

# The provision of education in residential settings for disabled children and young people and children with additional support needs: key legislation and policy developments from 1974 to 2024

**Report for the Scottish Child Abuse Inquiry**

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## Chapter 1 – Introduction

### Background

For over 250 years, Scotland has had institutions and residential establishments for disabled children and young people in various forms. Throughout this time there have been significant shifts in attitudes towards disabled children and young people and those with additional support needs (ASN). Changes have also taken place in residential care and in the debate over whether disabled children and young people should be educated separately or integrated into mainstream settings. As attitudes have evolved, so too has the language and terminology ascribed to disabled children and young people, reflecting contemporary social and cultural norms. These shifts have been driven by factors such as advocacy campaigns through pressure groups, the rise of the disability movement, family advocacy, and a growing emphasis on human rights. At the same time, research and previous inquiries have highlighted that disabled children and young people are particularly vulnerable to abuse, with one contributing factor being the reliance on residential and specialist services.<sup>1</sup>

The Scottish Child Abuse Inquiry (the Inquiry, or SCAI) was set up in October 2015 by Scottish Ministers following long-standing concerns about the historic abuse of children and young people in care in Scotland. The purpose of this report is to provide context setting for the Inquiry's Phase 9 investigation exploring the provision of residential care in establishments for children and young people with long-term health needs, additional support needs, and disabilities. This report will centre on an exploration of policy and legislation as it relates to the education of children and young people with additional support needs and disabilities (ASND) in residential care settings from 1974 until 2024. To address this topic the review draws on a wide range of policy and legislation (including education, disability, special educational needs (SEN)/additional support needs (ASN), health, social work, children's rights) that intersect in a complex and shifting way.

The overall aim and purpose of the Inquiry is to raise public awareness of the abuse of children in care and to provide an opportunity for public acknowledgement of the

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<sup>1</sup> Sílvia Alves, Mariana Lucas Casanova, Manuela Sanches-Ferreira, Sérgio Costa Araújo, Luiza Nobre Lima, and Clara Cruz Santos, 'A Systematic Review of Residential Care for Children and Young People with Disabilities: Towards the Development of Quality Indicators', *Child Indicators Research* 18, 1 (2020).

suffering of those children and a forum for validation of their experiences and testimony. The Inquiry's Terms of Reference (ToR), as set out by Scottish Ministers, are:

1. To investigate the nature and extent of abuse of children whilst in care in Scotland, during the relevant time frame.
2. To consider the extent to which institutions and bodies with legal responsibility for the care of children failed in their duty to protect children in care in Scotland (or children whose care was arranged in Scotland) from abuse, regardless of where that abuse occurred, and in particular to identify any systemic failures in fulfilling that duty.
3. To create a national public record and commentary on abuse of children in care in Scotland during the relevant time frame.
4. To examine how abuse affected and still affects these victims in the long term, and how in turn it affects their families.
5. The Inquiry is to cover that period which is within the living memory of any person who suffered such abuse, up until such date as the Chair may determine, and in any event not beyond 17 December 2014.
6. To consider the extent to which failures by state or non-state institutions (including the courts) to protect children in care in Scotland from abuse have been addressed by changes to practice, policy or legislation, up until such date as the Chair may determine.
7. To consider whether further changes in practice, policy or legislation are necessary in order to protect children in care in Scotland from such abuse in future.
8. To report to Scottish Ministers on the above matters, and to make recommendations, as soon as reasonably practicable.

The work of the Inquiry is guided by and must align with the ToR. The ToR define 'child' as a person under the age of 18. For the purposes of the Inquiry, 'abuse' is taken to mean primarily physical and sexual abuse, with associated psychological and emotional abuse. However, other forms of abuse may be considered and these include medical experimentation, spiritual abuse, unacceptable practices (such as deprivation of contact with siblings), and neglect.

The ToR define 'children in care' broadly, to include:

- children in institutional residential care such as children's homes (including

- residential care provided by faith-based groups)
- secure care units including List D schools, borstals, and young offenders' institutions
  - places provided for boarded out children in the Highlands and Islands
  - state, private, and independent boarding schools, including state-funded school hostels
  - healthcare establishments providing long-term care
  - any similar establishments intended to provide children with long-term residential care
  - children in foster care.

The ToR do not set out a specific definition of 'additional support needs' or 'disability'. Part of the work of this report is to set out the different definitions and terminology used in relevant Scottish legislation and policy and to explore the potential impact of this on disabled children and young people, alongside consideration of the impact of political movements and social changes on policy and legislative development. It will also consider the UK and international movements driven by disabled people, academics, and professionals that shifted the agenda for policy and practice in Scotland from segregation to integration and to a rights-based approach to provision.

### **Aims and objectives**

The principal aim of this research review is to set out the relevant Scottish legislation and policy in relation to the provision of education in residential settings for children and young people with disabilities and additional support needs from 1974 to 2024. The project has the following objectives:

- to set out and describe relevant legislation and policy on the education in residential settings of children and young people with disabilities and additional support needs in Scotland
- to identify changes in language and terminology over time, considering the reasons for and potential implications of these changes. This will also include consideration of key drivers for change as discussed in the literature
- to establish any implementation gaps between legislation, policy, and practice, and to highlight any apparent reasons for this

- to explore how potential developments in policy and legislation may impact the education of children and young people with additional support needs or disabilities in residential care in the future.

## Methods

The research review collates and analyses a range of material relevant to the development of legislation and policy on the education in residential settings of children and young people with disabilities and additional support needs in Scotland.

Materials for selection included:

- relevant legislation and regulations
- histories and reviews of legislation and policy development
- research studies on this area including evaluations and implementation studies
- grey literature: education providers' reports and documentation
- official statistics
- analyses of responses to legislation and policy consultation
- relevant government briefing papers
- relevant policy reviews.

Material has been identified by literature searches, requests for information from key experts, and archival research. A clear search strategy has been developed that sets out the databases and search terms used as well as clear inclusion and exclusion criteria. This strategy was developed with guidance from a subject librarian at the University of Strathclyde and in consultation with the Inquiry team (See [Appendix 1](#)).

Given the comprehensive nature of our search strategy, we are confident that a broad range of sources have been covered in this review. However, it is important to acknowledge that there may be gaps and a lack of depth in some places due to the limited time available to complete this review (from December 2024 to May 2025) and the wide range of legislation and policy that is involved in addressing this issue.

In writing this review, we recognise the breadth of relevant material that is available in other previously commissioned work by SCAI that is publicly available on the

website.<sup>2</sup> Therefore, we cross-reference this material, where relevant, rather than replicating it in full here.

## Context

This section of the review provides an overview of disability conceptually and in practice as it relates to the education of disabled children and young people in residential care. This provides context for the content of the review and a framework for considering the findings.

### *Understanding disability*

Disability is a contested concept, which presented a challenge for writing this review as well as for those working in the field. There is no one single, unified definition of disability, and our understanding of it has changed over time and has been influenced by a range of political, social, and environmental factors. According to Crialesi and colleagues, 'disability is not an all or nothing phenomenon, rather it represents a continuum from none to very severe difficulty'.<sup>3</sup> We will provide relevant definitions and discussions of these in relation to the various pieces of legislation and other relevant developments throughout this report. However, it is important that we offer some consideration of this upfront, in the framing of the report.

It has long been recognised that language denotes cultural norms and identities and that word choices can stigmatise and discriminate against marginalised groups such as disabled people.<sup>4</sup> Campaigning groups have long lobbied to disrupt stigmatising attitudes by modifying language,<sup>5</sup> introducing new terminology, or taking back terms.<sup>6</sup> It is evident throughout this report that changes in language as it relates to disability have been numerous and reflective of shifts in the cultural understanding

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2 See, for example, Kenneth McK. Norrie, Report to SCAI, 'Legislative Background to the Treatment of Children and Young People Living Apart from their Parents' (2017) and Andrew Kendrick, Erin Lux, Sharon McGregor, and Richard Withington, Report to SCAI, 'Development of Children's Care Services in Scotland' (2021).

3 Roberta Crialesi, Elena De Palma, Alessandra Battisti, and Children's Workgroup, 'Building a Module on Child Functioning and Disability', in Barbara M. Altman (ed.), *International Measurement of Disability: Purpose, Method and Application* (Cham: Springer International Publishing, 2016), 163.

4 Erin E. Andrews, Robyn M. Powell, and Kara Ayers, 'The Evolution of Disability Language: Choosing Terms to Describe Disability', *Disability and Health Journal* 15, 3 (2022), 101328.

5 Michelle R. Nario-Redmond, *Ableism: The Causes and Consequences of Disability Prejudice* (Hoboken, NJ, 2020).

6 Adam M. Croom, 'Slurs and Stereotypes for Italian Americans: A Context-sensitive Account of Derogation and Appropriation', *Journal of Pragmatics* 81 (2015).

and conceptualisation of disability as well as advancements in medical knowledge.<sup>7</sup> It is important therefore to appreciate these drivers and their influence on the language used in legislation and policy throughout the relevant time periods discussed. Policy has also been used as a mechanism to change or challenge discriminatory attitudes towards disabled people, and this is particularly relevant within this context when we consider policy frameworks such as *The Keys to Life* which promote a rights-based, needs-led approach to supporting those with learning disabilities.<sup>8</sup> There are, however, limitations to the impact policy can have. For example, Fisher and Purcal's analysis of policies aimed at changing attitudes towards disabled people found that effective policy reinforcement is required at the personal, organisational, and governmental levels.<sup>9</sup> This will be examined alongside the effectiveness of existing policy messages and their implications for the education of disabled children and young people in residential care.

According to Stalker and colleagues, our understanding of disability depends on how it is framed.<sup>10</sup> Framing of disability can be informed by a range of different models and concepts ranging from the medical model to the social model and beyond to a more nuanced understanding of disability offered by the social relational model, set out in the work of Carol Thomas.<sup>11</sup> The medical model is often viewed as a deficit-based model where the disability or impairment is located within the individual and has biological causes such as illness or functional limitations. The focus is on cure or rehabilitation. Disability is considered a personal tragedy, and the individual plays a passive role, while the professional is perceived as an expert.<sup>12</sup> The social model, on the other hand, considers disability to be the result of economic and social barriers.<sup>13</sup> It draws a distinction between impairment, which is seen as a physical, cognitive, or sensory issue, and disability, which refers to structural, material, or cultural barriers.

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7 Rose Galvan, 'The Making of the Disabled Identity: A Linguistic Analysis of Marginalisation', *Disability Studies Quarterly* 23, 2 (2003).

8 Scottish Government, *The Keys to Life: Improving Quality of Life for People with Learning Disabilities* (Edinburgh: Scottish Government, 2013).

9 Karen R. Fisher and Christiane Purcal, 'Policies to Change Attitudes to People with Disabilities', *Scandinavian Journal of Disability Research* 19, 2 (2016).

10 Kirsten Stalker, Julie Taylor, Deborah Fry, and Alasdair B.R. Stewart, 'A Study of Disabled Children and Child Protection in Scotland – A Hidden Group?', *Children and Youth Services Review* 59 (2015).

11 Carol Thomas, *Female Forms: Experiencing and Understanding Disability* (Buckingham: Open University Press, 1999).

12 Michael Oliver, *The Politics of Disablement* (London: Palgrave Macmillan, 1990).

13 Michael Oliver and Colin Barnes, *The New Politics of Disablement*. 2nd edn (Basingstoke: Palgrave Macmillan, 2012).

Proponents of the social model argue that disability is caused by social oppression and the ways society responds to impairment. The social model has been highly influential in the development of anti-discrimination legislation and has explicitly informed the development of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). However, despite its influence, it has been subject to critique from disability activists and writers who argue that it does not sufficiently take account of the effects of impairment or the diversity of individual experience. To this end, the social relational model offers a more nuanced understanding of the experiences of disabled people.<sup>14</sup> It introduces the concepts of impairment effects which better acknowledge the impact of impairment on an individual's lived experience. It also acknowledges the impact of negative societal attitudes and responses towards disability, conceptualising this as psycho-emotional disablism, which disabled people may experience on a regular basis. Thomas argued that this may have a negative impact on a disabled person's self-esteem and sense of self-worth.

According to Stalker and Moscardini, then, disability is located in the social, cultural, material, and attitudinal barriers that can exclude a person from mainstream life, rather than individual deficits.<sup>15</sup> This draws primarily on the social model<sup>16</sup> and the social relational model of disability outlined above.<sup>17</sup>

The legal definition of disability in the UK is set out in the Equality Act 2010:

A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.<sup>18</sup>

This means that in general:

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<sup>14</sup> Thomas, *Female Forms*.

<sup>15</sup> Kirsten Stalker and Lio Moscardini, 'A Critical Review and Analysis of Current Research and Policy Relating to Disabled Children and Young People in Scotland'. A Report to Scotland's Commissioner for Children and Young People (2012). Available online:

[Stalker\\_Moscardini\\_2012\\_Critical\\_review\\_and\\_analysis\\_of\\_current\\_research\\_and\\_policy.pdf](#)

<sup>16</sup> Michael Oliver, *Social Work with Disabled People* (Basingstoke: Macmillan, 1983).

<sup>17</sup> Thomas, *Female Forms*.

<sup>18</sup> Equality Act 2010, Section 6(1).

- the person must have an impairment that is either physical or mental
- the impairment must have adverse effects that are substantial
- the substantial effects must be long-term
- the long-term substantial effects must have a meaningful impact on day-to-day functioning.

While appearing to be informed by the social model of disability, the definition set out by the Equality Act focuses primarily on impairment and impairment effects.

For the purposes of this report, we use the UNCRPD definition of disability as set out in Article 1 and General Comment number 9 as a working definition, as this was felt to offer a more holistic understanding of the impact of disability.<sup>19</sup> As well as focusing on impairment effects, it focuses on the wider societal and attitudinal barriers and impacts that disabled people experience. This is a broader definition than that set out in the Equality Act. The UNCRPD definition has added strength in that it focuses on the intersection between impairment effects and societal barriers that impact on participation in society: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'<sup>20</sup>

McTier highlights the influence of the social model of disability, which is explicitly referenced in the UNCRPD,<sup>21</sup> though he also draws attention to the human rights model, put forward by the UNCRPD. Building on the social model of disability (which has been critiqued for its perceived failure to acknowledge the diverse experiences of disabled people), the human rights model notes that disability is a natural part of human diversity that must be respected and supported in all its forms.<sup>22</sup> Disabled people should have the same rights as everyone else in society and impairment

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19 'Article' refers to a specific, numbered provision within the treaty. Each article outlines particular rights, principles, obligations, or procedures that governments (called 'State Parties') must adhere to or implement. A General Comment provides detailed guidance to State Parties on how to interpret and implement specific rights in the UNCRPD. While not legally binding like the Convention itself, General Comments carry significant moral and interpretive weight and are used by courts, governments, and advocates worldwide. They often address complex issues, such as how children's rights apply in the digital environment, education, juvenile justice, or child labour.

20 United Nations Convention on the Rights of Persons with Disabilities, Article 1. Available online: [Convention on the Rights of Persons with Disabilities | OHCHR](#)

21 Alexander McTier, *Are Disabled Children and Young People Visible in Scotland's Children's Statistics?: Understanding the Data: A Review of Scotland's Statistics* (Glasgow: CELCIS, 2024).

22 McTier, *Are Disabled Children and Young People Visible?*, 6.

should not be used as a reason to deny people these rights. This human rights model incorporates a need for equality, non-discrimination, and the full inclusion and participation of disabled people.

With respect to terminology, rather than using the term ‘children with disabilities’ (person-first language), which suggests an inherent deficit within the child,<sup>23</sup> we use ‘disabled children and young people’ (identity-first language). This framing locates disability in relation to the cultural, structural, attitudinal, social, and material barriers that exclude individuals from mainstream life, rather than within the individual themselves. Historically, identity-first language was used because disability was considered an attribute of the individual. By the 1970s the People First movement sought to promote person-first language to empower individuals by placing emphasis on humanity. We argue here that identity-first language is congruent with the social model of disability which indicates that disability is not an innate characteristic of the individual, but rather it is societal attitudes and structures that make people disabled. Some individuals also prefer identity-first language as they take pride in this aspect of their identities.<sup>24</sup> However, where legislation or policy uses different language, we will use these terms as these reflect the cultural, structural, attitudinal, and social approaches that were evident at that time.

It is important to acknowledge these specific changes in language as they appear in legislation and policy describing disabled people. This has evolved from what can now be considered discriminatory and outdated terms such as ‘maladjusted’, ‘idiot’, and ‘imbecile’ to more person-first terms such as ‘children with disabilities’ or, in identity-first language, ‘disabled children’.<sup>25</sup> The dominant language of the relevant time is addressed at the beginning of each of the three main sections of the review (1945–73, 1974–95, and 1995–2024), and an analysis of the impact of the language is provided in the discussion within each section and in the conclusion of the report. The key drivers that influenced the evolution of language are also considered.

### **Changing terminology: disability and education**

The term ‘disability’ must be interpreted in the context in which it is being used at

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23 Stalker and Moscardini, ‘A Critical Review and Analysis of Current Research and Policy’.

24 Krista L. Best, W. Ben Mortenson, Zach Lauzière-Fitzgerald, and Emma M. Smith, ‘Language Matters! The Long-standing Debate between Identity-first Language and Person-first Language’, *Assistive Technology* 34, 2 (2022).

25 Andrews *et al.*, ‘The Evolution of Disability Language’.

the time. There have been shifts in terminology in respect of education which have reflected significant changes in attitudes and practice. The Education Act 1945 set up a three-tier categorisation of disabled children and young people: the 'educable', the 'trainable', and the 'ineducable and untrainable'.<sup>26</sup> More recently, the shift in terminology from special educational needs<sup>27</sup> to additional support needs in the Education (Additional Support for Learning) Act 2004 marked a major watershed in educational policy.<sup>28</sup> According to the Code of Practice that accompanies the Education (Additional Support for Learning) (Scotland) Act 2004, there are four factors that may give rise to additional support needs: the learning environment, family circumstances, disability or health needs, and social and emotional factors.<sup>29</sup>

Writing shortly after the 2004 Act came into effect, Francis suggested the new term was potentially more inclusive and less stigmatising, and should help to avoid negative labelling as it recognised that many children require additional support at some point or other.<sup>30</sup> Reasons for additional support needs might include:

- family circumstances where a child's home life is disrupted due to separation, bereavement, or parental substance use
- children in need of care and protection, such as looked-after children or children at risk, including some disabled children and young people
- children who experience social or emotional difficulties, such as bullying or difficulties in forming attachments.<sup>31</sup>

The term 'ASN' is therefore more inclusive but transient in nature, although for some, it is likely to be more fixed and longer-term. The key point is around identifying any

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26 George O.B. Thomson, 'Legislation and Provision for the Mentally Handicapped Child in Scotland since 1906', *Oxford Review of Education* 9, 3 (1983), 233–40.

27 Defined as follows in the Children and Families Act 2014, Part 3, Section 20(1): 'A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her'.

28 Education (Scotland) Act 1980, Section 21.

29 Scottish Executive, *Supporting Children's Learning: Code of Practice* (Edinburgh: Scottish Executive, 2005), 19–20. The Code of Practice explains the new duties on education authorities and other agencies and provides guidance on the Act's provisions. A code of practice in the UK is a set of written rules, standards, or guidelines that are designed to help individuals or organisations comply with legal requirements or follow best practices in a particular area of work or activity.

30 Joe Francis, 'Developing Inclusive Education Policy and Practice for Looked After Children', *Scottish Journal of Residential Child Care* 7, 2 (2008), 60–70.

31 Francis, 'Developing Inclusive Education', 65–6.

potential difficulties in learning and considering how these might be overcome.<sup>32</sup>

While this is a more inclusive and less stigmatising approach, it raises issues, given there has been a 768 per cent increase in pupils recorded as receiving additional support for learning (ASL) since the change in legislation in 2004.<sup>33</sup> Despite this increase, only a small proportion of pupils, around 3 per cent, attend specialist educational provision. The vast majority (around 90 per cent) of those receiving additional support for learning are educated in mainstream schools. In fact, 40 per cent of all pupils receive additional support for learning, with the rate in Scotland's most deprived areas nearly double that of the least deprived areas.<sup>34</sup> This, it could be argued, has created a system that is potentially unwieldy as well as difficult to clearly define, resource, and manage.

A further key point to note here is that all disabled children and young people are likely to be considered to have an additional support need, but not all children with additional support needs will have a disability. Given the very wide and heterogeneous nature of the potential group of children and young people with additional support needs set out by the Code of Practice, there is a very real chance that the needs of disabled children and young people may be hidden by being subsumed within this category. This also impacts on how legislation and policy that cuts across multiple areas impacts on different groups of children and young people.

### **Numbers of disabled children and young people**

There have been well-documented difficulties in collecting data on disabled children and young people.<sup>35</sup> These difficulties involve definitional challenges that raise questions about the specific point along the continuum at which disability is recorded.<sup>36</sup> Such difficulties are even more pronounced when considering disabled children and young people because of the challenges in distinguishing between disability, age and stage, developmental delay and trauma, and categorisations such as additional support needs. This is further complicated by organisational structures

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32 Francis, 'Developing Inclusive Education', 66.

33 Accounts Commission, *Briefing: Additional Support for Learning* (Edinburgh: Audit Scotland, 2025), 3.

34 Accounts Commission, *Briefing: Additional Support*, 3.

35 Claudia Cappa, Nicole Petrowski, and Janet Njelesani, 'Navigating the Landscape of Child Disability Measurement: A Review of Available Data Collection Instruments', *Alter, European Journal of Disability Research* 9, 4 (2015), 317–30.

36 McTier, *Are Disabled Children and Young People Visible?*

and boundaries which mean that responsibility for disabled children and young people falls between multiple government departments and partner agencies including health, education, social work, justice, and third-sector organisations. McTier therefore suggests that considerable organisational commitment is needed to collect data on this group of children.<sup>37</sup> The importance of good-quality data cannot be overemphasised and the Scottish Government notes that: 'Disability statistics are important for monitoring discrimination and inequality. Good quality disability data will help with understanding the issues faced by disabled people ... [and] ... may be used to inform policy formulation and service delivery.'<sup>38</sup>

This review suggests that a number of challenges remain with data collection and analysis, and that confronting and overcoming discrimination and addressing service provision remains problematic. This lack of data likely has an impact on securing resources for disabled children and young people.

Bearing these difficulties in mind, we present an overview of the relevant population of disabled children and young people in Scotland below. Further discussion of the composition of the population, and their location, experience, and challenges are provided in the introduction to each main section of the report (1945–73, 1974–95, and 1995–2024). It is important to note, however, that historical data collection has even more significant challenges, such as a lack of joined-up or consistent recording systems across sectors.<sup>39</sup> The data presented for earlier periods should therefore be considered as less robust.

## Population

Data from the Scottish Census in 2011 found that 4.8 per cent of Scottish children were reported as disabled. This was broken down as follows:

- 1.7 per cent of 0–15 year olds were reported as having their day-to-day activities limited a lot by their disability
- 3.1 per cent of 0–15 year olds were reported as having their day-to-day activities limited a little by their disability

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37 McTier, *Are Disabled Children and Young People Visible?*, 7.

38 Scottish Government, *Data Collection and Publication Guidance: Disability* (Edinburgh: Scottish Government, 2022), 2–3.

39 Cappa *et al.*, 'Navigating the Landscape'.

- 10.7 per cent of children were reported as having long-term health conditions.<sup>40</sup>

Analysis of the 2022 Scottish Census data indicates an increase in reported mental health problems for those between the ages of 16 and 24, attributed in large part to the impact of the pandemic.<sup>41</sup> In a recent blog (November 2024) McTier also indicated that the number of children aged between 0 and 15 who have a disability has risen from 5 per cent in 2011 to 8 per cent in 2022.<sup>42</sup>

In addition, the 2022/23 Pupil Census of primary and secondary school pupils in Scotland reported that:

- 1.8 per cent of primary school pupils were assessed or declared as disabled
- 3.3 per cent of secondary school pupils were assessed or declared as disabled
- 30.4 per cent of primary school pupils in mainstream schools had additional support needs
- 42.9 per cent of secondary school pupils had additional support needs.<sup>43</sup>

As noted by McTier, pupils are recorded as disabled if they require access to physical adaptation, access to curriculum adaptation, and/or access to communication adaptation to attend or participate in school.<sup>44</sup> Additional support needs are defined in line with the Education (Additional Support for Learning) Act 2004 as the need for additional support to overcome barriers to benefit from school education.

### **Disabled children and young people and child protection**

In Scotland the annual Children's Social Work Statistics published report provides data for looked-after children and children registered on the child protection register. In 2024, of 11,844 looked-after children in Scotland, 9.6 per cent were assessed as having a disability, but a further 24.4 per cent of children did not have their disability recorded.<sup>45</sup> Of the 54 children resident in secure care in Scotland in

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40 McTier, *Are Disabled Children and Young People Visible?*

41 Scotland's Census, 'Scotland's Census 2022 – Health, Disability and Unpaid Care' (2024). Available online: [Scotland's Census 2022 - Health, disability and unpaid care | Scotland's Census](#).

42 Alex McTier, 'Taking Action to Improve the Collection of Statistics about Disabled Children in Scotland', Celsis (2024). Available online: [Taking action to improve the collection of statistics about disabled children in Scotland :: Celsis](#).

43 McTier, *Are Disabled Children and Young People Visible?*, 17.

44 McTier, *Are Disabled Children and Young People Visible?*, 16.

45 McTier, *Are Disabled Children and Young People Visible?*, 22.

July 2024, 37 per cent were recorded as disabled.<sup>46</sup> In addition, 5.5 per cent of the 2,219 children on the child protection register were assessed as having a disability.<sup>47</sup>

### **Disabled children and young people and risk of abuse**

Several studies have shown that disabled children and young people are at greater risk of harm and abuse than non-disabled children and young people.<sup>48</sup> Jones and colleagues, in a meta-analysis of 17 US and European studies, found that disabled children and young people were three to four times more likely to be abused or harmed than non-disabled children and young people.<sup>49</sup> A seminal study by Sullivan and Knutson of over 50,000 children in Nebraska found that disabled children and young people were significantly more likely to experience maltreatment than their non-disabled peers. The prevalence rate of maltreatment was 31 per cent for disabled children and young people compared to 9 per cent for non-disabled children and young people.<sup>50</sup> Sullivan and Knutson found that children with communication impairments, behavioural disorder, learning disabilities, and sensory impairments were particularly vulnerable to maltreatment. Franklin and colleagues note that such figures are likely to be an underestimation given the 'lack of attention placed on disabled child abuse, and due to the fact that disabled children and young

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46 Scottish Government, *Children's Social Work Statistics: Secure Care 2023–24* (Edinburgh: Scottish Government, 2025), 6.

47 Scottish Government, *Children's Social Work Statistics: Child Protection 2023–24* (Edinburgh: Scottish Government, 2025).

48 Cappa *et al.*, 'Navigating the Landscape'; Anita Franklin, Geraldine Brady, and Louise Bradley, 'The Medicalisation of Disabled Children and Young People in Child Sexual Abuse: Impacts on Prevention, Identification, Response and Recovery in the United Kingdom', *Global Studies of Childhood* 10, 1 (2020); Anita Franklin and Geraldine Brady, "'Voiceless" and "Vulnerable": Challenging How Disabled Children and Young People Were Portrayed and Treated During the COVID-19 Pandemic in the UK and a Call for Action', in Ruby Turok-Squire (ed.), *Children's Experience, Participation, and Rights during COVID-19* (London: Palgrave Macmillan, 2022), 141–58; Lisa Jones, Prof. Mark A. Bellis, Sara Wood, Karen Hughes, Ellie McCoy, Lindsay Eckley, Geoff Bates, Christopher Mikton, Tom Shakespeare, and Alana Officer, 'Prevalence and Risk of Violence Against Children with Disabilities: A Systematic Review and Meta-analysis of Observational Studies', *Lancet* 380, 9845 (2012), 899–907; Mitchell Loeb, Daniel Mont, Claudia Cappa, Elena De Palma, Jennifer Madans, and Roberta Cialesi, 'The Development and Testing of a Module on Child Functioning for Identifying Children with Disabilities on Surveys: I: Background', *Disability and Health Journal* 11, 4 (2018); Rebecca Oosterhoorn and Andrew Kendrick, 'No Sign of Harm: Issues for Disabled Children and Young People Communicating about Abuse', *Child Abuse Review* 10, 4 (2001); Kirsten Stalker and Katherine McArthur, 'Child Abuse, Child Protection and Disabled Children and Young People: A Review of Recent Research', *Child Abuse Review*, 21, 1 (2012); Patricia M. Sullivan and John F. Knutson, 'Maltreatment and Disabilities: A Population-based Epidemiological Study', *Child Abuse & Neglect* 24, 10 (2000).

49 Jones *et al.*, 'Prevalence and Risk', 906.

50 Sullivan and Knutson, 'Maltreatment and Disabilities', 1268.

people are often invisible, marginalised, not listened to or heard'.<sup>51</sup>

The NSPCC, while recognising that disabled children and young people are not a homogeneous group, identified several common factors that increase their risk of abuse.<sup>52</sup> These included:

- communication barriers – it is argued that disabled children and young people are less likely to tell someone if they are experiencing abuse. There are several possible reasons for this including feeling threatened by the perpetrator, not understanding or knowing how to describe the abuse, and lack of appropriate help to support disclosure. Other barriers might include adults having difficulty in understanding speech, a lack of communication skills among adults (teachers, social workers, and so on), and relying on parents to communicate on their child's behalf
- misunderstanding the signs of abuse – disabled children and young people may display symptoms and behaviours that are misinterpreted by others as part of their disability rather than signs of abuse. Injuries, for example, may not raise the same level of concern as with peers
- lack of education – personal safety, and relationship and sex education are not always available or accessible to disabled children and young people. These subjects may not be taught in some special schools. Teachers may not have the skills to teach these subjects in a way that is accessible or understandable and may need more training. Parents may not think this education is necessary for their child
- increased isolation – abuse or neglect is more likely to be hidden as disabled children and young people are more likely to be socially isolated. They often have less contact with others due to having fewer out-of-school opportunities. They may have fewer opportunities to spend time with friends and less access to transport. If they live away from home in a residential school, placements are often far from home which may make it difficult for family and friends to visit regularly, meaning there are fewer people to tell if abuse is taking place
- dependency on others can increase opportunities for abusive behaviour. If a young person is dependent on a carer, they may be less likely to report abuse

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51 Franklin *et al.*, 'The Medicalisation of Disabled Children', 65.

52 NSPCC Learning, 'Safeguarding d/Deaf and Disabled Children and Young People' (2024, updated 2025). Available online: [Safeguarding d/Deaf and disabled children and young people | NSPCC Learning](#).

- lack of appropriate support may be exacerbated by a lack of professional confidence or knowledge of this area.

Franklin and Brady, and Stalker and McArthur identified similar factors, pointing to parent or carer isolation as well as financial hardship and stress as key risk factors. They also noted that practitioners and services did not always identify or respond to child protection concerns, impacting on the experiences of disabled children and young people.<sup>53</sup>

Kendrick and Taylor, while not writing specifically about disabled children and young people, highlighted concerns around potentially unidentified abuse of children in hospital settings, concerns which might also apply to disabled children and young people who are educated in residential settings (including hospitals).<sup>54</sup> They reported evidence from the United States that suggested abuse was more common in hospital than at home. Key risk factors included the isolation faced by young people who were often cut off from family, friends, and communities. They also highlighted the number of disabled children and young people living in healthcare settings in adult establishments or in unregulated homes, identifying this as a further risk factor for abuse.

### **Disabled children and young people: a hidden population**

Taken together, the factors discussed in the preceding sections result in considerable ambiguity, complexity, and uncertainty about this population, and many researchers and writers in the field have argued that there has likely been an underestimate and under-recording of prevalence of disability. As a result, the individual and collective needs of disabled children and young people are often overlooked and not fully understood within policy, legislation, and practice.<sup>55</sup> Stalker and colleagues describe this group as a 'hidden population' whose specific needs are not fully recognised.<sup>56</sup> McTier emphasises the importance of addressing this gap, given the heightened risk of harm and abuse that disabled children and young people face.<sup>57</sup> As we highlight

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53 Franklin and Brady, "'Voiceless' and 'Vulnerable'"; Stalker and McArthur, 'Child Abuse, Child Protection'.

54 Andrew Kendrick and Julie Taylor, 'Hidden on the Ward: The Abuse of Children in Hospitals', *Journal of Advanced Nursing* 31, 3 (2000).

55 Stalker *et al.*, 'A Study of Disabled Children and Child Protection'; McTier, *Are Disabled Children and Young People Visible?*

56 Stalker *et al.*, 'A Study of Disabled Children and Child Protection'.

57 McTier, *Are Disabled Children and Young People Visible?*

in this review, disabled children and young people are not always well represented within policy and legislation, and their needs are often overlooked or subsumed within policies that attempt to meet the needs of all children and young people.

Article 4(1) of the UNCRPD sets out that State Parties should consider the protection of the human rights of persons with disabilities in all policies and programmes.<sup>58</sup> This means that disability issues and the needs of disabled people should be considered across all areas of policies. It recognises that no one organisation can achieve the goal of equality for disabled people on its own and promotes multi-agency working as a result. This suggests that policy and legislation must consider the role of other professionals within a context of multi-disciplinary working to more effectively meet the needs of disabled children and young people.

