

# LEGISLATIVE BACKGROUND TO THE TREATMENT OF CHILDREN AND YOUNG PERSONS UNDER STATE REGULATION OF THEIR RESIDENCE

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## PART ONE: BEGINNINGS TO 1948

This part of this Report shall be presented in four sections, covering the statutory provisions in the various Children Acts during the periods: (A) before 1908, (B) from 1908 until 1932 and (C) between 1932 and 1948. Section (D) will then cover the position under the mental health legislation between 1913 and 1948.

### SECTION A: The Period Before 1908

#### 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 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,<sup>1</sup> whose role included the investigation of the running of poor houses. Most children accommodated in poorhouses were there as dependants of their parents, but there was also an obligation to care for orphans and deserted children.<sup>2</sup> 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.<sup>3</sup> “The Poor Law”, as a distinct legal doctrine, was abolished in 1948.<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> H.J. Macdonald, “Boarding-Out and the Scottish Poor Law, 1845 – 1914” (1996) 75 *Scottish Historical Review* 197 at p. 198.

<sup>3</sup> 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

## 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 criminality. In opening the Second Reading debate of the bill that became both the Children and Young Persons Act, 1932 and the Children and Young Persons (Scotland) Act, 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.<sup>5</sup>

Both types of school found their origins in a developing 19<sup>th</sup> 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. The connection between crime, immorality and poverty may have been overstated but it led to the sensible view that, as a victim of circumstances, an appropriate response to the juvenile offender was to remove him (or her) from such influences 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".<sup>6</sup> Receiving into state care children who had committed no crime originally required parental consent but it

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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".

<sup>4</sup> National Assistance Act 1948, s. 1.

<sup>5</sup> HC Deb. 12<sup>th</sup> February 1932 vol. 261 col. 11.

<sup>6</sup> Macdonald op. cit. at pp. 201-202.

came to be accepted that the aim of breaking cycles of both poverty (caused by parental indolence) and delinquency (caused by parental immorality) 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.

Ralston<sup>7</sup> 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 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,<sup>8</sup> the Youthful Offenders Act, 1854,<sup>9</sup> and the Industrial Schools Act, 1861.<sup>10</sup> 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<sup>11</sup> and the Industrial Schools Act, 1866,<sup>12</sup> which permitted the sending of juvenile offenders, as well as children “who have no guardian or whose guardians are neglecting them”,<sup>13</sup> to such institutions.<sup>14</sup> These schools tended to operate on a residential as opposed to a day basis, a tendency furthered, as Ralston points out,<sup>15</sup> 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.<sup>16</sup>

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<sup>7</sup> A. Ralston, “The Development of Reformatory and Industrial Schools in Scotland 1832 to 1872”, (1988) *Journal of Scottish Historical Studies* 40.

<sup>8</sup> 17 and 18 Vict. c. 74.

<sup>9</sup> 17 and 18 Vict. c. 86.

<sup>10</sup> 24 and 25 Vict. c. 132.

<sup>11</sup> 29 and 30 Vict. c. 117.

<sup>12</sup> 29 and 30 Vict. c. 118.

<sup>13</sup> Per Lord Trayner in *McKenzies v McPhee* (1889) 16 R(J) 53.

<sup>14</sup> In C. Kelly’s words “Continuity and Change in the History of Scottish Juvenile Justice” (2016) 1 *Law Crime and History* 59, at p. 64: “This was a prime example of philanthropic effort being co-opted by the state”.

<sup>15</sup> Ralston, op cit at p. 48.

<sup>16</sup> *Report of the Departmental Committee on Reformatory and Industrial Schools*, Cmd 8204 (1896), pp.8 and 132 (quoted in Kelly, at p. 64).

Throughout this period, there was debate as to the advisability of schools taking both categories of children.<sup>17</sup>

### *Regulatory Provisions and Obligations of School Managers*

Most schools, of either type, 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 subject to Government inspection;<sup>18</sup> a school could not, however, be certified as being both reformatory and industrial.<sup>19</sup> The obligation of the managers of a certified reformatory school was “to educate, clothe, lodge and feed” the inmates.<sup>20</sup> They were empowered to make rules for the management of the school but these had to be approved by the Secretary of State.<sup>21</sup> 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”.<sup>22</sup> The Reformatory and Industrial Schools Act, 1891<sup>23</sup> granted to the managers of a certified reformatory or industrial school 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”,<sup>24</sup> even before the period of detention expired.

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*.<sup>25</sup> The overseeing power of the Secretary of State was transferred on 1<sup>st</sup> April 1920 to the Scottish Education Department under s. 19 of the Education (Scotland) Act 1918.<sup>26</sup>

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<sup>17</sup> Ralston, n. 4.

<sup>18</sup> Reformatory Schools Act, 1866, s. 5; Industrial Schools Act, 1866, s. 10.

<sup>19</sup> Industrial Schools Act, 1866, s. 8.

<sup>20</sup> Reformatory Schools Act, 1866, s. 8.

<sup>21</sup> Reformatory Schools Act, 1866, s. 12.

<sup>22</sup> Industrial Schools Act, 1866, s. 5.

<sup>23</sup> 54 & 55 Vict. c. 23, s. 1.

<sup>24</sup> On emigration generally, see Appendix One.

<sup>25</sup> Cmd 7886 (1915).

<sup>26</sup> Reformatory and Industrial Schools (Scotland) (Transfer of Powers) Order, 1920 (SR&O 1920 No. 429 (S. 40)).

## Prevention of Cruelty to, and Protection of, Children Act, 1889<sup>27</sup>

This was the first UK Act expressly designed to tackle parental mistreatment or neglect of children (beyond either the criminal law or the poor laws). The protection offered was dependent on the child being the victim of a criminal offence, but the extent of the relevant offence was broader than anything that had gone before. Section 1 of the 1889 Act (the precursor to s. 1 of the 1894 and 1904 Acts, and then s. 12 of the 1908 and 1937 Acts<sup>28</sup>) 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, or exposes such child .... in a manner likely to cause such child unnecessary suffering, or injury to its health”. This went very much further than the existing law,<sup>29</sup> and recognised for the first time that neglect (in the sense of failure to fulfil parental responsibilities) without any intent to cause harm, could be as damaging to children as direct assault; consequentially it gave the state for the first time the right to act in cases other than deliberately inflicted injury or child destitution. The difference in age between boys and girls is to be noted.

For the purposes of this Report, the extension of the relevant crime was less important than the other major innovation in the 1889 Act, which was to permit the taking by the state of the child away from the parents (or others) convicted of the crime under s. 1. The *patria potestas* which inhered in the father of a child had been modified by the Conjugal Rights (Scotland) Amendment Act, 1861 and the 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<sup>30</sup> which allowed persons bringing up – and poor law authorities keeping – children to resist claims for their return by their

<sup>27</sup> 52 and 53 Vict. c. 44.

<sup>28</sup> All to be discussed below.

<sup>29</sup> The common law of Scotland held that the wilful neglect of a child by a person who had the custody and keeping of the child whereby such child was injured in its health was a punishable offence (*M’Intosh*, (1881) 4 Couper 389) but this required intention. See also Hume i, 299.

<sup>30</sup> 54 and 55 Vict. c. 3.

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”<sup>31</sup> 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”.<sup>32</sup>

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 today would be called “kinship care”. There were, however, no limitations expressed as to who would be a “fit person” for these purposes:<sup>33</sup> the matter was one for the court to judge and there seems to have been no prior approval or monitoring 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.<sup>34</sup> 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 parents. Worth noting also is the provision that: “Nothing in this Act shall be

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<sup>31</sup> Defined in s. 17.

<sup>32</sup> 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.

<sup>33</sup> 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).

<sup>34</sup> 1889 Act, s. 5(2).

construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child".<sup>35</sup> The person to whom the child was committed had thereby lawful charge of that child and so was conferred with the power of punishment: in effect this provided a defence to any charge of assault against a child if the act could be characterised as "punishment".

The 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.<sup>36</sup> 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".<sup>37</sup> 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.

### **Prevention of Cruelty to Children Act, 1894<sup>38</sup>**

The 1889 Act was amended by the Prevention of Cruelty to Children Amendment Act, 1894<sup>39</sup> 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,<sup>40</sup> which included a number of significant developments in the law. Within the s. 1 offence, mental harm was for the first time explicitly recognised in addition to bodily

<sup>35</sup> 1889 Act, s. 14. On the import of this provision for corporal punishment, see Appendix Two.

<sup>36</sup> 1889 Act, s. 6.

<sup>37</sup> 1889 Act, s. 17.

<sup>38</sup> 57 & 58 Vict. c. 41.

<sup>39</sup> 57 & 58 Vict. c. 27.

<sup>40</sup> 1894 Act, s. 28(2).

harm (though the language used was “mental derangement”, which might suggest that something more serious than emotional neglect was envisaged). 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 were based on 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.

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,<sup>41</sup> but the terms are clearly wide enough to include cohabitants who had neither legal nor genetic relationship with the child.

