regulations specify persons who are not fit to provide,[517] manage[518] or be employed in[519] a care service; breach of any of these rules is an offence.[520] In addition, no person listed in the children's list kept under the Protection of Vulnerable Groups (Scotland) Act 2007 may provide, manage or be employed in a care service for children.[521] The Regulations also make provision as to the fitness of premises[522] and as to the facilities required in care homes.[523] Providers have to ensure that at all times suitably qualified and competent persons are working in the care service in such numbers as are appropriate for the health, welfare and safety of service users, and ensure that they receive suitable training.[524] No person having a financial interest in a care home

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[516] 2011 Regulations, reg. 5.

[517] 2011 Regulations, reg. 6: those who are not of integrity and good character, anyone convicted of an offence punishable by at least three months imprisonment and in the opinion of the Care Inspectorate is therefore unsuitable to provide care services, anyone removed from being concerned with the management or control of a charity or disqualified from being a company director, or had been involved in bankruptcy (see the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Amendment Regulations 2013 (SSI 2013 No. 110), adding regs 6A and 6B to the 2011 Regulations).

[518] 2011 Regulations, reg 7: those who are not of integrity or good character, who have been convicted of an offence punishable by imprisonment for more than three months and in the opinion of the provider of the care service is therefore unsuitable, those who do not have the necessary skills, knowledge or experience, or who are not registered to do so.

[519] 2011 Regulations, reg. 9: those who are not of integrity or good character, who have been convicted of an offence punishable by imprisonment for more than three months and in the opinion of the manager is therefore unsuitable, those who do not have the qualifications, skills and experience, or who are not registered to be so employed.

[520] 2011 Regulations, reg. 19.

[521] 2011 Regulations, reg. 13(1).

[522] 2011 Regulations, reg. 10.

[523] 2011 Regulations, reg. 14.

[524] 2011 Regulations, reg. 15.

may act as a medical practitioner for any user of that service.[525] The care service must establish and operate a complaints procedure.[526]

Once registered, the Care Inspectorate may serve an improvement notice on a care service[527] and registration may be cancelled if after an improvement notice has been issued the relevant requirements are still not being met.[528] Emergency cancellation can be done by a sheriff, on application from the Care Inspectorate if there is a serious risk to life, health or well-being of either the service users or other persons.[529]

Though adoption and fostering services are inspected by the Care Inspectorate, they have no role in enforcing any local authority obligation since local authorities have a statutory duty to provide such services and so the Care Inspectorate cannot deregister them. But local authorities must nevertheless register their adoption and fostering services with the Care Inspectorate,[530] who may impose conditions to improve services: any such improvement notice must be reported to the Scottish Ministers,[531] who may direct the local authority to take steps to remedy the matter themselves or seek an order from the Court of Session for specific performance of the steps required.[532]

The Care Inspectorate may inspect any social service (which includes care services) in order to review and evaluate the effectiveness of the provision of the services being inspected, to encourage improvement, to investigate any cause for concern, and to give consideration to

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[525] 2011 Regulations, reg. 16: it is an offence to do so (reg. 19).

[526] 2011 Regulations, reg. 18.

[527] Public Services Reform (Scotland) Act 2010, s. 62.

[528] Public Services Reform (Scotland) Act 2010, s. 64. Special provision is made for local authorities in relation to services which they are obliged under statute to provide and for which registration cannot therefore be cancelled: s. 63 requires Scottish Ministers to be notified of any improvement notice.

[529] Public Services Reform (Scotland) Act 2010, s. 65.

[530] Public Services Reform (Scotland) Act 2010, s. 83.

[531] Public Services Reform (Scotland) Act 2010, s. 91.

[532] Public Services Reform (Scotland) Act 2010, s. 92.

the need for an improvement notice.[533] The Care Inspectorate must inspect any social service if requested to do so by the Scottish Ministers.[534] The person authorised by the Care Inspectorate to carry out the inspection has the power to enter and inspect premises[535] and on completion of inspection the Care Inspectorate must prepare a Report.[536] Inspections are to be carried out in accordance with the rules in the Public Services Reform (Social Services Inspection) (Scotland) Regulations 2011.[537]

c. Public Services Reform (Scotland) Act 2010, Part 6: Healthcare Improvement Scotland

The 2010 Act also established the body known as Healthcare Improvement Scotland ("HIS"), with the general duty of furthering improvement in the quality of health care provided both by the National Health Service and by independent health care providers.[538] This body is responsible for providing advice and guidance, support for implementation and improvement, and for assessing, monitoring and reporting on providers of healthcare services. HIS replaced the National Health Service Quality Improvement Scotland (NHS QIS), a special health board within the NHS which had previously assessed health boards' performances, and is independent of the National Health Service; it also took over the responsibilities of the Care Commission in respect of independent providers. It must exercise its functions in accordance with the following principles: the safety and wellbeing of service users are to be protected and enhanced, good practice in the provision of services is to be identified, promulgated and promoted, and practice that takes account of guidance

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[533] Public Services Reform (Scotland) Act 2010, s. 53. Additional purposes relating to strategic plans were added by the Public Bodies (Joint Working) (Scotland) Act 2014 (ASP 9).

[534] Public Services Reform (Scotland) Act 2010, s. 55.

[535] Public Services Reform (Scotland) Act 2010, s. 56.

[536] Public Services Reform (Scotland) Act 2010, s. 57.

[537] SSI 2011 No. 185.

[538] Public Services Reform (Scotland) Act 2010, s. 108, inserting s. 10A into the National Health Service (Scotland) Act 1978.

and evidence published or endorsed by HIS is to be promoted and encouraged.[539] HIS may inspect any service provided under the National Health Service and any independent health care provider,[540] and it is responsible for the registration (and cancellation of registration) of, and the making of improvement notices in respect of, independent health care services.[541]

ii. Protection Against Sexual Exploitation

It has long been understood that the ability to withhold consent to sexual activity (and therefore the existence of the crime of rape) does not offer sufficient protection to vulnerable young people from sexual manipulation and exploitation. This is why, for example, statutory offences relating to sexual intercourse with girls under the age of 16 have long existed irrespective of whether the girl consented or not. Children and young people being accommodated apart from their parents have always been particularly vulnerable to sexual exploitation, but that was not given statutory recognition until recently.

In 1981 the Scottish Law Commission[542] pointed out that the crime of incest protected children from their own parents but not from step-parents or their parents' partners. On their recommendation, a new offence was created by the Incest and Related Offences (Scotland) Act 1986, which inserted into the Sexual Offences (Scotland) Act 1976 a new s. 2C,[543] making it an offence for a person (aged over 16) who was in a position of trust or

[539] National Health Service (Scotland) Act 1978, s. 10B, as inserted by s. 108 of the Public Services Reform (Scotland) Act 2010. See their website at www.healthimprovementscotland.org.

[540] National Health Service (Scotland) Act 1978, ss. 10I and 10J, as so inserted. See further in relation to mental health services, below at **2.H.vi.c**.

[541] National Health Service (Scotland) Act 1978, ss. 10P – 10Z4, as so inserted. See further in relation to mental health services, below at **2.H.vi.c**.

[542] Scottish Law Commission *Report on the Law of Incest in Scotland* (Scot. Law Com. No 69, 1981).

[543] Incest and Related Offences (Scotland) Act 1986, s. 1, coming into force on 1st November 1986: Incest and Related Offences (Scotland) Act 1986 (Commencement) Order 1986 (SI 1986 No. 1803).

authority over a child (of either gender) under 16 to have sexual intercourse[544] with that child, with somewhat higher penalties than for the offence under s. 4 of the 1976 Act[545] of having sexual intercourse with a girl under 16. The offence was limited to situations in which the accused and the child were members of the same household,[546] for it was designed to protect against step-parents, cohabitants and the like, though it was broad enough also to include some foster carers in whose household the child lived. But limiting the offence in this way meant that children in residential establishments, where the child and carer cannot be said to be members of the same household,[547] would never be covered by the new offence. Where the offence did apply, it was a defence for the accused to show that he or she believed on reasonable grounds that the child was over 16, or that he or she did not consent to the sexual intercourse, or that he or she was married to the child (having married abroad in a marriage recognised as valid in Scotland).[548] This offence was repeated in s. 3 of the Criminal Law (Consolidation) (Scotland) Act 1995, but in neither the 1976 Act nor the 1995 Act was the concept of "position of trust" defined.

A much broader, and separate, offence was created by the Sexual Offences (Amendment) Act 2000, which came into force on 11th August 2003:[549] that is to say, sexual activity by a person over 18 with a person under 18 while the former was in a position of trust in respect

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[544] That is to say, penile penetration of the vagina.

[545] Subsequently s. 5 of the Criminal Law (Consolidation) (Scotland) Act 1995.

[546] The rationale for this limitation is explained at Scot. Law Com. No. 69, para. 4.33.

[547] In another context (the meaning of grounds of referral to the children's hearing) it was said that "the word 'household' … is plainly intended to connote a family unit or something akin to a family unit – a group of person, held together by a particular kind of tie who normally live together, even if individual members of the group may be temporarily separated from it": *McGregor v H* 1983 SLT 626 at p. 628. See also Sheriff Principal Macphail in *Cunningham v M* 2005 SLT (Sh Ct) 73 at [26].

[548] Cf. *Mohamed v Knott* [1969] 1 QB 1.

[549] Sexual Offences (Amendment) Act 2000 (Commencement No. 4) (Scotland) Order 2003 (SSI 2003 No. 378).

of the latter.[550] "Position of trust" was defined[551] to include not only those covered by the "same household" offence created in the Incest and Related Offences (Scotland) Act 1986 but also anyone looking after children or young people in residential accommodation. This new offence offered protection not only against heterosexual sexual intercourse but against any "sexual activity" (heterosexual or homosexual, penetrative or non-penetrative).[552] It also protected young people over 16 who were otherwise competent to consent to sexual activity – the rationale for the offence was the risk of exploitation by those in a position of care in relation to the young person. It was a defence if the accused could show that he or she did not know and could not reasonably have been expected to know that the young person was under 18 or was a person in relation to whom he or she was in a position of trust; it was also a defence that the accused was lawfully married to (or after 5th December 2005 in a civil partnership with) the young person.[553] The young person's consent, or ability to consent, was irrelevant to the offence.

The provisions in the 2000 Act applicable to Scotland were repealed by the Sexual Offences (Scotland) Act 2009. This Act substantially replicates the 2000 offence: it is now the offence of "sexual abuse of trust" for any person over 18 to engage in sexual activity with a person under 18 while in a position of trust over that person.[554] The rationale for this offence was explained by the Scottish Law Commission:

> Even if some instances of sexual contact with a person are wrong because of some characteristic of that person (such as age or mental condition), there is a separate and additional type of wrong where the perpetrator holds a position of trust over the victim. The existence of the trust relationship renders highly problematic any consent which the vulnerable person may give to sexual activity. But over and above the issue

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[550] Sexual Offences (Amendment) Act 2000, s. 3.

[551] Sexual Offences (Amendment) Act 2000, s. 4.

[552] "Sexual activity" was defined to mean any activity which a reasonable person would regard as sexual in all the circumstances, other than activity that could be so regarded only with knowledge of the intentions, motives or feelings of the parties: Sexual Offences (Amendment) Act 2000, s. 3(5).

[553] Sexual Offences (Amendment) Act 2000, s. 3(2), amended by the Civil Partnership Act 2004.

[554] Sexual Offences (Scotland) Act 2009, s. 42.

> of the validity of consent, a person who holds a position of trust over another is acting inconsistently with the duties imposed by that position if he engages in sexual activity with that person.[555]

"Position of trust" is defined, similarly to the 2000 Act, to include the looking after of persons under 18 while they are detained by a court order or under an enactment in an institution, or are resident in a home or other place in which accommodation is provided by a local authority, or are accommodated and cared for in a hospital, care home service, residential establishment or accommodation provided by a school care accommodation service or secure accommodation service. In addition, anyone who fulfils or exercises parental responsibilities or parental rights under an arrangement with a person who has such responsibilities or rights (private fosterers), or treats the person under 18 as a child of his or her family while being a member of the same household[556] is also in a position of trust.[557] The defences are (i) that the person over 18 reasonably believed either that the other person was over 18 or that he or she was not in a position of trust in relation to that person, and (ii) that the parties were married to or civil partners of each other or a sexual relationship already existed between them immediately before the position of trust arose.[558] Consent, or lack of it, is immaterial to this offence.[559]

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[555] *Report on Rape and Other Sexual Offences*, Scot Law Com. No. 209 (2007) at para. 4.107.

[556] This would include step-parents and foster carers. "Sexual intercourse" by a step-parent continues to be covered by s. 2 of the Criminal Law Consolidation (Scotland) Act 1995.

[557] Sexual Offences (Scotland) Act 2009, s. 43.

[558] Sexual Offences (Scotland) Act 2009, s. 45.

[559] *W v HM Advocate* [2016] HCJAC 44.

SECTION G: THE CHILDREN AND YOUNG PEOPLE (SCOTLAND) ACT 2014

i. Introduction

The most recent significant development in Scottish child protection law has been the giving of legislative effect to the recognition of the merits of early state intervention in family life as a means of avoiding, or at least reducing the risks of, compulsory intervention. The Children (Scotland) Act 1995 allowed local authorities to deal with children and parents even in the absence of any form of compulsory order, but early intervention as a primary aim of social work practice developed only subsequent to that Act. In 2004 the Scottish Executive published "Getting it Right for Every Child: A Report on the Responses to the Consultation on the Review of the Children's Hearing System", which identified the need to intervene earlier as one of the strategies that would help improve outcomes, and this led to Getting it Right for Every Child, or "GIRFEC", being developed as a framework of guidance and legislation informing all agencies working with vulnerable children and their families. A year earlier the Scottish Parliament had established the office of Commissioner for Children and Young People, with the general function of promoting and safeguarding the rights of children and young people, being all those under 18, together with those under 21 who had been looked after by a local authority.[560]

The Children and Young People (Scotland) Act 2014 sought to give statutory enhancement of the GIRFEC approach of early intervention, by requiring local authorities to provide services such as family group decision-making services and support services in relation to parenting to children and their families in their area if these services would reduce the risk of the children becoming looked after children.[561] In determining whether a child is at risk

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[560] Commissioner for Children and Young People (Scotland) Act 2003, ASP 17.

[561] Children and Young People (Scotland) Act 2014, s. 68; Children and Young People (Scotland) Act 2014 (Relevant Services in Relation to Children at Risk of Becoming Looked After etc) (Scotland) Order 2016 (SSI 2016 No. 44), art. 2.

of becoming a looked after child, the local authority must consider whether the child's wellbeing is being, or is at risk of being, adversely affected by any matter.[562]

The genesis of the 2014 Act may be traced to a Scottish Government consultation published in 2012.[563] Lady Hale, Lord Reed and Lord Hodge summarised the policy behind this Consultation Paper:

> In general terms, two ideas underlay many of the proposals. The first was a shift away from intervention by public authorities after a risk to children's and young people's welfare had been identified, to an emphasis on early intervention to promote their wellbeing, understood as including all the factors that could affect their development. The second was a shift away from a legal structure under which the duties of statutory bodies to cooperate with one another (under, for example, section 13 of the National Health Service (Scotland) Act 1978 and section 21 of the Children (Scotland) Act 1995) were linked to the performance of their individual functions, to ensuring that they work collaboratively and share relevant information so that "all relevant public services can support the whole wellbeing of children and young people" (para 73). In that regard, the consultation paper stated that it was "essential that information is shared not only in response to a crisis or serious occurrence but, in many cases, information should be shared about relevant changes in a child's and young person's life". There was, however, "no commonly agreed process for routine information sharing about concerns about wellbeing" (para 110). The establishment of a new professional role, that of named person, was proposed in order to address those concerns (para 111).[564]

The "named person" scheme will be considered shortly, but a summary of the main provisions of the Children and Young People (Scotland) Act 2014 was given by the Inner House, in a case challenging that scheme,[565] as follows:

> Parts 1 to 5 of the 2014 Act form a comprehensive scheme intended to promote and safeguard the rights and well-being of children and young people. Part 1 requires the respondents to consider and, if appropriate, to take steps to secure better or further

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[562] 2016 Order, art. 3(2).

[563] *A Scotland for Children: A Consultation on the Children and Young People Bill* (Scottish Government, 2012).

[564] *Christian Institute v Lord Advocate* [2016] UKSC 51 at para [1].

[565] *Christian Institute v Scottish Ministers* 2015 CSIH 64 at paras [2]-[4].

implementation ("effect") of the requirements of the UN Convention on the Rights of the Child (1990), reporting thereon to the Scottish Parliament triennially. Part 2 makes provision for the investigation, at the instance of the Commissioner for Children and Young People, of the extent to which any persons providing services for children and young people, excluding parents or guardians ("service providers": Commissioner for Children and Young People (Scotland) Act 2003 (asp 17), sec 16), have regard to the rights, interests and views of children and young people when making decisions, or taking action, that affect them. It remains the Commissioner's general function "to promote and safeguard the rights of children and young people." (2003 Act, sec 4.)

Part 3 provides for the preparation of three year "children's services plans" for local authority areas designed to secure, *inter alia*, that children's services are provided in a way which: best safeguards, supports and promotes the well-being of children; ensures that any action to meet their needs is taken at the earliest appropriate time; is most integrated from the point of view of recipients; and constitutes the best use of available resources. Part 4 requires service providers to make available, in relation to each child or young person, an identified individual ("named person"), whose general function is to promote, support or safeguard the well-being of the child or young person, on behalf of the service provider concerned. Part 5 provides for the preparation of a "child's plan" in respect of any child whose well-being is being, or is at risk of being, adversely affected by any matter and requires a targeted intervention beyond the services provided to children generally.

The "wellbeing" of the child or young person is to be assessed (2014 Act, sec 96) by reference to the extent to which he or she is or would be "Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included." (Described by the acronym "SHANARRI".) The [Scottish Ministers] must issue guidance on how the listed elements are to be used to assess well-being. The general principle, that functions should be exercised by local authorities in a way which is designed to safeguard, support and promote the well-being of children and young people, is extended (2014

Act, sec 95) to functions provided by them in terms of the Children (Scotland) Act 1995 (cap 36).

ii. The "Named Person" Scheme

a. Summary

By far the most controversial aspect of the 2014 Act has been the named person service. In summary, this is a service to "make available" to all children (for the purposes of the Act being persons under the age of 18 years[566]) and young people (for the purposes of the Act being persons over 18 who remain in schooling[567]) an identified individual, known as the "named person", to perform certain functions when he or she considers it appropriate to do so in order to promote, support or safeguard the wellbeing of the child or young person.[568] The functions are (i) advising, informing or supporting the child or young person, or a parent of the child or young person, (ii) helping the child or young person, or a parent of the child or young person, to access a service or support, and (iii) discussing, or raising, a matter about the child or young person with a service provider or relevant authority.[569]

The named person must be employed by the provider of the named person service or of any person who exercises any of the service provider's functions.[570] The service provider is (i) for pre-school children, the local health board,[571] (ii) for children and young people attending school, the local authority or other directing authority (the mangers of grant-aided schools and the proprietors of independent schools) of the school they attend,[572] (iii), for children and young people in secure accommodation, the directing authority (the local

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[566] 2014 Act, s. 97(1).

[567] 2014 Act, s. 22(2).

[568] 2014 Act, s. 19(1).

[569] 2014 Act, s. 19(5).

[570] 2014 Act, s. 19(2) and (3).

[571] 2014 Act, s. 20.

[572] 2014 Act, ss. 21(2), (5) and (6), 22 and 32.

authority or other person who manages the residential establishment) of the establishment concerned,[573] (iv) for those in legal custody, the Scottish Ministers;[574] and (v) for any other child (such as a home schooled child) residing in its area (except those in the regular armed forces), the local authority.[575]

b. Information Sharing: The Challenge to the Scheme

One of the purposes for which the named person scheme was designed was to ensure that information could be collated from a number of sources about individual children to allow fully informed decisions to be made as to whether support and guidance is necessary and whether the child is at risk of becoming a looked after child. Many tragedies in the past have been caused (at least partly) by the failure to bring together all the information held by different agencies about an individual child, depriving any individual professional of the opportunity to see the whole picture. The 2014 Act therefore imposed duties on health boards, local authorities and the Scottish Ministers to share information with the service provider relevant to the named person's functions, and the Act as originally passed required the service provider to share information with a wide variety of public authorities[576] where it was likely to be relevant to an exercise of the named person functions and ought to be provided for that purpose, unless to do so would be "in breach of a prohibition or restriction on the disclosure of information arising by virtue of an enactment or rule of law".[577] Information also required to be communicated from a previous service provider to a new service provider, such as when a child moved from being a pre-school child to a child attending school, or moved from a local authority to an independent school.[578]

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[573] 2014 Act, ss. 21(2) and (6) and 32.

[574] 2014 Act, s. 21(2) and (7).

[575] 2014 Act, s. 21(1) and (4). "Children" in the armed forces have no relevant person.

[576] Defined in 2014 Act, s. 31 and Sched. 2.

[577] 2014 Act, s. 26 (as originally enacted but never brought into force).

[578] 2014 Act, s. 23 (as originally enacted but never brought into force).

In *Christian Institute v Lord Advocate* the whole named person scheme was challenged as being a disproportionate breach of the right to respect for family life, as protected by Article 8 of the European Convention on Human Rights, and the information sharing provisions in particular were challenged as being incompatible with the right to private and family life under the same article. If so, the scheme would be outwith the legislative competence of the Scottish Parliament, and would not be law. The Outer House and Inner House rejected both these challenges[579] but in the Supreme Court[580] the challenge to the information sharing provisions was successful.

Lady Hale and Lords Reed and Hodge said this:

> [3] The [policy] memorandum [attached to the Bill that became the 2014 Act] explained that concern had been expressed about the existing legal framework for information sharing. This was felt to be confusing and potentially insufficient to enable the role of the named person to operate as well as anticipated. In particular, there were concerns regarding sharing information about children where consent was not given (para 75). The memorandum continued:
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> "Currently, information about a child may be shared where the child is at a significant risk of harm. However, the role of the named person is based on the idea that information on less critical concerns about a child's wellbeing must be shared if a full picture of their wellbeing is to be put together and if action is to be taken to prevent these concerns developing into more serious issues. Without the necessary power to share that kind of information, the named person will not be able to act as effectively as is intended … Specific provisions in the Bill, therefore, set out arrangements on information sharing, to give professionals and named persons the power to share information about those concerns." (paras 76-77)
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> [4] It appears, therefore, that one of the principal purposes of Part 4, as envisaged at that stage, was to alter the existing law in relation to the sharing of information about children and young people, so as to enable information about concerns about their wellbeing, held by individual bodies, to be pooled in the hands of named persons and shared with other bodies, with the ultimate aim of promoting their wellbeing….
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> [15] …[O]ne of the central purposes of Part 4 is to establish new legal powers and duties, and new administrative arrangements, in relation to the sharing of information

[579] [2015] CSOH 7; [2015] CSIH 64.

[580] 2016 UKSC 51.

> about children and young people, so as to create a focal point, in the form of named persons, for the pooling and sharing of such information, and the initiation of action to promote their wellbeing.
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> …
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> [91] … [I]t can be accepted, focusing on the legislation itself rather than on individual cases dealt with under the legislation, that Part 4 of the 2014 Act pursues legitimate aims. The public interest in the flourishing of children is obvious. The aim of the Act, which is unquestionably legitimate and benign, is the promotion and safeguarding of the wellbeing of children and young persons. As the Dean of Faculty submitted, the policy of promoting better outcomes for individual children and families is not inconsistent with the primary responsibility of parents to promote the wellbeing of their children. Improving access to, and the coordination of, public services which can assist the promotion of a child's wellbeing are legitimate objectives which are sufficiently important to justify some limitation on the right to respect for private and family life.

However, while the named person scheme itself was legitimate and benign – as must surely be obvious – and not in itself incompatible with Article 8 of the European Convention, the information sharing provisions that underpinned that scheme were held to be incompatible with the rights of children, young people and parents under Article 8 (both privacy rights and family rights). The provisions were not "in accordance with the law" because the interplay between the rules and the requirements of the Data Protection Act 1998 made them inaccessible and because the lack of safeguards meant that in practice information sharing had the potential to result in a disproportionate interference with the Article 8 rights of many children, young people and their parents.[581] The provisions themselves had the potential to operate disproportionately even although not designed to do so.[582]

Following the Supreme Court's decision the Scottish Government delayed the implementation of Part 4 and, on 19th June 2017, introduced a new Bill before the Scottish Parliament: the Children and Young People (Information Sharing) (Scotland) Bill. This will replace the original duties under ss. 23 and 26 to share information with a duty, instead, to

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[581] [2016] UKSC 51, paras [79]-[85].

[582] [2016] UKSC 51, paras [86]-[101].

identify information the sharing of which could promote, support or safeguard the wellbeing of the child or young person and to consider whether that information could be shared in compliance with the Data Protection Act and other relevant law. In addition, new ss. 26A and 26B will be inserted into the 2014 Act providing limitations on information sharing, and requiring the Scottish Ministers to issue (after consultation) a Code of Practice on information sharing, compliance with which will be mandatory. It is at the time of writing hoped that Part 4 of the 2014 Act can finally be brought into force in 2018.[583]

iii. Corporate Parenting

It has long been recognised that the life chances of children and young people moving out of the care system are reduced in comparison to children and young people brought up by their own parents. The Statutory Guidance issued under the 2014 Act reveals some uncomfortable statistics:

> Yet despite the extensive framework of law and policy, many looked after children and care leavers experience some of the poorest personal outcomes of any group in Scotland. Low levels of educational engagement and achievement feed into high levels of poverty, homelessness and poor mental health. Rates of suicide and self-harm are higher than that of the general population. In 2013 a third of young offenders had been in care at some point in their childhood.[584]

These problems may be traced, at least to some extent, to a lack of parental guidance and support for these children, but the disturbing fact is that the interference in the parent-child relationship caused by state action designed to protect the child from harm may itself contribute to that lack of guidance and support. Compensating, if imperfectly, for that loss is at the heart of the "corporate parenting" approach first given governmental approval in "These are our Bairns: A Guide for Community Planning Partnerships on Being a Good

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[583] See Ministerial Statement by the Deputy First Minister to the Scottish Parliament on 17th March 2017.

[584] *Children and Young People (Scotland) Act 2014: Statutory Guidance on Part 9: Corporate Parenting* at para [9] (references omitted).

Corporate Parent".[585] That Guide identified as keys to successful "corporate parenting" (i) the necessity for across-the-board co-operation between different parts of local authorities, and between different public agencies; (ii) the necessity to take a strategic, child-centred approach to service delivery; and (iii) a shift in the emphasis from "corporate" to "parenting".[586] The Guide elaborated on what was meant by "corporate parenting":

> The term refers to an organisation's performance of actions necessary to uphold the rights and secure the wellbeing of a looked after child or care leaver, and through which physical, emotional, spiritual, social and educational development is promoted, from infancy through to adulthood. In other words, corporate parenting is about certain organisations listening to the needs, fears and wishes of children and young people, and being proactive and determined in their collective efforts to meet them. It is a role which should complement and support the actions of parents, families and carers, working with these key adults to deliver positive change for vulnerable children.[587]

Part 9 of the Children and Young People (Scotland) Act 2014 gives statutory force to the concept of "corporate parenting". Unlike the named person scheme, which applies to virtually every child in Scotland, corporate parenting is relevant only to looked after, and previously looked after, children. Schedule 4 to the Act lists the public bodies who are "corporate parents" for the purposes of the Act, including the Scottish Ministers, local authorities, health boards, the Care Inspectorate, Healthcare Improvement Scotland, the Scottish Police Authority, the Mental Welfare Commission for Scotland, the Scottish Legal Aid Board and the Scottish Qualifications Authority.[588] Corporate parenting duties are owed to all looked after children, and to young persons under the age of 26 who were looked after at the date of their 16th birthday or subsequently.[589]

So far as is consistent with its other functions, it is the duty of every corporate parent:

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[585] Scottish Government, 2008.

[586] *These are Our Bairns*, p. 3.

[587] *These are Our Bairns*, para [11].

[588] 2014 Act, s. 56(2) allows the Scottish Ministers to add to this list or remove bodies from it.

[589] 2014 Act, s. 57.

(a) to be alert to matters which, or which might, adversely affect the wellbeing of children and young people to whom this Part applies,

(b) to assess the needs of those children and young people for services and support it provides,

(c) to promote the interests of those children and young people,

(d) to seek to provide those children and young people with opportunities to participate in activities designed to promote their wellbeing,

(e) to take such action as it considers appropriate to help those children and young people—

(i) to access opportunities it provides in pursuance of paragraph (d), and

(ii) to make use of services, and access support, which it provides, and

(f) to take such other action as it considers appropriate for the purposes of improving the way in which it exercises its functions in relation to those children and young people.[590]

The corporate parent must also prepare and keep under review its Corporate Parenting Plan[591] setting out how it intends to fulfil its corporate parenting responsibilities. An important obligation is imposed by s. 60 of the 2014 Act, which requires all corporate parents to co-operate with each other, in so far as reasonably practicable, while exercising their corporate parenting responsibilities: "co-operation" includes (but is not limited to) sharing information, providing advice and assistance, co-ordinating activities, sharing responsibility, funding activities jointly, and exercising functions under the Act jointly.[592] Each corporate parent must report, at least every three years (and in whatever form is appropriate to its organisational structure), on how it has exercised its corporate parenting responsibilities, and provide such information on these matters to the Scottish Ministers as they reasonably require.[593] Corporate parents must have regard to the guidance on

[590] 2014 Act, s. 58(1).

[591] 2014 Act, s. 59.

[592] 2014 Act, s. 60(2).

[593] 2014 Act, ss. 61 and 62. The Scottish Ministers are not corporate parents for these purposes: s. 56(3).

corporate parenting issued by the Scottish Ministers, who may also issue directions to particular corporate parents about its corporate parenting responsibilities;[594] the Scottish Ministers must report to the Scottish Parliament every three years about how they have exercised their corporate parenting responsibilities during that period.[595]

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[594] 2014 Act, ss. 63 and 64. The Scottish Ministers are not corporate parents for these purposes: s. 56(3). The Commissioner for Children and Young People in Scotland, and post-16 education bodies are not corporate parents for the purposes of s. 64 (directions from Scottish Ministers).

[595] 2014 Act, s. 65.

PART TWO: REGULATORY STRUCTURES GOVERNING PARTICULAR TYPES OF ACCOMMODATION

SECTION A: BOARDING OUT AND FOSTERING OF CHILDREN

i. Introduction

As we saw in Part One above, the Children and Young Persons (Scotland) Act, 1932 allowed for a major expansion of the use of boarding-out as an outcome in proceedings at a juvenile court. Under the previous law children and young persons who had been the victims of the crime of child cruelty could be committed to the care of a relative of the child or some other "fit person". It was for the court to identify the fit person and there was no statutory guidance on how the court did so, nor any subsequent monitoring process. It was not until regulations were made under the 1932 Act that identification and monitoring of appropriate persons was mandated. A consistent rule both before and after the 1932 Act concerned the powers of those who took children in on behalf of the state. When children were boarded-out under Part Two of the Children Act, 1908, the fit person had "the like control over the child or young person as if he were his parent, and shall be responsible for his maintenance".[596] The same rule appeared in the 1932 Act: "The person to whose care the boy or girl is committed shall, whilst the order is in force, have the same rights and powers, and be subject to the same liabilities in respect of his or her maintenance, as if he were his or her parent".[597] The Children and Young Persons (Scotland) Act, 1937 Act replicated this, other than that it talked of a "child or young person" rather than "boy or girl".[598] This last-mentioned provision was repealed by the Social Work (Scotland) Act 1968[599] and no equivalent rule was enacted in that statute: from that point much of the decision-making

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[596] Children Act, 1908, s. 22(1).

[597] Children and Young Persons (Scotland) Act, 1932, s. 19(4).

[598] Children and Young Persons (Scotland) Act, 1937, s. 79(4).

[599] Social Work (Scotland) Act 1968, sched. 9.

powers relating to children in care rested with the local authority and the foster carer's powers have been traced to and constrained by the applicable regulations.

ii. *Children and Young Persons (Scotland) Care and Training Regulations, 1933*[600]

The Children and Young Persons (Scotland) Care and Training Regulations, 1933, came into force on 1st November 1933.[601] Part C of these Regulations contained the rules "as to the Boarding Out etc of Boys and Girls Committed to the Care of Education Authorities".

> 37: Where an Education Authority[602] were willing to undertake the care of children, "they shall make arrangements to ensure that such boys and girls are boarded out in accordance with the provisions of the Act and of these rules. Such arrangements shall be subject to the approval of the Department" and shall include "keeping a list of persons, referred to in these rules as 'foster parents', who are willing and fitted to undertake the care of boys and girls." No mechanism was provided to assess "fitness" (nor criteria against which it was to be judged) other than the rules below excluding certain categories of individual from acting as foster parent.
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> 39: "Every boy and girl shall be examined by one of the Education Authority's medical officers before being boarded out" and given medical attention if required.
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> 40: The nature of the care and training expected of foster-parents was set out in revealingly specific terms: "The foster-parents shall be required (a) to give boys and girls the care and attention necessary for their proper training in habits of punctuality and thrift, of good manners and language, of cleanliness and neatness, of cheerful obedience to duty, of consideration and respect for others, and of honour

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[600] SR&O, 1933, No 1006 (S.55) (reproduced in Trotter *The Law as to Children and Young Persons* (W. Hodge & Co, 1938), pp. 335 – 347).

[601] Care and Training Regulations, 1933, reg. 63.

[602] Since s. 3 of the Local Government (Scotland) Act, 1929, local authorities had exercised the functions of education authorities.

and truthfulness to word and act, (b) to notify the Education Authority of any material facts regarding the boys and girls (e.g. illness, accident) and (c) to endeavour, in conjunction with the Education Authority, to find employment for the boys and girls when they leave school". After-care is seen primarily in terms of assisting to find employment, but it is impossible to determine today how effective such efforts would have been in the economic circumstances of the 1930s – or indeed how effectiveness could be assessed.

There followed a group of rules laying out exclusions, that is to say specifying the types of person with whom Education Authorities could not board out children.

41: No more than 2 children were to be boarded out at one address, unless of the same family "whom it is desirable to keep together"; and boarding out was not permitted in foster-homes where there are more than four other boys or girls resident.

42: Boarding out was not permitted with persons in receipt of poor relief. This provision was probably designed to avoid placing children removed from poverty into a situation characterised by poverty (at this time, as we saw in Part One of the Present Report, still perceived as an environment where the risk of falling into criminality and immorality was high) and where, therefore, the cycle of indigence would not be broken.

43: Boarding out was not permitted with a person who had at any time been convicted of an offence that rendered them unfit to be a foster-parent, or with a person occupying or residing in a house or premises which were licensed for the sale of any excisable liquor. There was no definition of "fitness" for this purpose but it would be safe to conclude that unfitness included convictions for offences (of whatever nature) against children.

44: Boarding out was not permitted in a foster-home in which a certified lunatic or mentally defective person[603] was residing. Almost certainly this was conceived in protective terms, on the understanding of the time that those suffering from mental illness constituted risk to others.

45: "No boy or girl shall be boarded out with a foster-parent who depends for a living mainly on the payments received for boarding boys or girls." This exclusion is an early recognition that children are best brought up in an environment in which they are not seen as a source of income-generation, but rather by individuals motivated by altruism.[604] The wording of this rule is, at first sight, perplexing: if no child is to be boarded out with persons whose income is primarily derived from taking in boarded out children, how is that income generated? What was in mind was the private provider of care, who took children in as a private (for profit) arrangement: such a person could not receive children committed to the care of (and whose care was funded by) organs of the state.

There were also rules concerning the geographical position of the homes to which children and young persons could be boarded out.

46: "Where for any reasonable cause it appears to the Department, in conjunction with the Department of Health, that boys and girls should not be sent to any particular district, they shall inform the Education Authority accordingly, and in any such case no boy or girl shall for the time being be boarded out in that district".

47: "No boy or girl shall be boarded out in a district outwith Scotland."

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[603] These were technical terms: see s. 1 of the Mental Deficiency and Lunacy (Scotland) Act 1913 (discussed below at **2.H.iii**).

[604] The Morton Committee, p. 116, had earlier adverted to the risks of attracting the wrong sort of carers when boarding out attracted financial assistance. These fears were repeated in the Clyde Report (1946) at para [53], discussed more fully above at **1.D.ii**.

48: An Education Authority was enabled to board children out in an area of another Education Authority. This was the basis upon which many children from the larger towns and cities were boarded out in the Highlands and Islands of Scotland.

Visiting (by officials) of boarded out children was mandated:

49: "The medical officer of the Education Authority shall visit boarded-out boys and girls in their foster-homes every six months, provided that where boys or girls are boarded out in the area of another Education Authority the responsible Authority may make arrangements with the other Authority for the visits to be made by the medical officer of the area of residence."

50: "The Education Authority to whose care boys and girls are committed shall cause them to be visited within one month of their being boarded out and thereafter at least once in every three months. No boy or girl shall be visited at school. The Authority shall forward to the Department half-yearly reports of these visits and shall notify them immediately of any change of address of the foster-home." The prohibition on school visits emphasises that it is the child's or young person's home surroundings (and their continuing suitability) that was to be the focus of inspections. That reports were required to be submitted indicates that visits were individualised and the opportunity was therefore present to identify and raise any welfare concerns in relation to any child, or his or her treatment by foster parents.

51: "Any boy or girl may be visited at any time by any person acting on behalf of the Scottish Education Department".

52: Medical and dental attention was to be arranged when necessary, including the provision of medicines, medical and surgical appliances and extras ordered by the medical attendant.

53: "Boys and girls shall be allowed to receive letters and, at such reasonable intervals as the Education Authority may determine, visits from their parents (or guardians), provided that the Authority may suspend the privilege in any particular

case if they are satisfied that it is in the interests of the boy or girl to do so." The conceptualisation of parental visits as a "privilege" is to be noted, as is the conferral on the Education Authority of discretion to permit (and therefore to refuse) personal visits.

54: "The Education authority shall make suitable arrangements for the care and supervision of a boy or girl who has been placed in employment and cannot conveniently continue to reside with the foster-parent".

iii. Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947[605]

On 20th October 1947, Part C of the Care and Training Regulations, 1933 was revoked[606] and replaced by the 1947 Regulations, which also covered, to some extent, the accommodation of children in institutions. The 1947 Rules and Regulations made some effort to address the issue identified in the Clyde Report[607] of ensuring the suitability of foster carers, but other than that contain no direct prohibition on boarded-out children being put to work by their foster-parents in crofts and the like. They provided in relevant part as follows:

2. "Foster-parent" was defined to mean "a husband and wife, or a woman, with whom a child is boarded-out by a local authority".

This provision had no predecessor in the 1933 Regulations. Single men, or unmarried couples (of any gender mix) were from 1947 unable to act as foster-parent. The assumptions were clearly that a man alone was likely to be motivated by desires not in keeping with children's welfare (or that caring for children was not man's work), and that couples who were unmarried would give the wrong moral message to impressionable children.

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[605] SI 1947 No. 2146 (S. 76).

[606] Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947, reg. 3.

[607] See above at **1.D.ii**.

> 4. Where a local authority become responsible for the care of a child apart from his parents they shall make arrangements for boarding him out as soon as possible with a suitable foster-parent, unless for some special reason they are satisfied that it is not desirable to do so.

This created a presumption in favour of boarding-out a year before such a presumption appeared in primary legislation and gave effect to the recommendation in the Clyde Report that boarding-out should if possible be preferred to institutional care.

> 7. A local authority shall satisfy themselves by all necessary enquiries that any person whom they propose to select as a foster-parent for the care of boarded-out children is of good character and is in all respects fit to look after the health, education and general well-being of children.

The selection of foster-parents was, as the Clyde Report had recommended, substantially tightened from what had gone before by requiring the local authority to make a positive assessment of the prospective foster-parent's fitness, rather than simply checking that they did not come within one of the exclusions.

> 8. Before boarding out a child with a foster-parent, the local authority shall satisfy themselves that the foster-parent is a suitable foster-parent for that child.

The previous article focused on suitability in general and this interesting article sought for the very first time to ensure that the prospective foster-parent would be able to meet the needs of the individual child being considered for boarding-out. This is an acceptance that different children have different needs. It was further provided that the local authority "shall, if possible, select a person who is of the same religious persuasion as the child or who gives an undertaking that the child will be brought up in accordance with that religious persuasion."

> 9. So far as reasonably practicable, children of the same family shall be boarded-out in the same house.

Again, this was new and is clearly motivated by a concern for the child's emotional wellbeing.

> 10. A child shall not be boarded-out or be allowed to remain

(1) in a house which-

(a) is so situated or in such sanitary conditions as to be injurious or dangerous to his health;

(b) having regard to available transport facilities, is not within reasonable distance of a school appropriate to his educational requirements;

(c) does not permit of suitable sleeping accommodation for the child in a room properly lit and properly ventilated;

(2) with a person who-

(a) is in receipt of public assistance;

(b) depends for a living mainly on the payments received for boarding children;

(c) by reason of old age, infirmity, ill-health or other cause, is not fit to have care of the child;

(d) occupies or resides in a house or premises licensed for the sale of excisable liquor;

(3) in a household which includes a person who-

(a) is certified as a lunatic or as a mental defective[608];

(b) has at any time been convicted of an offence which in the opinion of the local authority renders him unfit to be associated with the child;

(c) is suffering from pulmonary tuberculosis.

(4) in any environment which is likely to be detrimental to the child".

Much of this is a restatement of the 1933 Rules, but Paragraphs (1), (3)(c) and (4) are new and show an increased awareness of the importance of physical environment to the safe development of children. That a child was not to be "allowed to remain" if these conditions existed suggests an on-going monitoring obligation on the part of the local authority.

[608] These were technical terms: see s. 1 of the Mental Deficiency and Lunacy (Scotland) Act 1913.

11. “(a) Unless they are of the same family not more than three children shall be boarded-out, or allowed to remain, in the same house at the same time.[609]

(b) A child shall not be boarded-out in a house where more than three other children reside unless one of them is a brother or sister of the child to be boarded-out.

(c) If the total number of children in a house subsequently exceeds four, a boarded-out child, not being a brother or sister of another child in the home, shall forthwith be withdrawn.”

12. The child was to be provided with suitable clothing and footwear. No such requirement had appeared in the 1933 Rules.

13. “(a) Where a local authority board-out a child, they shall send immediately to the education authority of the area in which the child is boarded-out particulars of the child’s full name, age and religion and of any bodily or other condition that may require special attention, his Medical and Educational Record Card and also the name and address of the foster-parent with whom he has been boarded-out.

(b) They shall also in January of each year furnish each education authority in whose area children are boarded out by them with a list giving the full name, age and religion of each child and the name and address of his foster-parent.

(c) They shall also in any case where children are boarded-out in a large burgh send a copy of the particulars required by sub-paragraphs (a) and (b) of this Article to the local authority of the large burgh.”

This article imposed a substantial increase in the record-keeping requirements, which might have permitted better monitoring of children’s progress, though in its wording it seems

[609] The number had been two under the 1933 Regulations.

designed to ensure simply that the local authority did not lose track of children for whom they were responsible, and where these children were.

> 14. "Where a local authority board-out a child in their own area they shall arrange for his supervision by an officer of the authority duly appointed for the purpose or by some other reliable person resident in the locality where the child is boarded-out."
>
> 15. "Where a local authority board-out a child in the area of another local authority they shall arrange for his supervision by some reliable person resident in the locality in which the child is boarded-out, and in selecting such person shall consult with the local authority of that area."
>
> 16. "The boarding-out authority shall arrange that the person appointed to supervise a boarded-out child under Articles 14 and 15 hereof shall-
>
> > (a) report to them within three months of the boarding-out of the child with respect to the matters (a) to (j) inclusive in Article 18 hereof;
> >
> > (b) report immediately on any particular matter which in his or her view should be brought to the notice of the boarding-out authority".

This, and the preceding two rules, required (in the way that the 1933 Regulations had not) that each boarded-out child be allocated to a named individual whose duty was to supervise the child to ensure that the foster-parents and the home chosen continued to be suitable for the child, and to draw up a report thereon at regular intervals. (Today, we would see this role as that of an allocated social worker to a looked-after child). The content of "supervision" remained, however, unspecified.

> 17. "The local authority shall appoint an officer with experience and knowledge of social service for the purpose of assisting them in the performance of their functions under these Rules and Regulations, including the selection of foster-parents and the visitation of children boarded out by the authority."

> 18. "The officer appointed under Article 17 hereof shall visit or cause to be visited by persons with suitable qualifications and experience every child boarded-out by the authority within one month of the boarding out of the child and thereafter at intervals of not more than six months. The authority shall also arrange that such children shall be visited by members of the authority at least once a year. The officer or members, as the case may be, shall furnish to the authority a report on each visit in respect to-
>
> (a) the suitability of the foster-parent;
>
> (b) the general conditions of the home;
>
> (c) the number of other children in the house, keeping in view the requirements of Article 11 hereof;
>
> (d) the sleeping arrangements for the child and the condition of his bed, bed-clothes and night apparel;
>
> (e) the condition of the child's clothing;
>
> (f) the child's general well-being and behaviour;
>
> (g) the progress the child has made at school;
>
> (h) the manner in which the child is occupied outwith school hours;
>
> (i) any complaint made by, or concerning, the child; and
>
> (j) any other matter relative to the child's welfare which they consider should be reported."

Again, all of this was new – though the 1933 Regulations had required (without detailed specification of purpose) 3 monthly visits by the education authority. Following the Clyde Report's concerns about overburdening foster parents, the 1947 Rules and Regulations reduced this to 6-monthly visits, but with greater obligation on local authorities, which now

had to perform not only initial vetting of foster parents but also continuous monitoring. Official visitors were required to report on the matters listed above, though there is nothing to indicate how local authorities were to respond to such reports. It may, however, be assumed that negative reports would be used in the decision-making process of approving foster-parents and sending children to them in the future. Of particular note is the provision in article 18(i) which for the first time provided the child with an opportunity to make complaints.

> 19. The local authority was to be responsible for arranging for the child's medical care; medical examination was to be at six monthly intervals. This was set out with far greater specificity than was found in the 1933 Regulations.
>
> 21. "Where a local authority have reason to believe that a foster-parent is a party to a contract for the purpose of ensuring the payment to him of a sum of money upon the illness or death of the child boarded-out with him, they shall forthwith withdraw the child from the foster-parent."
>
> 22. The Secretary of State could specify that children should not be sent to any area, or that the number of children already boarded-out in that area should be reduced.
>
> 29. "No child shall be boarded-out with a foster-parent or placed in an institution outwith Scotland except with the consent of the Secretary of State."

The 1933 Rules had contained a prohibition on boarding-out outwith Scotland,[610] but this article now permitted it with the appropriate approval. How the visitation requirements could be met with children boarded-out outwith Scotland – particularly if overseas – is obscure.

[610] 1933 Rules, r. 47.

30. Any child could be visited at any time by any person acting on behalf of the Secretary of State.

31. "A local authority shall, if so required by the Secretary of State, remove a child from the care of a foster-parent or from an institution in which he has been placed".

32. "When a child to whom these Rules and Regulations apply is leaving or has left school the local authority shall secure, in consultation with the foster-parent or the institution concerned, that arrangements are made for placing him in suitable employment and for continuing care and supervision, including, if necessary, the provision of suitable lodging and equipment."

33. "A local authority shall, if required to do so, furnish the parents of a child boarded-out with a foster-parent or placed by them in an institution with periodical reports as to the welfare and progress of the child; and unless, in the opinion of the local authority, it would be against the interests of the child, the parents shall be permitted to communicate with the child or with his foster-parent or with the institution, either directly or through the office of the local authority, as the local authority may in any particular case decide; and in exceptional circumstances the local authority may permit the parents to visit the child."

Again, this is more detailed than the equivalent rule in the 1933 Rules,[611] but it retains the distrust of parental visits that characterised the earlier rules and ensures that the power to permit visits and communication lay solely with the local authority, whose discretion in the matter could not be challenged.[612] This, and the immediately following article, and para 10

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[611] 1933 Rules, r. 53.

[612] As late as 1982 the House of Lords affirmed that discretion to allow contact lay with local authorities and that the court had no power to review the merits of their decision – except as being "*Wednesbury* unreasonable": *A v Liverpool City Council* [1982] AC 363. Writing of English law, see J. Masson "Contact Between Parents and Children in Long-Term Care: the Unresolved Dispute" (1990) 4 *International Journal of Law and the Family* 97.

of the Schedule, are the only regulations governing the child's relationship with his or her natural family while boarded-out with foster-parents.

> 34. "A local authority shall immediately notify the parents of a child who has been boarded-out with a foster-parent or placed by them in an institution, of the death of the child or of any serious illness or serious accident, that may befall the child."

a. SCHEDULE: Boarding-Out Children with Foster-Parents: Principles to be Followed

"In boarding children with foster-parents the object is to ensure that they are brought up in the atmosphere of a good and secure home.[613] Foster-parents shall accordingly bring up[614] a child placed by the local authority in their custody as one of their own children and devote to this duty the care which good parents give to their children.[615] To this end, foster-parents should act in accordance with the following principles:-

1. *Food*. Each child shall be provided with regular meals, and the food shall be wholesome, varied and sufficient to maintain good health.
2. *Clothing*. The clothing (including sleeping apparel) and footwear, of each child shall be kept clean and in good repair.
3. *Sleeping arrangements*.
    a. Arrangements shall be made for each child to have sufficient hours of sleep.
    b. The bedroom in which a child sleeps shall be the one specifically approved by the local authority and shall not be changed except as an emergency arrangement without their approval.

[613] A secure home is not a temporary or short-term placement.

[614] Again, a long-term placement is implicit in the terminology of "bringing up" rather than merely looking after a child.

[615] This carried, at least by implication, the decision-making powers of parents.

c. No persons beyond the number approved by the local authority shall be allowed to occupy that bedroom.

d. The bedding for each child shall be sufficient and comfortable and shall be kept clean and well aired.

e. No child shall occupy the same bed or bedroom as an invalid or an old or infirm person.

f. No boy over the age of 7, and no girl, shall occupy the same bedroom as a person of the opposite sex over that age, except that very young children may occupy the same bedroom as their foster-parents. Not more than two children shall sleep in one bed.

4. *Fire-guards*. Precautions must be taken to protect domestic fires so as to guard against the risk of a child being burnt or scalded.

5. *Training and Discipline*.

   a. Each child shall be brought up in accordance with his or her religious persuasion.

   b. The foster-parent shall train each child in habits of punctuality and thrift, of good manners and language, of cleanliness and neatness, of self-respect, of consideration and respect for others, and of honour and truthfulness in word and act.[616]

   c. Each child shall also be brought up in habits of industry, but shall be given adequate opportunity for play and recreation.

   d. Each child of school age shall, if his or her health permits, be sent regularly to school.

   e. Wherever possible each child shall be encouraged to join some juvenile organisation.

[616] Much of this paragraph is repeated from the 1933 Rules, r. 40, though the requirement there to train the child in "cheerful obedience to duty" has been dropped.

f. The foster-parent shall not administer indiscriminate or harsh punishment. Persistent misconduct by the child shall be reported to the local authority at the address given in paragraph 12(b)[617] hereof.

6. *Medical.*
   a. [The doctor is to be named.]
   b. The doctor's attention shall be drawn to any apparent physical or mental weakness of the child, including such defects as weak eyesight, defective teeth, ear trouble, enlarged tonsils, chest weakness, incontinence, growing pains and rheumatism.
   c. The foster-parent shall see that the child receives any medicines, medical and surgical appliances and extras prescribed by the doctor; and that where spectacles have been provided they are worn.
   d. The foster-parent shall report immediately to the local authority any case of serious illness or accident occurring to the child.
7. *Insurance.* No foster-parent shall become a party to any contract for the purpose of ensuring the payment to him for his own benefit of a sum of money upon the illness or death of the child.
8. *Intoxicants*. No child shall be allowed to partake of any intoxicant except upon the order of the doctor or in case of sickness or other urgent cause; in no circumstances shall a child be sent to fetch excisable liquor for others.
9. *Visitation*. Children may be visited without notice from time to time by members or officials or other persons authorised by the local authority or by the Secretary of State, and, on these occasions, all facilities shall be afforded to the visitor to interview the children and inspect their clothing, sleeping accommodation, etc. If a visiting book is supplied to the foster-parent it must be available for inspection by any authorised visitor.

[617] This is a misprint: the address is listed in 11(b).

10. *Parents and relatives*. The foster-parent shall comply with any instructions of the local authority with reference to communication, whether by letters or visits, between children and their parents or other relations.
11. *Co-operation with Local Authority*.
    a. The foster-parent shall co-operate with the authority and their officials for the child's welfare and shall notify them of important facts such as –
       (i) persistent misconduct on the part of the child;
       (ii) any change of address, both before and after the change.
    b. Communications with the local authority shall be sent to [address to be provided].
12. The foster-parent shall, on demand, give up the boy or girl to any person duly authorised by the local authority.
13. *Employment after leaving school.* The foster-parent shall endeavour, in conjunction with the local authority, to find employment for the child when he or she leaves school".[618]

iv. The Boarding-out of Children (Scotland) Regulations, 1959[619]

The 1947 Rules and Regulations applied from 20th October 1947 until their replacement on 1st August 1959 by the Boarding-out of Children (Scotland) Regulations, 1959. The 1959 Regulations applied to boarding-out by a local authority in respect of children in their care under s. 1 of the 1948 Act, children committed to their care as a fit person under the 1937 Act, and children committed to their care under s. 10 of the Matrimonial Proceedings (Children) Act, 1958;[620] the Regulations also applied (as a major extension from the 1947

[618] It may be noted in passing that there was no expectation of training in college or further or higher education for boarded-out children leaving school, but a year later s. 20 of the 1948 Act itself authorised local authorities to meet education and training expenses of persons under 21 who had previously been in care.

[619] SI 1959 No 835 (S. 44).

[620] This new provision allowed the court in any matrimonial proceedings in which it was impracticable or undesirable to entrust the child to either of the parties to the marriage to commit the child to the care of any

Rules) to the boarding-out of children by voluntary organisations (other than by the managers of an approved school).[621] The 1959 Regulations represented more detailed regulation of boarding-out than its predecessor had done, especially in relation to the co-operation required between different local authorities (to facilitate the long-established practice of boarding-out children in areas other than their local area). The focus of the 1959 Regulations is far less than the 1947 Regulations on such matters as the child's sleeping arrangements and clothes, and more on the duties that local authorities have to ensure suitability of foster parents and supervision of children, for example by requiring three monthly rather than six monthly visits. The 1959 Regulations provide in relevant part as follows:

> 2. (1) Before boarding-out a child a care authority[622] or voluntary organisation shall obtain and consider reports on the circumstances of the child's home and the circumstances in which he came into care, and any report on the child which may be available from a reception centre or a child guidance clinic.
>
> (2) Before boarding-out a child a care authority or voluntary organisation shall arrange for the child to be examined by a duly qualified medical practitioner and shall obtain from him and consider-
>
> > (a) a report in writing on the child's bodily health and … on the child's mental condition; and
> >
> > (b) a statement whether, in his opinion, the child is fit to be boarded-out.
>
> (3) Immediately before boarding out a child a care authority or voluntary organisation shall arrange for him to be medically examined to enable them to

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other person, or the local authority. Section 10 of the 1958 Act was repealed by the Children (Scotland) Act 1995, sched. 5 para 1.

[621] 1959 Regulations, reg. 1(1)(b).

[622] That is to say the local authority into whose care a child has been committed: 1959 Regulations, reg. 1(1)(a).

determine whether he has any infection which may make postponement of boarding-out advisable.

a. Suitability of foster parent

3. (1) a child shall not be boarded-out except with-

(a) a married couple acting jointly, or

(b) a woman, or

(c) a grandfather, uncle or elder brother of the child.[623]

(2) A child shall not be boarded-out or remain boarded-out with a person who depends for a living mainly on payments received for the accommodation and maintenance of children in care.

4. A child shall be boarded-out, if practicable, with a person who is of the same religious persuasion as the child or, if that is not practicable, with a person who undertakes that the child will be brought up in accordance with the child's religious persuasion.

5. Before boarding-out a child the care authority or voluntary organisation shall satisfy themselves in all practicable ways, including the making of enquiries of persons to whom the prospective foster parent is known, that the prospective foster parent is of good character and is in all respects suitable to look after the child.

b. Suitability of foster home

[623] These circumstances (which did not appear in the 1947 Regulations) allowed a single man to act as a foster-parent so long as he was related to the child in the manner specified. The prohibition on unmarried couples acting as such remained. Provision was also made to allow the child to remain in the care of a foster home when one of the foster parents died.

6. (1) A child shall not be boarded-out or remain[624] boarded-out in a foster home which-

(a) by reason of its situation or condition may be injurious or dangerous to the child's health;

(b) does not permit of suitable sleeping accommodation for the child in a room with adequate ventilation and lighting; or

(c) does not have a sufficient supply of wholesome water for domestic purposes either within or near the home, and suitable and sufficient sanitary facilities.