## **Discussion**

In the three chapters that follow we set out key legislative and policy developments in relation to disabled children and young people and those with additional support needs. The focus of the review is on the provision of education in residential settings although, at times, our review is broader than this to provide additional context and to allow the reader to understand the routes into education in residential settings for these groups. We have structured the review across three broad time periods:

1. Developments from 1945 to 1973. This period was characterised by an increased focus on special education driven by an acknowledgement that no child should be considered uneducable. Education during this period was often provided within specialist settings that were segregated from the mainstream.
2. Developments from 1974 to 1995. This period was characterised by an increased drive towards mainstream provision within a wider legislative and policy shift towards deinstitutionalisation and community care, and from welfare state provision to individual responsibility. From the 1960s onwards the government announced its intention to halve the number of long-stay hospitals. This was partly due to increased awareness of abuse in long-stay hospitals that resulted in an increase in public concern over the treatment of disabled people. These abuse scandals were exposed by the media and this led to a series of public inquiries (such as the Ely Inquiry) that have been

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<sup>58</sup> United Nations Convention on the Rights of Persons with Disabilities, Article 4(1).

credited with the closure of many institutions. The Griffiths Report was seen by many as the blueprint for community care, followed by the NHS and Community Care Act 1990, which led to a much greater focus on mainstream services and inclusion.<sup>59</sup>

3. Developments from 1995 to 2024. This period was informed by the social model of disability which encourages a reframing of disability as a social issue rather than an individual concern.<sup>60</sup> It encourages a refocusing of attention on the ways in which policies, legislation, and societal expectations unnecessarily exclude disabled people from full participation. This period is characterised by a focus on human rights, full participation, and the involvement of those with lived experience in decision-making.

In each of the sections that follow we review relevant legislation and policy across education, disability, social work (including justice where relevant), and health. Before considering the first period (1945–73), we describe some early developments in relation to residential services for disabled children and young people in Scotland.

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59 Roy Griffiths, *Community Care: An Agenda for Action: A Report to the Secretary of State for Social Services* (London: HMSO, 1988) – commonly referred to as the Griffiths Report.

60 Oliver, *Social Work with Disabled People*. See also Thomas P. Dirth and Nyla R. Branscombe, 'Disability Models Affect Disability Policy Support through Awareness of Structural Discrimination', *Journal of Social Issues* 73, 2 (2017).

## Chapter 2 – Historical context: the early use of residential services for disabled children and young people in Scotland

The first residential institutions for disabled children and young people in Scotland opened in the eighteenth and nineteenth centuries, funded by wealthy philanthropists. The Thomas Braidwood Academy for hearing-impaired children (known at the time as the Thomas Braidwood Academy for the Deaf and Dumb) opened in 1760 in Edinburgh. This was the first school for deaf children in the UK. The Asylum for the Industrious Blind opened in Edinburgh in 1793 and provided vocational training for future employment.<sup>61</sup> More establishments for deaf and hearing-impaired children opened in the first half of the nineteenth century. Similarly, further schools and asylums for blind children opened in the nineteenth century.<sup>62</sup>

By the middle of the nineteenth century, two institutions for learning disabled children and young people opened: Baldovan Orphanage and the Asylum for the Cure of Imbecile and Idiot Children in 1855, and the Scottish National Institution for the Education of Imbecile Children at Larbert in 1863.<sup>63</sup> The former was known as a school for the 'education of imbeciles' and the latter as an 'institute for defectives'. In 1874 East Park Home in Glasgow was opened as the first provision for physically disabled children and young people. The first half of the twentieth century saw the opening of further institutions for disabled children and young people in Scotland.<sup>64</sup>

Disabled children and young people were often accommodated in a range of residential provision during the nineteenth and twentieth centuries as well as in the residential institutions specifically for them. While most children taken into care under the Poor Law in Scotland were boarded out, a significant number were accommodated in the poorhouses of Scotland. The Royal Commission on the Poor Law in the early 1900s found that almost a quarter of the 1,830 children in

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61 Sheila Riddell, Michael Adler, Enid Mordaunt, and Nadia Farmakopoulou, 'Special Educational Needs and Competing Policy Frameworks in England and Scotland', *Journal of Educational Policy* 15, 6 (2000), 621–35.

62 Iain Hutchison, 'Early Institutional Provision in Scotland for Disabled Children and Young People', *Scottish Journal of Residential Child Care* 3, 1 (2004), 31–43.

63 Iain Hutchison, 'Institutionalization of Mentally-Impaired Children in Scotland, c.1855–1914', *History of Psychiatry* 22, 4 (2011), 417.

64 Kendrick *et al.*, 'Development of Children's Care Services in Scotland', 93–110.

poorhouses were sick or infirm.<sup>65</sup> McMillan highlighted the plight of children with learning disabilities in the Glasgow poorhouse with its lunatic wards and asylums. These were often overcrowded and 'lacked sufficient means for the proper care and supervision of these children'.<sup>66</sup>

A significant number of disabled children and young people were placed in children's homes and orphanages. Abrams noted that children's homes were often a temporary measure and 'children passed through on their way to be adopted, fostered or transferred to another institution, such as an insane asylum or home for the physically handicapped, or were sent away to Glasgow or Liverpool en route for Canada and Australia'.<sup>67</sup> While there is little information on the numbers of disabled children and young people in children's homes and orphanages in these early years, a report on disabled children and young people in the care of local authorities and voluntary agencies in the 1960s found that over 60 per cent, or three-fifths, of the children in residential care were in 'homes for normal children'.<sup>68</sup>

Another form of residential care for children was the reformatory and industrial schools for young offenders or those on the brink of criminality. With the passing of the Children and Young Persons (Scotland) Act 1932, the distinction between reformatory and industrial schools was removed, and they were replaced by approved schools. Children could be placed in approved schools through the juvenile courts for offending, care and protection, being beyond parental control, or school truancy.<sup>69</sup> Little is known about disabled children and young people in approved schools in the first part of the twentieth century.

Expectations around the education of disabled children and young people in this early period were generally very low. A school attendance officer wrote that: 'disabled children and young people rarely, if ever, go to school'.<sup>70</sup> This led William

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65 Royal Commission on the Poor Laws and Relief of Distress, *Report on Scotland* (London: Wyman and Sons, 1909), 28.

66 Lachlan McMillan, 'Origins and Evolution of Special Education for Children with Intellectual Disabilities in Greater Glasgow 1862–1962' (PhD thesis, University of Strathclyde, 1998), 26.

67 Lynn Abrams, *The Orphan Country: Children of Scotland's Broken Homes from 1845 to the Present Day* (Edinburgh: John Donald Publishers, 1998), 83–4.

68 Scottish Education Department Social Work Services Group, *Handicapped Children in Care of Local Authorities and Voluntary Organisations* (Edinburgh: Her Majesty's Stationery Office, 1970), 7.

69 Kendrick *et al.*, 'Development of Children's Care Services in Scotland', 86.

70 Anne Borsay, 'Disability and Education in Historical Perspective', in Steve Haines and David Ruebain (eds), *Education, Disability and Social Policy* (Bristol University Press, 2011), 7–22.

Mitchell, who was the Chairman of the Attendance Committee of Glasgow School Board, to establish the Association for Visting and Aiding Permanently Infirm and Imbecile Children brought under notice by the School Board Education Inquiry in 1874.<sup>71</sup> This can be considered as marking the start of education for children in Glasgow who required additional support. However, the education was provided in their homes and away from other children of their age, meaning that children were segregated from mainstream education.

By the mid-nineteenth century, legislation was passed that recognised the educational needs of disabled children and young people including the Lunacy Act 1845 and the Idiots Act 1886. However, the language used speaks to individual deficit and deviancy, suggesting a need for social control in segregated settings. As Riddell argues, this early provision was very much intended to protect the state from the burden of supporting disabled people.<sup>72</sup> These approaches to disability were very influential at this time and continued well into the twentieth century.

The Education of Defective Children (Scotland) Act 1906 'empowered school boards to make provision in special schools or classes for the education of defective children between the ages of five and 16'.<sup>73</sup> However, some children were considered ineducable at this time.

By the time the Mental Deficiency Act was passed in 1913, school boards were required to identify 'defective' children in their area who were classed as 'idiots', 'imbeciles', 'feeble-minded persons', or 'moral imbeciles'. Those who were considered capable of benefiting from education were placed in special schools. This legislation therefore represents an early attempt to identify and classify disabled children and young people and to segregate them within special schools.

By 1918 local education authorities were required to grant-aid charitable schools for disabled children and young people or to develop their own provision in an emerging recognition of the state's responsibility for educational provision for

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71 Hutchison, 'Early Institutional Provision in Scotland for Disabled Children and Young People', 34.

72 Sheila Riddell, *Autonomy, Rights and Children with Special Educational Needs: Understanding Capacity across Contexts* (London: Palgrave Macmillan, 2020).

73 Sheila Riddell, *Special Educational Needs: Providing Additional Support*. 2nd edn (Edinburgh: Dunedin Academic Press, 2006).

disabled children and young people.<sup>74</sup> The Education Act 1918 introduced compulsory education for all children, forcing parents to have disability assessments carried out on their children. Professionals and officials began to emerge to facilitate the categorisation and segregation of disabled children and young people. This resulted in the growth of professional expertise, reflecting the medical model of disability where individuals are seen as weak, passive, and in need of treatment or cure. Some parents refused to have their children assessed at this time for fear they would be taken away, although it is unclear what the consequences of refusing might have been.<sup>75</sup>

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74 Anne Borsay, 'Disabled Children and Young People and Special Education, 1944–1981', presentation delivered at the Department for Education (2012). Available online: [\(PDF\) Disabled Children and Special Education, 1944-1981](#).

75 Riddell, *Autonomy, Rights and Children*.

## Chapter 3 – Developments in legislation and policy from 1945 to 1973

### Introduction

Although the focus of this review concerns developments from 1974, it is important to address the period following World War II because of significant changes in legislation and policy across education, health, and child welfare as they relate to disabled children and young people. These changes impact on the development of legislation and policy into the 1970s and 1980s. The legislation and policy discussed in this chapter is summarised in Table 1 below.

**Table 1: Summary of key legislation and policy discussed in Chapter 3**

Legislation/policy and relevant reports	Key aspects
<b>Education (Scotland) Act 1945</b>	Acknowledged that the broad purpose of education is the same for handicapped children as for other children, although continued to take a segregated approach and be dominated by a medical model of disability.
<b>National Health Service (Scotland) Act 1946</b>	Aimed to meet health needs of all citizens, free at the point of delivery. Expanded mental deficiency hospitals with an increased focus on the mental health of children and young people.
<b>National Assistance Act 1948</b>	Created a duty on local authorities to provide disabled people with resources such as day centres, social and recreational activities, and help with travel costs and finding suitable accommodation (Section 29). It also abolished the Poor Law. Section 47 authorised the removal from their homes of certain chronically sick, disabled, and elderly persons reflecting control and regulation of their lives.

<p><b>Declaration of Human Rights 1948</b></p>	<p>Relevant sections include right to education for all, prohibited torture, inhumane and degrading treatment, deprivation of liberty, respect for family life, home, and correspondence, and, perhaps most importantly, prohibition of discrimination.</p>
<p><b>The Children Act 1948 (UK-wide)</b></p>	<p>Highlighted the need for specialist knowledge and expertise in the care of children. Local authorities given the duty to take children into their care if in the child's best interests. Replaced the Poor Law as it relates to children. Disabled children and young people not considered explicitly in this legislation.</p>
<p><b>Special Educational Treatment (Scotland) Regulations 1954</b></p>	<p>Set out nine statutory categories of pupils covering a range of disabilities.</p>
<p><b>Education (Scotland) Act 1962</b></p>	<p>Does not affect statutory duties of local authorities in respect of special education, apart from updating to take account of the creation of the NHS. Maintained a segregated approach and dominance of the medical model of disability.</p>
<p><b>The Kilbrandon Report 1964</b></p>	<p>Considered the needs of children and young people who offend, and those in need of care and protection or beyond parental control. Watershed report, suggesting the creation of children's panels and a specialist social education department. Children's panels taken forward and social work departments created under future legislation. Recognised that often the placement of disabled children and young people who had come through the youth</p>

	justice system was inappropriate and proposed extending special educational facilities for those experiencing various forms of disability.
<b>Scottish Education Department (1967) Special Education</b>	Acknowledged the range of problems in special education was 'formidable' and solutions would involve the cooperation of many different agencies. Recognised the role of voluntary bodies in providing support to disabled children and young people. Early attempt to promote parental involvement and categorise disabled children and young people for the purposes of ensuring their needs were met.
<b>Social Work (Scotland) Act 1968</b>	Created specialist social work departments, established the children's hearing system, and tasked local authorities with a range of tasks, including assessment of need. General obligation for the local authority to further a child's best interests. Framework for promotion of social welfare. Transferred the functions of approved schools to social work departments.
<b>Education (Scotland) Act 1969</b>	Amended the definition of special education in the 1962 Act to consider ordinary methods of education before specialist provision. However, this did not translate into widespread integration.
<b>The Chronically Sick and Disabled Persons Act 1970</b>	Complex legislation covering a range of areas. Acknowledged that disabled people (both adults and children) were often hidden without receipt of services.

	Placed a duty on local authorities (Section 2) to provide any relevant services necessary to meet the needs of disabled people, including help with meals, home help (practical support), and adapting the home. An important omission is the right of disabled children and young people to play and leisure activities.
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## Language

As can be seen from the historical reflection on education for disabled children and young people in the previous chapter, the language associated with their care and treatment reflects a medical or illness model of disability (discussed earlier in this report), situating the challenges within the child or young person rather than recognising and countering societal barriers. Much of the same terminology continued during this time period. For example, Section 6 of the Education Act 1945 uses the terms 'handicapped', 'backward', and 'difficult children'.<sup>76</sup> References to 'children suffering from disability' are also made within this legislation, again reflecting a medical model. The delineation in the 1945 Act between the 'educable; the trainable; the ineducable and untrainable'<sup>77</sup> embeds this perspective in the law. Later in this period, despite a recognition that disabled children and young people should have the same access to education as all other children and remain in their own communities, institutions designed for their care grew in number, and legislation, such as the Education (Scotland) Act 1962, continued to reflect a medical model.

However, during this period some progress was made in considering the educational needs of disabled children and young people. The social model of disability which recognised the barriers created by society to the inclusion of disabled children and young people also began to emerge. This represented a change in societal attitudes post-war to those with disabilities. These issues are explored more below.

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<sup>76</sup> Education (Scotland) Act 1945.

<sup>77</sup> Thomson, 'Legislation for the Mentally Handicapped Child', 236.

## Population statistics

During this period, there was limited data available on the number of disabled children and young people. Data collection was inconsistent and sparse, although there were some efforts to classify school-aged children that meant that some information on their numbers was collected. For example, a 1952 Advisory Council report noted that 5 per cent of school-aged children were maladjusted because of a social handicap. In addition, the Education in Scotland report of 1955 indicated that there were 10,117 pupils attending special schools and classes, most of whom were identified as mentally handicapped. Of these, 911 were thought to attend residential school.

## A growing recognition of the educational needs of disabled children and young people

Provision for the education of disabled children and young people has existed for many years, and indeed some of the earliest institutions for disabled children and young people were established in Scotland.<sup>78</sup> However, the purpose of educational provision for disabled children and young people was not officially recognised as being similar to that of non-disabled children until the passing of the Education (Scotland) Act 1945.<sup>79</sup> Thomson notes that the 1945 Act embedded 'a three-tier distinction in the concept of mental handicap: the educable; the trainable; the ineducable and untrainable'.<sup>80</sup>

The Education (Scotland) Act 1945 therefore made it a duty for education authorities to identify those children who might require 'special educational treatment', and to make provision for this. Section 1(4) noted that primary and secondary education

include education by special methods (hereinafter referred to as special educational treatment) appropriate to the special requirements of pupils who suffer from disability of mind or body. Special educational treatment shall be given in special schools approved by the Secretary of State for the purpose, or by other means so approved.<sup>81</sup>

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78 Kendrick *et al.*, 'Development of Children's Care Services in Scotland'.

79 Scottish Education Department, *Special Education: An Extract from the Report of the Secretary of State for Scotland on Education in Scotland in 1966* (Edinburgh: Her Majesty's Stationery Office, 1967), 1.

80 Thomson, 'Legislation for the Mentally Handicapped Child', 236.

81 Education (Scotland) Act 1945, Section 1(4).

Education authorities were enabled to provide a child guidance service to 'study handicapped, backward and difficult children, to give advice to parents and teachers as to appropriate methods of education and training in suitable cases to provide special educational treatment for such children in child guidance clinics'.<sup>82</sup>

While not always specifically focused on the education of disabled children and young people in residential settings, the provisions of this Act are important because they set out the various attempts to categorise different groups of disabled children and young people and illustrate the various responses to their needs. Section 7, for example, addressed the education of pupils requiring special educational treatment. It placed a duty on the Secretary of State to make regulations to define the categories of pupils who required special educational treatment.<sup>83</sup> Arrangements for the special educational treatment of pupils should be provided, as far as practicable, in an appropriate special school or other appropriate way.<sup>84</sup> This left open the possibility that education might be most appropriately provided in a residential setting for certain groups. Section 10 of the Act allowed for the 'combination of institutions for mental defectives and special schools'.<sup>85</sup>

In relation to 'handicapped children', the Act made it a duty of an education authority to ascertain which children who had reached five years of age 'require special educational treatment'.<sup>86</sup> It must also ascertain those who 'are suffering from a disability of mind of such a nature or to such an extent as to make them incapable of receiving education at school, or as to make it inexpedient that they should be educated in association with other children either in their own interests or in those of the other children'.<sup>87</sup>

Section 42 of the Act allows the education authority to decide whether a child is 'incapable of receiving education or training in a special school' or cannot be 'educated or trained in association with other children'.<sup>88</sup> In this case, it must report to 'the education authority for the purposes of the Mental Deficiency Acts and to the General Board of Control for Scotland ... that the child has been found incapable of

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82 Education (Scotland) Act 1945, Section 6.

83 Education (Scotland) Act 1945, Section 7(1).

84 Education (Scotland) Act 1945, Section 7(2).

85 Education (Scotland) Act 1945, Section 10.

86 Education (Scotland) Act 1945, Section 40(1)(a).

87 Education (Scotland) Act 1945, Section 40(1)(b).

88 Education (Scotland) Act 1945, Section 42(1).

receiving education or training in a special school'.<sup>89</sup> This provision highlights the relationship between legislation and policy on education, and legislation and policy on mental health and illness. For those children where education was not seen as practicable or appropriate, alternative provision should be sought under the various Mental Deficiency Acts at the time.

Writing in 1950, Low states that the Education (Scotland) Act 1945 was a most significant piece of legislation and took a comprehensive approach to the education of 'handicapped' children in Scotland.<sup>90</sup> Jones also highlighted the importance of the Education (Scotland) Act 1945 in setting out for the first time a duty to provide education for all children: 'This Act, in which the term "special educational treatment" first occurs, did not simply give powers, but laid on education authorities a duty to provide such treatment for handicapped pupils, and that as part of their general duty to provide education for all children according to age, ability and aptitude.'<sup>91</sup>

Petrie, however, highlighted a range of issues in the implementation of such legislative principles: 'The Education Authorities, beset with the immediate post-war problems, tended to delegate responsibilities for Special Education to the most junior members of the directorate; continuity of policy was difficult to achieve as the juniors ascended the promotion ladder.'<sup>92</sup>

The education of disabled children and young people was not, therefore, given a high priority. Petrie also noted difficulties in relation to parental rights and responsibilities because of a tendency for local authorities to 'couch their advice to parents in legalistic terms' and variation in local authorities' responses to parents.<sup>93</sup>

Although the 1945 Act can be seen as an important moment in the education of disabled children and young people by identifying their educational needs, it continued to classify and segregate disabled children and young people, thus perpetuating the approach of previous legislation.

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89 Education (Scotland) Act 1945, Section 42(1).

90 Harry R. Low, 'Education of Handicapped Children in Scotland', *Journal of Exceptional Children* 17, 1 (1950), 20.

91 Hugh B. Jones, 'Special Education', in John Nisbet with Gordon Kirk (eds), *Scottish Education Looks Ahead* (Edinburgh: W. & R. Chambers, 1969), 149–56.

92 David Petrie, 'The Development of Special Education in Scotland since 1950', in E. Dockrell, W.R. Dunn, and A. Milne (eds), *Special Education in Scotland* (Edinburgh: Scottish Council for Research in Education, 1978), 3.

93 Petrie, 'The Development of Special Education', 3.

In 1947 the Secretary of State for Scotland requested that the Advisory Council on Education in Scotland review educational provision for disabled children and young people in primary and secondary education who experienced 'disability of mind or body or from maladjustment due to social handicaps'.<sup>94</sup> Between 1949 and 1952 the Advisory Council published eight reports about the education of particular groups of disabled children and young people, and other relevant issues.<sup>95</sup> The reports addressed the needs of pupils who were defective of hearing; pupils who were defective in vision; pupils with physical disabilities; pupils handicapped by speech disorders; pupils with mental or educational disabilities; and pupils who were maladjusted because of social handicaps.<sup>96</sup> Consistent across the reports was the opinion that 'children should not be removed from home to residential institution unless they themselves will clearly profit from the transfer, or unless their retention in a day school would be prejudicial to other pupils'.<sup>97</sup> This demonstrates a commitment to the education of disabled children and young people in their own homes and in their own communities. However, the reports contained a number of important caveats that relate to the child, as well as other children, that were also likely to be driven by financial imperatives. Petrie notes that the reports of the Advisory Council were the first comprehensive study of the educational problems of handicapped children in Scotland.<sup>98</sup>

In response to the reports produced by the Advisory Council, the Scottish Education Department published Circular No. 300.<sup>99</sup> The purpose of this policy communication was to provide background information and guidance on the education of disabled children and young people to ensure consistency across organisations. The circular argued for the development of the theme of integration:

special educational treatment should not be thought of mainly in terms of the provision on a large scale of separate schools for handicapped

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94 Scottish Education Department, *The Administration of Education for Handicapped Pupils: A Report of the Advisory Council on Education in Scotland* (Edinburgh: Her Majesty's Stationery Office, 1952), 4.

95 Scottish Education Department, *Administration of Education*, 4.

96 Kendrick *et al.*, 'Development of Children's Care Services in Scotland' provides further details on the content of these reports, including residential school provision.

97 Scottish Education Department, *Pupils with Physical Disabilities: A Report of the Advisory Council on Education in Scotland* (Edinburgh: His Majesty's Stationery Office, 1951), 7.

98 Petrie, 'The Development of Special Education', 5.

99 In the UK, a government circular is an official document issued by a government department to provide guidance, information, or instructions to other public sector bodies, such as local authorities, schools, or NHS trusts.

children. It is recognised that there must continue to be situations where it is essential in the children's interests that those who are handicapped must be separated from those who are not. Nevertheless, as medical knowledge increases and as general school conditions improve, it should be possible for an increasing proportion of pupils who require special educational treatment to be educated along with their contemporaries in ordinary schools. Special educational treatment should, indeed, be regarded simply as a well-defined arrangement with the ordinary educational system to provide for the handicapped child the individual attention that he particularly needs.<sup>100</sup>

Thomson stated that despite this strong lead, 'local authorities continued to provide for mentally handicapped children separately, believing that such children might be overwhelmed in ordinary schools'.<sup>101</sup> This shows that despite a growing policy rhetoric that emphasises a commitment to the education of disabled children and young people in ordinary settings within their local community, geographical variation persisted as some local authorities continued to prioritise segregated provision, believing this to be in the best interests of the disabled child or young person.

In 1954 the Special Educational Treatment (Scotland) Regulations came into force. These regulations set out nine statutory categories of pupils requiring special educational treatment: deaf pupils, partially deaf pupils, blind pupils, partially sighted pupils, mentally handicapped pupils, epileptic pupils, pupils suffering from speech defect, maladjusted pupils, and physically handicapped pupils.<sup>102</sup> The regulations gave little detail about the arrangements for special educational treatment. They did specify, however, that 'every deaf pupil and every blind pupil who is not mentally handicapped ... shall be educated in a special school for the deaf or a special school for the blind as the case may be'.<sup>103</sup> Pupils in the other categories 'shall be educated in a special school or in an ordinary school or arrangements may be made for his

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100 Scottish Education Department Circular No. 300, cited in Scottish Education Department, *Special Education*, 1–2. The Scottish Education Department published an annual report on education in Scotland from the Secretary of State for Scotland between the 1940s and 1970s, and, on occasion, published extracts as separate reports.

101 Thomson, 'Legislation for the Mentally Handicapped Child', 273.

102 Special Educational Treatment (Scotland) Regulations, 1954, Section 2.

103 Special Educational Treatment (Scotland) Regulations, 1954, Section 3(1)(a).

education in a hospital or in his home, as may be appropriate in his case'.<sup>104</sup> While paving the way for education in ordinary settings, the legislation also recognised the merit of education in specialist settings, including residential settings.

Commenting on changes in the education system during the 1940s and 1950s, Petrie considered that 'by the end of the fifties the strategic thinking and the general surveys that had gone on since the end of the war had brought home to those responsible for Scottish Special Education the magnitude of their task. Expectations had been raised, areas of uncertainty, ignorance or failure exposed.'<sup>105</sup>

This suggests that there was growing recognition of the complexities around educating disabled children and young people alongside a change in societal expectations. They were no longer considered ineducable but were increasingly viewed as having the right to access education in a similar way to other children and young people. Much of the 1945 Act was repealed by the Education (Scotland) Act 1946, which was subsequently repealed by the Education (Scotland) Act 1962. However, the definition of special educational treatment remained unchanged: 'In this Act "special educational treatment" means education by special methods appropriate to the special requirements of pupils who suffer from disability of mind or body and shall be given in special schools approved by the Secretary of State for the purpose, or by other means so approved.'<sup>106</sup>

The 1962 Act did not affect the statutory duties of local authorities in respect of special educational treatment, apart from updating the legislation in acknowledgement of the development of the NHS. The main significance of the 1962 Act was the recognition that education needed to meet the 'special requirements' of disabled children and young people who may 'suffer from disability of the body or mind'. The use of the word 'suffer' is important here, reflecting the dominance of the medical model of disability which focuses on individual suffering and impairment. Within this approach, it was expected that education would take place in special schools or settings to be approved by the Secretary of State. This does not rule out the provision of education in hospitals or other residential settings.

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104 Special Educational Treatment (Scotland) Regulations, 1954, Section 3(1)(b).

105 Petrie, 'The Development of Special Education', 9.

106 Education (Scotland) Act 1962, Section 5(1).

## **A significant milestone: the birth of the NHS**

As a result of the National Health Service (Scotland) Act 1947, the NHS came into being on 5 July 1948. It aimed to meet all health needs of people free of direct charge at the point of delivery. In Scotland more than 400 hospitals passed into state ownership as part of the NHS: 183 voluntary hospitals, 218 run by local authorities, and 7 run by the Department of Health in Scotland.

Many of the hospitals, such as the old poorhouses, catered for the elderly and infirm. Another group of hospitals were the infectious disease hospitals, sanatoria, and lock hospitals, a number of which treated children and young people with a range of ailments such as tuberculosis, poliomyelitis, scarlet fever, gastro-intestinal diseases, and sexually transmitted diseases. These hospitals closed in the 1940s, 1950s, and 1960s thanks to the development of vaccines, antibiotics, and antimicrobials, and improvements to sanitation, housing, and child nutrition.<sup>107</sup> A third group of hospitals were the 'mental deficiency' hospitals. According to the Scottish Consortium for Learning Disability (now the Scottish Commission for People with Learning Disabilities), the creation of the NHS brought about an expansion of 'mental deficiency' hospitals, mainly through the redevelopment of other hospitals that were no longer needed for their original purpose.<sup>108</sup> In the 1960s, while there was a recognition of the need for more care in the community, there was further expansion of institutional provision with two hospitals (Lynebank and Craig Phadrig) opening in the late 1960s.<sup>109</sup> At this time, 'there were 1533 children in these hospitals, representing about one-fifth of all patients'.<sup>110</sup>

There was also an increased focus on the mental health of children and young people, and Framrose described outcomes for the first 70 young people admitted to the Adolescent Psychiatric Unit in Edinburgh, which opened in 1968.<sup>111</sup> The Young People's Unit provided 15 places for young people aged between 14 and 20. Young people attended daily small group psychotherapy sessions, community meetings,

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107 Andrew Kendrick, 'Caring for Children with Infectious Diseases: Children's Experiences of Fever Hospitals and Sanatoria in Scotland', *Journal of the History of Childhood and Youth* 16, 1 (2023).

108 Scottish Consortium for Learning Disability, *The National Confidential Forum: Estimating the Number of People with Learning Disabilities Placed in Institutional Care as Children, 1930–2005* (Edinburgh: Scottish Consortium for Learning Disability, 2014), 23.

109 Scottish Consortium for Learning Disability, *Institutional Care as Children*, 26.

110 Scottish Consortium for Learning Disability, *Institutional Care as Children*, 28.

111 Rustam Framrose, 'The First Seventy Admissions to an Adolescent Unit in Edinburgh: General Characteristics and Treatment Outcome', *British Journal of Psychiatry* 126, 4 (1975), 381.

and weekly psychodrama sessions, and once a week joined with parents in multiple-family groups. They either attended a local school or were in part-time employment.<sup>112</sup> Framrose concluded that while most responded well to this approach, the more disturbed, impulsive, and antisocial young people had relatively poor outcomes. For the latter, he suggested the need for more specialised units offering intensive care and containment.<sup>113</sup> Framrose proposed that the severe nature of the mental distress exhibited by these young people suggested an ongoing need for residential care within a hospital setting. This would have had implications for the location of education for this group of severely unwell young people.

Alongside the birth of the NHS, the National Assistance Act was passed in 1948. Section 29 of this Act stated that local authorities had a duty to provide disabled people in their area with things such as day centres, social and recreational activities, and help with travel costs and with finding suitable accommodation. This Act was viewed as being particularly significant for disabled people and abolished the Poor Law.<sup>114</sup> It aimed to ensure that the National Assistance Board established welfare benefits payments and that assistance was given to people over 16 years who were not making National Insurance contributions and were 'without resource'.

Local authorities were to provide for the welfare of 'the disabled, sick and other persons as well as regulating homes for disabled and aged persons'.<sup>115</sup> Section 29(1) states that:

A Local Authority shall have power to make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, and other persons who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.<sup>116</sup>

The Act also placed a duty on local authorities to provide residential accommodation

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112 Framrose, 'Adolescent Unit', 38.

113 Framrose, 'Adolescent Unit', 388.

114 The Poor Law established the mechanisms by which local parishes provided relief to the poor. For further consideration of the Poor Law see Norrie, 'Legislative Background to the Treatment of Children and Young People'.

115 Luke Clements and Janet Read, *Disabled People and European Human Rights: A Review of the Implications of the 1998 Human Rights Act for Disabled Children and Adults in the UK* (Bristol: The Policy Press, 2003).

116 National Assistance Act 1948, Section 29(1).

and other services to disabled people but acknowledged the traditional role that charities played in these areas. As a result, the Act permitted local authorities to designate responsibility to voluntary agencies if they wished. The outcome was a plethora of residential institutions in a variety of forms, run by charitable trusts and private agencies, and the failure of local authorities to develop appropriate community-based services.<sup>117</sup> It is worth noting that Section 47 of the Act authorised the removal from their homes of certain 'chronically sick, disabled or elderly persons'. This highlights the level of regulation and control some sections of the population could be subject to, although it referred principally to disabled adults rather than children or young people. This gives us an important insight into how disabled people were viewed at this time with Barnes referring to this as the social construction of dependence.<sup>118</sup> The influence of the medical model meant that disabled people were viewed as passive, weak, and dependent, and to some extent disposable. Therefore, enforcing some form of social control as the legislation proposed seemed entirely appropriate in certain circumstances.

### **The care and protection of children**

At the same time, key reports (the Clyde Report, 1946<sup>119</sup> and the Curtis Report, 1946<sup>120</sup>) led to a major reform of childcare legislation across the UK with the passing of the Children Act in 1948. The 1948 Act introduced a new organisational structure for children in care, requiring local authorities to form children's committees and appoint a children's officer along with specialist staff. This emphasised the need for expertise in child welfare, and it encouraged a focus on the individual needs and identity of the child. This development is considered the foundation of modern social work, distinguishing between social work for children and families and social work for adults. Local authorities had a duty to receive children into their care if this was in the child's best interest. Primarily, this was when the child had no parents or guardians, had been abandoned, or when parents were unable to provide care. This also applied to some disabled children and young people, and, as discussed, children assessed as disabled make up a substantial number of children in care.

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117 Colin Barnes, *'Cabbage Syndrome': The Social Construction of Dependence* (Basingstoke: Falmer Press, 1991).

118 Barnes, *'Cabbage Syndrome'*.

119 Scottish Home Department, *Report by the Scottish Home Department on Homeless Children* (Edinburgh: His Majesty's Stationery Office, 1946) – commonly referred to as the Clyde Report.

