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

By

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Table of Contents

PART TWO: 1948 TO 1968

SECTION A: THE LEAD UP TO THE CHILDREN ACT, 1948
The Clyde Report 1946
The Children Bill 1948

SECTION B: THE CHILDREN ACT, 1948
Introduction
Structural Matters
The Boarding-out Preference
Local Authority Duty to Receive Children into their Care
Local Authority Assumption of Parental Rights

SECTION C: REGULATORY STRUCTURES GOVERNING THE
ACCOMMODATION OF CHILDREN 1948-1968
Regulation of Boarding-out and Fostering
  Children (Boarding-out etc) (Scotland) Rules and
  Regulations, 1947
  The Boarding-out of Children (Scotland) Regulations,
  1959
Regulation of Private Fostering
Regulation of Children’s Homes
  Local Authority Homes
  Voluntary Homes
  Administration of Children’s Homes (Scotland)
  Regulations, 1959
Approved Schools
  Approval of Approved Schools
  Management of Approved Schools
Remand Homes, Remand Centres and Detention Centres
SECTION D: ACCOMMODATION AWAY FROM HOME FOR EDUCATIONAL OR HEALTH REASONS

Independent Boarding Schools
   The Coming of Compulsory School Education
   Boarding Schools as Private Foster Care Providers
   Registration of Independent Schools
   Administration of Independent Boarding Schools

Homes for the Disabled
Detention under the Mental Health Legislation
   Registration
   Detention
   Special Offences in Relation to Mental Health Patients
SECTION A: The Lead-up to the Children Act, 1948

The lead-up to the Children Act, 1948 from the perspective of English law, including the political decisions behind it, has been carefully traced by Professor Steven Cretney in “The State as Parent: The Children Act 1948 in Retrospect”.¹ The route was a little different in Scotland, but the end result – a UK statute applicable in both England and Wales, and Scotland² – was much the same.

The Clyde Report 1946

As was seen in Part One of the present Report, by the outbreak of the Second World War, the provisions in Scotland under which children and young people could be accommodated away from home by state action were multifarious, and the regulations governing the various types of accommodation diverse and, in places, inconsistent. In the dying days of the War in April 1945, the British Government established two committees of inquiry, one for Scotland and one for England and Wales. The Scottish Committee on Homeless Children, under the chairmanship of James L. Clyde, KC,³ was given a remit (rather wider than its title suggests) “to inquire into the existing methods of providing for children deprived of normal home life, and to consider what further measures should be taken to compensate them for lack of parental care”. The last eight words, curiously formulated, are to be noted: they do not of course refer to monetary compensation, but (as we will see) presage the artificial replacement of “normal home life” as the main aim of state intervention in family life. The Clyde Committee produced its Report⁴ in 1946, at the same time as the English equivalent, the Report of the Committee on the Care of Children (the

² Northern Ireland was excluded from the operation of the 1948 Act: 1948 Act, s. 62(3).
³ Later Lord Advocate and then Lord President of the Court of Session.
⁴ Hereinafter “the Clyde Report", (1946, Cmd 6911).
Curtis Report,\(^5\) was published and both Reports made substantially similar recommendations. These recommendations to a large extent formed the basis of the Children Act, 1948. This Act did not amend the law relating to juvenile courts, as contained primarily in the Children and Young Persons (Scotland) Act, 1937, nor indeed the outcomes available under that Act. Its major aim was to simplify the regulatory mechanisms under which children and young persons were accommodated away from their parents, whether under court order or otherwise. It achieved this by replacing the multifarious forms of governmental control over such accommodation with unified control by local authorities; in addition it imposed a positive obligation on local authorities to be proactive and to seek out children in need of care and protection.

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

The Clyde Committee concluded:

\(^5\) 1946, Cmd 6922.
We consider that the time has now come to sweep away the existing anomalies and to recognise the importance of the welfare of children as a distinct function of the Local Authority, and not as an incidental function of a group of separate committees of different Local Authorities primarily concerned at present with other functions.\(^6\)

To achieve this, the Report recommended:

\[ T \] hat in each County and large Burgh there should be established a Children’s Care Committee which would administer the whole of this field. This Committee should have transferred to it all the functions at present exercised by the Public Assistance and Public Health Committees regarding these children. This would no longer then be regarded as an incidental matter in Poor Law or Local Health administration. Further, to the Town Councils of large Burghs and to the County Councils of Counties, and through them to their respective Children’s Care Committee, would be transferred all the functions at present exercisable by Education Authorities in relation to care and protection cases under the Children and Young Persons (Scotland) Act, 1937.\(^7\)

Underpinning that structural simplification was a need to focus on the importance of “family”, but the Clyde Committee understood by this concept not “family life” as we today, steeped in the language of Article 8 of the ECHR,\(^8\) understand that term but simply as an environment away from “the large institution”. In a paragraph headed “Value of the Family”,\(^9\) the Clyde Report said this:

The lesson which above all else the war years have taught us is the value of home. It is upon the family that our position as a nation is built, and it is to the family that in trouble and disaster each child naturally turns. It is the growing awareness of the importance of the family which has largely brought into prominence the problem of the homeless child. How then is the family to be re-created for the child who is rendered homeless?

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\(^6\) Clyde Report, para [80].
\(^7\) Clyde Report, para [80].
\(^8\) “Everyone has the right to respect for his private and family life, his home and his correspondence”.
\(^9\) Clyde Report, para [43].
“Re-creation” of the family was not seen, as it would be today, in terms of maintaining contact between the child and his or her birth family in order to work towards rehabilitation of the child with that family – rather, it was seen in terms of ensuring that a substitute family, in a private home, was provided for the child who could not remain with his or her parents. In the words of the Clyde Report:

The answer is certainly not to be found in the large Institution. That is an outworn solution, and some of them have left a bad impression upon the Members of the Committee who have visited them. The uniformity, the repression, the impersonality of these cold and forbidding abodes afford no real consolation to the children who grow up in them, and constitute a sorry preparation for entry into a world where the child must ultimately fend for itself.

Undoubtedly the solution of the problem is the good foster parent. By this means the child should get the nearest approximation to family life, and receive that individual treatment whereby it secures the necessary opportunity to build up its own personality and equip itself for the transition to independence and self-reliance in later years.11

State provision of substitute families, which would replace the unsatisfactory families from which children or young persons had been removed, was therefore seen as the primary solution to lack of parental care, underpinned by the belief that “parenting” in its fullest sense would be provided by foster parents. The Report’s preference for foster parents over institutional care was underpinned by a belief, which may strike the modern reader as naïve, that “parental affection”12 will always be an inherent part of the care offered by those fostering children. The assumption permeates the Report that a child once “homeless” (including through state removal of the child from its home due to parental inadequacy) will require to remain in the care of the state until adulthood. It is striking that there is so little in the Clyde Report about working with the child’s own family to allow its return, other than the substantially qualified assertion that “every encouragement should be given to … a reunion of the

10 Frustratingly, this sinister word is given no further elaboration.
11 Clyde Report, paras [44]-[45].
12 Clyde Report, para [83].
family (if the parents are satisfactory).\footnote{Clyde Report, para [105].} Nor is there anything about parental contact with children accommodated away from their parents: the aim is plainly to insulate the child from the harmful environment from which he or she has been removed. This also explains why there is no indication in the Clyde Report that care with the child’s wider (natural) family was a strategy to be considered, far less preferred. The sea-change in attitudes towards kinship care had come about rather earlier than the Clyde Report. While boarding out with “fit persons” had originally been conceived as being with other members of the child’s own family,\footnote{As was seen in Part One of the present Report, the Prevention of Cruelty to, and Protection of, Children Act, 1889 created the “fit person” order that committed the child to the care of “a relation of the child, or some other fit person named by the court”. This was repeated in the Prevention of Cruelty to Children Acts, 1894 and 1904, and finally in s. 21 of the Children Act 1908.} that had disappeared with the enactment of the Children and Young Persons (Scotland) Act 1932, and was not to reappear in the 1937 (or subsequent) legislation. Since then the aim of the legislation was to ensure that the child would be provided with family life by the state: just not with their own family. Many of the Clyde Committee’s recommendations focus, therefore, on ensuring the highest quality of foster parents, and subjecting foster parents to appropriate (by which they meant not intrusive) state supervision.

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

Many of the Local Authorities board out children on crofts. Some witnesses have condemned such a practice as unsuitable and we feel there is substance in their criticism. While fully appreciating what has been accomplished in the past through this valuable service, and the opportunity for home life which has been afforded to homeless children on some crofts, we think that, under modern conditions, radical changes are necessary. We strongly deprecate the boarding out of city children on crofts in very remote areas where they have no real contact with other children, where they have no facilities for learning a trade which is congenial to them, or where the living conditions are bad… Investigation of conditions in Highland crofts has shown
that the lack of sanitation and the absence of facilities for training the children in cleanliness and personal habits make it inadvisable to board out children in remote crofts in the Highlands, where economic conditions are such that the practice of taking children seems to be regarded as an industry, and the labour obtained therefrom often enables the guardians to maintain their crofts. Instances were found where children on crofts were overworked by their foster parents.\textsuperscript{15}

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

However great the response to the improvement of [the foster parent] service, there will always be cases in which the foster parent or the adopted parent is not the best solution. It is for these cases primarily that Voluntary and Local Authority Homes will be required. Apart altogether from the group of children who fall into the category of offenders … there will always be a certain number of children who, owing to their past treatment or environment, are specially difficult, and with whom for that reason a foster parent cannot effectively cope. There may be children belonging to a large family which, because of its size, cannot be boarded out in one foster parent’s home…

Further, there will always be a certain number of homeless children who need special medical or other treatment before they can be boarded out with foster parents, or whose condition may require their being retained under constant medical supervision for some time. For all these cases the Voluntary or Local Authority Home will be required. Apart from all other considerations, there will in every locality be need of a Home or Institution temporarily to house and protect children for whom foster parents are not immediately available and to which children may be sent in the first instance for medical examination prior to being placed with foster parents.\textsuperscript{16}

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

\textsuperscript{15} Clyde Report, para [73].
\textsuperscript{16} Clyde Report, para [82].
The Committee consider that the boarding out Authority or the Authority in charge of the Home should have a discretion to retain the child, subject always to a right of appeal to the Secretary of State or to the Sheriff against a decision to retain.17

In sum, the main recommendations made in the Clyde Report were (i) that there should be a single government department with oversight of the whole system, (ii) that the functions of the poor law authorities, education and health authorities should be transferred to a children’s committee of each local authority, (iii) that “a good foster parent system” should be encouraged as the best solution, with better selection and inspection of foster parents, (iv) that the boarding out (local) authority should be ultimately responsible for the child, (v) that boarded out children be visited (by officials)18 every six months, (vi) that the existing control of voluntary homes be extended to all institutional homes in which children may reside, and (vii) that large institutions be divided into smaller units.19

The Children Bill 1948

The Children Bill was introduced in the House of Lords, and at Second Reading20 the Debate was led by the Lord Chancellor (Viscount Jowitt), who commenced his speech with the recognition, which had underpinned the 1908, 1932 and 1937 Acts, that the child’s environment was a primary factor in both neglect and delinquency cases.21 The question then became: “how can we so arrange matters as to save those children who have not the benefit of a normal home life from suffering that disadvantage throughout their whole lives?”22 The two main recommendations of the Curtis and Clyde Committees, (i) that the local authority should be the primary state body for dealing with all such children, with each local authority being required to establish a children’s committee and to appoint a children’s officer and (ii) that

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17 Clyde Report, para [105].
18 Parental visitation of boarded out children or children accommodated in institutions was not considered in the Clyde Report.
19 Clyde Report, para [113].
20 Curiously, forty years to the day after the introduction (in the House of Commons) of the Bill that became the Children Act 1908.
boarding out of children and young persons in foster homes should be statutorily recognised as the preferred solution for children and young persons requiring to be accommodated away from their parents, were both accepted. In relation to the structural reforms, the Lord Chancellor painted this attractive picture:

The children's committee are to appoint a children's officer for the area of each local authority, with a possible right of combination of more than one area. The children's officer is to be employed on no other duties except looking after children, save with the express consent of the Secretary of State. It is for the local authorities to give the children's officer adequate staff. I should suppose that in many cases—I think I might say in most cases—the children's officer would be a woman, and she would require not merely academic qualifications, skill and administrative capacity but, beyond everything else, enthusiasm, fondness for children, and the type of personality which would enable her to be looked upon by the children as a real friend. Then she will be able to restore to the children the sense of being real members of the community and not unwanted members, as these children are so apt to feel they are. Of course, she cannot know all the children in care, and she must, therefore, have officers under her who will be allocated to specific groups.23

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

I am glad to say that the conclusion has been reached, which I feel sure is right, that, of all the methods, the best is that of boarding the child out, if only a suitable home can be found in which the child can become a member of the family. So long as a suitable family is found, I feel quite certain that that method is a better one than placing the child in even the best form of institution. But if such a home cannot be obtained, then the local authority can use either their own residential homes or the homes of voluntary

23 HL Deb. 10 February 1948, vol. 153, cols. 917-918.
associations. As things are to-day, I am afraid that residential establishments will remain necessary for a long time. I think it regrettable, because I do not believe one can do better than arrange for the children to become members of an ordinary family, sharing the normal life of the community.\textsuperscript{24}

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

Special emphasis is laid on boarding out in private households, because this is a method which gives the nearest equivalent to a normal home background. The extension of this system under adequate safeguards will probably be the first major task of the newly appointed children's officers. Where boarding out does not seem appropriate or practicable for the time being, the local authority may provide homes of their own or place children in voluntary homes. In any event, whether the children are boarded out in public authority homes or with voluntary organisations, my right hon. Friend the Secretary of State will make regulations governing the treatment of the children under those conditions.\textsuperscript{25}

And a Scottish MP, Commander Galbraith, said this:

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

\textsuperscript{24} HL Deb. 10 February 1948, vol. 153, cols. 919-920.
\textsuperscript{25} HC Deb 7 May 1948 vol. 450 col, 1614.
them are boarded out with foster parents and the remaining 400 are accommodated in children's homes.\textsuperscript{26}

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

The only other point I wish to touch upon in the general provisions of the Bill concerns the problem of boarding out. I agree with the views of the Curtis Committee up to a point, that at its best this is far and away the best method of caring for these children. But I think that "at its best" is a very important qualification. Once you begin to get below the best, you are exposing the child to very serious dangers…I do not place very great hopes on a sufficient number of the right type of families being found.\textsuperscript{27}

Much of the debate in the House of Commons concerned the structural provisions and the question (of minimal relevance in Scotland) of whether the Home Office was the appropriate Government department to have central oversight.\textsuperscript{28} Another issue discussed extensively at Committee Stage in the House of Commons was how to ensure that children were placed in homes of their (or their parents’) religious persuasion.\textsuperscript{29} There was however this troubling acknowledgement:

[T]here has been, on the part of too many voluntary bodies and public authorities, a failure to give to those under their care the personal sympathy and human understanding so necessary to the wellbeing of children who lack the love and affection of their parents.\textsuperscript{30}

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

\textsuperscript{26} HC Deb 7 May 1948 vol. 450 cols. 1619-1620.
\textsuperscript{27} HL Deb. 10 February 1948, vol. 153 col. 960.
\textsuperscript{28} See the Second Reading Debate at HC Deb. 7 May 1948 vol 450 cols 1609 – 1692; Report Stage at HC Deb. 13 April 1948, vol. 155 col. 42.
\textsuperscript{29} See, for example, HC Deb. 28 June 1948 vol. 452 col. 1850.
\textsuperscript{30} HC Deb 7 May 1948 vol. 450 col. 1611.
SECTION B: The Children Act, 1948

Introduction

The Children Act, 1948 Act did not replace the Children and Young Persons (Scotland) Act, 1937. Rather, it amended that Act in minor respects only and the processes whereby children and young persons could be accommodated away from home, and the options available – state-provided institutions, voluntary homes or foster homes – remained as before. The 1948 Act nevertheless represents a substantially increased involvement by the state in the running of the institutions, homes and placements utilised in these processes and, though by no means did it “nationalise” child care, the Act can still be seen as belonging to a group of measures introduced by the immediate post-War Government predicated upon the acceptance that the state itself had responsibility for the wellbeing of its citizens, including the National Insurance Act, 1946, the National Health Service (Scotland) Act, 1947, the National Assistance Act, 1948, and the Legal Aid and Solicitors (Scotland) Act, 1949. As Professor Cretney has put it:

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

Structural Matters

While the structural amendments made in the period before 1948 mostly concerned decision-making processes (particularly within the court system) the structural reforms in the 1948 Act, contained primarily in Part VI thereof, related more to how the services required as a result of court and other administrative decisions were to

31 11 & 12 Geo. VI, c. 43.
be organised. Section 39 obliged all local authorities\(^{33}\) to establish “a children’s committee for the purposes of their functions under Parts I (infant life protection), IV (offences) and V (approved schools, remand homes and committal to care) of the Children and Young Persons (Scotland) Act, 1937” and under the 1948 Act itself.\(^{34}\) These committees were to have no function other than these (except with the consent of the Secretary of State).\(^{35}\) A “children’s officer”\(^{36}\) was also to be appointed by each local authority,\(^{37}\) and that person was not to be employed by the local authority in any other capacity.\(^{38}\) The children’s committees, in the event, operated for only 20 years, before being subsumed into the wider social work departments of local authorities set up in 1968;\(^{39}\) the children’s officers’ role was at the same time taken over by the new Directors of social work.

In addition, there was established, for the purposes of advising the Secretary of State, an Advisory Council on Child Care for Scotland.\(^{40}\) The Under-Secretary of State for the Home Department had said this:

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

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\(^{33}\) In Scotland then defined as “the councils of counties and large burghs”: 1948 Act, s. 38(2).

\(^{34}\) 1948 Act, s. 39(1). Two or more local authorities could organise a combined committee to serve each: s. 40(5).