(2) A child shall not be boarded-out or remain boarded out in a foster home where the household includes a person who is believed by the care authority or voluntary organisation to be suffering from any physical or mental illness[625] which might adversely affect the child or to have been convicted of such an offence as would render it undesirable that the child should associate with him.

7. (1) Before boarding-out a child the care authority or voluntary organisation shall ensure that the prospective foster home is visited by the care authority's children's officer, or a visitor, as the case may be, who is personally acquainted with, or, if that is not practicable, fully informed about, the child, and shall satisfy themselves that the foster home and the household living there are likely to be suitable for the child.[626]

(2) Not less than 21 days before a child is to be boarded-out by the care authority in the area of another authority, or is to be boarded-out by a voluntary organisation,

[624] This suggests an on-going monitoring obligation on the local authority.

[625] This was wider than the technical specificity of both the 1947 and 1933 Rules.

[626] This concerns suitability for the individual child.

the care authority or the voluntary organisation, as the case may be, shall furnish the area authority with particulars of the prospective foster home; within 14 days thereafter the area authority shall furnish to the care authority or, as the case may be, the voluntary organisation such advice as they think fit on the suitability or otherwise of the prospective foster home; and before boarding-out the child the care authority or, as the case may be, the voluntary organisation shall consider such advice.

c. Boarding-out of children of same family

8. Where two or more children of the same family are to be boarded-out the care authority or voluntary organisation shall, wherever practicable, arrange for them to be boarded-out in the same foster home or, where this is not practicable, in foster homes as near together as is practicable.

d. Boarding-out outside Scotland

9. A child shall not be boarded-out with a person residing outside Scotland unless in his case special circumstances makes such boarding-out desirable in the opinion of the care authority or, as the case may be, the voluntary organisation, and, if a child is boarded-out outside Scotland, the care authority or voluntary organisation shall ensure that the requirements specified in Regulations 2 to 8 and 11 to 17 of these Regulations are observed in relation to that child as if he were boarded-out in Scotland.[627]

e. Limitation of Boarding-out

[627] This removed the requirement for the Secretary of State's authorisation for boarding-out outwith Scotland. It also put beyond doubt (as the 1947 Rules had not) that the suitability rules and the visitation rules continued to apply to children boarded-out outwith Scotland. No mechanism, however, was provided for visiting such children.

10. Where the Secretary of State directs that no more children shall be boarded-out in the area of a local authority, or a specified part of that area, no care authority or voluntary organisation shall board-out a child in that area or that specified part so as to increase the number of children boarded-out there beyond the number who were so boarded-out when the direction was given.

f. Notification of Boarding-out

11. (1) The care authority or voluntary organisation by whom a child has been boarded-out shall inform the parent or guardian of the child of the address of the foster home in which the child has been boarded-out unless-

(a) the parent or guardian cannot be found, or

(b) the care authority or voluntary organisation are of the opinion that in the interests of the child this paragraph should not apply in his case.

(2) Whenever a child who is under school leaving age or who, being over school leaving age, is continuing to attend school is boarded-out the care authority or, as the case may be, the voluntary organisation shall immediately send to the education authority for the area in which the child is boarded-out –

(a) particulars of the child's full name, age and religion and of any bodily or other condition that may require special attention, and

(b) the name and address of the child's foster parent.

(3) Whenever a child is boarded-out by a care authority with a person residing in the area of another local authority or is boarded-out by a voluntary organisation the care authority or the voluntary organisation, as the case may be, shall immediately inform the area authority, and shall send them the following particulars, that is to say –

(a) the child's name, sex, date of birth and religious persuasion;

(b) the name, religious persuasion and address of the child's foster parent;

(c) the date upon which the child is boarded-out with that foster parent; and

(d) the name of the authority or the voluntary organisation by whom the child is boarded-out.

g. Medical and dental treatment

12. (1) The care authority or voluntary organisation shall arrange that a boarded-out child shall be registered as a patient with a medical practitioner undertaking to provide general medical services under Part IV of the National Health Service (Scotland) Act 1947 in the district where the foster home is, and shall ensure that the foster parent arranges for the child to receive such medical treatment as may be required.

(2) The care authority or voluntary organisation shall arrange that a boarded-out child shall be examined by a medical practitioner within one month of his being placed in a foster home and thereafter at intervals not exceeding twelve months; and the care authority or voluntary organisation shall arrange to be furnished by the medical practitioner on the occasion of each examination with a report in writing on the health of the child.

(3) The care authority or voluntary organisation shall arrange that a boarded-out child shall undergo regular dental examination and shall ensure that the foster parent arranges for the child to receive such dental treatment as may be required.

h. Visits by children's officer or visitor

13. The care authority or voluntary organisation shall ensure that a child boarded-out by them shall within the first two months after being boarded-out and thereafter at intervals of not more than three months from the date of the last visit be visited by the children's officer or by a visitor, as the case may be, who shall on each occasion see the child, his foster home and foster parent and furnish to the care

authority, or, as the case may be, the voluntary organisation, a written report on the visit;

Provided that for eighteen months after the coming into force of these Regulations this Regulation shall read as if for the words “three months” there were substituted the words “six months”.[628]

i. Supervision by area authority

14. When a child is boarded-out by a voluntary organisation or is boarded out by a care authority with a person residing in the area of another authority, then, so long as the care of that child is not taken over by the area authority, either under subsection (4) of section 1 of the Act or otherwise, the voluntary organisation or the care authority may comply in relation to that child with the requirements of these Regulations with respect to the visiting and inspection of the foster home and of the boarded-out child by arranging for the area authority to carry out such visiting and inspection and to supply the required reports and information to the voluntary organisation or the care authority, as the case may be; but no such arrangement shall relieve the care authority or voluntary organisation of any other duties or powers in relation to the welfare of the child.

j. Misadventure to a boarded-out child

15. (1) The care authority or voluntary organisation by whom a child has been boarded-out shall require the child’s foster parent to notify them forthwith if the child-

(a) dies;

[628] The 1947 Regulations had required visits not more than six months apart and so the new requirement doubled the number of visits per year. Both the Clyde Report and the Scottish Advisory Council on Child Care Report from 1950 (discussed above at **1.D.ii** and **1.D.iv.c**) had considered that six monthly visits were sufficient.

(b) runs away or without lawful authority is taken away from the foster home; or

(c) suffers an illness or injury likely to result in death or a serious disability.

(2) The care authority or voluntary organisation shall forthwith inform the Secretary of State and, if practicable, the parent or guardian of the child of any such occurrence, and shall supply to the Secretary of State such further information about the circumstances of the occurrence as he may require.

k. Termination of boarding-out

16. (1) The care authority or voluntary organisation shall terminate the boarding-out of a child with a particular foster parent if it appears to them that it is no longer in the best interests of the child to be boarded-out with that foster parent.[629]

(2) The care authority or voluntary organisation shall forthwith terminate the boarding-out of a child with a particular foster parent if they have reason to believe that the foster parent is a party to a contract for the purpose of ensuring the payment of a sum of money upon the illness or death of the child.

(3) Where a child has been boarded-out by a voluntary organisation or has been boarded-out by a care authority with a person resident in the area of another authority, and the area authority have reason to believe that the home in which the child has been placed is no longer suitable as a foster home, or the person with whom the child has been boarded-out is no longer suitable as a foster parent, the area authority shall forthwith notify the care authority or voluntary organisation.

[629] This is a far wider power to terminate a placement than had existed before, and is not limited to a foster parent's failure to satisfy the conditions in the Regulations. Again, it suggests an on-going monitoring role for the local authority, primarily fulfilled by visitation and requiring an individualised assessment of the child's present position.

(4) Where a child ceases to be boarded-out the voluntary organisation or, as the case may be, the care authority (if it is not also the area authority) shall forthwith notify that fact, and the date upon which the child ceases to be boarded-out, to the area authority and the education authority; and if the boarding-out was terminated because a breach of these Regulations had occurred or because the foster parent had proved otherwise unsatisfactory, the voluntary organisation or, as the case may be, the care authority shall also notify the area authority of the reasons for the termination.

I. Records

17. (1) A care authority shall compile and maintain a case record in respect of-

(a) every child boarded-out by them;

(b) every child boarded-out by another local authority in respect of whom they perform under Regulation 14 of these Regulations any of the supervisory duties referred to in that Regulation; and

(c) every child boarded-out by a voluntary organisation in relation to whom they perform such supervisory duties.[630]

(2) A voluntary organisation shall compile and maintain a case record[631] in respect of every child boarded-out by them.

(3) Every case record compiled under this Regulation shall be preserved for at least three years after the child to whom it relates has attained the age of eighteen years or, if he has died before attaining that age, after his death; and shall be open to

[630] It is to be noted that the primary responsibility for record keeping, even in relation to children boarded-out by voluntary organisations, lay with the local authority.

[631] This appears to be different from the register of basic information required to be kept under para. 4 and suggests a requirement to monitor and assess the child's progress in the placement.

inspection at all reasonable times by any person authorised by the Secretary of State to inspect such records.

(4) A local authority shall in respect of every child boarded-out in their area, whether by them or by another local authority or by a voluntary organisation, enter into a register to be kept for the purpose particulars as to-

(a) the child's name, sex, date of birth and religious persuasion,

(b) the name, religious persuasion and the address of the foster parent,

(c) the name of the authority or organisation by whom he is boarded-out,

(d) the dates on which boarding-out on each occasion begins and ceases, and

(e) the reason why it ceases if they have been notified of this under paragraph (4) of Regulation 16 of these Regulations;

and such register shall be open to inspection at all reasonable times by any person authorised by the Secretary of State to inspect such records.

Though these Regulations were detailed in a number of important areas there were also noticeable (to modern eyes) omissions – in particular there was no requirement to work towards rehabilitation of the child with his or her natural family, nor to ensure regular contact between the child and that family.

v. *Boarding-Out and Fostering of Children (Scotland) Regulations 1985*[632]

The Social Work (Scotland) Act 1968 contained a power of the Secretary of State to make regulations governing how local authorities exercised their boarding out functions, including ensuring that both the persons boarded out and the places where they were boarded out would be "supervised and inspected by a local authority or voluntary organisation, as the

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[632] SI 1985 No. 1799.

case may be, and that those persons shall be removed from those places if their welfare appears to require it". But new regulations were not made immediately and the Boarding-out of Children (Scotland) Regulations, 1959 continued to apply until 1st April 1986, when they were revoked and replaced by the Boarding-out and Fostering of Children (Scotland) Regulations 1985.[633] While the 1959 Regulations were based on the understanding that boarding-out was a long-term solution, the 1985 Regulations perceived fostering as a temporary placement, reflecting the shift presaged by the 1968 Act from replacement families to short-term non-institutional care. This is probably why the provisions in the 1959 Regulations permitting boarding-out outside Scotland[634] and allowing the Secretary of State to limit the number of children boarded out in particular areas[635] were not repeated in the 1985 Regulations.

a. Application of Regulations

"To foster" was defined in the 1985 Regulations as meaning "to arrange for a child to live as a member of the family of a person who is not the child's parent or guardian and who undertakes to care for him other than in accordance with the Adoption Agencies (Scotland) Regulations 1984;[636] and it includes 'boarding out' within the meaning of the [1968] Act".[637] The Regulations applied to fostering of children in the care of either local authorities (under a variety of statutory authority) or voluntary organisations.[638] This included fostering made a condition of a supervision requirement by a children's hearing.[639] Indeed, a local authority

[633] 1985 Regulations, reg. 1 for commencement and reg. 26 for revocation. These regulations were based to a large extent on *Proposals for Regulations on the Fostering of Children Under the Social Work (Scotland) Act 1968*, produced by the Social Work Services Group in December 1984.
[634] 1959 Regulations, reg. 9
[635] 1959 Regulations, reg. 10.
[636] These imposed duties on adoption agencies (which all local authorities are) to safeguard and promote the welfare of children before they are placed for adoption.
[637] 1985 Regulations, reg. 2(1).
[638] 1985 Regulations, reg. 3(1)(a) – (c), (e).
[639] 1985 Regulations, reg. 3(1)(f).

could not recommend to a children's hearing a placement with a particular foster parent unless the procedures in the Regulations had been followed and the conditions satisfied:[640] this imposed significant obligations on local authorities in respect of children brought before children's hearings the outcome for whom was likely to be a placement away from home. The Regulations also applied to respite care where "a child with particular handicap or needs who is normally cared for by his parent, guardian or relatives is cared for by others for a short period" – but only where a local authority or voluntary organisation were responsible for choosing who would provide the respite care.[641] The obligations in the Regulations were imposed on "care authorities", defined as local authorities and voluntary organisations responsible for the care of children.[642]

b. Fostering Panels and Approval of Foster Parents

One of the major innovations in the 1985 Regulations was the requirement on care authorities to establish fostering panels,[643] whose functions were to "consider every person referred to it by the care authority as a prospective foster parent" and to make recommendations to the care authority as to the suitability of such a person to act as a foster parent either for any child, any category of child or any particular child.[644] In considering its recommendations, the care authority had to have regard to its duties under regs. 14 – 16 (see below), and also to its duties under s. 20 of the 1968 Act[645] to give first consideration to the need to safeguard and promote the welfare of the child throughout his

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[640] 1985 Regulations, reg. 20.

[641] 1985 Regulations, reg. 3(1)(d).

[642] 1985 Regulations, reg. 2(1).

[643] 1985 Regulations, reg. 4.

[644] 1985 Regulations, reg. 6(1).

[645] 1968 Act, s. 20, as substituted by s. 79 of the Children Act 1975 and amended by the Health and Social Services and Social Security Adjudications Act 1983, sched 2 para 5(a).

or her childhood and to give due consideration to the ascertainable wishes and feelings of the child, having regard to his or her age and understanding.[646]

A care authority could not approve any person as a potential foster parent unless:

> "(a) the care authority has, so far as reasonably practicable, obtained the information set out in Schedule 1;[647]
>
> (b) the prospective foster parent has been interviewed by or on behalf of the care authority;
>
> (c) the care authority has conveyed to the fostering panel a report including the information gathered under sub-paragraph (a) together with such other information and such comment as it thinks appropriate;
>
> (d) the care authority has considered a report from the fostering panel containing recommendations on the suitability of the prospective foster parent; and
>
> (e) the care authority is satisfied, having regard to the duty imposed on it by section 20 of the [1968] Act, that the prospective foster parent is a suitable person with whom to place children."[648]

c. Information and Agreements

The other major innovation in the 1985 Regulations was that the care authority became obliged to enter into an agreement with approved foster parents regarding the care to be provided for any children who might be placed with them, including details of the financial

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[646] 1985 Regulations, reg. 6(2).

[647] Including the name, age and address of the foster parents; details of other members of the household; the prospective foster parent's "personality", religion, financial circumstances, previous experience and reasons for wishing to become a foster parent; and the attitudes of other members of their household.

[648] 1985 Regulations, reg. 7.

arrangements;[649] the care authority's policies and practice regarding the welfare of children for whom it had responsibility, the ways foster parents would be expected to follow these policies and practices and the assistance to be provided by the care authority to that effect; and the arrangements made by the care authority to review "at appropriate intervals" its approval of foster parents for the purposes of the regulations.[650]

Once a child had been placed with a particular foster parent the care authority was obliged to provide the foster parent with information about that child's background, health and mental and emotional development, and any other relevant information including information about the child's own wishes and feelings about the placement.[651] The care authority and foster parent had to agree the arrangements to be made in respect of contact between the child and his or her family (in accordance with the Code of Practice issued by the Secretary of State under s. 17E of the 1968 Act[652]), the arrangements for the child's education and medical and dental treatment and details of any financial arrangements.[653]

d. Placement Decisions

A care authority was able to place a child for whom it had had responsibility for more than six weeks with foster carers only after having ascertained and considered particulars set out in Schedule 2 to the 1985 Regulations[654] and, having regard to its duty under s. 20 of the 1968 Act, it was satisfied that the foster placement was appropriate to the child's needs and

[649] The prohibition in reg. 3(2) of the Boarding-out of Children (Scotland) Regulations, 1959 (and earlier regulations) of boarding out with a person who depends for a living mainly on payments received for accommodating children was not repeated in the 1985 Regulations.

[650] 1985 Regulations, reg. 8.

[651] 1985 Regulations, reg. 23(a).

[652] Discussed above at **1.E.iii.a**.

[653] 1985 Regulations, reg. 23(b).

[654] Including details relating to the child and his or her background and any special needs, and details about the natural parents and any guardian.

in the child's best interests.[655] Where the care authority had had responsibility for the child for less than six weeks, either the primary conditions just described or other conditions relating to the health of the person with whom, and the premises in which, the child was to be kept had to be satisfied;[656] thereafter the care authority had six weeks to meet the primary conditions.[657] An emergency (short-term) placement when neither of these alternatives applied was permitted so long as the care authority concluded that it was in the best interests of the child.[658]

In any case, a care authority could not place a child for fostering in any household except one that comprised a man and a woman living and acting jointly together, or a man or a woman living and acting alone.[659] This represented a substantial increase in the pool of potential foster carers, for both unmarried cohabiting couples and (non-related) single men had been excluded from the 1947 and 1959 regulations.[660] Same sex couples remained absolutely and in all circumstances barred irrespective of whatever they could offer any individual child.[661] (Single gay men or lesbians were not excluded automatically but were unlikely to be approved as "suitable" given the mind-set of the time that regarded parenting by same-sex couples as axiomatically inimical to the interests of children).[662]

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[655] 1985 Regulations, reg. 11.

[656] 1985 Regulations, reg. 12(1): these also required the care authority to satisfy itself that fostering the child with the person was in the child's best interests.

[657] 1985 Regulations, reg. 12(2).

[658] 1985 Regulations, reg. 13.

[659] 1985 Regulations, reg. 14.

[660] See above at **2.A.iii**, and **2.A.iv.a**.

[661] This remained the case until the Looked After Children (Scotland) Regulations 2009 (SSI 2009 No 210), discussed below at **2.A.vii**.

[662] It is not the place here to expose the fallacy inherent in this mind-set, but it is worth referencing the words, wise before their time, of Lord Kilbrandon in *Re D (An Infant) (Adoption: Parent's Consent)* 1977 AC 602 at pp 641-642.

In choosing a particular foster parent from its list of approved individuals, the care authority, having regard to its duty under s. 20 of the 1968 Act to treat the child's welfare as its first consideration and taking into account so far as practicable the child's own wishes and feelings, was required to ensure that the child was fostered by a person of the child's religious persuasion or where that was not practicable that the person undertook to bring up the child in the child's own religious persuasion.[663] Again having regard to its s. 20 duty and to the child's wishes and feelings, care authorities had to keep two or more children from the same family together or, where that was not appropriate or practicable, in homes as near together as was appropriate or practicable.[664] The structure of this regulation suggests that care authorities could separate siblings only when this was positively shown to be inappropriate or impracticable.

e. Notice

Notice of the foster placement had to be given by the care authority to the local authority in whose area the foster parent resided, and to the local education authority, the health authority and the parent or guardian of the child whose whereabouts were known – except that the parent or guardian need not have been informed if it was considered contrary to the child's interests to do so,[665] (for example if there was thought to be a risk that the parent would disrupt the placement).

f. Monitoring and Termination of Placement

An important monitoring obligation was placed on the care authority (whether local authority or voluntary organisation) by reg. 18, which obliged the authority to ensure that the child and foster parent were visited within one week of the placement and thereafter at

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[663] 1985 Regulations, reg. 15. As usual, these types of provision refer to the child's religious persuasion and not that of the parents'. This might suggest that the provision applied only to children old enough to be persuaded: perhaps, however, that is not what was meant by the phrase "religious persuasion".

[664] 1985 Regulations, reg. 16.

[665] 1985 Regulations, reg. 17.

intervals of no more than three months, as well as "on such other occasions as the care authority considers necessary in order to supervise the child's welfare and to give support and assistance to the person caring for him". The care authority was obliged to terminate the placement as soon as practicable where it appeared to the authority that it was no longer in the child's best interests to be cared for by the person fostering him or her under the Regulations.[666] Likewise, if the local authority responsible for giving effect to a supervision requirement made under s. 44(1)(a) of the 1968 Act which contained a condition that the child reside with a person other than his or her parent or guardian came to the view that it was no longer in the child's interests to reside there, they had to refer the case to the reporter to arrange a review hearing.[667] This imposed an important continuous overseeing role on local authorities even when a voluntary organisation was the care authority. Local authorities could not recommend a foster placement to a children's hearing unless the approval procedures had been carried out and the placement satisfied the requirements in the regulations.[668]

vi. Fostering of Children (Scotland) Regulations 1996[669]

The Boarding-out and Fostering of Children (Scotland) Regulations 1985 were in force for exactly 11 years until 1st April 1997, when they were revoked and replaced by the Fostering of Children (Scotland) Regulations 1996.[670] Any existing approval of persons as foster parents remained effective.[671] The Arrangements to Look After Children (Scotland)

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[666] 1985 Regulations, reg. 19.

[667] 1985 Regulations, reg. 21(3).

[668] 1985 Regulations, reg. 20.

[669] Children (Scotland) Act 1995 etc (Revocations and Savings) (Scotland) Regulations 1997 (SI 1997 No. 691), reg. 1 and sched.

[670] SI 1996 No. 3263.

[671] Children (Scotland) Act 1995 etc (Revocations and Savings) (Scotland) Regulations 1997 (SI 1997 No. 691), reg. 3.

Regulations 1996,[672] which required local authorities to make a care plan for each child looked after by them (whether in foster care, in a residential establishment, or otherwise),[673] also came into force on that date.

Reflecting the simplicity inherent in the concept of "looked after child" introduced by the 1995 Act, the Fostering of Children (Scotland) Regulations 1996 were stated to apply "where a local authority foster a child looked after by them under s. 17(6)" of the 1995 Act (thereby excluding private fostering arrangements). "Fostering" was defined as it was under the 1985 Regulations, other than that the reference to "boarding out" was dropped: to *"foster"* was stated to mean to "arrange for a child to live as a member of the family of a person who is not a parent, does not have parental responsibilities in respect of the child and who is not a relevant person in relation to the child and who undertakes to look after the child other than in accordance with the Adoption Agencies (Scotland) Regulations 1996". Responsibility both for approving foster carers and for placing children with them, as well as the duty to establish fostering panels, was now to rest exclusively with local authorities rather than, as before, "care authorities" which included both local authorities and voluntary organisations.

a. Approval of Foster Carers

Each local authority had to establish fostering panels.[674] The function of the fostering panel remained as it has been under the 1985 Regulations: to consider every person referred to it as a potential foster carer[675] and to make recommendations as to the suitability of such a person to act as a foster carer either for any child, any category of child or any particular child.[676] In considering its recommendations, the fostering panel had to consider all information and reports passed to it and any other information it requested, together with

[672] SI 1996 No. 3262.

[673] Arrangements to Look After Children (Scotland) Regulations 1996, reg. 3. See further, above at **1.F.ii.b**.

[674] 1996 Regulations, reg. 4. Each fostering panel had to contain a medical officer: reg. 4(2).

[675] The earlier language was foster "parent": since 1996 we have talked of foster carers.

[676] 1996 Regulations, reg. 6(1).

its duty under s. 17(1) of the 1995 Act to (a) safeguard and promote the child's welfare (which was to be its paramount concern); (b) make such use of services available for children cared for by their own parents as appear reasonable; and (c) take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities in relation to the child as appears both practicable and appropriate.[677] It always was unclear how fostering panels could give effect to the latter two elements in s. 17(1) and this provision is really concerned with ensuring that the child's welfare is the panel's paramount concern. Approval could be granted only where:

> "(a) the local authority has, so far as reasonably practicable, obtained the information or data set out in Schedule 1;
>
> (b) the prospective foster carer has been interviewed by or on behalf of the local authority;
>
> (c) the local authority has conveyed to the fostering panel a report including the information or data gathered under sub-paragraph (a) together with such other information and such comment as they think appropriate;
>
> (d) the local authority have considered a report from the fostering panel containing recommendations on the suitability of the prospective foster carer; and
>
> (e) the local authority are satisfied, having regard to the duty imposed on them by section 17(1) of the [1995] Act, that the prospective foster carer is a suitable person with whom to place a child or children."[678]

The information in Schedule 1 that had to be obtained for these purposes was rather different from that to be obtained under the 1985 Regulations, and now included the name, age and address of the foster carers and particulars of other members of the household;

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[677] 1996 Regulations, reg. 6(2).

[678] 1996 Regulations, reg. 7.

their personality, religion (and capacity to care for a child from any particular religious persuasion), racial origin, cultural and linguistic background (and capacity to care for a child of any particular origin or cultural and linguistic background); employment and standard of living; previous experience in bringing up children; and an analysis of the person's motivations for wanting to be a foster carer. Records had to be kept by the local authority of each foster carer, including of their approval and any reviews thereof and of the agreements made with the foster carer.[679]

While the 1985 Regulations required review of the approval of a person as a foster parent "at appropriate intervals", the 1996 Regulations required such reviews at least annually, and the review process itself was set out in much greater detail.[680] If no longer satisfied as to the foster carer's suitability to act as such, the approval had to be terminated.[681]

b. Foster Care Agreements

As under the 1985 Regulations, the 1996 Regulations required the local authority to enter into a written agreement with the foster carer concerning the matters listed in Schedule 2, including the support and training to be given, the procedure for handling complaints against the foster carer, the financial arrangements, the obligation not to administer corporal punishment,[682] the duty of confidentiality, and the foster carer's obligation to care for the child placed with the foster carer as if he or she was a member of that person's

[679] 1996 Regulations, reg. 18. These records had to be kept for ten years: reg. 19.

[680] 1996 Regulations, reg. 10.

[681] 1996 Regulations, reg. 10(3)(b).

[682] On which generally, see Appendix Two to this Report.

family and in a safe and appropriate manner and to promote his or her welfare having regard to the local authority's immediate and longer-term arrangements for the child.[683]

c. Placement Decisions

A local authority could place a child only with a person who had been approved as a foster carer and when satisfied that placement of the child with the particular foster carer was in the child's best interests.[684] In any case, the household had to comprise of a man and a woman living and acting jointly together, or a man or a woman living and acting alone.[685] The prohibition on same-sex couples was therefore maintained by the 1996 Regulations. Provision was made for emergency placements with approved foster carers; and with persons who had not been approved so long as the local authority had interviewed the person and inspected the accommodation, and the person was a relative or friend of the child.[686] The local authority was not able to make a recommendation to the children's hearing that the child be placed with a foster carer unless these rules had been satisfied.[687]

Before the placement, the foster carer must have entered into a foster care agreement as specified above, and also a foster placement agreement in relation to the particular child.[688] That latter agreement included matters such as a statement of the local authority's "care plan for the child and the objectives of the placement", the child's personal history, state of health and educational needs; the financial support to be given during the placement; arrangements for the local authority to visit the child; the contact arrangements with the

[683] 1996 Regulations, reg. 8 and Sched 2. Again, it would seem to be implicit that the foster carers acquired the decision-making powers necessary to fulfil these duties.

[684] 1996 Regulations, reg. 12(1).

[685] 1996 Regulations, reg. 12(4).

[686] 1996 Regulations, regs. 13 and 14.

[687] 1996 Regulations, reg. 15.

[688] 1996 Regulations, reg. 12(2).

child's parents; and the co-operation required of the foster carer with arrangements made by the local authority.[689]

d. Arrangements Made by Voluntary Organisations

The 1996 Regulations allowed local authorities to enter into arrangements with voluntary organisations to discharge their duties in relation to fostering. They could do so only if satisfied that the voluntary organisation had the capacity to discharge these duties and that making such arrangements was the most suitable way for these duties to be discharged.[690] These arrangements had to be reviewed annually, and voluntary organisations were prohibited from placing the child outside the British Islands.[691] The local authority retained monitoring responsibility over the child even when a child was placed with a foster carer by a voluntary organisation on behalf of a local authority: the local authority had to arrange for one of its officers to visit the child either within 14 days of the voluntary organisation requesting them to do so, or within seven days of being informed that the welfare of the child was not being safeguarded or promoted.[692]

vii. Looked After Children (Scotland) Regulations 2009[693]

The Fostering of Children (Scotland) Regulations 1996 were revoked by the Looked After Children (Scotland) Regulations 2009,[694] which have governed public fostering arrangements from 28th September 2009 until the present day.

Writing in 2013, Wilkinson and Norrie describe the effects of these Regulations as follows:

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[689] 1996 Regulations, Sched. 3.

[690] 1996 Regulations, reg. 16(1) and (2).

[691] 1996 Regulations, reg. 16(3) and (4).

[692] 1996 Regulations, reg. 17.

[693] SSI 2009 No. 210.

[694] 2009 Regulations, reg. 52.

15.36 The Looked After Children (Scotland) Regulations 2009 make provision for the appointment and composition of fostering panels,[695] whose functions are to consider the suitability or continued suitability of prospective or actual foster carers, whether they would be a suitable foster carer for a particular child or children, or any child or category of child and the maximum number of children they may have in their care at any one time and to make recommendations to the local authority thereupon.[696] Since the coming into force of the 2009 Regulations there has been no limitation on the type of family structure that potential foster carers must belong to and foster carers are assessed as suitable according to their own merits, without legally specified preconceptions about their lifestyles.[697] The local authority is responsible for the approval of foster carers[698] as well as reviews and termination of that approval.[699] When considering whether to approve a person as a foster carer the local authority must refer the case to the fostering panel, providing them so far as reasonably practicable with information specified in Schedule 3[700] and such other information or observations as it considers appropriate, and if it receives a recommendation from the panel the local authority must make a decision within 14 days.[701] Where a decision has been made to approve a person as a foster carer the local authority must enter into a written agreement with the carer regarding the matters and obligations specified in Schedule 6[702] and any other matters or

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[695] Looked After Children (Scotland) Regulations 2009, reg. 17.

[696] Looked After Children (Scotland) Regulations 2009, reg. 20.

[697] Under the Fostering of Children (Scotland) Regulations 1996, S.I. 1996 No. 3263, reg. 12(4) a child could not be placed for fostering in any household except one that consisting of a man and a woman living and acting together or a man or a woman living and acting alone.

[698] Looked After Children (Scotland) Regulations 2009, regs. 21 and 22.

[699] Looked After Children (Scotland) Regulations 2009, regs. 25 and 26.

[700] Such as matters relating to the prospective carer and other adults in the household, particulars of the accommodation, their occupation, standard of living and other matters relating to their capacity to care for the child.

[701] Looked After Children (Scotland) Regulations 2009, reg. 22. Where the local authority makes a decision contrary to the recommendation of the fostering panel it must record in writing the reasons for that decision: reg. 22(6).

[702] Including the support and training to be given to the foster carer, the procedure for placing children with the foster carer, the prohibition on corporal punishment and the need for confidentiality.

obligations that the local authority considers appropriate.[703] Case records must be kept of each foster carer.[704]

15.37 The local authority is prohibited from placing a child with a foster carer where this would be contrary to the terms of any compulsory supervision order, other order made under the Children's Hearings (Scotland) Act 2011 or a permanence order, or where this would return the child to a person from whom the child has been removed by virtue of such an order.[705] Nor may the local authority place a child with a foster carer unless it is satisfied that (a) placement is in the best interests of the child; (b) placement of the child with that foster carer would be in the best interests of the child; (c) the person has been approved as a foster carer by the local authority; (d) they have taken into account all information available to them relevant to the performance of their duties under section 17(1) to (5) of the Children (Scotland) Act 1995; (e) they have given full consideration to the possibility of entering into an arrangement for the child to be cared for by parents or persons with parental responsibilities and parental rights; (f) the foster carer has entered into a written agreement with the local authority;[706] (g) the foster carer has entered into a written agreement with the local authority as to the matters specified in Schedule 4;[707] and (h) the terms of the foster carer's approval are consistent with the placement[708]...

15.39 The regulations also make provision for local authorities, either individually or jointly, to enter into arrangements with registered fostering services, whereby these services carry out the functions of the local authority in relation to fostering under the regulations.[709] A local authority must not, however, make arrangements under that regulation unless it is satisfied (i) as to the capacity of the registered fostering service to discharge duties and functions on their behalf and (ii)

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[703] Looked After Children (Scotland) Regulations 2009, reg. 24.

[704] Looked After Children (Scotland) Regulations 2009, reg. 31. This record must be retained by the local authority for 25 years from the date of the foster carer's approval or from the death of the foster carer, whichever is earlier and must take all necessary steps to ensure that the information contained therein is kept confidential: reg. 32.

[705] Looked After Children (Scotland) Regulations, reg. 27(1).

[706] reg. 24 governs such agreements.

[707] Matters specified in Sch. 4 include the local authority's arrangements for the financial support of the child, the arrangements for visits to the child by a person authorised by or on behalf of the local authority, contact arrangements with the parents or other persons, and co-operation with the local authority by the foster carer.

[708] Looked After Children (Scotland) Regulations 2009, reg. 27(2).

[709] Looked After Children (Scotland) Regulations 2009, reg. 48.

that the arrangements are the most suitable way for those duties and functions to be discharged; it has entered into a written agreement with the registered fostering service regarding the matters in Part I of Schedule 7[710]; and where it proposes to make arrangements in respect of a particular child, it has entered into a written agreement with the registered fostering service regarding the matters in Part II of Schedule 7.[711] Each local authority entering into an arrangement under this regulation must review the arrangement at intervals of not more than 12 months. No registered fostering service is permitted to place a child outside the United Kingdom.[712] Whenever a child is placed with a foster carer by a registered fostering service, the local authority must arrange for one of their officers to visit the child within 28 days of the placement; the local authority must also arrange to visit the child within 14 days of receiving representations from the registered fostering service that there are circumstances relating to the child which require a visit; and it must arrange to visit the child not later than three days from the day it is informed (by anyone) that the welfare of the child may not be or is not being safeguarded and promoted.[713]

Notwithstanding that there is provision in the 2009 Regulations (unlike the earlier regulations) for persons dissatisfied with a fostering panel's decision (either to withhold or to withdraw approval for them to act as foster carers) to seek a review of that decision[714] the decision itself may be challenged in court by means of judicial review.[715]

a. Registered Fostering Services

[710] Including the duties the local authority intends to delegate to the registered fostering service, the duties the authority will provide to the service, the requirement on the service to submit reports to the authority and the arrangements for the termination of the agreement.

[711] Being details of the foster carer with whom the child is to be placed, details of any service the child is to receive, and the terms of the proposed foster agreement and foster placement.

[712] Looked After Children (Scotland) Regulations 2009, reg. 48(5).

[713] Looked After Children (Scotland) Regulations 2009, reg. 49.

[714] Looked After Children (Scotland) Regulations 2009, reg. 26.

[715] See for example *CW, Petr* [2016] CSOH 56 where the petitioner's approval was withdrawn in light of an allegation of sexual misconduct against her husband and *Johns v Derby City Council* [2011] HRLR 20 where approval had been refused because of the applicants' strong (religiously based) disapproval of homosexuality: both applications failed. See also *TM & PM, Petrs* [2017] CSOH 139.

The fostering services mentioned above require to be registered, originally under Part One of the Regulation of Care (Scotland) Act 2001[716] and later under Part 5 of the Public Services Reform (Scotland) Act 2010.[717]

b. Kinship Care

The Looked After Children (Scotland) Regulations 2009 also provide for the approval by the local authority of (a) a person who is related to the child either by blood, marriage or civil partnership or (b) a person who is known to the child and with whom the child has a pre-existing relationship as a suitable carer for a child who is looked after by that local authority, that person to be known as a "kinship carer".[718] Before approving a person as a kinship carer the local authority must so far as reasonably practicable, obtain and record in writing certain specified information,[719] including in respect of the prospective carer and other adults in the household, particulars of the accommodation, the standard of living and other matters relating to the capacity of the proposed carer to care for the child. Taking this information into account the local authority must carry out an assessment of the person's suitability to care for the child.[720] Other than that, the process for approval is left to the local authority itself[721]The local authority must not place the child with a kinship carer unless it is satisfied that (a) placement is in the best interests of the child, (b) placement with that kinship carer is in the best interests of the child, (c) the kinship carer is a suitable person to care for the child, (d) the local authority has taken into account all the information available to it, (e) the kinship carer has entered into written agreements with the local

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[716] 2001 ASP 8, ss. 7-9.

[717] 2010 ASP 8, ss 44-107.

[718] 2009 Regulations, reg. 10.

[719] 2009 Regulations, Sched. 3.

[720] 2009 Regulations, reg. 10(3).

[721] Subject to Guidance issued by the Scottish Government:*Guidance on the Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007*, March 2011. For a discussion, see *TM & PM, Petrs* [2017] CSOH 139 (31st October 2017).

authority concerning the matters listed in Schedules 4 and 5 to the 2009 Regulations, including support and training to be given to the kinship carer, the procedure for review of the placement, the respective obligations of the local authority and the kinship carer,[722] any financial support to be provided for the child, the arrangements for visits to the child by or on behalf of the local authority, contact arrangements with the parents and other persons, and co-operation with the local authority by the kinship carer.[723]

The visitation requirements[724] on local authorities apply equally to children placed with kinship carers as to those placed with foster carers. These require that the local authority must ensure that the child and their carer are visited on its behalf within one week of the placement and thereafter at least every three months, as well as on any occasion when the local authority considers it necessary to safeguard or promote the welfare of the child or when the child or carer reasonably requests it.

Since 1st August 2014, local authorities have also been obliged to offer "kinship care assistance" to any person who is considering applying for, or has obtained, a "kinship care order", that is to say an order under s. 11 of the Children (Scotland) Act 1995 applied for by a relative or friend of the child; assistance must also be given to the child.[725] The forms of assistance required are laid down in the Kinship Care Assistance (Scotland) Order 2016,[726] which came into force on 1st April 2016. Assistance must be provided in a way that safeguards, supports and promotes the wellbeing of the child,[727] and it may include

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[722] These include an obligation not to administer corporal punishment.

[723] 2009 Regulations, reg. 11.

[724] 2009 Regulations, reg. 46.

[725] Children and Young People (Scotland) Act 2014, s. 71.

[726] SSI 2016 No. 153.

[727] 2016 Order, art. 3.

information and advice, as well as financial assistance both in making the application for the order and in fulfilling its terms.[728] The availability of this assistance must be publicised.[729]

[728] 2016 Order, art. 4.

[729] 2016 Order, art. 9.

SECTION B: PRIVATE FOSTERING

i. Infant Life Protection Before 1932

The practice known to the Victorians as "baby-farming" was the boarding out by parents of their children (often "illegitimate") with individuals paid to look after them. The motivation of the carers was primarily profit, and self-evidently the more children they received the more profit was to be had; the motivation of the parents was often to hide family "shame", or to avoid the inconvenience of parenting. The vulnerability of individual children being brought up under such arrangements had been recognised early in the 19th Century and a number of Acts later in that century attempted to regulate the trade.[730] The very terminology of "infant life protection"[731] indicates the potential dangers that were recognised by Parliament.[732] A substantial increase in the regulation of the practice, and thereby the protection offered to children, was contained in Part One of the Children Act, 1908 which (i) required that any reception of a child by a child-minder keeping the child of another on a residential basis for reward had to be notified to the local authority,[733] (ii) allowed the local authority to limit the number of infants under the age of 7 that any child-minder could receive (for reward) into their home[734] and (iii) most importantly, required

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[730] The first legislative attempt at regulating baby farms was the Infant Life Protection Act, 1872 (35 & 36 Vict, c. 38) which required baby farmers to register with the local authority, but that was limited to children below the age of one year. The Infant Life Protection Act, 1897 raised that age to five years. A call for the tightening of these rules is to be found in (1906) *British Medical Journal* 396-397.

[731] "Infant" was a term of art in English law but not Scots law. The terminology used was "Infant Life Protection" in the Children Act, 1908 and Children and Young Persons (Scotland) Act, 1932, both passed as UK statutes. That changed to "Child Life Protection" in the Children and Young Persons (Scotland) Act,1937, the first solely Scottish Act in this area, before becoming "Child Protection" in the Children Act, 1958.

[732] The last woman to be hanged in Edinburgh (in 1889) was Jessie King, who killed three of the children she was paid to bring up: see "The Stockbridge Baby Farmer", chap. 1 in Molly Whittington-Egan *Classic Scottish Murder Stories* (Neil Wilson Publishing, 2011).

[733] 1908 Act, s. 1.

[734] 1908 Act, s. 4.

that "child protection visitors", who would visit "from time to time" any notified child, be appointed by the local authority.[735] Local authorities could also remove (with court authority) any child to "a place of safety."[736] The 1908 Act as a whole presaged a substantially greater involvement of the local authority, as a manifestation of the state, in the welfare of vulnerable children and Part One represents the forerunner to the modern regulatory regime for private foster caring. Though legal responsibility lay with the local authority, in practice the majority of local authorities delegated their functions under Part One of the 1908 Act to the poor law authorities and visitation, for example, was left to parish councils (as the parochial boards set up in the Poor Law Amendment (Scotland) Act 1845 had by then become).[737]

ii. Amendments in 1932

The Report of the *Committee on Child Adoption*,[738] which ultimately led to the introduction of adoption in both England and Wales and Scotland, examined also the informal arrangements under which children were taken in for reward and identified significant gaps in the regulation of the practice, even after the 1908 Act:

> The absence of proper control over the "adoption" of children over seven years of age, and under that age, unless payment is made, results in an undesirable traffic in child life with which no one can interfere, unless proceedings are taken against the adopting parent for cruelty or neglect. Children may be handed from one person to another with or without payment, advertised for disposal, and even sent out of the country without any record being kept; intermediaries may accept children for "adoption" and dispose of them as and when they choose; "homes" and institutions

[735] 1908 Act, s. 2.

[736] 1908 Act, s. 5.

[737] This was stated to be the case in Public Assistance Circular No. 28, issued by the Department of Health for Scotland on 13th December 1932, reproduced in MG Cowan, *The Children Acts (Scotland)* (W. Hodge & Co, 1933) at pp. 370-379.

[738] Cmd. 1254, 1921 (chairman, Sir Alfred Hopkinson, KC).

> for the reception of children exist which are not subject to any inspection or control.[739]

The Committee recommended that all persons and institutions who undertook the "entire custody and control" of any child under 14, whether for payment or not, should come within the terms of the infant life protection provisions in Part One of the 1908 Act.[740] This recommendation was not followed in the Children and Young Persons (Scotland) Act, 1932, which increased the age of children whose reception into the care of a private foster carer, for reward, had to be notified to the local authority only to nine.[741] But that Act made other important amendments:[742] it required that notification be seven days before rather than within 48 hours after reception of the child;[743] clarified that "reward" did not necessarily involve making a profit;[744] mandated that the child protection visitor (or one of them if more than one was appointed) be a woman;[745] required the child protection visitors to "satisfy themselves as to the health and wellbeing" of the child (rather than, as before, merely as to the "nursing and maintenance" of the child);[746] and prohibited anonymous advertisements indicating that a person or society was willing to undertake the care of a child.[747] Frequency of visitation was specified in the legislation to be "from time to time",[748] though it may be noted that the Infant Life Protection registers held by Glasgow City Council show that, in that city at any rate, children were visited three or four times a year.

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[739] Report of *Committee on Child Adoption* (1921), as quoted in Cowan at p. 111.

[740] Ibid.

[741] 1932 Act, s. 59, amending s. 1 of the 1908 Act.

[742] From 1st January, 1933: Children and Young Persons (Scotland) Act, 1932 (Date of Commencement) Order (No. 1), 1932, SR&O 1932 No. 896 (S. 42).

[743] 1932 Act, s. 59(1); thereafter Children and Young Persons (Scotland) Act,1937, s. 1(1).

[744] 1932 Act, s. 59(1); 1937 Act, s. 1(1).

[745] 1932 Act, Second Schedule; 1937 Act, s. 2(2).

[746] 1932 Act, Second Schedule; 1937 Act, s. 2(2).

[747] 1932 Act, s. 62; 1937 Act, s. 9.

[748] 1908 Act, s. 2(2); 1937 Act, s. 2(2).

The provisions in the 1908 Act as amended in 1932 were replicated in Part One of the Children and Young Persons (Scotland) Act, 1937 without amendment. The Children Act, 1948 extended the child life protection provisions in the 1937 Act to all children under 18,[749] and gave the Secretary of State the power to inspect premises notified under Part One of the 1937 Act.[750] The 1937 provisions (as so amended) remained in force until 1st April 1959, when the Children Act, 1958 came into force.

iii. Child Protection in the Children Act, 1958

Part One of the 1958 Act, headed "Child Protection", applied in respect of "foster children", which it defined as those below the upper limit of compulsory schooling who were being looked after, for reward and for more than one month,[751] by individuals other than their relatives or guardians, and not being boarded out by any public authority, and also to children over that age but below 18 who remained in foster care.[752] Included were children who continued to reside in private schools during school holidays.[753] The Act required that officers of the local authority (no longer specifically appointed "child protection officers") visit foster children within their area, in order to satisfy themselves as to the well-being of

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[749] Children Act, 1948, ss. 35 and 36.

[750] Children Act, 1948, s. 54(2)(d).

[751] The Nurseries and Child-Minders Regulation Act, 1948 (c. 53) governed those who were paid to look after children for a day or substantial period of a day, or for any longer period not exceeding six days. To run such a business required registration with the local authority, which could be refused if the applicant for registration was not a fit person to look after children, or the premises are not fit for that purpose. Those paid to look after children for periods between six days and a month were free from regulation until s. 19 of and Schedule 1 to the Social Work (Scotland) Act 1968 closed that gap by extending the scope of the 1958 Act to children looked after for more than 6 days.

[752] 1958 Act, ss. 2 and 13. Curiously, the 1958 Act (and its 1984 successor) avoids, with a clumsiness that suggests deliberation, the term "foster parent" though it uses "foster child". "Foster parent" is used in the regulations governing public fostering which (perhaps equally curiously) avoid the term "foster child".

[753] 1958 Act, s. 12. See further, below at **2.I.ii**

the children and to give such advice as appeared to be needed.[754] The person maintaining a foster child had to notify the local authority,[755] which could impose requirements as to the number, age and sex of foster children, the accommodation and equipment to be provided for the children,[756] medical arrangements, and the qualifications of those employed to look after the children.[757] Certain persons were disqualified from keeping foster children[758] and a juvenile court, on the complaint of a local authority, could order the removal of a foster child to a place of safety if satisfied that he or she was being kept by a person unfit to have his or her care, or in any premises or environment detrimental to him or her.[759] A person maintaining a foster child for reward was unable to take out life assurance over the child.[760] The obligations of care to be provided by, and the powers and duties of, the person looking after the foster child were nowhere specified.

Under these provisions, the regulation of private fostering was very much less detailed than the regulation of boarding-out by local authorities (public fostering). The 1958 Act was amended by the Social Work (Scotland) Act 1968 in a number of important respects:

(i) Section 1 of the 1958 Act was repealed[761] and replaced with a new s. 1A which imposed on the local authority both the duty to "secure the welfare of children in their area who are foster children" within the meaning of the 1958 Act and, *where the local authority considered it necessary or expedient,* the duty to "cause the children to be visited from time to time by their

[754] 1958 Act, s. 1.

[755] 1958 Act, s. 3.

[756] Including the power to prohibit the use of specified premises.

[757] 1958 Act, s. 4.

[758] 1958 Act, s. 6: included were schedule 1 offenders, any person whose parental rights and powers had vested in a local authority and anyone from whom a child had been removed under the 1958 Act.

[759] 1958 Act, s. 7.

[760] 1958 Act, s. 9.

[761] 1968 Act, sched. 9.

officers, who shall give such advice as to the care and maintenance of the children as may appear to be necessary".[762] Visitation had previously been compulsory under s. 1 but it now became a matter of necessity or expediency – in the view of the local authority. This did not, however, absolve local authorities of all responsibility for oversight, since they would be required to seek out sufficient information to allow them to make their judgment as to whether visitation was necessary or not: the new provision certainly did not mandate official inaction.

(ii) Brought within the terms of the 1958 Act were all children being looked after for more than six days (rather than, as previously, for more than one month).[763] Excluded from this were children being looked after for less than a month by persons who did not receive foster children for specified periods[764] (in other words, relatives and the like who informally took over the care of children for short periods, such as school holidays).

(iii) The references to reward in the 1958 Act were removed so that private fostering arrangements without payment would now be covered.[765]

In addition, the 1968 Act permitted any authorised officer of the Secretary of State to enter any place where a privately fostered child was being maintained for the purpose of making such examinations into the state and management of the place, and the condition and treatment of the persons in it, as the officer thought necessary, and to inspect records.[766] Again, such inspections were not obligatory.

[762] Children Act, 1958, s. 1A, as inserted by Social Work (Scotland) Act 1968, sched. 1 para. 1.

[763] 1958 Act, s. 2(1), as amended by 1968 Act, sched. 1 para. 2(1).

[764] 1958 Act, s. 2(3)(f), inserted by 1968 Act, sched. 1 para 2(2).

[765] 1968 Act, sched. 1 para. 2(3), removing s.2(6) from the 1958 Act.

[766] 1968 Act, s. 6(1)(b)(i).

A sustained critique of the inadequacies of state regulation of private fostering was published in 1973,[767] suggesting that privately fostered children had needs and were subjected to circumstances little different from those children who were publicly fostered, but were not afforded the same level of support, services and protection from local authorities. The 1958 Act was further amended by the Children Act 1975, crucially restoring the obligation on the local authority to visit foster children[768] (or, more accurately, permitting regulations to restore that obligation).

iv. *Private Fostering Since 1985*

The 1958 Act was repealed by the Foster Children (Scotland) Act 1984,[769] which came into force on 31st January 1985.[770] Regulations made under that Act, the Foster Children (Private Fostering) (Scotland) Regulations 1985,[771] came into force on 1st April 1986 and requires local authorities to inquire into the circumstances of any private fostering placement "in order to determine whether the placement is or will be appropriate to [the child's] need":[772] this involves obligatory visiting of the child and parents before the placement and discovering the child's own wishes and feelings on the matter. The new rules brought the duties of local authorities in relation to privately fostered children substantially closer to their duties in relation to children fostered either by local authorities or voluntary organisations. With only minor amendments since (referable to changes in other

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767 R. Holman *Trading in Children: A Study of Private Fostering* (Routledge and Kegan Paul, London 1973).

768 Children Act 1975 (c. 72), s. 95(2), amending s. 1A of the 1958 Act.

769 Foster Children (Scotland) Act 1984, c. 56, s. 22(3) and sched. 3.

770 Foster Children (Scotland) Act 1984, s. 23(2).

771 SI 1985 No. 1798. These Regulations are based on the proposals made by the Social Work Services Group in its discussion paper: "Proposed Regulations on Private Fostering" (January 1985).

772 1985 Regulations, reg. 4(1). See also reg. 5 which requires the foster parent to be interviewed by the local authority.

legislation), these provisions continue to apply today. They are fully described in Wilkinson and Norrie's *Parent and Child*[773] which, in part, is reproduced below:

a. Meaning of "foster child"

> 15.44 A foster child, within the meaning of the Foster Children (Scotland) Act 1984, is a child below the upper limit of compulsory school age whose care is undertaken by a person who is not a relative or guardian of the child774…. This definition of "foster child" is wide and would, if unqualified, embrace many who would not in ordinary usage be so described. It is, however, qualified in a number of respects. First, a child is not a foster child for the purpose of the statutory provisions at present under consideration while he or she is being looked after775 by a local authority or is boarded out by an education authority.776 Secondly,777 a child is not a foster child while he or she is in the care778 of any person
>
> (a) in premises in which any parent, adult relative or guardian of his or her is, for the time being, residing;
>
> (b) in any residential establishment;[779]
>
> (c) in any school within the meaning of the Education (Scotland) Act 1980;[780]

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[773] 3rd edn by KM Norrie (W. Green, 2013) paras 15.44 – 15.59.

[774] Foster Children (Scotland) Act 1984, s. 1, as amended by the Children Act 1989, Sched. 12, para. 41.

[775] Within the meaning of s. 17(6) of the Children (Scotland) Act 1995: Foster Children (Scotland) Act 1984, s. 2(6), as inserted by the 1995 Act, Sched. 4, para. 35(2).

[776] Foster Children (Scotland) Act 1984, s. 2(1), as amended by the Children (Scotland) Act 1995, Sched. 4, para. 35(2). Education authorities in England and Wales appear to be contemplated. The provision for children who are looked after by local authorities covers children fostered by Scottish local authorities.

[777] Foster Children (Scotland) Act 1984, s. 2(2).

[778] Care is undertaken when it is in fact provided but the continuity of a period of care is not interrupted by a weekend break spend at the parents' home: *Surrey County Council v. Battersby* [1965] 2 Q.B. 194.

[779] *i.e.* an establishment managed by a local authority, voluntary organisation or any other person which provides residential accommodation for the purposes of the Social Work (Scotland) Act 1968 or of Pt II of the Children (Scotland) Act 1995, whether for reward or not: Foster Children (Scotland) Act 1984, s. 21(1).

[780] Where, however, a child below the upper limit of the compulsory school age resides, during school holidays, in a school other than a local authority school for a period exceeding one month, he or she is for most purposes of the Act, a foster child: Foster Children (Scotland) Act 1984, s. 16.

(d) in any hospital or in any accommodation provided by a care home service registered under Part V of the Public Services Reform (Scotland) Act 2010;

(e) in any home or institution not otherwise specified but maintained by a public or local authority; or

(f) if he or she has been in that person's care for a period of less than 28 days and that person does not intend to undertake his or her care for any longer period…Otherwise the provisions of the Act do not apply, so preserving the general policy that casual short-term arrangements should not be subject to local authority supervision.

15.45 Thirdly, a child is not a foster child while he or she is in the care of any person in compliance with a supervision order within the meaning of the Children and Young Persons Act 1969 in England and Wales, or a compulsory supervision order within the meaning of the Children's Hearings (Scotland) Act 2011, or a community payback order within the meaning of section 227A of the Criminal Procedure (Scotland) Act 1995.[781] Fourthly, a child is not a foster child while he or she is liable to be detained under the Mental Health (Care and Treatment) (Scotland) Act 2003.[782] And fifthly, a child is not a foster child while he or she is placed in the care of prospective adopters under arrangements made by an adoption agency.[783]

b. Disqualification from acting as foster carer

15.47 Unless the disqualifying fact has been disclosed to the local authority and its written consent obtained, no one may maintain a foster child if[784]:

(a) an order has been made against him or her under the Foster Children (Scotland) Act 1984 or the Foster Children Act 1980 removing a child from his or her care;

(b) a child has been removed from his or her care by virtue of an order made under the Children and Young Persons legislation[785] or a supervision requirement made under the Social Work (Scotland) Act 1968, the Children (Scotland) Act 1995 or the Children's Hearings (Scotland) Act 2011;

[781] Foster Children (Scotland) Act 1984, s. 2(3), as amended by the Criminal Justice and Licensing (Scotland) Act 2010, asp 13, Sched. 2(2) para 36.

[782] Foster Children (Scotland) Act 1984, s. 2(4).

[783] Foster Children (Scotland) Act 1984, s. 2(5).

[784] Foster Children (Scotland) Act 1984,s. 7…

[785] Children and Young Persons Acts 1933 and 1969 or the Children and Young Persons (Scotland) Act 1937.

(c) he or she has been convicted of any of certain specified offences against children and young persons,[786] or has been placed on probation or discharged absolutely or conditionally for any such offence;

(d) his or her parental rights and powers with respect to a child have been vested in a local authority[787] or his or her parental rights and responsibilities have been transferred to a local authority by an order under section 86 of the Children (Scotland) Act 1995;[788]

[(e) an order has been made refusing or cancelling his or her registration under the Nurseries and Child-minders Regulation Act, 1948;]

(f) an order has been made under any of specified Adoption Acts[789] for the removal of a “protected child” who was being kept or was about to be received by him or her; or

(g) he or she is disqualified from fostering a child privately, within the meaning of the Children Act 1989, by regulations made under section 68 of that Act;[790]

(h) all his or her parental responsibilities and parental rights have been extinguished by a permanence order under section 80 of the Adoption and Children (Scotland) Act 2007.

The disqualification extends to any person living in the same premises as the person disqualified or in premises at which he or she is employed.[791] Any disqualified person who maintains a foster child commits an offence,[792] but it is a defence for anyone disqualified by virtue of living in premises in which a disqualified person lives or is employed to show that he or she did not know and had no reasonable ground for believing that a disqualification applied to that person.[793]

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[786] Specified in Sched. 1 to the Criminal Procedure (Scotland) Act 1995, or in the corresponding statutory provisions for England and Wales (Children and Young Persons Act 1933, Sched. 1).

[787] Under s. 16 of the Social Work (Scotland) Act 1968, or under s. 2 of the Children Act 1948 or ss. 2 or 3 of the Child Care Act 1980.

[788] This [was] a parental responsibilities order ….

[789] Adoption Act 1958, s. 43; Adoption Act 1976, s. 34; Adoption (Scotland) Act 1978, s. 34.

[790] Sched. 15 to the Children Act 1989 repeals many of the English statutory provisions mentioned above. Orders made under them remain valid.

[791] Foster Children (Scotland) Act 1984, s. 7(2).

[792] Foster Children (Scotland) Act 1984, s. 15(1)(c).