120 Care of Children Committee, *Report of the Care of Children Committee* (London: His Majesty's Stationery Office, 1946) – commonly referred to as the Curtis Report.

The 1948 Act replaced the Poor Law as it related to children and set out responsibility for the care of children when they came under the provisions of earlier legislation that continued in force, including the Children and Young Persons (Scotland) Act 1937, the Mental Deficiency (Scotland) Acts 1913 and 1940, and the Lunacy (Scotland) Acts 1857 to 1919. Importantly, the 1948 Act continued to allow parents to place their children in a home on a voluntary basis. In fact, in 1949 parents placed over 3,900 children in voluntary homes, while just over 3,500 children were in local authority care in voluntary homes, local authority homes, or other residential establishments.<sup>121</sup>

Disabled children and young people were not considered explicitly within this legislation but rather subsumed within a broader conceptualisation of 'children in need'. It was not until the Children (Scotland) Act 1995 that disabled children and young people were formally included in this category. Disability was only explicitly mentioned in the 1948 Act in Section 2(1)(b) when referring to the disability of a parent impacting on their ability to care for a child. Wilson and Petrie noted that the different social circumstances at the time of the 1948 Act, including post-war euphoria, created a more positive and psychological understanding of the need for families to remain together with support rather than fostering out children.<sup>122</sup> Nonetheless, the focus of the 1948 Act was on rescuing children rather than working in partnership with families to secure the needs of children, which was more reflective in later legislation. One notable outcome of this Act noted by Rowe and Lambert was that significant numbers of children remained in care without any plans to return them home.<sup>123</sup>

## **Disability and human rights**

Alongside these developments in legislation, there was a slow but increasing recognition of disabled people's right to inclusion in the UK. This was enshrined in the UN Declaration of Human Rights 1948 as well as in later international human rights treaties. The European Convention on Human Rights (ECHR) was drafted by the Council of Europe and came into force in 1953. The UK was one of the first states

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121 Further information on the development and detail of this legislation is found in previous reports for the Scottish Child Abuse Inquiry by Kendrick *et al.*, 'Development of Children's Care Services in Scotland', and Norrie, 'Legislative Background to the Treatment of Children and Young People'.

122 Kate Wilson and Steph Petrie, 'No Place Like Home: Lessons Learned and Lessons Forgotten – The Children Act 1948', *Child & Family Social Work* 3, 3 (1998), 183–8.

123 Jane Rowe and Lydia Lambert, *Children Who Wait: A Study of Children Needing Substitute Families* (London: Association of British Adoption and Fostering Agencies, 1973).

to ratify it in 1951. The ECHR established the European Court of Human Rights and has had a significant influence on law in Council of Europe countries. It sets out several articles which are of relevance, although it does not make specific reference to disability. Here we set out the various articles that are of most relevance to disabled children and young people who may receive education in residential settings, including the right to live free from abuse.

- Protocol 1, Article 2 sets out the right to education for all. It states that no person shall be denied the right to an education (framed as a negative right) but does not oblige the state to provide this. Instead, it requires the state to 'respect the rights of parents to secure such education and teaching in conformity with their own religious and philosophical convictions'. This does not place an obligation on the state as it is required to respect parents' views rather than being bound to comply with them.
- Article 3 prohibits torture, and inhumane and degrading treatment.
- Article 5 deals with deprivation of liberty, in conjunction with Article 14 and Article 2.
- Article 8 sets out the right to respect for family life, home, and correspondence. This can be interfered with – for example, if a family is abusing a child. Article 14 covers prohibition of discrimination when exercising rights and freedoms under the ECHR.

Clement and Read distinguish between absolute rights and rights that are qualified.<sup>124</sup> Absolute rights cannot be restricted or qualified in any way. Any interference with a qualified right must be sanctioned by domestic law, must pursue one of the legitimate aims stated in the Article itself, and must not be more than is strictly necessary.<sup>125</sup> Most rights in the ECHR are qualified, and the state can intervene in certain situations.<sup>126</sup>

The idea that disabled children and young people have special needs has slowly given way to the conviction that they have rights, and this should be the same full spectrum of rights as adults: civil, political, cultural, and economic. These developments can be viewed as part of a growing international movement calling for

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124 Clements and Read, *Disabled People and European Human Rights*.

125 Clements and Read, *Disabled People and European Human Rights*.

126 The ECHR is discussed in more detail in the report by Norrie, 'Legislative Background to the Treatment of Children and Young People'.

inclusive education in schools that welcome all children, whatever their needs and abilities.

### **The significance of Kilbrandon**

The 1950s was a relatively quiet period for the passing of relevant legislation and the development of policies. A major milestone was the convening of the Kilbrandon Committee to consider the treatment of juvenile delinquents and juveniles in need of care or protection, or those who were considered beyond parental control, although the numbers of the former far outstripped the latter. The Kilbrandon Report 1964 marked a watershed in policy and decision-making for young offenders and children in need. It made a series of recommendations that focused on the establishment of children's panels and the potential development of social education departments. The Social Work (Scotland) Act 1968 established the children's hearing system and generic social work departments. The Act had taken full effect by 1971.<sup>127</sup>

Kilbrandon proposed that under the director of education a new Social Education Department would consider the needs of children requiring special education and training. Existing childcare services would be merged with this larger organisation:

In recent years there has been increasing public recognition of the need for early forestalling action in the case of children in need, such action being taken by a wide variety of voluntary and public agencies. It has been accepted that such needs cannot be met by treating the child in isolation but rather as a member of a family unit in a particular environment. The social education department would be recognised as the focal point for the collation of all information about children in need.<sup>128</sup>

The recommendations made by Kilbrandon represented a paradigm shift characterised by a growing awareness of the variety of services needed to support children in need including those with disabilities. It also acknowledged the roles,

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127 For more detail on the evolution of the Kilbrandon Report and subsequent developments, see Kendrick *et al.*, 'Development of Children's Care Services in Scotland', and Norrie, 'Legislative Background to the Treatment of Children and Young People'.

128 Scottish Home and Health Department and Scottish Education Department, *Children and Young Persons Scotland: Report by the Committee Appointed by the Secretary of State for Scotland* (Edinburgh: Her Majesty's Stationery Office, 1964), 32 – commonly referred to as the Kilbrandon Report.

responsibility, and value of families to contribute to any care and support alongside the state. However, the proposal for a new Social Education Department was not fully enacted, and it was argued that this led to poor multi-disciplinary working which had a negative impact on children and young people that could have largely been avoided.<sup>129</sup>

With specific reference to the education of disabled children and young people, paragraph 135 of the Kilbrandon Report recommended a change to the procedure applicable to the 'special educational treatment' of disabled children and young people. The Committee recommended that any dispute between a parent of a disabled child and the education department about the needs of that child, and any outcome, could be resolved by the proposed children's hearing system. That was to be done on the basis of a referral by the reporter acting on instruction from the proposed director of the Social Education Department (which became the Social Work Department as outlined in the Social Work (Scotland) Act 1968). This sets out an early dispute resolution process for parents of disabled children and young people that can be traced through to the development of the Additional Support for Learning Tribunal in 2004.

The report of the Kilbrandon Committee had significant implications for disabled children and young people. It is recognised that the placement of disabled children and young people who had come through the youth justice system had often been inappropriate or unnecessarily restrictive. The Committee considered that this was largely due to the lack of appropriate alternative facilities or resources and proposed extending special educational facilities for those experiencing various forms of 'handicap'. In addition, the need for early intervention and a clear assessment of need for those with disabilities was noted.

The Committee highlighted concerns about provision for children 'suffering from maladjustment or mental handicap' and suggested that there was a need for residential schools for such children as approved schools at the time did not offer adequate provision.<sup>130</sup> In addition to concerns about these children, the Committee also found evidence of the placement of disabled children and young people in

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129 Scottish Home and Health Department and Scottish Education Department, *Children and Young Persons*.

130 Scottish Home and Health and Scottish Education Department, *Children and Young Persons*, 168.

approved schools.<sup>131</sup> This highlights the ongoing practice of segregating those groups who were considered deviant or to be operating outside of established social norms.

A psychological survey of young people in Kibble Approved School in the 1960s highlighted similar concerns to those raised in the Kilbrandon Report and showed that approved schools were often occupied by children and young people with a range of significant needs.<sup>132</sup> Although the numbers of young people in the school were not given, half were classified as mentally defective (10.55 per cent); having a personality disorder (12.6 per cent); having severe maladjustment and would benefit from school for the maladjusted (14.7 per cent); severely maladjusted requiring inpatient psychiatric treatment (10.5 per cent); and maladjusted who could be at home with psychiatric support (2.1 per cent).<sup>133</sup> These figures suggest that this group of young people had significant support and educational needs not readily catered for in an approved school, raising questions around the appropriateness of approved schools as a setting for disabled children.<sup>134</sup>

According to Sturgeon and Leygue-Eurieult, Kilbrandon's legacy extended beyond the children's hearing system. Indeed, his vision of shared community responsibility for the welfare of children and the lasting impact of adverse childhood events forms an essential element of Scottish public policy for children, to public health, and to justice.<sup>135</sup> Stalker argued that Kilbrandon was ahead of his time in applying the same principles to all children at a time when disabled children and young people were either absent or generally treated differently.<sup>136</sup>

Some years later, the Social Work (Scotland) Act 1968 was passed. The Act created a framework for the promotion of social welfare in Scotland as well as the establishment of the children's hearing system. This remains the primary legislation underpinning all activities undertaken by local authority social work departments and

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131 Scottish Home and Health and Scottish Education Department, *Children and Young Persons*, 56.

132 The Kibble School, 'Background Information Study of Approved School Boys: Sample of 100 Consecutive Admissions', *The British Journal of Criminology*, 12, 4 (1972), 403–12.

133 The Kibble School, 'Study of Approved School Boys', 411.

134 The Kibble School, 'Study of Approved School Boys', 411.

135 John Sturgeon and Elodie Leygue-Eurieult, "'NEEDS NOT DEEDS": The Scottish Children's Hearing and the Enduring Legacy of Lord Kilbrandon', *Criminocorpus* (2020). Available online: <http://journals.openedition.org/criminocorpus/7257>.

136 Kirsten Stalker, 'The Kilbrandon Report and Disabled Children and Young People: Some Reflections 50 Years On', *Scottish Journal of Residential Child Care* 13, 3 (2014).

social work professionals in Scotland.<sup>137</sup> The Act contains a general obligation for the local authority to further a child's best interests regardless of where that child resides, and even if this requires removing the child from their family.<sup>138</sup>

The Social Work (Scotland) Act transferred the functions of approved schools, including the provision of education, to local authority social work departments.<sup>139</sup> Given the concerns raised in the Kilbrandon Report and the work undertaken at Kibble regarding the suitability of approved schools for disabled children and young people with high levels of support needs, this should be considered a positive development. There was, however, a lack of agreement about the future of approved schools. As a temporary measure, the schools were to be administered by the Scottish Education Department, and in 1971 became known as 'List D' schools. Despite ongoing concerns about low educational standards in these schools, several consultations failed to reach agreement on their future direction. Central government funding was withdrawn from the schools in 1986. For administrative purposes, the schools were placed on List G, which had included residential and special schools for pupils with a range of special educational needs (SEN), thus removing the official difference between different categories of residential schools.<sup>140</sup> Toman, commenting on the evidence that the children in List D schools had similar backgrounds and difficulties to those experienced by children in the List G schools, stated that 'the placement depended largely on which network picked up the child and his problems and the nature and amount of offending involved'.<sup>141</sup> It is interesting that this quote refers only to children who offend, raising further questions around the suitability of such schools for disabled children and young people, to the extent that their placement there often went unacknowledged.

### **Further amendments to education legislation: a focus on special education**

In 1967 the Scottish Education Department published *Special Education*, an extract

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137 The legislation is considered in detail in Norrie, 'Legislative Background to the Treatment of Children and Young People', 68–90, and in Kendrick *et al.*, 'Development of Children's Care Services in Scotland'.

138 The Social Work (Scotland) Act, 1968, Section 20

139 Mary Warnock, *Special Educational Needs: Report of the Committee of Enquiry into the Education of Handicapped Children and Young People* (London: Her Majesty's Stationery Office, 1978).

140 Kendrick *et al.*, 'Development of Children's Care Services in Scotland', 279. This report gives further details on List D schools, List G schools, and special residential schools.

141 Michael Toman, 'Scottish Residential Special Schools for Children with Social, Emotional and Behavioural Difficulties: A Descriptive and Evaluative Study from a Curriculum Perspective' (PhD thesis, University of Aberdeen, 1991), 119.

from the report of the Secretary of State for Scotland in Education in Scotland in 1966.<sup>142</sup> It acknowledged that the 'range of problems in special education is formidable and solutions involve the co-operation of many different agencies'.<sup>143</sup> The report outlined the range of special education provision by local authorities, including 14 schools with residential accommodation. 'The main reasons for the variation in the types of provision from one area to another are the differences in geography and the density of population and in the incidence of the handicap.'<sup>144</sup>

The significant contribution of voluntary bodies to special education was highlighted, including that of residential schools.

The report discussed the complexity of ascertainment (the process of identifying and officially classifying disabled children and young people) and commented on the work of four working parties that had been set up by the Scottish Education Department between 1961 and 1966, addressing the ascertainment of four groups of children: those with mental handicap, maladjusted children, children with hearing defects, and blind or partially sighted children.<sup>145</sup> 'The reports published so far, while emphasising the difficulties of attempting precise definitions of categories of handicapped children, accepted that groups of children had to be distinguished for the practical purposes of ensuring that each child received the education best suited to their needs.'<sup>146</sup>

These reports noted changes in the terminology used to describe disabled children and young people as well as changes in how they were grouped and categorised. The reports also appeared to demonstrate a commitment to the provision of education to disabled children and young people in their own homes. They also considered that children and young people should not be removed from home to special education or residential schools unless they or other children would clearly benefit from this. These caveats, relating to the educational needs of the child and other children, are similar to those described above.

Jones commented that the working parties agreed on three principles for general

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142 Scottish Education Department, *Special Education*.

143 Scottish Education Department, *Special Education*, 2.

144 Scottish Education Department, *Special Education*, 3.

145 A similar exercise had been carried out a decade earlier by the Advisory Council on Education in Scotland (see the section [A growing recognition of the educational needs of disabled children and young people](#)).

146 Scottish Education Department, *Special Education*, 2.

application: increased emphasis on gaining the cooperation of parents, taking a team approach, and the need for a continuing process of ascertainment and review.<sup>147</sup> This highlights the ongoing attempts to identify, assess, and categorise disabled children and young people at this time. Warnock stated that these reports from the working parties led to changes in procedure which were included in the Education (Scotland) Act 1969, including the redefinition of special education 'in terms which excluded the concept of a fixed disability of mind or of body'.<sup>148</sup>

The Education (Scotland) Act 1969 amended the definition of special education previously set out in the 1962 Act: "'special education" means education by special methods appropriate to the requirements of pupils whose physical, intellectual, emotional or social development cannot, in the opinion of the education authority, be adequately promoted by ordinary methods of education, and shall be given in special schools or by other appropriate means'.<sup>149</sup>

This new definition suggests that specialist provision should be considered as the exception rather than the rule and should be considered only when the needs of a disabled child or young person could not be adequately met in mainstream provision. This was open to interpretation, however, and Broadhead highlighted the differing approaches taken to integration across education authorities in Scotland at this time. Writing in 1975, Broadhead highlighted that the Scottish legislation and regulations provided just 'a brief and general outline' of educational methods, and was 'subject to interpretation and implementation by the Departments of Education of each of the 11 Regional Authorities'.<sup>150</sup> He drew attention to the fact that, in 1974, 90 per cent of children receiving special education in Scotland were provided for in 'autonomous special schools which separate exceptional children from their non-handicapped peers'.<sup>151</sup> Broadhead provided a brief overview of the approaches to integration in five regions in Scotland. He highlighted the widely varying approaches across the different regions, 'from a Region which pursues a policy of integrating handicapped children into the educational mainstream to another which continues to

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147 Jones, 'Special Education', 150–1.

148 Warnock, *Special Educational Needs*, 31.

149 Education (Scotland) Act 1962, Section 5(1), as amended by the Education (Scotland) Act 1969, Schedule 2, Section 27(2).

150 Geoffrey D. Broadhead, 'Integrating Special Children in Scotland: A P.L. 94-142 is Needed', *The Journal of Special Education* 13, 1 (1979), 92. P.L. (Public Law) 94–142 refers to the detailed legislation in the United States' Education for All Handicapped Children Act 1975.

151 Broadhead, 'Integrating Special Children', 92.

build separate special schools for the handicapped'.<sup>152</sup> He continued: 'It is readily apparent that the notion of integration is neither widely popular nor generally implemented. Indeed, there is much opposition to the formulation of any policy expressed with enough force to make implementation likely.'<sup>153</sup>

Findlay summarised the education of handicapped children in Scotland during this time.<sup>154</sup> He outlined the responsibilities of local authorities to establish which children needed special schooling and the requirements on parents to have their child assessed if necessary. He noted the nine recognised categories of handicap as set out under the 1954 Regulations and said:

Something under 11,000 of Scotland's children attend special schools, 'occupation centres' or local health authority 'care centres', which cater respectively for 'educable' (IQ 55–70), 'trainable' (IQ 40–55) and 'untrainable' (below IQ 40). As has been pointed out many times, these IQ levels are no more than a rough guide for making a humane decision based on knowledge of the individual.<sup>155</sup>

Findlay identified four types of school or class: day special schools; residential schools; residential-cum-day schools; and special classes in ordinary schools. He identified building programmes to provide new special schools and occupational centres.

Needs for improvement in forecasting incidence, in ascertainment (although the 1969 Act has gone in this direction), in testing and in after-care are evident. More liaison with industry and provision of occupational opportunities for the physically handicapped require investigation, and residential education for the maladjusted is likely to receive greater attention through curriculum development, in-service training for teacher-counsellors and so on.<sup>156</sup>

This suggests that despite the growing policy rhetoric and apparent commitment to integration, investment in special education in terms of buildings, resources, and

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152 Broadhead, 'Integrating Special Children', 91.

153 Broadhead, 'Integrating Special Children', 96–7.

154 Ian R. Findlay, *Education in Scotland* (Newton Abbot: David & Charles, 1973).

155 Findlay, *Education in Scotland*, 95–6.

156 Findlay, *Education in Scotland*, 96.

professionals with specific expertise continued at pace during this time.

### **The introduction of the children's hearing system**

The children's hearing system began operating in 1971, taking over from the courts the responsibility of dealing with children and young people in need of care or protection. We highlight this here as it forms an important part of the organisational scaffolding and decision-making structure that is part of the lives of disabled children and young people in Scotland. Initially there were separate Reporters Departments in each of the then 12 regional and island councils in Scotland. The role of the reporter was to keep a record of proceedings and support fair process. In 1994, under the Local Government (Scotland) Act 1994, the Scottish Children's Reporter Administrator (SCRA) was established. Their main responsibilities set out under the Social Work (Scotland) Act 1968 were to:

- facilitate the work of children's reporters
- deploy and manage staff to carry out that work
- provide suitable accommodation for children's hearings.

The work and duties of SCRA have evolved over the years, and more detail of this is provided in the next section of this report alongside the relevant legislation.<sup>157</sup>

### **Disabled children and young people in residential care**

While there is limited information on disabled children and young people in residential care during this period, a report published in 1970 provided some information on disabled children and young people in the care of local authorities and voluntary organisations on 1 April 1966.<sup>158</sup>

Questionnaire cards were sent out to local authorities and voluntary organisations, to provide information about each child with 'a mental, physical or emotional handicap'. In total, 1,122 cards were returned by children's departments and voluntary agencies. 'Of 1,122 handicapped children in care at 1st April 1966, 398 were cared for in homes for normal children, 68 in homes for handicapped children, 30 in residential nurseries, 35 in hostels, 43 in residential special schools and 67 in hospitals.'<sup>159</sup>

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157 Full details of the evolution, development, and operation of SCRA is explored in Norrie, 'Legislative Background to the Treatment of Children and Young People', 82.

158 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*.

159 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 7.

While the report considered that the statistics provided were of limited value because of issues of definition and assessment, they provided relevant information on the 641 disabled children and young people in residential care at the time. The children were categorised as having a mental handicap (229), physical handicap (50), emotional handicap (194), mental and physical handicap (46), mental and emotional handicap (91), physical and emotional handicap (16), or mental, physical, and emotional handicap (15).

With regard to special homes for disabled children and young people, the report considered that such provision should be of the 'small family kind, where life may be as near as possible to that of an ordinary family'.<sup>160</sup> It suggested that there could be cooperation between local authorities and voluntary agencies in considering how the needs of disabled children and young people could be better met. The report noted that some disabled children 'are not as a rule suitable for care in any kind of children's home and would benefit from admission to hospital'. However, such provision was not always available, and the report highlighted a serious shortage of psychiatric units and services for children and adolescents with emotional disorders. It also considered that there were a significant number of children in long-term hospital care who had been deserted or rejected by their parents who would benefit by being received into care.<sup>161</sup> It acknowledged the role of residential special schools for some disabled children and young people, and the overall shortage of provision for the 'maladjusted child'. The impact of staff shortages and rapid staff turnover was discussed, as was the need for improved staff training, and better liaison and support between the agencies involved in the care of disabled children and young people.<sup>162</sup>

The report highlighted the importance of stimuli within the home, such as well-equipped play space, opportunities for creative work, reading or looking at books, and music. 'Perhaps most important of all, however, is that the children should be given frequent opportunities of talking to adults.'<sup>163</sup>

Contacts outwith the home were emphasised – visits with parents, outside activities, excursions, and holidays.<sup>164</sup> The report considered that 'the benefits which may be derived by the handicapped child from the society and stimulation provided by the

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160 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 8.

161 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 9.

162 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 11–12.

163 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 10.

164 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 11.

company of normal children are considerable'.<sup>165</sup> It also emphasised a need to prepare children for attendance at school, with the cooperation of school staff.<sup>166</sup> What is interesting about this report is its recognition that disabled children and young people might benefit from greater contact with 'normal' children, suggestive of a change of thinking around the care and education of disabled children and young people. While an ongoing need for residential care and education was recognised, it was argued that this should take place, where possible, in a home-like rather than institutional setting. The importance of stimulation within the home as well as supporting disabled children and young people to develop positive relationships with adults was also highlighted.

### **Further provision for disabled people**

The Chronically Sick and Disabled Persons Act 1970 was informed by data from an Office of Population Censuses and Surveys (OPCS) survey on disabled people which revealed that of the three million disabled people in private households in the UK, many were receiving little, if any, assistance despite high levels of need. The Act was complex and wide-ranging, and involved 11 different ministries covering the needs of both adults and children with disabilities.<sup>167</sup> The Act required local authorities to ascertain the number of disabled people living in their area and to publish information about the services that were available to them. It also set out the duty on local authorities to provide these services. These duties extended to both disabled children and young people, and adults. The duty was to provide any of the following that are necessary to meet the needs of a disabled person:

- help in the home which can include a home help (a person who provides practical help with things such as cooking, cleaning and so on)
- help getting a radio, TV, library services or similar recreational facilities
- lectures, games, outings or other recreational facilities outside the home or help taking advantage of educational facilities in the area
- facilities to assist travel to and from home to take part in any services provided for disabled people in the community
- help arranging any work to adapt the home or provide any extra facilities designed to make the home safer, more comfortable or easier to live in

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165 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 7.

166 Scottish Education Department Social Work Services Group, *Handicapped Children in Care*, 8.

167 Clements and Read, *Disabled People and European Human Rights*.

- help going on holiday whether this is provided under arrangements made by the local authority or otherwise
- providing meals in the home or somewhere else.<sup>168</sup>

The Act also required new public buildings to be accessible.

Clements and Read suggest that the Act remains the cornerstone of community care provision today, recognising the rights of disabled people (including children and young people) to access services and provision within their local communities.<sup>169</sup> Yet the Act failed to have the impact on the lives of disabled people that some may have hoped for. The Act focused primarily on disabled adults, and an important omission was the right of disabled children and young people to play and to access leisure activities. At the time of the passing of the Act resources to support this right remained tied up in segregated services.<sup>170</sup> An analysis of relevant legislation by Barnes in 1991 suggests that the Chronically Sick and Disabled Persons Act did little to change a situation where local authorities had all but failed to develop adequate community-based services for disabled people, relying instead on charitable trusts and private agencies.<sup>171</sup> This reflects a prevalent issue of the time where there was considerable debate about the extent of state responsibility for disabled individuals. Many questions arose regarding whether the state should fully assume this responsibility or if it should remain with voluntary and charitable organisations.

### **Discussion and implications of legislative and policy developments from 1945 to 1974**

During the post-war period the lives of disabled children and young people were increasingly subject to state regulation, control, and scrutiny.<sup>172</sup> Local authorities were expected to provide some form of educational provision to all children, but parents and children had little involvement in decision-making around this. Developments during this time can be categorised according to a number of key themes. These relate to ongoing attempts to characterise and classify disabled

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168 Chronically Sick and Disabled Persons Act 1970, Section 2.

169 Clements and Read, *Disabled People and European Human Rights*.

170 Jenny Morris, *Hurling into a Void: Transition to Adulthood for Young Disabled People with Complex Health and Support Needs* (Brighton: Pavilion for the Joseph Rowntree Foundation, 1999).

171 Colin Barnes, *Disabled People in Britain and Discrimination: A Case for Anti-discrimination Legislation* (London: Hurst and Co., 1991).

172 Mark Priestley, 'Childhood Disability and Disabled Childhoods: Agendas for Research', *Childhood* 5, 2 (1998), 207–23.

children and young people to better understand their needs and make appropriate provision to meet these. There were also related and ongoing debates around the appropriateness of segregated as opposed to integrated education for these groups of children and young people. During this time, developments continued to be influenced by the medical model of disability, which focused on the role of professionals in identifying appropriate treatment and provisions for disabled children and young people. We do, however, see the beginnings of greater recognition of the right of disabled children and young people and their parents to participate in decision-making about their lives, informed by the social model of disability and associated legislative and policy developments at this time.

The 1950s brought ongoing attempts to categorise disabled children and young people, and this had significant implications for special educational treatment in special schools including residential establishments. We can see several attempts to categorise and re-categorise disabled children and young people set out in legislation and its accompanying guidance. What can also be seen, however, is the evolution of language, from terms like 'imbecile', 'backward', 'difficult', 'handicapped', and 'defective', towards a more generic disability paradigm encompassing children with a range of needs. This reflects a cultural shift in post-war attitudes towards disability, where it is argued that disabled people have been viewed more favourably and with greater sympathy.<sup>173</sup> The emergence of human rights for all during this period also influenced these developments in language. This can be viewed both positively, as a recognition of individual need, and negatively in that by considering the needs of children with a range of disabilities under one omnibus term, individual needs may be obscured and therefore not adequately responded to.

Whilst a move towards some form of categorisation can be considered useful, particularly in relation to resource allocation and effective policy implementation, commentators such as Petrie noted in the 1970s that 'the whole notion of categorization had come under criticism'<sup>174</sup> due to the potentially stigmatising and limiting nature of the categories.<sup>175</sup> Interestingly, addressing the educational needs of disabled children and young people was often assigned to the most junior staff

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173 Victor Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (New York: World Rehabilitation Fund, 1980).

174 Petrie, 'The Development of Special Education', 8.

175 Alex Quigley, 'The Stigma of SEND Diagnosis: What Does the Research Say?', *TES*, 13 February 2025.

and not given high priority.<sup>176</sup> This reflects the perception that disabled children and young people were considered less important than non-disabled children and young people, making this area of policy development relatively low status and low priority. Disabled children and young people who were categorised in various ways, such as visually impaired, physically disabled, and learning disabled, were often sent to different schools or residential settings. This fragmented the experience of special education across groups. While this might have met the specific needs of different groups, it led to inconsistent implementation of educational goals and unclear application of laws and policies, especially as local authority policies varied.

Riddell criticised the process of categorisation, arguing that it represented an overly medicalised approach to understanding and responding to disabled children and young people. She suggested that such an approach, which was common at this time, gave too much power and control to the professionals who were responsible for undertaking the assessments necessary to place disabled children and young people within certain categories. This was at the expense of the views of children and young people and their families who did not play a central part in this process.<sup>177</sup> While there was a slow shift towards recognising the benefits of parental involvement in decision-making and recognising parents as partners, considerations around parental roles and responsibilities were not really apparent at this time.

Ideas around the categorisation of disability have led us to reflect on the challenge of identifying the population at the centre of this review. The duty to identify additional needs of children who were labelled as handicapped, disabled, maladjusted, or emotionally or psychologically disturbed was held by the education department and, as can be seen throughout this chapter, difficulties in identifying the number of children who had special educational needs means that there was limited data available on the number of disabled children and young people. This makes it challenging to appreciate the range of needs that legislation and policy were attempting to address, and the resources needed to do so. The picture was further complicated by the range of different types of residential settings that were necessary to meet different needs or categories of disabled children and young people. This makes it difficult to compare the experiences and outcomes of children and young people in each setting and means that there is very limited information

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176 Petrie, 'The Development of Special Education'.

177 Riddell, *Autonomy, Rights and Children*.

on the education of disabled children and young people in residential settings at this time.

Educational provision for disabled children and young people took place in a range of different types of residential settings but this was also a period where the move from segregation to inclusion began to emerge, although often this was challenging, and implementation was patchy and slow across the country. For example, Strathclyde Regional Council invested heavily in the development of specialist educational provision at a time when there was a slow shift towards integration. Indeed, Turner noted, with specific reference to Glasgow, the expansion of segregated provision in the 1960s, which appeared to conflict with central government policy at the time.<sup>178</sup> Glasgow struggled to resolve the tension between the new integration agenda and its own legacy of segregated facilities. Extensive, and expensive, specialist provision encouraged a tendency to send children with even moderate learning disabilities to these institutions rather than trying to educate them in a mainstream setting.<sup>179</sup> As a result, Glasgow was still building special schools whilst others were beginning to embrace integration,<sup>180</sup> a dichotomy which existed for many years. This geographical variation suggests the emergence of a postcode lottery, with some disabled children and young people being subject to an implementation gap between policy and practice. Attempts to resolve these dilemmas involved promoting special schools as Centres of Excellence that might offer advice and support working in partnership with mainstream provision. Thus, despite the introduction of new policy objectives such as inclusion and the 'continuum of needs' into education legislation there continued to be a reliance on segregated provision and outdated categories of impairment.<sup>181</sup>

Riddell has argued that during the post-war period the lives of disabled children and young people were increasingly subject to state regulation and scrutiny and that the overall objective was to 'produce docile bodies and minds with little focus on rights'.<sup>182</sup> This suggests that, at this time, disabled children and young people were not viewed as full citizens or as active agents with rights and responsibilities,

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178 Angela Turner, 'Education, Training and Social Competence: Special Education in Glasgow since 1945', in Anne Borsay and Pamela Dale (eds), *Disabled Children and Young People: Contested Caring, 1850–1979* (London: Routledge, 2015), 166.

179 Turner, 'Special Education in Glasgow', 168.

180 Petrie, 'The Development of Special Education'.

181 Turner, 'Special Education in Glasgow', 171.

182 Riddell, *Autonomy, Rights and Children*, 34.

including the right to participate in decision-making about their own lives. Indeed, it appears that the aim of legislation and policy at the time was to manage these groups of children and young people by segregating them to minimise disruption to others. This can be seen as a form of ableism or othering which appears to be prevalent, if unspoken, in many policy and legislative developments at this time. Taken together, the evidence reviewed here suggests that legislation and policy developments during this period were designed primarily to protect the interests of the state by minimising disruption to the status quo, and by minimising contact between disabled and non-disabled children and young people.

It can be argued that legislation and policy at this time were influenced, to some extent, by the Eugenics movement which supported the continued segregation of disabled people from local communities, often in the guise of providing specialist support and protection. Spencer and colleagues highlight the influence of the Eugenics movement, noting beliefs held as far back as the late eighteenth century which suggested that the survival of humans depended on the eradication of genetic weaknesses by ensuring particular groups were removed from the gene pool.<sup>183</sup> Widespread use of policies and practices such as forced sterilisation ('positive' eugenics) and segregated institutionalisation ('passive' eugenics) were sanctioned during the first part of the twentieth century.<sup>184</sup>

Both Oswin<sup>185</sup> and Thomson highlight a lack of momentum and consistent commitment to integration at this time, Thomson arguing that 'local authorities continued [into the 1970s] to provide for mentally handicapped children separately, believing that such children might be overwhelmed in ordinary schools'.<sup>186</sup>

This suggests that the policy vision of integration was not implemented consistently in practice. This was informed partly by what was believed to be in the best interests of disabled children and young people at the time but was also a result of resource

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183 Margaret Spencer, Beth Tarleton, Susan Collings, Gillian McIntyre, and Danielle Turney, 'If We Know What Works, Why Aren't We Doing It?', *The British Journal of Social Work* 54, 6 (2024), 2808–25.

184 David McConnell and Sheena Phelan, 'The Devolution of Eugenic Practices: Sexual and Reproductive Health and Oppression of People with Intellectual Disability', *Social Science & Medicine* 298 (2022), 114877.