\(^{35}\) 1948 Act, s. 39(2).

\(^{36}\) A history of the development of children’s officers, and the early difficulties they found in establishing their position and fighting for resources in the austere post-war world, is offered by R. Parker in “Getting Started with the 1948 Act: What Did we Learn?” (2011) 35 Adoption and Fostering 17.

\(^{37}\) 1948 Act, s. 41. The Secretary of State could approve the appointment of a person as children’s officer to more than one local authority: s. 41(3).

\(^{38}\) 1948 Act, s. 41(4). This is reminiscent of the rule subsequently applied to children’s reporters: Social Work (Scotland) Act 1968, s. 36(5).

\(^{39}\) Social Work (Scotland) Act 1968, s. 2(4) repealed the 1948 Act provisions on children’s committees, with s. 2(2) requiring each local authority to have a social work committee to perform their functions.

\(^{40}\) 1948 Act, s. 44. (An English Advisory Council was established under s. 43).
the Secretary of State in the closest touch with the realities of the work and with the latest developments in child care.  

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

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

The Boarding-Out Preference

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

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41 HC Deb. 7 May 1948, vol. 450 col. 1617.  
42 See, for example, the Scottish Advisory Council’s Memorandum on the Boarding Out of Children (1959), Memorandum on Children’s Homes (1959) and “Remand Homes: A Report of a Special Committee” (1961).  
43 1948 Act, s. 45.  
44 1948 Act, s. 46.  
45 1948 Act, s. 47.  
46 “Getting Started with the 1948 Act: What Did we Learn?” (2011) 35 Adoption and Fostering 17 at p. 27.  
47 1948 Act, s. 13(1).
was therefore the first aim, and placing a child in a home, whether local authority or voluntary, was to be an option only when boarding out was deemed not practicable or not desirable. The Secretary of State was given the power to make regulations “for the welfare of children boarded out by local authorities”. An important addition to the existing law was that these regulations were permitted to include provisions for ensuring that the household into which a child was boarded was approved. The Care and Training Regulations of 1933, which applied before then, had merely listed types of person with whom a child could not be boarded out: now all foster households were to be positively vetted. Vetting had indeed been introduced very shortly before the 1948 Act was passed, when Part C of the Care and Training Regulations, 1933 was replaced by the Children (Boarding-out, etc.) (Scotland) Regulations, 1947.

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

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

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48 In the event, this preference lasted in statutory form for only 20 years, with s.21(1) of the Social Work (Scotland) Act 1968 simply listing as alternatives “boarding out” and “maintaining the child in a residential establishment”.
49 1948 Act, s. 14.
50 1948 Act, s. 14(2)(b).
51 See Part One of this Report.
53 At para [4].
since the aim of boarding out is to have the child absorbed into the community.\textsuperscript{54}

One of the issues they discussed in some depth\textsuperscript{55} was the appropriate frequency of official visitation of boarded out children. Noting that differing views had been offered to them, they concluded that “four visits a year to each boarded out child should not be necessary”, if the foster parents “have been wisely chosen in the first place”. The major concern was to protect the privacy (and thereby, it was thought, willingness to serve) of foster parents, and very little attention was paid to the role of visitors investigating the wellbeing of the children being fostered. The Committee also concluded that “the possibility of returning the child to his parents, provided it is consistent with his welfare to do so, must always be present in the mind of the children’s officer”,\textsuperscript{56} but it is to be noted that this was said in the context of a discussion on the desirability of parental visits: such visits were not perceived by the Committee as particularly helpful and it was recommended that visits by parents or relatives or friends to a boarded out child should not be allowed except at the discretion of the local authority acting through its children’s officer.\textsuperscript{57} How that discretion was to be exercised was not discussed.

The 1947 Regulations were replaced by the Boarding-out of Children (Scotland) Regulations, 1959,\textsuperscript{58} partly taking account of the recommendations of the 1950 Report. Shortly thereafter the Scottish Home Department published a \textit{Memorandum on the Boarding Out of Children}\textsuperscript{59} in which it examined whether more changes were required. Many of the themes of the 1946 Clyde Report and the 1950 Scottish Advisory Council Report were repeated, suggesting that little on the ground had changed in the preceding decade. At para 6 of the 1959 Memorandum it was made manifest that fostering continued to be considered a long-term family replacement:

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\item \textsuperscript{54}At paras. [8] and [9].
\item \textsuperscript{55}At paras. [12] et seq.
\item \textsuperscript{56}At para. [31].
\item \textsuperscript{57}Ibid.
\item \textsuperscript{58}SI 1959 No. 835 (S.44). These Regulations were in turn revoked by the Boarding-out and Fostering of Children (Scotland) Regulations 1985, SI 1985 No. 1799 (coming into force on 1\textsuperscript{st} April 1986), which were replaced by the Fostering of Children (Scotland) Regulations 1996, SI 1996 No. 3263 (S 253) and the Arrangements to Look After Children (Scotland) Regulations 1996, SI 1996 No. 3262 (S 252). The current equivalents are the Looked After Children (Scotland) Regulations 2009, SSI 2009 No. 210.
\item \textsuperscript{59}HMSO, 1959: available at \url{https://archive.org/stream/op1266365-1001/op1266365-1001_djvu.txt}.
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6. Boarding-out is a great deal more than the finding of a house in which the child may be given bed and board, kept reasonably clean, and sent regularly to school. It is, in its essential meaning, the creation of a home for the child. While by happy chance a foster home may sometimes so suit a particular child that the foster home quickly replaces, or largely replaces, his own, the normal experience is that the creation of a home is a slow, deliberate process in which child, foster-parent and boarding-out officer all play their different parts. It is not an easy task for any one of the three, and least of all for the child, whose reactions in a strange and bewildering situation must be understood sympathetically by the other two.

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

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

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

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

Nevertheless, the 1959 Memorandum recognised that the situation would be different with short-term fostering:

28. Where the boarding-out is likely to be for a comparatively short period, and the return of the child to his own home almost certain, it is most desirable that regular contact with the natural parents and relatives should be maintained. It should be remembered that the parent of a child in care under section 1 of the Children Act, 1948, in respect of whom a resolution under section 2 has not been passed, continues to have all the rights of a parent
and that a local authority have no power to keep such a child in care against the wishes of a parent. Section 1(3) of the Act also requires a local authority to endeavour to secure the return of the child to the care of parents or relatives where that appears consistent with the welfare of the child.

31. An increasing proportion of children are received into care for short periods only, often until the mother returns from hospital or other domestic difficulties are overcome. These are normal children who have not been neglected. On coming into care they may be upset at first but will quickly recover their confidence if tactfully and sympathetically handled, and to this end suitable short-term foster homes, if they can be found, could make a very valuable contribution.

As a snapshot at the end of the period under consideration here, the Secretary of State for Scotland reported that, on 30th November 1968, “6,207 children were boarded-out with foster-parents (i.e., about 58 per cent of those in care)”. Details of the 1947 and 1959 Regulations are given in Section (C) below.

Local Authority Duty to Receive Children into their Care

In many respects, the developments described above simply built upon existing policies and simplified existing structures: they did not represent a major sea-change in child care practice. But right at the start of the 1948 Act there is just such a sea-change, because the effect of Part I of the Act was to impose on local authorities a wholly unprecedented duty to be proactive and not simply reactive in respect of vulnerable children. The state (through the offices of each local authority) was for the first time statutorily obliged to receive into their care any child who appeared to have no parents or guardians or who had been lost or abandoned, or whose parents or guardians were “prevented” for any reason from providing for the child’s accommodation, maintenance and upbringing: in any of these cases, the intervention of the local authority was required whenever it was “necessary in the interests of the

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60 Child Care in Scotland, 1968 (Cmd 4069) at para 24.
61 That is to say a person who appeared to the local authority to be under the age of 17.
welfare of the child”, 62 (as assessed by the local authority). This duty was significantly enhanced 15 years later when the Children and Young Persons Act 1963 63 imposed on local authorities for the first time the duty to take preventative action: local authorities were required “to make available such advice, guidance and assistance as may promote the welfare of children by diminishing to need to receive children into and keep them in care”. 64 In 1968 it was reported:

This preventive aspect of child care work has developed steadily and now forms an important function of local authorities.

Close co-operation in preventive work continues to develop between local authorities, the Department of Health and Social Security, and the voluntary organisations. Co-ordination between different social services provided by local authorities has also increased; the practice of housing departments informing children’s departments of families liable to eviction orders is spreading … [M]ore gas and electricity authorities are informing children’s departments when there is a danger that gas or electricity supplies will be cut off because of non-payment of bills. Children’s departments have thus been given more opportunities to investigate cases … and to help the families concerned. 65

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

The duty under s. 1 was held by the Court of Appeal to impose a duty to examine each case individually – it was an unlawful fettering of discretion to make policy decisions as to when such advice and assistance was and was not to be offered. 66

Once the child was in the care of the local authority, that authority was obliged to keep the child in its care so long as his or her welfare – in the opinion of the local

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62 1948 Act, s. 1(1).
63 Children and Young Persons Act 1963 (c. 37).
64 1963 Act, s. 1.
65 Child Care in Scotland, 1968 (Cmnd 4069) at paras 20-21.
authority – appeared to require it or until the child attained the age of 18 years. This did not, however, authorise the local authority to keep the child if the parent or guardian wished to take over the care of the child and they were obliged “where it appears to them consistent with the welfare of the child so to do” to endeavour to secure that the care of the child was taken over either by a parent or guardian or by a relative or friend.

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

Another major development was the way the duty of the local authority towards children in their care was formulated in the 1948 Act. Previously, those looking after children under statutory authority would be vested with the rights and powers of a parent, but parents were not (and, it is often forgotten, are not) under any statutory obligation always to act in their child’s best interests. Under the 1948 Act, for any child in the care of a local authority, “it shall be the duty of that authority to exercise their powers with respect to him so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities.” The courts, since at least 1925, had been required to regard the welfare of any child before them as their first and paramount consideration, but local authority decision-making was not subject to that requirement until the 1948 Act. The requirement to further the child’s best interests imposed on local authorities a higher level of duty than the general law imposes on parents, and this may well have been the mechanism by which the Clyde Report’s aim to “compensate” the child for lack of a normal upbringing was addressed. Development of character and abilities was further enhanced by the provision that permitted local authorities to meet the expenses of

67 1948 Act, s. 1(2). Interestingly, the age of 18 as the limit of local authority obligation had been suggested by the Clyde Committee while the (English) Curtis Committee had suggested the age of 16: see HC Deb 7 May 1948, vol. 450 col. 1685, per Thomas Fraser, Under-Secretary of State for Scotland. In general under the Act, “child” was defined as a person under the age of 18 years: s. 59(1).
68 1948 Act, s. 1(3).
69 1948 Act, s. 5, amending s. 80 of the 1937 Act.
70 That consent remained necessary in respect of children and young persons currently subject to probation orders or supervision orders.
71 1948 Act, s. 12(1).
education and training of young persons under 21 who were previously in the care of the local authority and, later, to visit, advise, “befriend” and exceptionally give financial assistance to anyone between the ages of 17 and 21 who had previously been in their care. All these provisions amount to a fundamental shift in state responsibility and local authorities, since the 1948 Act came into force, have been obliged to seek to further the child’s best interests in all the decisions they make in respect of the child. This obligation suffered one limitation in its application since children subject to approved school orders – who would under such orders no longer be considered in the care of the local authority (either under s. 1 or after a parental rights resolution, which came to an end on the making of such an order) – were excluded. The duty owed to the child or young person by the managers of the school remained as it always had been, that is to say based on parental duty. Local authority care also ended if the care of the child was taken over by the Minister of Pensions, or the child became subject to the provisions of the mental health legislation.

Local Authority Assumption of Parental Rights

A not altogether welcome development in the 1948 Act was the enactment of a process whereby parental rights in respect of any child in the care of a local authority (originally, under s. 1 of the 1948 Act) could be assumed by that local authority simply on its passing a resolution to this effect (the so-called “parental rights resolution”). There were antecedents in English law, but none in Scots law, to institutions taking over parental rights without court process. The Poor Law Act 1889 had allowed guardians of poor law unions (which did not exist in Scotland) who

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72 1948 Act, s. 20, amended by s. 46 of the Children and Young Persons Act 1963. Section 47 thereof authorised local authorities to guarantee deeds of apprenticeship and articles of clerkship.
73 Children and Young Persons Act 1963, s. 58.
74 1948 Act, s. 6(3).
75 1937 Act, s. 79(4).
76 1948 Act, ss. 7 and 8.
77 And later under other statutory provisions also: see A Wilkinson and K Norrie Parent and Child (1st edn. 1993) at p. 420. Children committed to the care of a fit person under the 1937 Act could not be subject to a parental rights resolution: 1948 Act, s. 6(3)(b).
maintained a deserted child to “resolve that such child shall be under the control of the guardians until it reaches the age, if a boy, of 16, and if a girl of 18 years”. Parents could seek the overturning of this resolution by making a “complaint” to a court and showing that the child was not deserted or that “it is for the benefit of the child that it should be either permanently or temporarily under the control of such parent, or that the resolution of the guardians should be determined”, and if so the court “may make an order accordingly … and the guardians shall cease to have the rights and powers of the parent as respects the child”. This process, re-enacted as s. 52 of the (English) Poor Law Act, 1930 which transferred the power to pass such resolutions to local authorities, is clearly the model used for the parental rights resolution, which was applied to Scotland as well as England and Wales in the UK Children Act, 1948. Interestingly, it was not a model that had found favour with the (English) Curtis Committee:

We do not favour the assumption of parental rights by a local authority under Section 52 of the Poor law Act 1930, by mere resolution, without an initial application to a Court. We think it objectionable (even though in practice the Section may have worked satisfactorily or at any rate without criticism) that the rights of a parent or other guardian should be extinguished by a mere resolution of a Council. Even if extra publicity and work were involved in court proceedings, we are of opinion that they would be more than counterbalanced by the value of an impartial and detached judicial inquiry at the outset directed to the paramount welfare of the child.79

The matter, unsurprisingly, was not discussed by the Clyde Committee and the rejection of the Curtis objections meant that a process, conceptually indefensible in England,80 became part of Scots law in the UK-wide Children Act, 1948. For almost fifty years, therefore,81 all local authorities in Scotland had the power to assume parental rights over children in their care simply by making a resolution to that effect. Parents could oppose this resolution, though only subsequent to its passing, and on parental opposition being intimated in writing (within one month) the resolution

79 Curtis Committee Report, para [425(ii)].
81 The process was re-enacted, with only minor modifications, in the Social Work (Scotland) Act 1968, s. 16, before being abolished by the Children (Scotland) Act 1995.
(which took effect immediately it was made) would fall 14 days after that intimation unless the local authority sought the sheriff’s authority for the resolution to continue. The sheriff could allow the resolution to continue only if he were “satisfied that the child had been, and at the time when the resolution was passed remained, abandoned by the person who made the objection or that that person is unfit to have the care of the child by reason of unsoundness of mind or mental deficiency or by reason of his habits or mode of life.”

If the parents consented to the resolution, or did not challenge it on time, parental rights were transferred to the local authority even in the absence of any court order, and the parents lost the right to resume the care of their child under s. 1(3) (and indeed the right to claim custody).

SECTION C: Regulatory Structures Governing the Accommodation of Children
1948 – 1968

Most of the regulatory provisions discussed in Part One of this Report governing children accommodated under the auspices of the state continued to apply after the passing of the 1948 Act, but they were gradually replaced. The period under review in this Part is marked by a noticeable increase in the detail of the regulatory provisions, as well as a new (if at first limited) focus on the needs of the individual child.

Regulation of Boarding-out and Fostering

In the period under consideration in this Part of this Report, boarding-out and fostering was subject to two consecutive sets of rules, made in 1947 and 1959.

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82 1948 Act, s. 2(3).
83 McGuire v McGuire 1969 SLT (Notes) 36 (OH); Beagley v Beagley 1984 SC(HL) 202.
Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947

On 20th October 1947, Part C of the Care and Training Regulations, 1933, which had until then governed the boarding-out of children with foster parents, was revoked and replaced by the 1947 Regulations, which also covered, to some extent, the accommodation of children in institutions. The 1947 Rules and Regulations made some effort to address the issue identified in the Clyde Report of ensuring the suitability of foster carers, but other than that contain no direct prohibition on boarded-out children being put to work by their foster-parents in crofts and the like. They provided in relevant part as follows:

2. “Foster-parent” was defined to mean “a husband and wife, or a woman, with whom a child is boarded-out by a local authority”.

Single men, or unmarried couples (of any gender mix) were therefore unable to act as foster-parent. The assumptions were clearly that a man alone was likely to be motivated by desires not in keeping with children’s welfare, and that couples who were unmarried would give the wrong moral message to impressionable children.

4. “Where a local authority become responsible for the care of a child apart from his parents they shall make arrangements for boarding him out as soon as possible with a suitable foster-parent, unless for some special reason they are satisfied that it is not desirable to do so.”

This created a boarding out presumption a year before it appeared in primary legislation and gave effect to the recommendation in the Clyde Report that boarding-out should if possible be preferred to institutional care.

7. “A local authority shall satisfy themselves by all necessary enquiries that any person whom they propose to select as a foster-parent for the care of boarded-out children is of good character and is in all respects fit to look after the health, education and general well-being of children.”

The selection of foster-parents was, as the Clyde Report had recommended, substantially tightened from what had gone before by requiring the local authority to

84 SI 1947 No. 2146 (S. 76).
85 Set out in Part One of this Report.
86 Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947, reg. 3.
make a positive assessment of the prospective foster-parent’s fitness, rather than simply checking that they did not come within one of the exclusions.

8. “Before boarding out a child with a foster-parent, the local authority shall satisfy themselves that the foster-parent is a suitable foster-parent for that child”.