By s. 25, “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

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<sup>41</sup> See *Liverpool Society for the Prevention of Cruelty to Children v Jones* [1914] 3 KB 813.

police station, or any hospital surgery, or place of a like kind". This formulation, and in particular the last six words, substantially broadened out the earlier definition in the 1889 Act.

A well-known case decided under the 1894 Act is that of *R v Senior*,<sup>42</sup> 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.<sup>43</sup> Lord Russell of Killowen, CJ said this<sup>44</sup>:

The charge is one of manslaughter, and it is founded upon the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1...., the material words of which are as follows: "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, illtreats, neglects, abandons, or exposes, such child, or causes or procures such child to be assaulted, illtreated, 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 a misdemeanour." It is desirable to refer to the history of the legislation dealing with this subject. The former statutory provision was contained in the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 37 (a section since repealed), which provided that "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging, for his child, being in his custody, under the age of 14 years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction." Therefore under that statute it was made the duty of the parent, if he was able to do so, to provide medical aid for his child, where necessary, and if he did not do so he was guilty of an offence, and liable to punishment. That was followed by the Act of 1889, which it is not necessary further to refer to, because the provisions of that Act were in effect the same as those of the Act now in force so far as the present case is concerned. ...There is, no doubt, considerable

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<sup>42</sup> [1899] 1 QB 283.

<sup>43</sup> A similar case, though the reason for failure to provide medical care was psychological inadequacy, is *HM Adv. v Clarks* 1968 JC 53.

<sup>44</sup> At pp. 288 – 290.

difference between the language of the Act now in force and that which was contained in the Act of 1868. In the Act now in force the expression “medical aid” does not occur, and it becomes necessary to consider whether the omission of those words makes any difference with regard to the present case. It would be an odd result if we were obliged to come to the conclusion that, in dealing with such a subject as the protection of children, the Legislature had meant to take what may be described as a retrograde step; for the course of legislation, and the provisions of the Act of 1894, shew an increased anxiety on the part of the Legislature to provide for the protection of infants.

The fact that the provision of medical aid was held to be implicit in s. 1 indicated a willingness on the part of the courts to give expansive scope to the provision.

### **Prevention of Cruelty to Children Act, 1904<sup>45</sup>**

The 1894 Act was repealed, but substantially re-enacted, by the 1904 Act,<sup>46</sup> which came into force on 1<sup>st</sup> 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 1908 and then s. 12 of the 1937 Act). The importance of this offence to the obligations of care that the state owed to children removed from their parents will become apparent later. 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 poor children or the prevention of cruelty to children” within the concept of “fit person” to whose care of a child might be committed.

In *M v Locality Reporter*<sup>47</sup> Lord Justice Clerk Carloway offered this summary of these foregoing developments:

The origins of section 12 of the 1937 Act lie in a succession of statutes providing for the prevention of cruelty to children in the Victorian era. They led to the Prevention of Cruelty to, and Protection of, Children Act 1889 ... By virtue of section 1 of that Act, as applied to Scotland in terms of section 17:

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<sup>45</sup> 4 Edw. VII, c. 15.

<sup>46</sup> Schedule 2.

<sup>47</sup> 2015 CSIH 58 at paras [39] – [40].

“Any person ... who, having the custody, control, or charge of a child ... wilfully ill-treats, neglects, abandons, or exposes such child ... in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of [... an offence]...”. The Prevention of Cruelty to Children (Amendment) Act 1894, added (section 2(1)) a reference to assault, alongside and distinct from ill-treatment, also qualified by “wilfully”.

The Prevention of Cruelty to Children Act 1894, substantially re-enacted the terms of section 1 of the 1889 Act, as so amended, to read as follows:

“If any person ... wilfully assaults, ill-treats, neglects, abandons, or exposes such child ... in a manner likely to cause such child unnecessary suffering, or injury to its health ... that person shall be guilty of [... an offence]...”.

Further minor amendments were contained in the Prevention of Cruelty to Children Act 1904 and the Children Act 1908. Ultimately separate offences were provided for England by the Children and Young Persons Act 1933 (section 1) and for Scotland by the Children and Young Persons (Scotland) Act 1937 (section 12). The 1937 Act was subsequently amended by the Criminal Justice (Scotland) Act 2003 to remove the reference to assault (2003 Act, s 51).

## **SECTION B: 1908 – 1932**

### **The Children Act, 1908<sup>48</sup>**

The 1908 Act constituted 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.<sup>49</sup>

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<sup>48</sup> 8 Edw. 7, Ch. 67.

<sup>49</sup> Its remaining sections were repealed by the Children Act, 1958.

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 by 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<sup>50</sup> 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 became the 1908 Act was introduced by the Under-Secretary of the Home Office, Herbert Samuel;<sup>51</sup> and moved at Second Reading by the Lord Advocate, Thomas Shaw.<sup>52</sup> The Act was much amended in 1932, and replaced in 1937. So for the 29 years between 1908 and 1937, this was the governing primary legislation, though the 1932 Act provided a significant turning point in the law that the 1937 Act merely consolidated.

The Lord Advocate accepted that the Act represented an increase in the power of the state over family life, but dismissed this as a matter 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".<sup>53</sup> 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

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<sup>50</sup> 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.

<sup>51</sup> Later Leader of the Liberal Party between 1931 and 1935.

<sup>52</sup> Later Lord Shaw of Dunfermline.

<sup>53</sup> HC Deb. 24 March 1908, vol. 186, col. 1259.

do with parental neglect and bad example”.<sup>54</sup> 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”.<sup>55</sup>

### **1908 Act, Part One: Infant Life Protection (private fostering for reward)**

Part One of the 1908 Act enhanced the regulation of what was then known as “baby-farming”, that is to say the practice of boarding out infants (often “illegitimate”) by their parents with individuals paid to look after them. The dangers to children being brought up in such environments had been recognised early in the 19<sup>th</sup> century and a number of earlier Acts had attempted to regulate the trade.<sup>56</sup> The 1908 Act expanded the power of the state in this area by (i) requiring 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, (ii) limiting the number of infants under the age of 7 that any child-minder could receive (for reward) into their home and (iii) requiring that child protection visitors, who would visit any notified child, be appointed by the local authority. Local authorities could also remove (with court authority) any child to “a place of safety.” The Act therefore presaged an ever greater involvement of the local authority, representing the state, in the welfare of vulnerable children and

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<sup>54</sup> *Report of the Departmental Committee on Reformatory and Industrial Schools*, 1896 (Cmd 8204), p. 22 (quoted in Kelly, at p. 76).

<sup>55</sup> 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).

<sup>56</sup> The first legislative attempt at regulating baby farms was the Infant Life Protection Act, 1872, which 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.

this Part represents the forerunner to the modern regulatory regime for private foster caring.<sup>57</sup>

### **1908 Act, Part Two: Prevention of Cruelty to Children and Young Persons**

Part Two replaced and expanded the provisions (described above) from the 1889 to 1904 Acts. The 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.<sup>58</sup> The offence in s. 1 of the 1889, 1894 and 1904 Acts appeared as s. 12 of the 1908 Act, with the addition of a provision that explicitly included failure (of any person legally liable to maintain the child or young person) to provide food, clothing, lodging and (presumably in response to *R v Senior*) medical aid to the definition of “neglect in a manner likely to cause injury”. As well as general acts of neglect or ill-treatment under s. 12, various other actions that had come to be recognised as harmful to children were explicitly made offences that justified the removal of children from the perpetrator’s custody, charge or care, most noticeably “overlying” of children (suffocating children who were sleeping in the same bed as the adult, especially when the adult was “under the influence of drink”<sup>59</sup>), 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”.<sup>60</sup> Questioning whether criminalising bereaved parents was an effective response to family tragedies, Stewart<sup>61</sup> suggests that what was described as “overlying” was really the phenomenon of unexplained deaths given a name, 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

<sup>57</sup> Governed today by the Foster Children (Scotland) Act 1984.

<sup>58</sup> 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).

<sup>59</sup> 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.

<sup>60</sup> 1908 Act, s. 15. The Lord Advocate also stated that in one (unspecified) year there had been 1600 such infant deaths: HC Deb. 24 March 1908, vol. 186 col. 1254.

<sup>61</sup> J. Stewart, “Children, Parents and the State”, (1995) 9 *Children and Society* 90 at 95-96.

society, which provided a justification for the state's interest in family life afflicted by poverty that has never left the minds of policy makers since. 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.<sup>62</sup>

### **1908 Act, Part Three: Juvenile Smoking**

These provisions, though socially interesting, do not engage the issues covered by this Report.

### **1908 Act, Part Four: Reformatory and Industrial Schools**

Part Four furthered the blurring of the distinction between the two types of school (which, it has been suggested,<sup>63</sup> 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".<sup>64</sup>

Section 44 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"; "industrial school" was defined to mean "a school for the industrial training of children, in which children are lodged, clothed, and fed, as well as taught". Both were, therefore, *residential* schools<sup>65</sup> and both were to be subject to the same regulatory regime.

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<sup>62</sup> 1908 Act, ss. 16 and 17, as amended by the Children Act (1908) Amendment Act, 1910 (which added the reference to unlawful carnal knowledge).