185 Maureen Oswin, *The Empty Hours: A Study of the Weekend Life of Handicapped Children in Institutions* (London: Allen Lane, The Penguin Press, 1971); Maureen Oswin, *Children Living in Long-Stay Hospitals* (London: William Heinemann Medical Books, 1978).

186 Thomson, 'Legislation for the Mentally Handicapped Child', 273.

implications, which meant that some disabled children and young people were likely to be placed in residential settings because of available resources rather than need.

Overall, we argue that the provision of residential education for disabled children and young people was by no means uncommon at this time, although it is impossible to provide definitive figures on this. It is also difficult to present an accurate portrayal of the experiences of disabled children and young people who were educated in these settings. Although there was a growing commitment to integration, the dominance of the medical model of disability meant that disabled children and young people (and indeed all disabled people) were viewed as passive, weak, dependent, and in need of care (and in some cases control). The ongoing, predominantly unspoken influence of the Eugenics movement meant that this care and education often took place in specialist settings, which continued to be viewed as being in the best interests of disabled children and young people. Parents, carers, and other family members had an increasing say in the education of disabled children and young people, but user involvement was not common then. A growing recognition of the rights of disabled children and young people slowly emerged towards the end of this time period, influenced in part by a growing recognition of human rights more broadly.

It is useful to consider the extent to which Kilbrandon's vision of a society with shared community responsibility for the welfare of all children was realised and how the key themes identified here have evolved and progressed. It is perhaps worth concluding this section with Stalker's analysis of the significance of Kilbrandon in applying the same principles to all children at a time when disabled children and young people were either absent or treated very differently.<sup>187</sup> This will be explored in more detail in the following chapter.

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187 Stalker, 'The Kilbrandon Report'.

## Chapter 4 – Developments in legislation and policy from 1974 to 1995

### Introduction

In this chapter we consider how processes of deinstitutionalisation (characterised by the closure of long-stay institutions, such as large hospitals) impacted on disabled children and young people’s rights and education. We focus on the evolution and implementation of mainstreaming as well as the introduction of the category of special educational needs (SEN) in the Education (Scotland) Act 1981. This increased focus on mainstreaming reflected changes in cultural and social attitudes towards disabled people that can be attributed in part to the development and influence of the social model of disability and the disability rights movement. These changes were also influenced by an increase in awareness of abuse in long-stay hospitals that resulted in amplified public concern over the treatment of disabled people, the influence of pressure groups, and increased recognition of concepts such as normalisation and integration. The abuse in long-stay hospitals was exposed by the media and led to a series of public inquiries, including the Ely Inquiry.<sup>188</sup> The influence of pressure groups is less easy to quantify; however, Warnock and others have highlighted these as important in challenging the dominant discourse around disability towards a more inclusive, rights-based approach.<sup>189</sup> Table 2 provides a summary of the legislation and policy discussed in this chapter.

**Table 2: Summary of key legislation and policy discussed in Chapter 4**

Legislation/Policy/Key reports	Key aspects
<b>Education (Mentally Handicapped Children) (Scotland) Act 1974</b>	Discontinued the ascertainment of mentally handicapped children as unsuitable for education. Education

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<sup>188</sup> Barnes, *Disabled People in Britain*. The Ely Inquiry investigated the treatment of patients at Ely Hospital in Cardiff. It was initiated in 1967 following serious allegations made by a nursing assistant, known as ‘XY’, and culminated in a report published in 1969. The Inquiry revealed a culture of abuse and neglect, poor supervision, and a lack of accountability of senior staff. It prompted major reforms in the care of disabled people and led to increased scrutiny of long-stay hospitals, the development of patient rights, inspection regimes, and safeguarding policies.

<sup>189</sup> Sally Lindsay, Kristina Fuentes, Sharmigaa Rangunathan, Luiza Lamaj, and Jaclyn Dyson, ‘Ableism within Health Care Professions: a Systematic Review of the Experiences and Impact of Discrimination against Health Care Providers with Disabilities’, *Disability and Rehabilitation* 45, 17 (2023), 2715–31.

	authorities had a duty to provide for the education of such children.
<b>McCann Committee Report 1975</b>	Focused on the secondary education of disabled children and young people, encouraging education departments to arrange for physically handicapped children to attend mainstream schools when it was deemed to be in their best interests. It did not abolish specialist provision and acknowledged the value of that provision.
<b>National Development Group for the Mentally Handicapped 1975</b>	Acknowledged that a large hospital could never be regarded as a satisfactory home for a child. Move towards deinstitutionalisation.
<b>Warnock Report on Special Education Needs 1978</b>	Critical moment in how disability was understood with the introduction of the concept of special educational needs and expectations around the education received by children in this group. Signalled a move towards integration. Continued to acknowledge the need for specialist separate provision dependent upon children's needs.
<b>Scottish Education Department White Paper on special educational needs 1980 (response to the Warnock Report)</b>	Embraced Warnock's findings and recommendations including a single concept of special educational needs focused on ability and that the traditional distinction between ordinary and special education was no longer appropriate. Identified two specific groups: those who required regular access to specialist services and those who did not. Introduced the record of needs.
<b>The Education (Scotland) Act 1980</b>	Education authorities were required to

	<p>provide information to the Secretary of State on the provision of school education for three groups of children: those with the dual handicap of blindness and deafness, autism, or other forms of early childhood psychosis or acute dyslexia. The Act placed a duty on local authorities to secure adequate and efficient provision of school education for children in their area including those with special educational needs.</p>
<p><b>The Education (Scotland) Act 1981</b></p>	<p>Made amendments to the 1980 Act and aimed to apply some of the ideas of the Warnock Report. Adopted the term 'SEN' and changed the use of the term 'special education' by replacing 'education by special methods' to 'provision for special educational needs'. The term 'handicapped children' was replaced by the term 'children and young persons with certain special educational needs'. Examination and assessment were used to identify record of needs. However, segregated provision was maintained.</p>
<p><b>The Mental Health (Scotland) Act 1984</b></p>	<p>The focus of the Act was to provide support in the community and in hospital settings, both voluntary and involuntary, for those experiencing mental health problems. The Code of Practice accompanying the Act did not distinguish between adults and children but did suggest that the generality of its guidance would apply to children. No consideration of education was provided.</p>

<p><b>The Disabled Persons (Services, Consultation and Representation) Act 1986</b></p>	<p>Aimed to improve services for disabled people by strengthening their voice through making provision for representation and placing additional duties on local authorities. Regarding education, Section 13 required the education department to secure an assessment from the relevant authority, normally the social work department, as to whether the child was disabled and to carry out a future needs assessment. If the child was assessed as disabled a report had to be prepared on their need for any statutory service.</p>
<p><b>The Griffiths Report, Community Care: An Agenda for Action 1988</b></p>	<p>Created a blueprint for community care and changed expectations around how and where people should receive care from institution to community and suggested that local authorities rather than health boards took the lead on providing care within a mixed economy of care.</p>
<p><b>NHS and Community Care Act 1990</b></p>	<p>Focused on deinstitutionalisation, moving people to receive care in the community. Promoted the release of funding from health services to fund the purchase of a range of services in the community from care providers. Focused largely on the care of adults and did not specially refer to education or residential care. It did, however, develop the role of the local authority social work departments in the assessment and funding of residential places that may involve children and young people.</p>

<p><b>United Nations Convention on the Rights of the Child (UNCRC) adopted by the UN in 1989, ratified by the UK in 1991</b></p>	<p>First legally binding international instrument affirming, promoting, and protecting children’s human rights. Comprehensive charter of rights, outlining children’s civil, cultural, political, social, and economic rights. All rights apply to all children, but the UNCRC was the first international treaty to specifically reference disability. Set out the need to ensure that all actions taken by states must be in the best interest of the child and consider impact. Children’s voices must be heard in decision-making. Ten articles were specific to the needs of disabled children and young people including the right to freedom of expression; the right to respect for life; and the right of the child to education. General Comment 5 highlighted the need for comprehensive data collection to ensure full enjoyment of all rights.</p>
<p><b>Review of residential childcare in Scotland: Skinner Report 1992</b></p>	<p>Identified five situations where a residential home or residential school might offer the best placement. These included when a young person needs care with additional specialist, therapeutic, or educational services provided on the same site, and when a young person has complex special care and educational needs and their family require short-term support in sharing the care tasks.</p>
<p><b>Scottish Office Guidance: At Home in Hospital (1993)</b></p>	<p>Focused on the care of children and young people in hospital settings. Based on key principles such as family-centred</p>

	<p>care and the provision of a child-friendly environment to make hospital settings more supportive and less intimidating. Specific focus on educational continuity that stressed the importance of maintaining educational activities for children in hospital alongside the provision of psychosocial support for children and their families.</p>
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### Population statistics

At the beginning of this period, data collection on disabled children and young people was inconsistent and sparse, with different definitions of disability. This made it difficult to compare data over different regions and time periods. However, a special analysis of the 1974 General Household Survey (a UK-wide survey) suggested that 7.6 per cent of children under 16 had a long-standing illness, disability, or infirmity.<sup>190</sup> The severity of disabilities was assessed, with 10 per cent of children being classified as having a severe disability, 29 per cent as moderate, and 61 per cent as mild.<sup>191</sup> However, the data was not collected specifically for this purpose and came from various sources using different methods and definitions, limiting its usefulness. No comprehensive data on the number of disabled children and young people in Scotland was available at this time. However, the Scottish Consortium for Learning Disability (now the Scottish Commission for People with Learning Disabilities) referred to a 1972 memorandum from the Scottish Home and Health Department and the Scottish Education Department on services for the mentally handicapped: 'It stated that about 1200 school-age children and another 170 pre-school children were then resident in mental deficiency hospitals in Scotland ... It considered that between 120 and 240 of these children would be more appropriately placed in educational establishments.'<sup>192</sup>

The memorandum also noted that 'there were about 8,500 patients with learning

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190 Jane Weale and Jonathan Bradshaw, 'Prevalence and Characteristics of Disabled Children and Young People: Findings from the 1974 General Household Survey', *Journal of Epidemiology and Community Health* 34, 2 (1980), 112.

191 Weale and Bradshaw, 'Prevalence and Characteristics of Disabled Children and Young People', 111.

192 Scottish Consortium for Learning Disability, *National Confidential Forum*, 28.

disabilities in long-stay institutions (including in psychiatric as well as mental deficiency hospitals)', and it calculated that 25 per cent of these patients might be better catered for in hostels.<sup>193</sup> There is no indication of the ages of these patients, nor whether disabled children and young people with other impairments were living in residential settings. In recognition of the lack of robust data on children with learning disabilities living in mental deficiency hospitals, Richardson carried out a study of daycare provision and mental deficiency hospital schools in 1975 and identified 1,135 school-aged children within these settings.<sup>194</sup>

### **Educational settings**

Warnock noted that in Scotland in September 1976, there were 13 independent schools that catered wholly or mainly for handicapped pupils. These provided some 500 places. About '200 of the children placed there were mentally handicapped (40%), 160 maladjusted (32%) and 60 physically handicapped (12%)'.<sup>195</sup> The Warnock Report detailed the number of children in hospital education in Scotland in September 1976. There were '867 children in 15 mental deficiency hospital schools, of which 845 were, in present terminology, mentally handicapped or severely mentally handicapped'.<sup>196</sup> Another 508 children were receiving education in 45 hospitals under Section 14 of the Education (Scotland) Act 1962, which gave education authorities the power to provide education somewhere other than an educational establishment.

The McCann Committee Report provided further information and identified eight residential schools with provision for physically handicapped children, six of which were grant-aided. They provided residential care and education for 257 children and

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193 Scottish Consortium for Learning Disability, *National Confidential Forum*, 29.

194 J.N. Richardson, *Regional Patterns in the Education and Training of Severely Mentally Handicapped School Age Children in Scotland* (Glasgow: Scottish Society for the Mentally Handicapped, 1975), cited in Scottish Consortium for Learning Disability, *National Confidential Forum*, 34.

195 Warnock, *Special Educational Needs*, 139.

196 Warnock, *Special Educational Needs*, 146.

young people in January 1974.<sup>197</sup> Clark noted that by 1975, there were 12 residential special schools for maladjusted children in Scotland, providing 428 places.<sup>198</sup>

Given the complexity of educational provision at this time, Table 3 provides a summary of these figures.

**Table 3: Type and number of educational establishments**

Type and number of educational establishments	Number of children catered for	Type of disability catered for
<b>13 independent schools</b>	500	Handicapped children – 200 children were mentally handicapped, 160 maladjusted, 60 physically handicapped
<b>15 mental deficiency hospital schools</b>	867	845 children mentally handicapped or severely mentally handicapped
<b>45 hospitals</b>	508	Not specified
<b>8 residential schools (6 of which were grant-aided)</b>	257	Physically handicapped children
<b>12 residential schools</b>	428	Maladjusted children

Between 1980 and 1982 the Scottish Education Department carried out a survey on progress in providing education to children in 13 mental handicap hospitals in

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197 Scottish Education Department, *The Secondary Education of Physically Handicapped Children in Scotland: Report of the Committee Appointed by the Secretary of State for Scotland* (Edinburgh: Her Majesty's Stationery Office, 1975) – commonly referred to as the McCann Report.

198 Margaret M. Clark, 'A Study of Ascertainment for Special Education in Scotland 1973–1975', in W.B. Dockrell, W.R. Dunn, and A. Milne (eds), *Special Education in Scotland* (Edinburgh: Scottish Council for Research in Education, 1978), 87.

Scotland.<sup>199</sup> These hospitals accommodated approximately 85 per cent of pupils on the rolls of mental handicap hospitals. The report gave figures for the number of children in these hospitals and those attending school but noted that these figures were collated over the period of the survey and therefore did not give an accurate picture of the population at any one time. There were 632 children and young people resident in hospital (7 under the age of 5; 501 between 5 and 16; and 124 over 16). Seventeen of the children went out of the hospital to school, 608 went to school in the hospital, and 49 were not at school.<sup>200</sup>

We can see that significant numbers of disabled children or young people received their education in independent schools that catered wholly or mainly for handicapped pupils, within residential schools, or within hospital settings at the start of this period. The Scottish Education Department acknowledged questions about the appropriateness of such education in a hospital setting. They highlighted some improvements in provision but also variability across schools, hospitals, and social work provision. Given the medical and nursing focus on the wards, school was often the highlight of the children's day.<sup>201</sup> The survey described the life of the children on the ward and found that 'the large nursing charges which are still evident in many wards, coupled with frequent changes of staff, make the central requirement of continuing adult/child relationships difficult to attain'.<sup>202</sup>

While there were examples of the use of daily living activities to encourage learning, in many more instances such opportunities were not taken.

### **Terminology applied to disabled children and young people, and the impact thereof**

A range of terms were used to describe disabled children and young people during this period, including 'physically handicapped', 'mentally handicapped', and 'maladjusted'. Changes to language used and attitudes towards disabled children and young people can be observed throughout this period, perhaps most clearly

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199 Scottish Education Department, *Education in Mental Handicap Hospitals: A Progress Report by HM Inspectors of Schools* (Edinburgh: Scottish Education Department, 1984). The survey was based on visits to the hospitals and interviews with professionals. There is no mention of participation of children in the survey.

200 Scottish Education Department, *Education in Mental Handicap Hospitals*, 35.

201 Scottish Education Department, *Education in Mental Handicap Hospitals*, 30.

202 Scottish Education Department, *Education in Mental Handicap Hospitals*, 20.

illustrated by the Warnock Report in 1978.<sup>203</sup> The report argued that the categorisation of disabled children and young people in previous legislation and policy had been heavily influenced by a medical model of disability. This meant that some disabled children and young people were categorised as ineducable and therefore excluded from mainstream education.

Concepts such as normalisation and integration and the social model of disability were influential in challenging ideas around segregation, leading to the promotion of integration of disabled children and young people in mainstream settings.<sup>204</sup> Although now largely discredited, the concept of normalisation was highly influential in promoting deinstitutionalisation and the integration of disabled people in local communities.<sup>205</sup> It underpinned arguments that supported the rights of disabled people to access education, employment, community life, medical care, and citizenship. The concept of normalisation was developed in Scandinavia in the 1960s by Bengt Nirje and further expanded on by Wolf Wolfensberger and colleagues in the United States in the 1970s, who defined it as the utilisation of means that are as culturally normative as possible.<sup>206</sup> Wolfensberger was also associated with ideas around social role valorisation which focused on the socially valued roles that disabled people might undertake to promote inclusion and acceptance.<sup>207</sup> Integration was seen as a vital part of this process, and the influence of this can be seen in the Warnock Report. Chappell provides an influential critique of normalisation, arguing that it reflects the concerns of professionals rather than disabled people. She argues that it neglects to focus on the unequal power relationships between professionals and disabled people and does not consider the structural barriers faced by disabled people that inhibit their full integration in society.<sup>208</sup>

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203 Warnock, *Special Educational Needs*.

204 Thomas, *Female Forms*; Stalker, 'The Kilbrandon Report'.

205 Len Barton and Mike Oliver (eds), *Disability Studies: Past, Present and Future* (Leeds: The Disability Press, 1997); Anne Louise Chappell, 'Towards a Sociological Critique of the Normalisation Principle', *Disability, Handicap & Society* 7, 1 (1992).

206 Bengt Nirje, 'The Normalization Principle and its Human Management Implications', in Robert B. Kugel and Wolf Wolfensberger (eds), *Changing Patterns in Residential Services for the Mentally Retarded* (Washington, DC: President's Committee on Mental Retardation, 1969), 179–95; Wolf Wolfensberger, Bengt Nirje, Simon Olshansky, Robert Perske, and Philip Roos, *The Principle of Normalization in Human Services* (Toronto: NIMR, 1972).

207 Wolf Wolfensberger, 'Social Role Valorization: A Proposed New Term for the Principle of Normalization', *Mental Retardation* 21, 6 (1983).

208 Chappell, 'Towards a Sociological Critique'.

Despite this critique, conceptual insights from normalisation and from other influential models and theories (such as the social model of disability and the social relational approach) have contributed to a more nuanced understanding of the complexities associated with disability and how ableism affects children's lives.<sup>209</sup> Concurrent to these changes in conceptualising and understanding disability, parents of disabled children and young people formed pressure groups to campaign for the inclusion of all children in mainstream education.<sup>210</sup>

### **Education in 1970s Scotland**

From 1974 onwards there was a growing recognition of disabled children and young people's right to education. As a group they were no longer considered uneducable, and there was an increased focus on the possibility of education in mainstream settings. The Education (Mentally Handicapped Children) (Scotland) Act 1974 discontinued the 'ascertainment of mentally handicapped children as unsuitable for education at school'.<sup>211</sup> Further, education authorities had to provide for education of such children, including those accommodated in hospitals. This echoed developments in England, where the Education (Handicapped Children) Act 1970 set out increased support for integration.

The McCann Committee Report on the secondary education of physically handicapped children in Scotland, while recognising the continuing need for special schools, considered there would be an increasing number of physically disabled children and young people in mainstream school because of efforts towards integration. It made recommendations, addressing issues such as transportation, teachers with special training, and the employment of welfare assistants to provide support to children.<sup>212</sup> In summary, it stated: 'we recommend the policy of the Scottish Education Department as outlined in Circular 782 where education authorities are encouraged to arrange for physically handicapped children to attend ordinary school where this is deemed to be in the best interests of the child'.<sup>213</sup>

This demonstrates a commitment to integration although it is interesting to note the use of language at the time, with mainstream schools described as 'ordinary schools',

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209 Thomas, *Female Forms*, Stalker, 'The Kilbrandon Report'.

210 Lindsay *et al.*, 'Ableism within Health Care Professions'.

211 Education (Mentally Handicapped Children) (Scotland) Act, 1974, Chapter 27.

212 Scottish Education Department, *Secondary Education of Physically Handicapped Children*, 1.

213 Scottish Education Department, *Secondary Education of Physically Handicapped Children*, 21.

suggesting that those who do not attend these ordinary schools might be considered different or 'sub-normal'. The report identified eight residential special schools with provision for physically handicapped children, six of which were grant-aided. They provided residential care and education for 257 children and young people in January 1974.<sup>214</sup> Acknowledging the serious nature of the decision to place a child in residential care, the report concluded:

The residential schools have, however, much to offer and there is a variety of reasons why a place should be sought for a child in one. It may be that no suitable local day school can provide for the child's needs. Some children may require to be taken into residence for social or medical reasons. Residential provision may also be used for short periods of time to give the physically handicapped child a holiday and his parents a rest or holiday.<sup>215</sup>

The McCann Report noted the fall in numbers of physically handicapped children placed in both day and residential schools and forecasted a continuing decline in residential placements.<sup>216</sup>

The Scottish Council for Educational Technology noted that over time 'the provision of special educational facilities has been one of extension both by type of handicap and by depth of handicap'.<sup>217</sup> This reflects comments made by Broadhead considered in the previous chapter.<sup>218</sup> Although there was a decline in the 1970s in the use of residential education for disabled children and young people, there was an extension in the category of those considered to have special educational needs. Accordingly, special education was being provided for a wide range of handicaps of a physical, intellectual, and emotional nature. The means by which this education was provided varied throughout the country. In some areas, there was extensive provision of separate facilities for 'the handicapped', whereas in others there was a tendency towards maximum integration within the ordinary school system.<sup>219</sup>

Priestley considered the education of the group of children who, in the 1970s, were

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214 Scottish Education Department, *Secondary Education of Physically Handicapped Children*, 51.

215 Scottish Education Department, *Secondary Education of Physically Handicapped Children*, 23–4.

216 Scottish Education Department, *Secondary Education of Physically Handicapped Children*, 26.

217 Scottish Council for Educational Technology, *Resources in Special Education*. Occasional Working Paper 1 (Glasgow: Scottish Council for Educational Technology, 1976), 1.

218 See [Further amendments to education legislation: a focus on special education](#).

219 Scottish Council for Educational Technology, *Resources in Special Education*, 4.

referred to as 'maladjusted children' in Scotland just prior to the publication of the Warnock Report. Maladjusted children were typically defined as children who struggled to adapt appropriately to the demands and expectations of their environment, often manifesting as emotional responses and behavioural issues. Priestley noted that maladjustment is 'often relative to time and place rather than a constant state' and went on to discuss the 'problems in diagnosis and assessment'.<sup>220</sup> He highlighted the lack of consensus on the approach to be taken in the education of maladjusted children, although considered that there were indications that this was changing, with some early signs of an increased willingness to consider the potential suitability of integration for this group.<sup>221</sup> Riddell, writing about the same period, also noted that there would have been ongoing uncertainty about how to educate this group of children, who were regarded at the time to be potentially disruptive and challenging.<sup>222</sup>

While stressing the aim of keeping maladjusted children in the mainstream, Priestley called for a variety of special educational placements:

In order to increase the number of placement options available for maladjusted children, small education teams may be placed in establishments run by other departments and services. In this way, continuing education can be provided for children in Intermediate Treatment Centres or who are placed in Assessment Centres run by Social Work Departments or who are admitted to hospital units within psychiatric departments.<sup>223</sup>

Most children in the twelve maladjusted schools and units in Scotland belonged to one or other of two groups. One group consisted of children whose behaviour was difficult to control at home or in ordinary school; many of these had a history of delinquency or school exclusion. The other group had problems which were considered more emotional in nature, culminating in refusal to attend school.<sup>224</sup>

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220 Peter H. Priestley, 'The Education of Maladjusted Children', in W.B. Dockrell, W.R. Dunn, and A. Milne (eds), *Special Education in Scotland* (Edinburgh: Scottish Council for Research in Education, 1978), 29–30.

221 Priestley, 'Education of Maladjusted Children', 31.

222 Riddell, *Autonomy, Rights and Children*.

223 Priestley, 'Education of Maladjusted Children', 34.

224 Clark, 'A Study of Ascertainment', 87.

## **A move towards deinstitutionalisation**

During this period there was a general trend away from hospital care, and this had implications for the children who had been placed there and whose upbringing had been giving cause for concern.<sup>225</sup> These concerns, identified by Oswin through her detailed research, focused on the way in which children were treated in hospital, including being housed in cockroach-infested wards, being tranquillised for the ease of staff, and sleeping on mattresses on the floor. Indeed, Tyne argued that one of the biggest achievements of the National Development Group for the Mentally Handicapped, set up by the Secretary of State for the Department of Health and Social Security in 1975, was to convince government that a large hospital could never be regarded as a satisfactory home for a child.<sup>226</sup>

The Scottish Consortium for Learning Disability highlighted that although there had been an emphasis on care in the community since the 1960s, at the end of the 1970s 'mental deficiency' hospitals remained under pressure to admit children and adults with learning disabilities who, 'under contemporary legislation and discourse, should have been supported to live in the community'.<sup>227</sup> It was only in the 1990s that policies for the community care of disabled children and young people came to fruition.

## **The Warnock Report: a sea change in understanding special educational needs**

Many commentators regard the publication of the Warnock Report on Special Educational Needs in 1978 as a critical moment, both in terms of how disability was understood, with the introduction of the concept of special educational needs, and in terms of expectations around the education of pupils who formed part of this group.<sup>228</sup> Publication of the report was viewed as the beginning of a significant change in thinking about the education of children with special educational needs, promoting the integration of disabled children and young people as a central issue:

The principle of educating handicapped and non-handicapped children together, which is described as 'integration' in this country and 'mainstreaming' in the United States of America, and is recognised as

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225 Oswin, *The Empty Hours*, Oswin, *Children in Long-Stay Hospitals*.

226 Alan Tyne, 'Shaping Community Services: The Impact of an Idea', in Nigel Malin (ed.), *Reassessing Community Care* (London: Croom Helm, 1987), 80–96.

227 Scottish Consortium for Learning Disability, *Institutional Care as Children*, 30.

228 Warnock, *Special Educational Needs*.

part of a much wider movement of 'normalisation' in Scandinavia and Canada, is the particular expression of a widely held and still growing conviction that, so far as is humanly possible, handicapped people should share the opportunities for self-fulfilment enjoyed by other people.<sup>229</sup>

Warnock recommended that the all-embracing category of special educational needs should replace the previous nine categories of impairment, set out in the Special Educational Treatment (Scotland) Regulations<sup>230</sup> in 1954. These were deaf pupils, partially deaf pupils, blind pupils, partially sighted pupils, mentally handicapped pupils, epileptic pupils, pupils suffering from speech defect, maladjusted pupils, and physically handicapped pupils. Warnock suggested that around 20 per cent of children were likely to experience learning difficulties of some kind at some time during their education, and for about 2 per cent of children these difficulties would be severe and enduring.<sup>231</sup>

This is a significant underestimation, with recent figures suggesting almost 43 per cent of school-aged children and young people have an additional support need.<sup>232</sup> However, given the broad nature of the subsequent additional support needs (ASN) definition, it is difficult to make a clear comparison. For children assessed as having special educational needs, the local authority was to arrange multi-disciplinary assessment, and a legally binding statement was to be produced that indicated how the local authority intended to address the disabled child's needs. This would become known as the record of needs in Scotland and the statement of needs in England.

Warnock considered residential special schools in Scotland separately, but her recommendations were made to cover establishments across the UK.<sup>233</sup> Warnock noted that the 13 independent residential special schools in Scotland received grants towards expenditure on maintenance and were therefore 'part of the national system of special educational provision', unlike independent schools.<sup>234</sup> While Warnock also discussed the independent schools, it is not clear whether these were residential or

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229 Warnock, *Special Educational Needs*, 99.

230 See [A growing recognition of the educational needs of disabled children and young people](#).

231 Riddell, *Autonomy, Rights and Children*.

232 Riddell, *Autonomy, Rights and Children*.

233 Warnock, *Special Educational Needs*, 145.

234 Warnock, *Special Educational Needs*, 128. Warnock included residential schools for all types of disability, not solely physical disability as addressed in the McCann Report.

day schools. She did, however, note that: 'Childcare staff in residential special schools spend at least as much time with the children as do the teachers. Demarcation lines between childcare and teaching are rightly blurred.'<sup>235</sup>

This highlights and recognises the need for specialist support from a wide range of education, health, and social work professionals to meet the needs of disabled children and young people across a range of educational and care settings.<sup>236</sup>

The Warnock Report also considered the role of List D schools (previously called approved schools)<sup>237</sup> in Scotland given the broader definition of special educational needs employed by the committee. The report noted that:

There are 26 List D schools, with some 1,700 places, which provide the main resource for the accommodation of boys and girls considered by the children's hearings to be in need of compulsory measures of residential care or placed there by the Secretary of State as a result of court orders. Two of the schools are managed by Strathclyde Regional Council, and the rest by independent bodies of voluntary managers.<sup>238</sup>

Warnock continued to see the need for residential special schools and 'other, more flexible types of boarding school which would cater for children with varying needs for residential accommodation and education on or off the premises'.<sup>239</sup>

In discussing residential special schools, Warnock noted that proposals for the extension of the functions of special schools such as 'the provision of intensive, specialised short-term help, and the development of some schools as resource centres apply to residential as well as non-residential schools'.<sup>240</sup> Warnock set out the circumstances in which education in residential special schools would be needed:

- (i) where a child with severe or complex disabilities requires a combination of medical treatment, therapy, education and care which it would be beyond the combined resources of a day special school and his family to provide, but which does not call for his admission to

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235 Warnock, *Special Educational Needs*, 135.

236 Warnock, *Special Educational Needs*, 135–6.

237 See [The significance of Kilbrandon](#).

238 Warnock, *Special Educational Needs*, 145.

239 Warnock, *Special Educational Needs*, 126.

240 Warnock, *Special Educational Needs*, 125.

hospital;

- (ii) where learning difficulties or other barriers to educational progress are so severe that the whole life of the child needs to be under consistent and continuous educational influence, for example where a child is suffering from severe sensory loss, extensive neurological damage or malfunction, severe emotional or behavioural disorder or severe difficulties of communication;
- (iii) where a child has a severe disability and his parents cannot provide at home the sustained attention that he needs, or could not do so without unacceptable consequences for family life and the well-being of other children in the family;
- (iv) where poor social conditions or disturbed family relationships either contribute to or exacerbate the child's educational difficulty.<sup>241</sup>

In recommending that a range of different types of boarding special schools should be available, Warnock detailed the groups of children these could cater for:

- (a) those who need residential accommodation and full-time education under the same roof;
- (b) those who may be able to attend a local day school (either ordinary or special) but require the support and special expertise of a boarding school of the hostel type for some very important aspects of their education; and
- (c) those who can live at home but who need special education which can most suitably be provided by attendance as day pupils at a boarding school. Examples are blind children with a boarding school for the blind near their homes; and children who have been boarders at a local boarding school and who no longer need to live away from home, but for whom attendance at the school as day pupils provides a transitional stage before they go to a local day school.<sup>242</sup>

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241 Warnock, *Special Educational Needs*, 126.

242 Warnock, *Special Educational Needs*, 126.

Warnock considered that boarding special schools should offer facilities for residential assessment; short-stay, respite facilities for children with severe disabilities; opportunities for young people to increase their independence by a period of residential experience; intensive short courses of specialist teaching for pupils in ordinary day schools who need additional help to maintain their progress; and recreational and leisure activities.<sup>243</sup> 'We therefore recommend that boarding special schools should be prepared to accept children and young people with disabilities or significant difficulties for short periods wherever this meets a need.'<sup>244</sup>

Warnock also recommended that residential special schools should be as flexible as possible in terms of weekend arrangements to offer genuine choice, and that parents should be supported to visit their child's school.<sup>245</sup>

Warnock stressed the importance of working relations between professionals and the coordination of services for children with SEN. The report also highlighted the importance of parents as partners, although Riddell and colleagues questioned the impact of this over the coming years.<sup>246</sup> Indeed, according to Riddell, the Warnock Report drew on 'a discourse of needs rather than rights',<sup>247</sup> and was criticised for being overly vague. 'Despite its focus on children's needs rather than deficits, the Warnock Report reflected many of the traditional values of the post-war welfare state, with the emphasis on local authorities making key decisions on resource allocation, with little regard for the rights of children, young people and their families.'<sup>248</sup>

Riddell and colleagues noted that the 'field of SEN was traditionally dominated by psychologists, who sought to anatomise the nature of deviance and deficit'.<sup>249</sup> They offered a critique of the report which they suggest did not challenge this dominant discourse and 'failed to take account of the social circumstances that contribute to the creation of SEN, focusing instead on the individual child with little consideration

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243 Warnock, *Special Educational Needs*, 127.

244 Warnock, *Special Educational Needs*, 127.

245 Warnock, *Special Educational Needs*, 133.

246 Riddell *et al.*, 'Special Educational Needs'.

247 Riddell, *Autonomy, Rights and Children*, 35.

248 Riddell, *Autonomy, Rights and Children*, 35.

249 Sheila Riddell, Joan Stead, Elisabet Weedon, and Kevin Wright, 'Additional Support Needs Reforms and Social Justice in Scotland', *International Studies in Sociology of Education* 20, 3 (2010), 179–99.

of their environment'.<sup>250</sup> This highlights the ongoing influence of the medical model, despite advances brought about by the growth of the social model of disability and associated concepts, such as the social relational model, discussed earlier.<sup>251</sup> Indeed, Warnock herself later wrote that 'the most strikingly absurd fact is that the Committee was forbidden to count social deprivation as in any way contributing to educational needs'.<sup>252</sup> It is interesting to note the strong language used here by Warnock, when she described the Committee as forbidden from looking beyond a particular remit. This raises questions around who was controlling the narrative around disabled children and young people at the time.