[793] Foster Children (Scotland) Act 1984, s. 15(2).

c. Visiting of foster children

15.48 The duty is laid upon the local authority of securing the welfare of foster children within its area.[794] Presence within the area is sufficient to give rise to the duty and there is no additional residential or other qualification. In order to fulfil its duty, the local authority is required to cause foster children to be visited…. The officers making such visits are required to give such advice as to care and maintenance as may appear to be necessary.[795] Regulations provide[796] that a foster child is to be visited within one week of the placement or within one week of notice being given to the local authority under section 5(2), and thereafter (i) in the case of a child who has lived with the foster parent for less than one year at intervals of not more than three months, (ii) in any other case at intervals of not more than six months, (iii) and in all cases on such occasions as the local authority considers necessary. It is an offence to refuse to allow the visiting of any foster child by a duly authorised officer of a local authority[797]….

d. Control by local authorities of private fostering

Requirements and prohibitions

15.53 Where anyone keeps or proposes to keep foster children in premises used while the children are kept there, wholly or mainly for that purpose, the local authority may impose on him or her requirements as to:

(a) the number, age and sex of the foster children who may be kept at any one time on the premises or any part thereof;

(b) the accommodation and equipment to be provided for the children;

(c) the medical arrangements to be made for protecting the health of the children;

(d) the giving of particulars of the person for the time being in charge of children;

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[794] Foster Children (Scotland) Act 1984, s. 3(1).

[795] Foster Children (Scotland) Act 1984, s. 3(2). This might include, *e.g.*, the provision of assistance to the foster carer in dealing with any problems caused by the fact that the child has a different religious, racial, cultural or linguistic background, as was recognised in *Osborne v. Matthan (No. 2)*, 1998 S.L.T. 1264.

[796] Foster Children (Private Fostering) (Scotland) Regulations 1985, reg. 7.

[797] Foster Children (Scotland) Act 1984, s. 15(1)(b)(i).

(e) the number, qualifications or experience of the persons employed in looking after the children;

(f) the keeping of records.[798]

… If, within the specified time, a requirement is not complied with, the local authority may prohibit the keeping of foster children in the premises thereafter.[799]

…

15.55 … Failure to comply with a requirement or contravention of a prohibition is an offence.[800]

Inspection

15.56 The power to impose requirements and make prohibitions would be largely nugatory without a power of inspection; so any officer of a local authority authorised to visit foster children may inspect any premises in the area of the authority in which foster children are to be, or are being kept[801] …. It is an offence to refuse to allow inspection[802] …

e. Removal of foster children

15.59 The sanctions attaching to the maintaining of foster children by disqualified persons and to non-compliance with requirements and contravention of prohibitions do not give any direct protection to the child. Provision is accordingly made that if a sheriff is satisfied on the complaint of a local authority that a foster child is being kept, or is about to be received (a) by any person who is unfit to have his or her care, or (b) in contravention of a disqualification imposed by the Foster Children (Scotland) Act 1984 or of a prohibition from keeping foster children or a foster child imposed by a local authority, or (c) in any premises or any environment detrimental or likely to be detrimental to the child, he may make an order for removal of the child to

[798] Foster Children (Scotland) Act 1984, s. 9(1).

[799] Foster Children (Scotland) Act 1984, s.10(2).

[800] Foster Children (Scotland) Act 1984, s.15(1)(d).

[801] Foster Children (Scotland) Act 1984, s. 8.

[802] Foster Children (Scotland) Act 1984, s. 15(1)(b)(ii).

> a place of safety[803] until the child can be restored to a parent, relative or guardian, or until other arrangements can be made with respect to him or her.[804] On proof that there is imminent danger to the health or well-being of the child, the power to make such an order may be exercised by a justice of the peace acting on the application of a person authorised to visit foster children.[805] Where an order is made on the ground that a prohibition imposed by a local authority has been contravened, it may require the removal from the premises of all the foster children kept there.[806] It is an offence to refuse to comply with an order for the removal of any child or obstruct any person in the execution of such an order.[807] Any child removed under these provisions is regarded as requiring the provision of accommodation on the ground that the person who has been caring for him or her is prevented from providing suitable accommodation, with the result that the local authority has a duty to provide that child with accommodation …

Local authority functions in relation to private fostering have required to be registered since 2001, first with the Care Commission[808] and then with the Care Inspectorate.[809] This allows the monitoring body to make improvement notices, which can require the local authority to change its practices in specified ways.

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[803] As defined in s. 21(1) of the Foster Children (Scotland) Act 1984.

[804] Foster Children (Scotland) Act 1984, s. 12(1).

[805] Foster Children (Scotland) Act 1984, s. 12(2).

[806] Foster Children (Scotland) Act 1984, s. 12(3).

[807] Foster Children (Scotland) Act 1984, s. 15(1)(e).

[808] Regulation of Care (Scotland) Act 2001, s. 33.

[809] Public Services (Reform) (Scotland) Act 2010, s. 83.

SECTION C: CHILDREN'S HOMES AND RESIDENTIAL ESTABLISHMENTS

i. Introduction

Boarding-out or fostering of children, even after it became the preferred option in the late 1940s, was never seen as a complete solution to the issue of accommodating children and young people apart from their parents. Institutional care of children has always been required, whether provided by private organisations or by the state (through local authorities). In the years before the Children Act, 1948, institutional care was mostly provided by voluntary organisations, funded primarily by contributions and charitable donations; thereafter the state itself increasingly established children's homes.

ii. Voluntary Homes Prior to 1948

The Children Act, 1908 allowed (but did not require) the Secretary for Scotland to cause inspections of "any institution for the reception of poor children or young persons supported wholly or partly by voluntary contributions" which were not liable to inspection by any other Government department.[810] The inspector, if so desired by the managers of the institution, had to be of the religious denomination of the institution (if it had one) or a woman if the institution was for the reception of girls only.[811]

This inspection regime (based on power and not duty) was maintained under the Children and Young Persons (Scotland) Acts, 1932 and 1937[812] but a new requirement was imposed in 1932 on the managers of an institution[813] to notify the Secretary for Scotland of

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[810] Children Act, 1908, s. 25(1).

[811] Children Act, 1908, s. 25(3) and (4).

[812] Children and Young Persons (Scotland) Act, 1932, s. 41; Children and Young Persons (Scotland) Act, 1937, s. 98.

[813] "The institutions to which this Part of this Act [headed 'Voluntary Homes'] applies are homes and other institutions for the boarding, care and maintenance of poor children or young persons, being institutions supported wholly or partly by voluntary contributions" (except institutions certified under the Mental

prescribed particulars,[814] together with a new power to remove all children and young persons from a home found on inspection (or otherwise determined) to be unsatisfactory.[815] Cowan, in her commentary on the 1932 Act, said this:

> As there has hitherto been no official register of voluntary homes, nor any association co-ordinating them, it is impossible even to estimate, with any prospect of accuracy, the number of such, nor to survey them adequately. The number may, however, be in the vicinity of a hundred or more.[816]

She goes on to explain that since the beginning of the 20th Century the Church of Scotland had founded or taken over "no less than six homes for destitute and homeless lads, two similar ones for older girls, eight hostels for working women and girls, and two orphanages for children of school age"; that the Episcopal Church in Scotland ran special homes for girls and young women and had a link to the Aberlour Orphanage which "provides for no less than 450 children"; that the Roman Catholic Church in Scotland "has an extensive scheme of some twenty-three different orphanages, homes, and hostels for children and young people"; and that there were large secular institutions such as that founded by Mr Quarrier at Bridge of Weir and a variety of "small homes containing perhaps a dozen girls or lads, which have been organised to meet a local situation by some special committee".[817]

Voluntary homes therefore provided a significant amount of the care of children and young persons living apart from their parents before the Second World War, but the regulation

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Deficiency and Lunacy (Scotland) Act, 1913): 1932 Act, s. 40(3). Under the heading "Homes Supported by Voluntary Contribution", the same definition is given in s. 96 of the 1937 Act.

[814] See Children and Young Persons (Voluntary Homes) Regulations, 1933 (SR&O 1933 No 923 (S. 60)).

[815] Children and Young Persons (Scotland) Act,1932 Act, s. 42; Children and Young Persons (Scotland) Act, 1937, s. 99.

[816] MG Cowan, *The Children Acts, Scotland* (W Hodge & Co, 1933) at p. 73.

[817] MG Cowan, *The Children Acts, Scotland* at pp. 73 - 75.

thereof was substantially less than that governing the running of approved schools[818] (often managed by voluntary bodies) and state-run institutions like Borstals and remand homes.

iii. Voluntary Homes After 1948

The Children Act, 1948 strengthened the obligation on voluntary homes to "provide particulars" to the Secretary of State: the obligation was now to register the home with the Secretary of State, and it was provided that no voluntary home could "be carried on" unless it was so registered[819] (though all existing homes were registered automatically).[820] The Secretary of State could, if the running of the home was not in accordance with Regulations or was in any other way unsatisfactory, remove the home from the register and "all or any" of the children resident therein could be received into the care of the local authority.[821] Section 54(1) of the 1948 Act extended the powers of inspectors appointed by the Secretary of State[822] to include the power to inspect homes governed by the 1948 Act. Under s. 54(2) inspectors had the power to enter specified premises, including voluntary homes.[823] In addition a new duty of visitation was placed on local authorities, in addition to the existing power of the Secretary of State to inspect voluntary homes: "It shall be the duty of local authorities from time to time to cause children in voluntary homes in their area to be visited in the interests of the wellbeing of the children, and any person authorised in that behalf by

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818 Both Cowan at p. 77 and Trotter *The Law as to Children and Young Persons* (W Hodge & Co, 1938) at p. 177 suggest that approved schools would be within the scope of the inspection provisions relating to voluntary homes if they received voluntary contributions, but if that is so then this would be in addition to the more extensive control such schools are otherwise under, discussed below at **2.D**.

819 Children Act, 1948, s. 29.

820 The registration rules were contained in the Voluntary Homes Registration (Scotland) Regulations, 1948, SI 1948 No. 2595. See also the Voluntary Homes (Return of Particulars) (Scotland) Regulations, 1952, SI 1952 No. 1836.

821 1948 Act, s. 29(6).

822 Under s. 106 of the 1937 Act.

823 1932 Act, s. 41(3); 1937 Act, s. 98(3); 1948 Act, s. 54(2)(f) and s. 13(1)(b).

a local authority may enter any voluntary home in the area of the authority for the purpose of visiting the children in the home."[824] It was an offence to obstruct any such person.[825]

The 1948 Act also gave the power to the Secretary of State to make regulations "as to the conduct of voluntary homes and for securing the welfare of the children therein".[826] That power was not exercised until the making of the Administration of Children's Homes (Scotland) Regulations, 1959 (discussed below), but even before the 1948 Act "institutions" were made subject to a small group of provisions in the Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947 in respect of children placed there by a local authority.[827] The "institutions" being referred to in rules 23 to 28 of the 1947 Rules were the "institutions" mentioned in s. 25 of the 1908 Act, ss. 40-42 of the 1932 Act and ss. 96-99 of the 1937 Act – that is to say, "voluntary homes" being "a home or other institution supported wholly or partly by voluntary contributions". These Rules applied only to institutions "subject to inspection by the Secretary of State" which, as we have just seen, voluntary homes were; but they applied only in respect of children and young persons placed in these homes by local authorities (and not, for example, by the juvenile court[828]). The 1947 Rules provided as follows:

> 23. "Where a local authority having become responsible for the care of a child apart from his parents, are satisfied that for some special reason it is not desirable to board him out with a foster-parent, they may place him in an institution which is subject to inspection by the Secretary of State under the Children and Young Persons (Scotland) Act, 1937, or under the Education (Scotland) Acts, or is specially approved by the Secretary of State for the purposes of these Rules and Regulations".

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[824] 1948 Act, s. 54(3).

[825] 1948 Act, s. 54(7). Obstruction had similarly been an offence under the 1908 Act, s. 25(2), the 1932 Act, s. 41(3) and the 1937 Act, s. 98(3) (in respect of inspectors appointed by the Secretary for Scotland).

[826] 1948 Act, s. 31(1).

[827] Local authorities did not have the power themselves to place children or young persons in approved schools, remand homes or borstals, which all had their own detailed rules, discussed elsewhere in this Part of this Report: they were not "institutions" governed by the 1947 Rules.

[828] So these Rules would not apply to approved schools even when supported by voluntary contribution.

24. “The local authority before so placing the child shall satisfy themselves that the institution selected is suited to the particular needs of the child”.

25. “A child shall not be placed in an institution maintained for persons of a religious persuasion different from that to which the child belongs”.

26. “A local authority when placing a child in an institution shall arrange that they shall be afforded reasonable facilities for visiting the institution and satisfying themselves as to the arrangements for the child’s welfare”.

27. “The officer appointed under Article 17 hereof shall visit or cause to be visited by a person with suitable qualifications or experience every child placed in an institution by a local authority within one month of the placing of the child and thereafter at least once in every six months. The local authority shall also arrange that such children shall be visited by members of the authority at least once a year. The officer or members shall furnish a report to the local authority with respect to-

(a) the child’s health, well-being and behaviour;

(b) the progress of the child’s education; and

(c) any other matters relative to the child’s welfare which they consider should be reported.”

28. “Where a local authority take action on a report furnished under Article 27 hereof they shall send a copy of the report to the Secretary of State together with a note of such action”.

It is to be noted that the responsibility for monitoring both the home and each child’s progress while resident there lay with the local authority. And the terms of Article 28 clearly envisaged an active response by the local authority if any matter was found wanting. However, the further statutory obligations that local authorities had towards children in their care (such as the aftercare provisions) did not extend to children accommodated in voluntary homes, notwithstanding some parliamentary attempts to extend these obligations to all children accommodated in an institutional setting.[829] Children and young persons

[829] See HL Deb 9 March 1948, vol. 154 cols. 609-611. At HL Deb 10 Feb 1948, vol. 153 col 937 Lord Beveridge had expressed some concern that while the qualifications of children’s officers were carefully prescribed no qualifications were so prescribed for those running voluntary homes.

accommodated more directly by the state were in a very different (and more protected) legal position.

iv. Local Authority Homes

The Children Act, 1948 provided that each local authority might, and if so directed by the Secretary of State was obliged to, provide, equip and maintain homes for the accommodation of children in their care.[830] There had been no statutory authority to do so before then, though some local authorities had established their own children's homes, and all had been obliged to maintain remand homes.[831] Separate accommodation was to be provided for the temporary reception of children, with "the necessary facilities" for observing their physical and mental condition.[832] If the premises were unsatisfactory, the Secretary of State could close the home.[833] The Secretary of State was given the power to make regulations as to the conduct of these homes,[834] and while in England that power was exercised by the making of the Administration of Children's Homes Regulations, 1951[835] in Scotland it was not until 1959 that (substantially similar) regulations were made.

v. Administration of Children's Homes (Scotland) Regulations, 1959[836]

These Regulations, which came into force on 1st August 1959,[837] covered both local authority and voluntary homes. Excluded from their application, however, were remand homes, voluntary homes subject to inspection by a government department otherwise than under Part VI of the 1937 Act, and holiday homes where no child stayed more than one

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[830] 1948 Act, s. 15(1).

[831] Remand homes are considered below at **2.F.i**.

[832] 1948 Act, s. 15(2).

[833] 1948 Act, s. 15(5).

[834] 1948 Act, s. 15(4).

[835] SI 1951 No. 1217.

[836] SI 1959 No. 834.

[837] 1959 Regulations, reg. 22.

month.[838] The 1959 Regulations contained rules for the administration of homes, the welfare of children accommodated therein, and for oversight of both of these matters.

The administrative regulations placed ultimate responsibility for the good running of the home on the "administering authority", that is to say the local authority providing or the persons carrying on the home.[839] That body was obliged to make arrangements for the home "to be conducted in such manner and on such principles as will secure the well-being of the children of the home."[840] The immediate focus on the child's "well-being" is to be noted. The administering authority had to appoint a person to be in charge of the home,[841] but neither the qualifications of this person nor criteria for selection were set down. The name of the person in charge of a voluntary home had to be notified to the Secretary of State.[842] One of the most important duties of the person in charge was to maintain records, which were to be kept at all times available for inspection by official visitors and persons authorised by the Secretary of State.[843] The records had to include "a personal history of each child in the home", that is to say the child's medical history, a note of the circumstances in which the child was admitted to the home, and in the case of a child in the care of a local authority an explanation of the circumstances which made it impracticable or undesirable to board the child out.[844] Also to be included was a record of the child's progress made during his or her stay in the home (including details of visits received from parents, relatives or friends, successes achieved at school or elsewhere, and any emotional or other difficulties experienced by the child), and a note of the child's destination when

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[838] 1959 Regulations, reg. 19.

[839] 1959 Regulations, reg. 21.

[840] 1959 Regulations, reg. 1.

[841] 1959 Regulations, reg. 4.

[842] 1959 Regulations, reg. 16. Another rule, limited to voluntary homes, was that the Secretary of State could give directions as to the maximum number of children to be accommodated in the home: reg. 18.

[843] 1959 Regulations, reg. 14.

[844] This being the test for accommodating any child in the care of a local authority other than by boarding out: 1948 Act, s. 13(1).

discharged from the home.[845] Noticeably absent was any requirement for a care plan for the future. The Secretary of State, and if practicable the parent or guardian of the child, had to be informed if the child died, ran away, was abducted or suffered from any injury or illness likely to result in death or a serious disability.[846]

Oversight of the running of the home was provided by a system of official visitation. The administering authority for any home had to ensure that the home was visited at least once a month by an authorised visitor who was obliged to "satisfy himself that the home is conducted in accordance with Regulation 1 of these Regulations"[847] (i.e. that the home was conducted in such a manner as to secure the well-being of the children). This was in addition to the visiting duties of local authorities under s. 54(3) of the 1948 Act. Another source, and perhaps more independent, of oversight was the medical officer, who had to be appointed to every children's home. This officer was responsible for the general supervision of the health of the children accommodated in the home and of the hygienic conditions of the premises and staff, and for the giving of advice to the person in charge of the home on these matters. The medical officer was obliged to attend at the home "with sufficient frequency to ensure that he is closely acquainted with the health of the children", to examine each child on admission and thereafter at least once a year and then immediately before discharge, to provide necessary medical attention, and to supervise the compilation of a medical record for each child. The medical officer also had to submit reports on these matters to the administering authority.[848]

The physical welfare of the children was clearly the justification for requiring the appointment of a medical officer, and was also behind the requirement to take fire precautions[849] and the specificity of the sleeping accommodation: "There shall be provided

[845] 1959 Regulations, schedule.

[846] 1959 Regulations, reg. 13.

[847] 1959 Regulations, reg. 2.

[848] 1959 Regulations, reg. 6. Dental care also had to be provided: reg. 7.

[849] 1959 Regulations, reg. 9.

for every child accommodated in a home a separate bed in a room with sufficient ventilation and sufficient natural and artificial lighting, with not less than 45 square feet of floor space for each bed and at a distance of not less than 6 feet between the centres of the beds. There shall be easy access from every bedroom to suitable and sufficient water closets and washing facilities."[850]

Discipline was to be "maintained by the personal influence of the person in charge of the home".[851] Punishments, which had to be recorded, normally took the form of "a temporary loss of recreation or privileges", and if a child was punished with "abnormal frequency" the administering authority had to arrange for an investigation of the child's mental condition.[852] Corporal punishment was permitted "exceptionally", but could only be administered by a person specifically empowered by the administering authority to do so; if the child had any physical or mental disability the sanction of the medical officer was required before corporal punishment could be administered.[853] There were no statutory rules other than these governing corporal punishment and, in contrast (for example) to the position in approved schools, no distinction was made between boys and girls. Each administering authority may, however, have created their own more detailed rules.

The limitations to these rules, which are perhaps explained by a continuing reluctance to set rules for the administration of voluntary (that is to say, charitable and private) establishments, are to be noted. Most obviously there is nothing about the qualifications of the staff of the homes, nor the mechanisms for their selection, nor any exclusion criteria (even the most obvious, such as conviction of offences against children). That omission is all the more glaring given the express granting of the power to specify qualifications in the primary legislation itself.[854] The contrast with the rules for the selection of foster-parents,

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[850] 1959 Regulations, reg.8.

[851] 1959 Regulations, reg. 10.

[852] 1959 Regulations, reg. 10.

[853] 1959 Regulations, reg. 11. On corporal punishment generally, see Appendix Two to the present Report.

[854] 1948 Act, s. 31(1)(d).

considered above, and the qualifications of staff at approved schools, considered below, is stark. The Secretary of State for Scotland reported in 1968 that "one of the greatest difficulties in providing an adequate number and range of children's homes still lies in the recruiting and retaining of adequate and suitable staff".[855]

Another omission is that, other than the reference in Regulation 1 to the child's well-being, there is no statement of principle (equivalent to that contained in the Boarding-out Regulations 1947) placing the child's interests at the forefront of the purpose of keeping the child. There is little about contact between the child and parents[856] and there is nothing about preparing the child for return to his or her family: the Regulations are written on the assumption that the child's accommodation in the home would be long-term.

The 1959 Regulations governed children's homes for 29 years – from 1st August 1959 to 1st June 1988, when the Social Work (Residential Establishments - Child Care) (Scotland) Regulations 1987[857] came into force. Before then, however, new provision was made for children's homes by the Social Work (Scotland) Act 1968, after which such institutions were referred to as residential establishments.

vi. Residential Establishments Under the Social Work (Scotland) Act 1968

In a provision that remains in force today, the Social Work (Scotland) Act 1968 obliges local authorities to provide and maintain such residential and other establishments[858] as may be

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[855] *Child Care in Scotland, 1968* (Cmnd 4069) at para 28.

[856] In a regulation limited to voluntary homes it was required that the administering authority provide information to the Secretary of State (if he required it) about the facilities for visits to and communication with children by their parents or guardians: reg. 17. Contact was seen as a matter of appropriate arrangements to be made by those in charge of the home, rather than as a right of either parent or child.

[857] SI 1987 No. 2233 (S. 150).

[858] "Establishment" in this context means any establishment managed by a local authority, voluntary organisation or other person providing non-residential accommodation for the purposes of the Act, whether for reward or not; "residential establishment" means the same except that it involves residential accommodation: 1968 Act, s. 94(1).

required for their functions under the Act (and, subsequently, under other Acts[859]), or to arrange for the provision of such establishments.[860] They may do so by providing such establishments themselves or with other local authorities, or by securing the provision of such establishments by voluntary organisations or other persons.[861] The existing categories of voluntary home, local authority home and approved school were subsumed into the new, single, category of "residential establishment". Each initially remained subject to existing rules and regulations, though the 1968 Act additionally empowered any officer of the Secretary of State to enter any residential establishment or other establishment provided by a local authority or voluntary organisation or other person for the purposes of the Social Work (Scotland) Act 1968, in order to make "such examinations into the state and management of the place, and the condition and treatment of the persons in it", and to inspect its records. That officer could also enter any place where a private foster child was being maintained or a person was being boarded out by a local authority or voluntary organisation.[862] The power included the right to enter premises that the officer had reasonable cause to believe was registrable under Part IV of the Social Work (Scotland) Act 1968.[863]

a. Registration and Visiting of Residential Establishments

Any residential or other establishment the sole or main object of which is to accommodate persons for the purposes of the 1968 Act (other than those controlled or managed by a Government department or a local authority) required to be registered with a local authority.[864] Registration could be refused on a number of grounds: that the applicant or

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[859] Including the Children (Scotland) Act 1995 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

[860] 1968 Act, s. 59(1).
[861] 1968 Act, s. 59(2).
[862] 1968 Act, s. 6(1) and (2).
[863] 1968 Act, s. 6(3)
[864] 1968 Act, ss. 61 (subsequently amended by the Registered Establishment (Scotland) Act 1987 (c. 40, s. 1) and 62. Registration was required with the Secretary of State if he specified that any establishment or class of establishment should be so registered: s. 63. These provisions were replaced by the Regulation of Care (Scotland) Act 2001, discussed above at **1.F.v.a**.

any person employed or to be employed by the applicant was not a fit person to carry on or be employed at such an establishment, that the premises were not fit to be used for such an establishment or that the way in which it was proposed to conduct the establishment was not such as to provide services or facilities reasonably required by persons resorting to such an establishment.[865] Registration, once granted, could be cancelled on any of these grounds or on conviction by any person of an offence in relation to the establishment[866] or, after 1987, because a change of manager had not been notified or the annual fees for continuation of registration had not been paid.[867] When registration was refused or cancelled, the local authority could remove all or any persons resident in the establishment forthwith.[868]

The person in charge of the establishment was required to furnish particulars about the establishment and persons accommodated therein to the local authority (or the Secretary of State if registration was required with him) and failure to provide these particulars was a criminal offence.[869] Any duly authorised officer of the local authority could enter any registrable establishment in the area of the local authority "for the purpose of making such examinations into the state and management of the place, and the condition and treatment of the persons in it, as he thinks necessary, and for the purpose of inspecting any records or registers required to be kept therein".[870] In addition, local authorities were obliged "from time to time to cause persons in establishments in their areas to be visited in the interests of the well-being of the persons in the establishment":[871] this mandated the visiting of each individual child accommodated in a residential establishment and, together with the

[865] 1968 Act, s. 62(3).
[866] 1968 Act, s. 62(4). Appeal against either refusal to register or cancellation of registration could be taken under s. 64(4) (and then under the new s. 63A, as inserted by the Registered Establishment (Scotland) Act 1987, s. 4). Appeal tribunals were established under schedule 5, and procedure was governed by the Registration of Establishments (Appeal Tribunal) (Scotland) Rules 1983 (SI 1983 No. 71).
[867] 1968 Act, s. 62(4), as substituted by the Registered Establishment (Scotland) Act 1987, s. 3.
[868] 1968 Act, s. 65(1).
[869] 1968 Act, s. 66.
[870] 1968 Act, s. 67(1).
[871] 1968 Act, s. 68(1).

obligation to examine the state and management of the premises, these rules constituted the main mechanism by which local authorities monitored each child's wellbeing.

vii. Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987[872]

These regulations, which repealed[873] and replaced both the Administration of Children's Homes (Scotland) Regulations, 1959 (considered above) and the Approved Schools (Scotland) Rules, 1961 (considered below), came into force on 1st June 1988 and imposed obligations primarily on the managers of residential establishments – that is to say the appropriate officers of the local authority or voluntary organisation providing the residential establishment.[874] The overarching obligation on managers was to "make such provision for the care, development and control of each child resident there as shall be conducive to the best interests of each child".[875] The reference to "development" is particularly to be noticed.[876] The managers were also required to prepare, and keep under review, a statement of functions and objectives for the establishment, which had to contain the particulars specified in Schedule 1: these included the arrangements to meet the needs and development potential of all the children resident in the establishment, arrangements for each child's education, arrangements for visits by the child's relatives and friends, and (most interestingly) "the establishment's policy on the involvement of children and parents in decisions about the child's future".[877] The reference to involving children themselves is one of the earliest provisions allowing this. Also worth noting is that the particulars in Schedule

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[872] SI 1987 No. 2233 (S. 150).

[873] 1987 Regulations, reg. 31.

[874] 1987 Regulations, reg. 2.

[875] 1987 Regulations, reg. 4.

[876] The Approved Schools (Scotland) Rules 1961 had required the headmaster to run the school in the interests of the welfare, development and rehabilitation of the pupils (r. 11(1)) but the 1987 Regulation was more focused on the development of the individual.

[877] 1987 Regs, Sched 1 paras 1, 2 7 and 8.

1 included the procedures for dealing with complaints by children resident in establishments or by their parents or relatives.

To allow the managers to fulfil their responsibilities they had to arrange for the establishment to be visited on their behalf at least every six months and to receive a report at least every six months from both the visitors and the person in charge of the accommodation[878] on the implementation of the statement of functions and objectives for that establishment.[879] This required managers to keep the operation of that statement under continuous review. The managers could limit the total number of children who might normally be resident in each residential establishment they provided.[880]

Precautions against fire and accident had to be taken by the managers,[881] and any misadventure (the child's death or serious injury, the child absconding) required to be notified by the managers to the parent or guardian of the child and the care authority responsible for the child's welfare.[882]

Arrangements for discipline, relevant to the care and control of children resident in a residential establishment, were to be determined by the managers in accordance with the statement of functions and objectives formulated under regulation 5(1), but these arrangements could not involve corporal punishment.[883] The managers were obliged to ensure that each child received an "adequate and efficient education", and that sufficient premises and appropriately qualified teaching staff were provided for that purpose.[884] So far as was practicable and having regard to the child's wishes and feelings, the managers

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[878] Appointed under reg. 7 by either the local authority or (if the establishment was not provided by the local authority) the managers.

[879] 1987 Regulations, reg. 5.

[880] 1987 Regulations, reg. 6.

[881] 1987 Regulations, reg. 8.

[882] 1987 Regulations, reg. 9.

[883] 1987 Regulations, reg. 10. On corporal punishment generally, see Appendix Two to this Report.

[884] 1987 Regulations, reg. 11.

had to arrange that every child resident in the establishment was able to attend such religious services and to receive such religious instruction as appropriate to the child's religious persuasion.[885]

The managers were also obliged to make available (in consultation with the care authority[886]) any required medical or dental treatment; more generally they had to ensure that arrangements were made "for the maintenance of conditions conducive to good health among the children resident there including the maintenance of satisfactory conditions of hygiene".[887]

Records required to be kept in respect of each child resident in a residential establishment,[888] as well as a log book "of day-to-day events of importance or of an official nature, including, without prejudice to this generality and to the inclusion of such information in personal records maintained under regulation 14, details of disciplinary measures imposed".[889]

The local authority that issued a certificate of registration under s. 62(3) of the 1968 Act was obliged to visit the residential establishment at least annually in order to satisfy itself "that the operation of the residential establishment continues to conform to the requirements for registration" and "that the safety and welfare of children resident within the establishment are being maintained".[890]

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[885] 1987 Regulations, reg. 12. See also reg. 20.

[886] The care authority were also responsible for ensuring that the child received such medical and dental treatment as was required: reg. 30.

[887] 1987 Regulations, reg. 13.

[888] 1987 Regulations, reg. 14.

[889] 1987 Regulations, reg. 15.

[890] 1987 Regulations, reg. 16.

A number of obligations were also imposed on the care authority (that is to say, the local authority or voluntary organisation responsible for the welfare of the child[891]):

(1) The care authority could place a child in a residential establishment only when it had ascertained certain particulars set out in Schedule 2;[892] it was satisfied that the placement in residential care was appropriate to the child's needs, having considered these particulars and any other relevant information and having regard to its duty under section 20 of the Act; and it was satisfied that the particular residential placement proposed for the child was appropriate to the child's needs having regard, where a residential establishment was involved, to the statement of functions and objectives prepared by the managers.[893]

(2) The care authority had to ensure, so far as was consistent with its duty under section 20 of the Act[894] and having ascertained so far as practicable the wishes and feelings of each child, that each child of the same family was placed in the same residential placement or, where that was not appropriate or practicable, that the placements facilitated as far as possible continued mutual contact and access.[895]

(3) The care authority had to provide information to the person in charge of the establishment concerning the child's background, health, and mental and emotional development together with any other information that the care authority considered relevant to the placement including information about the child's wishes and

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[891] 1987 Regulations, reg. 2.

[892] Including the name, date of birth, religion, nationality and race of the child and his or her legal status under the Act, the child's "personality and social development", interests and hobbies, special needs, wishes and feelings and "the extent of access by members of the child's natural family".

[893] 1987 Regulations, reg. 18.

[894] That is to say to give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood.

[895] 1987 Regulations, reg. 21. Cf. the rather differing wording of reg. 16 of the Boarding-out and Fostering of Children (Scotland) Regulations 1985.

feelings about the placement. The care authority was also obliged to agree with the person in charge arrangements for the care to be provided for the child including education, medical and dental treatment, and contact arrangements between the child and his or her family.[896]

(4) The care authority had to take such steps as were necessary to satisfy itself that any placement continued to be in the interests of the child, by visiting the child (i) within one week of the placement being made; (ii) thereafter at intervals of not more than 3 months from the date of the last visit; (iii) on such other occasions as the care authority considered necessary in order to supervise the child's welfare; and by receiving and considering written reports on these visits.[897]

(5) The care authority was duty-bound to terminate the placement as soon as practicable where for any reason it appeared to it that it was no longer in the child's best interests to remain in the residential placement.[898]

A local authority could recommend to a children's hearing that a child be placed in a residential establishment only if, having carried out the procedure provided for in regulation 18, it was satisfied that it would be in the child's best interest to impose a supervision requirement with a condition to that effect.[899] And where the local authority came to the view that it was no longer in the interests of the child to remain in the residential placement named in the supervision requirement, it was obliged to refer the case to the reporter for a review of the supervision requirement.[900] There was, however, no sanction for the local authority's failure to do so.

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[896] 1987 Regulations, reg. 29.

[897] 1987 Regulations, reg. 23.

[898] 1987 Regulations, reg. 24.

[899] 1987 Regulations, reg. 26.

[900] 1987 Regulations, reg. 27(3).

viii. Residential Establishments – Child Care (Scotland) Regulations 1996[901]

The Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987 remained in force until 1st April 1997 when they were revoked[902] and replaced by the Residential Establishments – Child Care (Scotland) Regulations 1996, which continue to apply today. They apply to all residential establishments which provide residential accommodation for children which are either (i) controlled or managed by a local authority, (ii) require to be registered under s. 62 of the Social Work (Scotland) Act 1968, then s. 7 of the Regulation of Care (Scotland) Act 2001 then s. 59 of the Public Services (Reform) (Scotland) Act 2010, or (iii) was a school that was voluntarily registered under s. 61A of the 1968 Act.[903]

a. Duties of Managers; Statement of Functions and Objectives

The managers[904] of a residential establishment are obliged to ensure that the welfare of any child accommodated in the establishment is safeguarded and promoted and that the child receives such provision for his or her development and control as is conducive to his or her best interests.[905] To assist them in doing so, the managers must prepare, and keep under review, a statement of functions and objectives of the establishment, to include (amongst other things): details of the education to be provided; the measures to be taken to ensure the physical safety of children resident in the establishment; the sanctions for control; arrangements to assist each child in developing his or her potential and to take account of the child's views and to deal with complaints by children, their parents or relatives; arrangements for record keeping; arrangements for contact and visits by relatives and friends of the children; the policy on involving the children and parents in decisions about

[901] SI 1996 No. 3256 (S. 246).

[902] Children (Scotland) Act 1995 etc (Revocations and Savings) (Scotland) Regulations 1997 (SI 1997 No 691).

[903] 1996 Regulations, reg. 3.

[904] Defined in reg. 2(1).

[905] 1996 Regulations, reg. 4.

the child's future; and the policy and practice on recruitment and training of appropriately qualified staff.[906]

A provision in the 1996 Regulations that had no predecessor in the 1987 Regulations is Regulation 8, which requires the managers of a residential establishment to have in place appropriate procedures to be followed in the vetting of staff in relation to their suitability to work in the establishment both prior to their appointment and regularly thereafter. Vetting of staff now involves complying with the rules in the Protection of Children (Scotland) Act 2003 and the Protection of Vulnerable Groups (Scotland) Act 2007, as discussed above.[907]

The managers must also ensure that all necessary records, including where necessary health particulars, are maintained in respect of each child resident in a residential establishment.[908] They must also ensure that arrangements are made for "the maintenance of conditions conducive to good health among the children resident there including the maintenance of satisfactory conditions of hygiene", and for such medical and dental treatment to be available as may be required for each child.[909]

b. Duties of Local Authority

The local authority that registered the establishment was required under the 1996 Regulations to visit the establishment (i) at least annually to ensure that its operation continued to conform to the requirements of the registration and (ii) whenever they consider necessary or appropriate to ensure that the safety and welfare of the children resident there are being maintained.[910] When it places a child in a residential establishment the local authority must provide the person in charge with written information about the

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[906] 1996 Regulations, reg. 5 and Schedule.

[907] See above at **1.F.iv.**

[908] 1996 Regulations, reg. 13.

[909] 1996 Regulations, reg. 15.

[910] 1996 Regulations, reg. 16. Though not repealed, local authorities ceased to be registering authorities when the Care Commission took over that role under the Regulation of Care (Scotland) Act 2001.

child's background, health and mental and emotional development and any other information it considers relevant, including the child's views of the placement.[911] It must also agree with the person in charge the arrangements to ensure the child's welfare is safeguarded and promoted, the contact arrangements between the child and his or her family, and the arrangements for the child's education and medical and dental care.[912]

Other duties were placed on the local authority under the Arrangements to Look After Children (Scotland) Regulations 1996,[913] which applied to all children looked after by a local authority, and which are described earlier in this Report.[914] These Regulations were replaced by the Looked After Children (Scotland) Regulations 2009 which require local authorities to carry out an assessment of every child who is or is about to be looked after by a local authority,[915] making an assessment of (amongst other things) the child's immediate and long-term needs, and how they can be met, proposals for safeguarding and promoting the child's welfare, and arrangements for when the child will no longer be looked after by the local authority.[916] Thereafter the local authority must draw up a "child's plan", taking account of the views of the child, the child's parents, anyone with parental responsibilities or parental rights in respect of the child, anyone who ordinarily has (or had) charge of or control over the child, and any other person the local authority considers appropriate; this plan must include the assessment already made, the matters specified in Schedule 2 and the nature of the services proposed to ensure the arrangements concerning these matters are

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[911] 1996 Regulations, reg. 17(a); Looked After Children (Scotland) Regulations 2009, reg. 35(a)

[912] 1996 Regulations, reg. 17(b); Looked After Children (Scotland) Regulations 2009, reg. 35(b).

[913] SI 1996 No. 3262 (S.252), coming into force on 1st April 1997, the same day as the Residential Establishments – Child Care (Scotland) Regulations 1996.

[914] Above at **1.F.ii.b**

[915] Looked After Children (Scotland) Regulations 2009, reg. 3.

[916] Looked After Children (Scotland) Regulations 2009, reg. 4.

met.[917] And the child's case must be reviewed by the local authority within six weeks of the placement, then three months later and thereafter at least every six months.[918]

Finally, s. 32 of the Children (Scotland) Act 1995 allows the local authority to remove any child from a residential establishment, and requires them to do so if the person responsible for the establishment requests them to do so.

[917] Looked After Children (Scotland) Regulations 2009, reg. 5.

[918] Looked After Children (Scotland) Regulations 2009, reg. 45.

SECTION D: REFORMATORY, INDUSTRIAL AND APPROVED SCHOOLS

i. Reformatory and Industrial Schools Before 1932

Most reformatory and industrial schools at the turn of the 20th Century were under private management, funded by a treasury grant and money from local education authorities (with contributions if possible from parents). Both types of school were, since 1866, subject to Government inspection;[919] a school could not, however, be certified as being both reformatory and industrial.[920] The managers of a certified reformatory school were obliged "to educate, clothe, lodge and feed" the inmates;[921] they were empowered to make rules for the management of the school but these had to be approved by the Secretary of State.[922] An industrial school was defined as "a school in which Industrial Training is provided, and in which Children are lodged, clothed and fed, as well as taught".[923] The Reformatory and Industrial Schools Act, 1891[924] granted to the managers of certified reformatory and industrial schools the power to "apprentice to, or dispose of any child or youthful offender detained in or placed out on licence from such a school in any trade, calling or service, or by emigration",[925] even before the period of detention expired.

Section 44 of the Children Act, 1908 defined "reformatory school" to mean "a school for the industrial training of youthful offenders, in which youthful offenders are lodged, clothed, and fed, as well as taught", and "industrial school" to mean "a school for the industrial training of children, in which children are lodged, clothed, and fed, as well as taught". Both

[919] Reformatory Schools Act, 1866, s. 5; Industrial Schools Act, 1866, s. 10.

[920] Industrial Schools Act, 1866, s. 8.

[921] Reformatory Schools Act, 1866, s. 8.

[922] Reformatory Schools Act, 1866, s. 12.

[923] Industrial Schools Act, 1866, s. 5.

[924] 54 & 55 Vict. c. 23, s. 1.

[925] On emigration generally, see Appendix One.

were, therefore, *residential* schools[926] and both were made subject to the same regulatory regime by the 1908 Act.

Section 45 allowed the Secretary for Scotland[927] to "certify" schools as fit for the reception of youthful offenders or children, but only on receipt of a satisfactory report of the school's inspection. Thereafter schools were to be inspected annually, and certification could be withdrawn, permanently or temporarily, if the Secretary for Scotland were dissatisfied with the condition, rules, management or superintendence of the school.[928] The state, both central and local government, paid for the maintenance of children in certified schools, though parents could be made to contribute to the costs of maintenance.[929] Provision was made to identify which local authority was obliged to receive the child in a certified school (and liable, therefore, to contribute to costs). This was the local authority of the area in which the child resided[930] and it was presumed that the child resided where the offence was committed, or the circumstances justifying his or her removal from home occurred, unless it was proved that the child resided elsewhere.[931] The local authority or local education authority had the power to appeal that identification (in truth, that imposition of financial liability).[932]

The statutory obligation of the managers of the school (whether reformatory or industrial) was to "teach, train, lodge, clothe and feed" the child during the whole period of the child's

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[926] 1908 Act, ss. 77 – 83 amended the rules for day industrial schools, governed by the Day Industrial Schools (Scotland) Act, 1893.

[927] The Act throughout talks of the Secretary of State but s. 132(1) requires this in Scotland to be read as the Secretary for Scotland.

[928] 1908 Act, s. 47.

[929] 1908 Act, s. 75.

[930] 1908 Act, s. 74(1).

[931] 1908 Act, s. 74(3).

[932] 1908 Act, s. 74(7).

residence.[933] Any child sent to a certified school who was under the age of 8 years could be boarded out with "any suitable person" until reaching the age of 10, and thereafter for such longer period (with the consent of the Secretary for Scotland) as the managers considered to be advisable in the interests of the child, though the managers retained responsibility for the child.[934] The managers had the power to make rules for the school but these required to be approved by the Secretary for Scotland.[935]

A history of these two types of school up to 1915 is to be found in the *Report of Departmental Committee on Reformatories and Industrial Schools*.[936]

The overseeing power of the Secretary of State was transferred on 1st April 1920 to the Scottish Education Department under s. 19 of the Education (Scotland) Act 1918.[937] The Reformatory and Industrial Schools Regulations were made by the Scottish Education Department on 27th January 1921, coming into effect as from 1st April 1921.[938] School premises were to be "satisfactory as regards lighting, heating, ventilation, and sanitary condition, must provide adequate accommodation both for residential and instructional purpose, and must contain such equipment of workshops and special appliances as may be deemed necessary for securing the proper carrying on of the work of the institution."[939] The (educational) qualifications of the school staff had to be approved by the Scottish Education Department,[940] with teachers certified in particular subjects by the Department's normal

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[933] 1908 Act, s. 52.

[934] 1908 Act, s. 53.

[935] 1908 Act, s. 54.

[936] Cmd 7886 (1915).

[937] Reformatory and Industrial Schools (Scotland) (Transfer of Powers) Order, 1920 (SR&O 1920 No. 429 (S. 40)).

[938] These are reprinted in R.W. Roxburgh *The Law of Education in Scotland* (Wm. Hodge, 1928), vol. 1 (no volume 2 ever appeared) at pp.327-330.

[939] 1921 Regulations, reg. 1.

[940] Established under the Education (Scotland) Act, 1872 (as the Scotch Education Department) then re-established (as the Scottish Education Department) under the Education (Scotland) Act, 1918.

regulations; staffing levels were required to be sufficient to meet the needs of the school.[941] The timetable and curriculum, both of education and general routine of the school, required to be approved by the Department.[942] Regulation 4 is, perhaps, the most significant for the oversight of reformatory and industrial schools. It provided that "An efficient Committee of Management must be appointed which should meet at the school at least once a quarter and arrange for some of the members to visit the school periodically". It is likely that the purpose of such visits was to allow the Committee to ensure the standards set out above continued to be met, and there seems to have been no requirement to inquire into the wellbeing of any individual child, or to give them the opportunity to express concerns. The regulations concerned structural matters rather than care matters.

By 1931, there were in Scotland "four reformatories containing 374 lads and nineteen industrial schools containing 1301 pupils".[943]

ii. Approved Schools under the Children and Young Persons (Scotland) Acts, 1932 and 1937

The distinction between reformatory and industrial schools, retained but only formally by the 1908 Act, was finally abolished by the Children and Young Persons (Scotland) Act, 1932, which designated them both "approved schools".[944] The First Schedule to the 1932 Act, and subsequently ss. 83 and 85 of, and Schedule 2 to, the 1937 Act, governed the approval of schools "intended for the education and training of persons to be sent there" under the 1908 Act and then the 1937 Act. The system of approval was clearly designed to ensure that only schools suitable for their purpose, and safe for children and young persons to be sent to, received state funding. The managers of a school could "apply to the Scottish Education

[941] 1921 Regs, reg. 2.

[942] 1921 Regs, reg. 3.

[943] Cowan, *The Children Acts, Scotland* (W. Hodge & Co, 1933), p. 61, citing the Education (Scotland) Statistical Lists, 1932, p. 92.

[944] Existing certified reformatory and industrial schools were deemed to be approved by s. 37 of the 1932 Act.

Department to approve the school for that purpose, and the Scottish Education Department may, after making such inquiries as they think fit, approve the school for that purpose and issue a certificate of approval to the managers".[945] There was no statutory criteria set down by which the SED was to judge suitability for approval, but the SED, after having given approval, retained the power of oversight and could, if dissatisfied with the condition or management of the school, withdraw the certificate of approval.[946] Education Authorities could be the managers of approved schools,[947] but most were in practice run by voluntary organisations.

The SED was permitted to classify approved schools "according to the age of the persons for whom they are intended, the character of the education and training given therein, the religious persuasion of the persons for whom they are intended, their geographical position, and otherwise as they think best calculated to secure that a person sent to an approved school is sent to a school appropriate to his case".[948] The determination of what school was "appropriate" lay, therefore, with the SED. Both the SED and (with their approval) the managers of the school were entitled to make rules for the management and discipline of approved schools.[949] Children and young persons could be sent from England, Northern Ireland, the Isle of Man or the Channel Islands to approved schools in Scotland.[950]

Ministers of the religious persuasion of the child or young person were permitted to visit him or her in accordance with the rules made by the SED.[951] Medical attention was to be provided and the managers of the school could make arrangements for the child or young person to be received into and detained in any hospital, home or other institution for that

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[945] 1932 Act, Sched 1 para 1; 1937 Act, s. 83.

[946] 1932 Act, Sched 1 para 2; 1937 Act, s. 83(2).

[947] 1932 Act, Sched 1 para 11; 1937 Act, s. 84(1).

[948] 1932 Act, Sched 1 para 7; 1937 Act, s. 85(1).

[949] 1932 Act, Sched 1 para 8; 1937 Act, Sched 2 para 11.

[950] 1932 Act, s. 39; 1937 Act, s. 87.

[951] 1932 Act, Sched 1 para 12; 1937 Act, Sched 2 para 3.

purpose; importantly, the managers were in these circumstances deemed still to have the child or young person under their care.[952] Likewise, the managers could grant the child or young person leave to be absent from the school but they would still be deemed to have the care of the child or young person, and they could at any time require him or her to return to the school.[953] After twelve months residence at the school the managers could license the child or young person to live with the parent "or any trustworthy and respectable person (to be named in the licence) who is willing to receive and take charge of him" or her; while out on licence the child or young person remained under the formal care of the managers.[954] And the SED "shall through their inspectors review the progress made by persons detained in approved schools with a view to ensuring that they shall be placed out on licence as soon as they are fit to be so placed out".[955] Inspection, therefore, was not limited to the suitability of the school but also included individualised assessments of the children and young persons accommodated therein, always with the aim of releasing the child or young person back into the community.

An interesting group of provisions concerned the aftercare of the child, which constituted a recognition that children detained away from home were disadvantaged in their life-chances as compared with young adults growing up in a normal family environment. The state accepted a responsibility to replace, if imperfectly, lost opportunities. After the expiration of the period of detention, the child or young person was to remain "under the supervision of the managers of his school", either until the ages of 18 or 21 or for three years, though there was no specification as to what that supervision entailed, other than that if the young person was not yet 19, the managers had the power to recall him or her back to the school, if "it is necessary in his interests" to do so.[956] But again, the child or

[952] 1932 Act, Sched 1 para 13; 1937 Act, Sched 2 para 4.

[953] 1932 Act, Sched 1 para 14; 1937 Act, Sched 2 para 5.

[954] 1932 Act, Sched 1 para 15; 1937 Act, Sched 2 para 6.

[955] 1932 Act, Sched 1 para 15(2); 1937 Act, Sched 2 para 6(2).

[956] 1932 Act, Sched 1 para 16; 1937 Act, s. 78.

young person continued to be deemed under the care of the managers of the school.[957] While the child or young person was in the care of the managers, "all rights and powers exercisable by law by a parent shall … be vested in those managers".[958] It was further provided that "If a person under the care of the managers of an approved school[959] conducts himself well,[960] the managers of the school may, with his written consent, apprentice or place him in any trade, calling or service, including service in the Navy, Army or Air Force, or may, with his written consent and with the written consent of the Scottish Education Department, arrange for his emigration. Before exercising their powers under this paragraph the managers shall, in any case where it is practicable to do so, consult with the parents of the person concerned".[961] It is very noticeable that parental consent either to the apprenticing of the young person, placing him in the armed services or even his or her emigration[962] was not a legal requirement. Other than the addition of the Air Force in the 1932 legislation, this provision replicated the already-existing provision in the 1908 Act.[963]

Any person authorised by the managers to take charge of a person under their care and bring him or her to an approved school had "all the powers, protection and privileges of a constable".[964] The managers were obliged to accept any person sent to their school unless the school was for persons of a different religious persuasion, the school was an education authority school but that authority was not liable to contribute to the costs (because the child resided elsewhere), or the school was full.[965]

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[957] 1932 Act, Sched 1 para 16(5); 1937 Act, s. 78(5).

[958] 1932 Act, Sched 1 para 17(1); 1937 Act, Sched 2 para 12(1).

[959] And remember this may be a person no longer residing at the school.

[960] A qualification the practical effect of which was to ensure that discretion rested entirely with the managers.

[961] 1932 Act, Sched 1 para 18; 1937 Act, Sched 2 para 7.

[962] Emigration is considered more fully in Appendix One to the present Report.

[963] 1908 Act, s. 70.

[964] 1932 Act, Sched 1 para 19; 1937 Act, Sched 2 para 13.

[965] 1932 Act, Sched 1 para 20; 1937 Act, s. 85(2).

After 1st November 1963, the Secretary of State had the power to give directions to the managers of an approved school to secure that proper provision was made with regard to any matter relating to the premises or equipment of the school, the number or grades of the staff employed in the school, or the education, training or welfare of persons under the care of the managers.[966] The Secretary of State was also given the power to regulate the constitution and proceedings of the managers of any non-local authority approved school.[967] These provisions were repealed in 1968.[968]

iii. Children and Young Persons (Scotland) Care and Training Regulations, 1933[969]

Part A of the Care and Training Regulations, 1933, which came into force on 1st November 1933, set out the *"Rules for the Management and Discipline of Approved Schools"* as follows:

> 2. The managers [of each approved school], or a committee of them, shall meet as often as is required for the efficient management of the school. They shall arrange for some of their number to visit the school periodically … The headmaster or headmistress shall be responsible to the Managers for the conduct and discipline of the school.
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> 3. "The school premises shall be maintained in a satisfactory condition as regards lighting, heating, ventilation, cleanliness, sanitary arrangements and safety against fire. They shall provide adequate accommodation both for residential and for instructional purposes, and shall contain such equipment of workshops and special appliances as may be necessary for the proper conduct of the work of the school." The SED had to give approval for alterations to the buildings.

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[966] Criminal Justice (Scotland) Act 1963, s. 21.

[967] Criminal Justice (Scotland) Act 1963, s. 22.

[968] Social Work (Scotland) Act 1968, sched. 9.

[969] SR&O, 1933, No 1006 (S.55) (reproduced in Trotter at pp. 335 – 347).

4. Schools were obliged to hold regular fire drills.

5. The number of children resident in a school was not to exceed the number for which the school was approved.

7: Qualifications were a matter for the SED. "The staff shall be sufficient for the needs of the school and, generally, the school-room instruction shall be given by teachers qualified under the Department's regulations".

8: "The scheme of education and training, a specimen of the weekly dietary scale, and the time-tables of the routine, shall be submitted to the Department, as required, for their approval."

9: Reasonable provision was to be made for free-time and recreation. "Generally, additional freedom shall be given towards the end of a boy's or girl's period of detention with a view to him or her returning to ordinary life".

10: Children between the ages of 12 and 14 "shall not ordinarily be employed on school days for more than two hours. Suitable employment shall be provided for a reasonable period each day for those who have attained the age of 14 but such employment shall not be of such an amount as to interfere with further school-room instruction if such further instruction is required or is likely to be of benefit. Similarly, employment shall not interfere with the time needed for the boy's or girl's recreation or reasonable leisure. The employment of boys or girls who show signs of physical or mental infirmity shall be carefully safeguarded or in appropriate cases avoided altogether. No boy or girl shall be employed on any work which may involve the risk of serious injury. Provided they are under adequate supervision, older boys in senior schools may assist in attending to furnaces".

11: "The discipline of the school shall be maintained by the personal influence of the headmaster or headmistress and of the staff. In the ordinary exercise of his or her responsibility for the general discipline of the school, the headmaster or headmistress shall endeavour to reduce all forms of punishment to the minimum.

Punishment, where necessary, shall consist mainly of forfeiture of privileges or rewards; loss of conduct marks, recreation or liberty;[970] or degradation in rank. No boy or girl shall be deprived of recreation for more than one day at a time. The stopping of a period of home leave, i.e., leave extending to more than a day or two, is a severe punishment and should be resorted to only in the case of a serious offence." The list of types of punishment was not intended to be comprehensive (unlike the punishments specified in the Remand Home Rules described later), and other non-specified types (for example in relation to meals) were not prohibited.

12: "In no case shall the nature or the extent of the punishment be such as might be injurious to physical or mental health".

13: "For certain types of boys and girls isolation for a certain period may be the best method of correction and reform … A period of isolation shall not exceed six hours and the room in which the offender is placed must be light, airy and safe for the purpose; it must not be a cell or even a room definitely set apart for such punishments. Some form of occupation shall be provided and the offender shall be visited at frequent and regular intervals. In addition, some means by which the offender can communicate with the staff shall be furnished".

14: "If corporal punishment[971] is considered necessary a light tawse only may be used: a cane and any form of cuffing or striking are forbidden. No boy or girl who shows any sign of physical or mental weakness shall receive corporal punishment without the sanction of a medical officer. Corporal punishment should rarely be

[970] It is unclear what "liberty" consists of in this context but may well implicitly have authorised locking a child or young person in a room within the school. See also rule 13 which authorises "isolation".

[971] For a detailed examination of the developing law on corporal punishment, see Appendix Two to the present Report.

imposed on girls, whose treatment in other respects may differ from that required for boys, or be a modification of it."

15: "In girls' schools, corporal punishment may be inflicted only on the hands and the number of strokes shall not exceed three in all on any one occasion. In boys' schools corporal punishment may be inflicted only on the hands or on the posterior over ordinary cloth trousers" and the number of strokes varied according to age and where inflicted. It would be implausible to suggest that girls' posteriors were considered more delicate than boys' and the limitation to belting girls' hands may well indicate an official (if understated) acknowledgement that sexual abuse was a possibility during corporal punishment. If so, this provision ignored the possibility of sexual abuse of boys. In any case, the specificity of corporal punishment in these rules indicates clearly an understanding of the risk that "legitimate" punishment might readily cross the line to physical abuse. Kendrick and Hawthorn[972] report a case from 1936 where the magistrate in the trial of a physical education instructor accused of assaulting boys at an approved school in Dundee expressed difficulty in knowing "where reasonable punishment ended and assault began". Though the accused, on conviction, was merely admonished the case does illustrate both that the limits to corporal punishment were real and that the state would take action when it was considered that they had been crossed. However, the additional comment of the magistrate on boys "whining to the police or to the medical officer grumbling about assault" serves to reveal the social realities which would substantially inhibit pupils at approved schools from bringing their ill-treatment to the attention of the appropriate authorities.

16: Details were given as to who may inflict punishment.

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[972] *National Confidential Forum for Adult Survivors of Childhood Abuse in Care: Scoping Project on Children in Care in Scotland 1930-2005* (June 2012, CELCIS/SIRCC), at para 2.6.11.

17: Corporal punishment was not to be administered in the presence of other children, other than as punishment for minor school-room offences. This indicates some level of official awareness of the desirability of avoiding unnecessary humiliation for children deemed deserving of punishment.[973]

18: A record was required to be kept by the headteacher of all punishments.