<sup>63</sup> Ralston, *op cit*.

<sup>64</sup> HC Deb. 24 March 1908, vol. 186, col. 1257

<sup>65</sup> 1908 Act, ss. 77 – 83 amended the rules for day industrial schools, governed by the Day Industrial Schools (Scotland) Act, 1893.

Section 45 allowed the Secretary for Scotland<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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<sup>69</sup> 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.<sup>70</sup> The local authority or local education authority had the power to appeal that identification (in truth, that imposition of financial liability).<sup>71</sup>

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 residence.<sup>72</sup> 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.<sup>73</sup>

The managers had the power to make rules for the school but these required to be approved by the Secretary for Scotland.<sup>74</sup>

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

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<sup>66</sup> 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.

<sup>67</sup> 1908 Act, s. 47.

<sup>68</sup> 1908 Act, s. 75.

<sup>69</sup> 1908 Act, s. 74(1).

<sup>70</sup> 1908 Act, s. 74(3).

<sup>71</sup> 1908 Act, s. 74(7).

<sup>72</sup> 1908 Act, s. 52.

<sup>73</sup> 1908 Act, s. 53.

<sup>74</sup> 1908 Act, s. 54.

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.<sup>75</sup> 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.<sup>76</sup> 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
- (b) Had been found wandering without a settled home,<sup>77</sup> 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<sup>78</sup>)
- (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.<sup>79</sup>

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.<sup>80</sup> That reformatory and industrial schools were perceived as performing the same function is shown by the fact that youthful offenders, if under 12, could also be sent to an industrial as opposed to a reformatory school.<sup>81</sup> The court retained the

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<sup>75</sup> 1908 Act, s. 57.

<sup>76</sup> 1908 Act, s. 58.

<sup>77</sup> 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.

<sup>78</sup> 1908 Act, s. 58(1) proviso.

<sup>79</sup> 1908 Act, s. 58(1). Little of this is new and, as Kelly pointed out (at pp. 70-71), only (d) and (e) were additions to what had earlier appeared in the Industrial Schools Act 1866.

<sup>80</sup> 1908 Act, s. 58(4) and (5).

<sup>81</sup> 1908 Act, s. 58(2) and (3).

power to commit the child to the care of a relative or other fit person instead,<sup>82</sup> and if it did so the court could also order that the child be placed under the supervision of a probation officer.<sup>83</sup>

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).<sup>84</sup> 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.<sup>85</sup> The Secretary for Scotland had the power to discharge the child or young person from the school.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup>

Governance of certified reformatory and industrial schools similarly took a unified form. Following the general statutory restructuring of the governance of education in 1918, General Regulations were made by the Scottish Education Department on 27<sup>th</sup> January 1921, coming into effect as from 1<sup>st</sup> April 1921.<sup>89</sup> 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

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<sup>82</sup> 1908 Act, s. 58(7).

<sup>83</sup> 1908 Act, s. 60.

<sup>84</sup> 1908 Act, s. 66.

<sup>85</sup> 1908 Act, s. 67.

<sup>86</sup> 1908 Act, s. 69.

<sup>87</sup> 1908 Act, s. 68(1).

<sup>88</sup> 1908 Act, s. 70. On emigration generally, see Appendix One below.

<sup>89</sup> These are reprinted in Roxburgh *The Law of Education in Scotland* (Wm. Hodge, 1928, vol 1) at pp.327-330. They almost certainly replaced earlier regulations, which I have not yet been able to identify.

institution.”<sup>90</sup> The (educational) qualifications of the school staff had to be approved by the Scottish Education Department,<sup>91</sup> with teachers certified in particular subjects by the Department’s normal regulations; staffing levels were required to be sufficient to meet the needs of the school.<sup>92</sup> The timetable and curriculum, both of education and general routine of the school, required to be approved by the Department.<sup>93</sup> 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 enquire 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.

### **1908 Act, Part Five: Juvenile Offenders**

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.<sup>94</sup>) Instead, on conviction the child could be sent to an industrial or reformatory school, or be whipped.<sup>95</sup> Their parent or guardian was required to attend the court hearing the case<sup>96</sup> and the court had the power to order the parent or guardian to pay any fine, damages or costs in place of the child.<sup>97</sup> If the child was fined or ordered to pay damages or costs, default could not be met with imprisonment.<sup>98</sup> The death penalty was no longer to be available for any person

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<sup>90</sup> 1921 Regulations, reg. 1.

<sup>91</sup> 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.

<sup>92</sup> 1921 Regs, reg. 2.

<sup>93</sup> 1921 Regs, reg. 3.

<sup>94</sup> 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.

<sup>95</sup> 1908 Act, s. 107.

<sup>96</sup> 1908 Act, s. 98.

<sup>97</sup> 1908 Act, s. 99.

<sup>98</sup> 1908 Act, s. 102.

under the age of 18 years.<sup>99</sup> 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.<sup>100</sup> 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".<sup>101</sup>

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.<sup>102</sup> It was stated 24 years later in the House of Commons:

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.<sup>103</sup>

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<sup>99</sup> 1908 Act, s. 103.

<sup>100</sup> 1908 Act, s. 111(1).

<sup>101</sup> 1908 Act, s. 111(4).

<sup>102</sup> 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).

<sup>103</sup> HC Deb. 12<sup>th</sup> February 1932, vol. 261, cols. 1170-1171.

Nevertheless, the 1908 Act 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, and to recognise 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”.<sup>104</sup> 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”.<sup>105</sup> 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”.<sup>106</sup> 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 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,<sup>107</sup> but the 1908 Act marked the first occasion in which the proposition was made a central feature of criminal justice.

## **SECTION C: 1932 - 1948**

### **The Lead up to the Children and Young Persons (Scotland) Act, 1932**

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<sup>104</sup> HC Deb. 24<sup>th</sup> March 1908, vol. 186 col. 1257.

<sup>105</sup> J. Stewart, “Children, Parents and the State: The Children Act 1908” (1995) 9 *Children and Society* 90 at p. 95.

<sup>106</sup> Kilbrandon Committee Report, at para. [41].

<sup>107</sup> An issue frequently dealt with in the Prevention of Cruelty Acts.

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”.<sup>108</sup> The “present law” of course was that contained 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.<sup>109</sup>

The central recommendation therefore was the proper establishment of separate courts, 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 used instead.<sup>110</sup> Staffing of schools was to be considered carefully since the work “demands self-sacrifice, sympathy, unflagging energy and broad outlook”.<sup>111</sup>

Other Government Reports on related matters appeared around the same time. In 1926 the Government published its *Report of the Departmental Committee on*

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<sup>108</sup> Morton Committee Report (HMSO, 1928).

<sup>109</sup> Kilbrandon Committee Report *Children and Young Persons Scotland* (1964) at para [42].

<sup>110</sup> Morton Committee Report, pp. 94-95.

<sup>111</sup> *Ibid.*, pp. 90-91.

*Sexual Offences against Children and Young Persons in Scotland*.<sup>112</sup> 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”.<sup>113</sup> It is sometimes thought that our concern for the long-term emotional effect of sexual abuse of children, apart from the moral considerations, developed only in the latter part of the 20<sup>th</sup> 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 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.<sup>114</sup>

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.

### **The Children and Young Persons Bill 1932**

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<sup>112</sup> Cmd 2592, 1926. Cmd 2593 is an equivalent report looking at the situation in England.

<sup>113</sup> MG Cowan, *The Children Acts (Scotland)* (W. Hodge & Co, 1933) at p. 4.

<sup>114</sup> HC Deb. 12 Feb 1932, vol. 261, cols. 1225-6.

The bill that became the 1932 Act received its Second Reading on 12<sup>th</sup> February 1932. The Debate was led for the Government by Oliver Stanley, then Under-secretary in the Home Department,<sup>115</sup> 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 tackle 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 spirit of natural evil.<sup>116</sup>

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 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

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<sup>115</sup> Later Secretary of State for the Colonies in Churchill's wartime Cabinet.

<sup>116</sup> HC Deb. 12 Feb. 1932, vol. 261, cols. 1167/8.

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...<sup>117</sup>

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

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<sup>117</sup> HC Deb. 12 Feb, 1932, vol. 261, col. 1178.

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 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.<sup>118</sup>

With a 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”.<sup>119</sup>

### **The Children and Young Persons (Scotland) Acts, 1932 and 1937**

The bill discussed above was passed as a UK statute,<sup>120</sup> 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,<sup>121</sup> which mostly came into force on 1<sup>st</sup> November 1933.<sup>122</sup> 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<sup>123</sup> by the consolidating Children and Young Persons (Scotland) Act, 1937,<sup>124</sup> which came into force on 1<sup>st</sup> July 1937.<sup>125</sup> 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 paragraphs will therefore deal primarily with (and follow the

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<sup>118</sup> HC Deb. 12 Feb. 1932, vol. 261, cols. 1179 – 1180 (emphasis added).

<sup>119</sup> HC Deb. 12 Feb. 1932, vol. 261, col. 1172.