The previous article focused on suitability in general and this interesting article sought for the very first time to ensure the prospective foster-parent would be able to meet the needs of the individual child being considered for boarding-out. This is an acceptance that different children have different needs. It was further provided that the local authority “shall, if possible, select a person who is of the same religious persuasion as the child or who gives an undertaking that the child will be brought up in accordance with that religious persuasion.”

9. “So far as reasonably practicable, children of the same family shall be boarded-out in the same house”.

Again, this was new and is clearly motivated by a concern for the child’s emotional wellbeing.

10. “A child shall not be boarded-out or be allowed to remain

   (1) in a house which-

      (a) is so situated or in such sanitary conditions as to be injurious or dangerous to his health;

      (b) having regard to available transport facilities, is not within reasonable distance of a school appropriate to his educational requirements;

      (c) does not permit of suitable sleeping accommodation for the child in a room properly lit and properly ventilated;

   (2) with a person who-

      (a) is in receipt of public assistance;
(b) depends for a living mainly on the payments received for boarding children;

(c) by reason of old age, infirmity, ill-health or other cause, is not fit to have care of the child;

(d) occupies or resides in a house or premises licensed for the sale of excisable liquor;

(3) in a household which includes a person who-

(a) is certified as a lunatic or as a mental defective\footnote{These were technical terms: see s. 1 of the Mental Deficiency and Lunacy (Scotland) Act 1913.};

(b) has at any time been convicted of an offence which in the opinion of the local authority renders him unfit to be associated with the child;

(c) is suffering from pulmonary tuberculosis.

(4) in any environment which is likely to be detrimental to the child”.

Much of this is a restatement of the 1933 Rules, but Paragraphs (1), (3)(c) and (4) are new and show an increased awareness of the importance of physical environment to the safe development of children. That a child was not to be “allowed to remain” if these conditions existed suggests an on-going monitoring obligation on the part of the local authority.

11. “(a) Unless they are of the same family not more than three children shall be boarded-out, or allowed to remain, in the same house at the same time.

(b) A child shall not be boarded-out in a house where more than three other children reside unless one of them is a brother or sister of the child to be boarded-out.

(c) If the total number of children in a house subsequently exceeds four, a boarded-out child, not being a brother or sister of another child in the home, shall forthwith be withdrawn.”
12. The child was to be provided with suitable clothing and footwear. No such requirement had appeared in the 1933 Rules.

13. “(a) Where a local authority board-out a child, they shall send immediately to the education authority of the area in which the child is boarded-out particulars of the child’s full name, age and religion and of any bodily or other condition that may require special attention, his Medical and Educational Record Card and also the name and address of the foster-parent with whom he has been boarded-out.

(b) They shall also in January of each year furnish each education authority in whose area children are boarded out by them with a list giving the full name, age and religion of each child and the name and address of his foster-parent.

(c) They shall also in any case where children are boarded-out in a large burgh send a copy of the particulars required by sub-paragraphs (a) and (b) of this Article to the local authority of the large burgh.”

This article imposed a substantial increase in the record-keeping requirements, which might have permitted better monitoring of children’s progress, though in its wording it seems designed to ensure simply that the local authority did not lose track of children for whom they were responsible, and where these children were.

14. “Where a local authority board-out a child in their own area they shall arrange for his supervision by an officer of the authority duly appointed for the purpose or by some other reliable person resident in the locality where the child is boarded-out.”

15. “Where a local authority board-out a child in the area of another local authority they shall arrange for his supervision by some reliable person resident in the locality in which the child is boarded-out, and in selecting such person shall consult with the local authority of that area.”

16. “The boarding-out authority shall arrange that the person appointed to supervise a boarded-out child under Articles 14 and 15 hereof shall-

   (a) report to them within three months of the boarding-out of the child with respect to the matters (a) to (j) inclusive in Article 18 hereof;
(b) report immediately on any particular matter which in his or her view should be brought to the notice of the boarding-out authority”.

This, and the preceding two rules, required (in the way that the 1933 Regulations had not) that each boarded-out child be allocated to a named individual whose duty was to supervise the child to ensure that the foster-parents and the home chosen continued to be suitable for the child, and to draw up a report thereon at regular intervals. (Today, we would see this role as that of an allocated social worker to a looked-after child). The content of “supervision” remained, however, unspecified.

17. “The local authority shall appoint an officer with experience and knowledge of social service for the purpose of assisting them in the performance of their functions under these Rules and Regulations, including the selection of foster-parents and the visitation of children boarded out by the authority.”

18. “The officer appointed under Article 17 hereof shall visit or cause to be visited by persons with suitable qualifications and experience every child boarded-out by the authority within one month of the boarding out of the child and thereafter at intervals of not more than six months. The authority shall also arrange that such children shall be visited by members of the authority at least once a year. The officer or members, as the case may be, shall furnish to the authority a report on each visit in respect to-

(a) the suitability of the foster-parent;

(b) the general conditions of the home;

(c) the number of other children in the house, keeping in view the requirements of Article 11 hereof;

(d) the sleeping arrangements for the child and the condition of his bed, bed-clothes and night apparel;

(e) the condition of the child’s clothing;

(f) the child’s general well-being and behaviour;

(g) the progress the child has made at school;
(h) the manner in which the child is occupied outwith school hours;

(i) any complaint made by, or concerning, the child; and

(j) any other matter relative to the child’s welfare which they consider should be reported."

Again, all of this was new. Since then, local authorities have been obliged to perform not only initial vetting of foster parents but also continuous monitoring. Official visitors were required to report on the matters listed above, though there is nothing to indicate how local authorities were to respond to such reports. It may, however, be assumed that negative reports would be used in the decision-making process of approving foster-parents and sending children to them in the future. Of particular note is the provision in article 18(i) which for the first time provided the child with an opportunity to make complaints (an opportunity not afforded during this period to children in approved schools or local authority or voluntary homes.)

19. The local authority was to be responsible for arranging for the child’s medical care; medical examination was to be at six monthly intervals. This was set out with far greater specificity than was found in the 1933 Regulations.

21. “Where a local authority have reason to believe that a foster-parent is a party to a contract for the purpose of ensuring the payment to him of a sum of money upon the illness or death of the child boarded-out with him, they shall forthwith withdraw the child from the foster-parent.”

22. The Secretary of State could specify that children should not be sent to any area, or that the number of children already boarded-out in that area should be reduced.

29. “No child shall be boarded-out with a foster-parent or placed in an institution outwith Scotland except with the consent of the Secretary of State.”

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88 Rule 16 of the Approved Schools (Scotland) Rules, 1961 gave pupils the right to “request an interview” with the headmaster of the school, or the managers or inspectors thereof, who were thereafter permitted to interview the pupil in private: but the language of “complaint” was missing.
The 1933 Rules had contained a prohibition on boarding-out outwith Scotland, but this article now permitted it with the appropriate approval. How the visitation requirements could be met with children boarded-out outwith Scotland – particularly if overseas – is obscure.

30. Any child could be visited at any time by any person acting on behalf of the Secretary of State.

31. “A local authority shall, if so required by the Secretary of State, remove a child from the care of a foster-parent or from an institution in which he has been placed”.

32. “When a child to whom these Rules and Regulations apply is leaving or has left school the local authority shall secure, in consultation with the foster-parent or the institution concerned, that arrangements are made for placing him in suitable employment and for continuing care and supervision, including, if necessary, the provision of suitable lodging and equipment.”

33. “A local authority shall, if required to do so, furnish the parents of a child boarded-out with a foster-parent or placed by them in an institution with periodical reports as to the welfare and progress of the child; and unless, in the opinion of the local authority, it would be against the interests of the child, the parents shall be permitted to communicate with the child or with his foster-parent or with the institution, either directly or through the office of the local authority, as the local authority may in any particular case decide; and in exceptional circumstances the local authority may permit the parents to visit the child.”

Again, this is more detailed than the equivalent rule in the 1933 Rules, but it maintains the distrust of parental visits that characterised the earlier rules and ensures that the power to permit visits and communication lay solely with the local authority, whose discretion in the matter could not be challenged.

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89 1933 Rules, r. 47.
90 1933 Rules, r. 53.
91 As late as 1982 the House of Lords affirmed that discretion to allow contact lay with local authorities and that the court had no power to review the merits of their decision – except as being "Wednesbury unreasonable": A v Liverpool City Council [1982] AC 363. Writing of English law, see J. Masson
immediately following article, and para 10 of the Schedule, are the only regulations
governing the child’s relationship with his or her natural family while boarded-out with
foster-parents.

34. “A local authority shall immediately notify the parents of a child who has
been boarded-out with a foster-parent or placed by them in an institution, of
the death of the child or of any serious illness or serious accident, that may
befall the child.”

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

“In boarding children with foster-parents the object is to ensure that they are brought
up in the atmosphere of a good and secure home.92 Foster-parents shall
accordingly bring up93 a child placed by the local authority in their custody as one of
their own children and devote to this duty the care which good parents give to their
children. To this end, foster-parents should act in accordance with the following
principles:-

1. **Food.** Each child shall be provided with regular meals, and the food shall be
   wholesome, varied and sufficient to maintain good health.

2. **Clothing.** The clothing (including sleeping apparel) and footwear, of each child
   shall be kept clean and in good repair.

3. **Sleeping arrangements.**
   a. Arrangements shall be made for each child to have sufficient hours of
      sleep.
   b. The bedroom in which a child sleeps shall be the one specifically
      approved by the local authority and shall not be changed except as an
      emergency arrangement without their approval.
   c. No persons beyond the number approved by the local authority shall
      be allowed to occupy that bedroom.
   d. The bedding for each child shall be sufficient and comfortable and shall
      be kept clean and well aired.

“Contact Between Parents and Children in Long-Term Care: the Unresolved Dispute” (1990) 4
92 A secure home is not a temporary or short-term placement.
93 Again, a long-term placement is implicit in the terminology of “bringing up” rather than merely
looking after a child. [A POINT TO BE EXPANDED IN PT 3?]
e. No child shall occupy the same bed or bedroom as an invalid or an old or infirm person.

f. No boy over the age of 7, and no girl, shall occupy the same bedroom as a person of the opposite sex over that age, except that very young children may occupy the same bedroom as their foster-parents. Not more than two children shall sleep in one bed.

4. **Fire-guards.** Precautions must be taken to protect domestic fires so as to guard against the risk of a child being burnt or scalded.

5. **Training and Discipline.**
   a. Each child shall be brought up in accordance with his or her religious persuasion.
   b. The foster-parent shall train each child in habits of punctuality and thrift, of good manners and language, of cleanliness and neatness, of self-respect, of consideration and respect for others, and of honour and truthfulness in word and act. 94
   c. Each child shall also be brought up in habits of industry, but shall be given adequate opportunity for play and recreation.
   d. Each child of school age shall, if his or her health permits, be sent regularly to school.
   e. Wherever possible each child shall be encouraged to join some juvenile organisation.
   f. The foster-parent shall not administer indiscriminate or harsh punishment. Persistent misconduct by the child shall be reported to the local authority at the address given in paragraph 12(b) 95 hereof.

6. **Medical.**
   a. [The doctor is to be named.]
   b. The doctor’s attention shall be drawn to any apparent physical or mental weakness of the child, including such defects as weak eyesight, defective teeth, ear trouble, enlarged tonsils, chest weakness, incontinence, growing pains and rheumatism.

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94 Much of this paragraph is repeated from the 1933 Rules, r. 40, though the requirement there to train the child in “cheerful obedience to duty” has been dropped.

95 This is a misprint: the address is listed in 11(b).
c. The foster-parent shall see that the child receives any medicines, medical and surgical appliances and extras prescribed by the doctor; and that where spectacles have been provided they are worn.

d. The foster-parent shall report immediately to the local authority any case of serious illness or accident occurring to the child.

7. **Insurance.** No foster-parent shall become a party to any contract for the purpose of ensuring the payment to him for his own benefit of a sum of money upon the illness or death of the child.

8. **Intoxicants.** No child shall be allowed to partake of any intoxicant except upon the order of the doctor or in case of sickness or other urgent cause; in no circumstances shall a child be sent to fetch excisable liquor for others.

9. **Visitation.** Children may be visited without notice from time to time by members or officials or other persons authorised by the local authority or by the Secretary of State, and, on these occasions, all facilities shall be afforded to the visitor to interview the children and inspect their clothing, sleeping accommodation, etc. If a visiting book is supplied to the foster-parent it must be available for inspection by any authorised visitor.

10. **Parents and relatives.** The foster-parent shall comply with any instructions of the local authority with reference to communication, whether by letters or visits, between children and their parents or other relations.

11. **Co-operation with Local Authority.**
   a. The foster-parent shall co-operate with the authority and their officials for the child’s welfare and shall notify them of important facts such as –
      (i) persistent misconduct on the part of the child;
      (ii) any change of address, both before and after the change.
   b. Communications with the local authority shall be sent to [address to be provided].

12. The foster-parent shall, on demand, give up the boy or girl to any person duly authorised by the local authority.
13. Employment after leaving school. The foster-parent shall endeavour, in conjunction with the local authority, to find employment for the child when he or she leaves school.  

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

The 1947 Rules and Regulations applied from 20th October 1947 until their replacement on 1st August 1959 by the Boarding-out of Children (Scotland) Regulations, 1959. The 1959 Regulations applied to boarding-out by a local authority in respect of children in their care under s. 1 of the 1948 Act, children committed to their care as a fit person under the 1937 Act, and children committed to their care under s. 10 of the Matrimonial Proceedings (Children) Act, 1958; the Regulations also applied (as a major extension from the 1947 Rules) to the boarding-out of children by voluntary organisations (other than by the managers of an approved school). The 1959 Regulations represented more detailed regulation of boarding out than its predecessor had done, especially in relation to the cooperation required between different local authorities (to facilitate the long-established practice of boarding-out children in areas other than their local area). The focus of the 1959 Regulations is far less than the 1947 Regulations on such matters as the child’s sleeping arrangements and clothes, and more on the duties that local authorities have to ensure suitability of foster parents and supervision of children, for example by requiring three monthly rather than six monthly visits. The 1959 Regulations provide in relevant part as follows:

2. (1) Before boarding-out a child a care authority or voluntary organisation shall obtain and consider reports on the circumstances of the child’s home

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96 It may be noted in passing that there was no expectation of training in college or further or higher education for boarded-out children leaving school, but a year later s. 20 of the 1948 Act itself authorised local authorities to meet education and training expenses of persons under 21 who had previously been in care.

97 SI 1959 No 835 (S. 44).

98 This new provision allowed the court in any matrimonial proceedings in which it was impracticable or undesirable to entrust the child to either of the parties to the marriage to commit the child to the care of any other person, or the local authority. Section 10 of the 1958 Act was repealed by the Children (Scotland) Act 1995, sched. 5 para 1.

99 1959 Regs, reg. 1(1)(b).

100 That is to say the local authority into whose care a child has been committed: 1959 Regs, reg. 1(1)(a).
and the circumstances in which he came into care, and any report on the child which may be available from a reception centre or a child guidance clinic.

(2) Before boarding-out a child a care authority or voluntary organisation shall arrange for the child to be examined by a duly qualified medical practitioner and shall obtain from him and consider-

(a) a report in writing on the child’s bodily health and … on the child’s mental condition; and

(b) a statement whether, in his opinion, the child is fit to be boarded-out.

(3) Immediately before boarding out a child a care authority or voluntary organisation shall arrange for him to be medically examined to enable them to determine whether he has any infection which may make postponement of boarding-out advisable.

Suitability of foster parent

3. (1) A child shall not be boarded-out except with-

(a) a married couple acting jointly, or

(b) a woman, or

(c) a grandfather, uncle or elder brother of the child.\(^\text{101}\)

(2) A child shall not be boarded-out or remain boarded-out with a person who depends for a living mainly on payments received for the accommodation and maintenance of children in care.

4. A child shall be boarded-out, if practicable, with a person who is of the same religious persuasion as the child or, if that is not practicable, with a person who undertakes that the child will be brought up in accordance with the child’s religious persuasion.

\(^{101}\) These circumstances (which did not appear in the 1947 Regulations) allowed a single man to act as a foster-parent. The prohibition on unmarried couples acting as such remained. Provision was also made to allow the child to remain in the care of a foster home when one of the foster parents died.
5. Before boarding-out a child the care authority or voluntary organisation shall satisfy themselves in all practicable ways, including the making of enquiries of persons to whom the prospective foster parent is known, that the prospective foster parent is of good character and is in all respects suitable to look after the child.

Suitability of foster home

6. (1) A child shall not be boarded-out or remain boarded-out in a foster home which-

   (a) by reason of its situation or condition may be injurious or dangerous to the child’s health;

   (b) does not permit of suitable sleeping accommodation for the child in a room with adequate ventilation and lighting; or

   (c) does not have a sufficient supply of wholesome water for domestic purposes either within or near the home, and suitable and sufficient sanitary facilities.

(2) A child shall not be boarded-out or remain boarded out in a foster home where the household includes a person who is believed by the care authority or voluntary organisation to be suffering from any physical or mental illness which might adversely affect the child or to have been convicted of such an offence as would render it undesirable that the child should associate with him.

7. (1) Before boarding-out a child the care authority or voluntary organisation shall ensure that the prospective foster home is visited by the care authority’s children’s officer, or a visitor, as the case may be, who is personally acquainted with, or, if that is not practicable, fully informed about, the child, and shall satisfy themselves that the foster home and the household living there are likely to be suitable for the child.

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102 This suggests an on-going monitoring obligation on the local authority.
103 This expanded from the technical specificity of both the 1947 and 1933 Rules.
104 This concerns suitability for the individual child.
(2) Not less than 21 days before a child is to be boarded-out by the care authority in the area of another authority, or is to be boarded-out by a voluntary organisation, the care authority or the voluntary organisation, as the case may be, shall furnish the area authority with particulars of the prospective foster home; within 14 days thereafter the area authority shall furnish to the care authority or, as the case may be, the voluntary organisation such advice as they think fit on the suitability or otherwise of the prospective foster home; and before boarding-out the child the care authority or, as the case may be, the voluntary organisation shall consider such advice.