19: Visits by parents were permitted "at such reasonable intervals as the Managers may determine". Also, "Managers shall, as far as possible, consult the parents (or guardians) as to the disposal of a boy or girl and shall endeavour to secure the written consent of both parents (or guardians) in any case in which it is proposed to place a boy in the Navy, Army or Air Force, or to emigrate him. Managers shall not ignore an objection to disposal raised by parents (or guardians) unless the circumstances are such that it is definitely in the interests of the boy or girl that the objection shall be overruled". This seems to have placed an obligation at least to attempt to secure the consent of the parents, but it is clear that the Managers had the power to make the arrangements (including for emigration) even in the face of parental opposition. The Act itself, of course, required the consent of the young person to any of these "disposals".[974]

20: A medical officer required to be appointed, who was to give medical examinations. He was required also to examine the punishment book and call attention of the managers to any case of excessive punishment. This officer was also under a duty to give "advice as to dietary and general hygiene", and to keep such records "as may be required" and keep the managers informed "as to the health of

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[973] Though it was some years later held that "humiliation" may be a legitimate part of reasonable punishment, so long as it was not degrading in the sense that would infringe art. 3 of the European Convention on Human Rights: *Stewart v Thain* 1981 JC 13 at 18, per Lord Justice-Clerk Wheatley and *Costello-Roberts v UK* (1995) 18 EHRR 112.

[974] 1932 Act, sched 1 para. 18; 1937 Act, sched 2 para 7.

the school". The role of the medical officer seems therefore to have been a central element in external supervision of the safe operation of the school, though the role was ill-fitted to do this fully. And in relation to the treatment of individual children the concern of the medical officer would seem to have been limited to clear and quantifiable injuries (as opposed to ill-treatment or neglect of children – such as emotional abuse – that left no physical marks).

21: A dentist was also to be appointed.

22: Disposal and after-care. The circumstances of each boy and girl were to be reviewed after 12 months and then every six months thereafter "in order that he or she may be placed out on licence as soon as he or she is fit to be so placed out." The aim of detention, therefore, was to prepare for release. "Managers shall make every effort to obtain suitable employment for a boy or girl on leaving and shall make arrangements for the proper discharge of their obligations under the Act in relation to the after-care of former pupils". That after-care was perceived primarily in terms of assisting the young person in finding work in the adult world is to be noted, and appears time and again in the provisions covered by this Part of this Report.

23: Records required to be kept of admissions, licences and discharges, together with "individual records of all boys and girls under the care of the Managers." These records may have included the reviews required in Rule 22 above, as well as details of individual admissions, punishments and discharges, but it was not until 1961 that the Rules required a record of each child's progress to be kept.[975]

24: "The school shall be open at all times to the inspection of His Majesty's Inspector of Schools or of any officer appointed by the Department for the purpose. The school records shall be available for examination by the inspector…"

[975] Approved Schools (Scotland) Rules 1961, r. 11(2)(b).

iv. The Approved Schools (Scotland) Rules, 1961[976]

The rules for the management and discipline of approved schools contained in Part A of the Children and Young Persons (Scotland) Care and Training Regulations, 1933, applied until 1st December 1961 when the Approved Schools (Scotland) Rules, 1961 came into force.[977] These were substantially more detailed than the 1933 Regulations, and provided in relevant part as follows:

a. Management

As with the 1933 Rules, the names of the managers of approved schools were required to be submitted to the Secretary of State,[978] and they were required to meet and to visit the school once a month in order to ensure that "the conditions of the school and the welfare, development and rehabilitation of the pupils under their care" were satisfactory.[979] Obligations additional to those in the 1933 Rules during such visits, with a new focus on individual children, were imposed: "(2) A visiting Manager shall take opportunity to speak with individual pupils. (3) A visiting Manager shall visit any pupil who is segregated under Rule 33 at the time of his visit. (4) A Manager shall discuss with the Headmaster any complaint made by a pupil." The managers were for the first time explicitly obliged to "manage the school in the interests of the welfare, development and rehabilitation of the pupils".[980] Together, these provisions – and especially the opportunity for pupils to make complaints – gave far more scope than had previously existed for visitors to uncover harmful regimes and unlawful practices.

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[976] SI 1961 No. 2243 (S 124), amended by the Approved Schools (Scotland) Amendment Rules, 1963 (SI 1963 No. 1756) from 1st November 1963.

[977] 1961 Rules, r. 55. Rule 54 of the 1961 Rules revoked the 1933 Regulations.

[978] 1961 Rules, r. 1.

[979] 1961 Rules, r. 2.

[980] 1961 Rules, r. 4.

b. Premises and Accommodation

The school premises were required to be maintained "in a satisfactory condition as regards lighting, heating, ventilation, cleanliness, sanitary arrangements and safety against fire;" that included providing "adequate accommodation for the residence, instruction and recreation both indoors and outdoors of the pupils".[981] Fire precautions had to be taken and fire drills held "frequently".[982] The number of pupils in a school was not to exceed (save exceptionally) the number specified by the Secretary of State.[983]

c. Staffing

Unlike the rules governing the staff of children's homes (which were not teaching establishments), the 1961 Rules contained detailed requirements designed to ensure the quality of staff at approved schools. It was for the managers in consultation with the headmaster to determine the number, type and qualifications of staff to be employed by them;[984] suspension and dismissal lay with the managers but they had to act in accordance with s. 81 of the Education (Scotland) Act 1946.[985] The headmaster could suspend a member of staff.[986] Where the character or conduct of a member of staff lead directly or indirectly to his resignation or to the termination by the Managers of his employment or to his contract of employment not being renewed on its expiry, the Managers were required to submit a full report of the circumstances to the Secretary of State.[987] Teaching had to be provided by qualified teachers, except with the consent of the Secretary of State.[988] It was

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[981] 1961 Rules, r. 6.

[982] 1961 Rules, r. 7.

[983] 1961 Rules, r. 8.

[984] 1961 Rules. r. 10(1).

[985] Which set out the procedure whereby Education Authorities (or, here, the governing body) could resolve that a certified teacher be dismissed.

[986] 1961 Rules. r. 10(2).

[987] 1961 Rules, r. 10(3).

[988] 1961 Rules, r. 10(4).

not, however, until the 1960s that professional courses in child care were established at institutions of further and higher education.[989]

The headmaster was responsible to the Managers for the efficient conduct of the school in the interests of the welfare, development and rehabilitation of the pupils.[990] He or she was required to keep records, including: (a) a general record of all admissions, licenses[991] and discharges; (b) an adequate record of the progress of each individual pupil; (c) a list of pupils on licence or[992] under supervision showing dates of visits paid by the person appointed under Rule 47 to carry out aftercare, the receipt of any correspondence and dates of visits from pupils; (d) a log book in which was recorded the receipt of any written report on the school communicated to the Managers; the visit of any Manager; and any event connected with the school that deserved to be recorded; (e) a punishment book; (f) a record of each occasion on which a pupil absconded from the school and of the circumstances; and (g) an attendance register.[993] An important new responsibility of the headmaster was to ensure that the parent of the pupil was aware of "the full meaning of the Court Order" under which the child had been sent to the school, and that the pupil received a full explanation of the Rules and, in particular, of their "rights" contained therein to speak with the headmaster,[994] to write and receive letters and to have visits from their parents.[995] The headmaster was obliged to hold periodical staff conferences to review the progress of individual pupils.[996]

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[989] See *Child Care in Scotland, 1968* (Cmnd 4069) at para. 49: it was further reported at para. 50 that in-service training courses for staff of approved schools "had to be curtailed in 1968", without explanation offered.

[990] 1961 Rules, r. 11(1).

[991] After the 1963 Amendment Rules, this was to be read as "releases"

[992] The words "on licence or" were omitted after the 1963 Amendment Rules.

[993] 1961 Rules, r. 11(2).

[994] 1961 Rules, r. 16.

[995] 1961 Rules, r. 15.

[996] 1961 Rules. r. 17.

d. Care of Pupils

Pupils were to be provided "with a separate bed in a room with sufficient ventilation and sufficient natural and artificial lighting" and with "easy access from every bedroom or dormitory to suitable and sufficient water closets and washing facilities"; suitable clothing was to be provided.[997] Pupils were to receive "sufficient, varied, wholesome and appetising food in accordance with a dietary scale adequate for the maintenance of health, to be drawn up by the Managers after consultation with the Headmaster and the Medical Officer and approved by an inspector."[998] Withholding meals as punishment was forbidden.

e. Education

Reflecting the duty imposed on education authorities by s. 1 of the Education (Scotland) Act 1946, the education to be given in approved schools was to be such as "to secure the efficient full-time education suitable to the age, ability and aptitude of the pupils of compulsory school age and their further education thereafter as long as they remain in the school".[999] The reference to further education is to be noted.

f. Employment

The 1933 Rules had permitted pupils at approved schools to be in employment for up to two hours a day. The 1961 Rules reduced this to one hour, specified that it was to be "light work such as making beds or cleaning boots", and dropped the previous reference to older boys "attending furnaces". Any employment of older pupils was not to interfere with any further education that would benefit the pupil.[1000]

g. Recreation and Privileges

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[997] 1961 Rules, r. 18.

[998] 1961 Rules, r. 19.

[999] 1961 Rules, r. 21.

[1000] 1961 Rules, r. 22.

If practicable, home leave of up to forty two days, with no period more than fourteen days, was to be permitted each year.[1001] Pupils were to be encouraged “in the right use of leisure and in healthy interests, and for this purpose as great a measure of liberty as possible shall be allowed during free time. Generally, additional freedom, including additional home leave when appropriate, shall be given towards the end of a pupil's period of detention with a view to facilitating his return to ordinary life.”[1002] At least one hour each day was to be spent in the open air (unless prevented by bad weather or illness).[1003]

h. Discipline and punishment

This issue had constituted what might today be considered a disproportionate amount of space in the 1933 Regulations. Much the same detail is given in the 1961 Rules, though the relative space devoted to the topic is less.

“Discipline and punishment are the responsibility of the Headmaster, who, except for matters for which special provision is made in the Rules, may give such instructions and delegate such responsibility as he sees fit.”[1004] The available punishments were listed as follows:—

(a) reprimand;

(b) forfeiture of privileges or rewards;

(c) loss of conduct marks or reduction in rank;

(d) loss of recreation or liberty;

(e) performance of useful additional tasks;

[1001] 1961 Rules, r. 23.

[1002] 1961 Rules, r. 24.

[1003] 1961 Rules, r. 25.

[1004] 1961 Rules. r. 28.

(f) the disallowance of home leave, which may be used only in the case of a serious offence; or

(g) corporal punishment.[1005]

The type of punishment to be used was to be determined "not only by the gravity of the offence but also by the age, temperament and physical condition of the offender." The Medical Officer was to be consulted if there was reason to think that punishment might be harmful to the pupil. In no case was the nature or the extent of the punishment to be such as might be injurious to physical or mental health.[1006] Details were given as to who could administer corporal punishment, and in what circumstances.[1007] An important new provision in the 1961 Rules, which recognised the opportunity that the infliction of corporal punishment afforded for abuse (or, perhaps, which sought to reduce the risk of false allegations of excess punishment) was that "except when the punishment is inflicted in the presence of a class in a schoolroom, an adult witness must be present" and that no pupil could be called upon to assist the person inflicting the punishment.[1008] As with the 1933 Regulations, girls could be hit only on the hands while boys could be hit on the hands or posterior: in either case, "only a light tawse may be used: a cane or other form of striking is forbidden". Records were required to be kept when punishment was either corporal punishment or the stopping of home leave.[1009]

The Headmaster could order a pupil (if over the age of 13) who was behaving "in an unmanageable or violent manner" to be temporarily segregated in a special room with good natural lighting and natural ventilation, with regular visits by staff.[1010] A special section of

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[1005] 1961 Rules, r. 29.

[1006] 1961 Rules. r. 30.

[1007] 1961 Rules, r. 31. On corporal punishment generally, see Appendix Two to this Report.

[1008] 1961 Rules, r. 31(c) and (d).

[1009] 1961 Rules, r. 32.

[1010] 1961 Rules, r. 33.

the school could be set aside (with the approval of the Secretary of State) for "abnormally unruly" pupils or persistent absconders.[1011] This was the precursor of what later came to be called "secure accommodation", discussed in Section E of this part of this Report, below.

i. Parents

Pupils were to be encouraged to write to their parents at least once a week, and were allowed to receive letters: staff were, however, empowered to read these and the headmaster could withhold any letter, except one to the managers or the Secretary of State or his officers.[1012]

Pupils were allowed to receive visits from their parents, relatives or friends, though that "privilege" could be suspended "in the interests of the pupil or the school".[1013] Frequency of visits was not specified and it seems likely that individual schools followed their own practices in the matter.

The parents and the Secretary of State had to be informed immediately in any case of serious illness, infectious disease, accident or death.[1014]

Parents had to be consulted as to the arrangements to be made for a pupil who was about to be released and their written consent sought in any case in which it was proposed to place a boy in the Navy, Army or Air Force, or to allow him to emigrate.[1015] Managers could not ignore a parent's objection to these arrangements unless (in the managers' view) it was in the interests of the pupil to do so.[1016] In any case an assumption is made in the Rules that

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[1011] 1961 Rules, r. 34.

[1012] 1961 Rules, r. 35.

[1013] 1961 Rules, r. 36.

[1014] 1961 Rules, r. 37.

[1015] It is curious that the reference to emigration is limited, as the references to the armed services are, to boys.

[1016] 1961 Rules, r. 39.

arrangements for the pupil's future will have been put in place as the date of release approached. This is also apparent in the "Release and Aftercare" rules, considered below.

j. Medical

A Medical Officer was to be appointed, whose duties included—

(a) a thorough examination of each pupil on admission and shortly before leaving the school;

(b) a quarterly inspection of each pupil;

(c) the examination and treatment of pupils as required;

(d) a visit to the school at least once each week;

(e) general inspection and advice as to dietary and general hygiene in the school;

(f) the keeping of such medical records as may be required;

(g) the furnishing of such reports and certificates as the Managers required; and

(h) the examination of the punishment book at each visit, drawing the attention of the Managers to any apparent case of excessive punishment.[1017]

The managers, taking advice from the Medical Officer, had to "make full use of the preventive health measures at their disposal, including vaccination, immunisation and chest X-ray."[1018] Dental care was also to be provided (and recorded).[1019]

k. Release and After-Care

[1017] 1961 Rules, r. 40.

[1018] 1961 Rules, r. 41.

[1019] 1961 Rules, r. 42.

The managers were obliged to release each pupil "as soon as he has made sufficient progress; and with this object in view they shall review his progress and all the circumstances of his case (including home surroundings) at least quarterly."[1020] There was no mechanism specified by which the parents (or indeed the child) could participate in the assessment of "sufficient progress" that might allow for release from the school. The managers were to assist any pupil over school age to obtain suitable employment, and if the pupil's home was unsatisfactory, they were obliged to "arrange for suitable accommodation".[1021] The pupil on leaving the approved school had to be provided with a sufficient outfit and, if necessary, a reasonable sum for travelling and subsistence.[1022] A suitable person was to be nominated to supervise the pupil on release.[1023]

l. General

The school was to be open at all times to an inspector and the Managers had to give him all facilities for the examination of the books and records of the school, and for the interviewing of staff or pupils.[1024]

m. Supervision after Release

The Criminal Justice (Scotland) Act 1963, Pt II and Sched. II came into force on 1st November 1963,[1025] and provided for the supervision of persons released from approved schools, replacing the supervision provisions in s. 78 of and sched 2 to the Children and Young Persons (Scotland) Act 1937. The person released was to remain under the supervision of the managers of the approved school for two years, or until his or her 21st birthday,

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[1020] 1961 Rules, r. 43.

[1021] 1961 Rules, r. 44.

[1022] 1961 Rules, r. 46.

[1023] 1961 Rules, r. 47.

[1024] 1961 Rules, r. 48.

[1025] Criminal Justice (Scotland) Act 1963 (Commencement No 1) Order SI 1963 No. 1681.

whichever was earlier, and was to reside with a person named by the managers.[1026] During that time the released person could be recalled.[1027] While under supervision, the person would be "in the care of" the managers of the school.[1028] That care imposed on the managers the obligations of a parent and gave them the same rights and powers, and liabilities as respects maintenance, as a parent.[1029] For three years after the period of supervision came to an end, the managers, if requested to do so and to the extent that they considered appropriate, had to cause the person to be "visited, advised and befriended" and to give him or her "assistance (including, if they think fit, financial assistance)" in maintaining him- or herself and finding suitable employment.[1030] These provisions were repealed in 1968.[1031]

v. Approved Schools After the Social Work (Scotland) Act 1968

Lord Hughes, opening the Second Reading Debate in the House of Lords on the Social Work (Scotland) Bill, said this:

> Part IV of the Bill is concerned with the provision and regulation of the residential and other establishments which the local authority are given a duty to provide by Clause 12 of the Bill. Part IV makes no statutory distinction between different kinds of establishment, and it applies in exactly the same way to homes and day centres for children at one end of the scale and homes and centres for elderly people at the other. It applies to all establishments where they are provided and managed by the local authority themselves, by voluntary organisations or by private bodies or individuals, whether on a commercial basis or not. Any establishment carried on mainly to provide for people who could be assisted by the local authority under this Bill is required by Clause 62 to be registered with the local authority, who are given the powers of entry and inspection which will be necessary to ensure that the

[1026] Criminal Justice (Scotland) Act 1963, sched. 2 para. 1.

[1027] Criminal Justice (Scotland) Act 1963, sched. 2 para 2.

[1028] Criminal Justice (Scotland) Act 1963, sched. 2 para. 5.

[1029] 1937 Act, s. 79(4).

[1030] Criminal Justice (Scotland) Act 1963, sched. 2 para 7.

[1031] Social Work (Scotland) Act 1968, sched. 9.

> registration is effectively carried out. Part IV provides also for appeals against the refusal of a local authority to register any establishment.
>
> One effect of the Bill is that the present approved schools will become part of the whole range of establishments available to children's hearings for the care and treatment of children who come under their control. Children will no longer be sent to these establishments by courts, and the length of time which any child will remain in these establishments will be decided by the appropriate children's hearing, who will of course, be guided in reaching such decisions by the advice of the managers and staff of the establishment concerned. The name "approved school" is abolished, because it will no longer be appropriate….[1032]

Notwithstanding that approved schools were subsumed by the 1968 Act into the wider category of residential establishments,[1033] the Approved Schools (Scotland) Rules, 1961 continued in force until their repeal on 1st June 1988 by the Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987.[1034]

[1032] HL Deb. 21 March 1968 vol. 290 col. 799.

[1033] And the process of approving approved schools in ss. 83 – 85 of and sched. 2 to the 1937 Act was repealed by the 1968 Act, sched. 9.

[1034] Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987, reg. 31.

SECTION E: SECURE ACCOMMODATION

i. Introduction

The earliest statutory authority in Scotland for keeping children under lock and key (other than in Borstal or Young Offenders Institutions) appears to be a fairly obscure provision in the Approved Schools (Scotland) Rules, 1961 allowing the Secretary of State to approve the use of part of an approved school "as a special section for pupils who are abnormally unruly, or are persistent absconders".[1035] The 1961 Rules applied to the management and conduct of special sections as they did to the parts of the school that were not special sections.[1036] There was no provision to govern how any individual child was determined to be "abnormally unruly" or a persistent absconder (or indeed to define these phrases), nor any mechanism to review that determination, and though the Secretary of State's authority was required for the initial placement in a special section both release and return to the special section were matters solely for the headmaster of the school.[1037] The first use of the term "secure accommodation" would appear to be in s. 72 of the Children Act 1975, which inserted a new s. 59A into the Social Work (Scotland) Act 1968, authorising the Secretary of State to make grants to local authorities to provide "secure accommodation in residential establishments", "secure accommodation" being defined as "accommodation provided for the purpose of restricting the liberty of children" (which has remained the definition ever since).[1038] The provision allowing the use of a "special section" of an approved school was repealed in 1983 by the first set of regulations (considered below) dedicated to secure units.[1039]

[1035] Approved Schools (Scotland) Rules 1961, r. 34(1).

[1036] Approved Schools (Scotland) Rules 1961, r. 34(3)

[1037] Approved Schools (Scotland) Rules 1961, r. 34(2).

[1038] Children (Scotland) Act 1995, s. 93; Children's Hearings (Scotland) Act 2011, s. 202.

[1039] Secure Accommodation (Scotland) Regulations 1983, reg. 19.

ii. Criteria for Placing Child in Secure Accommodation

Since the United Kingdom acceded to the European Convention on Human Rights, any interference with a person's physical liberty has required to be compliant with Article 5 thereof (right to liberty and security) and, in a different context from children in care, the matter was authoritatively discussed by the European Court of Human Rights in *X v United Kingdom*.[1040] That case involved s. 66(3) of the (English) Mental Health Act, 1959 which allowed the Home Secretary to recall to a secure mental hospital a patient who had been conditionally discharged therefrom, but which did not lay down any criteria limiting the Home Secretary's discretion to do so. An exercise of this unfettered discretion was challenged by a patient on the basis of an incompatibility between the recall process and Article 5(4) of the European Convention, which requires the existence of "proceedings by which the lawfulness of [a detainee's] detention shall be decided speedily". The UK Government argued that recourse to the Mental Health Review Tribunal (MHRT) satisfied that requirement but the European Court disagreed, pointing out that the MHRT had no power to determine the "lawfulness of [the] detention", nor to order the detainee's immediate release: rather its role was advisory only.[1041] The Court went on to point out that in order to be able to challenge the lawfulness of detention a detainee would require to be "promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty".[1042] The absence of this from the recall process amounted to a breach of Article 5(4).

Much the same criticisms could obviously be made in relation to the detention of children and young persons in "special sections" of approved schools, for in the absence of any process to determine whether the child or young person should be so detained there was no basis upon which the lawfulness of any such detention could be challenged. Legislation

[1040] [1982] 4 EHRR 188.

[1041] [1982] 4 EHRR 188, para. [61].

[1042] [1982] 4 EHRR 188, para. [66].

was passed shortly after the European Court's decision in *X v United Kingdom* to avoid any risk of a finding of incompatibility in this context also. Section 8 of the Health and Social Services and Social Security Adjudications Act 1983[1043] added a new s.58A into the Social Work (Scotland) Act 1968 allowing the children's hearing, when making a residential supervision requirement over a child, to add a condition that the child be "liable to be placed and kept in secure accommodation in the named residential establishment at such times as the person in charge of that establishment, with the agreement of the director of social work of the local authority required to give effect to the supervision requirement, considers it necessary that he do so".[1044] Such a condition could be added only when the hearing were satisfied that:

> (a) [the child] has a history of absconding, and—
>
> (i) he is likely to abscond unless he is kept in secure accommodation; and
>
> (ii) if he absconds, it is likely that his physical, mental or moral welfare will be at risk; or
>
> (b) he is likely to injure himself or other persons unless he is kept in secure accommodation.[1045]

These criteria for the inclusion of a secure accommodation condition in a supervision requirement have not changed since,[1046] and it remains the case that attaching this condition to a supervision requirement does not impose any legal obligation to accommodate the child in secure accommodation but merely renders the child *liable* to be

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[1043] See the discussion of the amendments at HC Deb 11 May 1983, vol. 42 cols 856 – 857. See also, for England and Wales, s. 25 of the Criminal Justice Act 1982.

[1044] The Children's Hearings Rules were amended to take account of this new power by the Children's Hearings (Scotland) (Amendment – Secure Accommodation etc) Rules 1984 (SI 1984 No. 100).

[1045] 1968 Act, s. 58A(3), as inserted by s. 8(4) of the Health and Social Services and Social Security Adjudications Act 1983.

[1046] Children Act 1995 s. 70(10); Children's Hearings (Scotland) Act 2011, s. 83(6).

kept there.[1047] The condition required to be reviewed regularly[1048] and could be removed by the sheriff on an appeal against the imposition or continuation of a supervision requirement.[1049]

iii. Secure Accommodation (Scotland) Regulations 1983[1050]

The Approved Schools (Scotland) Rules, 1961[1051] and (after 1988) the regulation on residential establishments applied in whole to the secure parts of such establishments that provided secure accommodation; in addition other regulations were contained in the Secure Accommodation (Scotland) Regulations 1983, which came into force on 30th January 1984[1052] (the same day as the coming into force of s. 8 of the Health and Social Services and Social Security Adjudications Act 1983, considered immediately above). "Secure accommodation" was defined in these regulations to mean "accommodation provided in a residential establishment for the purpose of restricting the liberty of children".[1053] No accommodation in any residential establishment could be used to restrict a child's liberty except with the approval of the Secretary of State.[1054] The person in charge of a residential establishment providing secure accommodation was originally duty-bound to "ensure that a

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[1047] In *BJ v Proudfoot* 2011 SC 201 a challenge was taken on the point that if the hearing merely permits the use of secure accommodation and the actual decision of whether to implement it falls to two officials then art. 5(4) was breached since these officials did not constitute a "tribunal", there was no right to be heard, no appeal and no review of the decision to implement the authorisation. This challenge was rejected and the overall process held to be ECHR-compliant, but in the event a new appeal against the implementation of the hearing's secure authorisation was added by the Children's Hearings (Scotland) Act 2011.

[1048] 1968 Act, s. 58C.

[1049] 1968 Act, s. 58D.

[1050] SI 1983 No. 1912.

[1051] Discussed above at **2.D.iv**.

[1052] 1983 Regulations, reg. 1.

[1053] 1983 Regulations, reg. 2(1).

[1054] 1983 Regulations, reg. 3.

child placed and kept in such accommodation receives care appropriate to his needs",[1055] but responsibility for meeting the child's needs was shifted from 1st June 1988 to "the managers", (that is to say the appropriate officers of either the local authority or voluntary organisation running the residential establishment providing secure accommodation[1056]) who became obliged, in consultation with the person in charge of the residential establishment, to "ensure that a child placed and kept in such accommodation receives such provision for his care, development and control as shall be conducive to the child's best interests".[1057]

Appropriate records were required to be kept under reg. 16:

> "(1) The person in charge[1058] of the residential establishment providing the secure accommodation in which a child is placed, shall ensure that a record is kept with respect to the child's placement in such accommodation, which shall include a record of—
>
> (a) the child's full name, sex, and date of birth;
>
> (b) the supervision requirement or other provision by reference to which the placement was made;
>
> (c) the date and time of his placement in secure accommodation, the reasons for, and the names of the persons authorising, the placement, and the address at which the child was living before the placement;
>
> (d) the name and address of each person to whom notice was given … of the child's placement;
>
> (e) reviews undertaken with respect to the placement …;

[1055] 1983 Regulations, reg. 4.

[1056] 1983 Regulations, reg. 2, as amended by the Secure Accommodation (Scotland) Amendment Regulations 1988 (SI 1988 No. 841), reg. 3.

[1057] 1983 Regulations, reg. 4, as amended by the Secure Accommodation (Scotland) Amendment Regulations 1988, reg. 4.

[1058] From 1st June 1988, this read "The managers in consultation with the person in charge….": Secure Accommodation (Scotland) Amendment (Regulations) 1988, reg. 11(1).

(f) the date and time of his release, and his place of residence following release from secure accommodation, and the names of the persons authorising that release.

(2) These records shall be available for inspection by the Secretary of State who may require that copies of them be sent to him."

The 1983 Regulations also allowed children detained in a place of safety under s. 37 or s. 40 of the 1968 Act to be kept in secure accommodation.[1059] Similar provisions to those in the 1983 Regulations were made in respect of children sent to and kept in secure accommodation under a residential care order made by a court under s. 413 of the Criminal Procedure (Scotland) Act 1975. The appropriate Regulations[1060] (which came into force on 1st April 1988) required the managers[1061] of a residential establishment providing secure accommodation, in consultation with the person in charge, to "ensure that a child placed and kept in such accommodation receives care appropriate to his needs".[1062] And records were required to be kept (and made available to the Secretary of State) of:

"(a) the child's full name, sex and date of birth;

(b) the date and time of his placement in secure accommodation, the reasons for, and the names of the persons authorising, the placement;

(c) reviews undertaken …;

(d) the date and time of his release".[1063]

[1059] 1983 Regulations, regs. 14 and 15.

[1060] Residential Care Order (Secure Accommodation) (Scotland) Regulations 1988, SI 1988 No. 294 (S. 28).

[1061] That is to say the management committee of a voluntary organisation or the appropriate officers of the local authority: Residential Care Order (Secure Accommodation) (Scotland) Regulations 1988, reg. 2.

[1062] Residential Care Order (Secure Accommodation) (Scotland) Regulations 1988, reg. 6. Oddly, the structure of this obligation was not amended to consist with the amended obligation in reg. 4 of the 1983 Regulations, as set out above.

[1063] Residential Care Order (Secure Accommodation) (Scotland) Regulations 1988, reg. 7.

iv. Secure Accommodation (Scotland) Regulations 1996 and 2013

Both the 1983 and the 1988 Regulations were revoked on 1st April 1997,[1064] when they were replaced by the Secure Accommodation (Scotland) Regulations 1996,[1065] which were themselves replaced from 24th June 2013 by the Secure Accommodation (Scotland) Regulations 2013.[1066] The 2013 Regulations continue to apply today.

The 1996 Regulations placed on the managers of the residential establishment[1067] providing secure accommodation the duty, in consultation with the person in charge, to ensure that the welfare of a child placed and kept in such accommodation was safeguarded and promoted and that the child received such provision for his or her education, development and control as was conducive to his or her best interests.[1068] Reviews of the case of a child kept in secure accommodation were required at greater frequency than with other accommodated children, that is to say within seven days of being placed in secure accommodation and thereafter at least every three months, as well as at such times as appeared necessary or appropriate in light of the child's progress.[1069] This was designed to ensure that keeping the child in secure accommodation continued to be in the child's best interests and that the child's liberty was restored as soon as detention was no longer

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[1064] Children (Scotland) Act 1995 etc (Revocations and Savings) Regulations 1997, reg. 1 and sched. Any approvals granted under the earlier regulations remained effective: reg. 2.

[1065] SI 1996 No. 3255 (S. 245).

[1066] SSI 2013 No. 205, reg. 16.

[1067] That is to say (i) in the case of a local authority, those officers having delegated powers under section 56 of the Local Government (Scotland) Act 1973 for the management of the residential establishment providing secure accommodation or (ii) in any other case those who are responsible for management of the residential establishment providing secure accommodation: Secure Accommodation (Scotland) Regulations 1996, reg. 2.

[1068] Secure Accommodation (Scotland) Regulations 1996, reg. 4.

[1069] Secure Accommodation (Scotland) Regulations 1996, reg. 15. Under the Arrangements to Look After Children (Scotland) Regulations 1996, regs. 8 and 9, reviews were required within six weeks, then three months later and then at six monthly intervals.

necessary. Records required to be kept, concerning the same matters (set out above) as under the 1983 Regulations.[1070]

The 2013 Regulations place an obligation on the managers (defined the same way as under the 1996 Regulations[1071]) to ensure that the welfare of any child placed and kept in secure accommodation is safeguarded and promoted.[1072] Likewise the rules concerning records are replicated.[1073] Reviews are dealt with under the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013,[1074] which require the chief social work officer to review the child's placement in secure accommodation within seven days of the placement, and thereafter monthly, or whenever the child or relevant person[1075] requests a review. If the child is detained in secure accommodation under s. 44 of the Criminal Procedure (Scotland) Act 1995 (as opposed to being placed there as a term of a compulsory supervision order) then reviews are within seven days and thereafter every three months.[1076]

Visitation and inspection of secure accommodation was originally subsumed into the monitoring regime of all residential establishments,[1077] which was the primary responsibility of local authorities. "Secure accommodation services" were later placed within the definition of "care services" for the purposes of the Regulation of Care (Scotland) Act

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[1070] Secure Accommodation (Scotland) Regulations 1996, reg. 16. See above at **2.E.iii**

[1071] Secure Accommodation (Scotland) Regulations 2013, reg. 2.

[1072] Secure Accommodation (Scotland) Regulations 2013, reg. 4.

[1073] Secure Accommodation (Scotland) Regulations 2013, reg. 16.

[1074] SSI 2013 No. 212.

[1075] "Relevant person" in relation to a child within the children's hearing system is a parent, other person with parental responsibilities and parental rights, or a person deemed to be a relevant person because he or she has or has recently had significant involvement in the upbringing of the child: Children's Hearings (Scotland) Act 2011, ss. 81 and 200.

[1076] Secure Accommodation (Scotland) Regulations 2013, reg. 13.

[1077] Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987, reg 16; Residential Establishments – Child Care (Scotland) Regulations 1996, reg. 16.

2001[1078] as a result of which they were subject from 1st April 2002 to inspection by the Care Commission. Secure accommodation is today a “care service” under the Public Services Reform (Scotland) Act 2010[1079] and so subject to the inspection regime of the Care Inspectorate.[1080]

[1078] Regulation of Care (Scotland) Act 2001, s. 2.

[1079] Public Services Reform (Scotland) Act 2010, s. 47(1)(f) and Sched. 12 para 6.

[1080] The role of the Care Commission and the Care Inspectorate is examined above at **1.F.v**.

SECTION F: REMAND HOMES, BORSTALS AND YOUNG OFFENDERS INSTITUTIONS

i. Remand Homes

a. Origins of Remand Homes

Remand homes trace their origins to the Youthful Offenders Act 1901[1081] which enabled courts to "remand"[1082] a child accused of an offence to the care of any fit person willing to receive him, instead of committing the child to prison. The Children Act, 1908 obliged police authorities to provide (and keep a register of) such places of detention,[1083] and they were used both as places (i) where children and young persons committed to trial but not released on bail could be kept and (ii) where short sentences, not exceeding one month, could be spent. The Children and Young Persons (Scotland) Act,1932 was the first to designate such places as "remand homes", and that Act transferred responsibility therefor from the police authorities to local authorities: by s. 33 of the 1932 Act and s. 81 of the 1937 Act, "it shall be the duty of every local authority to provide for their area remand homes …". Trotter described remand homes as "places where children and young persons who offend against the law may be kept in detention and where children and young persons who are in need of care or protection may be temporarily sheltered".[1084] Kilbrandon perceived remand homes as places for the administration of "a short, sharp lesson".[1085] The key characteristic, therefore, is the short-term nature of this form of accommodation. Any child or young person who could be lawfully remanded in custody could be accommodated in a remand home.[1086] Any institution other than a prison could be used as a remand home, but it was

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[1081] 1 Edw. 7 c. 20.

[1082] This was an English term, to be construed in Scotland as adjourning proceedings and detaining in custody during the adjournment (Children Act, 1908, s. 132(14)).

[1083] 1908 Act, s. 108.

[1084] Trotter, *The Law as to Children and Young Persons* (W. Hodge & Co, 1938), p. 148.

[1085] Kilbrandon Committee Report at para. [56].

[1086] 1932 Act, s. 33(3); 1937 Act, s. 81(3).

not until 1949 that such homes required certification (see immediately following paragraph). Inspection was, prior to then, the only monitoring mechanism. Section 109(3) of the 1908 Act[1087] required that the Secretary for Scotland cause remand homes to be inspected and children and young persons resident therein to be visited.

b. Remand Homes, Remand Centres and Detention Centres

Further control of remand homes was added by the Criminal Justice (Scotland) Act 1949,[1088] which for the first time required both remand homes and any person in charge to be approved by the Secretary of State,[1089] the criteria of approval being those laid down for the approval of approved schools.[1090] The 1949 Act allowed a court to commit a young person to a remand home,[1091] to a detention centre[1092] (that is to say a place where 14 – 21 year olds might be detained, on conviction, for up to three months), or to a Borstal institution.[1093] The Act also allowed the Secretary of State to provide "remand centres" for 14 – 21 year olds committed in custody for trial or sentence[1094] and for offenders who were

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[1087] Subsequently re-enacted as s. 82(3) of the 1937 Act (and later amended by the 11th Schedule to the Criminal Justice (Scotland) Act, 1949).

[1088] 12, 13 and 14 Geo VI, ch. 94 (repealed by the Criminal Procedure (Scotland) Act 1975, Sched. 10).

[1089] Criminal Justice (Scotland) Act, 1949, s. 51(1) and (3).

[1090] Criminal Justice (Scotland) Act, 1949, s. 51(2).

[1091] Criminal Justice (Scotland) Act, 1949, s. 28.

[1092] Criminal Justice (Scotland) Act, 1949, s. 19. See the Report "Custodial Sentences for Young Offenders", drawn up by the Scottish Advisory Council on the Treatment of Offenders and published by HMSO on behalf of the Scottish Home Department in 1960, paras 21-24 for a description of the use of detention centres after 1949.

[1093] Criminal Justice (Scotland) Act, 1949, s. 20.

[1094] Criminal Justice (Scotland) Act, 1949, s. 50.

so unruly that they could not safely go to a remand home.[1095] Most of these provisions were repealed by the Social Work (Scotland) Act 1968.[1096]

Remand centres were subsequently defined as "places for the detention of persons not less than fourteen but under twenty-one years of age who are remanded or committed in custody for trial or sentence".[1097] Detention centres were at the same time defined as "places in which persons not less than fourteen but under twenty-one years of age who are ordered to be detained in such centres under the Criminal Justice (Scotland) Act, 1949,[1098] may be kept for short periods under discipline suitable to persons of their age and description".[1099] Only remand homes were under the direct control of local authorities; Borstal institutions and remand and detention centres were part of the prison estate. The Borstal rules are considered below; detention centres were covered by the Prison Rules made under the 1949 Act.[1100]

c. The Remand Home (Scotland) Rules, 1933[1101]

The Remand Home (Scotland) Rules, 1933 came into operation on 1 November 1933. They provided (in relevant part) as follows:

> 4: A remand home could be either a remand home established by a council or premises used as a remand home by arrangement made with the occupiers by a

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[1095] Criminal Justice (Scotland) Act, 1949, s. 28. In 1961, it was reported that no such remand centres had been established: "Remand Homes: A Report of a Special Committee of the Scottish Advisory Council on Child Care" (SED 1961, Cmnd 1588).

[1096] 1968 Act, sched. 9.

[1097] Prisons (Scotland) Act, 1952, s. 31(1)(a).

[1098] Later the Criminal Justice (Scotland) Act 1963.

[1099] Prisons (Scotland) Act, 1952, s. 31(1)(b).

[1100] Prison (Scotland) Rules, 1952 (SI 1952 No. 565). See especially rules 150-152, which dealt with prisoners under 21.

[1101] SR&O 1933 No 1024 (S. 58): reproduced in Trotter at pp. 326 et seq.

council. “Such premises may include Homes for boys and girls and other similar institutions and private dwelling houses. Public assistance institutions[1102] shall not be used as remand homes except with the consent of the Department of Health for Scotland”.

5: “Remand homes shall be open to inspection at all times by an Inspector”. [“Inspector” was defined in Rule 3 to mean “any officer of the Scottish Juvenile Welfare and After-Care Office[1103] engaged on the duties of the inspection of remand homes with the authority of the Secretary of State, or any other person authorised for the purpose by the Secretary of State”].

6. “Care shall be taken to keep in separation any inmate who may be likely to exercise a bad influence over other inmates”.

7. “Where accommodation is provided in a remand home for boys and girls, arrangements shall be made, so far as practicable, for the separation of boys of 10 years and over from girls except during instruction or employment or meals. The sleeping accommodation for boys shall be separate from that of girls.”

8. “Each inmate shall sleep in a separate bed.”

9. “Each inmate shall be supplied with sufficient and varied food.”

10. “The inmates shall wear their own clothing, but where desirable on sanitary or other grounds, suitable clothing shall be supplied.”

11. “Each inmate shall be thoroughly cleansed on admission.”

[1102] That is to say, poor houses.

[1103] The establishment of which had been recommended by the Morton Committee.

12. Instruction and practical work were required to be given (with only light work for inmates under 12 years of age).

13. “The inmates shall be allowed not less than two hours daily for recreation and exercise. Suitable reading books and games shall be provided.”

14. “So far as practicable arrangements shall be made for the attendance of the inmates each Sunday at a place of public worship. They may be visited at convenient times by a minister of the religious persuasion to which they belong”. “Convenient” probably meant, to the home rather than to the minister.

15. “The discipline of the remand home shall be maintained by the personal influence of the Superintendent”. [“Superintendent” was defined in Rule 3 to mean “the person in charge of the remand home”].

16: Punishment, where “necessary for the maintenance of discipline” had to be either temporary loss of recreation, reduction in quality or quantity of food (but not deprivation of two meals in succession), separation from other inmates (unless the subject of punishment was under 12) or, “for boys only, moderate corporal punishment. This shall be inflicted only by the Superintendent… The Superintendent shall immediately record particulars of each punishment, and the reason for it, in the Log Book required to be kept under Rule 21 of these Rules.” There is a lack of specificity as to how corporal punishment was to be carried out, which contrasts sharply with the contemporaneous rules for corporal punishment at approved schools.[1104] The limitation of corporal punishment to boys in remand homes is to be noted, a limitation not found in the approved schools rules.

17: A doctor was to attend the remand home and, where necessary, arrangements were to be made to remove an inmate to a hospital for medical treatment.

[1104] Rather more specificity was set out in the Remand Home (Scotland) Rules, 1946, discussed below.

18: Notification of death had to be given to the parent or guardian of a deceased inmate, to the local authority and the Secretary of State (as well as to the Procurator Fiscal in case of sudden or violent death).

19. "Arrangements shall be made for any premises used as a remand home to be regularly visited by persons appointed for that purpose by the local authority. The visitors so appointed shall include women."

20: "Reasonable facilities shall be given for inmates to receive visits from their relatives or guardians and friends and to send or receive letters".

21. "The Superintendent shall keep a Register of Admissions and Discharges, in which shall be recorded all admissions and discharges, and a Log Book in which shall be entered every event of importance connected with the remand home. These books shall be open to inspection by or on behalf of the council or by an Inspector."

d. The Remand Home (Scotland) Rules 1946[1105]

The Remand Home (Scotland) Rules, 1933, were replaced on 1st July 1946 by the Remand Home (Scotland) Rules, 1946 which were based on the recommendations of the Scottish Advisory Council of the Treatment and Rehabilitation of Offenders. The 1946 Rules are described in detail in the Shaw Review,[1106] as follows:

In terms of welfare, the rules generally said that each "inmate" - to use their terminology - should be thoroughly washed and examined by a doctor within 24-48 hours after being admitted.[1107] They also required that a doctor be appointed at

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[1105] SR&O 1946 No. 693 (vol XI, p. 667 of Revised SR&Os).

[1106] *Historic Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995*, Scottish Government, 2007, at pp. 62-64.

[1107] The Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 8. Furthermore, in the case of an inmate known to be awaiting removal to an approved school, a medical examination was to take place within 48 hours before such removal.

each remand home to act as medical officer and administer any necessary medical treatment to inmates.[1108] Reflecting the importance of this role, the medical officer had to regularly visit the remand home and generally ensure the premises were hygienic, supervise the inmates' health and provide any medical attention that was needed.[1109]

The superintendent (that is, the person in charge of the home[1110]) also had responsibilities under the 1946 Rules. First, he or she was required to inform the clerk of court, council and the inmate's parents if an inmate had to be taken to hospital, clinic or other safe place to be medically treated or examined, or if the medical officer felt the inmate shouldn't be detained in the remand home on medical grounds. If the inmate had been committed to the home under section 58 of the 1937 Act, the superintendent also had to inform the Secretary of State.[1111] Finally, the superintendent had to report any death, serious illness, infectious disease or accident to the inmate's parent or guardian, the council and the Secretary of State.[1112]

Homes had, as far as possible, to arrange for schoolroom instruction - on or off the premises - for inmates of school age,[1113] and in general the discipline of the remand home was to be maintained by "the personal influence" of the superintendent.[1114] When punishment was necessary to uphold discipline, the rules stipulated it should take the form of:

- temporary loss of recreation or privileges;

[1108] The Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 9.

[1109] *ibid*

[1110] *ibid*, paragraph 23(1).

[1111] The Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 9.

[1112] And any sudden or violent death was to be reported immediately by the council to the Procurator Fiscal: the Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 11.

[1113] *ibid* paragraph 12.

[1114] *ibid* paragraph 16.

- reduction in food; or
- separation from other inmates (but only for those aged over 12, and provided they had some way of communicating with a member of staff).[1115]

Corporal punishment was allowed if these punishments proved ineffective, but could only be administered to boys[1116] and under the following conditions:

- It should be administered by the superintendent or, if the superintendent wasn't available, by whoever was left in charge.
- Only punishments described by the rules were allowed: striking, cuffing or any shaking were forbidden.
- Only a strap approved by the council could be used:
    - for no more than three strokes on each hand; or
    - for no more than six strokes on the bottom, over trousers.[1117]

In terms of monitoring arrangements, the 1946 rules provided that homes had to be open for inspection by an inspector at all times.[1118] This was in addition to the general powers of inspection in the Children and Young Persons (Scotland) Act 1937.[1119] Homes also had to have arrangements in place for regular visits by council-appointed visitors, which were to take place at intervals of no more than three months, with at least two visits a year unannounced.[1120] It is significant that these visitors were to include women, and that a further channel of inspection was now available: the home should be open "at all reasonable hours" to visits by justices and magistrates of the juvenile courts that sent children to the home.[1121] In addition, reasonable facilities were to be given for inmates to receive visits from their relatives or guardians and friends, and to send or receive letters.[1122]

The rules also covered record-keeping. The superintendent was required to keep a register of inmates admitted to and discharged from homes, and had to keep log

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[1115] *ibid* paragraph 17(a)

[1116] *ibid*

[1117] *ibid* paragraph 18.

[1118] *ibid* paragraph 2.

[1119] I.e. s82(3) as amended by the Criminal Justice (Scotland) Act 1949. Later repealed by the Social Work (Scotland) Act 1968.

[1120] Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 19.

[1121] *ibid*

[1122] *ibid* paragraph 14.

books, which had to detail "every event of importance" connected with the home.[1123] These included details of all visits and dates of inspection, and all punishments. The latter was reinforced by a requirement on owners to record punishments immediately and to inform the Secretary of State every quarter of corporal punishments.[1124] Registers and log books had to be open to inspection by the council, on the council's behalf or by an inspector. They also had to be inspected regularly at intervals of no more than three months.[1125]

e. The Remand Home (Scotland) Rules 1964[1126]

In 1961 the Scottish Advisory Council on Child Care reported that: "With certain notable exceptions, the existing remand homes fall far short of the aims we have outlined above, and some of them deplorably so."[1127] The Council recommended that responsibility for remand homes be transferred to the Secretary of State, "that full diagnostic services should be available to each remand home, and provide for the skilled assessment of inmates", and that the 1946 Rules be reviewed.[1128] The 1946 Rules were revoked as from 1st October 1964 by the Remand Home (Scotland) Rules 1964 (not detailed in the Shaw Report).

Welfare of the children detained in remand homes was a more prominent feature of the 1964 Rules than it had been in the 1946 Rules, and the dehumanising language of "inmate", found in the earlier Rules, was changed in the 1964 Rules to "children". Local authorities were obliged to "conduct remand homes as in general to promote the welfare of the children admitted thereto, and in particular to ensure that such children are secure in custody, that their individual circumstances are carefully considered and assessed and that

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[1123] *ibid* paragraph 20.

[1124] *ibid* paragraph 17(b).

[1125] *ibid* paragraph 20.

[1126] SI 1964 No. 1260, rule 33.

[1127] "Remand Homes: A Report of a Special Committee of the Scottish Advisory Council on Child Care" (SED 1961, Cmnd 1588) at para. [33].

[1128] A fuller description of this Report, and the Government's response, may be found in the Kilbrandon Report, at paras 209-210.

they receive appropriate care and training."[1129] Staff were to be "suitably" qualified,[1130] though that term was not further defined. The food that was provided had to be "wholesome and appetising food, reasonably varied and adequate for the maintenance of health and strength in accordance with a dietary scale, which shall include a table of minimum quantities, prepared by the Superintendent in consultation with the medical officer."[1131] Children were allowed to wear their own clothing except where in the opinion of the Superintendent it was "necessary or desirable on the grounds of health, cleanliness, or welfare" to provide alternative adequate outdoor and indoor clothing and footwear.[1132] Primary and secondary education was to be provided, as well as "suitable practical instruction" for children over school age.[1133] The numbers accommodated in a remand home were set by the Secretary of State[1134] and these could be exceeded only in "exceptional circumstances". In 1968 the Secretary of State reported that "remand homes, particularly those in the West of Scotland, experienced frequent periods of pressure as regards numbers to be accommodated. This was especially noticeable in the earlier part of the year when most homes had recourse to the provision in the Remand Home (Scotland) Rules 1964 which permits homes to accommodate more than the normal maximum of children".[1135]

The medical officer remained responsible for the general supervision of the health and cleanliness of the children and of the home itself.[1136] Boys were to be segregated from girls[1137] and each child was to have a separate bed, with adequate ventilation, adequate

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[1129] 1964 Rules, rule 3.

[1130] 1964 Rules, rule 4.

[1131] 1964 Rules, rule 6.

[1132] 1964 Rules, rule 7.

[1133] 1964 Rules, rule 8.

[1134] 1964 Rules, rule 19.

[1135] *Child Care in Scotland, 1968* (Cmnd 4069) at para 36.

[1136] 1964 Rules, rule 14. Dental care was also to be provided: rule 15.

[1137] 1964 Rules, rule 21.

heating, adequate natural and artificial lighting and easy access to (gender-separated) water closets and washing facilities.[1138]

Discipline was to be "maintained by the personal influence of the Superintendent and his staff,[1139] punishment could be by reprimand, or by temporary loss of recreation or privileges, except that a child was not to be deprived of any meal or of exercise in the open air.[1140] Corporal punishment[1141] was permitted where reprimand or loss of privileges was not appropriate, but only subject to the following conditions:

> (a) it could not be administered to a girl;[1142]
>
> (b) it could be administered only by the Superintendent in the presence of an adult witness, and any assistance necessary in administering it could be given only by a member of the staff;
>
> (c) it was not to be inflicted on more than one occasion for one offence;
>
> (d) it could not, without the approval of the medical officer, be administered to any boy who showed any sign of physical weakness, mental illness or mental deficiency;
>
> (e) it could be inflicted only by means of a light tawse;
>
> (f) a boy who had reached the age of 14 years could be given not more than three strokes on each hand or six strokes on the posterior over ordinary cloth trousers, and

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[1138] 1964 Rules, rule 22.

[1139] 1964 Rules, rule 23.

[1140] 1964 Rules, rule 24.

[1141] See further, Appendix Two to the present Report.

[1142] This is slightly odd, given that corporal punishment of girls in approved schools was permitted under the Approved Schools (Scotland) Rules, 1961.

a younger boy could be given not more than two strokes on each hand or four strokes on the posterior over ordinary cloth trousers;[1143]

(g) any other form of corporal punishment was prohibited, with striking, cuffing and shaking being "strictly forbidden".[1144] The difference between a prohibited and a strictly forbidden act is obscure, but presumably reflected differing disciplinary consequences for the staff breaching the rules.

A child who was behaving in an unmanageable or violent manner or was likely, in the opinion of the Superintendent, to exercise a bad influence on the other children could be temporarily separated from the other children by being confined in a room approved for the purpose by the Secretary of State, so long as the room had good natural lighting, was lit after dark, and had adequate ventilation and heating; suitable forms of occupation had to be provided and means of communication between the child and a member of staff was to be available at all times during the day and night and the child was to be visited frequently by a member of staff and at least once each day by the Superintendent.[1145]

Children could be visited by their parents, relatives and friends at specified times, though visits could be suspended by the Superintendent in the interests of the child or the conduct of the remand home; legal advisers, police, probation officers and local authority officers could also visit the child.[1146] Three representatives of the local authority (at least one of whom being a woman) were obliged to visit the remand home at least once a month and remand homes were to be open at all times to inspection by an inspector,[1147] but the focus of these visits was not specified. Appropriate records were to be kept.[1148]

[1143] These replicated the rules for boys in approved schools: 1961 Rules, r. 31(f) and (g).

[1144] 1964 Rules, rule 25.

[1145] 1964 Rules, rule 26.

[1146] 1964 Rules, rule 12.

[1147] 1964 Rules, rules 27 and 28.

[1148] 1964 Rules, rules 29 – 31.

These Rules applied to children in remand homes as a place of safety, as well as to children committed to custody in a remand home.[1149]

f. The End of Remand Homes

A Report of the Secretary of State for Scotland in 1968 said this:

> The Social Work (Scotland) Act 1968 amends section 58 of the 1937 Act in such a way as to abolish detention in a remand home as a punishment. The 1968 Act also provides for the repeal of section 81 of the 1937 Act which requires local authorities to provide remand homes and in consequence remand homes will cease to exist as such. Local authorities will be required to provide such residential establishments as may be required for their functions under the 1968 Act and those remand homes which are suitable will become available for providing a full range of assessment facilities on a residential basis for those children sent to them.[1150]

ii. Approved Probation Hostels and Probation Homes

Section 12 of the Criminal Justice (Scotland) Act, 1949 allowed the Secretary of State to approve premises for the reception of persons required to reside there in terms of a probation order[1151] or a supervision order.[1152] Such premises were known as approved probation hostels (if the person was in employment outside the premises) or approved probation homes (in any other case), and could accommodate offenders of any age, including those under 18. The Approved Probation Hostel (Scotland) Rules 1967[1153] required hostels to be managed by a committee of not less than 16 persons, which had to meet at the hostel at least every two months.[1154] A member of the committee was required to visit the hostel at least once a month to "satisfy himself regarding the care of the

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[1149] 1964 Rules, rule 32.

[1150] *Child Care in Scotland, 1968* (Cmnd 4069) at para. 37.

[1151] Made under the 1949 Act.

[1152] Made under the Children and Young Persons (Scotland) Act, 1937, s. 72.

[1153] SI 1967 No. 858.

[1154] 1967 Rules, rr. 3 and 6.

residents and the state of the hostel, or some part of it".[1155] The warden was responsible to the committee for the efficient conduct of the hostel, and was required to keep records, including of "the progress of every person under supervision residing in the hostel".[1156] Corporal punishment (which was, unusually, specified to include "striking, cuffing or shaking or the intentional infliction of any form of physical pain as a means of punishment") was prohibited.[1157] A medical officer had to be appointed, who was responsible for the general supervision of the hygienic conditions of the premises and of the health of the staff and residents in the hostel.[1158]

If a probation order or a supervision order required a person to reside elsewhere than an approved probation hostel or home (otherwise than for medical treatment) the Secretary of State had the power to inspect the premises.[1159]

All these provisions were repealed by the Social Work (Scotland) Act 1968,[1160] which brought the probation service within the general social work framework, and the concept of probation hostel was subsumed into the concept of residential establishment.

iii. Borstal Institutions

Borstal institutions were first subject to regulation as a national strategy by the Prevention of Crime Act, 1908[1161] which allowed young persons to be sentenced to a Borstal institution (a secure environment) rather than an adult prison. They were designed, as prisons at the

[1155] 1967 Rules, r. 7(2).

[1156] 1967 Rules, r. 15.

[1157] 1967 Rules, r. 26.

[1158] 1967 Rules, r. 27.

[1159] Criminal Justice (Scotland) Act, 1949, s. 13.

[1160] Social Work (Scotland) Act 1968, Sched. 9 Pt 1.

[1161] 8 Edw. 7, ch. 59. This Act owed much to the *Report of the Departmental Committee on Prisons* (1895) ("the Gladstone Committee Report"), which was published at the end of Lord Rosebery's Liberal Government, but influenced the approach of Asquith's Liberal Government that took office in 1906.

time were not, to focus on rehabilitation and technical training, with the aim of preparing young offenders for release as useful members of society.[1162] As amended (and applied to Scotland) by the Criminal Justice Administration Act, 1914,[1163] the Prevention of Crime Act gave sheriffs the power to commit to a Borstal any young offender convicted, summarily, of an offence punishable with imprisonment, originally for between one and three years, and from 1914 for between two and three years.[1164] The Borstal provisions dealt with young persons who were not less than 16 nor more than 21 years of age and were of such "character, state of health and mental condition" as to be "likely to profit" from the instruction and discipline in a Borstal institution.[1165] A person detained in a Borstal institution could be released on license, but thereafter recalled whenever this was "necessary for his protection":[1166] one assumes this was protection from the criminal environment and bad associations that were taken into account in sending the young person to Borstal in the first place. Treasury grants were available to charitable societies undertaking the duty of assisting or supervising persons discharged from Borstal institutions.[1167] The Secretary of State had the power to make regulations for the rule and management of Borstal institutions, including the establishment of visiting committees along the same lines as the existing prison visiting committees.[1168] Such regulations were made in 1911 and amongst the duties then imposed on visiting committees were the following:

[1162] For a history of Borstal training in the United Kingdom, see J. Warder and R. Wilson, "The British Borstal Training System" (1973) 64 *Journal of Criminal Law and Criminology* 118.

[1163] 4&5 Geo. 5, ch. 58.

[1164] Criminal Justice Administration Act, 1914, s. 11(3), amending s. 6(2) of the Prevention of Crime Act, 1908.

[1165] Prevention of Crime Act, 1908, s. 1(1).

[1166] Prevention of Crime Act, 1908, s. 6.

[1167] Prevention of Crime Act, 1908, s. 8.

[1168] Prevention of Crime Act, 1908, s. 4(2).