<sup>120</sup> 22 & 23 Geo. V, c. 46.

<sup>121</sup> 22 and 23 Geo. V, c. 47. A detailed commentary on the 1932 Act is contained 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.

<sup>122</sup> S,R&O 1933 No 783 (S.41) (some other dates were set for specific matters).

<sup>123</sup> 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.

<sup>124</sup> For a detailed description of this Act, see T. Trotter, *The Law as to Children and Young Persons* (W. Hodge & Co Ltd, 1938).

<sup>125</sup> 1937 Act, s. 113(2).

structure of) the 1932 Act, with references to the 1937 Act added for the period subsequent to 1<sup>st</sup> July 1937.

The definitions of “child” and “young person”, originally found in the 1908 Act, were amended in the 1932 Act<sup>126</sup> (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:<sup>127</sup> “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.<sup>128</sup>

### **Part One: 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 three ways, discussed in the paragraphs below.

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 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”.<sup>129</sup> 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 case brought before them. Section 2 of the 1932 Act<sup>130</sup> therefore provided that “a panel of justices specially qualified to deal with juveniles”

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<sup>126</sup> 1932 Act, s. 64.

<sup>127</sup> 1937 Act, s. 110(1).

<sup>128</sup> These remain the definitions for the purposes of the 1937 Act that survive today, notwithstanding that the school leaving age has changed.

<sup>129</sup> *Report of the Committee on the Treatment of Young Offenders* (the Molony Committee), 1927, Cmd 2831 at p.25.

<sup>130</sup> Subsequently re-enacted as s. 51 of the 1937 Act.

was to be set up (progressively) in each district in Scotland.<sup>131</sup> 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:<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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)<sup>135</sup> but an assurance was given that in the framing of the rules due regard would be given to this question.<sup>136</sup> And in the areas where juvenile court panels existed the sheriff court retained concurrent jurisdiction.<sup>137</sup>

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

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<sup>131</sup> But no criteria were laid down to determine whether any justice was “specially qualified”.

<sup>132</sup> HC Deb, 12 Feb, 1932, vol. 261, cols. 1218 – 1219.

<sup>133</sup> This remained the case in 1964: Kilbrandon Committee Report at para. [47].

<sup>134</sup> Kilbrandon Committee Report at para [42].

<sup>135</sup> HC Deb. 12<sup>th</sup> May 1932 vol. 265, col. 2230.

<sup>136</sup> HC Deb. 12<sup>th</sup> May 1932 vol. 265, col. 2228. See Rule 13 of the Juvenile Courts (Constitution) (Scotland) Rules 1933, set out below.

<sup>137</sup> *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.

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<sup>138</sup> 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<sup>139</sup> 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<sup>140</sup> 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 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<sup>141</sup> 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,

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<sup>138</sup> Subsequently re-enacted as s. 52(1) of the 1937 Act.

<sup>139</sup> Cowan, *op cit* at pp. 17-18.

<sup>140</sup> And then s. 3(2) of the 1932 Act, subsequently re-enacted as s. 52(1) of the 1937 Act.

<sup>141</sup> Morton Committee, p. 55.

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".<sup>142</sup> 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),<sup>143</sup> the court was given jurisdiction over:

- (i) Juvenile crime. Section 14 of the 1932 Act raised the common law age of *doli incapax* from 7 to 8<sup>144</sup> (a recommendation of the Morton Committee),<sup>145</sup> and s. 64 increased the court's overall jurisdiction from 16 to 17 (a matter that had to overcome some significant political opposition.<sup>146</sup>)
- (ii) 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,<sup>147</sup> of removing school attendance cases from the Police Courts to the JP courts and the sheriff courts.
- (iii) Care and protection cases. The criteria for "care or protection" were substantially widened and are discussed below.

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<sup>142</sup> 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.

<sup>143</sup> Subsequently re-enacted as s. 50 of the 1937 Act.

<sup>144</sup> 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.

<sup>145</sup> 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. 12<sup>th</sup> May 1932, vol. 265, cols. 2234 – 2240.

<sup>146</sup> HC Deb. 12<sup>th</sup> Feb 1932 vol. 261, col.1173;12<sup>th</sup> May 1932 vol. 265, col. 2207.

<sup>147</sup> Cowan, *op. cit* at pp. 12-13.

(iv) Adoption orders.<sup>148</sup> 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.

### *Rules and Procedure at Juvenile Courts*

The Juvenile Courts (Constitution) (Scotland) Rules, 1933<sup>149</sup> provided in part as follows:

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<sup>150</sup> 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.

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<sup>148</sup> 1937 Act, s. 50(3).

<sup>149</sup> SR&O, 1933 No. 984 (S. 54). (Reproduced in Trotter at pp. 323 – 325).

<sup>150</sup> 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.)

(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 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.<sup>151</sup>

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”.

## **Part Two: Jurisdiction of Juvenile Courts and Outcomes**

Part One having sought to establish a proper juvenile court, Part Two of the 1932 Act then went on to deal with both who 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

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<sup>151</sup> 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.

of summary jurisdiction. Putting it in contemporary terms (which would not have misrepresented the position in 1932), s. 12<sup>152</sup> set out the offence ground, while s. 6<sup>153</sup> set out the grounds that needed to be established before a child could be held to be “in need of care or protection”. The offence ground was limited to offences punishable by imprisonment.<sup>154</sup> 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.<sup>155</sup>
- (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.<sup>156</sup> 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).<sup>157</sup> These provisions followed the recommendations of the *Report of the Departmental Committee on Sexual*

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<sup>152</sup> Subsequently re-enacted as s. 61 of the 1937 Act.

<sup>153</sup> Subsequently re-enacted as s. 65 of the 1937 Act.

<sup>154</sup> 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.

<sup>155</sup> Parental unfitness or failure to exercise proper care and guardianship became separate grounds in themselves, of course, in the Social Work (Scotland) Act 1968.

<sup>156</sup> This last was a late addition by the House of Lords: HL Deb. 9<sup>th</sup> 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).

<sup>157</sup> All of these related to persons under 16 notwithstanding that the general jurisdiction of the juvenile court was now to extend to age 17.

*Offences*<sup>158</sup> and ensured a substantial extension of protection from the 1908 Act: the earlier Act had required a definite conviction<sup>159</sup> 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.<sup>160</sup> 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 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, 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.<sup>161</sup> 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 was available only in conjunction with committal of the child or young person to the care of a fit person and not as an outcome on its own.<sup>162</sup> 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

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<sup>158</sup> Cmd 2593 (1926).

<sup>159</sup> 1908 Act, s. 21(2), following s. 5(1) of the 1889 Act.

<sup>160</sup> An offence created by s. 118 of the 1908 Act, for which see above.

<sup>161</sup> 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” under the Antisocial Behaviour etc (Scotland) Act 2004, s. 102).

<sup>162</sup> 1932 Act, s. 12; 1937 Act, s. 61.

steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training”.<sup>163</sup> 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<sup>164</sup> 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”.<sup>165</sup>

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.<sup>166</sup> 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 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”:<sup>167</sup> a parent could not therefore simply ask the court to relieve him or her of the burden of bringing up his or her child.

#### *Outcome One: 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 to abolish the distinction between reformatory and industrial schools: instead, there

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<sup>163</sup> 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, which require the Juvenile Court to deal with the case “in the child’s best interests”.

<sup>164</sup> 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).

<sup>165</sup> 1932 Act, s. 15; 1937 Act s. 43(2).

<sup>166</sup> 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).

<sup>167</sup> Trotter at p. 126.

were to be schools approved under the terms of the First Schedule to the Act,<sup>168</sup> 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,<sup>169</sup> 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.<sup>170</sup>

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”).<sup>171</sup> 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.<sup>172</sup> 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,<sup>173</sup> and an error could, at least in some cases, amount to a fundamental nullity vitiating the order.<sup>174</sup> 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

<sup>168</sup> 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.

<sup>169</sup> Cowan reproduces in her book at pp 327 – 332 SED Circular No 80, 16<sup>th</sup> 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”.

<sup>170</sup> Cowan at pp. 22-23.

<sup>171</sup> 1932 Act, s. 18; 1937 Act, s. 49(2).

<sup>172</sup> 1932 Act, Sched. 1 para. 26; 1937 Act, s. 72.

<sup>173</sup> 1932 Act, s. 23(4) and (5); 1937 Act, s. 74(1).

<sup>174</sup> 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).

circumstances that led to protective remedies arose:<sup>175</sup> on that identification depended the question of liability for the maintenance of the child in the approved school.<sup>176</sup> It was also provided that in determining the child or young person's residence, the court should ignore any period in which the child was an "inmate of a school or other institution, or while boarded out under this Act".<sup>177</sup>

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.<sup>178</sup>

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.<sup>179</sup> 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".<sup>180</sup> 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.

The management and regulation of approved schools is dealt with below.

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<sup>175</sup> 1932 Act, s. 23(6); 1937 Act, s. 74(2).

<sup>176</sup> 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.

<sup>177</sup> 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.

<sup>178</sup> 1932 Act, s. 31; 1937 Act, s. 62.