Turner, discussing the placement of children and young people in special educational provision in Glasgow in the 1970s, noted that there 'appeared to be growing official concern about a situation where entry into special schools appeared to depend on both a diagnosis of mental handicap (based on IQ scores) and an assessment of the social status of the child's family'.<sup>253</sup>

While it was important to consider the social and structural factors that might create barriers to learning, Turner argued that it was concerning that these should be considered a justification for entry into special schools as it could potentially significantly broaden the group of children and young people who were eligible for such provision. Indeed, Turner argued that special schools continued to flourish well into the 1980s, suggesting that 'integration remained a distant goal, though a much-discussed ideal'.<sup>254</sup>

The use of entry criteria such as IQ scores is interesting and continues to be relevant in contemporary debates around access to services and support for disabled people. Whilst the use of IQ testing has been largely discredited, as it was viewed as unreliable and potentially discriminatory, current concerns with resource constraints within a context of austerity suggest that increasingly strict eligibility criteria (often based on IQ testing) are being deployed.<sup>255</sup>

By the 1980s there were still clear differences across local authority policies leading

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250 Riddell *et al.*, 'Additional Support Needs Reforms'. See also Paul Croll, 'Social Deprivation, School-Level Achievement and Special Educational Needs', *Educational Research* 44, 1 (2002).

251 See [Understanding disability](#).

252 Baroness Warnock, 'If Only We Had Known Then ...', *TES*, 31 December 1999.

253 Turner, 'Special Education in Glasgow', 165.

254 Turner, 'Special Education in Glasgow', 170.

255 Spencer *et al.*, 'If We Know What Works, Why Aren't We Doing It?'.

to geographical differences in placement in special schools, with some areas demonstrating a greater commitment to integration policies than others. It appears that a categorisation of 'mental handicap' often resulted in segregated provision.

Turner argues that in the 1970s the goals of special education became somewhat confused and perhaps less ambitious. For example, protecting the mainstream rather than nurturing the special needs child was a key theme identified by Tomlinson, who argued that special education was used as 'a safety valve for the mainstream, allowing it to function unimpeded by these troublesome deviants'.<sup>256</sup> Meanwhile, disabled children and young people within special education settings continued to report experiences of isolation and exclusion, labelling, and stigma.<sup>257</sup>

In 1980, in response to the Warnock Report, the Scottish Education Department published a White Paper on special educational needs in Scotland, and the Secretary of State for Scotland announced his intention to introduce legislation 'in the field of special education to end the identification of pupils by category of handicap and to extend parental choice and education'.<sup>258</sup> The White Paper set out the intention to introduce legislation that focused on a broad spectrum of special educational needs including those children who currently received education in special schools or classes, along with those whose needs had not previously been recognised. It distinguished two groups of children: 'those whose needs can be met largely within the normal resources of primary and secondary schools and those who require regular access to specialised services'.<sup>259</sup> It stated: 'The legislation which the Government intend to introduce will to a large extent be concerned with children with pronounced, specific or complex educational needs.'<sup>260</sup>

It also addressed the perceived misinterpretation of the Warnock Report that considered it had advocated for total integration: 'In fact, the [Warnock] Committee was at pains to recognise the continuing place of the specialist provision constituted by the present special schools and classes and advocated their development as Centres of Excellence upon whose resources schools seeking to meet special

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256 Sally Tomlinson, *The Politics of Race, Class and Special Education: The Selected Works of Sally Tomlinson* (London: Routledge, 2014).

257 Turner, 'Special Education in Glasgow', 169.

258 Scottish Education Department, *Special Educational Needs in Scotland* (Edinburgh: Her Majesty's Stationery Office, 1980), 3.

259 Scottish Education Department, *SEN in Scotland*, 4.

260 Scottish Education Department, *SEN in Scotland*, 5.

educational needs could draw.<sup>261</sup>

It should be noted that the extent to which these Centres for Excellence were developed is unclear.

The White Paper also addressed assessment and recording of disability and stated that the new legislation would replace the system of ascertainment, which focused on identification and categorisation of children with special educational needs by assessment and recording based on a profile of needs, which took a more person-centred approach.<sup>262</sup> It also stressed the importance of the involvement of parents as partners in the education of their children.<sup>263</sup>

Following Warnock's recommendations, the White Paper suggested the implementation of a record of needs (as opposed to categorisation of pupils with special needs). This and other ideas were incorporated in the Education (Scotland) Act 1981, 'which set out to undermine previous terms associated with handicap ... breaking down boundaries between the normal, the remedial, the maladjusted and the handicapped, making them all in one sense "special"'.<sup>264</sup>

Prior to this however, the Education (Scotland) Act 1980 consolidated certain enactments to take account of the recommendations of the Scottish Law Commission.<sup>265</sup> These recommendations focused on simplifying and consolidating existing education laws into a single statute, modernising legal terminology to make it more accessible, clarifying the roles and responsibilities of education authorities and parents, and ensuring consistency with broader legal reforms in Scotland.

However, the definition of special education in the 1980 Act repeated the wording of the Education (Scotland) Act 1969: "'special education" means education by special methods appropriate to the requirements of pupils whose physical, intellectual, emotional or social development cannot, in the opinion of the education authority, be adequately promoted by ordinary methods of education, and shall be given in

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261 Scottish Education Department, *SEN in Scotland*, 8.

262 Scottish Education Department, *SEN in Scotland*, 5.

263 Scottish Education Department, *SEN in Scotland*, 6.

264 Turner, 'Special Education in Glasgow', 169–70.

265 Scottish Law Commission, *Report on the Consolidation of Certain Enactments Relating to Education in Scotland* (Edinburgh: Her Majesty's Stationery Office, 1980).

special schools or by other appropriate means'.<sup>266</sup>

For the most part, the 1980 Act repeated the 1969 legislation in relation to the provision of a child guidance service, and ascertainment of handicapped children. Section 4 of the 1980 Act imposed a duty on education authorities to provide a child guidance service, and Section 60 noted that the education authority still had a duty to ascertain which children required special education. The Act required education authorities to provide information to the Secretary of State on the provision of education for three groups of children: those with '(a) the dual handicap of blindness and deafness; (b) autism or other forms of early childhood psychosis; or, (c) acute dyslexia'.<sup>267</sup> Education authorities had a duty under the Act to secure the adequate and efficient provision of school education for children in their area, including those with special educational needs. An amendment to the 1980 Act introduced by the Education (Scotland) Act 1981 defined children with special needs as those who:

- have significantly greater difficulty in learning than the majority of those of their age
- suffer from a disability which either prevents or hinders them from making use of educational facilities of a kind generally provided for those of their age in schools managed by their education authority
- are under the age of five years and, if provision for special educational needs were not made for them, are, or would be likely, when over that age, to have a learning difficulty as defined above.

The Education (Scotland) Act 1981 made several amendments to the 1980 Act and attempted 'to apply some of the ideas of the Warnock Report to education authorities' practice in maintaining a record of all children considered in need of special educational provision not usually available in an ordinary school'.<sup>268</sup>

The 1981 Act also moved away from the term 'education by special methods' and the wording of Section 1(5)(c) of the 1980 Act was substituted with:

provision for 'special educational needs' in relation to a child or to a young person receiving school education, means educational provision

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266 Education (Scotland) Act, 1980, Section 1(5)(c).

267 Education (Scotland) Act, 1980, Section 5(1).

268 George Thomson Alexander Budge, Marianna Buultjens, and Margaret Lee, 'Scotland and the 1981 Education Act', *British Journal of Special Education* 13, 3 (1986), 115.

which is additional to, or otherwise different from, the educational provision made generally for children, or, as the case may be, young persons of his age in schools under the management of the education authority for the area to which he belongs in accordance with section 23(3) of this Act.<sup>269</sup>

The term 'handicapped children' was replaced by the term 'children and young persons with certain special educational needs'.<sup>270</sup> The process of ascertainment was replaced by assessment and examination 'to establish which of those children or, as the case may be, young persons have pronounced, specific or complex special educational needs which are such as require continuing review and to open and keep a Record of Needs of each such child or young person'.<sup>271</sup>

Other amendments to the 1980 Act took account of the new terminology and definitions across the whole of the Act.

According to Riddell, the Education (Scotland) Act 1980 (as amended by the 1981 Act) was a product of the social democratic political agenda of the 1970s. It was, however, implemented in the very different political climate of the 1980s and 1990s, where the major concern was to increase efficiency and effectiveness by introducing the market into the public sector.<sup>272</sup> Riddell goes on to say that following the amended 1980 Act, 'SEN policy in Scotland developed relatively slowly for two decades, reflecting elements of bureaucracy, professionalism and legality'.<sup>273</sup> This is reflected in the relatively slow pace of change, with further relevant legislation and policy in the education field not introduced until the early 2000s. Riddell suggests that complex legal systems characterised by bureaucracy and a focus on professionalisation (meaning fewer opportunities for families to be involved in decision-making) contributed to the slow pace of change.

According to Barnes, the Warnock Report and the subsequent 1981 Act explicitly emphasised the importance of the concept of special educational needs within the education system as a whole.<sup>274</sup> While Warnock developed ideas around special

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269 Education (Scotland) Act 1981, Section 3.

270 Education (Scotland) Act 1980, as amended, Section 60 (heading).

271 Education (Scotland) Act 1980, as amended, Section 60.

272 Riddell, *Special Educational Needs*, 11.

273 Riddell, *Special Educational Needs*, 14.

274 Barnes, *Disabled People in Britain*.

educational needs as a way to ensure children and young people's educational needs were met, Barnes argued that developments at this time were actually used to justify the continued segregation of a substantial part of the school population and excluded minority languages and cultures from the mainstream sector, particularly the non-hearing community.

### **A renewed focus on mental health: changes to legislation and policy**

The Mental Health (Scotland) Act 1984 consolidated the Mental Health (Scotland) Act 1960 and the Mental Health (Amendment) Scotland Act 1983, and came into force on 30 September 1984.<sup>275</sup> The 1984 Act did not specifically address the education of children whilst in hospital detention, nor did it specifically make a distinction between adults and children whilst being detained. Although a Code of Practice was published in 1984, an NHS circular drew attention to the fact that implementation of the Code was far from universal. The Annex to the Circular made comment on the Code and stated that:

although no specific mention of children is made in the Code of Practice for the 1984 Act, the generality of its guidance will apply to children as it applies to adults but, within the statutory requirements, doctors, nurses, social workers and other professionals may be expected to take the age of the patient into account in following the guidance within the Code.<sup>276</sup>

This failure to distinguish children from adults highlights a missed opportunity to consider the educational needs of children and young people who were detained because of mental disorder.

Whilst legislation failed to consider the educational needs of children and young people detained in hospitals, there were some examples of good practice. For example, research by Leach was one of the few studies at this time that considered the education of children in psychiatric inpatient units.<sup>277</sup> They described the education of children in the Lothian inpatient psychiatric unit, which catered for

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275 Full details are available in Norrie, 'Legislative Background to the Treatment of Children and Young People'.

276 Scottish Office, *Code of Practice: Mental Health (Scotland) Act 1984: Annex*. NHS MEL (1992) 43 (Edinburgh: Scottish Office, 1992), Annex, paragraph 6.

277 Deirdre Leach, 'Education in a Psychiatric Setting', in Gwynedd Lloyd (ed.), *Chosen with Care? Responses to Disturbing and Disruptive Behaviour* (Edinburgh: Moray House Publications, 1992), 129–38.

children from late infancy to early adolescence. The unit school was seen as an integral part of the treatment approach, and there were three classes, two primary and one secondary. Unlike other units, where education was part-time, the Lothian unit provided a full school week. Leach highlighted the range of educational abilities in the classroom, and that, where possible, continuity of curriculum was provided. Priority was given to the school timetable in relation to therapy to minimise disruption. Therapeutic approaches were adapted and integrated into the classroom to enhance teaching.<sup>278</sup>

### **Enhancing the participation of disabled people**

During this period there was an increased focus on consultation with and participation of disabled people in decision-making. The Disabled Persons (Services, Consultation and Representation) Act 1986 aimed to improve services for disabled people by strengthening their voice through making provision for representation and placing additional duties on local authorities. Some of the key provisions are discussed here. Although not specifically related to education, they are important because they set out the means by which disabled people can participate in decisions that affect them. They also emphasise the importance of multi-disciplinary working:

- Section 2 of the Act enabled the appointment of representatives for people with physical and learning disabilities as well as those with mental illnesses. Representatives would have access to records and information relating to the person concerned and the services they received.
- Section 3 obliged local authorities to assess the needs of disabled people and provide relevant services. If a disabled person or their representative was dissatisfied with their local authority assessment they were permitted to 'make representations to officers'.
- Section 7 required health authorities and local authorities to cooperate with each other in assessing the needs of people who were due to be discharged from a hospital after receiving care for a mental disorder.
- Section 8 obliged local authorities to consider the ability of carers when deciding what care services should be provided to a person with disabilities.

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<sup>278</sup> Leach, 'Education in a Psychiatric Setting'.

More specifically, in relation to education Section 13 required the education department to obtain an opinion from the appropriate authority, normally the social work department, as to whether a child was a disabled person, before carrying out a future needs assessment. When the social work department gave the opinion that the child was a disabled person, they had to assess, and prepare a report on, the needs of the child for any statutory service, under any of the relevant welfare enactments. The child's need for social care or services had to be assessed concurrently with the future needs assessment, unless the child, or their parents, requested that such an assessment should not take place.

The Act suggested that greater understanding of disability and improvements in services had made it possible for disabled people to lead active, fulfilling, independent lives in local communities. It set out that where a child had a record of needs, the requirement to prepare a 'future needs assessment' could prompt the beginning of a planning process that took account of the full range of the young person's needs. To help a young person make the transition from childhood to adulthood smoothly, social work departments had to work with local schools, colleges, housing departments, and families, and begin planning well before decisions were made.

While the 1986 Act appears to represent progress in terms of disabled people's right to participate and be heard, Barnes argued that it merely paid lip service to meaningful collaboration between disabled people and service providers, and that several barriers to participation remained.<sup>279</sup>

### **A shift in expectations and provision: the onset of care in the community**

By the late 1980s and into the early 1990s there was a significant change in the way that services for disabled people, including disabled children and young people, were to be delivered, and this provides important context for the delivery of education for disabled children and young people during this time. The Griffiths Report, *Community Care: An Agenda for Action*, was published in 1988, followed by the White Paper *Caring for People: Community Care in the Next Decade and Beyond*.<sup>280</sup> These papers proposed moving the provision of care from institution to community and moved assessment of need from being resource-led to needs-led. They further

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<sup>279</sup> Barnes, *Disabled People in Britain*.

<sup>280</sup> Griffiths, *Community Care*; Department of Health, *Caring for People: Community Care in the Next Decade and Beyond* (London: HMSO, 1989).

suggested that local authorities, rather than health boards, take the lead in providing care. This led to the growth of the independent care sector, an increased focus on the coordination of services, and increased support for individuals to enable them to live at home for as long as possible. It also led to the development of a mixed economy of care involving a range of care providers from different sectors, purportedly to enhance choice for service users. The Griffiths Report provided a blueprint for community care centred on money being released from health services to fund the purchase of different types of services (for example, help with cooking, bathing, dressing, and the provision of aids and adaptations) in the community to enable people to remain at home for longer and provide choice. Much of the Griffiths Report relates to older people, disabled people, and those with mental health problems, but suggests a broader framework for all adults requiring care in the community.

Following on from the Griffiths Report, the NHS and Community Care Act was passed in 1990. Whilst the Act has relevance for those with disabilities (mainly adults) living or moving into the community, particularly in terms of assessment, provision of services, and review, it is not specifically relevant for children. It does, however, have indirect implications for residential care that may involve children and young people, principally focused on the transition from child to adult services, and provides an important backdrop for provision. Jones, reflecting on the legacy of this Act, suggests that the implementation of this Act and the Children's Act (1989) in England and Wales represented the birth of the adult/child divide in the delivery of social work services and the beginning of increased specialisation in social work as a profession between adult and children's services.<sup>281</sup>

The shift to community care was also mirrored in discussions around the care of disabled children and young people in long-stay hospitals. In the early 1990s Skinner, as part of his review of residential childcare in Scotland, highlighted the need to end this practice.<sup>282</sup> There was, however, an acknowledgement that some disabled children and young people would continue to require care in hospital settings. To this end, the Scottish Office published guidance entitled *At Home in Hospital* in 1993.

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281 Ray Jones, 'Social Work across the Decades: the Birth of the Adults'/Children's Divide', *Community Care*, 12 June 2024. Available online: [Social work across the decades: the birth of the adults'/children's divide](#)

282 Angus Skinner, *Another Kind of Home: A Review of Residential Child Care* (Edinburgh: Scottish Office, 1992), 39.

This focused on the care of children and young people in hospital settings. It was based on several key principles including family-centred care and the provision of a child-friendly environment to attempt to make hospital settings less intimidating and more supportive. There was a specific focus on educational continuity that stressed the importance of maintaining educational activities for children in hospital alongside the provision of psycho-social support for children and their families.<sup>283</sup>

### **Residential care and education: disabled children and young people, and young people living away from home in the 1980s and early 1990s**

During the 1980s and into the 1990s there was ongoing interest in and concern around disabled children and young people who received their education in residential settings. In 1982 a working group considered the mental health needs of children and young people in Scotland.<sup>284</sup> It addressed the role of residential care in that context and identified a lack of training and high levels of staff turnover as a concern. This was viewed as particularly problematic given that 'staff working in a residential setting require complex skills in providing care, assessment, control, treatment and social education for a group of children with special needs'.<sup>285</sup> It considered that residential school placements should only be made in three circumstances:

- (1) where highly specialist educational needs can only be provided on a residential basis
- (2) where 'because of a child's behavioural problems, or severe handicap, it is essential to provide integrated educational and care regimes'
- (3) where there is a need for 'containment and control', which can only be met in a residential placement.<sup>286</sup>

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283 Scottish Office, *At Home in Hospital: A Guide to Care of Children and Young People* (Edinburgh: Scottish Office, 1993).

284 Elisabeth Mapstone, *Crossing the Boundaries: New Directions in the Mental Health Services for Children and Young People in Scotland, Report of a Working Group set up by the Mental Disorder Programme Planning Group* (Edinburgh: HMSO, 1983).

285 Mapstone, *Crossing the Boundaries*, 75.

286 Mapstone, *Crossing the Boundaries*, 79.

The working group questioned the distance and isolation of residential schools and argued for more local provision, so that children could remain in their locality and that work with families could take place.<sup>287</sup>

Toman provided a descriptive and evaluative overview of residential special schools in Scotland for children with social, emotional, and behavioural difficulties in the 1980s. He concluded that 'children in the contemporary residential special schools experience what may be termed positive educational climates', in contrast with their previous educational experience in mainstream schools.<sup>288</sup> This suggests that there are positive aspects of residential educational provision. However, Toman noted that placements often depended on young people's routes into the system and were often pragmatic in terms of availability and cost.<sup>289</sup>

Other studies highlighted the trend of disabled children and young people living away from home, despite a driver towards integrated education within local communities. An analysis of OPCS data from the 1980s showed that, generally, there was very limited information available on the circumstances of disabled children and young people living away from home.<sup>290</sup> It highlighted that the chance of a disabled child spending time in local authority care was ten times greater than for a non-disabled child.<sup>291</sup> Settings included hospitals and other healthcare establishments, substitute family placements, and residential schools where a significant number of children lost contact with family and friends.<sup>292</sup> A review of safeguards for children living away from home in England and Wales, chaired by Utting in 1997, found that disabled children and young people who were living away from home were 'extremely vulnerable to abuse of all kinds, including peer abuse'. It argued that 'high priority needs to be given to protecting them and ensuring that safeguards are rigorously applied'.<sup>293</sup>

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287 Mapstone, *Crossing the Boundaries*, 80.

288 Toman, 'Scottish Residential Special Schools', 411. See also Kendrick *et al.*, 'Development of Children's Care Services in Scotland' for further details.

289 Toman, 'Scottish Residential Special Schools', 151.

290 David Gordon, *Disabled Children in Britain: a Re-analysis of the OPCS Disability Surveys* (London: The Stationery Office, 2000).

291 Gordon, *Disabled Children in Britain*.

292 Stephen Humphries and Pamela Gordon, *Out of Sight: The Experience of Disability, 1900-1950* (Plymouth: Northcote House, 1992).

293 William Utting, *People Like Us: The Report of the Review of the Safeguards for Children Living Away from Home* (London: Stationery Office, 1997), 79. See also Roger Kent, *Children's Safeguards Review* (Edinburgh: Social Work Services Inspectorate, 1997).

In 1992 Angus Skinner's review of residential childcare in Scotland was published. It identified the unique roles of residential schools as part of the education system.<sup>294</sup> Skinner identified five situations where a residential home or residential school might offer the best placement for a child. Two of these are particularly relevant here:

- when a young person needs care with additional specialist, therapeutic or educational services, provided on the same site. The need for these placements can only be identified after thorough assessment.
- when a young person has complex special care and educational needs, and her or his family requires short-term support in sharing the care tasks.<sup>295</sup>

Skinner also identified the additional complications when children with learning difficulties and special educational needs were excluded from school and highlighted the importance of social work and education departments working closely together.<sup>296</sup> The health needs of disabled children and young people also demanded particular attention, and frequent moves and changes of school meant these needs could be overlooked.<sup>297</sup> Other complications included the potential for instability as the result of frequent placement moves, a risk of marginalisation leading to potential isolation, and a disengagement from education.

### **A focus on children's rights and disability rights**

By the end of this period, in the late 1980s and into the early 1990s, there was a growing focus on the rights of children influenced largely by the introduction of the United Nations Convention on the Rights of the Child (UNCRC), adopted by the UN in 1989 and ratified by the UK in 1991. It was the first legally binding international instrument affirming, promoting, and protecting children's human rights. It provided a comprehensive charter of rights, outlining children's civil, cultural, political, social, and economic rights, all of which are interlinked, interdependent, and indivisible. All the rights outlined in the UNCRC apply to all children but, with regard to disabled children and young people, the UNCRC was the first international human rights

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294 Skinner, *Residential Child Care*, 13.

295 Skinner, *Residential Child Care*, 14.

296 Skinner, *Residential Child Care*, 53.

297 Skinner, *Residential Child Care*, 56.

treaty that specifically referenced disability. By signing off the treaty, the UK recognised the commitment to ensuring the rights of every child to survive, grow, participate, and reach their full potential were upheld, regardless of where they lived.

The various articles enumerated within the convention are integral to Scots law, and the Scottish Government has aimed to reflect the principles of the convention in its laws and policies. See, for example, the UNCRC (Incorporation) (Scotland) Act 2024, considered later in this report.<sup>298</sup>

The UNCRC sets out the need to ensure that all actions that are taken by states must be in the best interests of the child and must include an evaluation of the possible impact of the decision on the child or children concerned. The following articles within the UNCRC are of specific relevance to disabled children and young people and provide the context within which education, including education in residential settings, should take place:

- Article 2 sets out the principle of non-discrimination, although it does not explicitly recognise the vulnerability of disabled children and young people. It does require states to take appropriate measures to ensure the equal treatment and non-discrimination of disabled children and young people.
- Article 12 recognises the right of the child who is capable of forming his or her own views to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- Article 13 states that the child shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
- Article 16: Right to respect for private life.
- Article 19: Right to protection from any form of abuse and the right to be safe from violence. If children have been abused, they have a right to therapeutic support under Article 39.
- Article 23 recognises the special needs of disabled children, promotes their right to enjoy a full and decent life, and requires State Parties to provide assistance in a manner conducive to achieving the fullest possible social

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<sup>298</sup> See [Chapter 5 – Developments in legislation and policy from 1995 to 2024](#).

integration, recognising disabled children and young people as full human beings.

- Article 24 states that all children have the right to enjoy the highest attainable standards of health. No child should be denied his or her right to access to health services.
- Article 28: Right of the child to education.
- Article 29: State Parties agree that the education of the child shall be directed, amongst other things, to the 'development of the child's personality, talents and mental and physical abilities to their fullest potential'.
- Article 37 prohibits torture, and inhuman or degrading treatment or punishment.

Some of the General Comments are also of relevance to disabled children and young people. General Comments 5 and 9 focus on the lack of information and data available on disabled children and young people that can make it challenging to identify children and provide them with appropriate support.

General Comment 5 states that comprehensive data collection plays a key role in promoting 'the full enjoyment of all rights in the Convention by all children' and requires states to 'identify individual children and groups of children [for whom] the recognition and realisation of whose rights may demand special measures'.<sup>299</sup> This can only be achieved if 'data collection is disaggregated to enable discrimination or potential discrimination to be identified'.<sup>300</sup>

General Comment 9 focuses specifically on disabled children and young people:

In order to fulfil their obligations, it is necessary for State Parties to set up and develop mechanisms for collecting data which are accurate, standardised and allow disaggregation, and which reflect the actual situation of children with disabilities. The importance of this issue is often overlooked and not viewed as a priority despite the fact that it has an impact not only on the measures that need to be taken in terms of

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299 UN Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (Geneva: United Nations, 2003), Articles 4, 42, and 44, paragraph 6; paragraphs 9 and 12.

300 UN Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (Geneva: United Nations, 2003), Article 2; paragraph 12.

prevention but also on the distribution of very valuable resources needed to fund programmes.<sup>301</sup>

With specific reference to disability, the United Nations published the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities in 1993.<sup>302</sup> The document set out 22 standard rules to set an international standard for policymaking and actions covering disabled people. Of particular relevance is rule 6 – Education:

1. States should recognise the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings regardless of gender and level of disability. They should ensure that the education of persons with disabilities is an integral part of the educational system.

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7. Integrated education and community-based programmes should be seen as complementary approaches in providing cost-effective education and training for persons with disabilities. National community-based programmes should encourage communities to use and develop their resources to provide local education to persons with disabilities.

8. In situations where the general school system does not yet adequately meet the needs of all persons with disabilities, special education may be considered. It should be aimed at preparing students for education in the general school system. The quality of such education should reflect the same standards and ambitions as general education and should be closely linked to it. At a minimum, students with disabilities should be afforded the same portion of educational resources as students without disabilities. States should aim for the gradual integration of special education services into mainstream education. It is acknowledged that in some instances special education may currently be considered the most appropriate form of education for some students with disabilities.

9. Owing to the particular communication needs of deaf and deaf/blind

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301 UN Committee on the Rights of the Child, *General Comment No. 9: The Rights of Children with Disabilities* (Geneva: United Nations, 2006), paragraph 19.

302 United Nations, *Standard Rule on the Equalization of Opportunities for Persons with Disabilities* (Geneva: United Nations, 1993).

persons, their education may be more suitably provided in schools for such persons or special classes and units in mainstream schools. At the initial stage, in particular, special attention needs to be focused on culturally sensitive instruction that will result in effective communication skills and maximum independence for people who are deaf or deaf/blind.

Furthermore, the education of persons with disabilities should be reflected in relevant policy and include consideration of appropriate support services, such as an interpreter and adequate accessibility. Consideration should also be given to adapted and flexible curricula with well-trained and supportive teachers. There is an emphasis on involving disabled groups and parents in the education process at the different levels, and a recognition that special attention should be given to adults with disabilities, and pre-school and very young children with disabilities.

The standard rules set out a comprehensive set of requirements that in many ways was ahead of its time. It is important because, perhaps for the first time, it set out clearly the access requirements of disabled people, including disabled children and young people, with a particular focus on education. Rule 6 clearly set out the general expectation that disabled children and young people should be educated in mainstream settings, except where there is clear evidence that the child's needs can be met more effectively within specialist provision. The aim was to provide standardised expectations around the development of education provision, and it fed into a number of significant national and international developments such as the Salamanca Statement and Framework for Action on Special Needs Education.<sup>303</sup>

An example of how one Scottish local authority considered its obligations under the UNCRC can be found in the 1992 Strathclyde Regional Council policy on special educational needs entitled *Every Child is Special: A Policy for All*.<sup>304</sup> The policy had a particular focus on the rights of all children and the rights of disabled children and young people as set out in the UNCRC. In examining provision within this framework of rights, the policy set out that it was important to ensure that all children had access to the widest possible educational and social opportunities. In considering appropriate provision, attention was to be given to accessing as 'normal' an

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303 UNESCO, *The Salamanca Statement and Framework for Action on Special Needs Education, Adopted by the World Conference on Special Needs Education: Access and Quality* (UNESCO, 1994).

304 Strathclyde Regional Council, *Every Child is Special: A Policy for All* (Glasgow: Strathclyde Regional Council, 1992).

environment as possible. Also, children had a right to provision and resources necessary to make their experiences appropriate both educationally and socially.<sup>305</sup> The policy noted that an increasing range of children were being recognised as having special educational needs, and school organisation and the curriculum needed to be evaluated 'to ensure that children are not disadvantaged by virtue of their class, race or gender'.<sup>306</sup>

The policy set out several key principles that included: positive discrimination in favour of those who were disadvantaged; acknowledgement that every child had individual learning needs; the non-segregation of children with special needs; and recognition of parental choice in the provision of their children's education. Other key principles addressed organisational issues, implementation guidelines, and development plans. The principles also stated that there would be special schools that would continue to offer highly specialised provision on an age-related basis, whilst maintaining links with mainstream schools and the community as a whole.<sup>307</sup>

The policy acknowledged the need for some residential provision. However, careful review and assessment procedures were to be in place, jointly between education and social work department where appropriate, to ensure that residential placements were only made in the following circumstances:

- (i) A child needs such specialist support that is only available in one location in the region and daily travel is not practicable (e.g. Middleton School). In this type of case residence should be from Monday to Friday whenever possible.
- (ii) In a few very exceptional cases, it is considered that a child requires an educational programme which takes place over the whole waking day (e.g. Carnbooth School).
- (iii) The family situation is such that a child cannot be maintained at home without undue stress on the rest of the family and possible family breakdown.<sup>308</sup>

In this last situation, 'the decision about placement must *always* be made in

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305 Strathclyde Regional Council, *Every Child is Special*, 4.

306 Strathclyde Regional Council, *Every Child is Special*, 4.

307 Strathclyde Regional Council, *Every Child is Special*, 6–7.

308 Strathclyde Regional Council, *Every Child is Special*, 11–12.

conjunction with the social work department'.<sup>309</sup> This reflects broader policy developments in relation to residential care across Scotland at the time.<sup>310</sup>

The policy also addressed the education of children who were in hospital for more than a few days and aimed 'to adapt the curriculum and teaching to the environment but to deliver a service which maintains the educational progress of the children'.<sup>311</sup> Strathclyde Regional Council acknowledged that the full implementation of the policy would take years, and that timelines for the implementation of different aspects of the policy would need to be drawn up.<sup>312</sup>

### **Discussion: implications of legislative and policy developments from 1974 to 1995**

During this period the focus of legislation and policy was on deinstitutionalisation: moving those with disabilities, including children, into the community, away from institutions where possible, and integrating disabled children and young people into mainstream education where practicable. These developments represented a change in how disability was understood and responded to by society, recognising that residential settings often had a poor record of protecting disabled children and young people from harm.<sup>313</sup> Various developments at this time and in particular the introduction and signing of the UNCRC placed increased value on all children, including those with disabilities, recognising their rights to access suitable education on an equal basis with others.<sup>314</sup> In addition to this, there was an acknowledgement of the value of families remaining together other than in certain exceptional circumstances, and this led to an understanding that children should be educated away from home as an exception rather than a rule.

A focus on mainstream rather than segregated education became more prominent at this time. This refocusing was influenced by the principle of normalisation, popular during the 1970s and 1980s, although challenged later as reflecting the concerns of professionals rather than disabled children and young people.<sup>315</sup> The social model of disability became the more dominant paradigm. This paradigm situated disabled

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309 Strathclyde Regional Council, *Every Child is Special*, 11–12.

310 Kendrick *et al.*, 'Development of Children's Care Services in Scotland'.

311 Strathclyde Regional Council, *Every Child is Special*, 12.

312 Strathclyde Regional Council, *Every Child is Special*, 21.

313 Stalker and McArthur, 'Child Abuse, Child Protection'.

314 Oliver, *Social Work with Disabled People*.

315 Chappell, 'Towards a Sociological Critique'.

children and young people within an oppressive and discriminatory society that reduced their opportunities to thrive and to be educated, rather than framing them as being disadvantaged by their impairment.

This is not to suggest that integration as a concept was without its challenges or detractors. For example, there were concerns over non-disabled children and young people losing out due to the amount of time teaching staff in mainstream settings might have to spend with disabled children and young people. There was also concern that the needs of disabled children and young people may be 'lost' in the mainstream classroom. However, the right to have access to education, in whatever setting, for all disabled children and young people emerged as a priority and was incorporated in policy and legislation during this period.

It should be acknowledged that policy and legislation at this time stopped short of requiring mainstream or inclusive education for all disabled children and young people, and there was agreement that specialist provision in segregated settings, including residential settings, continued to be the most appropriate option for some disabled children and young people. This was particularly so when the health or care needs of the child were so extensive that they could not be separated out from their educational needs. In such circumstances, residential education was sometimes considered to be the best option, particularly when the disabled child or young person remaining at home was thought to be detrimental to the rest of the family. There were also circumstances where a requirement for care and protection, whether on a compulsory or voluntary basis, was necessary.