> 2: "It shall be a special duty of a visiting committee to assist in providing for the employment of inmates on discharge from the Institution and to co-operate with any Society formed for the purpose."
>
> 7: "Inmates shall receive such religious instruction, mental and physical training, and practical and technical instruction in trades and employments as may be likely to lead to reformation of character and fitness for industrial employment."
>
> 8: The visiting committee could recommend that the inmate be discharged, having first examined his "character and conduct", and reached the conclusion that there was "a reasonable probability … that the inmate will abstain from crime and lead a useful and industrious life".[1169]

So the role of the visiting committee included investigating aspects of the welfare of individual inmates, and was not limited to systemic or structural matters. This is consistent with the rehabilitative purposes of the Borstal system. Their role in recommending early release existed until 1993.[1170]

a. Borstal (Scotland) Rules, 1950[1171]

The Criminal Justice (Scotland) Act, 1949 replaced the existing provisions relating to Borstal institutions. Any person aged between 16 and 21 convicted of an offence punishable by imprisonment could receive, in lieu of any other sentence, a sentence of borstal training; any person so sentenced was to be detained in a Borstal institution, and after his release therefrom would be subject to supervision under the Fourth Schedule to the 1949 Act.[1172]

[1169] Borstal (Scotland) Regulations, 1911 (SR&O 1911 No. 840), as amended by the Borstal (Scotland) Regulations, 1937 (SR&O 1937 No. 55). The history of the prison visiting system in Scotland is outlined in brief by A. Coyle "Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons", Scottish Government, January 2013 at pp. 8-9.

[1170] See below at **2.F.iv.b.**

[1171] SI 1950 No. 1944.

[1172] Criminal Justice (Scotland) Act, 1949, s. 20.

The Borstal (Scotland) Rules, 1950, made under the 1949 Act, replaced the earlier Borstal (Scotland) Regulations, 1911,[1173] and came into force on 11th December 1950.[1174]

Borstal training was described in the 1950 Rules as training "to bring to bear influences which may establish in an inmate the will to lead a good and useful life and to abstain from crime and to fit him to do so by the fullest possible development of his character, ability and sense of personal responsibility"; methods of training could "vary as between one institution and another according to the needs of the different types of inmate allocated to each."[1175] "Inmates" were to be grouped into "houses", each with a housemaster who, with the assistance of a matron, would be responsible "for the personal training of the inmates of it".[1176] Inmates were to be accommodated in separate beds, in either bedrooms or dormitories (of not less than three inmates).[1177] A personal record of each inmate was to be kept,[1178] and inmates were to be informed of the rules.[1179]

Medical examination was required to be provided on admission,[1180] and infant children of female inmates were to be received into the institution with their mothers.[1181] In a clear recognition of the risk of exploitation (sexual or otherwise) of girls by men in power over them it was provided that "Girls shall be attended only by female officers and if working under a male instructor shall be supervised by a female officer."[1182] The female officer in

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[1173] See the Report "Custodial Sentences for Young Offenders", drawn up by the Scottish Advisory Council on the Treatment of Offenders and published by HMSO on behalf of the Scottish Home Department in 1960, paras 13 – 20 for a description of the use of borstals in 1960.

[1174] 1950 Rules, r. 2.

[1175] 1950 Rules, r. 4.

[1176] 1950 Rules, r. 7.

[1177] 1950 Rules, rr. 10 and 11.

[1178] 1950 Rules, r. 14.

[1179] 1950 Rules, r. 18.

[1180] 1950 Rules, r. 16.

[1181] 1950 Rules, r. 17.

[1182] 1950 Rules, r. 27.

charge of girls was to "take care that no male officer or visitor enters any part of the institution allotted to female inmates unless accompanied by herself or some other female officer."[1183] These rules, typically for the period, ignored the possibility of such exploitation of boys (or indeed of exploitation of either boys or girls by women in power).

Offences against discipline were listed in Rule 33, and included disobedience, disrespect, idleness, insolence, indecency, making "repeated and groundless complaints" and, starkly revealing the Borstal mind-set, "mutiny". It was for the Governor of the institution (or his nominee) to investigate any alleged offence and potential punishments were listed, with more severe punishments lying with the Visiting Committee.[1184] "Mechanical restraints" were permitted only on direction of the medical officer,[1185] and temporary confinement of a "refactory or violent inmate" could be ordered by the Governor.[1186] The use of force in dealing with inmates was prohibited, "unless its use is unavoidable"; "an officer shall not strike an inmate unless compelled to do so in self-defence."[1187] Corporal punishment was not permitted in Borstal institutions.

An important right of inmates was to request to see the Governor, member of the Visiting Committee or sheriff or JP visiting the institution and to make complaints[1188] (though, as we have just seen, excessive complaining amounted to a disciplinary offence).

[1183] 1950 Rules, r. 28.

[1184] 1950 Rules, rr. 34 and 35.

[1185] 1950 Rules, r. 38.

[1186] 1950 Rules, r. 39.

[1187] 1950 Rules. r. 98.

[1188] 1950 Rules, r. 40.

Inmates were to be "employed on useful work, and shall be instructed as far as possible in occupations which may fit him to earn his livelihood on release."[1189] Continued education was also to be provided.[1190]

The maintenance of beneficial relationships between an inmate and his family and other persons or agencies outside the institution was to be encouraged[1191] and communications between inmates and their relatives and friends were permitted (though letters to and from inmates were to be read by the Governor or his nominee and withheld if "objectionable").[1192]

As with approved schools, the Medical Officer was an important officer in terms of the general health and wellbeing of inmates, and was required to pay special attention to inmates with contagious diseases as well as (in a clear recognition of the emotional vulnerabilities of Borstal inmates) suicidal thoughts or mental illness; the medical officer was also to make recommendations as to general hygiene in the institution.[1193] Whenever the Medical Officer had reason to believe that an inmate's physical or mental condition was likely to be injuriously affected by treatment authorised by the Rules, he had to report this and his recommendations in writing to the Governor, who had to give effect to the recommendations, or refer the matter to the Secretary of State; and whenever the Medical Officer considered that an inmate's life was endangered or his health was seriously endangered, or that a sick inmate would not survive the detention or the discipline of the institution, he had to report this, through the Governor, to the Secretary of State.[1194]

[1189] 1950 Rules, r. 45.

[1190] 1950 Rules, r. 54.

[1191] 1950 Rules. r. 57.

[1192] 1950 Rules, r. 60.

[1193] 1950 Rules, rr. 66 – 79.

[1194] 1950 Rules, r. 70.

The rules also required that food provided "at all times be wholesome and appetising, reasonably varied and adequate for the maintenance of health"; this being inspected "frequently" by the medical officer, and in accordance with a scale authorised by the Secretary of State.[1195] The Visiting Committee could also inspect the food being provided.[1196] Suitable clothing was to be provided, including protective clothing for use at work.[1197]

The Visiting Committee also had a role in protecting the welfare and future of individual inmates. It was obliged to "examine periodically the character, conduct and prospects of each inmate" and could recommend release.[1198] The Visiting Committee had to meet at the institution at least once a quarter and members were required to visit "frequently" to inspect the institution.[1199] An important aspect of the Committee's role was to investigate complaints made by inmates.[1200] They were also required to inquire into the state of the buildings and to report thereon.[1201] The Visiting Committee was required to make an annual report to the Secretary of State with regard to all or any of the matters referred to in the Rules, calling attention to such matters and making such advice and suggestions as they considered expedient.[1202]

Except with the permission of the Governor, no officer was knowingly to communicate with any ex-inmate, or with the friends or relatives of any inmate or ex-inmate.[1203]

[1195] 1950 Rules, rr. 83 & 84.

[1196] 1950 Rules. r. 121.

[1197] 1950 Rules, r. 87.

[1198] 1950 Rules. r. 91.

[1199] 1950 Rules, r. 111.

[1200] 1950 Rules, r. 119.

[1201] 1950 Rules, r. 125.

[1202] 1950 Rules, r. 126.

[1203] 1950 Rules. r. 101.

iv. Young Offenders Institutions

The Criminal Justice (Scotland) Act, 1949 governed the detention of young persons in Borstal institutions and young offenders institutions until that Act was repealed by the Criminal Procedure (Scotland) Act 1975.[1204] The relevant provisions in the 1975 Act were not substantially different from what had gone before, with s. 204 thereof continuing to permit a person between the ages of 16 and 21 convicted of an offence punishable by imprisonment to be sentenced to "undergo a period of training in a Borstal institution"[1205] in lieu of any other sentence. That provision was itself repealed by the Criminal Justice (Scotland) Act 1980,[1206] which removed the option of imprisonment for offenders under 21. The 1975 Act had originally prohibited the imprisonment of any person under 17,[1207] but that provision was amended so as to prohibit the imprisonment of any person under 21, allowing the court instead to impose on a person not less than 16 but under 21 years of age a "period of detention" either in a detention centre or in a young offenders institution.[1208] Any reference in any enactment to a period of training in a Borstal institution was from then on to be read as a reference to a period of detention in a young offenders institution.[1209] The 1975 Act was replaced by the still-extant Criminal Procedure (Scotland) Act 1995, which allows a court that remands or commits for trial or sentence a person under the age of 16 to commit that person to a local authority (to be kept in secure accommodation or a place of safety), and to commit a person over that age but under 21 to a remand centre (if available) or to prison or a young offenders institution.[1210] Section 207 of the 1995 Act prohibits

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[1204] Criminal Procedure (Scotland) Act 1975, c. 21, Sched. 10.

[1205] As defined in s. 31(1)(c) of the Prisons (Scotland) Act, 1952: a place "in which offenders who on the date of their conviction were not less than sixteen but under twenty-one years of age may be detained and given such training and instruction as will conduce their reformation and the prevention of crime.

[1206] 1980 c. 62, s. 45(3).

[1207] Criminal Procedure (Scotland) Act 1975, s. 207.

[1208] 1975 Act, s. 207, as substituted by the 1980 Act, s. 45(1).

[1209] 1980 Act, s. 45(4).

[1210] Criminal Procedure (Scotland) Act 1995, s. 51.

imprisonment as a punishment of any person under 21 but allows for the "detention" instead of any person not less than 16 but under 21 years of age. The 1995 Act also allows for the sentencing of any person not less than 16 but under 21 years of age to detention in a young offenders institution,[1211] as defined in the Prisons (Scotland) Act 1989.[1212]

The Prisons (Scotland) Act, 1952 was amended by the Criminal Justice (Scotland) Act 1963, to require the Secretary of State to provide (in addition to remand centres, detention centres and borstal institutions) "young offenders institutions, that is to say, places in which offenders upon whom detention therein has been imposed … may be kept for suitable training and instruction".[1213] The 1952 Act was repealed by the Prisons (Scotland) Act 1989, which allows the Secretary of State (now the Scottish Ministers) to provide (i) remand centres for the detention of persons not less than 14 but under 21 years of age who are remanded or committed in custody for trial or sentence and (ii) young offenders institutions, that is to say, places in which offenders sentenced to detention in a young offenders institution may be kept.[1214]

"Young offenders institutions" was originally the collective term for remand centres,[1215] detention centres[1216] and Borstal institutions[1217] and the Borstal (Scotland) Rules 1950 were

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[1211] Criminal Procedure (Scotland) Act 1995, s. 207(2) and (5).

[1212] Criminal Procedure (Scotland) Act 1995, s. 307(1), referencing Prisons (Scotland) Act 1989, s. 19(1).

[1213] Prisons (Scotland) Act, 1952, s. 31(1)(d), as inserted by Criminal Justice (Scotland) Act 1963, s. 2.

[1214] Prisons (Scotland) Act 1989, s. 19(1).

[1215] That is to say, "places for the detention of persons not less than fourteen but under twenty-one years of age who are remanded or committed in custody for trial or sentence": Prisons (Scotland) Act, 1952, s. 31(1)(a).

[1216] That is to say, "places in which persons not less than fourteen but under twenty-one years of age who are ordered to be detained in such centres under the Criminal Justice (Scotland) Act, 1949, may be kept for short periods under discipline suitable to persons of their age and description": Prisons (Scotland) Act, 1952, s. 31(1)(b).

[1217] Defined in the Prisons (Scotland) Act, 1952, s. 31(1)(c): see *Explanatory Notes* to the Young Offenders (Scotland) Rules 1965.

superseded on 3rd February 1965 by the Young Offenders (Scotland) Rules 1965,[1218] which themselves were amended in minor respects by the Young Offenders (Scotland) (Amendment) Rules 1966,[1219] 1981[1220] and 1993.[1221]

a. Young Offenders (Scotland) Rules 1965

The purpose of training and treatment of "inmates" was stated to be "to establish in them the will to lead a good and useful life on discharge, and to fit them to do so".[1222] Accommodation had to be of adequate size, "lighted, warmed, ventilated and fitted up in such a manner as may be requisite for health", and approved by the Secretary of State.[1223] If an inmate did not occupy a room by himself, he had to occupy a room or ward with no fewer than two others.[1224] Female inmates were to be attended by female officers and no male officer could enter the premises for females except when on duty and in the company of a female officer.[1225] The Governor was to exercise "close and constant personal supervision over the whole institution".[1226] Disciplinary offences, similar to those in rule 33 of the Borstal (Scotland) Rules, 1950 Rules, were listed in rule 44 of the 1965 Rules, though a new punishment, as curious as it was petty, was added: "deprivation of mattress for a period not exceeding 15 days".[1227] In 1993, the reference to "mutiny", which had long been one of the specified offences in Borstal institutions, was removed.[1228] No inmate was to be

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[1218] SI 1965 No 195 (S. 6).

[1219] SI 1966 No. 1551.

[1220] SI 1981 No. 1223.

[1221] SI 1993 No. 2228 (S. 238).

[1222] 1965 Rules, r. 3.

[1223] 1965 Rules, r. 7.

[1224] 1965 Rules, r. 8: a guard against bullying, or against sexual intimacy? (No such provision appears in subsequent Rules).

[1225] 1965 Rules, rr. 10 and 31.

[1226] 1965 Rules, r. 29.

[1227] 1965 Rules, r. 44(f).

[1228] Young Offenders (Scotland) Amendment Rules 1993, s. 4.

put under “mechanical restraint” except on medical grounds by direction of the medical officer;[1229] mechanical restraint was not to be used as a punishment.[1230] Force was not to be used against any inmate, unless unavoidable, and no officer could strike an inmate “unless compelled to do so in self-defence”.[1231] Inmates could request to see the Governor, or an officer of the Secretary of State or a sheriff or a JP visiting the institution, or a member of the Visiting Committee, and the Governor had to see any inmate who requested it.[1232]

Unless excused by the medical officer, every inmate was to be employed “on useful work”, for which they were to receive payment,[1233] and programmes of educational classes were to be arranged, with special attention being “paid to education of illiterate inmates, if necessary within the hours normally allocated to work”.[1234] Inmates were to be given such physical recreation, training and exercise as was required to promote health and physical well-being.[1235] “Special attention” was to be paid “to the maintenance of such relations between an inmate and his family as seem to the Governor desirable in the best interests of the inmate”.[1236] Communication between inmates and their relatives and friends was allowed, though the Governor could stop any letter the contents of which he considered objectionable.[1237]

[1229] 1965 Rules, r. 47.

[1230] 1965 Rules, r. 47(8).

[1231] 1965 Rules, r. 126.

[1232] 1965 Rules, r. 49.

[1233] 1965 Rules, r. 55.

[1234] 1965 Rules, r. 57.

[1235] 1965 Rules, r. 60.

[1236] 1965 Rules, r. 68. Curiously, the 1950 rules, r. 57, had talked of the best interests of “the inmate and his family”.

[1237] 1965 Rules, r. 71. Special rules for communications with courts, including the European Court of Human Rights and the European Court of Justice, were added by rule 8 of the Young Offenders (Scotland) Amendment Rules 1993.

As under the 1950 Rules, the 1965 Rules required the appointment of a Medical Officer who had to visit "every day" any sick inmate, inmates under restraint and inmates confined to a room.[1238] The Medical Officer was obliged to "report to the Secretary of State through the Governor any circumstances connected with the institution or the treatment of the inmates which at any time appear to him to require consideration on medical grounds",[1239] and whenever the Medical Officer had reason to believe that an inmate's physical or mental condition was likely to be injuriously affected by treatment authorised by the Rules, he had to report this and his recommendations in writing to the Governor, who had to give effect to the recommendations, or refer the matter to the Secretary of State.[1240] If the Medical Officer considered that an inmate's life was endangered or his health was seriously endangered, or that a sick inmate would not survive the detention or the discipline of the institution, he had to report this, through the Governor, to the Secretary of State.[1241] The Medical Officer had to oversee and advise the Governor upon the hygiene of the institution and the inmates.[1242] Food had to be at all times wholesome and appetising, reasonably varied and adequate for the maintenance of health.[1243]

The Visiting Committee was required to meet at the institution at least once a quarter, and the members thereof had to visit and inspect the institution "frequently".[1244] The Visiting Committee was required to bring to the notice of the Governor and the Secretary of State "immediately" any circumstances connected with the administration of the system that appeared to them to require his consideration.[1245] They were required to hear and investigate any request or complaint made by any inmate, and for that purpose could see

[1238] 1965 Rules. rr. 80 and 81.

[1239] 1965 Rules, r. 83.

[1240] 1965 Rules, r. 84.

[1241] 1965 Rules, r. 84(2).

[1242] 1965 Rules, r. 93.

[1243] 1965 Rules, r. 97.

[1244] 1965 Rules, r. 135.

[1245] 1965 Rules, r. 139.

inmates out of sight or hearing of officers; they had to record their findings.[1246] If the visiting committee believed that an inmate's physical or mental condition was likely to be adversely affected by the conditions under which he was being detained they had to report this to the Secretary of State, and in cases of urgency could give directions.[1247] As before, the Visiting Committee could make recommendations about an inmate's release date.[1248] The Visiting Committee was required to make an annual report to the Secretary of State with regard to all or any of the matters referred to in the Rules, calling attention to such matters and making such advice and suggestions as they considered expedient.[1249]

b. Prisons and Young Offenders Institutions (Scotland) Rules 1994,[1250] 2006[1251] and 2011[1252]

The Young Offenders (Scotland) Rules 1965 applied until their revocation on 1st November 1994 by the Prisons and Young Offenders Institutions (Scotland) Rules 1994, which came into force on 1st November 1994. The 1994 Rules were replaced from 26th March 2006 by the Prisons and Young Offenders Institutions (Scotland) Rules 2006, which were themselves replaced on 1st November 2011 by the Prisons and Young Offenders Institutions (Scotland) Rules 2011, being the rules currently in force. There is little substantive difference between the 1994, 2006 and 2011 Rules and they may therefore be considered together.

The Governor was under the 1994 and 2006 Rules obliged to seek to eliminate within the institution discrimination on the grounds of gender, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a

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[1246] 1965 Rules, r. 142.

[1247] 1965 Rules, r. 143.

[1248] 1965 Rules, r. 145.

[1249] 1965 Rules, r. 145.

[1250] SI 1994 No 1931 (S.85).

[1251] SSI 2006 No. 94.

[1252] SSI 2011 No. 331.

national minority, birth, medical condition and economic or other status against particular prisoners or categories of prisoners.[1253] Better to reflect the "protected characteristics" set out in the recently-passed Equality Act 2010,[1254] the grounds are specified differently in the 2011 Rules: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, or other status.[1255] "Harassment and victimisation" were added to "discrimination" by the Prisons and Young Offenders Institutions (Amendment) (Scotland) Rules 2012,[1256] as from 19th March 2012.

On reception in the institution, each prisoner is to be interviewed in order to determine any problems which may require immediate attention,[1257] and under the 1994 and 2006 Rules had to be medically examined within 24 hours. The accommodation is to be of an adequate size and be lighted, heated, ventilated and furnished as is necessary for the health and safety of prisoners.[1258] The medical officer was responsible under the 1994 Rules for the general care of the health of every prisoner[1259] and the Secretary of State had to ensure appropriate medical services and facilities are provided.[1260] Under the 2006 Rules, Scottish Ministers had to make arrangements for the provision of appropriate medical services and facilities.[1261] Under the 2011 Rules the Scottish Ministers have to provide accommodation within the institution for "health care services" to be provided by "health care professionals"[1262] and ensure outside treatment is provided where necessary.[1263]

[1253] 1994 Rules, r. 4; 2006 Rules, r. 6.

[1254] Equality Act 2010 (c. 15), s. 4.

[1255] 2011 Rules, r. 6.

[1256] SSI 2012 No. 26), r. 2(3).

[1257] 1994 Rules, r. 8; 2006 Rules, r. 10; 2011 Rules. r. 10

[1258] 1994 Rules, r. 16; 2006 Rules, r. 23; 2011 Rules, r. 29.

[1259] 1994 Rules, r. 23.

[1260] 1994 Rules, r. 24.

[1261] 2006 Rules, r. 32.

[1262] 2011 Rules, r. 37.

[1263] 2011 Rules, r. 39.

The Governor has to ensure that every prisoner is given reasonable assistance and facilities to maintain and develop relationships with their family and friends and with such other persons and agencies outwith the prison as may best offer them assistance during their sentence or period of committal, and in preparation for and after their release.[1264] Provision for religious observances by prisoners has to be made.[1265]

The Governor has to determine a programme of work, education and counselling for each prisoner in order to improve their prospects of successful resettlement in the community, and their morale, attitude and self-respect.[1266] Visiting rules are laid down.[1267] Disciplinary offences are listed,[1268] and procedure laid down for breaches.[1269] Opportunities to make complaints are given, though the details differ according to which Rules apply.[1270]

Female prisoners are to be accommodated separately from male prisoners.[1271] The Governor may permit a female prisoner to have her baby with her,[1272] though in deciding to do so under the 2011 Rules he or she has to take into account the best interests of the baby and the mother's ability to care for her baby.[1273]

[1264] 1994 Rules, r. 33; 2006 Rules, r. 41; 2011 Rules, r. 43.

[1265] 1994 Rules, rr. 35-39; 2006 Rules, rr. 43-47; 2011 Rules, r. 44 and (since the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2016) r. 44A.

[1266] 1994 Rules, r. 67; 2006 Rules, r. 81; 2011 Rules, r. 81.

[1267] 1994 Rules, rr. 55-64; 2006 Rules, rr. 63-78; 2011 Rules, rr. 63-78.

[1268] 1994 Rules, Sched. 3; 2006 Rules, Sched. 1; 2011 Rules, Sched. 1.

[1269] 1994 Rules, rr. 94-101; 2006 Rules, rr. 113-120; 2011 Rules, rr. 110-119. See *Shahid v Scottish Ministers* [2015] UKSC 58, where it was held that art. 8 of the European Convention on Human Rights (right to respect for private life) was engaged by the implementation of disciplinary measures, which had to be both in accordance with the law (as set out in the 2006 Regulations) and proportionate.

[1270] 1994 Rules, rr. 102-113; 2006 Rules, rr. 121-132; 2011 Rules, rr. 120-125.

[1271] 1994 Rules, r.114; 2006 Rules, r. 133; 2011 Rules, r. 126.

[1272] 1994 Rules, r. 116; 2006 Rules, r. 135; 2011 Rules, r. 128.

[1273] 2011 Rules, r. 128(5).

A Visiting Committee has to be established, and since 1998 at least one third of the membership thereof, or not less than two, must be women.[1274] The Visiting Committee is required to meet at the institution at least once a quarter,[1275] and at least two members must visit the institution at least fortnightly.[1276] It has to bring to the attention of the Governor any circumstance concerning the administration of the institution or the condition of any prisoner that the Governor should consider, then to the Secretary of State (later the Scottish Ministers) if it appears that the Governor has not remedied any matter brought to his or her attention.[1277] The Visiting Committee also hears and investigates any complaint made by a prisoner, and for that purpose may see inmates out of sight or hearing of officers; the findings have to be recorded and the prisoner informed.[1278] The Visiting Committee has to make an annual report to the Secretary of State, and later the Scottish Ministers, concerning the state of the prison and its administration and may include in the report any advice and suggestions it considers appropriate.1279

The role of the Visiting Committee in making recommendations for early release, found in the previous Young Offenders (Scotland) Rules 1965,[1280] was not replicated in the 1994 or subsequent Rules.[1281]

[1274] 1994 Rules, r. 133A (as inserted by the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 1998 (SI 1998 No. 1589), r. 54); 2006 Rules, r. 156; 2011 Rules, r. 147.

[1275] 1994 Rules, r. 134(3); 2006 Rules, r. 157(3); 2011 Rules, r. 148(5).

[1276] 1994 Rules, r. 137; 2006 Rules, r. 160; 2011 Rules, r. 151.

[1277] 1994 Rules, r. 135; 2006 Rules, r. 158; 2011 Rules, r. 149.

[1278] 1994 Rules, r. 136; 2006 Rules, r. 159; 2011 Rules, r. 150.

[1279] 1994 Rules, r. 139; 2006 Rules, r. 162; 2011 Rules, r. 153.

[1280] Discussed in above at **2.F.iv.a**.

[1281] Early release is now governed by the Prisoners and Criminal Proceedings (Scotland) Act 1993, and the Parole Board (Scotland) Rules 1993 (SI 1993 No. 2225) and 2001 (SSI 2001 No. 315).

SECTION G: PLACES OF SAFETY

i. The Concept of "Place of Safety"

Places of safety are places to which children and young persons might be taken, or seek refuge, in order to provide them with protection from harm: they are places, as the name suggests, in which children and young persons would be *safe*. Detention in a place of safety is essentially temporary, until the child or young person can be brought before an appropriate tribunal for more long-term provision for his or her care or protection to be made. There has never been dedicated regulatory control over "places of safety" as a concept, other than the definition, and such control as exists is to be found in the rules governing each particular type of place.

ii. Places of Safety Defined

Section 4 of the Prevention of Cruelty to, and Protection of, Children Act, 1889 permitted a constable to take any child who had been the victim of an offence under that Act to a "place of safety", which was defined in s. 17: "The expression 'place of safety' includes a poor house and any place certified by the local authority by byelaw under this Act for the purposes of this Act." That definition was widened substantially by s. 25 of the Prevention of Cruelty to Children Act, 1894 under which "place of safety" was defined to include "any place certified by the local authority under this Act for the purposes of this Act, and includes any poorhouse or police station, or any hospital surgery, or place of a like kind". The 1894 definition was replicated in s. 29 of the Prevention of Cruelty to Children Act, 1904. Under none of these Acts was the certification process specified.

The Children Act, 1908 restructured the definition by removing the reference to local authority certification, and making it exclusive (using "means" as opposed to "includes"): from then on a place of safety was defined to mean "any poorhouse, or police station or any hospital or surgery, or any other suitable place, the occupier of which is willing temporarily

to receive and infant, child or young person".[1282] To this definition the Second Schedule to the Children and Young Persons (Scotland) Act, 1932 Act added "remand home", and the amended definition was repeated in the Children and Young Persons (Scotland) Act, 1937.[1283] Under s. 11 of the 1932 Act, and then s. 71 of the 1937 Act, a "place of safety" was a place to which children or young persons in need of immediate protection might be taken, and kept, for that protection or (an innovation on the existing law) to which they might themselves go to seek refuge. Section 24 of the 1908 Act (and then s. 47 of the 1937 Act) also allowed the court to issue a warrant to remove a child or young person to a place of safety, if the person seeking the warrant had "reasonable cause to suspect" that the child or young person had been assaulted, ill-treated or neglected or was the victim of a scheduled[1284] offence.

The definition of "place of safety" in s. 110 of the Children and Young Persons (Scotland) Act, 1937 was amended in 1948 by the addition to the definition "any home provided by a local authority under Part II of the Children Act, 1948".[1285] Each local authority was obliged to make provision, in the homes they provided, "for the reception and maintenance of children removed to a place of safety" under the 1937 Act,[1286] this to be, so far as practicable, in the separate accommodation for the temporary reception of children as was required under s. 15(2) of the 1948 Act.[1287]

The Social Work (Scotland) Act 1968 defined "place of safety" as "any residential or other establishment provided by a local authority, a police station or any hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive a child".[1288] Both

[1282] Children Act, 1908, s. 131.

[1283] 1937 Act, s. 110.

[1284] Originally the schedule to the 1908 Act, and later the First Schedule to the 1937 Act.

[1285] 1948 Act, s. 60(2) and Sched. 3.

[1286] 1948 Act, s. 51(1).

[1287] 1948 Act, s. 51(2).

[1288] 1968 Act, s. 94(1).

"residential establishment" and "establishment" were defined to mean a place "managed by a local authority, voluntary organisation or any other person which provides [residential or non-residential] accommodation for the purposes of" the 1968 Act,[1289] and again the regulatory provisions governing such establishments would apply in relation to children taken to them as places of safety. The other named places, most obviously "other suitable place" would not be subject to specific provisions designed to ensure the wellbeing of children.

iii. The Orkney Case and its Aftermath for Places of Safety

The 1968 Act allowed children to be removed to a place of safety[1290] (as did, until 1975, ss. 40 and 47 of the Children and Young Persons (Scotland) Act, 1937) and detained there while the reporter investigated the matter. Also, the children's hearing, if unable to make a dispositive decision when it first convened, could issue a warrant requiring the child to be detained in a place of safety for up to 21 days,[1291] and that warrant could be renewed for a further 21 days.[1292] After the Children Act 1975, the reporter could thereafter apply to the sheriff for a warrant requiring the child's detention in a place of safety for a further 21 days, which could then be renewed once.[1293]

These provisions were central to that most contentious of all children's hearings cases, *Sloan v B*,[1294] which arose out of the removal on 27th February 1991 of nine children from their homes in Orkney to places of safety on the mainland under warrants granted under s. 37(2) – though it was not the granting of the warrants that was challenged in the appeal.

[1289] 1968 Act, s. 94(1).

[1290] 1968 Act, s. 37(2).

[1291] 1968 Act, s. 37(4).

[1292] 1968 Act, s. 37(5).

[1293] 1968 Act, s. 37(5A) and (5B), as inserted by Children Act 1975, s. 83(d).

[1294] 1991 SC 412. For comment, see J. Thomson, "*Sloan v B* – the Legal Issues" 1991 *Scots Law Times (News)* 421; E. Sutherland, "The Orkney Case" 1992 *Juridical Review* 93.

Nevertheless the publicity generated by the case led the Secretary of State for Scotland to appoint Lord Clyde[1295] to conduct an inquiry into the whole circumstances. In his subsequent Report, Lord Clyde said this:

> The removal of a child from the immediate control or care of the parents constitutes a significant invasion of the rights of the parent and of the child. While a power to remove a child requires to be available the limits of its exercise and the definition of its purpose must be certain, must be clearly known and must be appropriate to the seriousness of the course of action. Section 37(2) of the [1968] Act fails to meet these requirements.[1296]
>
> …
>
> The failure to specify the scope and limits of the power to remove a child with sufficient clarity to enable the citizen to appreciate the occasions on which the power may be exercised may well run foul of Article 8 [of the European Convention on Human Rights] if not also Article 16 [of the United Nations Convention on the Rights of the Child].[1297]

He concluded:

> The only occasion on which the removal of a child to a place of safety should be permitted by the law is where there is a real, urgent and immediate risk that the child is otherwise going to suffer significant harm, whether physical, moral or psychological.[1298]

He went on to recommend the creation of a new order to replace the existing place of safety order[1299] and this recommendation was shortly thereafter given effect by the creation of the child protection order under s. 57 of the Children (Scotland) Act 1995.

[1295] Then a judge in the Court of Session, later a Lord of Appeal in Ordinary; son of the Lord Clyde who wrote the 1946 Clyde Report discussed above at **1.D.ii**.

[1296] Clyde Report (1992), para. 16.1.

[1297] Clyde Report (1992), para. 16.3.

[1298] Clyde Report (1992), para. 16.5.

[1299] Clyde Report (1992), paras. 16.9 et seq.

iv. Places of Safety After 1995

As Lord Clyde pointed out,[1300] a child subject to a place of safety order under the 1968 Act (or, he could have added, earlier legislation) was not a child in the care of the local authority, and so the extent of the responsibilities that any local authority had to such a child was unclear. Only if the child were accommodated under the order in an environment directly under the control of the local authority would their responsibilities, flowing from that control, come into play. After the coming into force of the Children (Scotland) Act 1995, children subject to a child protection order became "looked after children"[1301] and subject, thereby, to all the protections that status involves.[1302]

The 1995 Act defined "place of safety" to which children could be taken under various statutory provisions to mean "(a) a residential or other establishment provided by a local authority; (b) a community home within the meaning of section 53 of the Children Act 1989; (c) a police station; or (d) a hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive the child".[1303] To this definition there was subsequently added "(e) the dwelling-house of a suitable person who is so willing; or (f) any other suitable place the occupier of which is so willing".[1304] Section 202 of the Children's Hearings (Scotland) Act 2011, though structured slightly differently, provides substantively the same definition. None of these definitions has generated judicial interpretation.

[1300] Clyde Report (1992), paras. 17.1 and 17.2.

[1301] Children (Scotland) Act 1995, s. 17(6)(c).

[1302] See above at **1.F.ii.b.**

[1303] Children (Scotland) Act 1995, s. 93(1).

[1304] Regulation of Care (Scotland) Act 2001, s. 74.

SECTION H: ACCOMMODATION UNDER THE MENTAL HEALTH LEGISLATION

i. Introduction

The Children Acts are not the only source of the state's power to regulate the residence of children and young people. The mental health legislation, never limited to adults, has long provided comparable mechanisms to those in the Children Acts for the care of children and young people whose vulnerabilities are traced not to their need for protection from others but to mental illness.

ii. The Early Years

Thomson and Cherry[1305] say this:

> Civil legislation to detain and treat people with mental disorders has been in place in Scotland since the Lunacy (Scotland) Act 1857. Prior to this, sheriffs were responsible for protecting the interests of the insane. Mental health legislation exists because it is recognised that people with major mental disorders may lack the realisation and understanding (or insight) that they are ill, and because the disorder may have impaired their judgment and reasoning regarding their need for treatment. Mental health legislation has two major functions: it creates powers to detain and/or treat people with mental disorders; and, very importantly, it establishes mechanisms and bodies to ensure that the rights of these individuals are protected.

That second function was less prominent in the early years of the 20th Century than it is today, but it was never wholly absent from the legislation.

The public asylum system in Scotland commenced with the Lunacy (Scotland) Act, 1857,[1306] which replaced the ad hoc and by no means universal system of Royal Mental Hospitals. Official inspection was mandated and for the first time put on a national basis. Compulsory detention of those suffering from mental health disorders was put on a statutory, and often court-ordered, basis by the Lunacy (Scotland) Act, 1866.[1307] That Act also utilised that

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[1305] L. Thomson and J. Cherry, *Mental Health and Scots Law in Practice* W. Green, (2nd edn. 2012) at [4.01].

[1306] 20 & 21 Vict. c. 71.

[1307] 29 & 30 Vict. c. 51.

characteristically Scottish tactic for the care of the vulnerable and those unable to look after themselves: boarding out with persons fit to look after them, known as Guardians of lunatics (and later mental health guardians).

Given that there was no lower age limit in these Acts, children and young persons could be equally dealt with under the mental health legislation, though the Education of Defective Children (Scotland) Act, 1906[1308] provided additional rules, drawing a distinction between educatable and uneducatable children suffering from mental deficiencies.

iii. The Mental Deficiency and Lunacy (Scotland) Act, 1913[1309]

This was the first major piece of legislation dealing with mental health in the 20th Century. The existing General Board of Commissioners in Lunacy for Scotland, which had been tasked with operating the earlier Lunacy Acts, was replaced by the General Board of Control for Scotland, which was vested with the power to enforce standards amongst certifying doctors. District Boards of Control took over the supervision of institutions (both public and private).

Both compulsory and voluntary detention was possible under the 1913 Act, though that distinction was hardly relevant in the case of pupils and minors. For both children and adults the Act, mirroring the position of children in need of care or protection, offered two basic mechanisms for the care and treatment of "mental defectives": committal to an institution (in this case a lunatic asylum rather than an industrial school), or committal to the care of a guardian (rather than to the care of a "fit person"). Persons under 21 could be placed in an institution or under guardianship with the consent of their parent or guardian; adults required court order.[1310] When a person under 21 was so placed, the Board could resist request by the parents for the patient's discharge.[1311] If a patient was placed under

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[1308] 6 Edw. 7, c. 10.

[1309] 3 & 4 Geo. 5, c. 38.

[1310] 1913 Act, ss. 4 and 5.

[1311] 1913 Act, s. 13(1). Continued detention was subject to appeal to the sheriff.

guardianship then the person named as guardian acquired the powers of a father over a pupil child,[1312] which carried parental responsibilities also. With guardianship it was expected that the patient would reside in a private house, chosen by (and normally with) the guardian: this was the equivalent of boarding out of children in need of care or protection,[1313] and though it would often involve care by family members it was also permitted for individuals to receive "defectives" in their own home for private profit.[1314] In relation to children between 5 and 16 who were "defectives"[1315] their parents or guardians were under an obligation "to make provision for the education or for the proper care and supervision of such children as the case may require" and if unable to meet the expense the school board was obliged to do so instead.[1316]

The certification of such institutions and private houses was dealt with under Part 3 of the 1913 Act, and the physical and emotional well-being of the patient was protected by the creation of particular offences. So it was provided that:

> If any superintendent, officer, nurse, attendant, servant, or other person employed in an institution or certified house, or any person having charge of a defective, whether by reason of any contract, or of any tie of relationship, or marriage, or otherwise, illtreats or wilfully neglects the defective, he shall be guilty of a crime and offence.[1317]

[1312] 1913 Act, s. 11(2). This did *not* include the power of corporal punishment: see Mental Deficiency and Lunacy (Scotland) Act (Secretary for Scotland's) Regulaions, 1914, reg.4.

[1313] And later developed into mental health guardianship, the primary aim of which was less to provide accommodation and more to determine treatment and provide support (though s. 41(2) of the Mental Health (Scotland) Act 1984 did empower mental health guardians to determine where the patient was to reside).

[1314] 1913 Act, s. 39.

[1315] As defined in s. 1 of the 1913 Act to mean "idiots", "imbeciles", "feeble-minded persons" and "moral imbeciles": each except the last was further defined in terms of the level of care they needed.

[1316] 1913 Act, s. 2.

[1317] 1913 Act, s. 45.

This was, of course, in addition to the crime against children and young persons by those caring for them in s. 12 of the Children Act, 1908 and of the Children and Young Persons (Scotland) Act, 1937.

The risk of sexual abuse was in the forefront of the minds of the legislators, and s. 46(1) of the 1913 Act provided as follows:

> Any person—
>
> (a) who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl who is a defective under care or treatment in an institution or certified house, or placed out on licence therefrom or under guardianship under this Act, under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was under such care or treatment or so placed out or under guardianship; or
>
> (b) who procures, or attempts to procure, any woman or girl who is a defective to have unlawful carnal connection, whether within or without the King's dominions, with any other person or persons; or
>
> (c) who, having the custody, charge, or care of any woman or girl who is a defective, causes or encourages her prostitution, whether within or without the King's dominions; or
>
> (d) who, being the owner or occupier of any premises, or having or acting or assisting in the management or control thereof, induces or knowingly suffers any woman or girl who is a defective to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; or
>
> (e) who, with intent that any woman or girl who is a defective should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such woman or girl out of the possession and against the will of her parent or any other person having the lawful care or charge of her;
>
> shall be guilty of a crime and offence and shall be liable upon conviction on indictment to be imprisoned, with or without hard labour, for any term not exceeding two years.

This provision constitutes a recognition of the especial vulnerability to sexual abuse of mentally ill people, and it covered patients both in institutions and boarded out with guardians. It is, however, noticeable that the protection is limited to female “defectives”: a

common narrow conception of sexual acts at the time that ignored (or perhaps was unable to comprehend) the possibility of sexual abuse of vulnerable males.[1318]

The Mental Deficiency and Lunacy (Scotland) Act (General Board's) Regulations, 1914[1319] provided Rules for the management of certified institutions and certified houses in which boarded out "defectives" would reside. These Regulations included rules for the certification of institutions and private homes,[1320] for their management[1321] and for the inspection of premises and the visitation of patients[1322] (including, interestingly, giving the patient the opportunity to make complaints).[1323] The managers of a certified institution were "responsible for seeing that the patients received into the Institution are properly fed, clothed, trained and employed, and that the provisions of the Act and of the Regulations made thereunder and the conditions of the certificate are observed."[1324] Managers were obliged to visit the institution and draw up an annual report.[1325]

The Regulations also provided for "The Care and Treatment of Defectives under Guardianship".[1326] Guardians were obliged to provide for the education and recreation of patients "according to the means available" and to "ensure that in these respects everything

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[1318] Such abuse was not outwith judicial experience. In *R v Hare* [1934] 1 KB 354 a woman was convicted of sexual assault against a 12 year old boy, and Avory J said (at p. 356) "there is no reason for saying that a woman cannot be guilty of an indecent assault on another female". Indecent assault would be a possible charge for acts falling short of sexual intercourse.

[1319] 22nd May 1914, SR&O 1914 No. 705 (S.59).

[1320] 1914 Rules, rr. 32 et seq.

[1321] 1914 Rules, rr. 52 et seq.

[1322] 1914 Rules, rr. 102 et seq.

[1323] 1914 Rules, r. 104(1)(b). There was no such statutory obligation under the Children Acts or rules made under these Acts until after 1948.

[1324] 1914 Rules, r. 67.

[1325] 1914 Rules, rr. 60 and 70.

[1326] 1914 Rules, rr. 145 et seq.

practicable is done for the improvement of the patient's mental and physical condition".[1327] The welfare of the patient, then, was at the forefront of the regulation of their care. It was a criminal offence for a guardian to abandon his guardianship.[1328]

The Regulations also required that defectives under guardianship were to be visited by representatives of the General Board of Control, and it is noticeable that the rules are worded with greater specificity than the equivalent rules for children and young persons residing in certified schools or boarded out under the Children Acts:

> 165. Every dwelling in which there is a patient under guardianship may at any time, by day or night, be visited by any Commissioner or Deputy Commissioner.
>
> 166. A Commissioner or Deputy Commissioner shall, at every visit to such dwelling which he is by the Act required to make, and may at any other visit-
>
> (a) See the patient and the guardian and any person residing in the house;
>
> (b) Inquire into the treatment and state of health, both bodily and mental, of the patient, and as to the moneys to the guardian paid on his account ;
>
> (c) Inspect the dwelling and any part thereof ;
>
> (d) Inspect the Visiting Book;
>
> (e) Inquire —
>
> What occupations and recreation are provided for the patient; How the patient is trained, educated and employed;

[1327] 1914 Rules, rr. 145 and 155, regarding private patients and "aided patients" respectively.

[1328] 1914 Rules, r. 161.

As to the diet and clothing of the patient;

As to such other matters as may, in his opinion, require investigation.

Visiting by relatives was permitted, but under the conditions set by the Board of Control.[1329]

The Mental Deficiency and Lunacy (Scotland) Act (Secretary for Scotland's) Regulations, 1914[1330] provided as follows:

> Reg. 3: "A guardian shall not in respect of his appointment as such have power to administer the estate of the defective under his guardianship".
>
> Reg. 4: "No corporal punishment shall under any circumstances be administered by a guardian to a defective under his guardianship. The penalty for a breach of this regulation shall be a fine not exceeding £20".
>
> Reg. 5: The senior paid commissioner "shall not be obliged to visit in any year more than one-half of the whole number of institutions under the jurisdiction of [the General Board of Control]".
>
> Reg. 6: The senior paid commissioner shall "keep himself informed of the administrative work of the Board".

The Mental Deficiency and Lunacy (Scotland) Act, 1913 was subject to minor amendments by the Mental Deficiency (Scotland) Act, 1940[1331] and the supervisory power of the General Board of Control over the powers and duties of education and local health authorities was transferred to the Secretary of State for Scotland by the National Health Service (Scotland) Act, 1947.[1332]

[1329] 1913 Act, s. 40.

[1330] 22nd May 1914, SR&O 1914 No. 706 (S.60).

[1331] 3 & 4 Geo. 6, c. 8.

[1332] National Health Service (Scotland) Act, 1947 (10 & 11 Geo. 6, c. 27), s. 49.

iv. The Mental Health (Scotland) Act, 1960

The 1913 Act remained in force until its replacement by the Mental Health (Scotland) Act, 1960,[1333] which was brought fully into force on 1st June 1962:[1334] amongst other things, this governed registration of non-NHS hospitals and nursing homes,[1335] residential homes for "persons suffering from mental disorder",[1336] and "state hospitals".[1337] A major innovation in the 1960 Act was the establishment of the Mental Welfare Commission for Scotland,[1338] whose first duty was (and is) "to exercise protective functions in respect of persons who may, by reason of mental disorder, be incapable of adequately protecting their persons or their interests".[1339] The Commission was obliged "to make inquiry into any case where it appears to them that there may be illtreatment, deficiency in care or treatment",[1340] as well as to visit regularly both patients in hospital and patients subject to mental health

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[1333] Mental Health (Scotland) Act, 1960, s. 1. Writing in 1999, A. Ward said this: "Although there was a review of mental health law in 1982, the last comprehensive reform was in 1960. Until then the relevant law was contained in the Lunacy (Scotland) Acts, 1857 to 1913 and the Mental Deficiency (Scotland) Acts, 1913 and 1940. The recommendations of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954-1957 were considered in Scotland by the Dunlop Committee and led to the Mental Health (Scotland) Act, 1960. The current Mental Health (Scotland) Act 1984 did not itself introduce any new law when enacted, though it has since been amended. It was a consolidating Act, re-enacting the 1960 Act with all subsequent amendments up to and including those in the Mental Health (Amendment) (Scotland) Act 1983. Changes prior to 1983 included the transfer of criminal procedure provisions into the Criminal Procedure (Scotland) Act 1975": (1999) *Journal of the Law Society of Scotland*, Feb 1.

[1334] Mental Health (Scotland) Act, 1960 (Appointed Day No. 3) Order, SI 1962 No. 516.

[1335] 1960 Act, ss. 15 and 16.

[1336] 1960 Act, s. 19.

[1337] 1960 Act, ss. 89 et seq.

[1338] 1960 Act, s. 2.

[1339] 1960 Act, s. 4(1).

[1340] 1960 Act, s. 4(2)(a).

guardianship.[1341] Local health authorities had to provide residential accommodation[1342] and local authorities acting under the Children Act, 1948 were empowered to accommodate in a home or other accommodation any child whose care or after care for mental disorder was being provided by a local health authority.[1343] Where the local authority had parental rights and powers over a patient under the Children and Young Persons (Scotland) Act, 1937 or the Children Act, 1948 the authority had to arrange for the patient to be visited and to "take such other steps in relation to the patient while in the hospital or nursing home as would be expected of a parent."[1344] The Education (Scotland) Act, 1946 had required education authorities to provide educational facilities for "pupils who suffer from disability of mind"[1345] and the 1960 Act required the local health authority to provide "suitable training and occupation" for both persons over 16 suffering from mental deficiency and persons under 16 "found unsuitable for education and training in a special school".[1346]

a. Registration

Private (that is to say, non-NHS) hospitals and nursing homes required to be registered, which involved an assessment of their fitness for purpose.[1347] Residential homes for "persons suffering from mental disorder" required to be registered, inspected and conducted under the terms of the National Assistance Act, 1946[1348] and such homes were not to be treated as "voluntary homes" under the 1937 Act.[1349] The 1960 Act also provided

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[1341] 1960 Act, s. 4(2)(b).

[1342] 1960 Act, s. 7.

[1343] 1960 Act, s. 9.

[1344] 1960 Act, s. 10(2).

[1345] Education (Scotland) Act, 1946, s. 1.

[1346] 1960 Act s. 12.

[1347] 1960 Act, ss. 15 and 16.

[1348] 1960 Act, s. 19; National Assistance (Registration of Homes) (Scotland) Amendment Regulations, 1962 (SI 1962 No. 2489).

[1349] 1960 Act, s. 19(3).

for "state hospitals" for patients detained under the Act who required "treatment under conditions of special security on account of their dangerous, violent or criminal propensities."[1350] This replaced the State Mental Hospitals established under the Criminal Justice (Scotland) Act, 1949.[1351]

b. Detention

Detaining a patient in hospital, or subjecting the patient to guardianship,[1352] required the authority of the sheriff,[1353] on the application of a mental health officer or the patient's "nearest relative".[1354] The guardian of the patient was prohibited, as was the case under the Mental Deficiency and Lunacy (Scotland) Act (Secretary for Scotland's) Regulations, 1914, from administering corporal punishment: to do so was a criminal offence, and there was no exception in relation to patients who were children and young persons.[1355] There was no such prohibition for staff in hospitals, but it was unlikely that the defence of "reasonable chastisement"[1356] extended to hospital staff who had the "lawful control or charge" of children and young persons,[1357] since they had no role in educative discipline.

[1350] 1960 Act, ss. 89 et seq.

[1351] The State Hospital at Carstairs is the only state hospital established in Scotland.

[1352] All the forms to be used were detailed in the Mental Health (Forms) (Scotland) Regulations 1962 (SI 1962 No. 613).

[1353] 1960 Act ss. 24 and 25. There was no remaining power by a hospital to detain a person against their will in a mental health hospital other than by this means, though private individuals were held to retain a common law power to detain, in a situation of necessity, a person of unsound mind who is a danger either to him- or herself or to others: *B v Forsey* 1988 SC(HL) 28, per Lord Keith of Kinkel at p. 63.

[1354] 1960 Act, s. 26. "Nearest relative" was defined in s. 45: interestingly within the word "spouse" was included cohabitants who had lived together for more than six months.

[1355] 1960 Act, s. 29(6).

[1356] See Appendix Two to this Report.

[1357] In the words of s. 12(7) of the Children and Young Persons (Scotland) Act, 1937, and its predecessors, which recognised the right to administer punishment adhering to "any parent, teacher or other person having

The Mental Health (Guardianship) (Scotland) Regulations 1962[1358] set out the powers and duties of guardians and local health authorities in respect of persons subject to guardianship under the 1960 Act. The local health authority was obliged to arrange visits to patients under guardianship at intervals of not more than three months.[1359] Guardians were subject to the following duties:

> "(1) The guardian shall be responsible for the care, supervision, and general welfare of the patient and for the promotion of his physical and mental health.
>
> (2) The guardian shall in particular ensure that the patient is provided with adequate and suitable food, clothing and accommodation.
>
> (3) The guardian shall, so far as is reasonably practicable in the circumstances, make arrangements for the occupation, training or employment, and recreation of the patient.
>
> (4) The guardian shall keep a visiting book provided by the local health authority concerned in which shall be recorded the date of each visit paid to the patient on behalf of that authority".[1360]

Detention in hospital or being subject to guardianship was to last for not more than a year, but could be renewed on an annual then biennial basis:[1361] that renewal was subject to appeal to the sheriff (so long as the patient was over 16 years of age).[1362] A resident of an approved school who was suffering from mental disorder could be placed under guardianship under the 1960 Act if the Secretary of State considered that it was in the public interest to do so.[1363]

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lawful control or charge of a child or young person". "Other person" would require to be interpreted *ejusdem generis* with "parent and teacher", and health care providers are, it is suggested, a quite different *genus*.

[1358] SI 1962 No. 614.

[1359] 1962 Regulations, reg. 5.

[1360] 1962 Regulations, reg. 7.

[1361] 1960 Act, s. 39.

[1362] 1960 Act, s. 39(7).

[1363] 1960 Act, s. 71.

c. Special Offences in Relation to Mental Health Patients

As with the 1913 Act, special offences were contained in the 1960 Act which again shows a clear understanding that mental health patients are especially vulnerability to ill-treatment and abuse:

> **95.— Ill-treatment of patients.**
>
> (1) It shall be an offence for any person being an officer on the staff of or otherwise employed in a hospital or nursing home, or being a member of the board of management of a hospital or a person carrying on a nursing home—
>
> > (a) to ill-treat or wilfully neglect a patient for the time being receiving treatment for mental disorder as an in-patient in that hospital or nursing home; or
> >
> > (b) to ill-treat or wilfully neglect, on the premises of which the hospital or nursing home forms part, a patient for the time being receiving such treatment there as an out-patient.[1364]
>
> (2) It shall be an offence for any individual to ill-treat or wilfully neglect a patient who is for the time being subject to his guardianship under this Act or otherwise in his custody or care.
>
> (3) Any person guilty of an offence against this section shall be liable—
>
> > (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds, or to both such fine and imprisonment;

[1364] In relation to children, this was in addition to the offence in s. 12 of the Children and Young Persons (Scotland) Act, 1937.

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding five hundred pounds, or to both such fine and imprisonment.

However, much of the force of s. 95 was reduced by s. 107[1365] which removed any civil or criminal liability "in respect of any act purporting to be done in pursuance of this Act" unless the act was done in bad faith or without reasonable care. In *Skinner v Robertson*[1366] a nurse of 22 years' experience was charged with assaulting a number of mentally handicapped children (aged between 8 and 11) in his care in a mental hospital by throwing water over them, striking them on the face and thigh and striking them on the head with his knuckles.[1367] The children were difficult to control and the nurse had thrown water from a jug with the intention (he said) of calming them down; the striking was done in the context of separating children who were attacking other children. Sheriff Fulton, following a House of Lords decision[1368] on the equivalent English provision, said this:

> On looking at the terms of s. 107, I think that Parliament must have had in mind, inter alia the necessity — albeit a regrettable necessity — for the use of physical force on occasions in a mental hospital by nurses on patients, and decided to enact s. 107 in terms which remove in the present type of case the hazard of civil liability for damages, or the stigma of criminal liability, from certain acts involving physical force necessarily used by nurses in carrying out their responsibility to care for and to control their patients, unless these acts were done in bad faith or without reasonable care…. Each case clearly will depend upon its own facts and circumstances, but I think that a useful approach is to measure good faith and reasonable care by looking at whether or not the use of force was reasonably required, and if so whether or not the physical force used was the minimum force reasonably necessary in the circumstances of the particular case, to fulfil the nurses' responsibility to care for and control the patient or patients involved…In applying my approach to s. 107 in the present case, I am satisfied that what the accused did was done in the belief that he was acting in the interests of his patients in exercising legitimate care for and control of these patients, and that he

[1365] Section 107 of the 1960 Act follows the antecedent in s. 141 of the (English) Mental Health Act 1959. Both sections were headed "Protection for acts done in pursuance of this Act".

[1366] 1980 SLT (Sh Ct) 43.

[1367] Student nurses had reported him, and were commended for doing to by the Sheriff.

[1368] *Pountney v Griffiths* [1976] AC 314.

> was acting with good faith and with reasonable care. Accordingly I am acquitting him of all charges.[1369]

In the House of Lords case cited, Lord Simon of Glaisdale offered the following justification for the remarkable overreach of this provision:

> Patients under the Mental Health Act may generally be inherently likely to harass those concerned with them by groundless charges and litigation, and may therefore have to suffer modification of the general right of free access to the courts. But they are, on the other hand, a class of citizen which experience has shown to be peculiarly vulnerable.[1370]

Section 107 represented a substantial extension of the protection of staff offered under the 1913 Act[1371] (and a corresponding diminution in the protection offered patients), for the earlier Act had limited the good faith exemption from civil or criminal liability to acts done to facilitate the reception into hospital of a patient: staff were protected, in other words, only against claims for wrongful detention. It is unclear the extent to which "harassment of staff" by false allegations of assault was a genuine problem that persuaded Parliament to extend the 1913 protection to include such allegations.[1372] However, the feeling that staff needed to be protected from "groundless charges" remained reflected in the legislation for many years and s. 107 of the 1960 Act was re-enacted as s. 122 of the Mental Health (Scotland) Act 1984.[1373] No equivalent, however, appeared in the Mental Health (Care and Treatment) (Scotland) Act 2003.

[1369] 1980 SLT (Sh Ct) at 46.

[1370] [1976] AC at p 329.

[1371] 1913 Act, s. 73.

[1372] The matter was not discussed in the *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency* (1957 Cmnd 169) which preceded the English legislation, itself the model (in many but not all respects) for the Scottish Act nor, as far as I have been able to trace, in the Parliamentary debates leading to either statute.

[1373] Section 122 of the 1984 Act was discussed (in the context of detention in a hospital) in *B v Forsey* 1988 SC(HL) 28.

Limited protection against sexual abuse of mental health patients was also provided by the 1960 Act. Again, this recognised an especial vulnerability of such patients, for there was no equivalent for other children or young persons living in institutional or foster care until a much later period.[1374]

> **96.— Protection of female defectives.**
>
> (1) It shall be an offence, subject to the exception mentioned in this section,—
>
> > (a) for a man to have unlawful sexual intercourse[1375] with a woman who is a defective;
> >
> > (b) for any person to procure or encourage any woman who is a defective to have unlawful sexual intercourse;
> >
> > (c) for the owner or occupier of any premises or any person having or assisting in the management or control of premises to induce any woman who is a defective to resort to or be upon such premises for the purpose of unlawful sexual intercourse with any man.
>
> (2) A person shall not be guilty of an offence against this section if he did not know and had no reason to suspect that the woman in respect of whom he is charged was a defective.[1376]
>
> …

[1374] See above at **1.F.vi**.

[1375] "Unlawful sexual intercourse" meant intercourse outwith marriage: *HM Adv. v Watson* (1885) 13 R(J) 6 at p. 9; *Rex v Chapman* [1959] 1 QB 100. It followed that this provision would be inapplicable to a man having sexual intercourse with his mentally disordered wife.

[1376] On this point, see *R v Hudson* [1966] 1 QB 448, discussing an equivalent English provision.

(7) In this section “defective” means a person suffering from mental deficiency which is of such a nature or degree that the person is incapable of living an independent life or of guarding herself against serious exploitation, and “woman” includes girl.