<sup>179</sup> 1932 Act, s. 25(1); 1937 Act, s. 75(11).

<sup>180</sup> Cowan, pp. 42 – 43.

*Outcome 2: Committal to the Care of a Fit Person (Boarding Out)*

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.<sup>181</sup>

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 for the first time the juvenile court to commit any child or young person in need of care or protection, or who had committed an offence, to the care of an Education Authority (which was deemed a “fit person” for the purpose),<sup>182</sup> with the Treasury bearing the cost.<sup>183</sup> Now, Education Authorities could not exercise their powers of caring for children or young persons by accommodating them in either approved schools or voluntary homes: rather, the only mechanism such authorities had to fulfil their obligations towards children committed to their care was to board them out with private families<sup>184</sup> – in other words, fostering outwith the wider family

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<sup>181</sup> Morton Committee Report, at p. 116.

<sup>182</sup> 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.

<sup>183</sup> 1932 Act, s. 79(1)(i)(b); 1937 Act, s. 107(1)(a)(ii) (repealed by the Children Act 1948, sched. 4). Cowan 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.

<sup>184</sup> 1932 Act, s. 20(3); 1937 Act, s. 88.

circle, the references to committal to “a relative” being dropped.<sup>185</sup> (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”.<sup>186</sup>) 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.<sup>187</sup> 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 not be made without the Secretary of State’s authority.<sup>188</sup> With both of these provisions, however, the Secretary of State’s powers were in practice exercised by an Education Authority.<sup>189</sup>

The power to board out had to be exercised in accordance with the rules (set out below) 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 religious persuasion.<sup>190</sup> Since children under ten could be sent to approved schools only in exceptional circumstances,<sup>191</sup> 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<sup>192</sup> 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

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<sup>185</sup> The terms “foster-parent” and “foster-home” were used in the Care and Training Regulations, 1933, set out below.

<sup>186</sup> 1932 Act, s. 20(4); 1937 Act, s. 88(8).

<sup>187</sup> 1932 Act, s. 19(6); 1937 Act, s. 88(4).

<sup>188</sup> 1932 Act, s. 19(7); 1937 Act, s. 88(5). On emigration generally, see Appendix One to this Report.

<sup>189</sup> 1932 Act, s. 81; Children and Young Persons (Scotland) Act 1932 (Transfer of Powers) Order 1933, SR&O 1933 No. 821 (S. 44).

<sup>190</sup> 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).

<sup>191</sup> 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.

<sup>192</sup> *Clyde Report on Homeless Children* (1946, Cmd 6911) at para [23].

Pensions – including 23 who had been committed under the 1937 Act to the care of the Ministry of Pensions.<sup>193</sup>

### *Boarding Out Under the Poor Law*

Boarding out was also a mechanism under the Poor Law (Scotland) Act 1934, which allowed public assistance authorities<sup>194</sup> – 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<sup>195</sup> 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 regulations as the Department may make with respect thereto.”<sup>196</sup> This regularised a long-established (and near universal<sup>197</sup>) practice of the poor-law authorities in Scotland.<sup>198</sup> 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.<sup>199</sup>

<sup>193</sup> Clyde Report at paras [34] – [35].

<sup>194</sup> That is to say, the poor law authorities who were quite separate from local authorities.

<sup>195</sup> 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.

<sup>196</sup> Poor Law (Scotland) Act 1934, s. 10 (repealed by the National Assistance Act 1948, 11-12 Geo 6, c. 29).

<sup>197</sup> Clyde Report at para [13].

<sup>198</sup> 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).

<sup>199</sup> 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 replaced both these and the Boarding Out Rules in the Care and Training Rules 1933 (set out below), and explicitly covered children boarded out under the Poor Law (Scotland) Act 1934 as well as those boarded out under the 1932 and 1937

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<sup>200</sup> 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, could be retrieved by their parents at any time. 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.

### *Outcome Three: Probation*

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 and throughout the period under consideration in this section the Probation of Offenders Act, 1907 was the governing statute.<sup>201</sup> The probation service was put on a national basis by the Probation of Offenders (Scotland) Act, 1931,<sup>202</sup> 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<sup>203</sup> 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

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Acts. On which Government department was responsible for visiting children boarded out under the poor law, see Clyde Report at paras [18] – [21].

<sup>200</sup> At para [22].

<sup>201</sup> A history of probation in Scotland is found in the Morton Committee Report at pp. 62 – 77.

<sup>202</sup> 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).

<sup>203</sup> Though originally designed for offenders, one effect of the 1932 Act was to extend probation to children in need of care or protection: this 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 that the distinction in the 1937 Act between supervision and probation would cease to exist on the implementation of its own proposals: para 140.

and often tedious and lengthy job of reclaiming the offender. *The success of the second part is dependent upon the efficiency of the first.*<sup>204</sup>

Probation committees were established to oversee the system, which included both salaried and voluntary probation officers.<sup>205</sup> The major innovation in the 1932 Act in respect of probation is that it extended the provisions of the 1907 Act beyond the case of juvenile offenders to include as well children and young persons in need of care or protection. This was the origin of local authority “supervision” of neglected and abused children within their home environment as a major aspect of the state’s support mechanisms for troubled families. The person appointed as probation officer was required to “visit, advise and befriend [the child or young person] and, when necessary, endeavour to find him suitable employment.”<sup>206</sup> Employment, it was hoped by the Morton Committee, was to be better than “blind-alley occupations and the higher wages offered them”.<sup>207</sup> In other words what probation officers ought to seek were skilled apprenticeships.

#### *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,<sup>208</sup> or be committed to a remand home.<sup>209</sup> The last mentioned was very uncommon<sup>210</sup> 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.<sup>211</sup> 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 long debate and against the wishes

<sup>204</sup> HL Deb. 26<sup>th</sup> May 1932 vol. 84 col. 482 (emphasis added).

<sup>205</sup> See Probation (Scotland) Rules, 1931, SR&O 1931 No 1023 (S.53) (reproduced in Cowan, pp. 349 – 369).

<sup>206</sup> 1932 Act, s. 10(1); subsequently re-enacted as s. 70 of the 1937 Act.

<sup>207</sup> Morton Committee Report, p. 112.

<sup>208</sup> 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.

<sup>209</sup> 1908 Act, s. 106, replaced by s. 58 of the 1937 Act. Remand homes are discussed below.

<sup>210</sup> Morton Committee Report, p. 177.

<sup>211</sup> Cowan, p. 51.

of the National Government) eventually conceded the point.<sup>212</sup> The matter did not re-emerge in the 1937 debates.<sup>213</sup>

### **Part Three: Voluntary Homes**

These are considered below.

### **Part Four: Employment of Children**

These provisions fall outwith the scope of this Report.

### **Part Five: Infant<sup>214</sup> Life Protection (private foster care)**

Part One of the 1908 Act had sought, in the ways described above, to regulate the “baby-farming” practices of the 19<sup>th</sup> century. In more modern parlance, this regulated private fostering undertaken for reward. The 1932 Act increased from 7 to 9 the age of children whose reception into the care of a private foster carer had to be notified to the local authority,<sup>215</sup> and Part One of the 1937 Act consolidated the rules and added a requirement that the child protection visitor (or one of them if more than one was appointed) be a woman.<sup>216</sup> These provisions were subsequently extended to all children under 18 by the Children Act, 1948<sup>217</sup> and then replaced by Part 1 of the Children Act, 1958.<sup>218</sup> (The Social Work (Scotland) Act 1968 extended these rules to private fostering not undertaken for reward, and the matter is now regulated under the Foster Children (Scotland) Act 1984, which repealed the 1958 Act).

## **Regulation and Management of Approved Schools and Committal to Fit Persons**

<sup>212</sup> See HL Deb. 9<sup>th</sup> June 1932, vol. 267 cols. 2069 – 2095. Whipping had long been recognised as a legitimate form of punishment (see *Macdonald’s Criminal Law* 3<sup>rd</sup> edn at p. 17) and was competent for boys below the age of 16: *Mackay v Lamb* 1923 JC 16.

<sup>213</sup> 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.

<sup>214</sup> “Infant” was a term of art in English law but not Scots law. The terminology used in the present provisions was “Infant Life Protection” in the 1908 and 1932 Acts, both passed as UK statutes. That changed to “Child Life Protection” in the 1937 Act, the first solely Scottish Act in this area, before becoming “Child Protection” in the Children Act, 1958.

<sup>215</sup> 1932 Act, s. 59, amending s. 1 of the 1908 Act.

<sup>216</sup> 1937 Act, s. 2(2).

<sup>217</sup> Children Act 1948, ss. 35 and 36.

<sup>218</sup> Considered below in Part Two of this Report.

### *Approved Schools*

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.<sup>219</sup> 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 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”.<sup>220</sup> 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.<sup>221</sup> Education Authorities could be the managers of approved schools,<sup>222</sup> but most were 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”.<sup>223</sup> 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.<sup>224</sup> Children and young persons could be sent from England, Northern Ireland, the Isle of Man or the Channel Islands to approved schools in Scotland.<sup>225</sup>

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<sup>219</sup> These rules applied until 1<sup>st</sup> November 1963, when the Criminal Justice (Scotland) Act 1963, Pt II and Sched II came into force.