**Boarding-out of children of same family**

8. Where two or more children of the same family are to be boarded-out the care authority or voluntary organisation shall, wherever practicable, arrange for them to be boarded-out in the same foster home or, where this is not practicable, in foster homes as near together as is practicable.

**Boarding-out outside Scotland**

9. A child shall not be boarded-out with a person residing outside Scotland unless in his case special circumstances makes such boarding-out desirable in the opinion of the care authority or, as the case may be, the voluntary organisation, and, if a child is boarded-out outside Scotland, the care authority or voluntary organisation shall ensure that the requirements specified in Regulations 2 to 8 and 11 to 17 of these Regulations are observed in relation to that child as if he were boarded-out in Scotland.\(^{105}\)

**Limitation of Boarding-out**

10. Where the Secretary of State directs that no more children shall be boarded-out in the area of a local authority, or a specified part of that area, no care authority or voluntary organisation shall board-out a child in that area or that specified part so as to increase the number of children boarded-out there beyond the number who were so boarded-out when the direction was given.

\(^{105}\) This removed the requirement for the Secretary of State’s authorisation for boarding-out outwith Scotland. It also put beyond doubt (as the 1947 Rules had not) that the suitability rules and the visitation rules continued to apply to children boarded-out outwith Scotland. No mechanism, however, was provided for visiting such children.
Notification of Boarding-out

11. (1) The care authority or voluntary organisation by whom a child has been boarded-out shall inform the parent or guardian of the child of the address of the foster home in which the child has been boarded-out unless-

(a) the parent or guardian cannot be found, or

(b) the care authority or voluntary organisation are of the opinion that in the interests of the child this paragraph should not apply in his case.

(2) Whenever a child who is under school leaving age or who, being over school leaving age, is continuing to attend school is boarded-out the care authority or, as the case may be, the voluntary organisation shall immediately send to the education authority for the area in which the child is boarded-out –

(a) particulars of the child’s full name, age and religion and of any bodily or other condition that may require special attention, and

(b) the name and address of the child’s foster parent.

(3) Whenever a child is boarded-out by a care authority with a person residing in the area of another local authority or is boarded-out by a voluntary organisation the care authority or the voluntary organisation, as the case may be, shall immediately inform the area authority, and shall send them the following particulars, that is to say –

(a) the child’s name, sex, date of birth and religious persuasion;

(b) the name, religious persuasion and address of the child’s foster parent;

(c) the date upon which the child is boarded-out with that foster parent; and

(d) the name of the authority or the voluntary organisation by whom the child is boarded-out.

Medical and dental treatment
12. (1) The care authority or voluntary organisation shall arrange that a boarded-out child shall be registered as a patient with a medical practitioner undertaking to provide general medical services under Part IV of the National Health Service (Scotland) Act 1947 in the district where the foster home is, and shall ensure that the foster parent arranges for the child to receive such medical treatment as may be required.

(2) The care authority or voluntary organisation shall arrange that a boarded-out child shall be examined by a medical practitioner within one month of his being placed in a foster home and thereafter at intervals not exceeding twelve months; and the care authority or voluntary organisation shall arrange to be furnished by the medical practitioner on the occasion of each examination with a report in writing on the health of the child.

(3) The care authority or voluntary organisation shall arrange that a boarded-out child shall undergo regular dental examination and shall ensure that the foster parent arranges for the child to receive such dental treatment as may be required.

Visits by children’s officer or visitor

13. The care authority or voluntary organisation shall ensure that a child boarded-out by them shall within the first two months after being boarded-out and thereafter at intervals of not more than three months from the date of the last visit be visited by the children’s officer or by a visitor, as the case may be, who shall on each occasion see the child, his foster home and foster parent and furnish to the care authority, or, as the case may be, the voluntary organisation, a written report on the visit;

Provided that for eighteen months after the coming into force of these Regulations this Regulation shall read as if for the words “three months” there were substituted the words “six months”.106

Supervision by area authority

106 The 1947 Regulations had required visits not more than six months apart and so the new requirement doubled the number of visits per year. Both the Clyde Report and the Scottish Advisory Council on Child Care Report from 1950 (discussed above) had considered that six monthly visits were sufficient.
14. When a child is boarded-out by a voluntary organisation or is boarded out by a care authority with a person residing in the area of another authority, then, so long as the care of that child is not taken over by the area authority, either under subsection (4) of section 1 of the Act or otherwise, the voluntary organisation or the care authority may comply in relation to that child with the requirements of these Regulations with respect to the visiting and inspection of the foster home and of the boarded-out child by arranging for the area authority to carry out such visiting and inspection and to supply the required reports and information to the voluntary organisation or the care authority, as the case may be; but no such arrangement shall relieve the care authority or voluntary organisation of any other duties or powers in relation to the welfare of the child.

**Misadventure to a boarded-out child**

15. (1) The care authority or voluntary organisation by whom a child has been boarded-out shall require the child’s foster parent to notify them forthwith if the child-

   (a) dies;
   
   (b) runs away or without lawful authority is taken away from the foster home; or
   
   (c) suffers an illness or injury likely to result in death or a serious disability.

(2) The care authority or voluntary organisation shall forthwith inform the Secretary of State and, if practicable, the parent or guardian of the child of any such occurrence, and shall supply to the Secretary of State such further information about the circumstances of the occurrence as he may require.

**Termination of boarding-out**

16. (1) The care authority or voluntary organisation shall terminate the boarding-out of a child with a particular foster parent if it appears to them that it is no longer in the best interests of the child to be boarded-out with that foster parent.\(^{107}\)

\(^{107}\) This is a far wider power to terminate a placement than had existed before, and is not limited to a foster parent’s failure to satisfy the conditions in the Regulations. Again, it suggests an on-going
(2) The care authority or voluntary organisation shall forthwith terminate the boarding-out of a child with a particular foster parent if they have reason to believe that the foster parent is a party to a contract for the purpose of ensuring the payment of a sum of money upon the illness or death of the child.

(3) Where a child has been boarded-out by a voluntary organisation or has been boarded-out by a care authority with a person resident in the area of another authority, and the area authority have reason to believe that the home in which the child has been placed is no longer suitable as a foster home, or the person with whom the child has been boarded-out is no longer suitable as a foster parent, the area authority shall forthwith notify the care authority or voluntary organisation.

(4) Where a child ceases to be boarded-out the voluntary organisation or, as the case may be, the care authority (if it is not also the area authority) shall forthwith notify that fact, and the date upon which the child ceases to be boarded-out, to the area authority and the education authority; and if the boarding-out was terminated because a breach of these Regulations had occurred or because the foster parent had proved otherwise unsatisfactory, the voluntary organisation or, as the case may be, the care authority shall also notify the area authority of the reasons for the termination.

Records

17. (1) A care authority shall compile and maintain a case record in respect of-

(a) every child boarded-out by them;

(b) every child boarded-out by another local authority in respect of whom they perform under Regulation 14 of these Regulations any of the supervisory duties referred to in that Regulation; and

monitoring role for the local authority, primarily fulfilled by visitation and requiring an individualised assessment of the child’s present position.
(c) every child boarded-out by a voluntary organisation in relation to whom they perform such supervisory duties.\(^{108}\)

(2) A voluntary organisation shall compile and maintain a case record\(^{109}\) in respect of every child boarded-out by them.

(3) Every case record compiled under this Regulation shall be preserved for at least three years after the child to whom it relates has attained the age of eighteen years or, if he has died before attaining that age, after his death; and shall be open to inspection at all reasonable times by any person authorised by the Secretary of State to inspect such records.

(4) A local authority shall in respect of every child boarded-out in their area, whether by them or by another local authority or by a voluntary organisation, enter into a register to be kept for the purpose particulars as to-

(a) the child’s name, sex, date of birth and religious persuasion,

(b) the name, religious persuasion and the address of the foster parent,

(c) the name of the authority or organisation by whom he is boarded-out,

(d) the dates on which boarding-out on each occasion begins and ceases, and

(e) the reason why it ceases if they have been notified of this under paragraph (4) of Regulation 16 of these Regulations;

and such register shall be open to inspection at all reasonable times by any person authorised by the Secretary of State to inspect such records.

Though these Regulations were detailed in a number of important areas there were also noticeable (to modern eyes) omissions – in particular there was no requirement to work towards rehabilitation of the child with his or her natural family, nor to ensure regular contact between the child and that family. The 1959 Regulations governed

\(^{108}\) It is to be noted that the primary responsibility for record keeping, even in relation to children boarded-out by voluntary organisations, lay with the local authority.

\(^{109}\) This appears to be different from the register of basic information required to be kept under para. 4 and suggests a requirement to monitor and assess the child’s progress in the placement.
the boarding-out of children until 1st April 1986, when they were revoked and replaced by the Boarding-out and Fostering of Children (Scotland) Regulations 1985\textsuperscript{110} (which similarly omitted consideration of the natural family).

**Regulation of Private Fostering**

Part One of the Children and Young Persons (Scotland) Act, 1937, under the increasingly recondite heading “Child Life Protection”, governed private fostering arrangements of children under 9. The 1948 Act substantially increased the scope of this governance by extending that age to 18.\textsuperscript{111} The 1937 provisions (discussed in Part One of the present Report) remained in force until 1st April 1959, when the Children Act, 1958\textsuperscript{112} came into force.

Part One of the 1958 Act, headed “Child Protection”, applied in relation to children below the upper limit of compulsory schooling being looked after, for reward and for more than one month,\textsuperscript{113} other than by relatives or guardians, and not being boarded out by any public authority, and also to children over that age but below 18 who remained in foster care.\textsuperscript{114} Included were children who continued to reside in private schools during school holidays.\textsuperscript{115} The Act required that officers of the local authority visit foster children within their area, in order to satisfy themselves as to the well-being of the children and to give such advice as appeared to be needed.\textsuperscript{116} The person maintaining a foster child\textsuperscript{117} had to notify the local authority,\textsuperscript{118} which could impose requirements as to the number, age and sex of foster children, the

\textsuperscript{110} SI 1985 No. 1799, reg 1 for commencement and reg 26 for revocation.
\textsuperscript{111} 1948 Act, ss. 35 and 36.
\textsuperscript{112} Children Act, 1958, c. 65.
\textsuperscript{113} The Nurseries and Child-Minders Regulation Act, 1948 (c. 53) governed those who were paid to look after children for a day or substantial period of a day, or for any longer period not exceeding six days. To run such a business required registration with the local authority, which could be refused if the applicant for registration was not a fit person to look after children, or the premises are not fit for that purpose. Those paid to look after children for periods between six days and a month seemed to have been free from regulation.
\textsuperscript{114} 1958 Act, ss. 2 and 13.
\textsuperscript{115} 1958 Act, s. 12. See below, Appendix Two.
\textsuperscript{116} 1958 Act, s. 1.
\textsuperscript{117} Defined in s. 2. Curiously, the Act (and its successors) avoids, with a clumsiness that suggests deliberation, the term “foster parent” though it uses “foster child” – foster parent is used in the Boarding Out regulations which (perhaps equally curiously) avoids the term “foster child”.
\textsuperscript{118} 1958 Act, s. 3.
accommodation and equipment to be provided for the children,\textsuperscript{119} medical arrangements, and the qualifications of those employed to look after the children.\textsuperscript{120} Certain persons were disqualified from keeping foster children\textsuperscript{121} and a juvenile court, on the complaint of a local authority, could order the removal of a foster child to a place of safety if satisfied that he or she was being kept by a person unfit to have his or her care, or in any premises or environment detrimental to him or her.\textsuperscript{122} A person maintaining a foster child for reward was unable to take out life assurance over the child.\textsuperscript{123} The obligations of care to be provided by, and the powers and duties of, the person looking after the foster child were nowhere specified.

In sum, the regulation of private fostering was very much less detailed than the regulation of boarding-out by local authorities (public fostering). The 1958 Act governed private fostering until 1\textsuperscript{st} February 1985, when the Foster Children (Scotland) Act 1984 came into force. That Act remains extant today and will be considered in Part 3 of the present Report.

**Regulation of Children’s Homes**

We saw earlier that the Clyde Report had accepted in 1946 that boarding-out of children could never be a complete solution and so institutional care would still require to be provided, either by private organisations or by the state (through the local authority). The two were recognised in the Parliamentary debates on the 1948 Act to be in very different legal positions. The statutory obligations that local authorities had towards children in their care (including the aftercare provisions) did not extend to children accommodated in voluntary homes, notwithstanding some parliamentary attempts to extend these obligations to all children accommodated in an institutional setting.\textsuperscript{124}

\textsuperscript{119} Including the power to prohibit the use of specified premises.
\textsuperscript{120} 1958 Act, s. 4.
\textsuperscript{121} 1958 Act, s. 6.
\textsuperscript{122} 1958 Act, s. 7.
\textsuperscript{123} 1958 Act, s. 9.
\textsuperscript{124} See HL Deb 9 March 1948, vol. 154 cols. 609-611. At HL Deb 10 Feb 1948, vol. 153 col 937 Lord Beveridge had expressed some concern that while the qualifications of children’s officers were carefully prescribed no qualifications were so prescribed for those running voluntary homes.
Local Authority Homes

The Children Act, 1948 provided that each local authority might, and if so directed by the Secretary of State was obliged to, provide, equip and maintain homes for the accommodation of children in their care.\textsuperscript{125} There had been no statutory authority to do so before then. Separate accommodation was to be provided for the temporary reception of children, with “the necessary facilities” for observing their physical and mental condition.\textsuperscript{126} If the premises were unsatisfactory, the Secretary of State could close the home.\textsuperscript{127} The Secretary of State was given the power to make regulations as to the conduct of these homes,\textsuperscript{128} and while in England that power was exercised by the making of the Administration of Children’s Homes Regulations, 1951\textsuperscript{129} in Scotland it was not until 1959 that (substantially similar) regulations were made. However, before then, certain provisions in the Children (Boarding-out etc) (Scotland) Rules and Regulations, 1947 applied to the placing of children in “institutions”.\textsuperscript{130} These provided as follows:

23. “Where a local authority having become responsible for the care of a child apart from his parents, are satisfied that for some special reason it is not desirable to board him out with a foster-parent, they may place him in an institution which is subject to inspection by the Secretary of State under the Children and Young Persons (Scotland) Act, 1937,\textsuperscript{131} or under the Education (Scotland) Acts, or is specially approved by the Secretary of State for the purposes of these Rules and Regulations”.

24. “The local authority before so placing the child shall satisfy themselves that the institution selected is suited to the particular needs of the child”.

25. “A child shall not be placed in an institution maintained for persons of a religious persuasion different from that to which the child belongs”.

\textsuperscript{125} 1948 Act, s. 15(1).
\textsuperscript{126} 1948 Act, s. 15(2).
\textsuperscript{127} 1948 Act, s. 15(5).
\textsuperscript{128} 1948 Act, s. 15(4).
\textsuperscript{129} SI 1951 No. 1217.
\textsuperscript{130} Approved schools, remand homes and borstals all had their own detailed rules, discussed elsewhere of this Report, and were not governed by the 1947 Rules.
\textsuperscript{131} That is to say approved schools, remand homes and voluntary homes.
26. “A local authority when placing a child in an institution shall arrange that they shall be afforded reasonable facilities for visiting the institution and satisfying themselves as to the arrangements for the child’s welfare”.

27. “The officer appointed under Article 17 hereof shall visit or cause to be visited by a person with suitable qualifications or experience every child placed in an institution by a local authority within one month of the placing of the child and thereafter at least once in every six months. The local authority shall also arrange that such children shall be visited by members of the authority at least once a year. The officer or members shall furnish a report to the local authority with respect to-

(a) the child’s health, well-being and behaviour;

(b) the progress of the child’s education; and

(c) any other matters relative to the child’s welfare which they consider should be reported.”

28. “Where a local authority take action on a report furnished under Article 27 hereof they shall send a copy of the report to the Secretary of State together with a note of such action”.

It is to be noted that the responsibility for monitoring both the home and each child’s progress while resident there lay with the local authority. And the terms of Article 28 clearly envisaged an active response by the local authority if any matter was found wanting.

**Voluntary Homes**

Voluntary homes, that is to say those maintained wholly or partly by private funding, continued in operation after the 1948 Act, but were subject to rather greater state control than previously. Since 1932 voluntary homes had required to be registered, and s. 29 of the 1948 Act provided that no voluntary home could “be

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132 See Children and Young Persons (Voluntary Homes) Regulations 1933 (SR&O 1933 No 923 (S. 60)).
carried on” unless it was registered with the Secretary of State (though all existing homes were registered automatically).133 The Secretary of State could, if the running of the home was not in accordance with Regulations or was in any other way unsatisfactory, remove the home from the register and “all or any” of the children resident therein could be received into the care of the local authority.134 Power was given to the Secretary of State to make regulations “as to the conduct of voluntary homes and for securing the welfare of the children therein”.135 In the event, that power was not exercised until the making of the Administration of Children’s Homes (Scotland) Regulations, 1959 (discussed below). Prior to then the small group of provisions in the 1947 Rules and Regulations applicable to “institutions” and set out in the immediately preceding paragraph applied to voluntary homes as they did to local authority homes, though only in respect of children placed there by a local authority. A wider obligation to visit all children was imposed by the 1948 Act. Section 54(1) extended the powers of inspectors appointed by the Secretary of State (under s. 106 of the 1937 Act) to inspect homes governed by the 1948 Act. Section 54(2) granted to such inspectors the power to enter specified premises, including voluntary homes.136 More significant, due to the fact that it imposed an obligation rather than a power, is s. 54(3): “It shall be the duty of local authorities from time to time to cause children in voluntary homes in their area to be visited in the interests of the wellbeing of the children, and any person authorised in that behalf by a local authority may enter any voluntary home in the area of the authority for the purpose of visiting the children in the home.” It was an offence to obstruct any such person.137

Administration of Children’s Homes (Scotland) Regulations, 1959138

These Regulations, which came into force on 1st August 1959,139 covered both local authority and voluntary homes. Excluded from their application, however, were

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133 The registration rules were contained in the Voluntary Homes Registration (Scotland) Regulations, 1948, SI 1948 No. 2595. See also the Voluntary Homes (Return of Particulars) (Scotland) Regulations, 1952, SI 1952 No. 1836.
134 1948 Act, s. 29(6).
135 1948 Act, s. 31(1).
136 1948 Act, s. 54(2)(f) and s. 13(1)(b).
137 1948 Act, s. 54(7).
138 SI 1959 No. 834.
139 1959 Regulations, reg. 22.
remand homes, voluntary homes subject to inspection by a government department otherwise than under Part VI of the 1937 Act, and holiday homes where no child stayed more than one month.\textsuperscript{140} The 1959 Regulations contained rules for the administration of homes, the welfare of children accommodated therein, and for oversight of both of these matters.