There was a much greater focus at this time on the rights of the child and family to be involved in decision-making around education and other matters. Parental partnership was pursued to identify and assess disabled children and young people's needs, something only briefly considered in the post-war era. Despite these positive developments, some commentators have considered the limitations of their reach during this period, and Harris and Riddell noted that it was only in the 2000s that disabled children and young people's rights were explicitly considered in legislation and policy.<sup>316</sup>

The language used to identify and describe disabled children and young people also

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316 Neville Harris and Sheila Riddell, 'Ensuring Rights Matter: England's and Scotland's Frameworks for Implementing the Rights of Children and Young People with Special Educational Needs and Disabilities', *The International Journal of Human Rights* 26, 9 (2022).

evolved during this period, and we see a move away from the term 'handicapped children' to 'children and young people with special educational needs (SEN)' in the amended 1980 Education Act, which enacted many of the recommendations made in the Warnock Report. These changes can be seen to embrace the social model of disability and should be viewed as a positive development in identifying the educational needs of all disabled children and young people. The development of the category of 'special educational needs' was felt, at the time, to better acknowledge the strengths of disabled children and young people and was thought to be less discriminatory than the previous nine educational categories, as set out in the 1954 Regulations, discussed above,<sup>317</sup> that had been used until this time. Yet, despite the adoption of 'special educational needs' as an all-encompassing category which recognised all disabled children and young people as 'special', attempts continued to categorise disabled children and young people according to disability type. This placed increasing importance on assessment of disability and associated needs. It also represents a subtle shift from the previous language of ascertainment, which focused very much on positioning disabled children and young people in particular categories, to assessment which focused on identifying individual needs, strengths, and deficits. It is argued that this move to assessment positioned those professionals who were responsible for carrying out these assessments (usually psychologists, sometimes social workers) in a position of power.<sup>318</sup>

Overall, it appears that there were missed opportunities to more fully acknowledge the structural barriers faced by disabled children and young people. Riddell argues that the term 'special educational needs' continued to locate any difficulties firmly within the individual.<sup>319</sup> Indeed, Warnock, reflecting on the impact of the Warnock Report, noted that the committee had been forbidden from considering wider social factors as part of its review.<sup>320</sup> We argue that the concept of special educational needs can further stigmatise and marginalise disabled children and young people by marking them as somehow different or 'other'. Demetriou argues that the development of categorisation that does not include disabled children and young people and their families merely serves the interests of the state rather than the

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317 See [Further amendments to education legislation: a focus on special education](#).

318 Harris and Riddell, 'Ensuring Rights Matter'.

319 Sheila Riddell and Elisabet Weedon, 'Additional Support Needs Policy in Scotland: Challenging or Reinforcing Social Inequality?', in Sheila Riddell (ed.), *Special Education and Globalisation* (London: Routledge, 2018), 8–24.

320 Warnock, 'If Only We Had Known Then ...'.

interests of disabled children and young people.<sup>321</sup> The usefulness of labelling and categorisation is therefore questioned and, in some ways, adds to existing challenges in identifying and responding appropriately to the needs of disabled children and young people, if the implications are not well considered. Demetriou suggests that labels and, consequently, categorisations should be used as a starting point for children rather than the end point, and used as and when they are advantageous to the child's education.<sup>322</sup>

Despite these challenges several positive developments relating to the education of disabled children and young people in residential settings took place during this period, particularly the shift towards legislation and policy based on the principle of integration rather than segregation. However, analyses of the legislation, policy, and guidance presented here suggest several important caveats that meant that specialist provision in segregated or residential settings retained an important place in the provision of education for disabled children and young people. Indeed, guidance from Strathclyde Regional Council suggested that to overlook the importance of specialist educational provision for disabled children and young people was to misinterpret the principles and recommendations set out by Warnock.<sup>323</sup> This meant that there were policy tensions at this time. While it was acknowledged that residential hospitals should never be considered a home for disabled children and young people, it was clear that residential schools continued to be necessary, and even desirable in certain circumstances.

Other positive developments were the growing commitment to hearing the voices of disabled children and young people and working with parents as partners. There was also a clear shift in policy direction that involved an acceptance that all disabled children and young people had the right to be educated amidst a growing commitment to promoting the rights of children more generally. This illustrates the influence of important human rights treaties, including the UNCRC – although it is not until the following period of this review that we can see any real evidence of its impact (or otherwise).

Challenges with statistics and data collection remained during this time. Statistics

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321 Kyriakos Demetriou, 'Special Educational Needs Categorisation Systems: To Be Labelled or Not?', *International Journal of Disability, Development and Education* 69, 5 (2022).

322 Demetriou, 'Special Educational Needs Categorisation Systems'.

323 Strathclyde Regional Council, *Every Child is Special*.

often appeared in silos based on physical or mental handicap and/or sensory impairment without clarification of definitions. The collection of data also continued to appear fragmented and difficult to access. Without a clear picture of the whole population and their individual and collective needs, resources will not be adequately allocated and there will be a lack of clarity for professionals, disabled children and young people, and their families. Whilst this does improve, as noted later in this report, it remains a significant challenge.

At the end of this period, a lack of clarity over the population in question remained, as well as variable and patchy service provision across geographical areas which led to a policy implementation gap in some cases. Consequently, the number of disabled children and young people receiving their education in residential settings during this period is unclear. Nonetheless, several trends and themes emerge, as outlined here. The evidence reviewed suggests that educational provision for disabled children and young people was complex and took place in a variety of settings with different providers. Disabled children and young people arrived in residential education via several routes and for different reasons. These often related to perceived complexity of need, and residential provision was often seen as being in the best interest of the child if their health and care needs could not be separated sufficiently from their educational needs. Residential provision might also be considered if the needs of the disabled child were thought to have a detrimental impact on the rest of the family or if there was a specific need for care and protection either on a voluntary or compulsory basis. In the next chapter we turn to look at contemporary developments that impact on the education of disabled children and young people in residential settings.

## Chapter 5 – Developments in legislation and policy from 1995 to 2024

### Introduction

In this final period of the review, from 1995 to 2024, concerns remained around access to education and poor educational attainment for disabled children and young people, as well as for looked-after children and young people. While reviews identified positive practice, they also highlighted a range of barriers to education.<sup>324</sup> During this time, there was a growing recognition of the right of children and young people to meaningfully participate and have their voices heard in decision-making about their lives, and we can see the influence of human rights legislation and international treaties including the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which has been explicitly influenced by the social model of disability. In particular, the views of looked-after children and young people were increasingly sought and considered,<sup>325</sup> and there was growing recognition of the support and training needs of staff working in this complex area of practice.<sup>326</sup>

Analysis for this period is broken down into smaller time periods, as a significant number of relevant developments took place. These can be linked to some of the factors discussed earlier, such as a growing focus on children’s rights and the need for economic efficiencies, but could also be related to devolution and the newly constituted Scottish Parliament’s wider nation-building.<sup>327</sup> As with previous sections, framing of the review is provided by considering the population of disabled children and young people and the evolution of language and terminology used to describe them. Table 4 summarises the legislation and policy discussed in Chapter 5.

**Table 4: Summary of legislation and policy discussed in Chapter 5**

Legislation/Policy	Key aspects
<b>Disability Discrimination Act 1995</b>	Made it unlawful to discriminate against

324 Moira Borland, Charlotte Pearson, Malcolm Hill, Kay Tisdall, and Irene Bloomfield, *Education and Care Away from Home: A Review of Research, Policy and Practice* (Edinburgh: Scottish Council for Research in Education, 1998).

325 Scottish Government, *Progressing the Human Rights of Children in Scotland: Report 2018–2021* (Scottish Government, 2021).

326 Barbara Hudson, Judy Furnivall, Steven Paterson, Kay Livingston, and Kirstie Maclean, *Learning with Care: Training Materials for Carers, Social Workers and Teachers Concerning the Education of Looked After Children and Young People* (Glasgow: University of Strathclyde, 2003).

327 Viv Cree and Mark Smith (eds), *Social Work in a Changing Scotland* (Abingdon: Routledge, 2018).

	<p>disabled people with respect to a range of services, including education.</p> <p>Recognised multiple kinds of legislation, including direct discrimination, failure to make a reasonable adjustment for someone with a disability to access a service, and victimisation, where a person is treated differently because they made a complaint.</p>
<p><b>The Children (Scotland) Act 1995</b></p>	<p>Seen as fulfilling the government's obligations to implement the United Nations Convention on the Rights of the Child and the Convention on Human Rights. Highlighted a shift in emphasis from parental rights to parental responsibilities. Set out local authority duties to provide services designed to minimise the impact of disability on children and allow them to lead fulfilling lives. The specific provisions relating to children with disabilities do not stand alone but are applied equally to all children. Disabled children and young people are framed as children in need of care and attention providing legal recognition of the specific needs of disabled children and young people.</p>
<p><b>Human Rights Act 1998, taken together with the Scotland Act 1998</b></p>	<p>Gave the European Convention on Human Rights a special position in law. This does not make the convention superior to Scots law but allows the Scottish courts to strike down as 'not law' any Act of the Scottish Parliament outwith its legislative competence, including on the grounds of its incompatibility. It also makes it unlawful</p>

	for any public body to act in a way that is incompatible with the Convention, including in the provision of care and support for disabled children and young people.
<b>Disability Rights Commission Act 1999</b>	Addressed a gap in the Disability Discrimination Act to establish a commission for disability rights.
<b>Riddell Committee 1999</b>	Focused on addressing significant concerns regarding education and support for children with severe and low incidence disabilities. Its remit was to examine the barriers to educational and social development affecting this group of children and young people.
<b>Standards in Scotland's Schools, etc. Act 2000</b>	Set out national priorities for school education. Section 15 of the Act made it a requirement that education should be provided in mainstream schools. This Act established the presumption of mainstreaming (replacing the readiness to participate of previous legislation) unless certain exceptions apply.
<b>The Same as You? (Scottish Executive) 2000</b>	National review of services available at the time to people with learning disabilities and autistic people. The review acknowledged the importance of education and other areas. It noted that the Scottish Executive should consider introducing a new duty on local authorities to identify a responsible person to put the future needs assessment into practice. The review accepted the continuing need for specialist provision for education.

<p><b>Regulation of Care (Scotland) Act 2001</b></p>	<p>Aimed to improve regulation and, consequently, the standard of social care services across Scotland, as well as the standard of support from staff. Established a framework to ensure that high-quality care services are provided to vulnerable individuals. For disabled children and young people this means that they are entitled to receive care that respects their dignity, promotes their independence, and meets their specific needs. Helped safeguard the rights of disabled children and young people by setting clear standards for care providers and offering a system for complaints and accountability.</p>
<p><b><i>For Scotland's Children, a review of the children's services system in Scotland (Scottish Executive, 2001)</i></b></p>	<p>Aimed to ensure that agencies work together effectively to provide services for all children. Called for a national approach which puts children and families at the centre. Acknowledged that disabled children and young people were not receiving the care, education, or training opportunities they required and that education outwith the mainstream can lead to isolation and exclusion.</p>
<p><b>Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002</b></p>	<p>Aimed to improve the accessibility of education for pupils with disabilities and to ensure that disabled pupils could fully participate in their education. This included the development of an accessibility strategy. Also included were provisions for the management and maintenance of pupils' educational records, ensuring that these records</p>

	were handled in a way that supported the educational needs of disabled pupils.
<b>Mental Health (Care and Treatment) (Scotland) Act 2003</b>	Aimed to improve the quality of care and support for people with mental health problems. Established new arrangements for the detention, care, and treatment of individuals with a mental disorder and placed duties on local authorities to provide appropriate care. The Act supports the education of anyone subject to measures under the Act by noting that the home authority of the child or young person is responsible for creating an education plan that supports the child's needs and education. The Code of Practice for the Act also indicates that the local authority must plan for the education of pupils unable to attend school because they are subject to measures under the Act. Guidance from the Mental Welfare Commission in 2006 further clarified expectations where children were admitted to adult wards, including that there should be access to appropriate therapeutic and recreational activities.
<b>Education (Additional Support for Learning) Act 2004</b>	Moved from the concept of special educational needs (SEN) to the concept of additional support needs (ASN), demonstrating a significant commitment towards inclusion and mainstreaming. This Act made it a duty for the responsible education authority to make adequate and efficient provision for such additional support as

	<p>is required by that child or young person and to keep this under consideration. It abolished the record of needs and made it a duty to assess the extent to which the child had additional support needs. The Additional Support for Learning Tribunal was established to resolve disagreements between education authorities and parents.</p>
<p><b>Disability Discrimination Act 2005</b></p>	<p>Amended the 1995 Act, extending its reach to place a duty on local authorities to promote equality for disabled people known as the Disability Equality Duty. It also reinforced the importance of reasonable adjustments.</p>
<p><b>United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)</b></p>	<p>Informed by the social model of disability and adopted by the General Assembly in 2006, it aimed to promote and protect the rights and dignity of disabled people. Ratified by the UK in 2009. It recognised that disabled children and young people should have full enjoyment of all human rights on an equal basis with other children. Key relevant articles include: disabled children and young people should not be separated from their parents against their best interests. If alternative care is necessary, every effort should be made to provide care within the extended family or within the community in a family setting. Most importantly for this review, Article 24 expresses a recognition of the right of persons with disabilities to education and calls on states to ensure an inclusive education</p>

	<p>system and lifelong learning. It emphasises the importance of gathering appropriate information to enable policy formulation.</p>
<p><b>Getting It Right for Every Child (GIRFEC) (Scottish Government, 2006)</b></p>	<p>GIRFEC aims to improve outcomes for all children and young people in Scotland. It sets out a national practice model to provide a framework to consider and assess children and young people's wellbeing, including for those in residential care.</p>
<p><b>Education (Additional Support for Learning) Scotland Act 2009</b></p>	<p>Amended the 2004 Act with a focus on children's rights, by extending the definition of a child with additional support needs to include any child or young person looked after by a local authority. The definition of additional support is clarified by specifying that it is not limited to an educational environment. Education authorities are required to provide for independent mediation services that cannot include in-house mediation, and authorities have a duty to seek and take account of the young person's views in relation to any information provided to an appropriate agency or agencies in relation to them leaving school.</p>
<p><b>Equality Act 2010</b></p>	<p>Prohibited discrimination and harassment based on certain protected characteristics, including disability. The provisions of the Act extended to schools, emphasising the legal duty on education providers so disabled children and young people can take part in education.</p>

<p><b>National Review of Services to Disabled Children and Young People (2011)</b></p>	<p>The National Review focused on how GIRFEC was being used with disabled children and young people. It agreed a set of key principles, including that every child was to be seen as a child first. The review acknowledged the key policy concern over universal versus specialist services.</p>
<p><b>Children’s Hearing (Scotland) Act 2011</b></p>	<p>Did not specifically target disabled children and young people but its emphasis on children’s welfare aimed to ensure that all children are properly supported within the system.</p>
<p><b>The Right Help at the Right Time in the Right Place: Strategic Review of Learning Provision for Children and Young People with Complex Additional Support Needs (Doran Review) (Scottish Government, 2012)</b></p>	<p>The review considered the role of residential schools for children and young people with the most complex needs. It recognised a lack of consensus around definitions and the need for further data collection. The review acknowledged education as a fundamental human right. Many benefits were identified, including improvement in learning and care for disabled children and young people with complex support needs. It also acknowledged ongoing challenges, such as tensions between grouping children with varied complex additional support needs together in larger schools and capacity for smaller units or schools to undertake specialised work. The need for ongoing specialist residential placements was acknowledged as necessary.</p>
<p><i>The Keys to Life – Improving Quality of Life for People with Learning</i></p>	<p><i>The Keys to Life</i> takes a rights-based approach that has been informed by the</p>

<p><b><i>Disabilities (Scottish Government, 2013)</i></b></p>	<p>UNCRPD.</p> <p>The second implementation framework published in 2019 focused on educational outcomes. Within the priority themes in the policy, Theme 2 related to learning, highlighting the importance of teachers in supporting people with learning disabilities and acknowledging that teachers need more support to help pupils with learning disabilities.</p>
<p><b>The Children and Young People (Scotland) Act 2014</b></p>	<p>Aimed to improve the way services worked together to support children, young people, and families and to ensure children’s rights are respected. Takes a rights-based approach. Part 4 set out the provision of named persons for young people who have attained the age of 18 while at school and remain at the same school or another school.</p>
<p><b>Education (Scotland) Act 2016</b></p>	<p>Amended the 2004 Act so that those with additional support needs and disabilities (ASND) had enhanced and legally enforceable rights. The main changes involved determining capacity regarding decision-making. In relation to the capacity of children and young people, the 2016 Act extended certain rights relating to the identification, planning, and review of their educational needs to children who are 12 and over and have capacity.</p>
<p><b>Independent Care Review (2020)</b></p>	<p>Three-year review of the care system for children and young people in Scotland. Intended to bridge the gap between</p>

	<p>legislation, policy, and lived experience based on the voices of children and young people within the care system. Reinforced the presumption of mainstreaming unless there are strong reasons to do otherwise. Personalised support to ensure that students with additional support needs could fully participate.</p>
<p><b>Morgan Review of Support for Learning (2020)</b></p>	<p>Its remit was to consider the implementation of the additional support for learning legislation. Highlighted the importance of a range of issues including staff needing greater knowledge and understanding of additional support needs and a willingness to adapt teaching methods. additional support needs to be adequately funded to ensure everyone gets the support they need when they need it. While the principles of inclusion and the presumption of mainstreaming are strongly supported, the review found that several children and young people reported feeling isolated and rejected. There was also concern around inequality.</p>
<p><b>The UNCRC (Incorporation) (Scotland) Act 2024</b></p>	<p>Embedded the United Nations Convention on the Rights of the Child (UNCRC) into Scots law, placing a legal duty on public authorities to act compatibly with children's rights as outlined in the Convention.</p>

### **Population and location statistics**

At the outset of this period the Scottish Office estimated that there were 33,000

children in Scotland with some form of disability.<sup>328</sup> Of this total, 14,285 children were recorded as having special educational needs. It is evident that from 1995 to 2024, there were advancements in the collection of data regarding the experiences of disabled children and young people, and more regular and consistent data collection appears to have taken place. Social work statistics were collected from 2011/12 onwards, and prior to this data was collected on an aggregate summarised basis. However, there remains some ambiguity around numbers of disabled children and young people at the start of this period, particularly in relation to those disabled children and young people living away from home.

Blackburn and colleagues found that there were around 952,741 disabled children and young people in the UK, representing about 7.3 per cent of the child population.<sup>329</sup> This figure was calculated using data from the Family Resources Survey, a cross-sectional UK-wide survey. The most common impairments related to memory, concentration, learning, and communication. Most disabled children and young people lived at home with families. Thirty-four per cent lived in single-parent households, which is higher than the general average of 26 per cent. Almost half of all disabled children and young people lived with a disabled parent.

An English study by Morris found that information on disabled children and young people living away from home was difficult to source.<sup>330</sup> A follow-up by Stalker suggested that the situation may be even worse in Scotland as there were no registers held in the late 1990s, and many disabled children and young people were becoming 'lost' in the system. Concerns were raised about the disproportionate numbers of disabled children and young people being sent to residential schools in England and it was thought likely that a similar pattern existed in Scotland.<sup>331</sup> Who Cares? Scotland identified a lack of coherent policy for disabled children and young people at residential schools in Scotland.<sup>332</sup> They identified a range of challenges

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328 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1: Support and Protection for Children and Their Families* (Edinburgh: Scottish Office, 1997).

329 Claire M. Blackburn, Nick J. Spencer, and Janet M. Read, 'Prevalence of Childhood Disability and the Characteristics and Circumstances of Disabled Children and Young People in the UK: Secondary Analysis of the Family Resources Survey', *BMC Pediatrics* 10, 21 (2010), 4.

330 Jenny Morris, 'Gone Missing?: a Research and Policy Review of Disabled Children and Young People Living Away from Their Families', Who Cares? Trust, 1995.

331 Kirsten Stalker, *Supporting Disabled Children and Their Families in Scotland: a Review of Policy and Research* (York: Joseph Rowntree Foundation, 2000).

332 Who Cares? Scotland, cited in Stalker, *Supporting Disabled Children and Their Families in Scotland*.

including insufficient information on the numbers and whereabouts of disabled children and young people, along with a lack of joint working between education and social work departments.

One way of identifying the number of disabled children and young people in Scotland is to consider the statistics on those children in receipt of a child disability payment, although not all disabled children and young people may have applied for or be in receipt of this payment. The following figures were published by Social Security Scotland in June 2024.<sup>333</sup> Between 2021 and 2024, 61,645 applications were received and as of September 2024 it is estimated that 84,750 children were in receipt of child disability payment.<sup>334</sup> This is a significantly higher number (more than double) than the 33,000 disabled children and young people identified as living in Scotland in 1995. The Scottish Government publication *Summary Statistics for Schools in Scotland 2024* indicated that in 2007 there were 36,544 pupils with additional support needs in mainstream settings and in 2024 there were 284,448, a significant increase in under 20 years. It is unclear whether this increase was due to greater awareness, better diagnostic criteria, or changing definitions.<sup>335</sup>

The available evidence points to several potential conclusions. Firstly, we still do not have a comprehensive and complete picture of the number of disabled children and young people living in Scotland. Secondly, the number of disabled children and young people living in Scotland has increased significantly over the last 30 years. Thirdly, disabled children and young people appear to be more regularly integrated in mainstream education settings. Yet we must take care when considering this data as our understanding and definitions of disability have also changed substantially over this time. This raises questions around the parameters of the term 'disability' with regard to who it now encompasses and what we know about the experiences of this group.

Further information is available on the number of children and young people who are looked after in Scotland. As of 31 July 2024 there were 11,844 children looked after, down 2 per cent since the previous year (12,084) and down 24 per cent since 2013/14 (15,600). The rate of children looked after per 1,000 was 11.7 in 2024. This is

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333 Scottish Government and Social Security Scotland, *Child Disability Payment: High Level Statistics to 30 June 2024* (Edinburgh: Scottish Government, 2024).

334 Scottish Government and Social Security Scotland, *Child Disability Payment*, 1.

335 Scottish Government, *Summary Statistics for Schools in Scotland 2024* (Scottish Government, 2024), Supplementary data, Table 1.5.

the lowest rate since 2005, suggesting an overall downward trend in recent times. The most common community placements for looked-after children were: kinship care (35%), foster care (22%), and at home with parents (20%). A smaller proportion of children (11%) were looked after in residential accommodation settings.<sup>336</sup> Of those 11,844 looked-after children, 1,192 (around 10%) are recorded as disabled, with another 2,954 whose status was unknown and 48 not yet assessed. The figure, then, will likely be higher than reported here.<sup>337</sup> Further statistics are provided within relevant sections as they relate to specific reports.

### **Terminology applied to disabled children and young people**

The use of language and terminology relating to disabled children and young people evolved again during this period. There was a move towards the use of what Jones defines as the omnibus term of disability, covering all forms of disability including physical, mental, developmental, and sensory.<sup>338</sup> This represents a significant shift from the previous preoccupation with categorising and ascertainment. Whilst this may be considered less stigmatising and more inclusive than the previous myriad of terms defining disabled people by their condition, it can also be argued that it may subsume individual need within an overly broad paradigm.<sup>339</sup>

Andrews and colleagues argue that language used responds to cultural shifts and in this sense reflects a need to more neatly categorise those with disabilities for the purposes of discussing their needs.<sup>340</sup> One significant message from their work is that the preferences of disabled people themselves should be the starting points for the use of language in any discourse. This fits well with the work of Riddell, who has consistently argued that attempts to ascertain and categorise are designed to meet the needs of professionals rather than disabled children and young people.<sup>341</sup>

The use of the term 'special needs', as in special educational needs, has been heavily criticised. Gernsbacher and colleagues suggest that the use of term indicates that

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336 Scottish Government, *Children's Social Work Statistics: Child Protection*.

337 Scottish Government, *Children's Social Work Statistics: Child Protection*.

338 Ray Jones, 'Social Work across the Decades: How the Disability Movement Reshaped Social Care', *Community Care*, 25 July 2024. Available online: [Social work across the decades: how the disability movement reshaped social care](#)

339 Andrews *et al.*, 'The Evolution of Disability Language'.

340 Andrews *et al.*, 'The Evolution of Disability Language'.

341 See, for example, Sheila Riddell, 'Social Justice, Equality and Inclusion in Scottish Education', *Discourse: Studies in the Cultural Politics of Education* 30, 3 (2009), 283–96.

people described as having 'special needs' are perceived more negatively than when they are described as having a disability or a type of disability.<sup>342</sup> The term 'special needs' has been rejected by most adults with disabilities, as it connotes segregation and implies special rights as opposed to equal rights. This is particularly relevant given the move during this period from the term special educational needs in education to additional support needs, perhaps reflecting an acknowledgement of these kinds of challenges. To quote one disability activist in the US, 'a need is not special if it is something everyone else takes for granted'.<sup>343</sup> Language, therefore, can still be seen to be evolving and perhaps the most defining characteristic of this period is the influence of disability rights activists on the use of language and the exhortation for policy-makers to listen to their concerns about how their needs are portrayed.<sup>344</sup>

## 1995 to 2001

### *Human rights and the introduction of anti-discrimination legislation*

This period can be characterised by an increased focus on human rights. The Human Rights Act 1998 taken together with the Scotland Act 1998 have given the European Convention on Human Rights (ECHR) a special position in law. The Scotland Act 1998 incorporates most provisions of the ECHR into Scots law. It also makes it unlawful for any public body to act in a way that is incompatible with the convention, including local authorities providing care and support for disabled children and young people.

An acknowledgement of the human rights of disabled people and children was hard won before being fully codified in law and policy over this time. During the 1980s and 1990s an increasingly active and well-organised disabled people's movement focused on identifying the oppression experienced by disabled people and on winning civil rights and equal opportunities.<sup>345</sup> Barnes argued that until this point 'legislation relating to disabled people [had] been ad hoc, piecemeal and grossly

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342 Morton Ann Gernsbacher, Adam R. Raimond, M. Theresa Balinghasay, and Jilana S. Boston, "'Special Needs' is an Ineffective Euphemism', *Cognitive Research: Principles and Implications* 1, 1 (2016), 1.

343 BBC, 'Full Transcript of "Nothing Feels Real a Third of the Time", Ouch Talk Show December 2017', 4 December 2017. Available online: <https://www.bbc.co.uk/news/disability-42223698>.

344 See, for example, Claire Raj, 'The Gap between Rights and Reality: The Intersection of Language, Disability, and Educational Opportunity', *Temple Law Review* 87, 2 (2014–15).

345 Clements and Read, *Disabled People and European Human Rights*.

inadequate'.<sup>346</sup> Lewis charted the development of anti-discrimination legislation for disabled people, recounting that in the early 1990s thousands of protestors took to the streets demanding new legislation. These protestors included members of the Disabled People's Direct Action Network who undertook a campaign of civil disobedience alongside marches and demonstrations. The group rejected notions of charity, instead calling for protection and rights to be enshrined in law. Disability rights groups and campaigners lobbied parliament for many years, keeping the issues in the minds of politicians and the wider public.<sup>347</sup>

This work led to the introduction of anti-discrimination legislation, which was seen as crucial in the broader struggle for disabled people's rights. In 1994 the Civil Rights (Disabled Persons) Bill was defeated by the government, who argued that the most appropriate way to achieve equality was through education and persuasion rather than legislation. However, sustained pressure from disabled people's organisations resulted in the passing of the Disability Discrimination Act in 1995.<sup>348</sup>

The Disability Discrimination Act 1995 made it unlawful to discriminate against disabled people with respect to employment, the provision of goods, facilities, and services, or the disposal and management of premises. It also contained measures related to the accessibility of public transport. The Act defined disability as 'a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities'.<sup>349</sup>

For the purposes of the Act:

- substantial means neither minor nor trivial
- long-term means that the effect of the impairment has lasted or is likely to last for at least 12 months (there are special rules covering recurring or fluctuating conditions)
- normal day-to-day activities include everyday things like eating, washing, walking, and going shopping
- a normal day-to-day activity must affect one of the 'capacities' listed in the

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346 Barnes, *'Cabbage Syndrome'*.

347 Philippa Lewis, 'Disability Discrimination Act: 1995 and Now', House of Lords Library (2020). Available online: <https://lordslibrary.parliament.uk/disability-discrimination-act-1995-and-now/>

348 Charlotte Pearson and Nick Watson, 'Tackling Disability Discrimination in the United Kingdom: The British Disability Discrimination Act', *Washington University Journal of Law and Policy* 23, 1 (2007).

349 Disability Discrimination Act 1995, Section 1(1).

Act, which include mobility, manual dexterity, speech, hearing, seeing, and memory.

The Act provided protection against discrimination in several areas, including:

- employment and occupation
- education
- transport
- the provision of goods and services
- the exercise of public functions.

The Act was the first of its kind to protect disabled people from multiple kinds of discrimination. These included:

- direct discrimination: where a disabled person is treated less favourably than another person due to their disability
- failure to make a reasonable adjustment: where any workplace practice or feature of the premises puts a disabled worker at a disadvantage
- victimisation: where a person is treated unfavourably because they made a complaint about their treatment as a disabled person.

The Act was seen by disabled people as weak and disappointing although some saw it as a small milestone, a first statement of its kind, and a tool that could be used for the benefit of disabled people.<sup>350</sup> Perhaps one of the biggest weaknesses of the Act was its failure to establish a commission for disability rights. This was rectified by the Labour government who came to office in 1997. They passed the Disability Rights Commission Act (DRC) in 1999. According to Ferrie, the DRC attempted to impose a rights-based model of equality on education, although her interviews with key stakeholders within education settings in Scotland identified tensions that resulted in resistance to fully engaging with the Disability Discrimination Act (DDA). Ferrie found that insufficient time was allowed for the DDA to impact on Scottish schools before the introduction of new legislation, as discussed in more detail next.<sup>351</sup>

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350 Clements and Read, *Disabled People and European Human Rights*.

351 Joanna M. Ferrie, 'The Impact of the Disability Discrimination Act Part 4 on Scottish Schools' (PhD thesis, University of Glasgow, 2008).

## **A growing emphasis on the rights of children and young people**

As well as a focus on the rights of disabled people, this period was characterised by a plethora of new legislation and policy focusing on children and young people. The primary focus of the legislation was on upholding children's rights, in line with the UNCRC.<sup>352</sup> There was also a focus on supporting child protection.

The Children (Scotland) Act 1995 introduced a new legal framework for assessment, services, and support to children, including children affected by disabilities and their families. The Act was seen by the government as fulfilling its obligations to implement the UNCRC and the ECHR. It incorporated the three main principles of UNCRC, namely non-discrimination, child welfare as a primary consideration, and listening to children's views. It was seen as having far-reaching consequences for the planning, structure, and quality of services offered to children and for the practice of professionals concerned.

The Act represented a fundamental shift in emphasis from the traditional view of parents having rights over children to the principle that parents have responsibilities towards their children and the rights they have in relation to their children exist to enable them to fulfil these responsibilities. The Act set out local authority duties to provide services designed to minimise the impact of disabilities on children to allow them to lead fulfilling lives. The specific provisions relating to children with disabilities did not stand alone and applied equally to all children. It also stated that children's views must be sought and considered in key decisions that affect them.

Section 93(4) of this Act suggested a child as needing care and attention if:

- he or she is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development unless there are provided for him or her, under or by virtue of this part of the Act, services by a local authority
- his or her health or development is likely to be significantly impaired, unless such services are so provided
- he or she is disabled
- he or she is affected adversely by the disability of any other person within his or her family.

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<sup>352</sup> As outlined in the section [A focus on children's rights and disability rights](#).

Disabled children and young people are therefore framed, within the context of this legislation, as children in need of care and attention. This is significant as it provides legal recognition, by acknowledging the specific needs of disabled children and young people, alongside the needs of other groups for the first time.

The regulations and guidance that accompanied the 1995 Act aimed to operationalise Parts II, III, and IV of the Act.<sup>353</sup> Several sections within the guidance are relevant to disabled children and young people and their education in residential care. The guidance sets out the duties that local authorities had to safeguard and promote the welfare of children in need in their area, and in so far as is consistent with that duty, promote the upbringing of children in need by their families by providing a range and level of services appropriate to the children's needs.<sup>354</sup>

Chapter 6 of this guidance explored issues for disability. It states that 'when a local authority provides services to children who are disabled, or affected by disability, and their families, those services should be designed to minimise the adverse effect of the child's disability'.<sup>355</sup> It recognised that 'transitional stages in children's development, such as entry to primary school, transfer to secondary school or school leaving age, are points at which the need for services and support may be particularly pressing'.<sup>356</sup>

Regarding residential care, including hospitals, the guidance lays out the responsibilities of the social worker in providing, amongst other things, financial, practical, and emotional help, but does not suggest any role in the education of disabled children and young people other than liaising with other organisations to meet the child's needs.<sup>357</sup>

The guidance provides details of how the educational needs of disabled children and young people should be met. This focuses on the primacy of inclusion in mainstream education, the involvement of carers and families, the importance of early

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353 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*.