<sup>220</sup> 1932 Act, Sched 1 para 1; 1937 Act, s. 83.

<sup>221</sup> 1932 Act, Sched 1 para 2; 1937 Act, s. 83(2).

<sup>222</sup> 1932 Act, Sched 1 para 11; 1937 Act, s. 84(1).

<sup>223</sup> 1932 Act, Sched 1 para 7; 1937 Act, s. 85(1).

<sup>224</sup> 1932 Act, Sched 1 para 8; 1937 Act, Sched 2 para 11.

<sup>225</sup> 1932 Act, s. 39; 1937 Act, s. 87.

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.<sup>226</sup> 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 purpose; importantly, the managers were in these circumstances deemed still to have the child or young person under their care.<sup>227</sup> 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.<sup>228</sup> 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; once again the child or young person remained under the formal care of the managers.<sup>229</sup> 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”.<sup>230</sup> 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 kept 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.<sup>231</sup> But again, the child or young person

<sup>226</sup> 1932 Act, Sched 1 para 12; 1937 Act, Sched 2 para 3.

<sup>227</sup> 1932 Act, Sched 1 para 13; 1937 Act, Sched 2 para 4.

<sup>228</sup> 1932 Act, Sched 1 para 14; 1937 Act, Sched 2 para 5.

<sup>229</sup> 1932 Act, Sched 1 para 15; 1937 Act, Sched 2 para 6.

<sup>230</sup> 1932 Act, Sched 1 para 15(2); 1937 Act, Sched 2 para 6(2).

<sup>231</sup> 1932 Act, Sched 1 para 16; 1937 Act, s. 78.

continued to be deemed under the care of the managers of the school.<sup>232</sup> It was further provided that “If a person under the care of the managers of an approved school<sup>233</sup> conducts himself well,<sup>234</sup> 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”.<sup>235</sup> 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<sup>236</sup> was not a legal requirement.<sup>237</sup> Other than the addition of the Air Force in the 1932 legislation, this provision replicated the already-existing provision in the 1908 Act.<sup>238</sup>

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”.<sup>239</sup> 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.<sup>240</sup>

### *Obligations of Care: School Managers and Foster Parents*

It was provided that “the managers of an approved school shall be under an obligation to provide for the clothing, maintenance and education of the persons under their care, except that while such a person is out on licence, or under supervision, their obligation shall be to cause him to be visited, advised and

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<sup>232</sup> 1932 Act, Sched 1 para 16(5); 1937 Act, s. 78(5).

<sup>233</sup> And remember this may be a person no longer residing at the school.

<sup>234</sup> A qualification the practical effect of which was to ensure that discretion rested entirely with the managers.

<sup>235</sup> 1932 Act, Sched 1 para 18; 1937 Act, Sched 2 para 7.

<sup>236</sup> Emigration is considered more fully in Appendix One.

<sup>237</sup> See also the Care and Training Regulations, set out below, reg. 19.

<sup>238</sup> 1908 Act, s. 70.

<sup>239</sup> 1932 Act, Sched 1 para 19; 1937 Act, Sched 2 para 13.

<sup>240</sup> 1932 Act, Sched 1 para 20; 1937 Act, s. 85(2).

befriended and to give him assistance (including, if they think fit, financial assistance) in maintaining himself and finding suitable employment”.<sup>241</sup> The managers were also obliged to provide medical care when required, and that could include making arrangements for the child or young person to be received into and detained in any hospital, home or other institution.<sup>242</sup> More generally, both the managers of approved schools and the fit persons to whose care children and young persons were committed had what today we would call parental responsibilities and parental rights. In relation to children and young persons committed to the care of a fit person, it was provided<sup>243</sup> that “the person<sup>244</sup> 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 in his care notwithstanding any claim by a parent or any other person”.<sup>245</sup> This of course included the right of parents to visit “punishment” on their children, the exercise of which right was explicitly not within the offence of assault for the purposes of s. 12.<sup>246</sup> As with fit persons, so too with the managers of approved schools: “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”.<sup>247</sup>

“Care” was, therefore, an important aspect of the responsibility that the state had towards children and young persons sent to approved schools or fit persons by the state. The content of that obligation may be found primarily not in the terms of the legislation itself but in the extent of the care that parents were lawfully obliged to provide to their children. The statutory conferral of parental rights and powers on those acting on behalf of the state is of the utmost significance. Though worded in terms of conferring “all rights and powers” of a parent, Erskine<sup>248</sup> had in the 18<sup>th</sup> Century traced parental (at that time, paternal) power to “the strongest obligations,

<sup>241</sup> 1932 Act, Sched 1 para 17(2); 1937 Act, Sched 2 para 12(2).

<sup>242</sup> 1932 Act, Sched 1 para 13; 1937 Act, Sched 2 para 4.

<sup>243</sup> 1932 Act, s. 20(4); 1937 Act, s. 79(4).

<sup>244</sup> This is likely to refer to both the natural person with care – the foster parent – and (if different) the institutional “fit person” named as such in the court order.

<sup>245</sup> This did not remove the parents’ rights: *Browne v Browne* 1969 SLT (Notes) 15.

<sup>246</sup> 1937 Act, s. 12(7). See further, Appendix Two to this Report.

<sup>247</sup> 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.

<sup>248</sup> Erskine’s *Institute of the Law of Scotland* (1773) 1, vi, 53.

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 & Wisbech Area Health Authority*<sup>249</sup> – and subsequently s. 2 of the Children (Scotland) Act 1995 – that parental power exists only insofar as necessary to fulfil parental responsibility. A good argument may be made from this that the statutory granting to the state (exercised via the managers of approved schools or via Education Authorities when children were boarded out with fit persons) of parental rights and powers necessarily carried with it the imposition on the state of parental responsibility. Section 12 of the 1908 and 1937 Acts,<sup>250</sup> though worded in terms of an offence committed by a natural person (the reference is to a person over the age of 16 being liable), may also be taken to give an indication of how the law expected parents – and therefore parent-substitutes – to act towards their children. In particular, parents were expected not to subject them to cruelty or neglect – and so too, long before the European Convention on Human Rights had been conceived, was the state expected not to allow children and young persons to be subjected to cruelty or neglect when they took over parental powers. And of course a charge under s. 12 was competent against either the managers of an approved school or the adults with whom a child had been boarded out. Section 38 of the 1908 Act, and thereafter s. 27 of the 1937 Act, 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* Avory J said this: “The very object of the last paragraph in s.38(2) 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”.<sup>251</sup> 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) 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*

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<sup>249</sup> [1985] 3 WLR 830.

<sup>250</sup> The only substantive change made in the 1937 Act to the offence in s. 12 was to limit its effects to victims under 16 (the definition of “young person” having become person under 17 in the 1932 Act).

<sup>251</sup> [1914] 3 KB 813 at 817.

*Blount*,<sup>252</sup> 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).<sup>253</sup> In *Ridley v Little*<sup>254</sup> a headmaster was 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 (one assumes under s. 12) of wilful mistreatment of two boys in their care.<sup>255</sup>

If carers took on the responsibilities of parents, then the state itself also undertook the responsibility to ensure that the child was not subjected to cruelty or neglect at the hands of these very people. And it is important to be remembered that “neglect” for the purposes of s. 12 encompassed – and still encompasses – (with its reference to “mental derangement” and “unnecessary suffering” beyond injury to health) emotional neglect. Neglect in general was later held to be construed by reference to what the reasonable parent would regard as necessary to provide proper care and attention to the child.<sup>256</sup> Children who are kept clean and well-fed may yet be “neglected” within the terms of s. 12.<sup>257</sup> These decisions are consistent with the underpinning rationale of the 1937 Act – and the 1908 Act before it – and do not represent any change in the law: they may therefore be taken to illustrate the position from (at least) 1908. It became thereby a legal obligation on the managers of an approved school, and the fit persons with whom children were boarded out, to treat the children and young persons under their care with respect and dignity – an obligation only very partially satisfied by the mere provision of clothing, sustenance and education.

Further statutory responsibilities owed, during this period, to children and young persons either in approved schools or boarded out by Education Authorities are to be

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<sup>252</sup> [1923] 1 KB 257.

<sup>253</sup> It is not necessary for a competent charge under s. 12 that the child be at risk of harm: see *Henderson v Stewart* 1954 JC 94, where a father was convicted for child neglect though the child lived safely with its mother (part of the child’s maintenance was borne by the National Assistance Board).

<sup>254</sup> *The Times* 26 May 1960.

<sup>255</sup> *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.

<sup>256</sup> *R v Sheppard* [1981] AC 394; *H v Lees*, *D v Orr* 1993 JC 238.

<sup>257</sup> *Kennedy v S* 1986 SC 43.

found in the Children and Young Persons (Scotland) Care and Training Regulations, 1933.<sup>258</sup> These provide (in relevant part) as follows:

### **The Rules Governing Approved Schools and Boarding Out to Fit Persons**

#### *A. Rules for the Management and Discipline of Approved Schools*

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.