The administrative regulations placed ultimate responsibility for the good running of the home on the “administering authority”, that is to say the local authority providing or the persons carrying on the home.\textsuperscript{141} That body was obliged to make arrangements for the home “to be conducted in such manner and on such principles as will secure the well-being of the children of the home.”\textsuperscript{142} The immediate focus on the child’s “well-being” is to be noted. The administering authority had to appoint a person to be in charge of the home,\textsuperscript{143} but neither the qualifications of this person nor criteria for selection were set down. The name of the person in charge of a voluntary home had to be notified to the Secretary of State.\textsuperscript{144} One of the most important duties of the person in charge was to maintain records, which were to be kept at all times available for inspection by official visitors and persons authorised by the Secretary of State.\textsuperscript{145} The records had to include “a personal history of each child in the home”, that is to say the child’s medical history, a note of the circumstances in which the child was admitted to the home, and in the case of a child in the care of a local authority an explanation of the circumstances which made it impracticable or undesirable to board the child out.\textsuperscript{146} Also to be included was a record of the child’s progress made during his or her stay in the home (including details of visits received from parents, relatives or friends, successes achieved at school or elsewhere, and any emotional or other difficulties experienced by the child), and a note of the child’s destination when discharged from the home.\textsuperscript{147} Noticeably absent was any requirement for a care plan for the future. The Secretary

\textsuperscript{140} 1959 Regulations, reg. 19.
\textsuperscript{141} 1959 Regulations, reg. 21.
\textsuperscript{142} 1959 Regulations, reg. 1.
\textsuperscript{143} 1959 Regulations, reg. 4.
\textsuperscript{144} 1959 Regulations, reg. 16. Another rule, limited to voluntary homes, was that the Secretary of State could give directions as to the maximum number of children to be accommodated in the home: reg. 18.
\textsuperscript{145} 1959 Regulations, reg. 14.
\textsuperscript{146} This being the test for accommodating any child in the care of a local authority other than by boarding out: 1948 Act, s. 13(1).
\textsuperscript{147} 1959 Regulations, schedule.
of State, and if practicable the parent or guardian of the child, had to be informed if
the child died, ran away, was abducted or suffered from any injury or illness likely to
result in death or a serious disability.\textsuperscript{148}

Oversight of the running of the home was provided by a system of official visitation.
The administering authority for any home had to ensure that the home was visited at
least once a month by an authorised visitor who was obliged to “satisfy himself that
the home is conducted in accordance with Regulation 1 of these Regulations”\textsuperscript{149} (i.e.
that the home was conducted in such a manner as to secure the well-being of the
children). This was in addition to the visiting duties of local authorities under s. 54(3)
of the 1948 Act. Another source, and perhaps more independent, of oversight was
the medical officer, who had to be appointed to every children’s home. This officer
was responsible for the general supervision of the health of the children
accommodated in the home and of the hygienic conditions of the premises and staff,
and for the giving of advice to the person in charge of the home on these matters.
The medical officer was obliged to attend at the home “with sufficient frequency to
ensure that he is closely acquainted with the health of the children”, to examine each
child on admission and thereafter at least once a year and then immediately before
discharge, to provide necessary medical attention, and to supervise the compilation
of a medical record for each child. The medical officer also had to submit reports on
these matters to the administering authority.\textsuperscript{150}

The welfare of the children was clearly the justification for requiring a medical officer,
and was also behind the requirement to take fire precautions\textsuperscript{151} and the specificity of
the sleeping accommodation: “There shall be provided for every child
accommodated in a home a separate bed in a room with sufficient ventilation and
sufficient natural and artificial lighting, with not less than 45 square feet of floor space
for each bed and at a distance of not less than 6 feet between the centres of the
beds. There shall be easy access from every bedroom to suitable and sufficient
water closets and washing facilities.”\textsuperscript{152}

\textsuperscript{148} 1959 Regulations, reg. 13.
\textsuperscript{149} 1959 Regulations, reg. 2.
\textsuperscript{150} 1959 Regulations, reg. 6. Dental care also had to be provided: reg. 7.
\textsuperscript{151} 1959 Regulations, reg. 9.
\textsuperscript{152} 1959 Regulations, reg. 8.
Discipline was to be “maintained by the personal influence of the person in charge of the home.” Punishments, which had to be recorded, normally took the form of “a temporary loss of recreation or privileges”, and if a child was punished with “abnormal frequency” the administering authority had to arrange for an investigation of the child’s mental condition. Corporal punishment was permitted “exceptionally”, but could only be administered by a person specifically empowered by the administering authority to do so; if the child had any physical or mental disability the sanction of the medical officer was required before corporal punishment could be administered. There were no statutory rules other than these governing corporal punishment and, in contrast (for example) to the position in approved schools, no distinction was made between boys and girls. Each administering authority may, however, have created their own more detailed rules.

The limitations to these rules, which are perhaps explained by a continuing reluctance to set rules for the administration of voluntary (that is to say, charitable and private) establishments, are to be noted. Most obviously there is nothing about the qualifications of the staff of the homes, nor the mechanisms for their selection, nor any exclusion criteria (even the most obvious, such as conviction of offences against children). This is so notwithstanding the express granting of the power to specify qualifications given in the primary legislation itself. The contrast with the rules for the selection of foster-parents, considered above, and the qualifications of staff at approved schools, considered below, is stark. The Secretary of State for Scotland reported in 1968 that “one of the greatest difficulties in providing an adequate number and range of children’s homes still lies in the recruiting and retaining of adequate and suitable staff”.

Another omission is that, other than the reference in Regulation 1 to the child’s well-being, there is no statement of principle (equivalent to that contained in the Boarding-out Regulations 1947) placing the child’s interests at the forefront of the purpose of keeping the child. There is little about contact between the child and

153 1959 Regulations, reg. 10.
154 Ibid.
155 1959 Regulations, reg. 11. On corporal punishment generally, see Appendix Two to the present Report.
156 1948 Act, s. 31(1)(d).
157 Child Care in Scotland, 1968 (Cmnd 4069) at para 28.
parents\textsuperscript{158} and there is nothing about preparing the child for return to his or her family: the Regulations are written on the assumption that the child’s accommodation in the home would be long-term.

And it is noticeable that the visitation and inspection of voluntary homes under the 1959 Regulations was the responsibility not of the local authority or the Secretary of State, but of the voluntary body that ran the home. Self-regulation is seldom the most robust method to ensure the proper maintenance of standards of safety and security. (Local authorities were, however, obliged to visit and inspect under s. 54(3) of the 1948 Act, discussed above).

The 1959 Regulations governed children’s homes for 29 years – from 1\textsuperscript{st} August 1959 to 1\textsuperscript{st} June 1988, when the Social Work (Residential Establishments - Child Care) (Scotland) Regulations 1987\textsuperscript{159} came into force.

**Approved Schools**

*Approval of Approved Schools*

Sections 83 and 85 of, and Schedule 2 to, the 1937 Act\textsuperscript{160} continued throughout this period to govern the approval of schools “intended for the education and training of persons to be sent there”.\textsuperscript{161} Approval was given by the Scottish Education Department.

*Management of Approved Schools*

The rules for the management and discipline of approved schools contained in Part A of the Children and Young Persons (Scotland) Care and Training Regulations,

\textsuperscript{158} In a regulation limited to voluntary homes it was required that the administering authority provide information to the Secretary of State (if he required it) about the facilities for visits to and communication with children by their parents or guardians: reg. 17. Contact was seen as a matter of appropriate arrangements to be made by those in charge of the home, rather than as a right of either party.

\textsuperscript{159} SI 1987 No. 2233 (S. 150), to be discussed in Part Three of this Report.

\textsuperscript{160} Discussed in Part One of this Report.

\textsuperscript{161} These provisions were repealed by the Social Work (Scotland) Act 1968, sched. 9.
applied until 1st December 1961 when the Approved Schools (Scotland) Rules, 1961 came into force. These were substantially more detailed than the 1933 Regulations (and indeed than the children’s homes regulations just considered), and provided in relevant part as follows:

**Management**

As with the 1933 Rules, the names of the managers of approved schools were required to be submitted to the Secretary of State, and they were required to meet and to visit the school once a month in order to ensure that “the conditions of the school and the welfare, development and rehabilitation of the pupils under their care” were satisfactory. Obligations additional to those in the 1933 Rules during such visits, with a new focus on individual children, were imposed: “(2) A visiting Manager shall take opportunity to speak with individual pupils. (3) A visiting Manager shall visit any pupil who is segregated under Rule 33 at the time of his visit. (4) A Manager shall discuss with the Headmaster any complaint made by a pupil.” The managers were for the first time explicitly obliged to “manage the school in the interests of the welfare, development and rehabilitation of the pupils”. Together, these provisions – and especially the opportunity for pupils to make complaints – gave far more scope than had previously existed for visitors to uncover harmful regimes and unlawful practices.

**Premises and Accommodation**

The school premises were required to be maintained “in a satisfactory condition as regards lighting, heating, ventilation, cleanliness, sanitary arrangements and safety against fire,” that included providing “adequate accommodation for the residence, instruction and recreation both indoors and outdoors of the pupils”. Fire precautions had to be taken and fire drills held “frequently”. The number of pupils

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162 As set out in Part One of this Report.
164 1961 Rules, r. 55.
165 1961 Rules, r. 1.
166 1961 Rules, r. 2.
167 1961 Rules, r. 4.
168 1961 Rules, r. 6.
169 1961 Rules, r. 7.
in a school was not to exceed (save exceptionally) the number specified by the Secretary of State.\textsuperscript{170}

**Staffing**

Unlike the rules governing the staff of children’s homes (which were not teaching establishments), the 1961 Rules contained detailed requirements designed to ensure the quality of staff at approved schools. It was for the managers in consultation with the headmaster to determine the number, type and qualifications of staff to be employed by them;\textsuperscript{171} suspension and dismissal lay with the managers but they had to act in accordance with s. 81 of the Education (Scotland) Act 1946.\textsuperscript{172} The headmaster could suspend a member of staff.\textsuperscript{173} Where the character or conduct of a member of staff lead directly or indirectly to his resignation or to the termination by the Managers of his employment or to his contract of employment not being renewed on its expiry, the Managers were required to submit a full report of the circumstances to the Secretary of State.\textsuperscript{174} Teaching had to be provided by qualified teachers, except with the consent of the Secretary of State.\textsuperscript{175} It was, however, only at the end of the period under consideration in this Part of this Report that professional courses in child care were established at institutions of further and higher education\textsuperscript{176}

The headmaster was responsible to the Managers for the efficient conduct of the school in the interests of the welfare, development and rehabilitation of the pupils.\textsuperscript{177} He or she was required to keep records, including: (a) a general record of all admissions, licenses and discharges; (b) an adequate record of the progress of each individual pupil; (c) a list of pupils on licence or under supervision showing dates of visits paid by the person appointed under Rule 47 to carry out aftercare, the receipt of any correspondence and dates of visits from pupils; (d) a log book in which

\textsuperscript{170}1961 Rules, r. 8.
\textsuperscript{171}1961 Rules. r. 10(1).
\textsuperscript{172}Which set out the procedure whereby Education Authorities (or, here, the governing body) could resolve that a certified teacher be dismissed.
\textsuperscript{173}1961 Rules. r. 10(2).
\textsuperscript{174}1961 Rules, r. 10(3).
\textsuperscript{175}1961 Rules, r. 10(4).
\textsuperscript{176}See Child Care in Scotland, 1968 (Cmdn 4069) at para. 49: it was further reported at para. 50 that in-service training courses for staff of approved schools “had to be curtailed in 1968”, without explanation offered.
\textsuperscript{177}1961 Rules, r. 11(1).
\textsuperscript{178}After the 1963 Amendment Rules, this was to be read as “releases”
\textsuperscript{179}The words “on licence or” were omitted after the 1963 Amendment Rules.
was recorded the receipt of any written report on the school communicated to the Managers; the visit of any Manager; and any event connected with the school that deserved to be recorded; (e) a punishment book; (f) a record of each occasion on which a pupil absconded from the school and of the circumstances; and (g) an attendance register.\textsuperscript{180} An important new responsibility of the headmaster was to ensure that the parent of the pupil was aware of “the full meaning of the Court Order” under which the child had been sent to the school, and that the pupil received a full explanation of the Rules and, in particular, of their “rights” contained therein to speak with the headmaster,\textsuperscript{181} to write and receive letters and to have visits from their parents.\textsuperscript{182} The headmaster was obliged to hold periodical staff conferences to review the progress of individual pupils.\textsuperscript{183}

\textit{Care of Pupils}

Pupils were to be provided “with a separate bed in a room with sufficient ventilation and sufficient natural and artificial lighting” and with “easy access from every bedroom or dormitory to suitable and sufficient water closets and washing facilities”; suitable clothing was to be provided.\textsuperscript{184} Pupils were to receive “sufficient, varied, wholesome and appetising food in accordance with a dietary scale adequate for the maintenance of health, to be drawn up by the Managers after consultation with the Headmaster and the Medical Officer and approved by an inspector.”\textsuperscript{185} Withholding meals as punishment was forbidden.

\textit{Education}

Reflecting the duty imposed on education authorities by s. 1 of the Education (Scotland) Act 1946, the education to be given in approved schools was to be such as “to secure the efficient full-time education suitable to the age, ability and aptitude of the pupils of compulsory school age and their further education thereafter as long as they remain in the school”.\textsuperscript{186} The reference to further education is to be noted.

\textsuperscript{180} 1961 Rules, r. 11(2).
\textsuperscript{181} 1961 Rules, r. 16.
\textsuperscript{182} 1961 Rules, r. 15.
\textsuperscript{183} 1961 Rules, r. 17.
\textsuperscript{184} 1961 Rules, r. 18.
\textsuperscript{185} 1961 Rules, r. 19.
\textsuperscript{186} 1961 Rules, r. 21.
Employment

The 1933 Rules had permitted pupils at approved schools to be in employment for up to two hours a day. The 1961 Rules reduced this to one hour, specified that it was to be “light work such as making beds or cleaning boots”, and dropped the previous reference to older boys “attending furnaces”. Any employment of older pupils was not to interfere with any further education that would benefit the pupil. 187

Recreation and Privileges

If practicable, home leave of up to forty two days, with no period more than fourteen days, was to be permitted each year. 188 Pupils were to be encouraged “in the right use of leisure and in healthy interests, and for this purpose as great a measure of liberty as possible shall be allowed during free time. Generally, additional freedom, including additional home leave when appropriate, shall be given towards the end of a pupil’s period of detention with a view to facilitating his return to ordinary life.” 189 At least one hour each day was to be spent in the open air (unless prevented by bad weather or illness). 190

Discipline and punishment

This issue had constituted what might today be considered a disproportionate amount of space in the 1933 Regulations. Much the same detail is given in the 1961 Rules, though the relative space devoted to the topic is less.

“Discipline and punishment are the responsibility of the Headmaster, who, except for matters for which special provision is made in the Rules, may give such instructions and delegate such responsibility as he sees fit.” 191 The available punishments were listed as follows:—

(a) reprimand;
(b) forfeiture of privileges or rewards;
(c) loss of conduct marks or reduction in rank;
(d) loss of recreation or liberty;

187 1961 Rules, r. 22.
188 1961 Rules, r. 23.
189 1961 Rules, r. 24.
190 1961 Rules, r. 25.
191 1961 Rules, r. 28.
(e) performance of useful additional tasks;  
(f) the disallowance of home leave, which may be used only in the case of a serious offence; or  
(g) corporal punishment. 192  
The type of punishment to be used was to be determined “not only by the gravity of the offence but also by the age, temperament and physical condition of the offender.” The Medical Officer was to be consulted if there was reason to think that punishment might be harmful to the pupil. In no case was the nature or the extent of the punishment to be such as might be injurious to physical or mental health. 193 Details were given as to who could administer corporal punishment, and in what circumstances. 194 An important new provision in the 1961 Rules, which recognised the opportunity that the infliction of corporal punishment afforded for abuse (or, perhaps, which sought to reduce the risk of false allegations of excess punishment) was that “except when the punishment is inflicted in the presence of a class in a schoolroom, an adult witness must be present” and that no pupil could be called upon to assist the person inflicting the punishment. 195 As with the 1933 Regulations, girls could be hit only on the hands while boys could be hit on the hands or posterior: in either case, “only a light tawse may be used: a cane or other form of striking is forbidden”. Records were required to be kept when punishment was either corporal punishment or the stopping of home leave. 196  

The Headmaster could order a pupil (if over the age of 13) who was behaving “in an unmanageable or violent manner” to be temporarily segregated in a special room with good natural lighting and natural ventilation, with regular visits by staff. 197 A special section of the school could be set aside (with the approval of the Secretary of State) for “abnormally unruly” pupils or persistent absconders. 198  

Parents

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192 1961 Rules, r. 29.  
193 1961 Rules, r. 30.  
194 1961 Rules, r. 31. On corporal punishment generally, see Appendix Two to this Report.  
195 1961 Rules, r. 31(c) and (d).  
196 1961 Rules, r. 32.  
197 1961 Rules, r. 33.  
198 1961 Rules, r. 34.
Pupils were to be encouraged to write to their parents at least once a week, and were allowed to receive letters: staff were, however, empowered to read these and the headmaster could withhold any letter, except one to the managers or the Secretary of State or his officers.  \(^{199}\)

Pupils were allowed to receive visits from their parents, relatives or friends, though that “privilege” could be suspended “in the interests of the pupil or the school”.  \(^{200}\) Frequency of visits was not specified and it seems likely that individual schools followed their own practices in the matter.