354 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 1, paragraph 1.

355 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 6, paragraph 4.

356 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 6, paragraph 4.

357 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 6, paragraph 41.

identification, the safe administering of medication, and the production of the record of needs. It states that when providing support and services to families with children who are disabled local authorities should make every effort to ensure that children can attend a local mainstream school or local special school if this can meet their identified needs and is in their best interests.<sup>358</sup>

The guidance explores the needs of disabled children and young people in residential care. It focuses on the need for equality with other children including provision of the same quality of accommodation, rights to privacy, access to all equipment, and/or adaptations that enable them to be fully included in their home life. Regulation and inspection of these establishments is identified as not simply a social work function, but also a function of HM Inspector of Schools with a focus on ensuring the safeguarding and promotion of the welfare of resident pupils.<sup>359</sup> It details the arrangements that must be made to ensure children and young people can remain in contact with their families when placed in residential care. Local authority social work departments also have responsibility to ensure good coordination between families and school. This section also notes that: 'When a child is provided with accommodation for the purposes of attending school, the education authority, board of management or managers of the school have a duty to safeguard and promote the welfare of the child throughout the period he or she is accommodated in the school.'<sup>360</sup>

Further guidance was available for local authorities in *Scotland's Children: A Brief Guide to the Children (Scotland) Act 1995*.<sup>361</sup> In addition, the Scottish Office Education and Industry Department (SOEID) Circular 4/96 provided guidance on the involvement of young people in assessment and made reference to the Age of Legal Capacity (Scotland) Act 1991.<sup>362</sup> Under this Act, a child had the right to consent on his or her own behalf to a medical assessment where, in the opinion of a qualified

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358 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 6, paragraph 70.

359 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 6, paragraph 70.

360 Scottish Office, *The Children (Scotland) Act 1995 Regulations and Guidance, Volume 1*, Chapter 6, paragraph 71.

361 Scottish Office, *Scotland's Children: A Brief Guide to the Children (Scotland) Act 1995* (Edinburgh: The Stationery Office, 1995).

362 Scottish Office Education and Industry Department, *Children and Young Persons with Special Educational Needs Assessment and Recording*, Circular 4/96 (Edinburgh: SOEID, 1996).

medical practitioner, he or she is capable of understanding the nature and possible consequences of that assessment.<sup>363</sup>

According to Stalker, the 1995 Act had limitations and was less far-reaching than equivalent legislation in England. For example, although there was a duty to assess children in need (including disabled children and young people and those children affected by disability), local authorities were not required to provide the same range of services as in England; only daycare, after-school care, and holiday care were specified. In addition, there was no requirement on Scottish local authorities to keep registers of disabled children and young people as there was in England, which may contribute to the lack of clarity over numbers discussed throughout this report.<sup>364</sup>

### **A renewed focus on closure of long-stay hospitals**

This focus on the rights of groups that have been previously marginalised or overlooked, including disabled people and children, took place during the final stages of deinstitutionalisation where there was an increased focus on mainstreaming and inclusion. The Scottish Consortium for Learning Disability (now the Scottish Commission for People with Learning Disabilities) noted that during the last decade of the twentieth century, Scotland witnessed the final push towards the closure of long-stay learning disability hospitals. It was increasingly accepted that children should not be placed in these hospitals and should be given enough support to stay at home and go to the local school or attend a residential school where necessary.<sup>365</sup> Stalker and Hunter found that, by 1999, only two or three children were still being brought up in a 'mental handicap' hospital. Three hospitals continued to provide respite care for children in a hospital setting, in one case on a hospital ward.<sup>366</sup>

In 1997 Kent carried out the Children's Safeguards Review, which addressed the protection of children living away from home in various settings, including hospitals.<sup>367</sup> He highlighted the vulnerability of disabled children and young people to abuse, in part because they are more likely to spend time in residential and

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363 Scottish Office Education and Industry Department, *Children and Young Persons with Special Educational Needs*, paragraphs 81 and 99.

364 Stalker, *Supporting Disabled Children and Their Families*.

365 Scottish Consortium for Learning Disability, *National Confidential Forum*, 35.

366 Kirsten Stalker and Susan Hunter, 'To Close or Not to Close? The Future of Learning Disability Hospitals in Scotland', *Critical Social Policy* 19, 2 (1999), 180.

367 Kent, *Children's Safeguards Review*.

specialist facilities. Despite the commitment to inclusion and the provision of care and support in mainstream settings, he noted the significant number of children that remained in hospital or other healthcare facilities at this time, although these are unlikely to be the long-stay hospitals (or institutions) discussed by Stalker earlier. Kent suggested that:

almost 700 children under 18 spent over 30 days in hospital acute services in 1994 of whom 600 were under 15 and for almost 500 this was a continuous stay. More than 1,000 young Scots under 18 went to a psychiatric hospital or unit in 1994 of whom 200 were between 5 and 15 with a mean stay of nearly 3 months.<sup>368</sup>

He noted that while some services were subject to inspection, others were not, potentially increasing risk further. He recommended that health trust residential services for children should be inspected by the Scottish Hospital Advisory Service, with assistance from local authority social work inspectors.

Stalker and colleagues carried out further research on children with complex health needs who spent significant time in healthcare settings. They found that from April 1999 to March 2000, 1,399 children and young people with complex needs had stays of more than four weeks in hospital. Importantly, the study found that there was confusion about the legal status of children who had been in hospital settings for over three months. They found that service managers and providers in both health and social services were often uncertain about whether these children should be considered as 'looked after'. This ambiguity affected how responsibilities were assigned and how services were coordinated. Indeed, there was evidence that educational provision in some settings was fragmented and variable.<sup>369</sup> They concluded that clearer legal frameworks and better inter-agency collaboration were needed to ensure children in long-term healthcare settings received appropriate care and education.

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<sup>368</sup> Kent, *Children's Safeguards Review*, 118–19.

<sup>369</sup> Kirsten Stalker, John Carpenter, Rena Phillips, Clare Connors, Charlotte MacDonald, Janet Eyres, Jane Noyes, Stephen Chaplin, and Michael Place, *Care and Treatment? Supporting Children with Complex Needs in Healthcare Settings* (Brighton: Pavilion Publishing, 2003).

## **Educational context: ongoing concerns around outcomes for disabled children and young people**

With this renewed focus on the rights of disabled people and the rights of children alongside a commitment to end institutionalisation, education was provided within a context of concern around outcomes for marginalised groups including disabled children and young people and looked-after children and young people. The Riddell Committee was set up in 1999 to address significant concerns regarding the education of and support for children with severe and low incidence disabilities.<sup>370</sup> Its remit was to examine the barriers to educational and social development affecting this group of children and young people. The review was carried out at a time of resource constraints which meant that disabled children and young people often had difficulties in accessing services. This was exacerbated by dissatisfaction with how resources were allocated and managed. The review demonstrated a commitment to inclusive education and made 22 recommendations including:

- a harmonisation of education and social services legislation
- greater inclusion of children in mainstream schools
- the setting up of a National Special Needs Advisory Forum
- far better inter-agency cooperation
- more effective partnership between parents and professionals
- full and accurate information
- the need to listen to children's wishes about their education.<sup>371</sup>

Taking these recommendations on board, the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 was enacted to improve the accessibility of education for pupils with disabilities. Its overarching goal was to ensure that disabled pupils could fully participate in their education by addressing physical and informational barriers. The Act set out a duty for the responsible body of a school to prepare a strategy to enhance the accessibility of school environments, the curriculum, and school information for disabled pupils. Section 1(2) set out what should be covered in the strategy:

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<sup>370</sup> Scottish Executive, *The Report of the Advisory Committee on Educational Provision for Children with Severe or Low Incidence Disabilities* (Edinburgh: Scottish Executive, 1999).

<sup>371</sup> Scottish Executive, *Advisory Committee on Educational Provision*.

- (a) increasing the extent to which pupils with a disability can participate in the school's curriculum or, as the case may be, the schools' curriculums
- (b) improving the physical environment of the school, or schools, in relation to which the strategy is prepared for the purpose of increasing the extent to which pupils with a disability are able to take advantage of education and associated services provided or offered by such school or schools; and
- (c) improving communication with pupils with a disability and, in particular, improving the communication to pupils with a disability –
  - (i) within a reasonable time; and
  - (ii) in ways which are determined after taking account of their disabilities and any preferences expressed by them or their parents.

of information which is provided in writing for pupils, or persons who may be admitted as pupils, who do not have a disability.<sup>372</sup>

The Act also set out provisions for the management and maintenance of pupils' educational records, ensuring that these records were handled in a way that supported the educational needs of pupils with disabilities.

With regard to further promoting the inclusion of disabled children and young people within education in Scotland, a particularly significant development took place in August 2003, with the introduction of Section 15 of the Standards in Scotland's Schools etc. Act 2000. The Act set out national priorities for school education under five key headings: achievement and attainment; framework for learning; inclusion and equality; values and citizenship; and learning for life. Section 15 was particularly significant as it established the 'presumption of mainstreaming' principle that set out the expectation that children with 'special educational needs' should be educated in mainstream settings, unless certain exceptions apply.<sup>373</sup> The circumstances where it is appropriate to provide education for the child in a school

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<sup>372</sup> Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002, Section 1(2).

<sup>373</sup> George Head and Anne Pirrie, 'The Place of Special Schools in a Policy Climate of Inclusion', *Journal of Research in Special Educational Needs* 7, 2 (2007), 90–6.

other than a special school are when this:

- (a) would not be suited to the ability or aptitude of the child
- (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or
- (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred.<sup>374</sup>

According to Watson, this presumption of mainstreaming was intended to replace the notion of 'readiness' to participate that underpinned the findings of the Warnock Report.<sup>375</sup> In contrast to Warnock and the 1980 and 1981 Education Acts, the presumption of mainstreaming assumed that schools were able to meet a diverse range of needs.<sup>376</sup> This represents a sea change in education policy, albeit one that was implemented somewhat incrementally.

### **Children and young people with learning disabilities**

During this time there was increasing recognition of the exclusion and marginalisation faced by people with learning disabilities and an acknowledgement of the need to improve services and support for people with learning disabilities and their families. *The Same as You?*, a national review of services available at the time to people with learning disabilities and autistic people, was launched by the Scottish Executive in 2000.<sup>377</sup> It had what was at the time an unprecedented level of engagement with people with learning disabilities, autistic people, and their families. The review acknowledged the importance of education, employment, housing, and other areas. It aimed to ensure that people with learning disabilities could live more independently and be more included in society. Six taskforces were set up to focus on key areas, including one for children's services. From a survey of users' and carers' views, which included four focus groups with children and young people, the main issues to emerge were:

- lack of social and recreational opportunities

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374 Standards in Scotland's Schools, etc. Act 2000, Section 15(3).

375 Cate Watson, 'Educational Policy in Scotland: Inclusion and the Control Society', *Discourse: Studies in the Cultural Politics of Education* 31, 1 (2010).

376 Watson, 'Educational Policy in Scotland'.

377 Scottish Executive, *The Same as You? National Review of Learning Disability Services in Scotland* (Edinburgh: Scottish Executive, 2000).

- social isolation experienced by many children
- bullying at school and in local neighbourhoods
- more support needed for siblings.

The review made 29 recommendations relating to joint working and collaboration and coordination that were intended to drive change and improve the overall quality of life for people with learning disabilities. Recommendation 24 stated that ‘the Scottish Executive should consider introducing a new duty on local authorities to identify a responsible person to advise and help the person with learning disabilities and their family put the future needs assessment (FNA) into practice’.<sup>378</sup> At the time of the implementation of *The Same as You?* future needs assessments were required when a young person with a record of needs reached the age of 14. This changed in 2004 with the introduction of the Education (Additional Support for Learning) (Scotland) Act 2004.

The review aimed to increase social inclusion, but it was accepted that the need for some special schools remained. At the time of the review, almost two thirds (64%) of children and young people recorded as having additional support needs due to learning disability attended mainstream schools.<sup>379</sup>

A review of progress on *The Same as You?* carried out some years later gathered feedback from people with learning disabilities, their families, and service providers.<sup>380</sup> It identified the following key issues that were particularly relevant to the education of disabled children and young people:

- The experiences of older participants confirmed that historically, education had not been viewed as a priority for people with learning disabilities.
- Carers with children in primary and secondary education talked about the lasting benefits of their time in school. They stressed the role of school in improving their children’s skills and capacities.

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378 Scottish Executive, *The Same as You?*, Recommendation 24.

379 Scottish Government, *Pupils in Scotland, 2009* (Edinburgh: Scottish Government, 2009).

380 Scottish Government, *The Same as You? 2000–2012 Consultation Report* (Edinburgh: Scottish Government, 2012).

- In several instances these carers also expressed concerns, including that their child's capabilities might be overlooked and the lack of social inclusion of some special units within mainstream schools.
- Several families of children with complex needs had to relocate or follow alternative paths to deal with the lack of appropriate school services in their areas.
- All carers of children with learning disabilities mentioned that communication was their children's greatest barrier. However, gaps in communication support were identified including insufficient access to Speech and Language Therapy. Another significant challenge for pupils and families was that different communication and symbol systems were in use in different areas.
- Transition from school to adult education or services could result in the loss of friends and familiar contacts. 3 out of 7 carers interviewed had children close to the age of transition and each asserted that this was one of the most difficult times they have ever had as a family.<sup>381</sup>

Education was therefore something that was highly valued by people with learning disabilities and their families, but it was not always felt to be readily accessible, and children and young people faced structural barriers to achieving their full potential. This was felt to be particularly true for those with more complex needs who discussed the lack of local provision that made it difficult for them to remain connected to their local communities.

### **An increase in monitoring and regulation**

Alongside this increased focus on inclusion, rights, and the presumption of mainstreaming, developments that were of relevance to disabled children and young people took place within a context of increased monitoring and regulation. With respect to social work and social care, several important pieces of legislation were passed that focused specifically on the regulation of care and support. For example, the Regulation of Care (Scotland) Act 2001 aimed to improve regulation and consequently the standard of social care services across Scotland. The Act set out a requirement that social service workers must adhere to, and established rules and

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<sup>381</sup> Scottish Government, *The Same as You? Consultation Report*, 17.

codes of practice. Failing to comply with the Act and associated regulations means social services workers can be de-registered and services closed.

The Regulation of Care (Scotland) Act 2001 is important for disabled people, including children and young people, as it establishes a framework to ensure that high-quality care services are provided to vulnerable individuals. This legislation also created the Care Commission, which was responsible for regulating and inspecting care providers, ensuring that they meet essential standards of care and safety. This means people with disabilities are entitled to receive care that respects their dignity, promotes their independence, and meets their specific needs. The Act helps safeguard the rights of individuals with disabilities by setting clear standards for care providers and offering a system for complaints and accountability. It also promotes inclusivity by ensuring that services are tailored to support individuals in living fulfilling, autonomous lives within their communities. The Act defines care services broadly and includes residential care for children as well as early education. While not explicitly detailed in the Act, residential care homes may provide education depending on the needs of the children placed there, and this provision should be aligned with relevant education standards.

The *National Care Standards* set out the level of care that people using a service can expect.<sup>382</sup> There are specific care standards for care homes for people with disabilities which indicate what each resident can expect, including the requirement for an individual risk assessment plan.<sup>383</sup> The standards also say that people with learning disabilities have the right to choose the risks they wish to take, providing there is a balance between these and the welfare of other residents and staff. A series of publications (23) encompassing several care settings, including school accommodation services, was produced.<sup>384</sup> These covered a range of accommodation settings supporting people with different disabilities including learning disabilities, physical and sensory impairment, and mental health problems. The core principles underpinning the standards are:

- dignity and respect
- compassion

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382 Scottish Executive, *National Care Standards: a Guide* (Edinburgh: Scottish Executive, 2002)

383 Scottish Executive, *National Care Standards: Care Homes for People with Learning Disabilities* (Edinburgh: Scottish Executive, 2001, revised 2005).

384 See, for example, Scottish Executive, *National Care Standards: a Guide*.

- be included
- responsive care and support
- wellbeing.

These standards emphasised the importance of ensuring that disabled children, young people, and adults have access to education that is tailored to their needs and abilities, promoting an inclusive environment where learning and personal development can thrive. The standards also highlighted the importance of providing a safe, supportive, and stimulating environment for residents, both children and adults, allowing them to access educational opportunities alongside appropriate care. As a result, residential care providers were encouraged to collaborate with educational institutions to offer individualised learning plans, helping residents achieve their full potential, and ensuring that their educational rights were respected. Ultimately, the standards contributed to a more integrated and holistic approach to care and education for individuals with disabilities in residential settings with an increased focus on the rights of those who use services.

## 2001–9

### A time of legislative and policy development

This period was marked by significant legislative developments in education and in other relevant policy areas such as mental health, children’s rights, and child protection. This can be attributed in part to devolution, resulting in a plethora of new policy initiatives,<sup>385</sup> which some commentators suggest is part of attempts to create a new national identity.<sup>386</sup> A central focus at this time was on ensuring different agencies work together effectively to promote social justice and tackle inequality. With respect to disabled children and young people, this is captured in a report published in 2001 by the Scottish Executive. *For Scotland’s Children*, a review of the children’s services system in Scotland, aimed to ensure that agencies work together effectively to provide services for children.<sup>387</sup> Although this was focused on all children in Scotland, it set the framework for the development of services targeted at more vulnerable children, including disabled children and young people. The action plan called for a national approach which put children and families at the centre by

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385 Elke Viebrock, ‘Social Policy in Scotland since Devolution’, *Social Policy and Society* 8, 3 (2009).

386 Cree and Smith (eds), *Social Work in a Changing Scotland*.

387 Scottish Executive, *For Scotland’s Children: Better Integrated Children’s Services – Report* (Edinburgh: Scottish Executive, 2001).

'treating all services as part of a Children's Services System and by all staff perceiving themselves as operating within that single system'.<sup>388</sup>

With specific reference to disabled children and young people, it stated that: 'There is a widely shared view that children with disabilities are not receiving the care, education or training opportunities they require. For many, education outwith the mainstream and their community can lead to isolation and exclusion.'<sup>389</sup>

What follows will allow us to assess the extent to which this statement is true by considering key policy and legislative changes across education, health, and social work for disabled children and young people during this period.

### **Reform of Scotland's mental health system: the introduction of the Mental Health Care and Treatment (Scotland) Act 2003, and its impact on child and adolescent mental health**

During this period, and prior to the implementation of the new legislation discussed below, several reports had considered child and adolescent mental health. In 2003 the Scottish Needs Assessment Programme report on child and adolescent mental health was published.<sup>390</sup> This report focused on the gaps in service provision. It identified challenges to services including a lack of training for staff in meeting the needs of children and young people and the importance of working with young people in schools to support their mental health. Following this, the Scottish Executive produced *The Mental Health of Children and Young People: A Framework for Promotion, Prevention and Care*.<sup>391</sup> As part of this framework, a commitment was made to develop community services to reduce the number of admissions of children and young people to adult beds in hospitals and other institutions by 50 per cent by 2009.<sup>392</sup> This framework was launched at the same time as the Mental Health (Care and Treatment) (Scotland) Act 2003. This had the potential to reduce the number of children who received their education in hospital due to mental disorder.

The Act was the result of recommendations from the Millan Committee Report in

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388 Scottish Executive, *For Scotland's Children*, 9.

389 Scottish Executive, *For Scotland's Children*, 9.

390 Public Health Institute for Scotland, *Needs Assessment Report on Child and Adolescent Mental Health: Final Report – May 2003* (Glasgow: Public Health Institute for Scotland, 2003).

391 Scottish Government, *The Mental Health of Children and Young People: A Framework for Promotion, Prevention and Care* (Edinburgh: Scottish Government, 2005).

392 Scottish Executive, *Delivering for Mental Health* (Edinburgh: Scottish Executive, 2006).

2001.<sup>393</sup> A central feature of the Millan Report was that both the law and practice relating to mental health should be driven by a set of ten principles, but especially minimum interference in people's liberty and maximum involvement of service users in any treatment decisions. The Millan Principles are as follows:

- non-discrimination
- equality
- respect for diversity
- reciprocity
- informal care
- participation
- respect for carers
- least restrictive alternative
- benefit
- child welfare.<sup>394</sup>

The introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003 was a significant development that brought about several important changes. The Act aimed to improve the quality of care and support for individuals with mental health problems and learning disabilities. It placed service user participation at the centre and provided several robust measures to safeguard the rights of those with mental disorder. The Act established new arrangements for the detention, care, and treatment of individuals with a mental disorder and placed duties on local authorities to provide care and support services for people with mental disorders. It also introduced changes to develop community-based mental health services.

With specific reference to children and young people, the Code of Practice accompanying the 2003 Act suggested that it was necessary to consider

- the wishes and feelings of the child and the views of any carers
- the carer's needs and circumstances which are relevant to the discharge of any function
- the importance of providing any carer with information that might

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393 Scottish Executive, *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (Edinburgh: Scottish Executive, 2001) – commonly referred to as the Millan Report.

394 Scottish Executive, *New Directions*, 18–21.

assist them to care for the child

- where the child has been subject to compulsory measures, the importance of providing appropriate services to that child
- the importance of any functions being discharged in a manner that appears to involve minimum restriction on the freedom of the child in the circumstances.<sup>395</sup>

The Act supports the education of anyone subject to its measures by noting that the home authority of the child or young person is responsible for creating an education plan that supports the child's needs and education. The Code of Practice for the Act also indicated that the local authority must make arrangements for the education of pupils unable to attend school because they are subject to measures under the Act or, in consequence of their mental disorder, by measures under the Criminal Procedure (Scotland) Act 1995. Section 277 of the 2003 Act amended the Education (Scotland) Act 1980 to that effect.<sup>396</sup> It is worth noting that the definition of medical treatment under the 2003 Act (Section 329) also included habilitation (including education and training in work, social, and independent living skills) and rehabilitation and so may be of direct relevance to children and young people who experience mental disorder.

The Code of Practice for the 2003 Act also considered the placement of children on adult psychiatric inpatient units. It stated that consideration should be given to the likely impact on the child of the behaviour of other patients and the need to protect children from exposure to distressing experiences. Other ward policies, such as visiting, may need to be modified. Nursing staff with experience of working with children should be available to provide direct input to the care of the child. This suggests that there are certain settings that may not be of benefit to the health and wellbeing of children and young people.

The Mental Welfare Commission published guidance on the admission of children to adult wards in 2006, as follows:

- The needs of each young person must be central to decisions about

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<sup>395</sup> Scottish Executive, *Mental Health (Care and Treatment) (Scotland) Act 2003: Code of Practice, Volume 1* (Edinburgh: Scottish Executive, 2005), 16.

<sup>396</sup> Scottish Executive, *Mental Health Code of Practice*, 22.

admission and management. The needs of families and carers must also be considered.

- Every effort must be made to provide for age-appropriate specialist care. This should include a child and adolescent psychiatrist taking consultant responsibility where at all possible; nursing staff with experience of working with young people being available to provide input to ward staff; and access being available to other local child and adolescent services.
- There must be attention to the needs of young people in terms of their protection and welfare within a ward environment that is designed for adults. The Commission noted that this is especially important in an admission to an intensive psychiatric care unit and must include an awareness of the young person's potential physical, emotional, and sexual vulnerability.
- There should be access to appropriate therapeutic and recreational activities as well as an awareness of the educational needs of the child or young person.
- Staff need to be aware of the legal context of a young person's admission and treatment as this may have implications for their care and treatment.
- If possible, a particular ward should be identified within an adult in-patient service to receive young people's admissions. This allows a particular group of medical and nursing staff to become more familiar with the needs of young people.<sup>397</sup>

According to Latimer, the Mental Welfare Commission had information on 59 children being treated in adult inpatient facilities in 2006 (although it was unclear

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397 Mental Welfare Commission for Scotland, 'Young People on Adult Mental Health Wards' (2006). Available online: [mental\\_welfare\\_commission\\_guidance\\_on\\_the\\_admission\\_of\\_young\\_people\\_to\\_adult\\_mental\\_health\\_wards\\_review2\\_.pdf](#)

how many of these children were being treated by compulsory measures).<sup>398</sup> The Commission noted that best practice was not being followed in all these cases. For example:

- Only 34% had a consultant that was a child and adolescent specialist.
- 34% had nursing staff with experience of young people working directly with them.
- 64% had nursing staff with experience of working with young people able to provide advice to ward staff.
- 42% had access to other age-appropriate therapeutic input.
- 59% had access to age-appropriate recreational activities.
- 29% had discussed their educational needs.<sup>399</sup>

This indicates that the Code of Practice for the 2003 Act was not being thoroughly implemented in practice.

These major changes in mental health legislation centred the needs of children and young people with mental health problems by ensuring that their welfare was the primary concern in any decisions made under the 2003 Act. Children and young people's views were also to be taken into account in decisions about their care and treatment and they should have access to accessible information and advocacy to enable them to express their views.

### **Additional support needs and additional support for learning**

Echoing this theme on children's views, the lived experiences of disabled children and young people, including those in residential care, on their education and other key issues in their lives were sought. A survey of looked-after children and young people in Scotland, addressing their health, educational achievement, and lifestyle behaviours, was published in 2004.<sup>400</sup> Structured interviews, using standardised

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398 Mental Welfare Commission for Scotland, 'Our Annual Report 2005–2006: a New Year, a New Law' (2006), cited in Kate Latimer, 'Mental Health (Care and Treatment) (Scotland) Act 2003: Impact on Child and Adolescent In-patient Services', *Psychiatric Bulletin* 33, 2 (2009).

399 Latimer, 'Mental Health (Care and Treatment) (Scotland) Act 2003'.

400 Howard Meltzer, Deborah Lader, Tania Corbin, Robert Goodman, and Tamsin Ford, *The Mental Health of Young People Looked After by Local Authorities in Scotland* (London: The Stationery Office,

measures such as the strengths and difficulties questionnaire, were administered to children and young people aged 5–17. Carers and teachers were also interviewed to build a comprehensive picture of children and young people’s mental health and wellbeing. Teachers were asked to assess looked-after children’s educational achievements. This suggested that three-fifths of children were at least one year behind in their intellectual development. One-fifth were three or more years below the level expected of their age. Just under a third of children had officially recognised special educational needs, though only 5 per cent had a special educational needs statement suggesting that most children with special educational needs may not have been accessing the support that they needed. Importantly, children with special educational needs were more likely to be found in residential care.<sup>401</sup> This suggests a gap between residential care settings and the recognition of special educational needs, potentially leaving those with special educational needs without support. It also indicates that barriers to educational attainment may be related to both disability and looked-after status.

At the time this survey was published, major changes in education were taking place with the introduction of the Education (Additional Support for Learning) (Scotland) Act 2004. As mentioned above, the Riddell Committee (1999) set out the Scottish vision for a more inclusive education system. In 2003 the Scottish Executive published *Moving Forward! Additional Support for Learning* to provide context for the draft Education (Additional Support for Learning) (Scotland) Bill. It stated: ‘We wish to see an education system that is inclusive, welcomes diversity and provides an equal opportunity for all children to develop their personality, skills and abilities to their fullest potential.’<sup>402</sup>

Five key principles supported this vision:

- (1) Education must be child-centred, yet take a holistic approach to the needs of the child and his or her family.
- (2) Schools should demonstrate a commitment to inclusiveness.

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2004). See also Howard Meltzer and Deborah Lader, ‘The Mental Health of Young People Looked After by Local Authorities in Scotland’, *Scottish Journal of Residential Child Care* 3, 2 (2004). Further details of this survey can be found in Kendrick *et al.*, ‘Development of Children’s Care Services in Scotland’.

401 Meltzer and Howard, *Mental Health of Young People*, 71–2.

402 Scottish Executive, *Moving Forward! Additional Support for Learning* (Edinburgh: Scottish Executive, 2003), 6.

- (3) The rights and views of children, young people and their parents should be respected and listened to.
- (4) National and local policies for improving standards should include all children.
- (5) Allocation of resources by schools, local authorities, and their partners should demonstrate a commitment to inclusiveness and delivery of integrated services, and take account of the diversity of local pupil populations.<sup>403</sup>

*Moving Forward!* also set out a range of national priorities: achievement and attainment; framework for learning; inclusion and equality; values and citizenship; and learning for life. It recognised the continuing need for a range of specialist provision for those with more significant or complex needs, despite its focus on mainstream services: 'We acknowledge the good work and commitment of special schools. In particular specialist provision can provide customised packages of provision to meet the education, health and care needs of children with more significant or complex needs.'<sup>404</sup>

Referring to the Education (Scotland) Act 1980, *Moving Forward!* highlighted that the 'legislative model represented by the record of needs is one which is increasingly at odds with current policies on the development of inclusive education within an inclusive society'.<sup>405</sup> It stated that the term 'special educational needs' had 'negative connotations' and placed too much 'emphasis on weaknesses and problems'.<sup>406</sup> Indeed, according to Florian, the problem with the category of special educational needs was that it was seen as something 'different from' or 'additional to' that which is provided to others of similar age. She argues that it also raises questions about how to make educational provision available to all learners without marking some learners as different.<sup>407</sup>

The new legislative framework, then, was to be around the concept of additional support needs. This appears to be a significant departure from previously held views

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403 Scottish Executive, *Moving Forward!*, 6.

404 Scottish Executive, *Moving Forward!*, 23.

405 Scottish Executive, *Moving Forward!*, 10.

406 Scottish Executive, *Moving Forward!*, 11.

407 Lani Florian, 'Reimagining Special Education: Why New Approaches are Needed', in Lani Florian (ed.), *The Sage Handbook of Special Education* (London: Sage Publications, 2013), 7–20.

around the importance of specialist provision for disabled children and young people and provides evidence of a significant commitment to inclusion and mainstreaming. Hammill and Clark considered that this represented a radical change,<sup>408</sup> and Moscardini argued that: 'the adoption of the term additional support needs in the early 2000s represented a significant conceptual departure from the construct of special educational needs by taking into account broader social and contextual factors that give rise to the need for support'.<sup>409</sup>

This point was also supported by Riddell and colleagues who argued that driving this definitional change was the recognition that additional support needs often arise because of social deprivation and a view that the old conceptualisation of special educational needs was too rooted in a notion of individual deficit detached from environmental factors.<sup>410</sup> We can see here the influence of the social model of disability that encourages a shift in focus from individual deficit towards broader, structural barriers.

The Education (Additional Support for Learning) (Scotland) Act 2004 replaced the concept of special educational needs with that of additional support needs, which included children who had difficulty in learning for whatever reason.<sup>411</sup> The Act established that:

A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person.<sup>412</sup>

This is a very inclusive definition that covers children with a range of needs, including those with disabilities. This broader, more inclusive understanding of additional support needs is consistent with the social model of disability.

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408 Paul Hammill and Kathleen Clark, *Additional Support Needs: An Introduction to ASN from Nursery to Secondary* (Paisley: Hodder Gibson, 2005), 1.

409 Lio Moscardini, 'Additional Support Needs', in Tom G.K. Bryce, Walter M. Humes, Donald Gillies, and Aileen Kennedy (eds), *Scottish Education, Fourth Edition: Referendum* (Edinburgh: Edinburgh University Press, 2013), 707.

410 Riddell *et al.*, 'Additional Support Needs Reforms'.

411 Riddell *et al.*, 'Additional Support Needs Reforms'.

412 Education (Additional Support for Learning) (Scotland) Act 2004, Section 1(1).

This new definition introduced some ambiguity, and while disabled children and young people are recognised within the broader group of children and young people with additional support needs, it is worth noting that not all children and young people with additional support needs are disabled. For example, children and young people with additional support needs may have experienced bullying, homelessness, parental drug or alcohol use, bereavement, abuse, or secure care. The situations that give rise to additional support needs in these cases may not always be long-term or permanent. This ambiguity results in further challenges in identifying the number of disabled children and young people.

Perhaps in recognition of this potential ambiguity, the Code of Practice that accompanied the Act highlighted four factors that may give rise to additional support needs: the learning environment, family circumstances, social and emotional factors, and disability or health need.<sup>413</sup> Yet Moscardini argues that while policy and legislation set out the underlying principles of support and their application in practice, an arguably weak understanding of the concept of additional support needs has led to the term being used as a proxy for special educational needs, further highlighting the ambiguity around the term.<sup>414</sup> The National Statistical Bulletin on Pupils and Schools in Scotland published annually by the Scottish Government shows consistently that the largest group of children and young people with additional support needs are those identified as having a learning disability. However, the bulletins state that 'there are wide variations in the extent to which pupils with disabilities had been identified in different local authorities and the information should not be considered as complete'.<sup>415</sup> In 2010 Her Majesty's Inspectorate of Education (HMIE) recommended that the Scottish Government and education authorities should ensure effective collection and management of data so that children can receive the support they need.<sup>416</sup> Interestingly, documentation from the Scottish Exchange of Data (ScotXed) showed that in 2010 the number of pupils recorded as 'assessed disabled' had decreased by 44 per cent; there was an increase in three local authorities but a decrease of more than 50 per cent in 16, suggesting

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413 Scottish Executive, *Supporting Children's Learning: Code of Practice*.

414 Moscardini, 'Additional Support Needs', 707.

415 Scottish Government, see for example *Summary Statistics for Schools in Scotland 2024*, Supplementary data, Table 1.5.