97.— Protection of female patients.

(1) Without prejudice to the last foregoing section, it shall be an offence, subject to the exception mentioned in this section.—

(a) for a man who is an officer on the staff or is otherwise employed in a hospital or nursing home, or who is a member of the board of management of a hospital or who is a person carrying on a nursing home to have unlawful sexual intercourse with a woman who is for the time being receiving treatment for mental disorder as an in-patient in that hospital or nursing home, or to have such intercourse on the premises of which the hospital or nursing home forms part with a woman who is for the time being receiving such treatment there as an out-patient;

(b) for a man to have unlawful sexual intercourse with a woman suffering from mental disorder who is subject to his guardianship under this Act or is otherwise in his custody or care under this Act or in pursuance of arrangements under the National Health Service (Scotland) Act, 1947, or Part III of the National Assistance Act, 1948, or as a resident in a residential home for persons suffering from mental disorder within the meaning of Part III of this Act.

> (2) It shall not be an offence under this section for a man to have sexual intercourse with a woman if he does not know and has no reason to suspect her to be a person suffering from mental disorder.[1377]

As before, the provisions relating to sexual abuse were limited to abuse of females[1378] by males and there was no specific statutory offence that covered the sexual abuse of male patients (or indeed of any sexual abuse by females). Nor is there any specific statutory offence dealing with acts of a sexual nature falling short of "sexual intercourse", though a charge of indecent assault at common law would have been available. In the event, there are no reported cases of charges under these provisions.

The 1960 Act was amended on numerous occasions, notably by the Social Work (Scotland) Act 1968 and the Mental Health (Amendment) (Scotland) Act 1983, before being replaced by the Mental Health (Scotland) Act 1984.

v. The Mental Health (Scotland) Act 1984

The 1960 Act was replaced by the Mental Health (Scotland) Act 1984, which came into force on 30th September 1984.[1379] The 1984 Act continued in operation the Mental Welfare Commission,[1380] whose duty under the Act was "to exercise protective functions in respect of persons who may, by reason of mental disorder,[1381] be incapable of adequately protecting their persons or their interests".[1382] The Commission was obliged to "make inquiry into any case where it appears to them that there may be ill-treatment, deficiency in

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[1377] On this point, see *R v Hudson* [1966] 1 QB 448, discussing an equivalent English provision.

[1378] Curiously, s. 97 does not define "woman" to include "girl", as s. 96 does, but in any case of doubt a charge could be brought under s. 96 against a member of staff: penalties were the same.

[1379] 1984 Act (c. 36), s. 130.

[1380] 1984 Act, s. 2(1).

[1381] Defined in s. 1.

[1382] 1984 Act, s. 3(1).

care or treatment",[1383] as well as to visit regularly both patients in hospital and patients subject to guardianship.[1384] Local authorities had to make arrangements for the provision, equipment and maintenance of residential accommodation,[1385] and where the patient was a child or young person in respect of whom the local authority had assumed parental rights under ss. 16 and 17 of the Social Work (Scotland) Act 1968 the local authority had to arrange for the patient to be visited on their behalf and "take such other steps in relation to the patient while in the hospital or nursing home as would be expected of a parent".[1386] Local authorities were required to provide "suitable training and occupation" for persons suffering from mental handicap who were over the school leaving age (except where the person was in hospital).[1387]

Private hospitals (that is to say any premises for the provision of medical treatment for persons subject to the 1984 Act other than those vested in the Secretary of State, or State hospitals or premises managed by a Government Department or provided by a local authority) had to be registered with the Secretary of State[1388] as being fit for their purposes and staffed by suitably trained and qualified persons.[1389] They were to be inspected regularly.[1390]

Persons could be detained under the 1984 Act by order of the sheriff, on the application of a mental health officer or the patient's "nearest relative".[1391] Any person over the age of 16 could be made subject to a guardianship order, approved by a sheriff under s. 37 of the

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[1383] 1984 Act, s. 3(2)(a).

[1384] 1984 Act, s. 3(2)(b).

[1385] 1984 Act, s. 7.

[1386] 1984 Act, s. 10.

[1387] 1984 Act, s. 11.

[1388] 1984 Act, s. 12.

[1389] 1984 Act, s. 13.

[1390] 1984 Act, s. 14.

[1391] 1984 Act, ss. 17-19.

1984 Act, on an application made by the patient's nearest relative or a mental health officer (in practice, most applications were made by the latter). Guardianship gave the guardian the right to require the patient to reside at a specified place.[1392] The Mental Health (Specified Treatments, Guardianship Duties etc) (Scotland) Regulations 1984[1393] (made under s. 43 of the 1984 Act and coming into force on 30th September 1984) replaced the Mental Health (Guardianship) (Scotland) Regulations 1962 and provided that the local authority was to exercise "general supervision" over every patient subject to guardianship under the 1984 Act.[1394] That included an obligation to visit the patient at least once every three months.[1395] The local authority also had to inform the Mental Welfare Commission of any change of address.[1396] The local authority could require that the guardian (if not the local authority[1397]) furnish them with all reports and other information concerning the patient as they may require, and guardians had to notify the local authority of various matters including changes of address, the name and address of the patient's GP, and any absences without leave.[1398] The duties of guardians are specified with far less detail than was to be found in the 1962 Regulations. The guardian was prohibited, as was the case under the Mental Health (Scotland) Act, 1960, from administering corporal punishment: to do so was a criminal offence.[1399]

[1392] 1984 Act, s. 41(2)(a).

[1393] SI 1984 No. 1494 (S. 122).

[1394] 1984 Regulations, reg. 4.

[1395] 1984 Regulations, reg. 5.

[1396] 1984 Regulations, reg. 6.

[1397] And most guardians were, in fact, local authorities.

[1398] 1984 Regulations, reg. 7.

[1399] 1984 Act, s. 41(4).

a. Special Offences in Relation to Mental Health Patients

The offences in the Mental Health (Scotland) Act, 1960[1400] were repeated in the 1984 Act. So s. 105 of the Mental Health (Scotland) Act 1984 replicated the offence (ill-treatment of patients) in s. 95 of the 1960 Act[1401] and its effectiveness as a protection continued to be qualified by s. 122 which removed any civil or criminal liability "in respect of any act purporting to be done in pursuance of this Act" unless done in bad faith or without reasonable care. Likewise, s. 106 of the 1984 Act replicated the offence (man having unlawful sexual intercourse with mentally defective woman) in s. 96 of the 1960 Act, and s. 107 of the 1984 Act replicated the offence (hospital staff member or guardian having unlawful sexual intercourse with patient) in s. 97 of the 1960 Act – with an added reference in the latter section (but, curiously, not the former section) to homosexual acts designed to protect vulnerable male patients.[1402] Any sexual abuse of mental health patients by women continued to be ignored by the legislators.

vi. The Mental Health (Care and Treatment) (Scotland) Act 2003

The operation of the Mental Health (Scotland) Act 1984 was reviewed in the Millan Report[1403] and the Act was replaced from 1st July 2003 and 5th October 2005 by the Mental Health (Care and Treatment) (Scotland) Act 2003,[1404] which is the Act in force today. An approved medical practitioner may grant a short-term detention certificate to detain a patient in hospital for up to 28 days.[1405] A compulsory treatment order, which may last for

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[1400] Discussed above at **2.H.iv.c.**

[1401] And was subsequently amended slightly by the Mental Health (Patients in the Community) Act 1995.

[1402] 1984 Act, s. 107(3): the wording is clumsy. "Unlawful sexual intercourse with a woman" was to be read as including "sodomy or an act of gross indecency by one male person with another male person". (And after 1995 a reference to "shameless indecency" was added).

[1403] *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* by Bruce Millan (SE/2001/56).

[1404] 2003 ASP 13.

[1405] 2003 Act, s. 44.

up to six months, may be made by the Mental Health Tribunal for Scotland[1406] (rather than, as under the earlier legislation, the sheriff).

Guardianship of patients is dealt with not under the Mental Health (Care and Treatment) (Scotland) Act 2003 but under the Adults with Incapacity (Scotland) Act 2000. "Adult" means a person over the age of 18 years[1407] and so the 2000 Act is outwith the scope of this Report.

a. The Mental Welfare Commission

The 2003 Act continues in being the Mental Welfare Commission for Scotland,[1408] while giving it a slightly wider range of duties than it had under the 1984 Act, including to monitor the operation of the Act and to promote best practice,[1409] and to bring to the attention of the Scottish Ministers such matters as the Commission considers ought to be brought to their attention.[1410] Since 1st August 2010, in discharging its functions the Commission has been obliged to act in a manner that seeks to protect the welfare of persons who have a mental disorder,[1411] to raise any concern it has about any social service or health care in respect of a mentally disordered person with the Care Inspectorate, with Healthcare Improvement Scotland, or with any other relevant person,[1412] and to give advice when asked to do so to any person about matters relating to its function.[1413] The Commission (or, after 1st August 2010, Commission Visitors[1414]) may investigate the cases of individual

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[1406] 2003 Act, s. 64.

[1407] Adults with Incapacity (Scotland) Act 2000, s. 1(6).

[1408] 2003 Act, s. 4.

[1409] 2003 Act, s. 5.

[1410] 2003 Act, s. 6.

[1411] 2003 Act, s. 4(2A), as inserted by the Public Services Reform (Scotland) Act 2010, s. 111(2).

[1412] 2003 Act, s. 8A, as inserted by the Public Services Reform (Scotland) Act 2010, s. 111(5).

[1413] 2003 Act, s. 9A, as inserted by the Public Services Reform (Scotland) Act 2010, s. 111(6).

[1414] 2003 Act, s. 4A, as inserted by the Public Services Reform (Scotland) Act 2010, s. 111(3).

patients and make recommendations,[1415] and must visit, as often as they think appropriate, both patients in hospital and patients subject to an intervention or guardianship order under the Adults with Incapacity (Scotland) Act 2000.[1416]

b. Duties of Health Boards and Local Authorities

The Health Board is obliged to provide such services and accommodation as are sufficient for the particular needs of any person under the age of 18 who has either been detained in a hospital under the Act or been admitted, voluntarily or otherwise, for treatment for a mental disorder.[1417] The local authority has to provide or secure the provision of care and support for persons (of whatever age) with a mental disorder, which includes residential accommodation, personal care and personal support (but not nursing care), and other services designed to promote the wellbeing and development of such persons, and may do so for such persons in hospital.[1418] The local authority must inquire into the case of a person who is over 16 and suffering from a mental disorder and who may have been ill-treated, neglected, or suffered a deficiency in care (otherwise than in a hospital), or whose property is at risk, or who is living alone or without care, or the safety of some other person may be at risk.[1419] Any person under 18 is a "child" for the purposes of Part 2 of the Children (Scotland) Act 1995, and local authorities have duties towards any "child in need" under s. 22 thereof (including in particular to safeguard and promote the child's welfare): a child who is "disabled" is a child in need,[1420] and a child is "disabled" if he or she suffers from or has a mental disorder within the meaning of the mental health legislation.[1421] The services provided to children in need under s. 22 must, under s. 23, be designed to minimise the

[1415] 2003 Act, s. 11.

[1416] 2003 Act, s. 13.

[1417] 2003 Act, s. 23.

[1418] 2003 Act, ss. 25 and 26.

[1419] 2003 Act, s. 33.

[1420] Children (Scotland) Act 1995, s. 93(4).

[1421] Children (Scotland) Act 1995, s. 23(2).

effect of the disability and to give the child the opportunity to lead as normal a life as possible.

c. Monitoring and Inspection of Mental Health Facilities

From 1st August 2010, Healthcare Improvement Scotland[1422] (HIS) took over the functions of the Care Commission in respect of private health care providers, together with the functions of NHS Quality Improvement Scotland in respect of health service providers. In pursuance of its general duty of furthering improvement, HIS may inspect any health care service (whether NHS[1423] or independent[1424]) and must do so if requested by the Scottish Ministers.[1425] Inspection must be carried out in accordance with the rules in the Healthcare Improvement Scotland (Inspections) Regulations 2011.[1426]

Independent health care service providers (previously registered with the Secretary of State, and subject to inspection by NHS QIS) must seek registration of the service they provide with HIS,[1427] which may grant registration conditionally.[1428] Improvement notices may be given by HIS,[1429] and registration may be cancelled, either by HIS[1430] or on an emergency basis by the sheriff.[1431]

[1422] Established under s. 10A of the National Health Service (Scotland) Act 1978, as inserted by s. 108 of the Public Services Reform (Scotland) Act 2010.

[1423] National Health Service (Scotland) Act 1978, s. 10I, as so inserted, and amended by the Public Bodies (Joint Working) (Scotland) Act 2014.

[1424] National Health Service (Scotland) Act 1978, s. 10J, as so inserted.

[1425] National Health Service (Scotland) Act 1978, s. 10M, as so inserted.

[1426] SSI 2011 No. 184.

[1427] National Health Service (Scotland) Act 1978, s. 10P, as so inserted; Healthcare Improvement Scotland (Applications and Registration) Regulations 2011 (SSI 2011 No. 35).

[1428] National Health Service (Scotland) Act 1978, s. 10Q, as so inserted.

[1429] National Health Service (Scotland) Act 1978, s. 10R, as so inserted.

[1430] National Health Service (Scotland) Act 1978, s. 10S, as so inserted.

[1431] National Health Service (Scotland) Act 1978, s. 10T, as so inserted.

d. Special Offences in Relation to Mental Health Patients

Like its predecessors, the Mental Health (Care and Treatment) (Scotland) Act 2003 contains special offences that are designed to protect mental health patients from the peculiar vulnerabilities inherent in their condition. But the offences of a sexual nature in the 2003 Act were structured differently from, and less absolutely than, the earlier statutory offences. The earlier legislation had rendered all sexual intercourse with mental health patients (outwith marriage) a crime, irrespective of the actual patient's capacity to consent,[1432] which had the effect of depriving all patients of their right to choose to lead a life with sexual experiences (outwith marriage). As the Scottish Law Commission put it,

> The challenge in making provision for sexual activity with people with mental disorder is to recognise the rights of those persons to engage in sexual activity and promote their sexual autonomy as far as possible. This aim must be balanced with the need to protect vulnerable persons from sexual exploitation and to recognise that in certain situations mental disorder may act as a barrier to meaningful understanding of, and valid consent to, sexual activity.[1433]

The 2003 Act went much further than the earlier legislation in recognising that sexual abuse and exploitation comes in many forms, including those other than penile penetration of the vagina. So, s. 311 of the 2003 Act[1434] (replacing s. 106 of the Mental Health (Scotland) Act 1984) made it an offence from 5th October 2005[1435] for a person to engage in "sexual intercourse (vaginal or anal)" or "any other sexual act"[1436] with a mentally disordered person who either did not consent to that act or, due to the mental disorder, was incapable

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[1432] Mental Deficiency and Lunacy (Scotland) Act, 1913, s. 46; Mental Health (Scotland) Act 1960, s. 96; Mental Health (Scotland) Act 1984, s. 106.

[1433] *Report on Rape and Other Sexual Offences* Scot. Law Com. No. 209 (2007) at para [4.88].

[1434] Coming into force on 5th October 2005: Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No. 4) Order 2005 (SSI 2005 No. 161).

[1435] Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No. 4) Order 2005 (SSI 2005 No. 161).

[1436] "*Sexual act"* was defined to mean "any activity which a reasonable person would, in all the circumstances, regard as sexual": s. 311(8).

of consenting to the act. This decriminalised sexual intercourse with a mentally disordered person who could and did, in fact, consent to that act, while at the same time criminalising other non-consensual sexual activity. Consent was vitiated if the person was shown to have consented as a result of being placed in a state of fear, or being subject to threat, intimidation, deceit or persuasion.[1437] An important innovation in the 2003 Act was the inclusion of a definition of lack of capacity: this was to mean an inability either (i) to understand what the act was, (ii) to form a decision as to whether to engage in the act, or (iii) to communicate any such decision.[1438] It was a defence that the accused did not know and could not reasonably have been expected to know that the person had a mental disorder and that the person was incapable of consenting.[1439]

Consent was not, however, of any relevance to the offence in s. 313 of the 2003 Act, which replaced and widened the offence previously contained in s. 107 of the 1984 Act. This made it an offence, from 5th October 2005,[1440] for a person to engage in sexual intercourse (vaginal or anal) or any other sexual act with or towards a mentally disordered person if the person was providing care services to the patient or was employed in or was the manager of a hospital in which the mentally disordered patient was being given medical treatment. Lack of consent was not the essence of this offence which was, rather, abuse of trust. (If there was indeed no consent, then the offence under s. 311 could be charged). It was a defence for the accused to prove either (i) that he or she did not know and could not reasonably be expected to know that the other person was mentally disordered, or (ii) that

[1437] 2003 Act, s. 311(3).

[1438] 2003 Act, s. 311(4).

[1439] 2003 Act, s. 311(5).

[1440] Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No. 4) Order 2005.

the patient was his or her spouse,[1441] or (iii) that a sexual relationship existed between the parties before care services were commenced or the patient was admitted to hospital.[1442]

Both of these offences were repealed by the consolidating Sexual Offences (Scotland) Act 2009.[1443] Instead of a single offence in s. 311 of the 2003 Act, any of the various sexual offences in ss. 1 to 9 of the 2009 Act,[1444] all based on lack of consent,[1445] may be committed against mentally disordered persons. In respect of any person suffering from a mental disorder as defined by the 2003 Act[1446] the 2009 Act repeats the 2003 definition of lack of capacity and provides, in respect of all the offences in ss. 1 to 9, that a person is incapable of consenting when unable either to understand what the conduct is, or to form a decision as to whether to engage in the conduct (or as to whether the conduct should take place), or to communicate any such decision.[1447] There is no defence to any of the offences, as there was under the 2003 Act, that the accused did not know and could not reasonably have been expected to know that the person had a mental disorder and was incapable of consenting: rather, absence of reasonable belief of consent to any of the offences in ss. 1 to 9 is an essential part of the offence to be proved by the Crown.[1448]

The offence in s. 313 of the 2003 Act (sexual act by persons providing care services) was replaced in the 2009 Act by an offence known as sexual abuse of trust of a mentally disordered person.[1449] This will be committed when any person intentionally engages in

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[1441] Or, after 5th December 2005 when the Civil Partnership Act 2004 came into force, the patient's civil partner.

[1442] 2003 Act, s. 313(3).

[1443] 2009 ASP 9.

[1444] Including rape, sexual assault, sexual coercion and indecent communication.

[1445] Consent being determined by the rules in ss. 12 – 15 of the 2009 Act.

[1446] Mental Health (Care and Treatment) (Scotland) Act 2003, s. 328.

[1447] Sexual Offences (Scotland) Act 2009, s. 17.

[1448] *Winton v HM Advocate* [2016] HCJAC 19 at [8].

[1449] Sexual Offences (Scotland) Act 2009, s. 46.

sexual activity with or towards a mentally disordered person while providing care services to that person, or being employed in, contracted to provide services in or to, or being the manager of a hospital, independent health care service or state hospital in which the mentally disordered person is being given medical treatment. This offence may be committed irrespective of whether or not the mentally disordered person consented to the act. It is a defence if the accused reasonably believed either that the other person did not have a mental disorder or that he or she was not in a position of trust; it is also a defence that the parties were spouses or civil partners or had been in a sexual relationship immediately before care services were provided to the patient.[1450]

The offence previously found in s. 105 of the Mental Health (Scotland) Act 1984 was replaced by s. 315 of the 2003 Act which, not involving a sexual offence transposed into the Sexual Offences (Scotland) Act 2009, continues in force today. Section 315 makes it an offence for any individual employed in or contracted to provide services in or to a hospital, any manager of a hospital, provider of a care service, or person providing care or treatment (otherwise than under a contract or as a volunteer for a voluntary organisation) to ill-treat or wilfully neglect a mentally disordered person. The 1984 (and earlier[1451]) defence to this offence – that the act was not done in bad faith or without reasonable cause – has no place in the 2003 Act.

[1450] Sexual Offences (Scotland) Act 2009, s. 47.

[1451] See the discussion above at **2.H.iv.c** of s. 95 of the Mental Health (Scotland) Act 1960.

SECTION I: INDEPENDENT BOARDING SCHOOLS

Until the coming into force of the Education (Scotland) Act, 1946, there was no legislative control of either the setting up or running of boarding schools by private individuals, organisations or religious groups. Since children at boarding schools, by and large and unlike children at approved schools and the like, are there as a result of the exercise of parental power the assumption seems to have been (insofar as the matter was considered at all) that the parental right to remove children immediately from any risky environment would be sufficient protection from harm. The flaw in that reasoning, of course, is the lack of any robust mechanism to allow parents properly to assess any potential risk to their children.

i. The Coming of Compulsory School Education

The history of modern school education in Scotland is usually traced to the Education (Scotland) Act, 1872,[1452] which abolished the authority of the Church of Scotland (and Free Church of Scotland) presbyteries over Scottish local schools and transferred their jurisdiction to parochial school boards, which were secular and non-denominational.[1453] The 1872 Act imposed on the newly-established school boards a duty to provide "for every parish and burgh a sufficient amount of accommodation in public schools available for all persons resident in such parish and burgh and for whose education efficient and suitable provision is not otherwise made".[1454] All teachers in public schools[1455] had to be qualified.[1456] All public schools were open to inspection by Her Majesty's Inspectors (except, curiously, that

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[1452] 35 and 36 Vict. c. 62. For a history both of the 1872 Act and subsequent developments, see J. Scotland "The Centenary of the Education (Scotland) Act 1872" (1972) 20 *British Journal of Educational Studies* 121.

[1453] The Roman Catholic Church had declined to transfer their schools to the public system, but did so when the Education (Scotland) Act 1918 extended state funding of denominational schools.

[1454] Education (Scotland) Act, 1872, s. 26.

[1455] "Public School" was defined to mean "any parish or burgh school or any school under the management of a school board established under this Act": Education (Scotland) Act, 1872, s. 1.

[1456] Education (Scotland) Act, 1872, ss. 57-59.

inspectors were not to inquire into any religious instruction).[1457] So schools had to be provided, and funded, by the state but, perhaps more importantly, it was made compulsory for all parents to provide "elementary education in reading, writing and arithmetic for his children, between five and thirteen years of age":[1458] failure to do so was made a criminal offence.[1459] The 1872 Act did not, however, require that this elementary education be provided at public schools and it remained (and remains) open to any parent to make other provision for the suitable and efficient education of their children, including by home tuition or at private (non-state funded[1460]) schools. Many such independent schools offered (and offer) boarding accommodation as well as educational provision, and do so for reward.

ii. Boarding Schools as Private Foster Care Providers

As we saw earlier, Part One of the Children Act, 1908 regulated what was then known as "baby farming" and what would now be called private fostering: the looking after of young children, apart from their parents or guardians, for reward.[1461] That Act, under the hearing "Infant Life Protection", required notification to the local authority of the placement of children under the age of seven for residential care, mandated visits by infant protection visitors, and allowed the local authority to limit the number of children any one person could receive for these purposes. It was explicitly provided, however, that Part One of the 1908 Act was not to apply to "boarding schools at which efficient elementary education is provided".[1462]

[1457] Education (Scotland) Act, 1872, s. 66.

[1458] Education (Scotland) Act, 1872, s. 69. The same obligation was imposed on employers of children under 13: s. 72.

[1459] Education (Scotland) Act, 1872, s. 70.

[1460] Other than indirectly through favourable tax regimes.

[1461] See above at **2.B.i.**

[1462] Children Act, 1908, s. 11(1).

Few children under seven would have been boarders in independent boarding schools in any case, but the age of seven was increased to nine by the Children and Young Persons (Scotland) Act, 1932,[1463] and then that age was increased to 18 in 1948.[1464] More significantly, the exclusion of boarding schools was removed by the 1932 Act[1465] and replaced by a procedure where the local authority could grant a certificate of exemption to "any hospital, convalescent home or institution".[1466] That exemption could be granted (conditionally or unconditionally) in respect of "any particular premises within their district [area] which appear to them to be so conducted that it is unnecessary that they should be visited."[1467]

Cowan, in her book on the 1932 Act,[1468] described the consequences of that change somewhat cautiously:

> All private hospitals, orphanages, *private boarding schools* and similar institutions which receive children under nine years for payment or fees will *apparently* have to apply to the Local Authority for such a certificate or, alternatively, to notify individually each child whom they receive.

The provisions on child life protection in the 1937 Act survived the 1948 Act which, by extending the age of their application to all children under 18, would (if Cowan were correct) have brought within the terms of the 1937 Act the vast majority of boarders at independent boarding schools. That would require notification to and visitation by the local authority, or a positive decision of the local authority that any particular boarding school was so conducted as not to require visitation. I have no access to information as to whether

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[1463] Children and Young Persons (Scotland) Act, 1932, s. 59, amending s. 1 of the 1908 Act. The 1908 provisions (as so amended) were replaced by Part One of the Children and Young Persons (Scotland) Act, 1937.

[1464] Children Act, 1948, ss. 35 and 36.

[1465] Children and Young Persons (Scotland) Act, 1932, s. 63(1) and (2).

[1466] Children and Young Persons (Scotland) Act, 1932, s. 63(1); Children and Young Persons (Scotland) Act, 1937, s. 11.

[1467] Children Act, 1908, s. 2(4); Children and Young Persons (Scotland) Act, 1937, s. 2(3).

[1468] MG Cowan *The Children Acts (Scotland)* (W. Hodge & Co, 1933) at p. 115 (emphasis added).

any such certificates of exemption were granted to independent boarding schools in Scotland, or whether such notification was ever given. But in *Wallbridge v Dorset County Council*[1469] the Chancery Division, interpreting the equivalent English infant life protection provisions, held that they did not apply to independent boarding schools, if for the slightly counter-intuitive reason that children at boarding schools were not living "apart from his parents". The judge held that the protective nature of the provisions coloured that phrase and required a distinction to be made between mere delegation of authority by parents and a parental intention to "part from" their children. While the latter would activate the infant life protection provisions, boarding a child at a fee-paying school would typically involve only the former. I can trace no discussion of the point in the Scottish courts but it seems likely that in practice it was assumed that these provisions did not apply to independent boarding schools.

The matter was clarified somewhat when Part One of the 1937 Act was replaced by Part One of the Children Act, 1958. Section 2 of the 1958 addressed the ambiguities identified in *Wallbridge* and defined "foster child", to whom the Part applied, as "a child below the upper limit of the compulsory school age whose care and maintenance are undertaken for reward for a period exceeding one month by a person who is not a relative or guardian of his". This would clearly have included children of the appropriate age residing in fee-charging[1470] boarding schools, except that it was further provided that Part One would only apply, subject to modifications, to children who reside during school holidays in independent schools for a period of more than one month.[1471] Residence of children during term time in boarding schools would not, therefore, be covered by the 1958 Act. For those

[1469] [1954] 2 WLR 1068.

[1470] And, as was decided in *Wallbridge*, it would not matter whether the fees were paid by the parents, charity, or by the state.

[1471] Children Act, 1958, s. 12(1) and (4).

children who were covered, the private fostering provisions discussed above did apply, but subject to the following modifications:

(i) the full notice provisions in s. 3 (unless the local authority itself seeks information) did not apply;

(ii) though visiting and inspection of premises was permitted, the local authority could not impose conditions nor prohibit the use of premises for the keeping of any child;

(iii) the provisions did not extend to children over the compulsory school age;

(iv) notice that children would remain in the school during school holidays had to be given to the local authority, unless the local authority exempted the school from doing so, either for a specified period or indefinitely.[1472]

These provisions applied until the 1958 Act was replaced by the Foster Children (Scotland) Act 1984, which remains in force today. Section 16 of the 1984 Act brings within the terms of that Act children residing in a school during school holidays, subject to modifications, so long as the school is not one maintained by an education authority. The modifications are as follows. First, the full notification provisions in s. 5 do not apply, though the local authority have to be informed that "children" will be residing at the school during the school holidays and an estimate of numbers has to be given, unless an exemption from the duty to give this notice (for a stated period or indefinitely) is granted by the local authority. The local authority may then request, if they wish, details about the name, age and sex of the child and the name and address of the child's parents and guardians. Secondly, though the visiting and inspection provisions in s. 8 apply, the local authority cannot impose requirements as to the keeping of foster children, nor prohibit the keeping of foster children.[1473] These rules have applied since 31st January 1985 and continue to apply today.

[1472] Children Act, 1958, s. 12.

[1473] Foster Children (Scotland) Act 1984, s. 16(2).

iii. Registration of Independent Schools

a. Under the Education (Scotland) Acts, 1946 and 1962

Registration of independent schools was required for the first time by the Education (Scotland) Act, 1946 but the relevant provisions were not brought into force until 30th September 1957.[1474] The 1946 Act was repealed on 1st October 1962 by the Education (Scotland) Act 1962,[1475] which made no substantive change to the registration rules. Both Acts required that independent schools be registered with the Registrar of Independent Schools in Scotland (a newly-created officer of the Secretary of State for Scotland),[1476] and made it a criminal offence to carry on an independent school that was not registered.[1477] The Registration of Independent Schools (Scotland) Regulations, 1957[1478] laid down the procedure to be followed for registration and the information to be supplied: details were required to be given about the proprietor of the school, the number of pupils, their sex and whether or not they were boarders; also the names, dates of birth and qualifications of each teacher employed in the school.[1479] This was nothing more than a requirement to supply information and the Regulations themselves did not lay down conditions, for example as to the qualifications of teachers or the standards of education, or personal care of pupils, to be expected. The Acts themselves, however, provided that no independent school could be registered if the proprietor was disqualified from being the proprietor of an independent school, or if the school premises were disqualified from being used as a school or any purpose specified in the disqualification.[1480] Disqualification was one of the potential

[1474] Education (Scotland) Act, 1946 (Commencement No. 3) Order, 1957 (SI 1957 No. 224).

[1475] 1962, c. 47, sched. 8.

[1476] 1946 Act, s. 109; 1962 Act, s. 111.

[1477] 1946 Act, s. 109(2); 1962 Act, s. 111(2).

[1478] SI 1957 No. 1058 (S. 55). An explanation of how these Regulations came about may be found at HC Deb. 23 July 1957, vol. 574, cols. 366-377.

[1479] 1957 Regulations, Sched.

[1480] 1946 Act, s. 109(1), proviso (i); 1962 Act, s. 111(1), proviso (i).

outcomes of the "Complaint" mechanism, also brought into effect in 1957, which gave added teeth to the inspection process (discussed below) that had existed by then for the previous ten years. Under this mechanism the Secretary of State could specify in a Complaint shortcomings that required to be rectified (having presumably been identified at inspections), in terms of the efficiency and suitability of the education being provided; the suitability of the school premises; the adequacy or suitability of the accommodation provided; the Secretary of State could also conclude that the proprietor of the school or any teacher was not a proper person to be such proprietor or teacher.[1481] There was, however, at this period of time no guidance as to what would make anyone not a "proper person", but having committed offences against children would obviously do so.[1482] Notice of a Complaint had to be sent to the proprietor (and, where relevant, an individual teacher), together with the measures necessary to remedy the situation, and specifying the time to do so, being not less than six months.[1483] Appeals from any requirement specified in a Complaint could be taken to the Independent Schools Tribunal,[1484] procedure at which was laid down by the Independent Schools Tribunal (Scotland) Rules, 1961.[1485] Either the Independent Schools Tribunal or (if no appeal was taken to them) the Secretary of State could strike the school off the register, or disqualify the proprietor or any teacher.[1486] It would thereafter be an offence to use disqualified premises for a school or for a person to

[1481] 1946 Act, s. 110(1); 1962 Act, s. 112(1).

[1482] One of the very few (briefly) reported cases, which arose under the equivalent English provisions, is *Byrd v Secretary of State for Education and Science* (1968) 112 *Solicitors Journal* 519, where a headmaster was imprisoned for "ill-treating boys at the school" and the school he ran with his wife had its registration withdrawn. The appeal by the wife against her disqualification from running independent schools was dismissed.

[1483] 1946 Act, s. 110(1); 1962 Act, s. 112(1).

[1484] 1946 Act, s. 111; 1962 Act, s. 113. Constitution of this Tribunal was governed by Sched 5 to the 1946 Act and thereafter Sched. 7 to the 1962 Act. Appeal from the decision of the Tribunal could be taken to a court of law.

[1485] SI 1961 No 2402 (S. 136), coming into force on 16th January 1962.

[1486] 1946 Act, s. 111(2); 1962 Act, s. 113(2).

act as a proprietor, or as teacher at any school (and not just an independent school).[1487] The Secretary of State could be asked to remove any such disqualification on the ground of a change of circumstances, and refusal to do so could be appealed to the Independent Schools Tribunal.[1488]

b. Under the (Original) Education (Scotland) Act 1980

The provisions on registration of independent schools discussed immediately above applied from 30th September 1957 until they were replaced on 1st September 1980 by similar provisions in Part V of and Schedule 2 to the Education (Scotland) Act 1980,[1489] an Act which, though substantially amended, remains in force today. The 1980 Act requires, as the earlier legislation had done, that independent schools be registered with the Registrar of Independent Schools in Scotland and, in its original form, provided that registration would be refused if the proprietor were disqualified (through the Complaint mechanism discussed in the immediately following paragraph) from being the proprietor of an independent school, or if the premises were disqualified from being used as a school.[1490] The Registration of Independent Schools (Scotland) Regulations, 1957, which set down the information to be supplied for registration, applied[1491] until their revocation on 31st December 2005 by the Registration of Independent Schools (Scotland) Regulations 2005.[1492]

[1487] 1946 Act, s. 112; 1962 Act, s. 114.

[1488] 1946 Act, s. 113; 1962 Act, s. 115.

[1489] 1980 Act, c. 44.

[1490] 1980 Act, s. 98(1). It was (and is) an offence for any person to conduct an independent school that is not registered: s. 98(2).

[1491] Subject to minor amendment in the Registration of Independent Schools (Scotland) Amendment Regulations 1975, SI 1975 No. 1412.

[1492] SSI 2005 No. 571; replaced by the Registration of Independent Schools (Scotland) Regulations 2006 (SSI 2006 No. 324).

As under the earlier legislation, the Secretary of State could serve on the proprietor of a registered independent school a notice of Complaint, together with specified actions to remedy the situation, if satisfied that:

(a) efficient and suitable instruction was not being provided at the school, having regard to the ages and sex of the pupils attending thereat;
(b) the school premises or any part thereof were unsuitable for a school;
(c) the accommodation was inadequate or unsuitable, having regard to the number, ages and sex of the pupils;
(d) the proprietor or any teacher was not a proper person to be the proprietor of an independent school or a teacher at any school.[1493]

As before, "proper person" was not (as the 1980 Act originally stood) defined in any way. Any Complaint made by the Secretary of State was subject to appeal to the Independent Schools Tribunal,[1494] procedure at which was governed by the Independent Schools Tribunal (Scotland) Rules 1961 from 16th January 1962 until 22nd August 1977, and thereafter by the Independent Schools Tribunal (Scotland) Rules 1977.[1495] That Tribunal, or the Secretary of State if no appeal was made, could strike the school off the register, disqualify the premises (or part thereof) from being used as a school, or disqualify a person from being a proprietor of an independent school or from being a teacher at any (public as well as independent) school.[1496] It would thereafter be an offence for the premises to be so used, or for the person so to act.[1497] The Secretary of State could be asked to remove any such

[1493] 1980 Act, s. 99.

[1494] 1980 Act, s. 100(1).

[1495] SI 1977 No. 1261 (S. 95).

[1496] 1980 Act, s. 100(2) and (3).

[1497] 1980 Act, s. 101.

disqualification on the ground of a change of circumstances, and refusal to do so could be appealed to the Independent Schools Tribunal.[1498]

In addition, the prohibition in s. 61 of the Social Work (Scotland) Act 1968 on carrying on a residential establishment without being registered was extended on 9th July 1998 to any grant-aided or independent school if (i) it provided residential accommodation and (ii) any part of its functions related to personal care or support whether or not combined with board and whether for reward or not.[1499] After 17th October 1988, independent schools could also be registered voluntarily under the Social Work (Scotland) Act 1968 as providing accommodation for the purposes of that Act.[1500] The main effect of being registered under this provision was to bring schools that did voluntarily register within the regulatory structures contained in the Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987,[1501] considered above.[1502] (Schools voluntarily registered under the 1968 Act remained, in addition, subject to the compulsory registration requirements of Part V of the 1980 Act).[1503]

[1498] 1980 Act, s. 102.

[1499] Registered Establishments (Scotland) Act 1998 (c. 25), s. 1(1), amending s.61(1) of the Social Work (Scotland) Act 1968.

[1500] Social Work (Scotland) Act 1968, s. 61A, as inserted by the Residential Establishment (Scotland) Act 1987 (c. 40), s. 2.

[1501] SI 1987 No. 2233, reg. 3(c).

[1502] See **2.C.vii**. This replaced the regulatory provisions applicable to independent boarding schools in the Administration of Children's Homes (Scotland) Regulations, 1959.

[1503] A new s. 61A was substituted by the Children (Scotland) Act 1995, s. 34(3), and both it and s. 61 were amended by the Registered Establishments (Scotland) Act 1998, before their repeal by the Regulation of Care (Scotland) Act 2001.

c. Amendments to the 1980 Act in the Standards in Scotland's Schools etc Act 2000[1504]

Two important amendments to the registration rules were made by the Standards in Scotland's Schools etc Act 2000, which came into force on 13th October 2000.[1505]

First, the grounds for refusing registration were expanded. The grounds found in the 1946 and 1962 Acts, and in the 1980 Act as originally enacted, were based not on any original inadequacy but only on existing disqualification through the Complaints process, with the result that registration could only be refused to those who had previously – and unsuccessfully – run schools but *not* to those who had never run schools before and who, therefore, had never been disqualified from doing so. The 2000 Act added to the existing grounds a new ground for refusing registration: that the Scottish Ministers are satisfied (on grounds they must specify) "that the proprietor is not a proper person to be the proprietor of any school, that a teacher to be employed in the school is not a proper person to be a teacher in any school or that the school premises, or any parts of those premises, are unsuitable for a school".[1506] This brought the grounds for refusing registration much closer to the grounds upon which a Complaint could be drawn up in relation to an already registered school, and the concept of "proper person" or "unsuitable premises" permitted an assessment to that effect even without an earlier history of problems in running an independent school. At this stage, however, "proper person" still had no statutory definition to guide the Scottish Ministers. Refusal of registration on this new ground was subject to an appeal to the Independent Schools Tribunal.[1507] (The original grounds, based

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[1504] 2000 ASP 6.

[1505] Standards in Scotland's Schools etc Act 2000 (Commencement No. 3 and Transitional Provisions) Order 2000 (SSI 2000 No. 361).

[1506] 1980 Act, s. 98(1) proviso (ia), as inserted by 2000 Act, s. 24(1)(a) from 13th October 2000.

[1507] 1980 Act, s. 98A, as inserted by 2000 Act, s. 24(2).

as they were on disqualification, did not need to be subject to appeal since the disqualification process itself had an appeal mechanism already embedded).

Secondly, a new ground of Complaint, through which the Scottish Ministers could require remedial action (failure to take which could result in the school being removed from the Register), was added: "that the welfare of a pupil attending the school is not adequately safeguarded and promoted there".[1508]

d. Restructuring of the 1980 Act by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004

The registration rules contained in the Education (Scotland) Act 1980 were substantially restructured by the 2004 Act, which came into force on 31st December 2005.[1509] The need for this restructuring was explained in the Policy Memorandum attached to the Bill as presented to the Scottish Parliament:

> 29. The Bill proposes a revision of the legislation governing independent schools for a number of reasons. First, many of the provisions in the 1980 Act date from the early part of the 20th century and no longer reflect expectations of a modern school. In particular, they do not allow for quick action to be taken by Ministers, where necessary, to address child welfare concerns. Second, the appeal process lacks clarity and the constitution of the Independent Schools Tribunal has met with criticism. Third, the current minimum number of pupils required to constitute an independent school has caused practical difficulties. The aim of this part of the Bill, therefore, is to provide up to date, consistent, ECHR compliant and effective legislation in the interest of pupils.

The 2004 Act modified the definition of "independent school", to remove the requirement that the institution have five or more pupils.[1510] It also made provision for identifying the

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[1508] 1980 Act, s. 99(1)(aa), as inserted by 2000 Act, s. 25. "A pupil", of course, included a number of pupils.

[1509] School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 (Commencement No. 2 and Transitional Provisions) Order 2005 (SSI 2005 No. 570).

[1510] 2004 Act, s. 3, amending s. 135(1) of the 1980 Act.

responsible individual when the proprietor of the independent school is a body corporate, Scottish partnership or other unincorporated association.[1511]

On the same day as the 2004 Act was brought into force also came into force the Registration of Independent Schools (Scotland) Regulations 2005,[1512] which replaced the Registration of Independent Schools (Scotland) Regulations, 1957, and set out the information to be included in applications for registration. The 2005 Regulations were themselves replaced from 1st July 2006 by the Registration of Independent Schools (Scotland) Regulations 2006,[1513] which continue to apply today. As well as the name and address of the school, and the type of education provided there, the 2006 Regulations require that the application contain information about the school's child protection policy and procedure, including a statement of the school's policy and practice on seeking criminal record certificates under Part V of the Police Act 1997, and a statement of what checks are made in respect of all persons working or to be working in a child care position relative to the school.[1514] Also to be included is a statement confirming that criminal record certificates have been obtained in respect of the proprietor of the school, all proposed teachers, and all other persons in or to be in a child care position relative to the school.[1515] This information also has to be supplied to the Registrar in annual returns.[1516] In this way, the Scottish Ministers may judge more readily than before – and with more transparency – whether a proprietor or a teacher is a "fit person" to be a proprietor of an independent school or a teacher at any school.

[1511] 2004 Act, s. 7, inserting a new s. 103A into the 1980 Act.

[1512] SSI 2005 No. 571.

[1513] SSI 2006 No, 324. The rules on information to be supplied in applications for registration were the same in the 2005 and 2006 Regulations, but the latter put the requirement to supply information to the Registrar onto an annual basis.

[1514] 2006 Regulations, sched. 1 para 9(g).

[1515] 2006 Regulations, sched. 1 para 10.

[1516] 2006 Regulations, reg. 4.

Before 2005 the 1980 Act had listed the grounds upon which the Secretary of State could refuse registration, but had not specified any criteria for the granting of registration. The 2004 Act replaced the s. 98A that had been inserted into the 1980 Act by the Standards in Scotland's Schools etc Act 2000[1517] with a new s. 98A to specify such criteria and since then the Scottish Ministers may only grant an application for registration of an independent school if they are satisfied that:

> (a) efficient and suitable instruction will be provided at the school, having regard to the ages and sex of the pupils who shall be attending the school;
>
> (b) the welfare of such pupils will be adequately safeguarded and promoted;
>
> (c) … –
>
>> (i) the proprietor of the school is a proper person to be the proprietor of an independent school; and
>>
>> (ii) every proposed teacher in the school is a proper person to be a teacher in any school;
>
> (d) … the proposed school premises are suitable for use as a school; and
>
> (e) … the accommodation to be provided at the school premises is adequate and suitable, having regard to the number, ages and sex of the pupils who shall be attending the school.[1518]

[1517] This dealt with referral of refusal of registration to the Independent Schools Tribunal.

[1518] 1980 Act, s. 98A(3), as inserted by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 4(2).

It is further provided[1519] that the Scottish Ministers are not to be so satisfied if any person, premises or accommodation is subject to a disqualification, or if a person is disqualified from working with children (originally, in terms of s. 17 of the Protection of Children (Scotland) Act 2003, and then from 27th February 2011 in terms of the Protection of Vulnerable Groups (Scotland) Act 2006) or is a "prescribed person" under the Protection of Vulnerable Groups (Scotland) Act 2007 (Transitory Provisions in Consequence of Safeguarding Vulnerable Groups Act 2006) Orders.[1520]

The grounds for refusing registration, previously contained in s. 98, now appear in s. 98B, though they were not in substance changed from the grounds that had applied since 2000. The Scottish Ministers may refuse registration if they are not satisfied that:

(a) the proposed school premises are suitable for use as a school;

(b) accommodation to be provided at the proposed school premises is adequate and suitable, having regard to the number, ages and sex of the pupils who shall be attending the school;

(c) the proprietor of the independent school is a proper person to be the proprietor of such a school; or

(d) a proposed teacher in the school is a proper person to be a teacher in any school.[1521]

If registration is refused, the Scottish Ministers may make an order disqualifying the premises from being used as a school or limiting its use, or an order disqualifying a person

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[1519] 1980 Act, s. 98A(5), as so inserted.

[1520] SSI 2009 No. 4 and SSI 2009 No. 337.

[1521] 1980 Act, s. 98B, as inserted by School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 4(2).

from being a proprietor of a school or a teacher at any school.[1522] The Independent Schools Tribunal was abolished by the 2004 Act and an appeal can now be taken instead, against refusal of registration or disqualification, or refusal to remove disqualification, by the proprietor or individual teacher to the Sheriff Principal.[1523] (That appellate jurisdiction was not transferred to the Sheriff Appeal Court under the Courts Reform (Scotland) Act 2014).

The Scottish Ministers may impose, vary or revoke any condition designed to prevent an independent school becoming objectionable in terms of the grounds specified in s. 99, under which a notice of Complaint can be served on the proprietor.[1524] These grounds include (i) that efficient and suitable instruction is not being provided at the school, (ii) that the welfare of a pupil attending the school is not adequately safeguarded and promoted there, (iii) that the school premises are unsuitable or the accommodation is inadequate or unsuitable, or either has been disqualified, (iv) that a condition for carrying on the school has not been complied with, (v) that the proprietor or a teacher is disqualified or disqualified from work, later regulated work,[1525] with children or is a prescribed person or otherwise not a proper person to be a proprietor of an independent school or a teacher in any school.[1526] Appeal may be taken to the Sheriff Principal against a notice of

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[1522] 1980 Act, s. 98B(2) – (5).

[1523] 1980 Act, s. 98C(6) – (8), as inserted by School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 4(2). On p. 22 of the Consultation Paper that preceded the 2004 Act, *Ensuring Improvement in Our Schools: A Consultation Paper and Draft Bill* (Scottish Executive, 2003), it was stated: "At present appeals are to the Independent Schools Tribunal, a tribunal that is set up only when required to hear a case. The Tribunal has not met since the late 1970s and we propose to abolish it. Instead an appeal would be available to the Sheriff Principal. The Sheriff Principal would be able to grant or refuse any appeal and to impose, vary or remove conditions. The Sheriff Principal's decision could be appealed to the Court of Session only on a point of law".

[1524] 1980 Act, s. 98E, as inserted by School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 5(1).

[1525] Protection of Vulnerable Groups (Scotland) Act 2007, sched. 4 para 7.

[1526] 1980 Act, s. 99(1A).

Complaint.[1527] If no appeal is taken the Scottish Ministers may make an order imposing conditions or disqualifying the premises or any person from being proprietor or a teacher; appeal from this order may be taken to the Sheriff Principal.[1528] It is an offence to use disqualified premises as a school, or for a disqualified person to act as a proprietor of an independent school or to seek a position as teacher at any school.[1529] Disqualification may be removed on a change of circumstances and a refusal of a request to do so is subject to an appeal to the Sheriff Principal.[1530]

iv. Inspection of Independent Schools

a. Under the Education (Scotland) Act, 1946

[1527] 1980 Act, s. 98E(3), as inserted by School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 5(2)(b).

[1528] 1980 Act, s. 100, as substituted by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 5(3). Under the rather different legislation in England, an appeal against removal of registration was taken successfully in *Al Huda Girls School v Secretary of State for Education*, discussed by P. Meredith in "Successful Challenge to Removal from the Register of Independent Schools" 2012 *Education Law Journal* 157. There seems to have been no reported decisions on these provisions in Scotland.

[1529] 1980 Act, s. 101, as substituted by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 5(4).

[1530] 1980 Act, s. 102. For appeals generally, see s. 103, as substituted by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 6.

Independent schools were first subject to regulation under the Education (Scotland) Acts, 1945[1531] and 1946,[1532] since when, as Janys Scott, QC, in *Education Law in Scotland*[1533] put it, "The organisation of inspection in relation to independent schools is exactly the same as for public schools". Though she is talking of the law at a later period, the statutory wording has been virtually identical since 1945. The school inspection regime operated by HM Inspector of Schools has since 1st January 1947, when the 1946 Act (mostly) came into effect,[1534] applied equally to public schools (that is to say, "any school under the management of an education authority"[1535]) and independent schools (that is to say, "a school at which full-time education is provided for five or more pupils of school age (whether or not such education is also provided for pupils under or over that age), not being a public school or a grant-aided school"[1536]).

Inspection was required under s. 61 of the 1946 Act, which provided that:

> It shall be the duty of the Secretary of State to cause inspection to be made of every educational establishment being a school or junior college at such intervals as appear to him to be appropriate, and to cause a special inspection of any such school or junior college to be made whenever he considers such an inspection to be desirable … and such inspections shall be made by His Majesty's Inspectors or other persons appointed by the Secretary of State for the purpose.

[1531] 8 & 9 Geo 6, c. 37. There were many modernisations in the 1945 Act. Of peculiar note is s. 51 (later s. 78(2) of the 1946 Act): "No woman shall be disqualified for employment as a teacher in any school, junior college or other educational establishment under the management of an education authority or be dismissed from such employment by reason only of marriage."

[1532] 9 & 10 Geo 6, c. 72. The circumstances in which the 1945 Act was passed, requiring speedy consolidation in the 1946 Act, are described by Lord Morrison moving the Second Reading of the Education (Scotland) Bill 1947 (which failed) at HL Deb. 11 November 1947 vol. 152 cols. 569-570 and again moving the Second Reading of the Education (Scotland) Bill 1949 (which passed), at HL Deb. 10 February 1949 vol. 160 cols. 687-688.

[1533] 1st edn, (W. Green, 2003) at para [8.50].

[1534] 1946 Act, s. 144(3).

[1535] 1946 Act, s. 143; 1962 Act, s. 145; 1980 Act, s. 135.

[1536] 1946 Act, s. 143; 1962 Act, s. 145; 1980 Act, s. 135.

Since “school” was (and is) defined to mean “a public school, a grant-aided school or an independent school, and includes a nursery school and a special school” the duty of inspection applied to them all. The Secretary of State was obliged to arrange inspection, but frequency was left up to him, as were the issues to be examined during inspections.

Section 62 of the 1946 Act also provided that:

> Where the managers of a school other than a public school apply to the Secretary of State for an inspection of the school with a view to ascertaining its general efficiency or the efficiency of the instruction in any specified subject, and undertake to pay towards the expenses of such inspection such sum as the Secretary of State may fix, it shall be lawful for the Secretary of State to cause the school to be inspected by one or more of His Majesty's Inspectors or by such other persons as the Secretary of State may appoint for the purpose.

b. Under the Education (Scotland) Act 1962

The duty of inspection in s. 61 of the 1946 Act was replaced with identical words in s. 67 of the 1962 Act, but s. 62 of the 1946 Act (inspection on request) was not re-enacted in the 1962 Act (nor, subsequently, in the Education (Scotland) Act 1980). Section 67 of the Education (Scotland) Act 1962, following s. 61 of the Education (Scotland) Act, 1946, imposed a duty on the Secretary of State “to cause inspection to be made of every educational establishment being a school or junior college at such intervals as appear to him to be appropriate … such inspections shall be made by Her Majesty’s Inspectors or other persons appointed by the Secretary of State for the purpose”. “School” was defined to include an independent school, which itself was defined to mean “a school at which full-time education is provided for five or more pupils of school age … not being a public school or a grant-aided school”.[1537] Inspection was on the same terms as for public schools.

c. Under the Education (Scotland) Act 1980

[1537] Education (Scotland) Act 1962, s. 145.

The 1962 Act was replaced by the Education (Scotland) Act 1980 and s. 66 of the 1980 Act was worded similarly to s. 67 of the 1962 Act, except that the Secretary of State was now to have the "power" to cause inspection rather than (as before) the duty to do so. The definitions of "school" and "independent school" remained as they were before.[1538] Section 66 of the Education (Scotland) Act 1980 gave the Secretary of State the power "to cause inspection to be made of every [educational establishment being a school or junior college][1539] at such intervals as appear to him to be appropriate … such inspections shall be made by Her Majesty's Inspectors or other persons appointed by the Secretary of State for the purpose". "School" is defined to include an independent school, which itself is defined to mean "a school at which full-time education is provided for [five or more][1540] pupils of school age … not being a public school or a grant-aided school".[1541] Inspection has always been on the same terms as for public schools. An important amendment was made to the inspection regime by the Children (Scotland) Act 1995, which inserted into the 1980 Act a new s. 125A obliging school inspectors to inspect boarding accommodation (whether provided by independent schools or by other schools) in order to determine whether the pupils' welfare is adequately safeguarded and promoted there.[1542]

Another amendment was made to s. 66 from 13th October 2000 by s. 11 of the Standards in Scotland's Schools etc Act 2000: this provides that the Scottish Ministers may request HM Inspectors of Education to give them advice about any matter specified in the request, and in order to do so HM Inspectors may inspect and report on any school.[1543] "School" includes

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[1538] 1980 Act, s. 135.

[1539] After the Self-Governing Schools etc (Scotland) Act 1989, Sched. 10 para. 8(14), these words were replaced by the word "school".

[1540] See n. 953 below.

[1541] Education (Scotland) Act 1980, s. 135.

[1542] 1980 Act, s. 125A, as inserted by the Children (Scotland) Act 1995, s. 35. This provision came into force on 1st November 1995.

[1543] Education (Scotland) Act 1980, s. 66(1AA), as inserted by s. 11 of the Standards in Scotland's Schools etc Act 2000.

independent schools, and since 31st December 2005 it has included schools even with less than five pupils.[1544]

The Care Commission[1545] took over regulation and inspection of boarding facilities at independent schools in 2005 and the Care Inspectorate[1546] took over these functions in 2011. Sched 12 para 3 of the Public Services Reform (Scotland) Act 2010 defines "school care accommodation service" (subject to regulation by the Care Inspectorate) as the provision of "residential accommodation to a pupil in a place in or outwith a public, independent or grant-aided school".

v. Administration of Independent Boarding Schools

The administration of independent schools, boarding or otherwise, has by and large been free from statutory regulation, but with some institutions certain provisions in the Administration of Children's Homes (Scotland) Regulations, 1959[1547] would appear to have applied. Regulation 19 specified the extent of these Regulations:

> Subject to the next following Regulation these Regulations shall apply to all homes provided by local authorities under section 15 of the Act and to all voluntary homes, within the meaning of section 96 of the Children and Young Persons (Scotland) Act, 1937, as amended by section 27 of the Act…

As amended "voluntary home" in the 1937 Act meant "a home or other institution supported wholly or partly by voluntary contribution", or "a home or other institution supported wholly or partly by endowments, not being a school within the meaning of the Education (Scotland) Act 1946". Section 20 of the 1959 Regulations then stated that "Where a home [supported wholly or partly by voluntary contribution] includes a school

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[1544] School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 3.

[1545] Set up under the Regulation of Care (Scotland) Act 2001.

[1546] Which replaced the Care Commission under the Public Services Reform (Scotland) Act 2010.

[1547] SI 1959 No. 834.

which is a public school, a grant-aided school or an independent school[1548]" then various of the 1959 Regulations would "not apply to the part of the home used as a school during that part of the day in which it is being so used or to any child attending the school during that part of the day in which he is so attending". This is obscure, but it would seem to mean that any part of an independent school supported wholly or partly by endowments that is not used as a school (i.e. the residential part) was indeed subject to all the 1959 Regulations, set out above.[1549] The Regulations that did not apply to the school part of the institution were those relating to local authority visitation, the specification of the medical officer's duties, the requirement to provide dental care, the rules on discipline and corporal punishment, notification of misadventure, and record-keeping.[1550] The 1959 Regulations were replaced by the Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987,[1551] which applied to independent schools that had voluntarily registered under s. 61A of the Social Work (Scotland) Act 1968.

[1548] As defined in the Education (Scotland) Act, 1946, s. 143 (as amended by the Education (Scotland) Act, 1956 s. 13(1), sched. 1) to mean a school at which full-time education is provided for five or more pupils of school age, not being a public school or grant-aided school.

[1549] Above at **2.C.v.**

[1550] That is to say, 1959 Regulations 2, 6(2), 7, 10, 11, 13, 14 and 15.

[1551] SI 1987 No. 2233 (S. 150).

APPENDICES

Note: These appendices should be read in conjunction with the main Report, which contextualises all the issues and provides definitions of the terms used.

APPENDIX ONE: Emigration of Children

i. Introduction

The practice of institutions sending children abroad to settle, primarily in parts of the British Empire that welcomed British (white) settlers, was well-established long before any statutory authority for, or control of, the practice was in place.[1552] It is at this distance in time impossible to say to what extent non-statutory emigration of children was a consensual matter, or to identify the efforts made to obtain the consent of parents and to ensure that any such consent was freely given. But it is clear that philanthropic individuals and societies saw emigration of needy children as a means to provide them with a better life. It is, for example, interesting to read the Lord President in *McFadzean v Kilmalcolm School Board*,[1553] a case involving a deed of trust dated 1876 designed "for the purpose of providing homes for, and upbringing and educating, destitute children" in what became known as Quarrier's Homes in Renfrewshire, explaining that "the form of agreement which persons desiring to have children received into the Homes are required to sign, bears that they are received with a view to being emigrated to Canada under the care of Mr Quarrier or his agents". Yet parental consent was of doubtful efficacy in providing legal authority to the sending of children abroad, because parental responsibility was in principle inalienable.[1554] The website of SurvivorScotland[1555] reports that between 1869 and 1939 around 7000 children were sent by Quarrier's to Canada:[1556] other voluntary organisations were enthusiastic as well. So too, it may safely be said (if for rather more mixed motives),

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[1552] See K. Karr "The Lost Children of Britain" (2012) 2 *Oxford Monitor of Forced Migration* 41-46

[1553] (1903) 5F 600 at p. 611.