The parents and the Secretary of State had to be informed immediately in any case of serious illness, infectious disease, accident or death.  \(^{201}\)

Parents had to be consulted as to the arrangements to be made for a pupil who was about to be released and their written consent sought in any case in which it is proposed to place a boy in the Navy, Army or Air Force, or to allow him to emigrate.  \(^{202}\) Managers could not ignore a parent’s objection to these arrangements unless (in the managers’ view) it was in the interests of the pupil to do so.  \(^{203}\)

**Medical**

A Medical Officer was to be appointed, whose duties included—

(a) a thorough examination of each pupil on admission and shortly before leaving the school;

(b) a quarterly inspection of each pupil;

(c) the examination and treatment of pupils as required;

(d) a visit to the school at least once each week;

(e) general inspection and advice as to dietary and general hygiene in the school;

(f) the keeping of such medical records as may be required;

\(^{199}\) 1961 Rules, r. 35.

\(^{200}\) 1961 Rules, r. 36.

\(^{201}\) 1961 Rules, r. 37.

\(^{202}\) It is curious that the reference to emigration is limited, as the references to the armed services are, to boys.

\(^{203}\) 1961 Rules, r. 39.
(g) the furnishing of such reports and certificates as the Managers required; and
(h) the examination of the punishment book at each visit, drawing the attention of the Managers to any apparent case of excessive punishment.204

The managers, taking advice from the Medical Officer, had to “make full use of the preventive health measures at their disposal, including vaccination, immunisation and chest X-ray.” Dental care was also to be provided (and recorded).206

Release and After-Care

The managers were obliged to release each pupil “as soon as he has made sufficient progress; and with this object in view they shall review his progress and all the circumstances of his case (including home surroundings) at least quarterly.”207

There was no mechanism specified by which the parents (or indeed the child) could participate in the assessment of “sufficient progress” that might allow for release from the school. The managers were to assist any pupil over school age to obtain suitable employment, and if the pupil’s home was unsatisfactory, they were obliged to “arrange for suitable accommodation”.208 The pupil on leaving the approved school had to be provided with a sufficient outfit and, if necessary, a reasonable sum for travelling and subsistence.209 A suitable person was to be nominated to supervise the pupil on release.210

General

The school was to be open at all times to an inspector and the Managers had to give him all facilities for the examination of the books and records of the school, and for the interviewing of staff or pupils.211

Supervision after Release

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204 1961 Rules, r. 40.
205 1961 Rules, r. 41.
206 1961 Rules, r. 42.
207 1961 Rules, r. 43.
208 1961 Rules, r. 44.
209 1961 Rules, r. 46.
210 1961 Rules, r. 47.
211 1961 Rules, r. 48.
The Criminal Justice (Scotland) Act 1963, Pt II and Sched. II came into force on 1st November 1963, and provided for the supervision of persons released from approved schools, replacing the supervision provisions in s. 78 of and sched 2 to the Children and Young Persons (Scotland) Act 1937. The person released was to remain under the supervision of the managers of the approved school for two years, or until his or her 21st birthday, whichever was earlier, and was to reside with a person named by the managers. During that time the released person could be recalled. While under supervision, the person would be “in the care of” the managers of the school. That care imposed on the managers the obligations of a parent and gave them the same rights and powers, and liabilities as respects maintenance, as a parent. For three years after the period of supervision came to an end, the managers, if requested to do so and to the extent that they considered appropriate, had to cause the person to be “visited, advised and befriended” and to give him or her “assistance (including, if they think fit, financial assistance)” in maintaining him- or herself and finding suitable employment.

**Timeframe of 1961 Rules**

The 1961 Rules applied from 1st December 1961 until 1st June 1988, when they were replaced by the Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987.

**Remand Homes, Remand Centres and Detention Centres**

**1946 Rules**

The Remand Home (Scotland) Rules 1946, coming into force on 1st July 1946, replaced the earlier Remand Home (Scotland) Rules 1933 and were based on the

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212 Criminal Justice (Scotland) Act 1963 (Commencement No 1) Order SI 1963 No. 1681.
213 See Part One of this Report.
214 Criminal Justice (Scotland) Act 1963, sched. 2 para. 1.
215 Criminal Justice (Scotland) Act 1963, sched. 2 para 2.
216 Criminal Justice (Scotland) Act 1963, sched. 2 para. 5.
217 1937 Act, s. 79(4).
218 Criminal Justice (Scotland) Act 1963, sched. 2 para 7.
219 SI 1987 No. 2233 (S. 150), to be discussed in Part Three of this Report.
recommendations of the Scottish Advisory Council of the Treatment and Rehabilitation of Offenders. These rules are described in detail in the Shaw Review,222 as follows:

In terms of welfare, the rules generally said that each "inmate" - to use their terminology - should be thoroughly washed and examined by a doctor within 24-48 hours after being admitted.223 They also required that a doctor be appointed at each remand home to act as medical officer and administer any necessary medical treatment to inmates.224 Reflecting the importance of this role, the medical officer had to regularly visit the remand home and generally ensure the premises were hygienic, supervise the inmates' health and provide any medical attention that was needed.225

The superintendent (that is, the person in charge of the home226) also had responsibilities under the 1946 Rules. First, he or she was required to inform the clerk of court, council and the inmate's parents if an inmate had to be taken to hospital, clinic or other safe place to be medically treated or examined, or if the medical officer felt the inmate shouldn't be detained in the remand home on medical grounds. If the inmate had been committed to the home under section 58 of the 1937 Act, the superintendent also had to inform the Secretary of State.227 Finally, the superintendent had to report any death, serious illness, infectious disease or accident to the inmate's parent or guardian, the council and the Secretary of State.228

Homes had, as far as possible, to arrange for schoolroom instruction - on or off the premises - for inmates of school age,229 and in general the discipline of the remand home was to be maintained by "the personal influence" of the superintendent.230 When punishment was necessary to uphold discipline, the rules stipulated it should take the form of:

- temporary loss of recreation or privileges;
- reduction in food; or

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221 SR&O 1933 No. 1024 (S. 58), described in Part One of this Report.
223 The Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 8. Furthermore, in the case of an inmate known to be awaiting removal to an approved school, a medical examination was to take place within 48 hours before such removal.
225 ibid paragraph 23(1).
226 ibid, paragraph 23(1).
228 And any sudden or violent death was to be reported immediately by the council to the Procurator Fiscal: the Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 11.
229 ibid paragraph 12.
230 ibid paragraph 16.
• separation from other inmates (but only for those aged over 12, and provided they had some way of communicating with a member of staff). 231

Corporal punishment was allowed if these punishments proved ineffective, but could only be administered to boys232 and under the following conditions:

• It should be administered by the superintendent or, if the superintendent wasn’t available, by whoever was left in charge.
• Only punishments described by the rules were allowed: striking, cuffing or any shaking were forbidden.
• Only a strap approved by the council could be used:
  o for no more than three strokes on each hand; or
  o for no more than six strokes on the bottom, over trousers. 233

In terms of monitoring arrangements, the 1946 rules provided that homes had to be open for inspection by an inspector at all times. 234 This was in addition to the general powers of inspection in the Children and Young Persons (Scotland) Act 1937. 235 Homes also had to have arrangements in place for regular visits by council-appointed visitors, which were to take place at intervals of no more than three months, with at least two visits a year unannounced. 236 It is significant that these visitors were to include women, and that a further channel of inspection was now available: the home should be open "at all reasonable hours" to visits by justices and magistrates of the juvenile courts that sent children to the home. 237 In addition, reasonable facilities were to be given for inmates to receive visits from their relatives or guardians and friends, and to send or receive letters. 238

The rules also covered record-keeping. The superintendent was required to keep a register of inmates admitted to and discharged from homes, and had to keep log books, which had to detail "every event of importance" connected with the home. 239 These included details of all visits and dates of inspection, and all punishments. The latter was reinforced by a requirement on owners to record punishments immediately and to inform the Secretary of State every quarter of corporal punishments. 240 Registers and log books had to be open to inspection by the council, on the council's behalf or by an inspector. They also had to be inspected regularly at intervals of no more than three months. 241

231 ibid paragraph 17(a)
232 ibid
233 ibid paragraph 18.
234 ibid paragraph 2.
235 I.e. s82(3) as amended by the Criminal Justice (Scotland) Act 1949. Later repealed by the Social Work (Scotland) Act 1968.
236 Remand Home (Scotland) Rules 1946 SI 1946/693, paragraph 19.
237 ibid
238 ibid paragraph 14.
239 ibid paragraph 20.
240 ibid paragraph 17(b).
241 ibid paragraph 20.
Further control of remand homes was added by the Criminal Justice (Scotland) Act 1949, which for the first time required both remand homes and any person in charge to be approved by the Secretary of State, the criteria of approval being those laid down for the approval of approved schools. The 1949 Act also allowed for “detention centres” (for 14 – 21 year olds to be detained, on conviction, for up to three months), and “remand centres” for those committed in custody for trial or sentence and for offenders who were so unruly that they could not safely go to a remand home. Most of these provisions were repealed by the Social Work (Scotland) Act 1968.

In 1961 the Scottish Advisory Council on Child Care reported that: “With certain notable exceptions, the existing remand homes fall far short of the aims we have outlined above, and some of them deplorably so.” The Council recommended that responsibility for remand homes be transferred to the Secretary of State, “that full diagnostic services should be available to each remand home, and provide for the skilled assessment of inmates”, and that the 1946 Rules be reviewed. The 1946 Rules were revoked as from 1st October 1964 by the Remand Home (Scotland) Rules 1964 (not detailed in the Shaw Report).

1964 Rules

Welfare of the children detained in remand homes was a more prominent feature of the 1964 Rules than it had been in the 1946 Rules, and the dehumanising language of “inmate” changed to “children”. Local authorities were obliged to “conduct remand

\[\text{References}\]

- Criminal Justice (Scotland) Act, 1949, s. 51(1) and (3).
- Criminal Justice (Scotland) Act, 1949, s. 51(2).
- Criminal Justice (Scotland) Act, 1949, s. 50.
- Criminal Justice (Scotland) Act, 1949, s. 28. In 1961, it was reported that no such remand centres had been established: “Remand Homes: A Report of a Special Committee of the Scottish Advisory Council on Child Care” (SED 1961, Cmdn 1588).
- 1968 Act, sched. 9.
- “Remand Homes: A Report of a Special Committee of the Scottish Advisory Council on Child Care” (SED 1961, Cmdn 1588) at para. [33].
- A fuller description of this Report, and the Government’s response, may be found in the Kilbrandon Report, at paras 209-210.
- SI 1964 No. 1260, rule 33.
homes as in general to promote the welfare of the children admitted thereto, and in particular to ensure that such children are secure in custody, that their individual circumstances are carefully considered and assessed and that they receive appropriate care and training. 251 Staff were to be “suitably” qualified. 252 The food that was provided had to be “wholesome and appetising food, reasonably varied and adequate for the maintenance of health and strength in accordance with a dietary scale, which shall include a table of minimum quantities, prepared by the Superintendent in consultation with the medical officer.” 253 Children were allowed to wear their own clothing except where in the opinion of the Superintendent it was “necessary or desirable on the grounds of health, cleanliness, or welfare” to provide alternative adequate outdoor and indoor clothing and footwear. 254 Primary and secondary education was to be provided, as well as “suitable practical instruction” for children over school age. 255 The numbers accommodated in a remand home were set by the Secretary of State 256 and these could be exceeded only in “exceptional circumstances”. In 1968 the Secretary of State reported that “remand homes, particularly those in the West of Scotland, experienced frequent periods of pressure as regards numbers to be accommodated. This was especially noticeable in the earlier part of the year when most homes had recourse to the provision in the Remand Home (Scotland) Rules 1964 which permits homes to accommodate more than the normal maximum of children”. 257

The medical officer remained responsible for the general supervision of the health and cleanliness of the children and of the home itself. 258 Boys were to be segregated from girls 259 and each child was to have a separate bed, with adequate ventilation, adequate heating, adequate natural and artificial lighting and easy access to (gender-separated) water closets and washing facilities. 260

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251 1964 Rules, rule 3.
252 1964 Rules, rule 4.
254 1964 Rules, rule 7.
255 1964 Rules, rule 8.
256 1964 Rules, rule 19.
257 Child Care in Scotland, 1968 (Cmd 4069) at para 36.
258 1964 Rules, rule 14. Dental care was also to be provided: rule 15.
259 1964 Rules, rule 21.
260 1964 Rules, rule 22.
Discipline was to be “maintained by the personal influence of the Superintendent and his staff,” punishment could be by reprimand, or by temporary loss of recreation or privileges, except that a child was not to be deprived of any meal or of exercise in the open air. Corporal punishment was permitted where reprimand or loss of privileges was not appropriate, but only subject to the following conditions:

(a) it could not be administered to a girl;
(b) it could be administered only by the Superintendent in the presence of an adult witness, and any assistance necessary in administering it could be given only by a member of the staff;
(c) it was not to be inflicted on more than one occasion for one offence;
(d) it could not, without the approval of the medical officer, be administered to any boy who showed any sign of physical weakness, mental illness or mental deficiency;
(e) it could be inflicted only by means of a light tawse;
(f) a boy who had reached the age of 14 years could be given not more than three strokes on each hand or six strokes on the posterior over ordinary cloth trousers, and a younger boy could be given not more than two strokes on each hand or four strokes on the posterior over ordinary cloth trousers;
(g) any other form of corporal punishment was prohibited, with striking, cuffing and shaking being “strictly forbidden”. The difference between a prohibited and a strictly forbidden act is obscure, but presumably reflected differing disciplinary consequences for the staff breaching the rules.

A child who was behaving in an unmanageable or violent manner or was likely, in the opinion of the Superintendent, to exercise a bad influence on the other children could be temporarily separated from the other children by being confined in a room approved for the purpose by the Secretary of State, so long as the room had good natural lighting, was lit after dark, and had adequate ventilation and heating; suitable forms of occupation had to be provided and means of communication between the

261 1964 Rules, rule 23.
262 1964 Rules, rule 24.
263 See further, Appendix Two to the present Report.
264 This is slightly odd, given that corporal punishment of girls in approved schools was permitted under the 1961 Rules (discussed above).
265 These replicated the rules for boys in approved schools: 1961 Rules, r. 31(f) and (g).
266 1964 Rules, rule 25.
child and a member of staff was to be available at all times during the day and night and the child was to be visited frequently by a member of staff and at least once each day by the Superintendent. 267

Children could be visited by their parents, relatives and friends at specified times, though visits could be suspended by the Superintendent in the interests of the child or the conduct of the remand home; legal advisers, police, probation officers and local authority officers could also visit the child. 268 Three representatives of the local authority (at least one of whom being a woman) were obliged to visit the remand home at least once a month and remand homes were to be open at all times to inspection by an inspector. 269 Appropriate records were to be kept. 270 The focus of these visits was not specified.

These Rules applied to children in remand homes as a place of safety, as well as to children committed to custody in a remand home. 271 A Report of the Secretary of State for Scotland in 1968 said this:

The Social Work (Scotland) Act 1968 amends section 58 of the 1937 Act in such a way as to abolish detention in a remand home as a punishment. The 1968 Act also provides for the repeal of section 81 of the 1937 Act which requires local authorities to provide remand homes and in consequence remand homes will cease to exist as such. Local authorities will be required to provide such residential establishments as may be required for their functions under the 1968 Act and those remand homes which are suitable will become available for providing a full range of assessment facilities on a residential basis for those children sent to them. 272

**Borstals**

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268 1964 Rules, rule 12.
269 1964 Rules, rules 27 and 28.
271 1964 Rules, rule 32.
272 *Child Care in Scotland, 1968* (Cmd 4069) at para. 37.
The Criminal Justice (Scotland) Act, 1949273 replaced the existing provisions relating to Borstal institutions. Any person aged between 16 and 21 convicted of an offence punishable by imprisonment could receive, in lieu of any other sentence, a sentence of borstal training; any person so sentenced was to be detained in a Borstal institution, and after his release therefrom would be subject to supervision under the Fourth Schedule to the 1949 Act.274 The Borstal (Scotland) Rules, 1950,275 made under the 1949 Act, replaced the earlier Borstal (Scotland) Regulations, 1911 (discussed in Part One above),276 and came into force on 11th December 1950.277

Borstal training was described in the 1950 Rules as training “to bring to bear influences which may establish in an inmate the will to lead a good and useful life and to abstain from crime and to fit him to do so by the fullest possible development of his character, ability and sense of personal responsibility”; methods of training could “vary as between one institution and another according to the needs of the different types of inmate allocated to each.”278 “Inmates” were to be grouped into “houses”, each with a housemaster who, with the assistance of a matron, would be responsible “for the personal training of the inmates of it”.279 Inmates were to be accommodated in separate beds, in either bedrooms or dormitories.280 A personal record of each inmate was to be kept,281 and inmates were to be informed of the rules.282

Medical examination was required to be provided on admission,283 and infant children of female inmates were to be received into the institution with their mothers.284 In a clear recognition of the risk of exploitation (sexual or otherwise) of girls by men in power over them it was provided that “Girls shall be attended only by

273 12, 13 and 14 Geo VI, ch. 94 (repealed by the Criminal Procedure (Scotland) Act 1975, Sched. 10).
274 Criminal Justice (Scotland) Act, 1949, s. 20.
275 c1 1950 No. 1944.
277 1950 Rules, r. 2.
278 1950 Rules, r. 4.
279 1950 Rules, r. 7.
280 1950 Rules, r. 10 and 11.
281 1950 Rules, r. 14.
282 1950 Rules, r. 18.
283 1950 Rules, r. 16.
284 1950 Rules, r. 17.
female officers and if working under a male instructor shall be supervised by a female officer." The female officer in charge of girls was to “take care that no male officer or visitor enters any part of the institution allotted to female inmates unless accompanied by herself or some other female officer.” These rules, typically for the period, ignored the possibility of such exploitation of boys (or indeed of exploitation by women in power).