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.

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."

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<sup>258</sup> SR&O, 1933, No 1006 (S.55) (reproduced in Trotter at pp. 335 – 347).

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;<sup>259</sup> 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 below), and other non-specified types (for example in relation to meals) were not prohibited.

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<sup>259</sup> 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”.

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<sup>260</sup> 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 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<sup>261</sup> 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

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<sup>260</sup> For a detailed examination of the developing law on corporal punishment, see Appendix Two.

<sup>261</sup> Op. cit. at para 2.6.11.

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 they were crossed. However, the additional comment of the magistrate on boys “whining to the police or to the medical officer grumbling about assault” reveals 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 are given as to who may inflict punishment.

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.<sup>262</sup>

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

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<sup>262</sup> 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.

opposition. The Act itself, of course, required the consent of the young person to any of these “disposals”.<sup>263</sup>

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 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

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<sup>263</sup> 1932 Act, sched 1 para. 18; 1937 Act, sched 2 para 7.

discharges, but it was not until 1961 that the Rules required a record of each child's progress to be kept.<sup>264</sup>

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..."

Part A of these rules remained in force until 1<sup>st</sup> December 1961.<sup>265</sup>

*C. Rules as to the Boarding Out etc of Boys and Girls Committed to the Care of Education Authorities.*

37: Where an Education Authority<sup>266</sup> 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.

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.

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

<sup>264</sup> Approved Schools (Scotland) Rules 1961, r. 11(2)(b).

<sup>265</sup> On that date the Approved Schools (Scotland) Rules, 1961 (SI 1961 No. 2243 (S. 124), discussed in Part Two of the present Report) came into force, with r. 54 revoking the 1933 Rules.

<sup>266</sup> Since s. 3 of the Local Government (Scotland) Act, 1929, local authorities had exercised the functions of education authorities.

and neatness, of cheerful obedience to duty, of consideration and respect for others, and of honour 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 once again 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 (still perceived as an environment where the risk of falling into criminality and immorality was high).

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<sup>267</sup> 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.

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<sup>267</sup> These were technical terms: see s. 1 of the Mental Deficiency and Lunacy (Scotland) Act 1913 (discussed below).

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 reveals an official understanding 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.<sup>268</sup> 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 may have been in mind is 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.”

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 central belt 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

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<sup>268</sup> 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 in Part Two of this Report.

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”.

Part C of the 1933 Rules was replaced as from 20<sup>th</sup> October 1947 by the Children (Boarding Out etc) (Scotland) Rules and Regulations 1947,<sup>269</sup> which will be discussed in Part Two of the present Report.

## **Other Establishments in Which Children and Young Persons Could be Accommodated**

### *Places of Safety*

Section 11 of the 1932 Act<sup>270</sup> provided for a “place of safety” 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. The very name “place of safety” indicates the hope and expectation with which children and young people would be accommodated in such places: they would be *safe* from harm there. Section 131 of the 1908 Act had defined a place of safety as “any poorhouse, or police station or any hospital or surgery, or any other suitable place”, and to this the Second Schedule to the 1932 Act added “remand homes” (the rules governing which are given shortly); this expanded definition was repeated in the 1937 Act.<sup>271</sup> There was no other regulatory control than the definition. Section 24 of the 1908 Act (and then s. 47 of the 1937 Act) 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<sup>272</sup> offence. Detention in a place of safety was essentially temporary, until the child or young person could be brought before a juvenile court for more long-term care or protection.

### *Voluntary Homes*

Part Three of the 1932 Act also provided some regulation of “voluntary homes”,<sup>273</sup> that is to say private (often church-run) establishments supported wholly or partly by

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<sup>269</sup> SI 1947 No. 2146 (S. 76).

<sup>270</sup> Subsequently re-enacted as s. 71 of the 1937 Act.

<sup>271</sup> 1937 Act, s. 110.

<sup>272</sup> Originally the schedule to the 1908 Act, and later the First Schedule to the 1937 Act.

<sup>273</sup> Defined in s. 40(3) of the 1932 Act and s. 96 of the 1937 Act.

voluntary contributions, where children and young persons could reside (away from their families) but not necessarily under court order.<sup>274</sup> The aim of this Part of the Act was to bring under better (yet still light-touch) state control private institutions that carried out valuable public functions. The major change to the regime that existed under the 1908 Act was that the 1932 and 1937 Acts required such institutions to be registered, and to renew their registration annually.<sup>275</sup> The particulars to be included in the registration and renewal thereof were prescribed in the Children and Young Persons (Voluntary Homes) Regulations (Scotland) 1933,<sup>276</sup> but these were limited to information to be provided to rather than requirements set by the Secretary of State. The protections this offered were further limited by the fact that inspection<sup>277</sup> (the usual method of ensuring suitability of environment and a central feature of the monitoring of approved schools, remand homes and borstal institutions) was not compulsory for voluntary homes but instead was at the discretion of the Secretary of State.<sup>278</sup> Any person appointed to inspect could enter any voluntary home and make such examinations into the state and management thereof as well, importantly, on the condition and treatment of the child or young person therein, and “a refusal to allow a person so appointed to enter the home shall, for the purposes of s. 47 of this [1937] Act (which relates to search warrants) be deemed to be reasonable cause to suspect that a child or young person in the home is being neglected in a manner likely to cause him unnecessary suffering or injury to health”.<sup>279</sup> The Secretary of State, if satisfied that there was danger to the welfare of the children or young persons in voluntary homes, had the power to issue general or special directions regarding the institution and if the directions were not complied with the Secretary of State could, if satisfied that there was danger to the welfare of some of the children,<sup>280</sup> order the removal of all of the children; the local authority was then obliged to provide the children with a place of safety until other

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<sup>274</sup> A description of the arrangements at “Quarrier’s Homes” may be found in *McFadzean v Kilmalcolm School Board* (1903) 5F 600 at pp. 608-611.

<sup>275</sup> Excluded from these provisions were institutions to which individuals were sent under the Mental Deficiency and Lunacy (Scotland) Act, 1913, on which see Section D below.

<sup>276</sup> SR&O 1933 No 923 (S. 60), reproduced in Trotter, pp. 330 et seq. These were replaced as from 15<sup>th</sup> October 1952 by the Voluntary Homes (Return of Particulars) (Scotland) Regulations 1952, SI 1952/1836 .

<sup>277</sup> 1932 Act, s. 41; 1937 Act, s. 98.

<sup>278</sup> This led to some criticism of the 1932 Act: Cowan, p. 6.

<sup>279</sup> 1932 Act, s. 41(3); 1937 Act, s. 98(3).

<sup>280</sup> Trotter at p. 182 wondered if “some children” might include “one child”.

arrangements could be made.<sup>281</sup> The extremity of the outcome suggests that removal would be activated only in extreme circumstances and, if this is so, the reality of the protection offered is likely to have been of limited effect. And it is very noticeable that this remedy is not available in respect of other institutions than voluntary homes.

And yet inspection, if not primarily designed as such, did offer an opportunity to ensure the wellbeing of individual children, for by its very nature it recognised that children being accommodated away from home were especially vulnerable to harm at the hands of those charged with their care – either through deliberate action or neglect or carelessness. Cowan in discussing these provisions pointed out that:

The possibility of inspection under Part III [of the 1932 Act] may be fruitful from the constructive side as modern inspection generally is, even more so than from what one would hope would be rare in incidence, the possible detection of abuse and cruelty.<sup>282</sup>

The assumption of rarity of abuse would not have been unusual at the time, but the mind-set it represents suggests that inspectors might not have been equipped to recognise anything other than the most obvious examples of abuse or cruelty, or manifest failings in the institutional environment.

Inspection of approved schools (where abuse and cruelty was no less likely) was, in contradistinction to inspection of voluntary homes, compulsory and the opportunities for discovery ought to have been, for that reason, all the greater. Yet it is not to be imagined that abuse and cruelty at approved schools was thought more likely than at voluntary homes: rather, these provisions on voluntary homes suggest only a reticence in expanding state interference in the running of private (charitable) institutions. It was not until 1947 that Regulations set out rules for the management and monitoring of voluntary homes<sup>283</sup> (the post-War Government being rather less

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<sup>281</sup> 1932 Act, s. 42; 1937 Act, s. 99.

<sup>282</sup> Cowan, p. 76.

<sup>283</sup> The Children (Boarding Out etc) (Scotland) Rules and Regulations 1947, SI 1947 No. 2146 ) (rr 23-28); replaced and expanded by the Administration of Children's Homes (Scotland) Regulations 1959, SI 1959 No. 834, discussed in Part Two of this Report.

committed to keeping state and private provision of care at arms' length than its pre-War predecessors were).