[1554] This was true at least insofar as the *patria potestas* related to pupil children. Minor children (girls over 12 and boys over 14) were free to choose their own residence if emancipated or under the guardianship of curators (whose power was not traced to the *patria potestas*): *Craig v Greig and McDonald* (1863) 1 M 1172.

[1555] http://www.survivorscotland.org.uk/are-you-a-survivor/child-migrants/ (accessed 3rd November 2016).

[1556] A brief history of Quarrier's from its establishment until the 1980s, including its immigration policy, is to be found at para 2.2 of Tom Shaw, *Time to be Heard: A Pilot Forum*, (Scottish Government, February 2011).

was the state. Not only were statutory arrangements made to encourage general emigration to the Dominions,[1557] but official reports such as the Morton Committee Report, published in 1928,[1558] also perceived this as a means of dealing with children in need. A 1929 Scottish Education Department Circular[1559] to certified (reformatory and industrial) schools brought to their attention the views laid out in the Morton Committee Report at pages 10-11:

> The Committee's remarks on migration as a method of disposal [of children and young persons committed to certified schools] should be carefully noted. In view of the attitude of the Dominions towards those who have been in certified schools, it is of supreme importance in the general interest that Managers should exercise scrupulous discrimination in selecting boys for submission to the migration authorities as suitable settlers. The Committee are of opinion that more might be done to make girls in industrial schools acquainted with the opportunities which await them abroad after a suitable training in this country.

To modern eyes, this does not read as placing children's welfare at the forefront of official consideration: it is a manifesto for settling the Empire (then at its absolute height) with suitable stock. The House of Commons Health Committee published a report *The Welfare of Former British Child Migrants*[1560] in 1997, detailing UK Government policy on the matter from the Victorian period to 1989, its effects, and (in Annex 1 of the Department of Health's submitted Memorandum[1561]), the English and Welsh legislation governing the practice of emigrating children from the care system over that period. The equivalent Scottish legislation over a similar timeframe is set out below.

[1557] See the Empire Settlement Acts, 1922 c. 13; 1937 c. 18; 1952 c. 26.

[1558] *Protection and Training* (HMSO, 1928). See above at **I.C.i.**

[1559] SED Circular No. 80, 16th January 1929, para 12, reproduced in MG Cowan *The Children Acts (Scotland)* (W. Hodge & Co, 1933) at p. 331.

[1560] http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhealth/755/75503.htm (accessed 5th November 2016).

[1561] http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhealth/755/8052004.htm (accessed 5th November 2016).

ii. Scottish Statutory Authority to Emigrate Children

a. 1891 – 1932

The early child cruelty and child protection statutes (discussed in the main body of this Report) had tended to confer parental power upon those who were looking after children who had been removed from their parents. So for example the Prevention of Cruelty to, and Protection of, Children Act, 1889 gave to a "fit person" into whose charge a child had been committed the power to act as a parent:[1562] this might have been interpreted to include the power to arrange for the child's emigration, on the ground that a parent certainly could make such arrangements. However, the first statute applicable to Scotland that explicitly granted a power to those other than parents to arrange for a child's emigration seems to have been the Reformatory and Industrial Schools Act, 1891,[1563] which granted to the managers of certified reformatory and industrial schools the power, in relation to any child or youthful offender (who "conducts himself well") detained in or placed out on licence from such a school, to "apprentice him to, or dispose of him in, any trade, calling or service, or by emigration", even before the period of detention had expired. To "dispose of" the child by emigration required the consent of the Secretary of State. The matter, however, was within the discretion of the managers, who were not required to obtain the parent's – or even the child's – consent to any disposition including emigration.

The Prevention of Cruelty to Children Acts, 1894 and 1904 granted a similar power to "fit persons", that is to say persons (including, under the 1904 Act, any society or body corporate established for the reception of poor children or the prevention of cruelty to children[1564]) into whose custody a child had been committed (in other words, the person or

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[1562] 1889 Act, s. 5(2).

[1563] 54 & 55 Vict. c. 23, s. 1.

[1564] 1894 and 1904 Acts, s. 6(1).

institution with whom the child had been boarded out). Section 6(5) of both Acts provided as follows:

> A Secretary of State, in any case where it appears to him to be for the benefit of a child who has been committed to the custody of any person in pursuance of this section, may empower such person to procure the emigration of the child, but, except with such authority, no person to whose custody a child is so committed shall procure its emigration.

From that point, "fit persons" (such as Mr Quarrier or his agents) had no legal authority to arrange a child's emigration without the state's permission. It is noticeable that there continued to be no (*and in the event never was to be any*) statutory requirement to obtain parental consent (or even, at this stage, the consent of the child) and the Secretary of State's consent must, therefore, be taken to be a statutory supersession of the parent's rights and responsibilities in the matter.

The school manager provisions and the fit person provisions were brought together by the Children Act, 1908. Section 6(5) of the 1904 Act was replaced by s. 21(6) of the 1908 Act, in substantially similar terms:

> The Secretary of State in any case where it appears to him to be for the benefit of a child or young person who has been committed to the care of any person in pursuance of this section, may empower such a person to procure the emigration of the child or young person, but, except with such authority, no person to whose care a child or young person is so committed shall procure his emigration.

And s. 70 of the 1908 Act replaced the power of school managers in the 1891 Act, but with a new requirement that (in addition to the Secretary of State's consent) the child him- or herself must also consent:

> If any youthful offender or child detained in or placed out on licence from a certified school, or a person when under the supervision of the managers of such a school, conducts himself well, the managers of the school may, with his own consent, apprentice him to, or dispose of him in, any trade, calling or service, including service in the Navy or Army, or by emigration, notwithstanding that his period of detention or supervision has not expired; and such apprenticing or disposition shall be as valid as if the managers were his parents:

Provided that where he is to be disposed of by emigration, and in any case unless he has been detained for twelve months, the consent of the Secretary of State shall also be required for the exercise of any power under this section.

The differences between s. 70 (emigration arranged by school managers) and s. 21(6) (emigration arranged by fit persons) are to be noted: s. 70 required the child's consent while s. 21(6) did not (parents were not mentioned in either provision); and the condition in s. 70 was that the child "conducts himself well" (in the view of the school managers) while s. 21(6) required that emigration would benefit the child (in the opinion of the Secretary of State).

b. 1932-1969

The power in s. 21(6) of the 1908 Act of a fit person to arrange a child or young person's emigration was replaced by a similar power in s. 19(7) of the Children and Young Persons (Scotland) Act 1932 Act, with two crucial additions to what had gone before: (i) that the child had to consent and (ii) that the parents had to be consulted. Not everyone was impressed either with the efficacy of parental consultation or the after-care likely to be available to the child. Lord Banbury in the House of Lords debate on the 1932 Act may be found saying:[1565]

> I pass to Clause 23. Subsection (7) of that clause says: The Secretary of State, in any case where it appears to him to be for the benefit of a boy or girl who has been committed to the care of any person, may empower that person to arrange for his or her emigration. The boy or girl may be sent abroad—of course at the expense of the ratepayer or the taxpayer. The Secretary of State of course will not do anything of this kind himself. He will appoint some official. The Secretary of State has to be satisfied that the boy or girl consents, and also that his or her parents have been consulted, or that it is not practicable to consult them. That, of course, makes the provision for consultation nonsense. The official will not take the trouble to consult the parents. He will say it is not practicable to consult them. And again we are dependent upon the Secretary of State or his official. If he chooses to send these children abroad he will have to pay a considerable sum to send them wherever they go. There will be the

[1565] HL Deb. 26 May 1932, vol. 84, cols. 470-471.

> expense of the voyage and the expense of keeping them when they get there, wherever that is. And what they are going to do when they get there I do not know.

The "some official" became in 1933 the Scottish Education Department, for the powers of the Secretary of State in this regard were transferred to the SED,[1566] insofar as they related to children and young persons committed to the care of an education authority.

Emigration arranged by the managers of approved schools (as certified reformatory and industrial schools became under the 1932 Act) was authorised under para 18 of the First Schedule to the 1932 Act:

> If a person under the care of the managers of an approved school conducts himself well, the managers of the school may, with his written consent, apprentice or place him in any trade, calling or service, including service in the Navy, Army or Air Force, or may, with his written consent and with the written consent of the Scottish Education Department, arrange for his emigration.
>
> Before exercising their powers under this paragraph the managers shall, in any case where it is practicable so to do, consult with the parents of the person concerned.[1567]

The 1932 Act was replaced by the Children and Young Persons (Scotland) Act, 1937. Section 88(5) of that Act authorised the emigration of children and young persons who had been boarded out with fit persons:

> The Secretary of State[1568] in any case where it appears to him to be for the benefit of a child or young person may empower the person to whose care he has been committed to arrange for his emigration, but except with the authority of the Secretary of State no person to whose care a child or young person has been committed shall arrange for his emigration:
>
> Provided that the Secretary of State shall not empower such a person to arrange for the emigration of a child or young person, unless he is satisfied that the child or young

[1566] Children and Young Persons, Scotland (Transfer of Power) Order, 1933 (SR&O 1933 No. 821 (S.44)), reprinted in Trotter *The Law as to Children and Young Persons* (W. Hodge & Co, 1938), pp. 332-333.

[1567] And see r. 19 of the Care and Protection Rules, 1933.

[1568] Still, the SED for children and young persons committed to the care of an education authority.

person consents and also that his parents have been consulted or that it is not practicable to consult them.

After 1948, this did not apply to children and young persons committed to the care of a local authority[1569] (for whom the Children Act, 1948 made separate provision, discussed below). Where the provision continued to apply, the Children Act, 1948 added to the requirement that the child or young person consents the words "or being too young to form or express a proper opinion on the matter, is to emigrate in company with a parent, guardian or relative of his, or is to emigrate for the purpose of joining a parent, guardian, relative or friend."[1570]

Emigration arranged by managers of approved schools was regulated by para 7 of the Second Schedule to the 1937 Act, which was in identical terms to para 18 of the First Schedule to the 1932 Act, quoted above. The right of the parent remained one of consultation only, and they could not prevent the emigration of their children if the managers had, with the appropriate consents, determined upon it. And the distinction remained that emigration of boarded out children was justified by the assessment that it would be for the child's benefit, while emigration of children in approved schools was presented as a reward for the child who "conducts himself well".[1571] (In reality, this provision sought to address concerns from the Dominions that the "wrong sort" of child was being sent out, with the risk of the Dominions becoming dumping grounds for wayward youths).

[1569] Children Act, 1948, sched. 3.

[1570] Children Act, 1948, sched. 3.

[1571] See also r. 39 of the Approved Schools (Scotland) Rules 1961 (SI 1961 No. 2243) which provided that: "The Managers shall, as far as possible, consult the parents as to the arrangements to be made for a pupil who is about to be released and shall endeavour to secure the written consent of both parents in any case in which it is proposed to place a boy in the Navy, Army or Air Force, or to allow him to emigrate. Managers shall not ignore an objection to arrangements raised by parents unless the circumstances are such that it is in the interests of the pupil that the objection shall be overruled."

Additional powers in relation to emigration were created in the Children Act, 1948, which gave local authorities the power to arrange for the emigration of children in their care. The focus was much more clearly on the child's welfare and for the first time this included an obligation to assess the suitability of the arrangements in the overseas country for the child's future.[1572] Section 17 of the 1948 Act provided as follows:

> (1) A local authority may, with the consent of the Secretary of State, procure or assist in procuring the emigration of any child in their care.
>
> (2) The Secretary of State shall not give his consent under this section unless he is satisfied that emigration would benefit the child, and that suitable arrangements have been or will be made for the child's reception and welfare in the country to which he is going, that the parents or guardian of the child have been consulted or that it is not practicable to consult them, and that the child consents:
>
> Provided that where a child is too young to form or express a proper opinion on the matter, the Secretary of State may consent to his emigration notwithstanding that the child is unable to consent thereto in any case where the child is to emigrate in company with a parent, guardian or relative of his, or is to emigrate for the purpose of joining a parent, guardian, relative or friend.

Again, the right of parents was limited to consultation and they were unable to prevent emigration of their children by withholding their consent. It was reported that in the year before the Social Work (Scotland) Act 1968 came into force, the Secretary of State consented under the 1948 Act to the emigration of five children from Scotland.[1573]

The 1948 Act also gave the Secretary of State the power to make regulations to control the making and carrying out by voluntary organisations of arrangements for the emigration of

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[1572] Though a certain scepticism had been shown in the House of Commons Second Reading Debate as to how effective such after-care was likely to be: see for example HL Deb 7 May 1948, vol. 450 cols. 1645 – 1647; 1653. Rather more supportive comments can be found at cols. 1682-1683.

[1573] *Child Care in Scotland: A Report of the Secretary of State* (Cmnd 4069, 1969) at para [34].

children,[1574] but that power was never exercised in relation to Scotland. Ward LJ, more than half a century later and speaking of English law, said this:

> Paragraph 19 [of Pt 2 of Schedule Two to the Children Act 1989] was enacted for the purpose of ending what many would regard as the scandalous child migration schemes that led to so many children in care being sent to the Colonies because the power under the Children Act 1948 given to the Secretary of State to control that emigration was never exercised in time. I believe the last group of children were sent out to Australia in 1967 but it was not until January 1982[1575] that any regulations were made to control this pernicious export.[1576]

By 1982, however, the provision was no longer in force in Scotland because the whole of the 1948 Act had been repealed in this jurisdiction by the Social Work (Scotland) Act 1968.[1577]

c. 17th November 1969 to 1st April 1997

Section 88(5) of the 1937 Act (emigration arranged by fit persons), para 7 of sched 2 to the 1937 Act (emigration arranged by school managers), and s. 17 of the 1948 Act (emigration arranged by local authorities) remained in force until their repeal by the Social Work (Scotland) Act 1968.[1578] All these provisions were replaced by a single and more limited power, contained in s. 23 of the 1968 Act,[1579] which provided as follows:

> (1) A local authority or a voluntary organisation may, with the consent of the Secretary of State, arrange or assist in arranging the emigration of any child in their care.

[1574] 1948 Act, s. 33. In the Second Reading Debate in the House of Lords Lord Scarbrough offered detailed suggestions as to what matters these Regulations should cover, including monitoring, after-care and limitation on numbers: HL Deb. 10 Feb 1948, vol. 153 cols. 961-962.

[1575] The Emigration of Children (Arrangements by Voluntary Organisations) Regulations 1982 (SI 1982 No. 13) (England and Wales only).

[1576] *R (G) v. Barnet London Borough Council* [2001] EWCA Civ. 540 at [31].

[1577] Social Work (Scotland) Act 1968 (c. 49) s. 95 and Sched. 9, Pt 1.

[1578] Social Work (Scotland) Act 1968, Sched. 9 Pt. 1.

[1579] This came into force on 17th November 1969: Social Work (Scotland) Act 1968 (Commencement No. 2) Order SI 1969 No. 1274.

> (2) The Secretary of State shall not give his consent under this section unless he is satisfied that emigration would benefit the child, and that suitable arrangements have been or will be made for the child's reception and welfare in the country to which he is going, that the parent of the child has been consulted or that it is not practicable to consult him, and that the child consents:
>
> Provided that where a child is too young to form or express a proper opinion on the matter, the Secretary of State may consent to his emigration notwithstanding that the child is unable to consent thereto in any case where the child is to emigrate in company with a parent or relative[1580] of his, or is to emigrate for the purpose of joining a parent, relative or friend.

Managers of approved schools and persons with whom children were statutorily boarded out ("fit persons") no longer had the power themselves to arrange for the child's emigration – though it is to be noted that voluntary organisations retained their power to do so. The continuing lack of requirement for parental consent, a feature of this legislation since the earliest days, is to be noted.

This remained part of Scots law until 1st April 1997, when Sched 5 to the Children (Scotland) Act 1995, which repealed s. 23, came into force.[1581] Since then, the state has not had the power to arrange, or to authorise or regulate arrangements for, the emigration of children who would since 1995 be called "looked after" children.

[1580] "Or friend" was subsequently added by the Health and Social Services and Social Security Adjudications Act 1983 (c. 41), Sched 2 para 6.

[1581] SSI 1996 No. 3201, art 3(7).

APPENDIX TWO: Corporal Punishment of Children

i. The Parental Right of Chastisement

The common law of Scotland granted to parents the right to visit corporal punishment upon their children, certainly their pupil children and probably also their children in minority.[1582] This right was statutorily acknowledged by s. 14 of the Prevention of Cruelty to, and Protection of, Children Act, 1889 and repeated in that Act's successors including in s. 37 of the Children Act, 1908 and then s. 12(7) of the Children and Young Persons (Scotland) Act, 1937. Section 12(1) had made it a statutory offence to assault, ill-treat, neglect, abandon or expose any child under the age of 16,[1583] but by s. 12(7) this was not to be construed as affecting "the right of any parent" (and others, see below) "to administer punishment" to the child. However, the right of corporal punishment was never unlimited in lawful severity nor free from constraints on motive. According to Erskine (writing in the 18th Century) parents were allowed to exercise "that degree of discipline and moderate chastisement upon them, which their perverseness of temper or inattention calls for".[1584] The purpose of chastisement required to be educative and designed to further the welfare of the child which, in Fraser's words (writing in the 19th Century), "while it sanctions, also limits the right".[1585] Corporal punishment, then, was lawful but only when both (i) aimed at chastisement, in the sense of educative punishment, and (ii) within a moderate and reasonable level of severity. Acting in a manner beyond "reasonable chastisement" has long been a legal wrong, exposing the perpetrator to both criminal liability under s. 12 of the 1937 Act,[1586] and to civil liability;[1587] since 1971, (the s. 12 offence being a scheduled offence

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[1582] See Wilkinson and Norrie, *Parent and Child* (3rd edn) at 7.36.

[1583] This offence is discussed below in Appendix Four.

[1584] Erskine, *An Institute of the Law of Scotland* (1773) I, vi, 53.

[1585] Fraser, *Parent and Child* (3rd edn) p. 83.

[1586] And before that the Children Act, 1908, s. 12 and its predecessors from 1889.

[1587] As for example in *Ewart v Brown* (1882) 10R 163.

for the purposes of the children's hearing system) punishing to a severity that is beyond reasonable chastisement has amounted to a ground for referral to the children's hearing.[1588]

The concept of "reasonableness" is never static and always reflects the temper of the times, but cases from the earliest period indicate a judicial awareness of the dangers to vulnerable children of excessive physical punishment. The determination of what is "reasonable" today is affected by the jurisprudence of the European Court of Human Rights, whose decisions on the matter[1589] led directly to the passing of s. 51 of the Criminal Justice (Scotland) Act 2003 which, amongst other things, repealed s. 12(7) of the 1937 Act.[1590] It is there provided:

> (1) Where a person claims that something done to a child was a physical punishment carried out in exercise of a parental right or of a right derived from having charge or care of the child, then in determining any question as to whether what was done was, by virtue of being in such exercise, a justifiable assault a court must have regard to the following factors—
>
> > (a) the nature of what was done, the reason for it and the circumstances in which it took place;
> >
> > (b) its duration and frequency;
> >
> > (c) any effect (whether physical or mental) which it has been shown to have had on the child;
> >
> > (d) the child's age; and
> >
> > (e) the child's personal characteristics (including, without prejudice to the generality of this paragraph, sex and state of health) at the time the thing was done.
>
> (2) The court may also have regard to such other factors as it considers appropriate in the circumstances of the case.
>
> (3) If what was done included or consisted of—

[1588] Social Work (Scotland) Act 1968, s. 32(2)(d); Children (Scotland) Act 1995, s. 52(2)(d); Children's Hearings (Scotland) Act 2011, s. 67(2)(b).

[1589] See especially *Costello-Roberts v. United Kingdom* (1995) 19 EHRR 112 and *A v United Kingdom* (1999) 27 EHRR 611.

[1590] Criminal Justice (Scotland) Act 2003, s. 51(5)(b).

> (a) a blow to the head;
>
> (b) shaking; or
>
> (c) the use of an implement,
>
> the court must determine that it was not something which, by virtue of being in exercise of a parental right or of a right derived as is mentioned in subsection (1), was a justifiable assault; but this subsection is without prejudice to the power of the court so to determine on whatever other grounds it thinks fit.[1591]

Other than the imposition of an absolute prohibition on blows to the head of a child, shaking a child, or using an implement against a child, the factors to be considered by the statute all previously featured in the case law, leading Wilkinson and Norrie to doubt "whether a radical change has been affected by the Criminal Justice (Scotland) Act 2003 to the law that applied before".[1592] And while the 2003 Act may have sought to address ECHR concerns, there is an increasing acceptance that the Scottish position, even if compatible with the European Convention, breaches Article 19 of the United Nations Convention on the Rights of the Child, and the UN Committee on the Rights of the Child has more than once criticised the United Kingdom for not removing entirely from its law the parental defence of reasonable chastisement.[1593]

[1591] Interestingly, previous attempts to restrict the defence of reasonable chastisement had failed. During the debates on the Children (Scotland) Bill in 1995 an amendment based on the Scottish Law Commission's proposal to that effect (*Report on Family Law* SLC No. 135 at para 2.105) was defeated in the House of Commons by 260 votes to 193: HC Deb. 1st May 1995 vol. 259 col. 75, and then again in the House of Lords by 128 votes to 87: HL Deb. 5th July 1995 vol. 565 col. 1120.

[1592] Wilkinson and Norrie, *Parent and Child* (3rd edn) at para. 7.41.

[1593] See Committee on the Rights of the Child, *Concluding Observations on the UK's Second Report*, 9 October 2002, CRC/C/15.Add.188; and Committee on the Rights of the Child, *Concluding Observations on the UK's Third and Fourth Report*, 3 October 2008, CRC/C/GBR/CO/4. The arguments are set out in detail in the Report *Equally Protected: A Review of the Evidence on the Physical Punishment of Children,* NSPCC Scotland, Children 1st, Barnardo's Scotland and the Children and Young Persons Commissioner Scotland (2015).

ii. School Teachers

Most of the earlier cases involved defenders who were teachers rather than parents.[1594] In either case, however, the test for legality was the same: the striking of a child amounted to "reasonable chastisement" only when aimed at educative discipline, and only when reasonable force was used in all the circumstances. A teacher's power of chastisement, when it existed, was not traced to delegation by parents of their right to discipline but was a self-standing privilege arising from the obligation of the teacher to maintain school-room discipline.[1595] As early as 1848 the Lord President (Boyle) may be found saying: "It is clear that a teacher of a public school, being bound to see that the pupils behave correctly, is entitled to administer chastisement when the pupils deserve it; but it must be moderate, and without any cruel or vindictive feeling or passion."[1596] In 1882 it was stated "A schoolmaster is invested by law with the power of giving his pupils moderate and reasonable corporal punishment, but the law will not protect him when his chastisement is unnatural, improper, or excessive."[1597] And in 1922 Lord Ormidale said this: "we look in vain for anything in the evidence or in the complaint which indicates that the chastisement was cruel or savage, or anything more than a teacher, whether a head teacher or an assistant teacher, was entitled to inflict upon disobedient pupils in order to maintain discipline."[1598] This "entitlement" prevented the chastisement from being a common assault or, later, an offence under s. 12 of either the Children Act, 1908 or the Children and Young Persons

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[1594] Indeed it was not until *Guest v Annan* 1988 SCCR 275 that a case appeared in the law reports in which a parent was criminally charged (see also *Byrd v Wither* 1991 SLT 245 which involved the mother's cohabitant), though since then it has been vastly more common for parents to have been found to have committed an offence under s. 12 of the 1937 Act for the purposes of referral to the children's hearing: see for example *C v Harris* 1989 SC 278; *B v Harris* 1990 SLT 208; *Kennedy v A* 1993 SLT 1134; *G v Templeton* 1998 SCLR 180.

[1595] See Wallington, "Corporal Punishment in Schools" 1972 *Juridical Review* 124.

[1596] *Muckarsie v Dickson* (1848] 11 D 4 at p. 5.

[1597] *Ewart v Brown* (1882) 10 R 163, note at p. 166, per Sheriff-Substitute Buntine.

[1598] *McShane v Paton* 1922 JC 26 at p. 31.

(Scotland) Act, 1937. Indeed, s. 37 of the 1908 Act and then s. 12(7) of the 1937 Act gave statutory recognition to the teacher's right:

> Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having lawful control or charge of a child or young person to administer punishment to him.

In the event, few cases against school teachers were actually successful, partly due to difficulty in establishing intent to cause injury,[1599] and partly through a reluctance on the part of the courts to become involved in overseeing school-room discipline.[1600] In *Gray v Hawthorn*[1601] (one of the few cases in which a conviction against a teacher was sustained[1602]) Lord Guthrie said this:

> There is no doubt that a school teacher is vested with disciplinary powers to enable him to do his educational work and to maintain proper order in class and in school, and it is therefore largely a matter within his discretion whether, and to what extent, the circumstances call for the exercise of these powers by the infliction of chastisement. In general it is true to say that the court will not review the exercise of these disciplinary powers by a schoolmaster, since it cannot interfere with what falls within the scope of his discretion. If what the schoolmaster has done can truly be regarded as an exercise of his disciplinary powers, although mistaken, he cannot be held to have contravened the criminal law. It is only if there has been an excess of punishment over what could be regarded as an exercise of disciplinary powers that it can be held to be an assault. In other words the question in all such cases is whether there has been dole on the part of the accused, the evil intent which is necessary to constitute a crime by the law of Scotland.

He went on:

> When a headmaster or a teacher is charged with assault on a pupil, such matters as the nature and violence of the punishment, the repetition or continuity of the punishment, the age, the health and the sex of the child, the blameworthiness and the degree of blameworthiness of the child's conduct, and so on, are all relevant

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[1599] See for example *Scorgie v Lawrie* (1883) 10 R 610

[1600] *McShane v Paton* 1922 JC 26.

[1601] 1964 JC at 69 p. 75.

[1602] In *Brown v Hilson* 1924 JC 1 the charge of assault was held competent.

> circumstances in considering whether there was or was not that evil intent on the part of the accused at the time of the alleged offence.[1603]

A teacher's self-standing right of reasonable chastisement has now been removed by statute (see below).

iii. Others Acting In Loco Parentis

a. Foster Carers

The "right" to inflict corporal punishment was recognised at common law to inhere in more than simply parents and teachers. Section 12(7) of the 1937 Act, quoted above, assumed that the right to administer punishment was held not only by parents and teachers but also by any "other person having the lawful control or charge of a child or young person". These words were to be read with s. 27, which provided that "any person to whose charge a child or young person is committed by any person who has the custody of him shall be presumed to have charge of the child or young person". According to Avory J in *Liverpool Society for the Prevention of Cruelty to Children v Jones*,[1604] "the very object of [these words as they appeared in the Children Act, 1908] is to provide that persons who are neither parents nor legal guardians nor legally liable to maintain the child may be subject to the obligations imposed by s. 12 [of both the 1908 and 1937 Acts]". They would certainly cover private foster parents, and there is no reason to suppose that foster parents with whom children have been boarded out by local authorities were not also covered. Foster parents, in any case, had all the rights and powers of a parent,[1605] which included the right of reasonable chastisement. The very aim of boarding-out – to integrate the child fully into his or her foster home – is consistent with the foster-parents' power being the same as they had over their own children. The only statutory modification of this (before its outright prohibition,

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[1603] 1964 JC at pp. 75-76. In the case, a series of punishments that amounted to what the Court described as "unjust persecution" of the pupil was held to go beyond the ambit of the teacher's disciplinary powers.

[1604] [1914] 3 KB 813 at p. 817.

[1605] Children Act, 1908, s. 22(1); Children and Young Persons (Scotland) Act, 1937, s. 79(4).

for which see below) is to be found in the Schedule to the Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947 para 5(f), which states that "The foster-parent shall not administer indiscriminate or harsh punishment": this does not, however, seem to add anything to the law of reasonable chastisement as applied to parents. Nothing similar appears in the Boarding-out of Children (Scotland) Regulations, 1959, but during their currency public foster parents could claim to act *in loco parentis* and so enjoy all the powers of corporal punishment that parents enjoyed. It is worth noting that no case has been traced in which foster carers were charged with going beyond reasonable chastisement of children boarded-out with them.

b. Residential Establishments: General

The position of children in approved schools, remand homes, local authority homes and voluntary homes was very different, because secondary legislation long set down explicit rules for the administration of corporal punishment, which may be taken to supersede any common law power of reasonable chastisement inhering in those acting *in loco parentis*.

c. Voluntary and Local Authority Homes

Prior to 1959, managers and staff of children's homes, whether voluntary or otherwise, could probably claim to be persons *in loco parentis* by virtue of having lawful control or charge of the children, and to have the right, therefore, to administer corporal punishment so long as that amounted to "reasonable chastisement" in the sense discussed above. The Administration of Children's Homes (Scotland) Regulations, 1959 recognised this right but did not constrain it any more than the common law did, other than to specify that corporal punishment was to be used only "exceptionally", and not against any child with physical or mental disability other than with the sanction of the medical officer.[1606] Beyond that, lawfulness of corporal punishment during the period while these Regulations were in force would, as before, be determined by the moderation of the force used, and the motives of

[1606] 1959 Regulations, reg. 11.

the person administering the punishment. This was the case until the abolition of corporal punishment in children's homes (by then called residential establishments) from 1st June 1988 (see below).

d. Approved Schools

Corporal punishment by a "light tawse" in approved schools was permitted under the Children and Young Persons (Scotland) Care and Training Regulations, 1933, though only "rarely" on girls, and details of the number of strokes permitted, varying according to the age and sex of the child, were laid down, as was who could inflict the punishment; records were to be kept of punishments inflicted.[1607] These rules, superseding any common law rule, were replicated in the Approved Schools (Scotland) Rules, 1961,[1608] and they applied until the abolition of corporal punishment in approved schools from 1st June 1988 (see below).

e. Remand Homes

Corporal punishment was permitted in remand homes, though only on boys, under the Remand Home (Scotland) Rules 1933, rules 15 – 16, the Remand Home (Scotland) Rules 1946, rules 16 – 18, and the Remand Home (Scotland) Rules 1964, rules 23 – 25. These rules are described in detail earlier in this Report.[1609] Such homes had been absorbed into the concept of residential establishment by the time corporal punishment therein was abolished.

[1607] 1933 Regulations, regs. 14 – 18. See above at **2.D.iii**.

[1608] 1961 Rules, rr. 29-32. See above at **2.D.iv**.

[1609] See above at **2.F.i.**

f. Borstals and Approved Probation Hostels

The Borstal (Scotland) Rules, 1950 listed punishments for offences against discipline[1610] but corporal punishment was not included. Borstal institutions took young persons only from the age of 16 and so s. 12(7) of the 1937 Act never had relevance. Corporal punishment was likewise prohibited under the Approved Probation Hostel (Scotland) Rules 1967[1611] which, unusually, elaborated on what was meant by corporal punishment: it was to include "striking, cuffing or shaking or the intentional infliction of any form of physical pain as a means of punishment".[1612]

iv. Abolition of Corporal Punishment

a. Schools

In *Campbell and Cosans v. UK*[1613] it was argued that the use of corporal punishment in Scottish schools was contrary to Article 3 of the European Convention on Human Rights[1614] and though the European Court of Human Rights rejected that claim (on the ground that the children involved had not in fact been subjected to corporal punishment, but had merely been suspended from school for refusing to accept it) the Court nevertheless found the United Kingdom in breach of Article 2 Protocol 1 for failing to respect the parents' philosophical conviction against corporal punishment. The Government (rightly) considered it impractical to prohibit corporal punishment only of children whose parents objected, and

[1610] 1950 Rules, rr. 34 and 35.

[1611] See above at **2.F.ii**.

[1612] Approved Probation Hostel (Scotland) Rules 1967, r. 26.

[1613] [1982] 4 EHRR 293.

[1614] Art. 3 prohibits, with neither qualification nor exception, torture or inhuman or degrading treatment or punishment.

so instead, all pupils at public schools were granted protection from corporal punishment by their teachers. In the words of Wilkinson and Norrie:[1615]

> Section 48A of the Education (Scotland) Act 1980, which was inserted by the Education (No. 2) Act 1986, s. 48,[1616] provided that "corporal punishment" could never be justified on the ground that it was administered by a member of staff at a school by virtue of his position as such, but this was limited to state and other specified schools. That provision was replaced by s. 16 of the Standards in Scotland's Schools etc. Act 2000, which extends the prohibition to all schools. Neither the 2000 Act nor any common law defence has any relevance in a case in which, for example, the teacher claims to have been engaged in necessary constraint of unruly children[1617] … [W]hile parents may in limited circumstances and subject to the statutory constraints discussed above visit physical punishment upon their children, the effect of s. 16 of the 2000 Act is to remove that power from schoolteachers entirely".

Teachers, acting as such, cannot visit corporal punishment on children even when authorised to do so by parents, and that rule does not breach parents' rights to their philosophical and religious views.[1618]

b. Residential Establishments

While the terms of s. 16 of the 2000 Act are carefully calibrated to ensure that they cover all staff, teaching or otherwise, at "schools", whether public or independent, they do not capture staff at institutions other than schools, such as children's homes. Staff at such institutions had lost the power to punish children corporeally on 1st June 1988, when the Social Work (Residential Establishments – Child Care) (Scotland) Regulations[1619] came into force. Regulation 10(1) thereof permitted "arrangements for discipline, relevant to the care and control of children resident in a residential establishment" to be determined by the

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[1615] Wilkinson and Norrie, *Parent and Child* (3rd edn) at para. 7.40.

[1616] For a description of the parliamentary history of this provision, see K Marshall, "Spare the Rod" in J Grant and EE Sutherland (eds) *Scots Law Tales* (2010) at pp. 193-196.

[1617] *Barile v Griffiths* 2010 SLT 164.

[1618] *R (Williamson) v Secretary of State for Education* [2005] 2 AC 246.

[1619] SI 1987 No 2233.

managers, but it was provided in Regulation 10(2) that "the arrangements shall not authorise the giving of corporal punishment", which was given the same meaning as in s. 48A of the Education (Scotland) Act 1980, as inserted by s. 48 of the Education (No 2) Act 1986. This remains the law today.[1620]

c. Foster Carers

There was no statutory[1621] prohibition on local authority foster parents visiting corporal punishment on the children they cared for until the Fostering of Children (Scotland) Regulations 1996,[1622] which came into force on 1st April 1997. These Regulations required that foster carer agreements contain a provision recognising the foster carer's obligation not to administer corporal punishment to any child placed with them.[1623] That obligation was repeated in the Looked After Children (Scotland) Regulations 2009.[1624] Neither the 1996 nor the 2009 Regulations cover private foster carers who, by acting *in loco parentis*, would seem therefore to remain governed by the same rules as parents themselves (set out above).[1625]

d. Children (Equal Protection from Assault) (Scotland) Bill 2017

On 12th May 2017 John Finnie MSP issued a consultation on a proposed Bill whose aim is to give children the same right of protection from assault as any adult: in other words, to

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[1620] Residential Establishments – Child Care (Scotland) Regulations 1996 (SI 1996 No. 3256), reg. 10. "Residential establishment" is as defined in s. 93(1) of the Children (Scotland) Act 1995.

[1621] It is possible that individual local authorities had policies requiring foster carers to refrain from corporal punishment, and such policies were expected to be followed by carers (Boarding Out and Fostering of Children (Scotland) Regulations, 1985, reg. 8).

[1622] SI 1996 No. 3263. The matter was not mentioned by the Boarding Out and Fostering of Children (Scotland) Regulations 1985 (which replaced the 1959 Regulations).

[1623] 1996 Regulations, sched 2 para 6.

[1624] SSI 2009 No. 210, sched. 6 para 6. The same rule applies to kinship carers: sched 5 para 5.

[1625] The Foster Children (Private Fostering) (Scotland) Regulations 1985 (SI 1985 No 1798) does not mention corporal punishment.

remove the defence of reasonable chastisement entirely from the law. At the time of finalising this Report (November 2017) it was reported that 75% of respondents were supportive of the proposal and that the Scottish Government is committed to ensuring the Bill, at least in some form, becomes law.

APPENDIX THREE: International Law Relating to Children

i. The Position of International Law in Scotland

International law, when derived from international treaty, is not directly enforceable in Scots domestic law, unless made part of our domestic legal system by statute;[1626] customary international law,[1627] on the other hand, is automatically part of our legal system.[1628] In either case, the effect of international law is to impose upon the state – and the agencies through which the state acts – those obligations embodied in either customary international law or the treaties signed by the executive on behalf of the state. Customary international law has added little to the principles of child protection, but for almost 100 years formal international agreements have contained provisions relating to the protection of children. How domestic courts in Scotland are to deal with such provisions is explained in the Stair Memorial Encyclopaedia:[1629]

> Although international law is primarily concerned with establishing the rights and obligations that exist between states, questions of international law can nevertheless arise in domestic courts…
>
> [T]reaties may often be used as a means of interpreting an Act of Parliament or a statutory instrument. As with customary international law, there is a presumption that Parliament does not intend to legislate in a way that is incompatible with treaties to which the United Kingdom is a party. In *Saloman v Commissioners of Customs and*

[1626] As for example the Child Abduction and Custody Act 1985, which "incorporated" the Hague Child Abduction Convention, and the Human Rights Act 1998, which "incorporated" the European Convention on Human Rights.

[1627] Defined by Wex Legal Dictionary (Legal Information Institute) as "a general and consistent practice of states that they follow from a sense of legal obligation".

[1628] "A rule of customary international law is a rule of Scots law": *per* High Court of Justiciary (Lords Prosser, Kirkwood and Penrose) in *Lord Advocate's Reference No 1 of 2000*, 2001 JC 143, at para [23].

[1629] *The Laws of Scotland: Public International Law (Reissue)* at paras [55] and [60]. See also D. Johnston, "The Scottish Tradition in International Law" (1978) 16 *Canadian Year Book of International Law* 3, who argues that this "tradition" ended with the death of James Lorimer in 1890. Lorimer was remarkable in the 19th Century in calling for the creation of a "congress of nations": *Studies National and International* (1890).

> *Excise*, the Court of Appeal considered whether the Customs and Excise Act 1952 could be interpreted in light of the 1950 Convention on the Valuation of Goods for Customs Purposes which it was intended to implement. The court concluded that consultation of international treaties was appropriate in the case of ambiguity, although 'if the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations'.[1630] The court continued, 'but if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred'.[1631]

This position was more recently affirmed by the Supreme Court in *R (On the Application of SG & Ors v Secretary of State for Work and Pensions)*.[1632]

Additionally, the UK and Scottish Parliaments take full account of international law in drafting legislation, as does the executive in giving effect to existing laws. Schedule 5 para 7(1) to the Scotland Act 1998, states that "international relations" are a reserved matter, but para 7(2) states that this does not reserve "observing and implementing international obligations".[1633] The Stair Memorial Encyclopaedia again:[1634]

> Under the Scotland Act 1998, the Scottish Parliament can legislate in those areas falling within its competence[1635]. 'Foreign affairs' is a reserved matter but this refers to

[1630] *Saloman v Customs and Excise Commrs [1967] 2 QB 116, [1966] 3 All ER 871, CA*, per Diplock LJ.

[1631] [1967] 2 QB 116, [1966] 3 All ER 871, CA. See also *Attorney-General v Guardian Newspapers* [1990] 1 AC 109 at 283; *R v Lyons* [2002] UKHL 44 at [27], [2003] 1 AC 976, [2002] 4 All ER 1058.

[1632] [2015] UKSC 16, per Lord Kerr (dissenting) at paras 235 – 246.

[1633] In *Whaley v Lord Advocate* 2007 SC(HL) 107 Lord Hope of Craighead at para [8] rejected the proposition that this required the Scottish Parliament to incorporate into Scots law (make directly enforceable in Scottish courts) international obligations. But it clearly gives the Scottish Parliament the authority to do so. An example is the International Criminal Court (Scotland) Act 2001 (ASP 13) which brings into force the Statute of the International Criminal Court, adopted at Rome, 17th July 1998.

[1634] *Stair Memorial Encyclopaedia of the Laws of Scotland: Public International Law (Reissue)* at para [58].

[1635] Scotland Act 1998 (c 46), s. 29.

the conduct of relations with other states and international organisations, not the implementation of international obligations per se[1636]. Therefore, the Scottish Parliament may pass measures to implement international obligations which touch on devolved matters.[1637] This ability is shared with the Westminster Parliament.[1638]

There is no general provision in the Scotland Act 1998 preventing the Scottish Parliament from legislating in a manner that is incompatible with international law. However, United Kingdom ministers have the power to intervene if a bill contains provisions that they reasonably believe would be incompatible with any international obligations of the United Kingdom.[1639] The Secretary of State may make an order prohibiting the Presiding Officer from submitting such a Bill for royal assent. The Secretary of State has similar powers in relation to acts of the Scottish Executive and secondary legislation which are incompatible with international law.[1640]

a. The European Convention on Human Rights

The position of the European Convention on Human Rights is today different, but that was not always the case. Doubts had earlier been expressed about how far the ECHR could be relied on in Scottish courts, and in *Kaur v Lord Advocate*[1641] Lord Ross denied not only the direct enforceability of the ECHR but also (contrary to the approach in England) its use as an aid to interpreting UK statutes. However, in 1996 Lord President Hope in *T, Petitioner*[1642] disapproved Lord Ross's approach:

> It is now clearly established as part of the law of England and Wales, as a result of decisions in the House of Lords, that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it: see *R v Home*

[1636] SA 1998, Sch 5, Pt 1 para 7.

[1637] See eg the Nature Conservation (Scotland) Act 2004 (asp 6), s 1, referring to the Convention on Biological Diversity. See also NC(S)A 2004, s 38, referring to the Ramsar Convention on Wetlands of International Importance.

[1638] SA 1998, s 28(7).

[1639] SA 1998, s 35 (as amended). For a definition of 'international obligations', see s 126(10).

[1640] SA 1998, s 58.

[1641] 1980 SC 319 (OH) at 328-329.

[1642] 1996 SLT 724 at 733-4.

> *Secretary, ex p Brind* per Lord Bridge of Harwich at [1991]1 AC, pp 747H-748A. Similar views with regard to the relevance of the Convention were expressed by Lord Reid in *R v Miah* [1974] 1 WLR at p 694B-E, and by Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC at pp 550D-551G. In *Anderson v HM Advocate* the opportunity was taken at 1996 SCCR, p 121; 1996 SLT, p 158, to refer to the Convention and to Lord Bridge's observations. But an opinion was reserved as to whether these observations were part of the law of Scotland also, as the court was not concerned with a matter of statutory interpretation in that case. It is however now an integral part of the general principles of European Community law that fundamental human rights must be protected, and that one of the sources to which regard may be made for an expression of these rights is international treaties for the protection of human rights on which member states have collaborated or of which they are signatories: see Stair Memorial Encyclopaedia, Vol 10, "European Community Law", para 95. I consider that the drawing of a distinction between the law of Scotland and that of the rest of the United Kingdom on this matter can no longer be justified. In my opinion the courts in Scotland should apply the same presumption as that described by Lord Bridge, namely that, when legislation is found to be ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not in conflict with it.

This located the ECHR within the classic understanding in relation to any international Convention ratified by the UK, though in the absence of any other judicial discussion it remains unclear the extent to which Lord Ross's analysis represented the general Scottish approach to international treaties before 1996.[1643]

The Human Rights Act 1998 Act, taken together with the Scotland Act 1998, have since the latter came into effect in 1999 given the European Convention on Human Rights a special position in law. These Acts do not make the Convention in any way "superior" to domestic Scots law, but they do allow the Scottish courts to strike down as "not law" any Act of the Scottish Parliament outwith its legislative competence, including on the ground of its incompatibility with the ECHR.[1644] Acts of the Westminster Parliament cannot be so struck down but all legislation, primary and secondary, "must be read and given effect to in a way

[1643] Lord Hope's language in *T, Petitioner* of a distinction between Scots and English law being "no longer" justified implies that, at an earlier point, it was.

[1644] Scotland Act 1998, s. 29(1) and (2)(d).

that is compatible with Convention rights".[1645] And the court must interpret the Convention in light of the judgments, decisions, declarations and advisory opinions of the Strasbourg institutions.[1646]

The Human Rights Act 1998 also makes it unlawful for any public authority to act in a way that is incompatible with a convention right (unless it is required to do so by primary legislation).[1647] "Public authority" is defined to include "any person certain of whose functions are functions of a public nature".[1648] The care of children on behalf of the state, whether by a local authority, a voluntary organisation or a public health facility, is certainly a function of a public nature and so any such body is a public authority, for the purposes of s. 6 of the Human Rights Act 1998.

ii. Children's Rights in International Law

Children's rights in international law have been recognised and protected by international treaty for almost a century, starting in the field of labour law.[1649] (Though of only tangential relevance to the present Report, it is interesting to note that the United Kingdom does not have an unblemished record in its rules on the employment of children law,

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[1645] Human Rights Act 1998, s. 3(1).

[1646] Human Rights Act 1998, s. 2(1). For an examination of the response of the Scottish courts to these provisions, see T. Mullen et al, "Human Rights in the Scottish Courts" (2005) 32 *Journal of Law and Society* 148.

[1647] Human Rights Act 1998, s. 6(1).

[1648] Human Rights Act 1998, s. 6(3).

[1649] The International Labour Organisation, originally established under the Treaty of Versailles as an agency of the League of Nations and becoming later a specialised agency of the United Nations, has promulgated a number of conventions dealing with children and young persons in the workplace, including the Night Work of Young Persons (Industry) Convention, 1919 (No. 6) (ratified by the UK in 1921); the Minimum Age (Industry) Convention, 1919 (No. 5) (ratified by the UK in 1921); the Minimum Age Convention 1973 (No. 138), which also addresses conditions of employment (ratified by the UK in 2000, with 16 being the specified minimum age for full-time employment); and the Convention on the Worst Forms of Child Labour 1999 (No. 182) (ratified by the UK in 2000).

notwithstanding that domestic attempts to regulate child labour began in the early 19th century. The concluding observations of the UN Committee on the Rights of the Child to the UK's second periodic report on its own compliance with the Convention on the Rights of the Child found in 2002 that the UK failed adequately to protect children's rights in a number of employment-related areas).[1650]

a. The Declarations of the Rights of the Child

Beyond the limited field of employment law, the League of Nations adopted in 1924 the Declaration of the Rights of the Child, drafted in Geneva in 1923 by the International Save the Children Union. It was brief:

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

The second of these principles obliged states to "reclaim" the delinquent child and to shelter and succour any child who, for whatever reason, was not being looked after sufficiently by their own family. There is no indication from the Parliamentary debates on the Children and Young Persons Acts of 1932, 1933 and 1937 that this Declaration influenced the design of these Acts, but the aims of the legislation were to a very large

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[1650] CRC/C/15/Add.188, of 4 October 2002, available at: http://www.crights.org.uk/pdfs/UNCRC_conc_obs_2002.pdf

extent consistent therewith. The United Nations, created as the Second World War was coming to a close, adopted the 1924 Declaration in 1946. It also adopted, in 1948, the Universal Declaration of Human Rights, which included an article recognising that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection".[1651] Then in 1959 the General Assembly of the United Nations adopted a much expanded version of the 1924 Declaration, which became the UN Declaration of the Rights of the Child 1959.[1652] It is in the following terms:

> THIS DECLARATION OF THE RIGHTS OF THE CHILD to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:
>
> 1 The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.
>
> 2 The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

[1651] Universal Declaration of Human Rights (General Assembly Resolution 217A (III), 10th December 1948, art. 25.

[1652] UN General Assembly Resolution 1386 (XIV), 10th December 1959.

3 The child shall be entitled from his birth to a name and a nationality.

4 The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

5 The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

6 The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

7 The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

8 The child shall in all circumstances be among the first to receive protection and relief.

9 The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.
The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

10 The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

b. Other International Treaties

Many other international treaties ratified by the United Kingdom, with a primary focus other than children, contain nevertheless special provisions relating to children. Amongst the most important of such provisions are the following:

(i) The International Covenant on Economic, Social and Cultural Rights[1653] provides that "special measures of protection and assistance" should be taken on behalf of the young without discrimination and that they should be protected from economic and social exploitation.[1654] States parties should

[1653] Adopted by the United Nations General Assembly on 16 December 1966 and entering into force on 3rd January 1976.

[1654] ICESCR, art 10(3).

aim for "the healthy development of the child"[1655] and make primary education compulsory and free to all.[1656]

(ii) The International Convention on Civil and Political Rights[1657] provides that "every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the rights to such measures of protection as are required by his status as a minor, on the part of his family, society and the state".[1658]

(iii) The Convention on the Elimination of Discrimination Against Women[1659] proscribes betrothal and marriage of children.[1660]

(iv) The Convention on the Rights of Persons with Disabilities[1661] requires states parties to take all necessary measures to ensure that children with disabilities enjoy to the full all human rights and fundamental freedoms on an equal basis with other children, including the right to express views and to have assistance in doing so.[1662]

(v) The Convention on Transnational Organised Crime[1663] was enhanced from 25 December 2003 by a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

[1655] ICESCR, art 12(2).

[1656] ICESCR, art 13(2a).

[1657] Adopted by the United Nations General Assembly on 16 December 1966 and entering into force on 23rd March 1976.

[1658] ICCPR, art 24.

[1659] Adopted by the United Nations General Assembly on 18 December 1979 and entering into force on 3 September 1981.

[1660] CEDAW, art. 16.

[1661] Adopted by the United Nations General Assembly on 13 December 2006 and entering into force on 3 May 2008.

[1662] CRPD, art 7.

[1663] Adopted by the United Nations General Assembly on 15 November 2000 and entering into force on 29 September 2003.

(vi) The General Assembly of the United Nations also adopted "Rules for the Protection of Juveniles Deprived of their Liberty" on 14 December 1990.

A convention relevant to the present Report which has been signed but not ratified by the UK is the Council of Europe's Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, which requires the screening of people working with children, programmes to support victims and the criminalisation of child prostitution, pornography, grooming and "sex tourism".

c. The United Nations Convention on the Rights of the Child

By far the most important and far reaching source of international law relating to children is the UN Convention on the Rights of the Child ("the UNCRC"), which includes a monitoring process through the establishment of the UN Committee on the Rights of the Child. This Committee examines self-reflective reports from signatory states and, through its "concluding observations" thereon, makes recommendations to states for better compliance.[1664] The UNCRC was adopted by the UN General Assembly and opened for signature on 30th November 1989,[1665] and it entered into force on 2nd September 1990. The UNCRC has been ratified by all member-states of the United Nations, other than the USA, including by the United Kingdom on 16th December 1991. Ratification involves undertakings to "take action to ensure the realisation of all the rights in the Convention for all children in their jurisdiction",[1666] to keep under comprehensive review all domestic legislation and related administrative guidance to ensure full compliance with the Convention,[1667] and to

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[1664] For a full description of the monitoring mechanisms, see C. Hamilton, "Children's Rights and the Role of the UN Committee on the Rights of the Child: Underlying Structures for States in Implementing the Convention on the Rights of the Child" 2010 *International Family Law* 31.

[1665] UN General Assembly, session 44, resolution 25.

[1666] UN Committee on the Rights of the Child *General Comment No. 5* (CRC/GC/2003/527 November 2003), section I.

[1667] UN Committee on the Rights of the Child *General Comment No. 5*, section IV.

ensure "visible cross-sectoral coordination to recognize and realize children's rights across Government, between different levels of government and between Government and civil society – including in particular children and young people themselves".[1668]

Lord Hughes in *R (On the Application of SG and Ors) v Secretary of State for Work and Pensions* said of the UNCRC that it is:

> an international treaty ratified by the UK. It is binding on this country in international law. It is not, however, part of English law. Such a treaty may be relevant in English law in at least three ways. First, if the construction (ie meaning) of UK legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations. Second, international treaty obligations may guide the development of the common law. For these two propositions see for example *R v Lyons (Isidore)* [2002] UKHL 44; [2003] 1 AC 976, para 13. Neither has any application to this case. This case is concerned with legislation, not with the common law, and it is not suggested that there is any room for doubt about the meaning of the regulations. Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the court to apply the European Convention on Human Rights ("ECHR") via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC. An example is *Demir v Turkey* (2008) 48 EHRR 1272 which concerned the scope of article 11 (right of freedom of association).[1669]

Though Lord Hughes was talking of English law, the same is true in relation to Scots law.[1670]

The directly protective provisions in the UNCRC are found in various of its articles. It recognises that the primary duty to look after children falls to parents:

> State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the

[1668] UN Committee on the Rights of the Child *General Comment No. 5*, section VI.

[1669] [2015] UKSC 16 at para. 137.

[1670] See the comments of Lord President Hope in *T, Petitioner*, quoted above.

> child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.[1671]

But in addition, it requires the state to have in place sufficient legal procedures that will allow the state to take such protective measures as are necessary:

> States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.[1672]

Further, there is a positive obligation on the state to take protective measures on behalf of any individual child at risk of harm:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent, legal guardian, or other person who has the care of the child.[1673]

"Person" in that context can include manifestations of the state itself.

Originally, the UK entered some reservations to the UNCRC:

> The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.

> Employment legislation in the United Kingdom does not treat persons under 18, but over the school-leaving age as children, but as 'young people'. Accordingly the United Kingdom reserves the right to continue to apply article 32 subject to such employment legislation.

[1671] UNCRC, art. 18.

[1672] UNCRC, art. 3(2).

[1673] UNCRC, art. 19(1).

> Where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom reserves the right not to apply article 37(c) in so far as those provisions require children who are detained to be accommodated separately from adults.
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> In Scotland there are tribunals (known as 'children's hearings') which consider the welfare of the child and deal with the majority of offences which a child is alleged to have committed. In some cases, mainly of a welfare nature, the child is temporarily deprived of its liberty for up to seven days prior to attending the hearing. The child and its family are, however, allowed access to a lawyer during this period. Although the decisions of the hearings are subject to appeal to the courts, legal representation is not permitted at the proceedings of the children's hearings themselves. Children's hearings have proved over the years to be a very effective way of dealing with the problems of children in a less formal, non-adversarial manner. Accordingly, the United Kingdom, in respect of article 37(d), reserves its right to continue the present operation of children's hearings.

Only the third and fourth of these reservations engage the issues considered in the present Report. The fourth reservation seems to have been included to ensure that a children's hearing could continue to require a child to reside in a place of safety during an interim period, and in its Second Periodic Report to the UN Committee on the Rights of the Child, the UK Government explained that the new appeal processes introduced by the Children (Scotland) Act 1995 rendered the Reservation unnecessary, and it was withdrawn on 17th April 1997, shortly after the coming into force of the relevant parts of the 1995 Act.[1674] The second reservation (relating to employment) was withdrawn on the coming into force in 1998 of the Working Time Regulations 1998.[1675] In October 2008 in the UK's Response to the list of issues raised in connection with the consideration of the third and fourth periodic

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[1674] Second Periodical Report (United Kingdom) to the UN Committee on the Rights of the Child (1999), at paras 2.12.1 and 2.12.2. (Accessed from http://www.togetherscotland.org.uk/pdfs/uncrc%20-%20uk%20second%20state%20report%201999.pdf).

[1675] SI 1998 No. 1833, implementing Council *Directive* 93/104/EC concerning certain aspects of the organization of working time (Official Journal No. L307, 13 December 1993, p.18).

report of the United Kingdom of Great Britain and Northern Ireland1676 it was indicated that both the first reservation (immigration) and the third reservation (young offenders) were under review, and later that year both reservations were withdrawn.

An Optional Protocol was subsequently added to the UNCRC, on the Sale of Children, Child Prostitution and Child Pornography.[1677] This requires states parties to take action to prevent and prosecute these crimes, which are defined for the purposes in the Optional Protocol, and to adopt "appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by: … Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses".[1678]

The UNCRC's special position in our legal system was enhanced when the Children and Young People (Scotland) Act 2014 imposed, from 15th June 2015, an obligation on the Scottish Ministers to "keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements" and to report on these matters to the Scottish Parliament every three years; public authorities must also publish reports on the steps to the same end that they take.[1679]

d. The European Convention on Human Rights

The European Convention on Human Rights was opened for signature on 4th November 1950 and, after the requisite number of ratifications (the first being by the United Kingdom

[1676] CRC/C/GBR/4, at paras. 22 – 24.

[1677] Adopted by the General Assembly on 25 May 2000 and coming into force on 18 January 2002.

[1678] Optional Protocol, art. 8(1).