Offences against discipline were listed in Rule 33, and included disobedience, disrespect, idleness, insolence, indecency, making “repeated and groundless complaints” and, revealing the Borstal mind-set and probably regime, “mutiny”. It was for the Governor of the institution (or his nominee) to investigate any alleged offence and potential punishments were listed, with more severe punishments lying with the Visiting Committee. “Mechanical restraints” were permitted only on direction of the medical officer, and temporary confinement of a “refactory or violent inmate” could be ordered by the Governor. The use of force in dealing with inmates was prohibited, “unless its use is unavoidable”; “an officer shall not strike an inmate unless compelled to do so in self-defence.” Corporal punishment was not permitted in Borstal institutions.

An important right of inmates was to request to see the Governor, member of the Visiting Committee or sheriff or JP visiting the institution and to make complaints.

Inmates were to be “employed on useful work, and shall be instructed as far as possible in occupations which may fit him to earn his livelihood on release.” Continued education was also to be provided.

The maintenance of beneficial relationships between an inmate and his family and other persons or agencies outside the institution was to be encouraged and

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285 1950 Rules, r. 27.
286 1950 Rules, r. 28.
287 1950 Rules, rr. 34 and 35.
288 1950 Rules, r. 38.
289 1950 Rules, r. 39.
290 1950 Rules, r. 98.
291 1950 Rules, r. 42.
292 1950 Rules, r. 45.
293 1950 Rules, r. 54.
communications between inmates and their relatives and friends were permitted (though letters to and from inmates were to be read by the Governor or his nominee and withheld if “objectionable”).

As with approved schools, the medical officer was an important officer in terms of the general health and wellbeing of inmates, and was required to pay special attention to inmates with contagious diseases, suicidal thoughts or mental illness, and also to make recommendations as to general hygiene in the institution. The rules also required that food provided “at all times be wholesome and appetising, reasonably varied and adequate for the maintenance of health”; this being inspected “frequently” by the medical officer, and in accordance with a scale authorised by the Secretary of State. The Visiting Committee could also inspect the food being provided. Suitable clothing was to be provided, including protective clothing for use at work.

The Visiting Committee was to “examine periodically the character, conduct and prospects of each inmate” and could recommend release. The Visiting Committee had to meet at the institution at least once a quarter and members were required to visit “frequently” to inspect the institution. An important aspect of the Committee’s role was to investigate complaints made by inmates. They were also required to inquire into the state of the buildings and to report thereon.

Except with the permission of the Governor, no officer was to knowingly communicate with any ex-inmate, or with the friends or relatives of any inmate or ex-inmate.

294 1950 Rules. r. 57.
295 1950 Rules, r. 60.
296 1950 Rules, rr. 66 – 79.
297 1950 Rules, rr. 83 & 84.
298 1950 Rules. r. 121.
299 1950 Rules, r. 87.
300 1950 Rules. r. 87.
301 1950 Rules, r. 91.
302 1950 Rules, r. 111.
303 1950 Rules, r. 119.
304 1950 Rules, r. 125.
305 1950 Rules. r. 101.
[The Criminal Justice (Scotland) Act 1963 amended (in minor respects) the 1949 Act; s. 204 of Criminal Procedure (Scotland) Act 1975 dealt with sentences of Borstal training. Section 207 of the CPSA 1995 changed this to sentences of detention in Young Offenders Institutions (and see the Prisons and Young Offenders Institutions (Scotland) Rules 2006, 2011).]

**Places of Safety**

The definition of “place of safety”, to which children and young persons could be removed, contained in s. 110 of the Children and Young Persons (Scotland) Act, 1937 was amended in 1948 by the addition to the definition “any home provided by a local authority under Part II of the Children Act, 1948”. Each local authority was obliged to make provision, in the homes they provided, “for the reception and maintenance of children removed to a place of safety” under the 1937 Act, this to be, so far as practicable, in the separate accommodation for the temporary reception of children as was required under s. 15(2) of the 1948 Act.

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**SECTION D: Accommodation Away from Home for Education or Health Reasons**

**Independent Boarding Schools**

Until the late 1950s, there was no legislative regulation governing either the setting up or running of boarding schools by private individuals, organisations or religious groups. The regulation that has existed since then has (until relatively recently) afforded the state very little oversight of how such schools are conducted, or power to provide any genuinely effective protection of children there resident. Since children at boarding schools, by and large and unlike children at approved schools

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305 1948 Act, s. 60(2) and Sched. 3.
306 1948 Act, s. 51(1).
307 1948 Act, s. 51(2).
and the like, are there as a result of the exercise of parental power the assumption seems to have been that the parental right to remove children immediately would be sufficient protection. The flaw in that reasoning, of course, is the lack of any robust mechanism to allow parents properly to assess any potential risk to their children.

**The Coming of Compulsory School Education**

The history of modern school education in Scotland is usually traced to the Education (Scotland) Act, 1872,\(^{308}\) which abolished the authority of the Church of Scotland (and Free Church of Scotland) presbyteries over Scottish local schools and transferred their jurisdiction to parochial school boards, which were secular and non-denominational.\(^{309}\) The 1872 Act imposed on the newly-established school boards a duty to provide “for every parish and burgh a sufficient amount of accommodation in public schools available for all persons resident in such parish and burgh and for whose education efficient and suitable provision is not otherwise made”.\(^{310}\) All teachers in public schools had to be qualified.\(^{311}\) All public schools were open to inspection by Her Majesty’s Inspectors (except, curiously, that inspectors were not to inquire into any religious instruction).\(^{312}\) So schools had to be provided, and funded, by the state but, perhaps more importantly, it was made compulsory for all parents to provide “elementary education in reading, writing and arithmetic for his children, between five and thirteen years of age”:\(^{313}\) failure to do so was made a criminal offence.\(^{314}\) The 1872 Act did not, however, require that this elementary education be provided at public schools and it remained (and remains) open to any parent to make other provision for the suitable and efficient education of their children, including by home tuition or by private (non-state funded)\(^{315}\) schools. Many such independent

\(^{308}\) 35 and 36 Vict. c. 62. For a history both of the 1872 Act and subsequent developments, see J. Scotland “The Centenary of the Education (Scotland) Act 1872” (1972) 20 British Journal of Educational Studies 121.

\(^{309}\) The Roman Catholic Church had declined to transfer their schools to the public system, but did so when the Education (Scotland) Act 1918 extended state funding of denominational schools.

\(^{310}\) Education (Scotland) Act, 1872, s. 26.

\(^{311}\) Education (Scotland) Act, 1872, ss. 57-59.

\(^{312}\) Education (Scotland) Act, 1872, s. 66.

\(^{313}\) Education (Scotland) Act, 1872, s. 69. The same obligation was imposed on employers of children under 13: s. 72.

\(^{314}\) Education (Scotland) Act, 1872, s. 70.

\(^{315}\) Other than indirectly through favourable tax regimes.
schools offered (and offer) boarding accommodation as well as educational provision, and they do so for reward.

**Boarding Schools as Private Foster Care Providers**

As we saw in Part One of the present Report, Part One of the Children Act, 1908 regulated what was then known as “baby farming” and what would now be called private fostering: the looking after of young children, apart from their parents, for reward. That regulation (called in the Act “Infant Life Protection”) required notification to the local authority of the placement of children under the age of seven for residential care, mandated visits by infant protection visitors, and allowed the local authority to limit the number of children who could be received for these purposes by any one person. It was provided, however, that Part One of the 1908 Act was not to apply to “boarding schools at which efficient elementary education is provided.”

Few children under seven would have been boarders in independent boarding schools in any case, but the age of seven was increased to nine in 1932, and then that age was increased to 18 in 1948. More significantly, the exclusion of boarding schools was explicitly removed by the 1932 Act and replaced by a procedure where the local authority could grant a certificate of exemption to “any hospital, convalescent home or institution”. That exemption could be granted (conditionally or unconditionally) in respect of “any particular premises within their district [area] which appear to them to be so conducted that it is unnecessary that they should be visited.”

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316 Children Act, 1908, s. 11(1).
317 Children and Young Persons (Scotland) Act, 1932, s. 59, amending s. 1 of the 1908 Act. The 1908 provisions (as so amended) were replaced by Part One of the Children and Young Persons (Scotland) Act, 1937.
318 Children Act, 1948, ss. 35 and 36.
319 Children and Young Persons (Scotland) Act, 1932, s. 63(1) and (2).
320 Children and Young Persons (Scotland) Act, 1932, s. 63(1); Children and Young Persons (Scotland) Act, 1937, s. 11.
321 Children Act, 1908, s. 2(4); Children and Young Persons (Scotland) Act, 1937, s. 2(3).
Cowan, in her book on the 1932 Act, described the consequences of that change somewhat cautiously:

All private hospitals, orphanages, *private boarding schools* and similar institutions which receive children under nine years for payment or fees will *apparently* have to apply to the Local Authority for such a certificate or, alternatively, to notify individually each child whom they receive.

The provisions on child life protection in the 1937 Act survived the 1948 Act which, by extending the age of their application to all children under 18, would (if Cowan were correct) have brought within the terms of the 1937 Act the vast majority of boarders at independent boarding schools. That would require notification to and visitation by the local authority, or a positive decision of the local authority that any particular boarding school was so conducted as not to require visitation. I have no access to information as to whether any such certificates of exemption were granted to independent boarding schools in Scotland, or whether such notification was ever given. But in *Wallbridge v Dorset County Council* the Chancery Division, interpreting the equivalent English infant life protection provisions, held that they did not apply to independent boarding schools, if for the slightly counter-intuitive reason that children at boarding schools were not living “apart from his parents”. The judge held that the protective nature of the provisions coloured that phrase and required a distinction to be made between mere delegation of authority by parents and a parental intention to “part from” their children. While the latter would activate the infant life protection provisions, boarding a child at a fee-paying school would typically involve only the former. I can trace no discussion of the point in the Scottish courts but it seems likely that in practice it was assumed that these provisions did not apply to independent boarding schools.

The matter was clarified somewhat when Part One of the 1937 Act was replaced by Part One of the Children Act, 1958. Section 2 of the 1958 addressed the ambiguities identified in *Wallbridge* and defined “foster child”, to whom the Part applied, as “a child below the upper limit of the compulsory school age whose care and maintenance are undertaken for reward for a period exceeding one month by a

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322 MG Cowan *The Children Acts (Scotland)* (W. Hodge & Co, 1933) at p. 115 (emphasis added).
323 [1954] 2 WLR 1068.
person who is not a relative or guardian of his”. This would clearly have included children of the appropriate age residing in fee-charging boarding schools, but for the fact that it was further provided that Part One would only apply, subject to modifications, to children who reside during school holidays in independent schools for a period of more than one month. Residence of children during term time in boarding schools would not, therefore, be covered by the Act. For those children who were covered, the private fostering provisions discussed above did apply, but subject to the following modifications:

(i) the full notice provisions in s. 3 (unless the local authority itself seeks information) did not apply;
(ii) though visiting and inspection of premises was permitted, the local authority could not impose conditions nor prohibit the use of premises for the keeping of any child;
(iii) the provisions did not extend to children over the compulsory school age;
(iv) notice that the child would remain in the school during school holidays had to be given to the local authority, unless the local authority exempted the school from doing so, either for a specified period or indefinitely.

Registration of Independent Schools

State oversight of independent schools was for the first time provided by the Education (Scotland) Act, 1945, but that oversight took a weak form in comparison to the oversight of other establishments considered elsewhere in this Report. Section 66 of the 1945 Act, shortly thereafter replaced by s. 109 of the Education (Scotland) Act, 1946, required that independent schools be registered with the

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324 And, as was decided in Wallbridge, it would not matter whether the fees were paid by the parents, charity, or by the state.
325 Children Act, 1958, s. 12(1) and (4).
326 Children Act, 1958, s. 12.
327 8 & 9 Geo 6, c. 37. There were other modernisations in the 1945 Act. Of peculiar note is s. 51 (later s. 76(2) of the 1946 Act): “No woman shall be disqualified for employment as a teacher in any school, junior college or other educational establishment under the management of an education authority or be dismissed from such employment by reason only of marriage.” This rule did not extend to teachers in independent schools.
328 9 & 10 Geo 6, c. 72. The circumstances in which the 1945 Act was passed, requiring speedy consolidation in the 1946 Act, are described by Lord Morrison moving the Second Reading of the
Registrar of Independent Schools in Scotland (a newly-created officer of the Secretary of State for Scotland). That section was not brought into force until 30th September 1957. On that date also the Registration of Independent Schools (Scotland) Regulations, 1957 came into force, setting out the procedure to be followed for registration and the information to be supplied. Details were required about the proprietor of the school, the number of pupils, their sex and whether or not they were boarders; also the names, dates of birth and qualifications of each teacher employed in the school. This was nothing more than a requirement to supply information and the Regulations themselves did not lay down conditions, for example as to the qualifications of teachers. The Act itself, however, allowed the Secretary of State to specify in a Complaint shortcomings that required to be rectified, in terms of the efficiency and suitability of the education being provided, the suitability of the school premises and (separately) the accommodation provided; he could also conclude that the proprietor of the school or any teacher was not a proper person to be such proprietor or teacher. Registration could be refused or withdrawn for any of these reasons. Appeals from such refusal, or from a requirement to rectify matters specified in a Complaint, could be taken to the Independent Schools Tribunal, procedure at which was laid down by the Independent Schools Tribunal (Scotland) Rules, 1961. It was a criminal offence to carry on an independent school that was not registered. Given the absence of any visitation or inspection provisions, it is unclear how the Secretary of State could judge matters such as the suitability of school premises and it is noticeable that the one case in the law reports

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329 Education (Scotland) Act, 1946 (Commencement No. 3) Order, 1957 (SI 1957 No. 224).
330 SI 1957 No. 1058 (S. 55).
331 1957 Regulations, Sched.
332 1946 Act, s. 110.
333 1946 Act, s. 111. Constitution of this Tribunal was governed by Sched 5 to the 1946 Act. Appeal from the decision of the Tribunal could be taken to a court of law. An example under the equivalent English provisions is Byrd v Secretary of State for Education and Science (1968) 112 Solicitors Journal 519, where a headmaster was imprisoned for "ill-treating boys at the school" and the school he ran with his wife had its registration withdrawn (the appeal by the wife against her disqualification from running independent schools was unsuccessful).
334 SI 1961 No 2402 (S. 136), coming into force on 16th January 1962. These rules were replaced by the Independent Schools Tribunal (Scotland) Rules 1977 (SI 1977 No. 1261 (S. 95)), which applied until the Independent Schools Tribunal was abolished, and its jurisdiction transferred to the Sheriff Principal, by the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, s. 6(2), commencing 31 December 2005 (SSI 2005 No. 570).
335 1946 Act, s. 112.
on these provisions\textsuperscript{336} arose after the criminal conviction of a headmaster. The provisions therefore facilitated responsive protective action by the state, but were ill-equipped to provide pre-emptive protection.

The 1946 Act was repealed by the Education (Scotland) Act 1962,\textsuperscript{337} Part V and Schedule 7 of which replicated without substantive change the provisions relating to the registration of independent schools.\textsuperscript{338} The 1957 Regulations were amended in 1975\textsuperscript{339} but remained in force until their repeal on 31 December 2005 by the Registration of Independent Schools (Scotland) Regulations 2005.\textsuperscript{340}

\textit{Administration of Independent Boarding Schools}

The administration of independent schools, boarding or otherwise, has by and large been free from statutory regulation, but with some institutions certain provisions in the Administration of Children’s Homes (Scotland) Regulations, 1959\textsuperscript{341} would appear to have applied. Regulation 19 specified the extent of these Regulations:

\begin{quote}
Subject to the next following Regulation these Regulations shall apply to all homes provided by local authorities under section 15 of the Act and to all voluntary homes, within the meaning of section 96 of the Children and Young Persons (Scotland) Act, 1937, as amended by section 27 of the Act…
\end{quote}

As amended “voluntary home” in the 1937 Act meant “a home or other institution supported wholly or partly by voluntary contribution”, or “a home or other institution supported wholly or partly by endowments, not being a school within the meaning of the Education (Scotland) Act 1946”. Section 20 of the 1959 Regulations then stated that “Where a home [supported wholly or partly by voluntary contribution] includes a

\textsuperscript{336} Byrd \textit{v} Secretary of State for Education, above.
\textsuperscript{337} 1962 c. 47, sched. 8.
\textsuperscript{338} The 1962 Act was itself replaced by the Education (Scotland) Act 1980 to be considered in Part Three of the present Report.
\textsuperscript{339} Registration of Independent Schools (Scotland) Amendment Regulations 1975, SI 1975 No. 1412.
\textsuperscript{340} SSI 2005 No. 571. These short-lived regulations were themselves replaced by the Registration of Independent Schools (Scotland) Regulations 2006, SSI 2006 No. 324, to be discussed in Part Four of the present Report.
\textsuperscript{341} SI 1959 No. 834.
school which is a public school, a grant-aided school or an independent school then various of the 1959 Regulations would “not apply to the part of the home used as a school during that part of the day in which it is being so used or to any child attending the school during that part of the day in which he is so attending”. This is obscure, but it would seem to mean that any part of an independent school supported wholly or partly by voluntary contributions that is not used as a school (i.e. the residential part) was indeed subject to all the 1959 Regulations, as set out above. The Regulations that did not apply to the school part of the institution were those relating to local authority visitation, the specification of the medical officer’s duties, the requirement to provide dental care, the rules on discipline and corporal punishment, notification of misadventure, and record-keeping. The 1959 Regulations were replaced by the Social Work (Residential Establishments – Child Care) (Scotland) Regulations 1987, which applied to independent schools that had voluntarily registered under s. 61A of the Social Work (Scotland) Act 1968.