### *Remand Homes*

Remand homes trace their origins to the Youthful Offenders Act 1901<sup>284</sup> which enabled courts to “remand”<sup>285</sup> a child 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,<sup>286</sup> 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 1932 Act 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,<sup>287</sup> “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”.<sup>288</sup> Kilbrandon perceived the remand home as a place for the administration of “a short, sharp lesson”.<sup>289</sup> The key, therefore, is the temporary (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.<sup>290</sup> Any institution other than a prison could be authorised as a remand home, but it was not until 1949 that such homes required certification.<sup>291</sup> Inspection was, prior to then, the only monitoring mechanism. Section 109(3) of the 1908 Act<sup>292</sup> required that the Secretary of State cause remand homes to be inspected and for children and young persons resident therein to be

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<sup>284</sup> 1 Edw. 7 c. 20.

<sup>285</sup> This was an English term, to be construed in Scotland as adjourning proceedings and detaining in custody during the adjournment (1908 Act, s. 132(14)).

<sup>286</sup> 1908 Act, s. 108.

<sup>287</sup> Subsequently re-enacted as s. 81 of the 1937 Act.

<sup>288</sup> Trotter, p. 148.

<sup>289</sup> Kilbrandon Committee Report at para. [56].

<sup>290</sup> 1932 Act, s. 33(3); 1937 Act, s. 81(3).

<sup>291</sup> Criminal Justice (Scotland) Act, 1949, s. 51(1), discussed in Part Two of this Report.

<sup>292</sup> Subsequently re-enacted as s. 82(3) of the 1937 Act (and later amended by the 11<sup>th</sup> Schedule to the Criminal Justice (Scotland) Act, 1949).

visited. The Remand Home (Scotland) Rules, 1933<sup>293</sup> 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 council. “Such premises may include Homes for boys and girls and other similar institutions and private dwelling houses. Public assistance institutions 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<sup>294</sup> 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.”

12. Instruction and practical work were required to be given (with only light work for inmates under 12 years of age).

<sup>293</sup> SR&O 1933 No 1024 (S. 58). They are reproduced in Trotter at pp. 326 et seq.

<sup>294</sup> The establishment of which had been recommended by the Morton Committee.

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". "(b) 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 rules of corporal punishment at approved schools (set out below).<sup>295</sup> 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.

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).

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<sup>295</sup> Rather more specificity was set out in the Remand Home (Scotland) Rules, 1946.

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.” Again in contradistinction to the rules for approved schools, there is no explicit requirement that punishments be recorded, but corporal punishment in practice may have been regarded as an “event of importance” requiring to be logged.

These rules remained in force until replaced by the Remand Home (Scotland) Rules 1946, on 1<sup>st</sup> July, 1946.<sup>296</sup>

### *Borstals*

Borstal institutions were first subject to regulation as a national strategy by the Prevention of Crime Act, 1908<sup>297</sup> 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 time were not, to emphasise rehabilitation and technical training, with the aim of preparing young offenders for release as useful members of society.<sup>298</sup> As amended (and applied to Scotland) by the Criminal Justice Administration Act, 1914,<sup>299</sup> 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

<sup>296</sup> SR&O 1946 No. 693. (vol XI, p 667 of Revised SR&Os). These will be described in Part Two of this Report.

<sup>297</sup> 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.

<sup>298</sup> 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.

<sup>299</sup> 4&5 Geo. 5, ch. 58.

1914 for between two and three years.<sup>300</sup> The provisions of the Children Act 1908 applied only to persons under 16 or, after the 1932 Act, under 17, while 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.<sup>301</sup> A person detained in a Borstal institution could be released on license, but thereafter recalled whenever this was “necessary for his protection”.<sup>302</sup> 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.<sup>303</sup> 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.<sup>304</sup> Amongst the duties imposed on visiting committees were the following:

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 concluded there was “a reasonable probability ... that the inmate will abstain from crime and lead a useful and industrious life”.<sup>305</sup>

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<sup>300</sup> Criminal Justice Administration Act, 1914, s. 11(3), amending s. 6(2) of the Prevention of Crime Act, 1908.

<sup>301</sup> Prevention of Crime Act, 1908, s. 1(1).

<sup>302</sup> Prevention of Crime Act, 1908, s. 6.

<sup>303</sup> Prevention of Crime Act, 1908, s. 8.

<sup>304</sup> Prevention of Crime Act, 1908, s. 4(2).

<sup>305</sup> 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

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.

These provisions relating to Borstal institutions applied in Scotland until the coming into force of the Criminal Justice (Scotland) Act, 1949.<sup>306</sup>

#### **SECTION D: Detention Under the Mental Health Legislation**

The Children Acts were 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, provided comparable mechanisms to those in the Children Acts for the care of children and young people whose vulnerabilities were traced not to their need for protection from others but to mental illness.

Thomson and Cherry<sup>307</sup> 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.

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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.

<sup>306</sup> The regulations made under the 1949 Act were the Borstal (Scotland) Rules, 1950, discussed in Part Two of this Report.

<sup>307</sup> L. Thomson and J. Cherry, *Mental Health and Scots Law in Practice* W. Green, (2<sup>nd</sup> edn. 2012) at [4.01].

That second function was less prominent, but not non-existent, in the early years of the 20<sup>th</sup> Century.

The public asylum system in Scotland commenced with the Lunacy (Scotland) Act, 1857,<sup>308</sup> 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.<sup>309</sup> That Act also utilised that 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<sup>310</sup> provided additional rules, drawing a distinction between educatable and uneducatable children suffering from mental deficiencies.

Much of the earlier law was swept away by the Mental Deficiency and Lunacy (Scotland) Act 1913,<sup>311</sup> the first major piece of legislation dealing with mental health in the 20<sup>th</sup> 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, and 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

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<sup>308</sup> 20 & 21 Vict. c. 71.

<sup>309</sup> 29 & 30 Vict. c. 51.

<sup>310</sup> 6 Edw. 7, c. 10.

<sup>311</sup> 3 & 4 Geo. 5, c. 38.

“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.<sup>312</sup> When a person under 21 was so placed, the Board could resist request by the parents for the patient’s discharge.<sup>313</sup> If a patient was placed under guardianship then the person named as guardian acquired the powers of a father over a pupil child,<sup>314</sup> 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,<sup>315</sup> 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.<sup>316</sup> In relation to children between 5 and 16 who were “defectives”<sup>317</sup> 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.<sup>318</sup>

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.<sup>319</sup>

This was, of course, in addition to the crime against children and young persons in s. 12 of the 1908 and 1937 Acts.

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<sup>312</sup> 1913 Act, ss. 4 and 5.

<sup>313</sup> 1913 Act, s. 13(1). Continued detention was subject to appeal to the sheriff.

<sup>314</sup> 1913 Act, s. 11(2). This did *not* include the power of corporal punishment: see below.

<sup>315</sup> 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).

<sup>316</sup> 1913 Act, s. 39.

<sup>317</sup> 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.

<sup>318</sup> 1913 Act, s. 2.

<sup>319</sup> 1913 Act, s. 45.

The risk of sexual abuse was in the forefront of the minds of the legislators, and s. 46(1) 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 recognised 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.<sup>320</sup>

The Mental Deficiency and Lunacy (Scotland) Act (General Board’s) Regulations, 1914<sup>321</sup> 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,<sup>322</sup> for their management<sup>323</sup> and for the inspection of premises and the visitation of patients<sup>324</sup> (including, interestingly, giving the patient the opportunity to make complaints).<sup>325</sup> 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.”<sup>326</sup> Managers were obliged to visit the institution and draw up an annual report.<sup>327</sup>

The Regulations also provided for “The Care and Treatment of Defectives under Guardianship”.<sup>328</sup> 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 practicable is done for the improvement of the patient’s mental

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<sup>320</sup> 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.

<sup>321</sup> 22<sup>nd</sup> May 1914, SR&O 1914 No. 705 (S.59).

<sup>322</sup> 1914 Rules, rr. 32 et seq.

<sup>323</sup> 1914 Rules, rr. 52 et seq.

<sup>324</sup> 1914 Rules, rr. 102 et seq.

<sup>325</sup> 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.

<sup>326</sup> 1914 Rules, r. 67.

<sup>327</sup> 1914 Rules, rr. 60 and 70.

<sup>328</sup> 1914 Rules, rr. 145 et seq.

and physical condition".<sup>329</sup> 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.<sup>330</sup>

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;
  - 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.<sup>331</sup>

<sup>329</sup> 1914 Rules, rr. 145 and 155, regarding private patients and "aided patients" respectively.

<sup>330</sup> 1914 Rules, r. 161.

<sup>331</sup> 1913 Act, s. 40.

The Mental Deficiency and Lunacy (Scotland) Act (Secretary for Scotland's) Regulations, 1914<sup>332</sup> 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 1913 Act was amended by the Mental Deficiency (Scotland) Act, 1940, and then repealed and replaced by the Mental Health (Scotland) Act, 1960,<sup>333</sup> brought fully into force on 1<sup>st</sup> June 1962.<sup>334</sup>

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<sup>332</sup> May 22, 1914, SR&O 1914 No. 706 (S.60).

<sup>333</sup> 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.

<sup>334</sup> Mental Health (Scotland) Act, 1960 (Appointed Day No. 3) Order 1962 (SI 1962 No. 516).