[1679] Children and Young People (Scotland) Act 2014, ss. 1 - 3. "Public authorities" are defined in sched. 1 to include local authorities, SCRA, CHS, health boards, and the Scottish Qualifications Authority.

on 8th March 1951[1680]) came into force on 3rd September 1953. Individual petition to the newly established Court of Human Rights at Strasbourg was, however, rejected by the British Government until 1965.[1681]

It has justly been said[1682] that a simple reading of the European Convention on Human Rights reveals that it is not a child-friendly treaty.[1683] Unlike the other main international and regional human rights instruments, it does not even contain a general provision recognising the need for special protection and assistance to be given to the child.[1684] While States are under an obligation to secure the Convention rights of every person within their jurisdiction, it is apparent that these rights do not always apply to children in the same way as they can for adults. The European Court of Human Rights recognised in *Nielsen v Denmark* that the rights of the child may be limited by those who have parental rights and responsibilities with regard to their custody and care.[1685] However, it also accepted that "the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse".[1686]

[1680] Not without objection from such influential figures as Sir Stafford Cripps and Lord Chancellor Jowitt: see E. Wicks "The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry" (2000) *Public Law* 438.

[1681] HC Deb, 7th December 1965, vol. 722, col. 235, oral answer by the Prime Minister, Mr Harold Wilson.

[1682] M. Woolf, "Coming of Age? – the Principle of 'Best Interests of the Child'" (2003) 2 *European Human Rights Law Review* 205 at 205.

[1683] The only explicit references to the child in the 1950 Convention are found in Art.5(1)(d) and Art.6(1). In addition, Art.5 of Protocol No. 7 concerns the equality of spouses during marriage and its dissolution and refers to the interests of the child.

[1684] Universal Declaration of Human Rights 1948, Art.25(2); International Covenant on Economic, Social and Cultural Rights 1966, Art.10(3); International Covenant on Civil and Political Rights 1966, Art.24; American Convention on Human Rights 1969, Arts 16 and 19; African Charter on Human and Peoples' Rights 1981, Art.18(3).

[1685] (1989) 11 E.H.R.R. 175, para.61.

[1686] *(1989) 11 E.H.R.R. 175,* para.72.

The Strasbourg Court has, however, in the past ten years or so begun to be far more conscious of the interests of children, and more willing to accept that children's rights require protection in different ways from adults' rights. The Court has also begun to use the UNCRC to interpret the ECHR.[1687] In Lord Reed's words, "the UNCRC can be relevant to questions concerning the rights of children under the ECHR. There are also cases in which, although the court has not referred to the UNCRC, it has taken the best interests of children [not mentioned in the ECHR] into account when considering whether an interference with their father's or mother's right to respect for their family life with the children was justified."[1688]

Child protection in domestic law is affected by the ECHR by a side-wind, rather than by imposing a direct obligation in one or more of the substantive articles. Many of these articles have been interpreted by the Strasbourg court to impose positive obligations on the state. In other words, not only must the state refrain from actions that directly breach the Convention, but it must also take positive steps to prevent others from doing so. For example, Article 3 provides, without qualification, that "no one shall be subjected to torture or inhuman or degrading treatment or punishment". Not only must the state itself not visit such treatment of anyone (including on children, for example by corporal punishment in state schools[1689]) but it must take effective measures to ensure that others are not able to visit such treatment on children. In *A v United Kingdom*[1690] a step-father who had beaten a child with a garden cane was acquitted of a charge of assault on his establishing a defence of "reasonable chastisement", but the European Court of Human Rights held that the existence of this defence robbed the law of assault of its ability to be an effective deterrent

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[1687] Woolf, n. 131. Perhaps the best known recent example is *Neulinger & Shuruk v Switzerland* (2010) 54 EHRR 1087.

[1688] *R (on the Application of SG and Ors) v Secretary of State for Work and Pensions* 2015 UKSC 16, at para [86].

[1689] Cf. *Campbell & Cosans v United Kingdom* (1982) 4 EHRR 293, where the claim that such punishment breached art. 3 was rejected: see Appendix Two to the present Report.

[1690] (1998) 27 EHRR 611.

against inhuman or degrading treatment, with the result that there was a violation of Article 3.

A positive obligation on the state was also found to arise from both Articles 2 (right to life) and 3 in *Osman v United Kingdom*[1691] where a child had been seriously injured and his father killed by a school-teacher who had become infatuated with the child: it was held that the police, to whom complaints had earlier been made, required to act to provide effective protection. The European Court of Human Rights held that there would be a breach of the state's positive obligation only in well-defined and limited circumstances:

> It must be established to [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk … It is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.[1692]

The state's obligation is, therefore, not absolute but one of reasonableness: it is reasonable steps and not all steps that require to be taken in light of known risks.[1693] The European Court itself has accepted that the standard of reasonableness is affected by the age and vulnerability of the child.[1694] In *Z v United Kingdom*[1695] four children had suffered severe neglect and abuse at the hands of their parents but the local authority had failed to place them on the Child Protection Register. There was no dispute that the abuse easily reached the standard of seriousness required for Article 3 to be engaged. The European Court acknowledged the "difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life", but concluded that "the

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[1691] (1998) 29 EHRR 245.

[1692] (1998) 29 EHRR 245 at para [116].

[1693] *Re E (A Child)* [2008] UKHL 66, per Lord Carswell at para [48].

[1694] *Mayeka v Belgium* (2008) 46 EHRR 23 at para [53].

[1695] (2002) 34 EHRR 3.

present case … leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse”.[1696]

That the crucial question is what the state knew or ought to have known may be illustrated by a comparison between *E v United Kingdom*[1697] and *DP & JC v United Kingdom*.[1698] In the former, serious physical and sexual abuse had been committed against children within the family setting by the mother’s cohabitant. Though the cohabitant was eventually convicted of various sexual offences, no referral had been made to the children’s reporter on the basis of this abuse.[1699] The European Court held that there was a breach of Article 3 because, in the circumstances of the case, the local authority ought to have been aware of the cohabitant’s history of sexual abuse, and that he continued to have access to the children notwithstanding the terms of a probation order. In *DP & JC v United Kingdom* the mother’s cohabitant had similarly committed serious sexual assaults against the applicants over a lengthy period of time. Though there had been a high level of social work involvement, the abuse had never been addressed and no effective steps taken to protect the children from the abuser. Nevertheless, the European Court accepted that the local authority were unaware of the abuse and, because there was no particular aspect of this turbulent and volatile family that suggested a more insidious problem, it could not be said that the local authority ought to have been aware of the abuse: it followed that there was no breach of Article 3.

Article 8 protects the right to respect for private and family life, and this has been held to encompass protection of physical integrity as well as personal privacy.[1700] This is important because the level of harm required to engage Article 8 is significantly lower than that

[1696] (2002) 34 EHRR 3 at para [74].

[1697] (2003) 36 EHRR 31.

[1698] (2003) 36 EHRR 14.

[1699] Though referrals had been made on other grounds.

[1700] *X & Y v The Netherlands* (1985) 8 EHRR 235 at para. [22].

required to engage Article 3. But Article 8 similarly imposes positive obligations on the state:

> Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primary negative undertaking, there may be positive obligations inherent in an effective respect for private and family life.[1701]

In *S v Sweden*[1702] Article 8 was held to be breached because Swedish law did not adequately protect a 14-year-old girl from the voyeurism of her step-father. (The Court referred to the positive obligations imposed by Article 8 and also by Sweden's ratification of the Council of Europe's *Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*).

In sum, the European Convention on Human Rights provides both an international and, since 1998, domestic mechanism to protect the child from abuse and neglect by imposing an enforceable obligation on the state to protect children whenever their right to life or to bodily or mental integrity is being threatened either by private individuals or by manifestations of the state.

[1701] *Airey v Ireland* (1980) 2 EHRR 305 at [32]; *Marckx v Belgium* (1980) 2 EHRR 330 at [31].

[1702] (2014) 58 EHRR 36.

APPENDIX FOUR: Remedies

i. Criminal Liability

a. At Common Law

Anderson, writing in 1904 and citing a series of Scottish cases from 1839 to 1868, says this:

> If a person has power over another, or a duty of taking care of another, and grossly neglects or cruelly ill-treats the dependent, he is guilty of an offence. Sick persons and children are peculiarly liable to neglect and ill-usage.[1703]

After a discussion of the then extant Prevention of Cruelty to Children Act, 1894 (for which see below) he goes on to describe exposure and desertion of infants as a crime at common law, and states that "even placing the child in danger, without actual intent to desert, is criminal, as in sending the child in a basket by rail without informing the officials".[1704] Macdonald is to the same effect.[1705] In *David and Janet Gemmell*[1706] parents pled guilty to a charge of "cruel and unnatural treatment" of their child whom they had locked in a cupboard and failed to afford wholesome food or decent clothing. A charge was held competent in 1881 of "culpable and wilful neglect and bad treatment of a child of tender age by a person who has the custody and keeping of it, whereby the child is injured in its health".[1707] The essence of the common law crime was that the accused had some pre-existing obligation of care over the child and as such there was no requirement to prove any intent to injure: actions wider than would justify a charge of assault would be covered, but a

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[1703] AM Anderson, *The Criminal Law of Scotland* Edinburgh, Bell and Bradfute, 1904 at p. 167.

[1704] Anderson *The Criminal Law of Scotland* at pp. 171-172, citing *Gibson* (1845) 2 Broun 366.

[1705] JHA Macdonald *A Practical Treatise on the Criminal Law of Scotland* (5th edn, W. Green, 1948) at p. 125, citing Hume *Commentaries on the Law of Scotland Respecting Crimes*, i, 299 and Alison, *Principles and Practice of the Criminal Law of Scotland*, i, 162. See also MGA Christie, *Gordon's Criminal Law* (3rd edn, 2001) vol. 2 para 31.01.

[1706] (1841) 2 Swinton 552.

[1707] *McIntosh* (1881) 4 Couper 389.

more restricted class of persons could face the charge. This principle is reflected in the statutory formulation of the common law crime which, though today is contained in s. 12 of the Children and Young Persons (Scotland) Act, 1937, traces its origins to the Prevention of Cruelty to Children statutes from the late 19th Century.

b. The Statutory Offence of Neglect or Ill-treatment of Children

The earliest of the child cruelty statutes is the Prevention of Cruelty to, and Protection of, Children Act, 1889, s. 1 of which reads as follow:

> Any person over sixteen years of age who, having custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons or exposes such a child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health shall be guilty of [an offence].[1708]

This provision was amended by the Prevention of Cruelty to Children Amendment Act, 1894, which added "assault" to the list of actions that amounted to the offence, and equalised at 16 the ages for both boys and girls who were to be protected under the provision. The 1889 Act was then replaced by the Prevention of Cruelty to Children Act, 1894, s. 1 of which repeated the earlier s. 1, but with an expanded notion of "injury to health":

> If any person over the age of sixteen years, who has the custody, charge or care, of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes, such a child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of [an offence].[1709]

[1708] Penalties were relatively severe: a fine or up to £100 or imprisonment for up to two years (if charged on indictment), or £25 or three months imprisonment (on summary conviction).

[1709] "Neglect" was to encompass the failure to seek poor relief: 1894 Act, s. 23(2).

The reference to "mental derangement" is to be noted, as an early recognition that neglect and ill-treatment may cause emotional or psychological as well as physical harm to children, though the phrase, which has not been subject to any judicial construction since its introduction, does suggest that something more than emotional neglect was envisaged. Ill-treatment leading to unnecessary suffering is clearly wide enough to include suffering of the mind (even short of a clinically recognised injury) as well as bodily suffering.

Section 1 of the 1894 Act was replaced, without amendment, by s. 1 of the Prevention of Cruelty to Children Act, 1904, which itself subsequently became s. 12 of the Children Act, 1908:

> If any person over the age of sixteen years, who has the custody, charge or care of a child or young person[1710] wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body and any mental derangement), that person shall be guilty of [an offence] … and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person,[1711] or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take such steps to procure the same to be provided under the Acts relating to the relief of the poor.

The Children and Young Persons (Scotland) Act, 1932 raised the age at which an individual was considered to be a young person to 17,[1712] but the offence in s. 12 of the 1908 Act

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[1710] "Child" was a person below school leaving age, then 14, and "young person" was a person above that age but below 16.

[1711] These words were added to the earlier formulation, probably in response to the case of *R v Senior* [1899] 1 QB 283 where parents were charged with causing the death of their child through failure (for religious reasons) to seek necessary medical treatment. That failure was held to be implicitly included in the 1894 Act, and the new words in the 1908 Act make this explicit.

[1712] Children and Young Persons (Scotland) Act ,1932 Act, s. 64.

remained limited to victims under the age of 16. To achieve that, Schedule 2 to the 1932 Act amended the 1908 Act so that s. 12 now read:

> If any person who has attained the age of sixteen years and who has the custody, charge or care of a child or young person under the age of sixteen years wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body and any mental derangement), that person shall be guilty of [an offence] … and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take such steps to procure the same to be provided under the Acts relating to the relief of the poor.

Section 12 of the Children Act, 1908, as so amended, remained extant until the Children and Young Persons (Scotland) Act, 1937, which repealed most of the 1908 Act and replaced s. 12 thereof with a new s. 12. As enacted the new s. 12 read:

> (1) If any person who has attained the age of sixteen years and has the custody, charge or care of any child or young person under that age[1713] wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence …
>
> (2) For the purposes of this section –
>
> (a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid, or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid, or lodging, he has failed to take steps to procure it to be provided under the Acts relating to the relief of the poor.

[1713] "Child" is defined in s. 110 as a person under the age of 14; "young person" as a person under the age of 17, but the offence remains limited to persons "under that age", ie the age of 16.

(b) where it is proved that the death of a child under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the child) while the child was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the child in a manner likely to cause injury to his health.[1714]

(3) A person may be convicted of an offence under this section—

(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;

(b) notwithstanding the death of the child or young person in question.

(4) Where any person who has attained the age of sixteen years is tried on indictment for the culpable homicide of a child or young person under the age of sixteen years of whom he had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under this section, to find him guilty of that offence. […][1715]

(7) Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him.

The Children (Scotland) Act 1995 amended s. 12(1) of the 1937 Act to take account of the abolition of "custody" and its replacement with the concept of parental responsibilities and parental rights: from then it read:

If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such a young person, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or

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[1714] Section 12(2)(b) is repeated from s. 13 of the 1908 Act, the Parliamentary debates at the time being much concerned with "overlaying" as a cause of infant death: see above at **1.B.ii**. It was in 1908 far more common for babies and infants to share their parents' beds than is the case today.

[1715] Subsections 5 and 6 dealt with insurance policies payable in the event of death of child or young person, and were repealed by the Criminal Justice Act 1988.

> organ of the body, and any mental derangement), that person shall be guilty of an offence…

A more substantive amendment of s. 12 was made by s. 51 of the Criminal Justice (Scotland) Act 2003, the provision that attempted to tighten the defence of reasonable chastisement of children to a charge of assault.[1716] The word "assault" was removed from the list of actions that amount to the offence under s. 12(1) with the result that parents and others with responsibilities towards the child would have to be charged with the common law crime of assault, in the same way as strangers to the child; in addition, subs. (7) was removed in its entirety.[1717] These amendments were designed to ensure that the defence of reasonable chastisement (as restructured by the 2003 Act) was limited to the common law charge of assault and could never be used by parents as a defence to a charge under s. 12.

c. Case Law on Section 12 of the 1937 Act

The offence in s. 12 of the Children and Young Persons (Scotland) Act 1937 serves two purposes: (i) to ensure the punishment of the perpetrator of an offence and (ii) to provide the catalyst for the civil authorities to activate child protection mechanisms over the victim (and the victim's siblings). It has always been thus. If a person was convicted of an offence under s. 1 of the 1889 Act, s. 5 thereof authorised the court to "order that the child be taken out of the custody of [the offender] and committed to the charge of a relation of the child, or some other fit person named by the court". This was also the case under s. 6 of the 1894 Act, s. 6 of the 1904 Act, and s. 21 of the 1908 Act. Under the 1937 Act, s. 65 defined a child or young person "in need of care or protection" to include a child or young person in respect of whom the offences listed in the First Schedule to the Act had been committed: one of the offences listed was that contained in s. 12. Since the children's hearing system was established under the Social Work (Scotland) Act 1968, being the victim of a "schedule 1

[1716] For which see Appendix Two above.

[1717] Criminal Justice (Scotland) Act 2003, s. 51(5).

offence”[1718] has amounted to a ground of referral to the children’s hearing.[1719] The reported cases on s. 12 of the 1937 Act were mostly criminal cases before 1971 (when the children’s hearing system came into operation) but since then are more commonly concerned with grounds of referral to the children’s hearing.

A number of the earlier cases – English, involving UK-wide legislation – dealt with who had caring responsibilities for the child and who, therefore, might be charged with an offence under s. 12. Section 38 of the 1908 Act, and thereafter s. 27 of the 1937 Act (for Scotland), provided that the parent or “lawful guardian” was presumed to have custody of the child or young person, that “any person to whose charge a child or young person is committed by any person who has the custody of him shall be presumed to have charge of the child or young person”, and that “any other person having actual possession or control of a child or young person shall be presumed to have the care of him”. In *Liverpool Society for the Prevention of Cruelty to Children v Jones*[1720] Avory J said this: “The very object of the last paragraph in s.38(2) [of the 1908 Act] is to provide that persons who are neither parents nor legal guardians nor legally liable to maintain the child may be subject to the obligations imposed by s. 12”. He added that a gaoler would “undoubtedly have the custody of a child who was in the prison”. It would follow that the managers of any approved school (or borstal, or remand home, or voluntary home) and foster carers would be subject to the same obligations. The matter of who had charge, control or care of a child was held to be a matter of fact in *Brooks v Blount*,[1721] where Salter J said: “a person who has actual possession or control of a child cannot be heard to say that he had not the care of the child” (for the purposes of a charge under s. 12 of the 1908 Act and subsequently the 1937 Act). In

[1718] Originally, Schedule 1 to the 1937 Act, then Schedule 1 to the Criminal Procedure (Scotland) Act 1975 and now Schedule 1 to the Criminal Procedure (Scotland) Act 1995.

[1719] Social Work (Scotland) Act 1968, s. 32(2)(d); Children (Scotland) Act 1995, s. 52(2)(d); Children’s Hearings (Scotland) Act 2011, s. 67(2)(b).

[1720] [1914] 3 KB 813 at 817.

[1721] [1923] 1 KB 257.

Ridley v Little[1722] a headmaster was held to have been competently charged under s. 1 of the Children and Young Persons Act 1933 (the English equivalent to s. 12 of the 1937 Act); Kendrick and Hawthorn report a case from Fife in 1945 in which foster parents were convicted of wilful mistreatment of two boys in their care.[1723] Under different legislation the English Court of Appeal held that an accused who employed a 14-year-old girl to baby-sit his children had "charge or care" of her.[1724]

It follows from the reference to persons over the age of 16 being potential offenders under s. 12 that only natural persons can be charged with this offence.

Subsequent cases on the 1937 Act have been more concerned with what type of behaviour might constitute an offence under s. 12, and what level of intent the accused must be shown to have possessed. In a decision that paid rather less attention to likelihood of harm than more recent cases have done, it was held in *Henderson v Stewart*[1725] that the failure of a non-resident father to provide sufficient maintenance for his child could amount to "neglect" even although the child was well-looked after by the mother (and the child's maintenance was partly borne by the National Assistance Board). Other cases of neglect have involved leaving 3 children under 9 alone in a warm house with a barking and excreting dog from 11.30 in the morning until 8.30 in the evening,[1726] failing to seek medical help for an injured baby,[1727] dangling a 13-month old child from the window of a high flat,[1728] and leaving a child alone in a room with a pan of hot liquid.[1729] A failure to protect the child

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[1722] *The Times* 26 May 1960.

[1723] *National Confidential Forum for Adult Survivors of Childhood Abuse in Care: Scoping Project on Children in Care in Scotland 1930-2005*, at para. 2.7.2.

[1724] *R v Drury* (1974) 60 Cr. App. R. 195.

[1725] 1954 JC 94.

[1726] *W v Clark* 1999 SCCR 775.

[1727] *S v Authority Reporter* 2012 SLT (Sh Ct) 89.

[1728] *Keltie v HM Adv.* 2012 HCJAC 79.

[1729] *B v Murphy* 2014 HCJAC 56.

from the harmful acts of others was held to amount to "neglect" for the purposes of s. 12 in *Kennedy v S*.[1730] The overall principle was identified by the Lord Justice-General, Lord Hope, in *H v Lees, D v Orr*,[1731] where he said that what amounted to neglect was to be tested according to "what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention to the child". In the English decision of *R v Boulden*[1732] it was held that "to abandon" a child means to leave it to its fate. "Abandonment" was found to be established in *M v Orr*[1733] where the accused, in order to free himself to go to the pub and get drunk, instructed his children to go to their grandmother's, or to school, but without doing anything to ensure their safety or that they followed his instructions. And placing a child in a situation of risk amounted to "exposure" when a grandmother took the child to the house of a sex offender, got drunk there and allowed the child to share a bed with both grandmother and offender, next to a bucket of excrement.[1734]

JS v Mulrooney,[1735] a children's hearing case, contains one of the few discussions of emotional abuse (though it involved s. 12 only obliquely). The sheriff had used the term "emotional abuse" to describe the "neglect" to which children had been subjected: a pattern of behaviour that seriously interfered with the child's cognitive, emotional, psychological or social development, and the Inner House said: "we cannot say that she was wrong to do so".[1736]

Intent, in relation to the common law crime of child cruelty, concerned the action and not the consequences, and this has always been the case under the statutory provisions also. In

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[1730] 1986 SC 43.

[1731] 1993 JC 238 at p. 245.

[1732] (1957) 41 Crim. App. Rep. 105.

[1733] 1995 SLT 26.

[1734] *M v Aitken* 2006 SLT 691. Cf the English decision of *R v Gibbons* [1977] Crim LR 741 where it was held, construing the same word in the English statute, that "expose" did not include "expose to risk".

[1735] 2014 CSIH 70.

[1736] 2014 CSIH 70 at [30].

Clark v HM Adv[1737] the parents had failed to provide adequate food and medical aid as a result of which their daughter had died, but they themselves were so mentally disabled as to be unaware that their behaviour was harmful. The question to be decided was whether, in these circumstances, the parents could be said to have had the capacity for "wilful" neglect. The court held that capacity to understand the outcome was not necessary for a competent charge: "wilful" qualified the acts and not the harms listed in s. 12.[1738] This was expanded upon in *H v Lees, D v Orr*[1739] where it was held that the critical element to be proved by the Crown was the likelihood of injury to the child as a result of the behaviour of the accused: behaviour might be captured by s. 12 in one circumstance but not in another, depending upon whether, in all the circumstances, the child was "likely" to be injured. So in *M v Normand*[1740] it was held that leaving a child strapped in a car while shopping could not sustain a charge of "wilful neglect" without specification of likely risk. In *Dunn v McDonald*[1741] parents kept a very unhygienic house and did not wash their baby. The sheriff held, after a careful examination of the cases, that the offence in s. 12 might be committed irrespective of whether the parents intended to put the child at risk or foresaw any possible risk. Adequacy of food, clothing, medical aid and lodging was to be judged according to what the reasonable parent would regard as sufficient or tolerable.[1742]

The most recent sustained analysis of the s. 12 offence is to be found in *JM v Brechin*,[1743] which involved a ground of referral to the children's hearing that the father was guilty of "wilful ill-treatment" by lifting each of his twin children by one hand, exerting such force as

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[1737] 1968 JC 53.

[1738] Trotter *Children and Young Persons (Scotland) Act 1937* W. Hodge & Co, 1938) at pp 21 and 25 had much earlier stated that "wilfully" meant that the act had to be done deliberately and not accidentally but that there was no need to establish intent to injure: this was cited with approval in *JM v Brechin* 2016 SC 98.

[1739] 1993 JC 238.

[1740] 1995 SLT 1284.

[1741] 2013 SLT (Sh Ct) 34.

[1742] 2013 SLT (Sh Ct) 34 at [66].

[1743] [2015] CSIH 58.

to cause severe fractures to their ribs. He contended (i) that the offence of wilful ill-treatment required proof of awareness either that his actions would cause unnecessary suffering or injury to health, or recklessness and (ii) that the word "wilfully" qualified both the actions (the neglect, ill-treatment etc) and the consequences (the unnecessary suffering or the injury to health). These averments were rejected and, following *Clark v HM Advocate*, it was held that the word "wilfully" required only the conduct to be deliberate with the result that the accused's awareness of likely consequences was nothing to the point. Lord Carloway said this:

> "Wilful" ill-treatment requires deliberate or intentional conduct. "Wilful", as it is ordinarily understood in the context of the mental element in crimes, involves intention. Notwithstanding the origins of the statutory offence in legislation generally applicable throughout the United Kingdom, there is nothing to suggest that Parliament intended to restrict the common law position in Scotland. The pre-existing common law offences of child cruelty, loosely defined, paid little, if any, regard to either the motives or the state of mind of the perpetrator who put his child at risk or in danger, or caused the child to suffer injury. The relevant issue was whether harm would be likely to, or inevitably, arise from the deliberate act or omission in question.
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> The scope of the requisite intention is sufficiently clear from the statutory purpose to improve the protection of children from cruelty (short of assault) at the hands of those who bear the responsibility of caring for them. The statute requires the assessment of ill-treatment or neglect, according to the objectively assessed likelihood of its harmful consequences, in order to give effect to that purpose. The offence strikes only at conduct at such a level of culpability that it is likely to cause the child suffering or injury to health. The imposition of criminal liability is circumscribed by the likelihood and significance of harm, and is restricted to the class of person in the position of responsibility for a child. The introduction of a subjective assessment of ill-treatment or neglect, involving a search for the carer's thinking at the relevant time, would remove the desired statutory protection otherwise afforded to children.
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> …[W]hat is required, first, is that the conduct be deliberate. Secondly, the court must be able to categorise the conduct as 'ill-treatment', in the sense of involving what can reasonably be described as cruelty. The character or quality of conduct that will constitute ill-treatment is a matter to be determined objectively. The addition of the term 'wilful' does not import a subjective element to that assessment. The proper threshold of criminal liability is fixed also by reference to the likelihood of sufficiently grave consequences arising from deliberate or voluntary action or inaction. The term 'wilful' necessarily serves to exclude accidental or inadvertent conduct, as opposed to the accidental or inadvertent consequences of deliberate conduct, from the scope of the offence. It is unnecessary, and contrary to the statutory purpose, to restrict the

scope of the offence by reference to the subjective awareness of the individual of the harmful nature of the conduct in question.[1744]

ii. Criminal Injuries Compensation

In February 1964, the UK Government issued a White Paper, *Compensation for Victims of Crimes of Violence*[1745] and in June of that year it established the Criminal Injuries Compensation Board, which operated the Criminal Injuries Compensation Scheme to provide *ex gratia* payments to the victims of crimes of violence, based on the levels of compensation payable under delictual liability. What amounted to a "crime of violence" generated substantial case law,[1746] but it was long accepted that the crime had to be of a violent nature and not simply have violent consequences.[1747] It followed that sexual abuse involving the giving of consent that was compromised by either the age of the victim or the position the accused held over the victim would not generally be regarded as a crime of violence.[1748] Another significant limitation in the scheme as originally operated was the exclusion of injuries suffered by members of the offender's household.[1749] This exclusion was traditionally justified by the perceived difficulty in establishing the facts and the need to ensure that the compensation paid did not benefit the offender, but it was amply wide enough to exclude violence visited on a child or young person by their foster carer. As explained by the Lord Justice-Clerk, Lady Dorrian, in *MA v Criminal Injuries Compensation Board*:

[1744] [2015] CSIH 58 at [49] – [51].

[1745] 1964 Cmnd 2323.

[1746] See P. Duff, "Criminal Injuries Compensation and 'violent' Crime" 1987 *Criminal Law Review* 219.

[1747] *R v Criminal Injuries Compensation Board, ex p. Webb & Ors* [1986] 3 WLR 251.

[1748] *R (August) and R (Brown) v Criminal Injuries Compensation Authority* [2001] 2 WLR 1452.

[1749] "The word 'household' … is plainly intended to connote a family unit or something akin to a family unit – a group of persons, held together by a particular kind of tie who normally live together, even if individual members of the group may be temporarily separated from it": per Lord President Emslie in *McGregor v H* 1983 SLT 626 at 628. See also *Cunningham v M* 2005 SLT (Sh Ct) 73, per Sheriff Principal Macphail at [26].

That rationale for the inclusion of what became known as the "same roof rule" persisted until, in its Eighth Report dated 23 September 1972 (Cmnd 5127), the Board recommended that the same roof rule should be reconsidered when the scheme was reviewed. The two explanations for the rule were criticised. It was pointed out that where there has been a criminal trial the facts would often be established beyond doubt. Where no criminal proceedings had followed the Board would scrutinise the application with particular care, bearing in mind the possibility of collusion. No real risk of benefit to the offender would arise when a long prison sentence had been imposed, where parties had been divorced, or where it was plain they would never again live together. Otherwise, powers available under the scheme allowed the making of special arrangements for administration of the award so that the offender did not benefit. Only one application made by a child injured by a member of the family had been made, and had been refused on the same roof rule. The Board could not tell how many had simply failed to apply because of the exclusion. Nevertheless, in the Board's view, the exclusion of children assaulted by their parents or by a man living with their mother, seemed unjustified.

Following review by an interdepartmental working party in 1978, (*Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party,* (1978), HMSO) that recommendation was given effect to prospectively. For offences committed on or after 1 October 1979, an award could be made where the assailant and applicant lived together so long as the assailant had been prosecuted in connection with the offence or there were good reasons why a prosecution had not been brought. For offences committed before that date, the original rule was retained.[1750]

The case in which these comments were made involved a claimant who had been criminally injured by her mother before the same roof rule was removed. The Inner House held that the rule, which engaged Article 1 of Protocol 1 of the European Convention on Human Rights,[1751] was discriminatory in terms of Article 14 thereof, but nevertheless was justified: the restriction of the scheme at the time was a prudent policy decision concerning the allocation of finite resources in a matter of socio-economic policy and neither the aim, nor the means employed, could be said to be manifestly without reasonable foundation, with the result that there was no basis upon which the court might interfere.

[1750] [2017] CSIH 46 at [4]-[5].

[1751] A claim to a benefit was held to be a “possession” for the purposes of A1P1.

The same roof rule, when it applied, might have excluded from the ambit of the Criminal Injuries Compensation Scheme crimes of violence committed by foster carers over children in their households, but it would not exclude crimes against children living in residential establishments or boarding at independent schools by those charged with their care. In any case, sexual offences were covered only when the victim did not consent,[1752] so any "abuse of trust"-type sexual offences, where consent may have been given but was fatally compromised would not attract criminal injury compensation: they were not seen as "crimes of violence".[1753]

The Criminal Injuries Compensation Scheme was put onto a statutory basis by the Criminal Injuries Compensation Act 1995, coming into force in 1996, and operated by what now became the Criminal Injuries Compensation Authority. The major change to how the non-statutory scheme had operated was that compensation was in future to be assessed on the basis of a set tariff rather than by reference to delictual damages. On 27th November 2012, a revised Scheme came into effect, which aimed better to target victims of serious crime, repeat and vulnerable victims.[1754]

iii. Civil Liability in Delict

A full and detailed examination of the civil remedies that Scots law provides for persons neglected or ill-treated while in the care of the state would require far more space than is available within the context of the present Report. The following provides, therefore, no more than an outline of the principles governing this area of law. Unlike the legislative provisions with which much of this Report deals, it is generally not possible to identify precise dates when the rules of civil liability changed, for that depends to a large extent on

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[1752] *R (August) and R (Brown) v Criminal Injuries Compensation Authority* [2001] 2 WLR 1452.

[1753] The cases are discussed by D. Miers, "Compensating Deserving Victims of Violent Crimes: The Criminal Injuries Compensation Scheme 2012" (2014) 34 *Legal Studies* 242 at pp 258-260.

[1754] See D. Miers, "Compensating Deserving Victims of Violent Crimes: The Criminal Injuries Compensation Scheme 2012" (2014) 34 *Legal Studies* 242.

whether judicial decisions recognising or expanding liability are regarded as declaratory of the existing position or as creating new law.

Guthrie Smith, writing in 1864,[1755] discussed the direct liability of the magistrates and council of a burgh, saying that they "may be sued in three different characters: 1st, for acts done by them as trustees *virtute officii* but not as representing the community; 2d, for acts done by them as agents of the community in the administration of the common good, and in the discharge of duties imposed on the community; 3d, as proprietors". He gave examples including, of the first, misuse of public funds, of the second, maintaining prisons and public streets, and of the third, injuries caused by the defective state of "places of public resort within burgh".

Both the 1905 second edition (at p 103) and the 1939 third edition (at p. 102) of *Glegg on Reparation* talk of the liability of public authorities for injuries caused by defective conditions of public streets, and the third edition describes the position thus: "If a public authority is in possession and control of a street, liability for defects will attach to it". Though he cites no cases involving children's homes (and few were managed by local authorities at the time) this suggests that injuries caused by defects in the fabric of homes controlled by local authorities would render them liable. Charities and voluntary organisations are likely similarly to have been held liable, though the only discussion in Glegg of the liability of charities is on misuse of funds. Defects in fabric will have been covered since 1960 by the Occupiers Liability (Scotland) Act 1960.[1756]

[1755] J. Guthrie Smith, *Treatise on the Law of Reparation*, T&T Clark, 1864 at p. 171.

[1756] For a succinct discussion of occupiers liability in Scotland, see Gloag and Henderson *The Law of Scotland* (14th edn, 2017) at [27.04] – [27.09]. Prior to 1929 the strictness of the duty of an occupier of premises varied according to all the circumstances, including the authority under which the injured party was on the premises. The House of Lords imposed the more rigid English approach on Scots law in *Dumbreck v Addie & Sons (Colliers) Ltd* 1929 SC(HL) 51, which distinguished between "visitors, invitees, licensees and trespassers". The Occupiers Liability (Scotland) Act 1960 to a large extent restored the common law position that the authority with which the pursuer was on the premises when injured is no more than one of the factors that will affect

The 1960s to the 1980s was a period of expansionary judgments on liability for negligence. In *Home Office v Dorset Yacht Co. Ltd.*[1757] the House of Lords held that there were no policy reasons why damage to property belonging to third parties which was caused by inmates at a Borstal institution could not be recoverable by normal principles of negligence, and there is no indication in that case that the matter would be any different if it were an inmate that was injured, either at the hands of other inmates,[1758] or at the hands of staff, or as a result of unsafe buildings or operational practices. Likewise, it was accepted by the early 1970s that local authorities could be held liable, on normal principles derived from *Donoghue v Stevenson*,[1759] for injuries caused by their failure to fulfil duties of care, for example to keep buildings reasonably safe and to carry out their statutory duties in accordance with accepted standards.[1760] Those responsible for the management and running of children's homes, or schools, and those with care and control of children with whom they reside (such as foster carers), will nearly always owe a duty of care to take reasonable steps to avoid such injuries to their charges as may reasonably be foreseen. It made no difference whether the injuries were caused through neglect or deliberate act. However, it was held in 1992 that local authorities acting as education authorities would not owe a common law duty of care towards children they placed in special schools since the duty to inspect rested with the Secretary of State and not the education authorities.[1761]

Those operating residential establishments might be found liable in delict for the injuries suffered by residents either directly (that is to say through their own fault) or vicariously

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the extent to which the care taken by the occupier was "reasonable". See for example *Bermingham v Sher Bros* 1980 SC(HL) 67.

[1757] 1970 AC 1004.

[1758] A more recent example (involving a prison) is *Kaiser v Scottish Ministers* [2017] CSOH 110. The principle is likely to apply to residential establishments for children and young people.

[1759] 1932 SC(HL) 31.

[1760] *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; *Anns v Merton Borough Council* [1977] 2 All ER 492.

[1761] *Palmer v London Borough of Harrow* [1992] PIQR P296.

(that is to say for the harmful acts of their employees). Local authorities placing children with foster carers might similarly be liable for injuries caused by their own negligence (as in their failure properly to vet potential carers or to monitor their performance) or for actions of the carers for which they are vicariously responsible.

a. Direct Liability

Local authorities or voluntary organisations might be found directly liable for their own faults in failing to ensure the safety of children in residential establishments run by them. This might be due to their employing insufficiently qualified staff or staff whose propensities to harm children ought to have been known, or their failing to ensure the establishment operated along safe lines, or their failing to have in place mechanisms and procedures by which residents could be protected, or their need for protection from, for example, bullying recognised and acted upon.[1762] An early example is the claim for damages against a reformatory school (later approved school and then residential establishment) made in *Conolly v Stranraer Reformatory*,[1763] where an injury to an inmate put to work in a saw mill was caused, the pursuer averred, by the saw not being properly fenced. The major discussion in the case was whether a reformatory school was a "public authority" for the purposes of the Public Authorities Protection Act, 1893, which at that time created a limitation period of six months within which claims had to be made. Lord Kincairney held that the reformatory was indeed a "public authority" (and therefore the instant action was time-barred), but he also refused to accept the argument that reformatories were carried on for the purposes of bringing up boys entrusted to their care: he preferred to see them as places for the detention of youthful offenders, with the result that the character of reformatories and of prisons – and therefore the duties owed by the officials of these

[1762] A failure to prevent bullying was one of the claims in *C v Flintshire County Council* [2001] PIQR Q9. Bullying at school may impose liability on an education authority: *Wands v Fife Council* 2009 G.W.D. 30-477. See also *Scott v Lothian Council* 1999 Rep. LR 15 and *Ahmed v Glasgow City Council* 2000 SLT (Sh Ct) 153.
[1763] 1904, 11 SLT 638.

institutions – was closely analogous. That approach is unlikely to have survived the Care and Training Regulations 1933,[1764] in which the care to be afforded residents in approved schools was constructed as far more akin to parental care.

More recently claims have tended to found on the alleged negligence of local authorities failing to act quickly enough to prevent harm befalling their charges or, conversely, acting too readily when the perceived harm was in fact illusory, and the major source of dispute has been the extent to which public policy arguments should restrict liability for harm caused by child protection decisions which, with hindsight, have proved to be detrimental to the child. In *X (Minors) v Bedfordshire County Council; M v Newham London Borough Council*[1765] the House of Lords unanimously held that, for policy reasons, the court could not recognise liability in negligence either for a local authority's failure to intervene to protect children on being informed of serious maltreatment at the hands of their parents, or for its unnecessarily intervening due to negligently obtained information that ultimately proved mistaken. To recognise such a common law duty, they held, would cut across the statutory scheme for the protection of children at risk and cause local authorities to be more cautious in their decision-making approach. However, insofar as this created a blanket immunity for public authorities acting in their child-protection capacity, the decision of the European Court of Human Rights in *Osman v United Kingdom*[1766] required the English courts to reconsider the approach in *X (Minors)*. That case was doubted by a seven-judge panel in *Phelps v Hillingdon London Borough Council.*[1767] In *Barrett v Enfield London Borough Council*[1768] a child sued the local authority which had placed him in a variety of foster care placements alleged to be unsuitable and to be the cause of various psychological hurts and the House of Lords unanimously reversed the original striking out decision, accepting that in

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[1764] For which see above at **2.D.iii**.

[1765] [1995] 2 AC 633.

[1766] (1998) 29 EHRR 245.

[1767] [2001] 2 AC 619.

[1768] [2001] 2 AC 550.

some circumstances a claim may arise against local authorities for the decisions they make in child care processes.[1769] After a review of these, and other, cases,[1770] Lord Bingham of Cornhill in *D v East Berkshire Community Health NHS Trust*[1771] concluded:

> In the light of all this authority, coupled with *Z v United Kingdom 34 EHRR 97* and *TP and KM v United Kingdom 34 EHRR 42* it could not now be plausibly argued that a common law duty of care may not be owed by a publicly-employed healthcare professional to a child with whom the professional is dealing.

The same is true in respect of the duty owed by both publicly and privately employed child care professionals.

b. Vicarious Liability

Arguments based on public policy have little or no purchase when the public body is sued on the basis of vicarious liability, because at issue is not the body's own actions, inactions or processes (amenable to change according to whether or not civil suit is a possibility), but the actions or inactions of others. A public body may be held vicariously liable for the civil wrongs, intentional as well as unintentional, of those for whom they are responsible. Employees and agents are certainly covered, as are those who carry out the duties the law imposes upon the public body, on that body's behalf.

Prior to 2001 it was widely assumed that vicarious liability was limited to situations in which the employee caused the harm while doing what he or she was employed to do. The result of that approach was to deny vicarious liability for sexual abuse of children in the care of the abuser's employers, since sexual abuse could never be said to be an unauthorised way of

[1769] See also *S v Gloucester County Council* [2001] Fam 313 where a child was sexually abused by the foster carer with whom he had been placed and was able to sue the local authority for its negligence both in the original placement and its monitoring.

[1770] The cases are discussed from a Scottish perspective by A. Inglis, "Personal Injury Claims for Child Protection Failures" 2009 *Scots Law Times (News)* 173.

[1771] [2005] 2 AC 373.

doing an authorised act.[1772] The application of this test would be far less problematic in relation to physical ill-treatment or neglect, which might well amount to unauthorised ways of doing the authorised act of caring for children.

In any case, that approach to vicarious liability was discredited in *Lister v Helsey Hall Ltd*[1773] after which the test has been one of close connection between the wrong complained of and the duties the employee was employed to perform. In that case the warden of a residential home had subjected children resident therein to sexual abuse and the House of Lords, overturning *T v North Yorkshire County Council* and following instead two decisions of the Supreme Court of Canada,[1774] held that the abuse was so closely connected to the warden's employment that it would be fair and just to hold the employers vicariously liable.

In Scotland Lady Paton applied *Lister v Helsey Hall Ltd* in *M v Hedron*,[1775] and, the SED being one of the various defenders in that case, she also explored the extent to which oversight bodies could be directly liable for failure to investigate concerns over the running of residential establishments. Her decision was overturned by the Inner House, though the judges there held that *Lister*, applicable in the employer-employee situation, did not apply to the principal-agent situation (*M v Hedron* was a claim against numerous defenders, including an unincorporated religious association and the SED, none of which directly employed the monk who abused the children in the case). The approach of the Inner House was disapproved by the Supreme Court in a similar English decision,[1776] which held that

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[1772] See, for example, *T v North Yorkshire County Council* [1999] IRLR 98.

[1773] [2001] UKHL 22.

[1774] *Bazley v Curry (1999) 174 DLR(4th) 45*; *Jacobi v Griffiths (1999) 174 DLR(4th) 71 – described by P. Cane in "Vicarious Liability for Sexual Abuse" (2000) 116 Law Quarterly Review 21 at p. 24 as "a genuine advance on the unauthorised conduct/unauthorised mode distinction". The House of Lords cited with approval for what might be considered the new approach their earlier decision in the well-known Scottish case of Williams v A&W Hemphill Ltd 1966 SC(HL) 31.*

[1775] 2005 SLT 1122.

[1776] *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56.

Lister applied more widely than the direct employer-employee situation. In *Cox v Ministry of Justice*[1777] the Supreme Court revisited the point and held that relationships beyond the employer-employee situation could give rise to vicarious liability if the wrong was committed by the wrong-doer as a result of activity being performed on behalf of the defendant, the activity was integral to the defendant's business and the defendant's employing the wrongdoer to perform the activity created the risk of the wrong being done to the claimant.

Cox was applied in the context of child care in the most recent decision of the Supreme Court, *Armes v Nottingham County Council*,[1778] which concerned a child who had been physically and sexually abuse by her foster carers during the 1980s. The lower courts had held that the defendant was not vicariously liable for the wrongs of the foster carers because local authorities did not exercise sufficient "control" over the day to day care provided by foster carers: the role of foster carers was to provide the child with "family life" which was not amenable to the control of local authorities. The Supreme Court, however, overturned the Court of Appeal and held the local authority vicariously liable on the grounds (i) that the provision of care by the foster carers was an integral part of the local authority's organisation of its child care services, (ii) that the local authority's placement of children with the foster carers creates a relationship of trust and authority between the carer and the child where close control cannot be exercised by the local authority but which nevertheless creates a risk to vulnerable children; and (iii) that the local authority had statutory duties to select and monitor foster carers and to remove children from their care when that monitoring showed danger to the child's health, safety or morals. The analogy between the care provided by foster carers and family life provided by parents was not good. The activity being performed by the foster carers was therefore sufficiently close to

[1777] [2016] UKSC 10.

[1778] [2017] UKSC 60.

the local authority's own duties that it was appropriate to recognise the latter's vicarious responsibility for the harm caused by the former.

The statutory regulation of foster care in Scotland has long been sufficiently similar to that in England that *Armes* can be said to represent the law of Scotland also.

c. Standard of Care

> The answer to the question 'What is the standard of care expected by the law of negligence?' is always the same. It is reasonable care in all the circumstances. One therefore is only required to 'take *reasonable* care to avoid acts or omissions which (one) can reasonably foresee would be likely to injure (one's) neighbour'. It follows that 'negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'.[1779]

Probability of harm and likely seriousness of consequences are amongst the factors that will affect the reasonableness assessment. The level of care required to be shown by those responsible for the care of a child is the care that a reasonably careful parent would show to their own child.[1780] So in *Surtees v Royal Borough of Kingston upon Thames*[1781] the Court of Appeal held that the existence and the extent of the duty of care owed by those acting as parents (in the instant case a foster carer) depended on the circumstances including the "rough and tumble" of normal family life in which the injured child was not the only child being looked after.

The powers and responsibilities imposed by statute on local authorities and others responsible for the care of children will clearly affect the standard of care required to be shown, but are not to be interpreted as imposing an absolute obligation to ensure any child's safety.[1782] Part Two of the present Report sets out the statutory provisions governing

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[1779] B. Pillans, in *Delict* (W. Green/SULI, 2007) at para. 5.147.

[1780] *Harris v Perry* [2008] EWCA Civ. 907.

[1781] [1991] 2 FLR 559.

[1782] See *Armes v Nottinghamshire County Council* [2017] UKSC 60.

various forms of care to be provided to children and young persons being accommodated apart from their parents, including the provision of medical care. In addition, it was before 1968 provided that those to whom a child's care was committed had the same rights and powers as a parent had over the child.[1783] And the managers of approved schools were under the Children and Young Persons (Scotland) Acts, 1932 and 1937 vested with "all rights and powers exercisable by law by a parent".[1784] The level of care required to be afforded children and young persons whose accommodation was determined by these provisions mirrored, therefore, the care that parents were lawfully obliged to provide to their children (in addition to the further statutory obligations governing the particular type of accommodation). Though these provisions were worded in terms of conferring "all rights and powers" of a parent, Erskine[1785] had in the 18th century traced parental (at that time paternal) power to "the strongest obligations, from nature itself, to take care of" children, thereby presaging by two centuries the famous proposition of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[1786] – and subsequently s. 2 of the Children (Scotland) Act 1995 – that parental power exists only insofar as necessary to fulfil parental responsibility. It would follow that the granting of parental powers to fit persons (foster carers) or the managers of approved schools necessarily carried with it the imposition of parental responsibility, the existence of which would affect the standard of care expected to be shown.

Though the statutory provisions conferring the rights and powers of a parent on those caring for children under the authority of the state did not survive the Social Work (Scotland) Act 1968 there is no reason to doubt that responsibility of at least the extent that

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[1783] Prevention of Cruelty to, and Protection of, Children Act, 1889, s. 5(2); Prevention of Cruelty to Children Act, 1894, s. 7; Prevention of Cruelty to Children Act, 1904, s. 7; Children Act, 1908, s. 22(1); Children and Young Persons (Scotland) Act, 1932, s. 20(4); Children and Young Persons (Scotland) Act, 1937, s. 79(4).

[1784] 1932 Act, Sched. 1 para 17(1); 1937 Act, Sched. 2 para 12(1).

[1785] Erskine's *Institute of the Law of Scotland* (1773) 1, vi, 53.

[1786] [1985] 3 WLR 830.

parents had continued to apply in respect of children in care or looked after by the state. The matter was put beyond doubt by the Children (Scotland) Act 1995, under which any person over 16 years of age who has care or control of a child under that age but has no parental responsibilities or parental rights has nevertheless the responsibility to do what is reasonable in all the circumstances to safeguard and promote the child's health, development and welfare (and may in particular give consent to any surgical, medical or dental treatment to which the child does not have capacity to consent to).[1787] And local authorities looking after children are obliged to safeguard and promote the child's welfare.[1788] The word "promotion" suggests in both instances that active steps need to be taken, to the extent that it is reasonable to do so.

d. Assessment of Damages

The assessment of damages due to a woman who had been sexually and physically abused in a children's home was discussed by the Court of Appeal in *C v Flintshire County Council*[1789] which found it impossible to separate out the various causes of the claimant's emotional injury and affirmed an award higher than the norm for emotional loss in contexts other than child abuse. Ward LJ said this:

> Physical, emotional and sexual abuse of children in care by those who are supposed to provide that care seems to me to fall into a wholly different category from psychiatric damage that follows other personal injuries. The injury is of a different character. The essential element of the damage is the extent to which the injury compounds and multiplies the effect of the pre-existing condition.

iv. Damages for Breach of Statutory Duty

Most of the legal provisions examined in the present Report are contained in primary or secondary legislation. This legislation tends to impose duties on public bodies, whether

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[1787] Children (Scotland) Act 1995, s. 5(1), coming into force on 1st November 1996.

[1788] Children (Scotland) Act 1995, s. 17(1), coming into force on 1st April 1997.

[1789] [2001] PIQR Q9 at para [54].

central Government, local authorities or voluntary organisations, and sometimes on individuals such as foster carers, to act in particular ways or to provide specified services. The question arises as to whether a failure to fulfil such duties, which causes harm to the child involved, can in itself create civil liability based on breach of statutory duty, irrespective of any potential liability in negligence. This question has practical relevance only if the statutory duty might be said to impose a higher standard of care, or to provide broader remedies, than the common law. Occasionally, a statute that imposes a duty on a person specifies a civil (or criminal) remedy when the duty is not fulfilled, and if so a remedy in damages (if not the remedy specified) will usually not arise.[1790] But in most statutes (and certainly those with which this Report is concerned) the matter is left to implication – one way or the other.

To establish a civil remedy in damages for breach of statutory duty it is necessary to show the following:

(i) That the statute was intended to create civil liability. "It has long ago been decided", said Lord Clyde in what is generally regarded as the leading Scottish case on the issue,[1791] "that the mere fact that a duty has been created by a statute will not entitle a person injured by the breach of that statutory duty to claim damages from the person upon whom the duty is imposed – *Atkinson v Newcastle Waterworks* Co (1877) 2 Ex. D. 441, *per* Lord Cairns, LC at 448 – and the Courts have frequently had to determine whether a particular statutory obligation does or does not confer a right upon a person injured by its breach to damages for that injury. The solution in each case must depend upon what the intention of Parliament was in enacting the obligation in question, and what persons consequently have a right to

[1790] See *Morrisons Sports Ltd v Scottish Power plc* [2010] UKSC 37; *Campbell v Peter Gordon Joiners Ltd* [2016] UKSC 38.

[1791] *Pullar v Window Clean Ltd & Scottish Special Housing Association* 1956 SC 13 at p. 20.

enforce it or to found upon it as a basis for a claim of damages". An important and pertinent case is *R v Deputy Governor of Pankhurst Prison, ex p. Hague,*[1792] which concerned the (English) Prison Rules 1964. A prisoner sought damages for having been kept in solitary confinement in breach (he averred) of these Rules, but the House of Lords held that the Rules were designed for the management of prisons and not for the benefit of prisoners. It is likely that most of the provisions in the Borstal Rules, Young Offenders Institution Rules, and the Regulations dealing with approved schools and residential establishments, all considered in the body of this Report, will be regarded in the same light.

(ii) That the statutory duty was owed to the individual claimant and not to a section of the community as a whole. In *R (On the Application of G) v Barnett London Borough Council*[1793] the House of Lords held that s. 17 of the Children Act 1989 (the English equivalent to s. 22 of the Children (Scotland) Act 1995), which imposes on local authorities the duty to safeguard and promote the welfare of children in need, did not impose a duty that is owed to, or can be enforced by, any individual child (even a child in need). Lord Hope of Craighead said "I think that the correct analysis of section 17(1) is that it sets out duties of a general character which are intended to be for the benefit of children in need in the local social services authority's area in general. The other duties and the specific duties which then follow must be performed in each individual case by reference to the general duties which section 17(1) sets out. What the subsection does is to set out the duties owed to a section of the public in general by which the authority must be guided in the performance of those other duties."[1794] After an analysis of the equivalent

[1792] [1992] 1 AC 58.

[1793] [2004] 2 AC 208.

[1794] [2004] 2 AC 208 at [91].

Scottish legislation, Lady Smith reached the same conclusion in *Crossan v South Lanarkshire Council*[1795] where she said: "In providing, in section 22(1) [of the Children (Scotland) Act 1995], that a local authority has a duty to 'safeguard and promote the welfare of children in their area who are in need' by 'providing a range and level of services appropriate to the children's needs', Parliament has chosen to use the language of generality. The subsection is not concerned with the needs of individual children. It refers only to a class, 'children in need', and not to the needs of the individuals within that class… Not everything that every child needs requires to be provided for by the local authority".[1796] That case was one of judicial review rather than an action for damages for breach of statutory duty, but the principle holds good that an action for damages will not lie if a local authority fails to fulfil its duties of the type contained in s. 22 of the 1995 Act.[1797]

(iii) That the harm suffered was in the contemplation of the Act in question. In *Grant v NCB*[1798] Viscount Simonds said: "where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish … that the injury was one against which the legislation was designed to protect". The classic illustration of this point is *Gorris v Scott*[1799] where regulations on the transport of livestock, which were designed to prevent the spread of disease, did not give a cause of action when the loss was caused by the livestock being swept into the sea from the vessel in which they were being transported. It would follow that any child injured while in state care would have a claim for breach of statutory duty only if the type of

[1795] 2006 SLT 441.

[1796] 2006 SLT 441 at [20].

[1797] This is not inconsistent with the proposition made above that s. 17 and s. 22 of the 1995 Act helps to indicate the standard of care in a common law action for negligence.

[1798] 1956 SC(HL) 48 at p. 52.

[1799] (1874) 9 LR Exch. 125.

injury they suffered was the type the rule or regulation was itself designed to avoid. This is likely to be easier to establish when the harm is caused by defective premises and the like than when the harm is constituted by neglect or ill-treatment of children in the care of the state. However, it might be argued that the rules on persons unsuitable to work with children[1800] are designed to avoid the very harm the risk of which constitutes the ground of their unsuitability.

v. *Compensation Under the European Convention on Human Rights*

Article 13 ECHR provides that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

This sometimes requires that, in cases in which no other remedy is available, damages should be payable in compensation for any harm that a breach of the rights contained in the European Convention on Human Rights has caused. The European Court itself may make an award of damages,[1801] though this is uncommon and in most cases "just satisfaction" is achieved by the finding that the Convention has been breached. Since 2nd October 2000, the Human Rights Act 1998 has provided that damages or compensation for any breach thereof may be paid by any court in civil proceedings with the power to do so.[1802] This is a statutory, and discretionary, remedy that may be sought in addition to any other remedy based on breach of a common law duty of care, but (similar to the approach of the European Court) the English courts have regarded any monetary remedy for a breach of the

[1800] First contained in the Protection of Children (Scotland) Act 2003 and now in the Protection of Vulnerable Groups (Scotland) Act 2007: see above at **1.F.iv**.

[1801] Article 41 provides: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[1802] Human Rights Act 1998, s. 8.

1998 Act as being secondary to the main aim of preventing the continuation of a breach of the Convention.[1803] The breach must be shown to be grave, and a causative link between the breach and harm requires to be shown. In *Venema v Netherlands*[1804] a mother was suspected of deliberately harming her own child and the child was removed from her care without any opportunity having been given for the mother to address the concerns. Damages were awarded on the finding that had such an opportunity been given, the suspicions would have been laid to rest and the child not removed. But in *Re P*[1805] it was found that the child's care plan would not have been altered had full participation been assured: the result was that any breach of Article 8 did not cause the harm complained of and a declaration that a breach had occurred was sufficient satisfaction of the claim, without any monetary compensation. Successful claims for damages have included *P, C, S v the UK*[1806] where the European Court awarded the parents €12,000 each for breaches of their rights under Articles 6 and 8 in a case that involved removal of a baby at birth;[1807] *Northamptonshire County Council v AS*[1808] where a local authority had been guilty of "outstanding and inexcusable failures" in their treatment of a 15-day-old baby who was put into foster care and not placed with his extended family for 23 months; and *CZ (Human Rights Claim: Costs)*[1809] where £3,750 was awarded to both parents and the child who had been removed without notice shortly after birth.[1810]

[1803] See *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ. 1406.

[1804] [2003] 1 FLR 552.

[1805] [2007] EWCA Civ. 2.

[1806] [2002] 2 FLR 631.

[1807] This case also contained a useful discussion of how damages should be assessed.

[1808] [2015] EWHC 199.

[1809] [2017] EWFC 11.

[1810] See also *R v Highland Council* 2007 SLT 513 where substantially larger amounts were claimed by a looked after child for alleged failings of the local authority, including failing to assess properly the pursuer's special educational needs, to ensure she was able to maintain contact with her mother, and to facilitate her continuing to follow her Roman Catholic faith by placing her with protestant foster carers.