**Homes for the Disabled**

Section 37 of the National Assistance Act, 1948 required that homes for disabled persons (and old persons) be registered with the local authority, which had the power to refuse registration if the applicant was not a “fit person” to carry on or be employed by a home of the sort being registered, or if the accommodation, equipment or staff were not fit to be used for such a home, or if the way it was to be run would not provide the services or facilities reasonably required by persons resorting to such a home. Registration could be cancelled for the same reasons, or because a person had been convicted of an offence relating to registration of the

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342 As defined in the Education (Scotland) Act, 1946, s. 143 (as amended by the Education (Scotland) Act, 1956 s. 13(1), sched. 1) to mean a school at which full-time education is provided for five or more pupils of school age, not being a public school or grant-aided school.
343 That is to say, 1959 Regulations 2, 6(2), 7, 10, 11, 13, 14 and 15.
344 SI 1987 No. 2233 (S. 150).
345 11 & 12 Geo. 6, ch. 29.
346 Other than those for the mentally disabled, or public hospitals, or voluntary homes under the 1937 Act.
347 Defined in s. 29 as the blind, deaf or dumb, “and other persons who are substantially and permanently handicapped by illness, injury or congenital deformities”.
348 National Assistance Act, 1948, s. 37(1) and (3).
home. The Secretary of State had the power to enter and inspect any such home. The court had the power to order the removal of a person in such a home to a hospital or other suitable place if they were in need to care and attention not being provided in the home.

Detention under the Mental Health Legislation

We saw in Part One of the present Report that the especial vulnerability to abuse of mental health patients had been recognised, and addressed, in legislation as early as the Mental Deficiency and Lunacy (Scotland) Act, 1913. That Act was subject to minor amendments by the Mental Deficiency (Scotland) Act, 1940 and the supervisory power of the General Board of Control over the powers and duties of education and local health authorities was transferred to the Secretary of State for Scotland by the National Health Service (Scotland) Act, 1947. The 1913 Act itself remained in force until its replacement by the Mental Health (Scotland) Act, 1960, which was brought fully into force on 1st June 1962. The 1960 Act established the Mental Welfare Commission for Scotland, whose first duty was (and is) “to exercise protective functions in respect of persons who may, by reason of mental disorder, be incapable of adequately protecting their persons or their interests”. The Commission was obliged “to make inquiry into any case where it appears to them that there may be illtreatment, deficiency in care or treatment”, as well as to visit regularly both patients in hospital and patients subject to mental health guardianship. Local health authorities had to provide residential accommodation and local authorities acting under the Children Act, 1948 were empowered to accommodate in a home or other accommodation any child whose

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349 National Assistance Act, 1948, s. 37(4).
350 National Assistance Act, 1948, s. 39.
351 National Assistance Act, 1948, s. 47 (amended in certain procedural respects by the National Assistance (Amendment) Act, 1951).
352 3 & 4 Geo. 5, c. 38, esp. ss. 45 and 46.
353 3 & 4 Geo. 6, c. 8.
354 National Health Service (Scotland) Act, 1947 (10 & 11 Geo. 6, c. 27), s. 49.
355 Mental Health (Scotland) Act, 1960 (Appointed Day No. 3) Order, SI 1962 No. 516.
356 1960 Act, s. 2.
357 1960 Act, s. 4(1).
358 1960 Act, s. 4(2)(a).
359 1960 Act, s. 4(2)(b).
360 1960 Act, s. 7.
care or after care for mental disorder was being provided by a local health
authority. Where the local authority had parental rights and powers over a patient
under the Children and Young Persons (Scotland) Act, 1937, or the Children Act,
1948, the authority had to arrange for the patient to be visited and to “take such other
steps in relation to the patient while in the hospital or nursing home as would be
expected of a parent.” The Education (Scotland) Act, 1946 had required
education authorities to provide educational facilities for “pupils who suffer from
disability of mind” and the 1960 Act required the local health authority to provide
“suitable training and occupation” for both persons over 16 suffering from mental
deficiency and persons under 16 “found unsuitable for education and training in a
special school”.

Registration
Private (that is to say, non-NHS) hospitals and nursing homes required to be
registered, which involved an assessment of their fitness for purpose. Residential
homes for “persons suffering from mental disorder” required to be registered,
inspected and conducted under the terms of the National Assistance Act, 1946 and
such homes were not to be treated as “voluntary homes” under the 1937 Act. The 1960 Act also provided for “state hospitals” for patients detained under the Act
who required “treatment under conditions of special security on account of their
dangerous, violent or criminal propensities.” This replaced the State Mental
Hospitals established under the Criminal Justice (Scotland) Act, 1949.

Detention
Detaining a patient in hospital, or subjecting the patient to guardianship, required
the authority of the sheriff on the application of a mental health officer or the

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361 1960 Act, s. 9.
362 1960 Act, s. 10(2).
363 Education (Scotland) Act, 1946, s. 1.
364 1960 Act s. 12.
365 1960 Act, ss. 15 and 16.
366 1960 Act, s. 19; National Assistance (Registration of Homes) (Scotland) Amendment Regulations, 1962 (SI 1962 No. 2489).
367 1960 Act, s. 19(3).
368 1960 Act, ss. 89 et seq.
369 The State Hospital at Carstairs is the only state hospital established in Scotland.
370 All the forms to be used were detailed in the Mental Health (Forms) (Scotland) Regulations 1962 (SI 1962 No. 613).
The guardian of the patient was prohibited, as was the case under the Mental Deficiency and Lunacy (Scotland) Act (Secretary for Scotland’s) Regulations, 1914, from administering corporal punishment: to do so was a criminal offence, and there was no exception for patients who were children and young persons. There was no such rule for staff in hospitals.

The Mental Health (Guardianship) (Scotland) Regulations 1962 set out the powers and duties of guardians and local health authorities concerned in respect of persons subject to guardianship under the 1960 Act. The local health authority was obliged to arrange visits to patients under guardianship at intervals of not more than three months. Guardians were subject to the following duties:

“(1) The guardian shall be responsible for the care, supervision, and general welfare of the patient and for the promotion of his physical and mental health.

(2) The guardian shall in particular ensure that the patient is provided with adequate and suitable food, clothing and accommodation.

(3) The guardian shall, so far as is reasonably practicable in the circumstances, make arrangements for the occupation, training or employment, and recreation of the patient.

(4) The guardian shall keep a visiting book provided by the local health authority concerned in which shall be recorded the date of each visit paid to the patient on behalf of that authority.”

These Regulations applied until their revocation by the Mental Health (Specified Treatments, Guardianship Duties etc) (Scotland) Regulations 1984.

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371 1960 Act ss. 24 and 25. There was no remaining power by a hospital to detain a person against their will in a mental health hospital other than by this means, though private individuals were held to retain a common law power to detain, in a situation of necessity, a person of unsound mind who is a danger either to him or herself or to others: B v Forsey 1988 SC(HL) 28, per Lord Keith of Kinkel at p. 63.
372 1960 Act, s. 26. “Nearest relative” was defined in s. 45: interestingly within the word “spouse” was included cohabitants who had lived together for more than six months.
373 1960 Act, s. 29(6).
374 SI 1962 No. 614.
375 1962 Regulations, reg. 5.
376 1962 Regulations, reg. 7.
Detention in hospital or being subject to guardianship was to last for not more than a year, but could be renewed on an annual then biennial basis;\textsuperscript{378} that renewal was subject to appeal to the sheriff (so long as the patient was over 16 years of age).\textsuperscript{379} A resident of an approved school who was suffering from mental disorder could be placed under guardianship under the 1960 Act if the Secretary of State considered that it was in the public interest to do so.\textsuperscript{380}

\textit{Special Offences in Relation to Mental Health Patients}

As with the 1913 Act, special offences were contained in the 1960 Act which again shows a clear understanding that mental health patients are especially vulnerability to ill-treatment and abuse:

\begin{quote}
\textbf{95.— Ill-treatment of patients.}

(1) It shall be an offence for any person being an officer on the staff of or otherwise employed in a hospital or nursing home, or being a member of the board of management of a hospital or a person carrying on a nursing home—

\begin{itemize}
  \item[(a)] to ill-treat or wilfully neglect a patient for the time being receiving treatment for mental disorder as an in-patient in that hospital or nursing home; or
  \item[(b)] to ill-treat or wilfully neglect, on the premises of which the hospital or nursing home forms part, a patient for the time being receiving such treatment there as an out-patient.
\end{itemize}

(2) It shall be an offence for any individual to ill-treat or wilfully neglect a patient who is for the time being subject to his guardianship under this Act or otherwise in his custody or care.

(3) Any person guilty of an offence against this section shall be liable—

\begin{itemize}
  \item[(a)] on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds, or to both such fine and imprisonment;
\end{itemize}
\end{quote}

\begin{footnotes}
\footnote{\textsuperscript{377} SI 1984 No. 1494, to be discussed in Part Three of the present Report.}
\footnote{\textsuperscript{378} 1960 Act, s. 39.}
\footnote{\textsuperscript{379} 1960 Act, s. 39(7).}
\footnote{\textsuperscript{380} 1960 Act, s. 71.}
\end{footnotes}
(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding five hundred pounds, or to both such fine and imprisonment.

However, much of the force of s. 95 was reduced by s. 107 which removed any civil or criminal liability "in respect of any act purporting to be done in pursuance of this Act" unless the act was done in bad faith or without reasonable cause. In *Skinner v Robertson* a nurse of 22 years' experience was charged with assaulting a number of mentally handicapped children (aged between 8 and 11) in his care in a mental hospital by throwing water over them, striking them on the face and thigh and striking them on the head with his knuckles. The children were difficult to control and the nurse had thrown water from a jug with the intention (he said) of calming them down; the striking was done in the context of separating children who were attacking other children. Sheriff Fulton, following a House of Lords decision on the equivalent English provision, said this:

> On looking at the terms of s. 107, I think that Parliament must have had in mind, inter alia the necessity — albeit a regrettable necessity — for the use of physical force on occasions in a mental hospital by nurses on patients, and decided to enact s. 107 in terms which remove in the present type of case the hazard of civil liability for damages, or the stigma of criminal liability, from certain acts involving physical force necessarily used by nurses in carrying out their responsibility to care for and to control their patients, unless these acts were done in bad faith or without reasonable care.... Each case clearly will depend upon its own facts and circumstances, but I think that a useful approach is to measure good faith and reasonable care by looking at whether or not the use of force was reasonably required, and if so whether or not the physical force used was the minimum force reasonably necessary in the circumstances of the particular case, to fulfil the nurses' responsibility to care for and control the patient or patients involved...In applying my approach to s. 107 in the present case, I am satisfied that what the accused did was done in the belief that he was acting in the interests of his patients in exercising

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381 Section 107 of the 1960 Act follows the antecedent in s. 141 of the (English) Mental Health Act 1959. Both sections were headed "Protection for acts done in pursuance of this Act".

382 1980 SLT (Sh Ct) 43.

383 Student nurses had reported him, and were commended for doing to by the Sheriff.

legitimate care for and control of these patients, and that he was acting with good faith and with reasonable care. Accordingly I am acquitting him of all charges.\textsuperscript{385}

In the House of Lords case cited, Lord Simon of Glaisdale offered the following justification for the remarkable overreach of this provision:

Patients under the Mental Health Act may generally be inherently likely to harass those concerned with them by groundless charges and litigation, and may therefore have to suffer modification of the general right of free access to the courts. But they are, on the other hand, a class of citizen which experience has shown to be peculiarly vulnerable.\textsuperscript{386}

Section 107 represented a substantial extension of the protection of staff offered under the 1913 Act (and a corresponding diminution in the protection offered patients) for the earlier Act\textsuperscript{387} had exempted from civil or criminal liability only those who had done anything to facilitate the reception into hospital of a patient, unless the person had not acted in good faith and with reasonable care. In other words, staff were protected against claims for wrongful detention. It is unclear the extent to which “harassment of staff” by false allegations of assault was a genuine problem that persuaded Parliament to extend the 1913 protection to include such allegations.\textsuperscript{388} However, the feeling that staff needed to be protected from “groundless charges” remained reflected in the legislation for many years and s. 107 of the 1960 Act was re-enacted as s. 122 of the Mental Health (Scotland) Act 1984.\textsuperscript{389} No equivalent, however, appeared in the Mental Health (Care and Treatment) (Scotland) Act 2003.\textsuperscript{390}

Limited protection against sexual abuse of mental health patients was also provided by the 1960 Act. Again, this recognised an especial vulnerability of such patients, for

\begin{footnotes}
\item[385] 1980 SLT (Sh Ct) at 46.
\item[386] [1976] AC at p 329.
\item[387] 1913 Act, s. 73.
\item[388] The matter was not discussed in the Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency (1957 Cmnd 169) which preceded the English legislation, itself the model (in many but not all respects) for the Scottish Act nor, as far as I have been able to trace, in the Parliamentary debates leading to either statute.
\item[389] Section 122 of the 1984 Act was discussed (in the context of detention in a hospital) in B v Forsey 1988 SC(HL) 28.
\item[390] Though s. 313 of the 2003 Act did re-enact the crime of ill-treatment and wilful neglect of mentally disordered persons. That section was replaced by s. 46 of the Sexual Offences (Scotland) Act 2009.
\end{footnotes}
there was during the period presently under consideration no equivalent for other children or young persons living in institutional or foster care. 391

96.— Protection of female defectives.

(1) It shall be an offence, subject to the exception mentioned in this section,—

(a) for a man to have unlawful sexual intercourse 392 with a woman who is a defective;
(b) for any person to procure or encourage any woman who is a defective to have unlawful sexual intercourse;
(c) for the owner or occupier of any premises or any person having or assisting in the management or control of premises to induce any woman who is a defective to resort to or be upon such premises for the purpose of unlawful sexual intercourse with any man.

(2) A person shall not be guilty of an offence against this section if he did not know and had no reason to suspect that the woman in respect of whom he is charged was a defective. 393

... (7) In this section “defective” means a person suffering from mental deficiency which is of such a nature or degree that the person is incapable of living an independent life or of guarding herself against serious exploitation, and “woman” includes girl.

97.— Protection of female patients.

(1) Without prejudice to the last foregoing section, it shall be an offence, subject to the exception mentioned in this section.—

(a) for a man who is an officer on the staff or is otherwise employed in a hospital or nursing home, or who is a member of the board of

391 This was so until, on the recommendation of the Scottish Law Commission (The Law of Incest in Scotland Scot. Law Com. 69, 1981, para 4.30), the Incest and Related Offences (Scotland) Act 1986 amended the Sexual Offences (Scotland) Act 1976 (c. 67) to include a new s.2C, “Intercourse of Person in Position of Trust with Child Under 16”. That provision was re-enacted as s. 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) and then replaced by the more detailed ss. 42 – 45 of the Sexual Offences (Scotland) Act 2009, asp 9. The 2009 Act extends the protection previously offered to young persons from the age of 16 up to the age of 18 years.

392 “Unlawful sexual intercourse” meant intercourse outwith marriage: HM Adv. v Watson (1885) 13 R(J) 6 at p. 9; Rex v Chapman [1959] 1 QB 100. It followed that this provision would be inapplicable to a man having sexual intercourse with his mentally disordered wife.

393 On this point, see R v Hudson [1966] 1 QB 448, discussing an equivalent English provision.
management of a hospital or who is a person carrying on a nursing home to have unlawful sexual intercourse with a woman who is for the time being receiving treatment for mental disorder as an in-patient in that hospital or nursing home, or to have such intercourse on the premises of which the hospital or nursing home forms part with a woman who is for the time being receiving such treatment there as an out-patient;
(b) for a man to have unlawful sexual intercourse with a woman suffering from mental disorder who is subject to his guardianship under this Act or is otherwise in his custody or care under this Act or in pursuance of arrangements under the National Health Service (Scotland) Act, 1947, or Part III of the National Assistance Act, 1948, or as a resident in a residential home for persons suffering from mental disorder within the meaning of Part III of this Act.

(2) It shall not be an offence under this section for a man to have sexual intercourse with a woman if he does not know and has no reason to suspect her to be a person suffering from mental disorder.\(^{394}\)

As before, the provisions relating to sexual abuse were limited to abuse of females\(^{395}\) by males and there was no specific statutory offence that covered the sexual abuse of male patients (or indeed of any sexual abuse by females). Nor is there any specific statutory offence dealing with acts of a sexual nature falling short of “sexual intercourse”, though a charge of indecent assault at common law would have been available. In the event, there are no reported cases of charges under these provisions.

The 1960 Act was amended on numerous occasions, notably by the Social Work (Scotland) Act 1968 and the Mental Health (Amendment) (Scotland) Act 1983, before being replaced by the Mental Health (Scotland) Act 1984.\(^{396}\)

\(^{394}\) On this point, see \textit{R v Hudson [1966]} 1 QB 448, discussing an equivalent English provision.

\(^{395}\) Curiously, s. 97 does not define “woman” to include “girl”, as s. 96 does, but in any case of doubt a charge could be brought under s. 96 against a member of staff: penalties were the same.

\(^{396}\) To be discussed in Part Three of the present Report.