416 Her Majesty's Inspectorate of Education, *Learning Together: Lessons About School Improvement – An HMIE Report on How Schools Get Better*. 2nd edn (Livingston: HM Inspectorate of Education, 2010). Available online: [Learning Together: Lessons about school improvement](#)

either poor recording, variable data collection methods, or definitional variations.<sup>417</sup> This was despite 43 per cent of secondary school pupils in Scotland being recorded as having additional support needs, highlighting again the discrepancy between 'assessed disability' and additional support needs. Taken together, these figures demonstrate a lack of clarity around the term 'additional support needs' and which groups of children and young people this includes. The figures also provide further evidence of the difficulties in accurately determining the number of disabled children and young people, as well as those with additional support needs in Scotland.

### **An analysis of the concept of additional support needs**

Building on the analysis developed in the previous section, academics and commentators have considered the additional support needs concept since its inception within the 2004 Act. The potentially significant implications of its use were highlighted in the introduction to this report, where it was noted that, while the category can be considered more inclusive,<sup>418</sup> it is so broad that it has resulted in a 768 per cent increase in children and young people classified in this way.<sup>419</sup> The concept of additional support needs is an acknowledgement by policy-makers that all children and young people may have additional support needs at some stage in their school career.<sup>420</sup> This raises questions around the usefulness of the concept in ensuring that resources are effectively targeted at those with greatest need.

Riddell and Weedon have questioned the extent to which the additional support needs system reduces or reinforces existing social and economic inequalities. They point out the inflation of the additional support needs category within administrative data, particularly in relation to 'non-normative sub-categories' such as social, emotional, and behavioural difficulties that are strongly associated with social disadvantage.<sup>421</sup> Riddell has also pointed out that while the need for extra resources for children and young people with additional support needs is clear, decisions about needs, and resources to meet those needs, are often made by professionals with little input from the children and their families. She argues that families from more

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417 Scottish Government, *Summary Statistics for Schools in Scotland, No. 1 – 2010 Edition*, Statistical Bulletin Education Series (Edinburgh: Scottish Government, 2010). Available online:

<https://www.gov.scot/collections/school-education-statistics/>.

418 Francis, 'Developing Inclusive Education'.

419 Accounts Commission, *Briefing: Additional Support*.

420 Anne Pirrie, 'Through a Glass, Darkly: Reflections on the "Presumption of Mainstreaming" in Scottish Education', *Scottish Affairs* 62, 1 (2008), 63–79.

421 Riddell and Weedon, 'Additional Support Needs Policy'.

disadvantaged backgrounds are less likely to be able to advocate effectively for themselves within the additional support needs system.<sup>422</sup>

### **Key provisions under the Education (Additional Support for Learning) (Scotland) Act 2004**

The 2004 Act made it a duty for the responsible education authority to 'make adequate and efficient provision for such additional support as is required by that child or young person' and to keep this under consideration, unless this 'would result in unreasonable public expenditure being incurred'.<sup>423</sup> It also abolished the records of needs and made it a duty of the relevant education authority to carry out an assessment or examination to determine whether a child had additional support needs. It created Co-ordinated Support Plans (CSPs), although these were to apply only to those children with multiple or complex needs lasting more than a year and requiring significant additional support from other services.<sup>424</sup> The Act provided the legal basis for these plans to ensure that education authorities worked with other local authority and health board services to assess and support children and young people who required inter-agency input. The 2012 Doran Review of learning provision for children and young people with additional support needs found that despite the statutory basis of CSPs, education authorities vary widely in the percentage of pupils who have a CSP.<sup>425</sup> Most children and young people with complex additional support needs would require a CSP, but many who appeared to meet the criteria did not have one.

The Act also created the Additional Support for Learning Tribunal as a means of resolving disagreements over educational provision for children and young people with additional support needs. The tribunal could hear about several issues including decisions about CSPs; refusal over placing requests; failure to plan for children leaving school; decisions over whether children aged 12–15 can use their rights; and claims over disability discrimination. The Tribunal is made up of a legal member and two members with expertise in additional support for learning. They can uphold or overturn decisions made by local authorities or order them to do certain things. Local

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422 Riddell, 'Social Justice, Equality and Inclusion'.

423 Education (Additional Support for Learning) (Scotland) Act 2004, Sections 4(1) and (2)(b).

424 Riddell *et al.*, 'Additional Support Needs Reforms'.

425 Peter Doran, *The Right Help at the Right Time in the Right Place: Strategic Review of Learning Provision for Children and Young People with Complex Additional Support Needs* (Edinburgh: Scottish Government, 2012).

authorities must do what the Tribunal orders them to do. Parents were also given new means to challenge local authority decisions through mediation and independent adjudication, and low-level dispute resolution at school and local authority level were also encouraged.<sup>426</sup> Riddell and Weedon argued that these new measures advanced parents' rights to some extent but suggested further changes were needed to achieve a radical shift away from the post-war dominance of bureaucracy and professionalism in the education system in Scotland.<sup>427</sup> Research carried out by Riddell and Weedon found that while all parents were invested in their children's educational success, more affluent parents were able to use their material resources to lever additional school and local authority provision.<sup>428</sup> While support such as advocacy was useful in helping families from more disadvantaged backgrounds to argue their case, this was considered insufficient to counterbalance the negative effects of deprivation.

Within the context of these changes in educational provision and in light of the presumption of mainstreaming, Hammill and Clark considered the role of the special school at the time. They suggested that it 'is clear that the educational context in which special schools have operated is changing rapidly'.<sup>429</sup> They saw it as inevitable that the impact of inclusion would lead to the closure of a number of special schools, which was likely to have implications for the availability of specialist support for those children and young people with the most complex of needs. They argued that over the years special schools have developed a wide range of knowledge, skills, and experience in relation to caring for and supporting young people with additional support needs.<sup>430</sup> They suggested that careful planning would be required to ensure adequate provision remains. This highlights an even greater need for more accurate data on the number of disabled children and young people in Scotland to ensure that accurate provision is available to meet their needs.

### **Residential schools at a time of legislative change**

In 2007 the Care Commission and HMIE published a joint report which was the first

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426 Sheila Riddell and Elisabet Weedon, 'Approaches to Dispute Resolution in Additional Support Needs in Scotland', *European Journal of Special Needs Education* 24, 4 (2009).

427 Riddell and Weedon, 'Approaches to Dispute Resolution'.

428 Sheila Riddell and Elisabet Weedon, 'Social Justice and Provision for Children with Additional Support Needs in Scotland', *Education, Citizenship and Social Justice* 12, 1 (2017).

429 Hammill and Clark, *Additional Support Needs*, 119.

430 Hammill and Clark, *Additional Support Needs*, 121.

national review of school care accommodation services in Scotland.<sup>431</sup> It was based on the first round of inspections of all of Scotland's residential schools following the Regulation of Care (Scotland) Act 2001. These joint inspections took place between 2002 and 2004 and made use of published core *National Care Standards* and quality indicators for education.<sup>432</sup>

Thirty-four residential special schools in Scotland were inspected at that time. Twenty-three catered for children and young people with additional support needs arising from significant social, emotional, and behavioural difficulties. Most of the young people had been involved with children's hearings or experienced significant difficulties in mainstream schools. Eleven schools supported children and young people with a range of additional support needs, including sensory impairment, physical disabilities, autism, and other complex needs. Some children had been placed primarily for care purposes, although they spent time with parents or carers at weekends and holidays. Some children in both types of residential schools attended on a 52-week-per-year placement because of their level of need or because of supervision requirements.<sup>433</sup>

The report noted that many schools had made investments to improve buildings and facilities, and, increasingly, 'children and young people had their own bedrooms, lockable as appropriate, decorated to their own taste and containing personal belongings'.<sup>434</sup> All the schools had one or more communal living area and dining area, and most had a high standard of food. In some schools, the surrounding grounds were a very positive feature, and most schools used these to good effect for recreational purposes.<sup>435</sup>

As regards creating the climate to ensure pupils' care and protection, the report highlighted the role of senior managers in promoting positive behaviour and relationships and celebrating success. Staff morale was noticeably higher in schools where the ethos was positive. Staff were clear about the aims and purpose of the school and clearly worked together as a team to fulfil these aims.<sup>436</sup>

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431 Care Commission and Her Majesty's Inspectorate of Education, *Residential Care and Education: Improving Practice in Residential Special Schools in Scotland* (Edinburgh: Scottish Executive, 2007).

432 Care Commission and HMle, *Residential Care and Education*, 1.

433 Care Commission and HMle, *Residential Care and Education*, 3.

434 Care Commission and HMle, *Residential Care and Education*, 6.

435 Care Commission and HMle, *Residential Care and Education*, 7.

436 Care Commission and HMle, *Residential Care and Education*, 9.

Inspectors acknowledged that in many of the schools, pupils sometimes exhibited extremely challenging behaviour, and in 'schools for pupils with complex needs, challenging behaviour often arose from a range of medical needs'.<sup>437</sup> A range of effective practices for managing challenging behaviour in the classroom were identified and included:

- small group settings
- clear communication of school policy on behaviour
- consistently applying rewards for positive behaviour and consequences for unacceptable behaviour
- the availability of consequences
- successfully implementing consequences through individualising the sanction
- rapid access to additional support
- effective support from senior education managers.<sup>438</sup>

The reward system worked effectively when staff and pupils were clear about the consequences of poor behaviour and when there was consistency across the school, though most schools found it difficult to maintain such consistency.

The report also commented on additional approaches and creative, individualised strategies, as well as the effective use of 'time-out' in a positive, supportive environment. While nearly all the schools used methods of de-escalating challenging behaviour, 'the quality of practice in relation to de-escalation and restraint varied'.<sup>439</sup> Effective risk assessment was identified as important in protecting young people, as was 'the paramount need to have a robust policy and clear procedures on child protection'.<sup>440</sup> In relation to absconding, schools varied in both the existence and quality of protocols with local police. It argued that best practice in protecting the rights of young people involved providing appropriate information about complaints

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437 Care Commission and HMle, *Residential Care and Education*, 9.

438 Care Commission and HMle, *Residential Care and Education*, 10.

439 Care Commission and HMle, *Residential Care and Education*, 11.

440 Care Commission and HMle, *Residential Care and Education*, 12.

procedures and access to children's rights officers, Childline, and the Care Commission.<sup>441</sup>

Inspectors stressed the importance of working together to meet pupils' needs, echoing some of the themes that emerged from the Education (Additional Support for Learning) Act 2004. Effective schools undertook risk assessment or individual crisis management assessment as part of the initial care planning process. They regularly reviewed and updated care plans to take account of changing needs and circumstances.<sup>442</sup> They also ensured effective links between care and educational planning, and engagement with reviews, including the participation of young people. Successful schools had devised and implemented individualised educational programmes which provided sufficiently challenging long- and short-term targets, with details of how these would be achieved within well-judged timescales.<sup>443</sup>

Concerning the implementation of the 2004 Act, the report stated that despite some schools' best efforts to obtain background information on young people from education authorities, 'this was often inadequate, and formal documentation, such as Records of Needs, was frequently incomplete or out of date'.<sup>444</sup> In best practice, senior managers in schools had started to take steps to arrange appropriate training for relevant staff regarding the implementation of the Act, so that they were knowledgeable about the features of legislation for pupils with additional support needs and disabilities.<sup>445</sup>

A minority of schools were providing 'a sufficiently broad and balanced curriculum which had taken account of national guidelines and also matched learning activities to the needs of their pupils'.<sup>446</sup> A few schools offered a choice of curriculum at the end of S2. Some schools appropriately offered Standard Grade and Highers in a range of subjects. Most were developing a range of NQ units across Access 1 to Intermediate 2. Some schools had not sufficiently matched the progression from 5–14 levels to NQ units, with the result that their units were at an insufficiently challenging level.<sup>447</sup>

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441 Care Commission and HMle, *Residential Care and Education*, 12.

442 Care Commission and HMle, *Residential Care and Education*, 14.

443 Care Commission and HMle, *Residential Care and Education*, 14.

444 Care Commission and HMle, *Residential Care and Education*, 15.

445 Care Commission and HMle, *Residential Care and Education*, 15.

446 Care Commission and HMle, *Residential Care and Education*, 20.

447 Care Commission and HMle, *Residential Care and Education*, 21.

Personal and social development (PSD) was identified as a core part of the curriculum by almost all schools. Targets in PSD for pupils with complex learning difficulties included the enhancement of aspects of independent living such as travel, budgeting, shopping, the use of household equipment, and the preparation of meals. In the case of young people experiencing social, emotional, and behavioural difficulties, targets in areas such as interpersonal skills, anger management, and citizenship were often highly appropriate.<sup>448</sup> Effective schools had put in place mechanisms to give pupils a voice, such as pupil councils or parliaments, and where 'the ethos was good or very good, young people had a range of opportunities to raise issues beyond their pupil council'.<sup>449</sup> 'Pupil voice' is another important theme that is apparent across other legislative and policy developments.

The report highlighted promoting pupils' learning through an appropriate curriculum. Sharing of information through effective key worker/key teacher systems improved support for pupil learning. Schools were increasingly providing suitable study facilities for homework, and some had developed homework clubs, although 'few schools had consistent homework practice'.<sup>450</sup> Schools also varied widely in provision of books, magazines, newspapers, puzzles, and games.

In relation to additional support needs, 'most schools which specialised in supporting pupils with communication, sensory or physical disabilities showed very good practice in knowing and responding to pupils' additional support needs'.<sup>451</sup> In contrast,

in some schools, particularly those supporting pupils experiencing social, emotional and behavioural difficulties, both education and care staff felt they did not have sufficient knowledge about, or training in, pupils' additional support needs. This was an increasing concern as many schools reported that more young people, with significant and complex learning difficulties, were being admitted to residential schools which specialised in supporting [those with] challenging behaviour.<sup>452</sup>

The report noted a lack of very good strategic management and planning for

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448 Care Commission and HMle, *Residential Care and Education*, 16.

449 Care Commission and HMle, *Residential Care and Education*, 16.

450 Care Commission and HMle, *Residential Care and Education*, 19.

451 Care Commission and HMle, *Residential Care and Education*, 18.

452 Care Commission and HMle, *Residential Care and Education*, 18.

improvement. In the small number of schools where this existed, there had been significant developments. In effective schools, leadership had established a clear vision for the standard of care and education, planning for improvement integrated care and education, care and education staff were fully involved in improvement planning, and a range of policies provided guidance to staff. However, 'only a few schools undertook formal observation of care and classroom practices, using shared criteria for evaluation'.<sup>453</sup> There were rigorous procedures in place for recruitment and development of care staff in line with the Scottish Social Services Council's Code of Practice.<sup>454</sup>

Staff in the schools inspected were striving to meet the needs of some of the most vulnerable young people in Scotland. All schools had staff who were highly committed to young people and worked hard to develop good relationships with them. Where schools were most effective, they had developed very good links between care and education staff, resulting in good collaborative work and effective approaches to planning for care and education. Staff had started to take account of the new *National Care Standards* and recently introduced regulations. This had led to better attention to the comfort, safety, and security of young people, and improved approaches to care and protection. Where all staff were committed to supporting pupils' learning within an appropriately broad, balanced, and flexible curriculum, pupils were often achieving well.

This very detailed account of inspections of residential schools in Scotland reflects many of the key themes in this report. The outcomes of these inspections suggest that there are committed individuals who are striving to support disabled children and young people to achieve their potential. Yet it also suggests that developments have been patchy and that more work is needed to ensure good multi-agency working and communication and better partnership working with parents, and that disabled children and young people are meaningfully involved in decision-making. The report demonstrates a commitment to ensuring that even when the education of disabled children and young people and those with additional support needs takes place in residential settings away from the family home, efforts are made to create a home-like environment with good-quality relationships that meet both the care and educational needs of children. This recognises the benefits of a home-like environment in promoting the health and wellbeing of disabled children and young

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453 Care Commission and HMle, *Residential Care and Education*, 25.

454 Care Commission and HMle, *Residential Care and Education*, 24.

people. Attention has also been given to ensuring that disabled children and young people who are educated in residential settings have access to as wide a curriculum as is appropriate for their learning needs to ensure they realise their educational potential.

### **GIRFEC: meeting the needs of disabled and looked-after children and young people?**

Getting It Right for Every Child (GIRFEC) is Scotland's national approach to improving outcomes for children and young people in Scotland, bringing together and coordinating services so that children and young people can get the help they need when they need it.<sup>455</sup> It is aimed at every child and young person, and their family, so that no one is left without the support they need and builds on existing strengths to improve wellbeing. It is a way of working that promotes partnership and recognises the rights of children and families to be involved in decision-making about the help they need and how that help should be organised and delivered. It aims to tackle needs early to avoid crisis situations developing and recognises that for some disabled children and young people living with chronic long-term health conditions and complex care needs, more targeted, coordinated care may be needed. GIRFEC takes a mainstreaming approach based on the principle that all children should be treated in the same way and as a result very little specific reference is made to disability.

The Scottish Government suggests that GIRFEC is a rights-based approach that brings the UNCRC to life. It aims to:

- ensure that children and parents have a clear point of contact within the system
- ensure that children receive the right help at the right time
- improve outcomes for children and young people

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<sup>455</sup> Scottish Executive, *Getting It Right for Every Child: Implementation Plan* (Edinburgh: Scottish Executive, 2006).

- create a culture of shared responsibility between education, health, and social work.<sup>456</sup>

GIRFEC identifies eight wellbeing indicators, known as the SHANARRI indicators, that suggest that every child should be:

- safe
- healthy
- achieving
- nurtured
- active
- respected
- responsible
- included.

It has ten main components:

- a focus on improving outcomes for children, young people, and their families based on a shared understanding of wellbeing
- a common approach to gaining consent and to sharing information where appropriate
- an integral role for children, young people, and families in assessment, planning, and intervention
- a coordinated and unified approach to identifying concerns, assessing needs, and agreeing actions and outcomes, based on the wellbeing indicators
- streamlined planning, assessment, and decision-making processes that lead to the right help at the right time.
- consistent high standards of cooperation, joint working, and communication where more than one agency needs to be involved, locally and across Scotland
- a lead professional (where necessary) to coordinate and monitor multi-agency activity
- maximising the skilled workforce within universal services to address needs and risks as early as possible

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456 Scottish Government, *Getting It Right for Every Child (GIRFEC)* (Edinburgh: Scottish Government). Available online: <https://www.gov.scot/policies/girfec>.

- a confident and competent workforce across all services for children, young people, and their families
- the capacity to share demographic, assessment, and planning information – including electronically – within and across agency boundaries.

GIRFEC sets out the intention that children should be at the centre of any planning to meet their wellbeing. Part 4 suggests that every child should have a named person (usually a health visitor or teacher), which should ensure that someone is responsible for helping children get the support they need when they need it. It should also be a clear point of contact for parents if they need advice or want to discuss any concerns about the wellbeing of their child. The aim was to help ensure services could provide more effective and coordinated support to children, young people, and parents.

GIRFEC sets out a National Practice Model to provide a framework to consider and assess children's and young people's wellbeing in a holistic, consistent, and strengths-based way. It promotes the participation of children, young people, and their families in making decisions about planned support. It aims to promote more effective multi-agency working, with all information being contained within an individual child's plan.

GIRFEC also provides a tool for documenting and analysing the child's world in the form of a resilience matrix. The resilience matrix uses four data sets on two axes to identify the context within which a child lives and the systems of support to which they have access. Vulnerability is compared with resilience, and adversity is compared with protective factors in the environment. They can be extended to frame the issues typically faced by disabled children and young people:

- Vulnerability may refer to impairment or disability that affects the child. It may also refer to secondary issues.
- Resilience considers how well the child is able to manage disability.
- Adversity considers issues faced by the child in managing disability.
- Protective environment considers the child's support system.

Stalker and Moscardini noted that there is always a risk that inclusive policies such as GIRFEC can overlook the specific needs of particular groups, including disabled children and young people:

GIRFEC is intended to apply to all children. However, inclusive policies that do not highlight the particular needs of disabled children and young people may inadvertently exclude them. These children often need additional support to benefit from mainstream services and there is concern that some children, particularly those with complex needs, may fall through the net ... Disabled children and young people have been relatively invisible within GIRFEC. What does 'healthy' mean for a life-limiting medical condition? What does 'achieving' mean for a child with complex multiple impairments?<sup>457</sup>

These questions draw attention to the importance of making 'reasonable adjustments' as set out in the Equalities Act 2010, acknowledging the additional support that disabled children and young people might need to achieve equality of outcomes. In previous work Taylor and colleagues noted that equity is not about treating all children the same, therefore 'getting it right for every child does not mean treating every child the same'.<sup>458</sup>

Critiques of GIRFEC from the perspective of those with disabilities have largely focused on the lack of participation of children and families in the process of creating plans and in designing relevant interventions. Mitchell and Colville<sup>459</sup> and Jundler<sup>460</sup> highlighted the importance of professional beliefs around child capacity and their understanding of what constitutes a competent view. Stalker and Moscardini argue that disabled children and young people tend to be framed in terms of individual vulnerability.<sup>461</sup> These beliefs influence the extent to which professionals find representations of children's views worthwhile. Further barriers are caused by challenges of communication for some disabled children and young people that may impact their ability to participate in the design and planning of their own care. Research by Morris suggests that some staff assume that disabled children and young people may not have views of their own or that their views will concur with

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457 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy'.

458 Julie Taylor, Kirsten Stalker, and Alasdair Stewart, 'Disabled Children and the Child Protection System: A Cause for Concern', *Child Abuse Review*, 1 (2015), 60.

459 Kerry L. Mitchell and Tracey Colville, "'Can You Hear Me?'" An Exploratory Study Investigating the Representation and Impact of Children's Views in Multi-Agency Meetings', *Children & Society* 36 (2022), 472–93.

460 Alexandra Jundler, 'Critiquing the Presence and Absence of Children and Young People's Participation in Policies for Looked After Children in Scotland' (PhD thesis, University of Edinburgh, 2023).

461 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy'.

those of their parents.<sup>462</sup> Stalker and colleagues also highlighted the lack of confidence and skill of practitioners in communicating effectively with disabled children and young people, which was thought to have negative consequences for engagement with GIRFEC.<sup>463</sup> GIRFEC guidance states that practitioners should be encouraged to identify any skills gaps they may have and be given opportunities to address these. Many workers would benefit from training in both disability equality and communication skills to support them in seeking disabled children and young people's views to engage them fully in decision-making.

Tisdall highlights a distinction between children's wellbeing and children's rights, suggesting that they are not equivalent concepts.<sup>464</sup> This often creates tension in policy terms. This is important to keep in mind when assessing the effectiveness of GIRFEC. She argues that children's wellbeing benefits from being aspirational and can incorporate children's relationships and collective needs, but it can risk being apolitical, utilitarian, and professionally led. Children's rights, on the other hand, emphasise minimum standards and do not always include matters that are important to children, such as love and friendship. They are, however, politically powerful, backed by law, and hold duty bearers accountable.<sup>465</sup>

### **GIRFEC and disabled children and young people**

To assess the effectiveness of GIRFEC in meeting the needs of disabled children and young people it is necessary to consider the National Review of Services to Disabled Children.<sup>466</sup> The review was undertaken jointly by the Scottish Government, the Convention of Scottish Local Authorities (COSLA), and the For Scotland's Disabled Children and Young People (fSDC) Liaison Project to provide a strategic assessment of services for disabled children and young people. It placed policy and practice relating to disabled children and young people in the context of GIRFEC and argued that 'the GIRFEC principles must be applied to the many complex problems besetting services for disabled children'. It also identified a need for 'a "more systematic plan of

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462 Morris, *Hurling into a Void*.

463 Kirsten Stalker, Pam Green Lister, Jennifer Lerpiniere, and Katherine McArthur, 'Child Protection and the Needs and Rights of Disabled Children and Young People: A Scoping Study', Abridged report for the University of Strathclyde (2010).

464 E. Kay M. Tisdall, 'Children's Rights and Children's Wellbeing: Equivalent Policy Concepts?', *Journal of Social Policy* 44, 4 (2015).

465 Tisdall, 'Children's Rights'.

466 Scottish Government, *Report of the National Review of Services for Disabled Children* (Edinburgh: Scottish Government, 2011).

action” to enable the necessary changes to systems, practices and cultures if the SHANARRI well-being indicators are to be delivered for disabled children’.<sup>467</sup>

The remit of the review was to advise Scottish Ministers, COSLA, and fSDC on

- the key needs of families with disabled children and young people, and of disabled children and young people themselves
- the current configuration of services for disabled children and young people, how well families’ and children’s needs are met, and whether gaps can be identified
- workforce/ training issues around disabled children and young people and families of disabled children and young people, and specific issues around children’s disability to inform wider work on workforce development within children’s services
- short-, medium and longer-term actions to deliver practical improvements to the wellbeing of disabled children and young people, their siblings, parents, and carers.<sup>468</sup>

The review agreed a set of key principles to underpin disability services and outlined a clear action plan. The key principles were in line with GIRFEC:

- a single system for the delivery of flexible, timely, and appropriate services focusing on the needs of the child
- each child to be seen first as a child, and second as disabled, acknowledging that every child has views and preferences as well as a way of expressing them, and that disabled children and young people have the same range of interests and aspirations as their peers
- service development, assessment, and delivery should be transparent, fair, and equitable
- within acknowledged constraints, the empowerment of children and

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<sup>467</sup> Children in Scotland, *Developing an Outcomes Model for Disabled Children and Young People in Scotland* (Edinburgh: Scottish Government Social Research, 2013), 25.

<sup>468</sup> Scottish Government, *Report of the National Review of Services for Disabled Children*, 1.

families through the availability of greater choice and control

- the correct balance between risk assessment and the promotion of children and young people's autonomy, resilience, and ability to grow
- the delivery of outcomes for children and young people across Scotland which consistently meet their needs and rights
- engagement with children and young people in the implementation of actions flowing from the review, and in the range of activity involved in the ongoing development and delivery of services<sup>469</sup>

The review noted that practical guidance on implementing GIRFEC for disabled children and young people was required. The Review Action Plan set the task of developing a GIRFEC Practice Briefing specific to disabled children and young people. The GIRFEC Programme Board identified five core components as initial priorities:

- (1) implementing the role of the Named Person
- (2) implementing the role of the Lead Professional
- (3) managing concerns and risks appropriately
- (4) using the National Practice Model for assessment and planning
- (5) promoting the single planning process for organisations to sign up and use.<sup>470</sup>

A common theme across all these priorities is 'the importance of hearing the child's voice'.<sup>471</sup> Consideration was also given to whether the National Practice Model was suitable for use with disabled children and young people or whether additional tools were needed. On the one hand, it was considered essential to see the child as a child first and disabled second, and thus undesirable to have separate procedures for disabled children and young people. On the other hand, there was concern that some children, for example those with complex health needs, may fall through the net within universal approaches. This is an important tension and policy dilemma that

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469 Scottish Government, *Report of the National Review of Services for Disabled Children*, 27.

470 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy', 15.

471 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy', 16.

runs throughout this period of legislative and policy development.

Key informants who took part in the review endorsed the GIRFEC approach as suitable for disabled children and young people. Yet a 2009 report by Burns for the Scottish Government set out in detail a number of problems that had been reported previously by parents to education authorities, including:

- a lack of information about what support was available for disabled children and young people and how to access it
- little or no coordination between agencies
- the child's or family's needs having to fit in with services rather than a person-centred approach
- the absence of a single named person acting as a central co-ordinating point.<sup>472</sup>

In response to some of these concerns, research undertaken by Children in Scotland for the Scottish Government on the development of a national outcomes model for disabled children and young people noted that GIRFEC did not provide the detail of how national outcomes could be achieved for disabled children and young people.<sup>473</sup> The research recognised the variety of settings, disabilities, and situations that practitioners may encounter. It suggested that this required an extensive outcomes model to meet the needs of disabled children and young people. The key recommendations were comprehensive and covered a broad range of issues including:

- the importance of knowledge sharing and effective collaboration across agencies and professions
- widespread use of evaluation of existing outcome measures
- the need for explicit policy and practice guidance that outlines extra steps required for those with disabilities to achieve their outcomes.

Regarding GIRFEC, the following recommendations were made:

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472 R. Burns, 'Children's Disability Services – Key Issues for Families'. Unpublished report for the Scottish Government (2009), cited in Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy'.

473 Children in Scotland, *Developing an Outcomes Model*.

Greater understanding of and commitment to, the GIRFEC ethos of supporting all children's needs, by seeing the child first, then their wellbeing needs, is required across the children's and adult sectors and including parents and carers.

Robust guidance supported by a communications and engagement programme, which is focussed on professionals to ensure that communication with children and families is better.<sup>474</sup>

The report concluded by suggesting that despite some advances there was a long way to go before the priorities set out in GIRFEC would be realised for disabled children and young people. It advanced a strong message around viewing a disabled child as a child first and disabled person second. Interestingly, this contradicts somewhat the position taken by proponents of the social model for disability who argue that the focus should remain on the structural issues that create barriers for disabled people. This contradictory positioning creates confusion for practitioners around how to prioritise their work with disabled children and young people.

### **GIRFEC and looked-after children and young people**

With specific reference to children and young people who are looked after, Extraordinary Lives aimed to demonstrate good care for children and young people who are looked after by local authorities, to identify good practice, and to recommend the ways in which care can be further improved.<sup>475</sup> It estimated that disabled children and young people account for about 15 per cent of looked-after children in Scotland, with half of these children and young people having social, emotional, and behavioural difficulties, and the remainder having physical or learning disabilities, mental health problems, or multiple disabilities. The report noted a decline in the use of long-stay hospitals for children with complex needs, which is a positive development.

Extraordinary Lives referred to the implementation of the Education (Additional Support for Learning) (Scotland) Act 2004 and the introduction of CSPs, and suggested that many looked-after children benefited from these arrangements for additional support which required greater multi-disciplinary working. It stressed that

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474 Children in Scotland, *Developing an Outcomes Model*, 52.

475 Social Work Inspection Agency, *Extraordinary Lives: Creating a Positive Future for Looked After Children and Young People in Scotland* (Edinburgh: Social Work Inspection Agency, 2006).

the education of looked-after children should be the concern of the whole local authority, and the importance of joint working and shared understanding between professionals.

### **Enhancing the rights of disabled people: UNCRPD and equalities legislation**

At an international level and just before the introduction of the Equalities Act 2010, the UNCRPD was adopted by the UN General Assembly in 2006 and came into force in 2008. It aims to promote and protect the rights and dignity of disabled people. The convention was ratified by the UK in 2009 and has played a key role in shifting perceptions of disabled people from objects of charity, medical treatment, and social protection to citizens with rights, capable of claiming those rights and making decisions about their lives.

With specific reference to disabled children and young people, the preamble to the UNCRPD recognises that they 'should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children' and recalls the obligations to that end undertaken by states parties to the UNCRC.<sup>476</sup> The following articles are of relevance:

- Article 3 sets out the general principles of the UNCRPD, including non-discrimination, full and effective participation and inclusion in society, and respect for the evolving capacities of children with disabilities and respect for their right to preserve their identities.
- Article 7 recalls the obligation to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with others; that the best interests of the child should be a primary consideration; and that children with disabilities have the right to express their views freely on all matters affecting them.
- Article 19 outlines the equal right of all persons with disabilities to live in the community with choices equal to others, and their right to independent living, underlining states' responsibility to ensure that persons with disabilities have access to a range of in-home, residential, and other community support services necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.
- Article 23 states that disabled children and young people have equal rights

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<sup>476</sup> United Nations Convention on the Rights of Persons with Disabilities, paragraph 18.

with respect to family life, that they should not be separated from their parents against their best interests, and never on grounds of disability, and, if alternative care is necessary, every effort should be made to provide it within the wider family, or within the community in a family setting.

- Article 24 expresses a recognition of the right of persons with disabilities to education and calls on states to ensure an inclusive education system and lifelong learning.
- Article 31 calls on states to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. This also appears to be significant given the problems in gathering accurate data on disabled children and young people discussed throughout this report.

The UNCRPD, as discussed previously, notes the difficulties in collecting appropriate data about disabled children and young people, which means our knowledge of the number of disabled children and young people internationally, and their experiences and outcomes is limited.

The UNCRPD has been informed by the social model of disability,<sup>477</sup> although, as discussed earlier, the model itself has been open to critique because of its focus on societal barriers and its lack of acknowledgement of the impact of impairment. Crow argues that:

As [disabled] individuals, most of us simply cannot pretend with any conviction that our impairments are irrelevant because they influence every aspect of our lives. We must find a way to integrate them into our whole experience and identity for the sake of our physical and emotional well-being, and, subsequently, for our capacity to work against Disability.<sup>478</sup>

Thomas promotes a social relational understanding of disability. This sees disability as 'a form of social oppression involving the social imposition of restrictions of

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477 Theresia Degener, 'Disability in a Human Rights Context', *Laws* 5, 3 (2016), 35.

478 Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability* (1992). Available online: <https://www.roaring-girl.com/work/including-all-of-our-lives-renewing-the-social-model-of-disability>

activity on people with impairments and the socially engendered undermining of their psycho-emotional well-being'.<sup>479</sup>

The UNCRPD also puts forward a human rights model, noting that disability is a natural part of human diversity that must be respected and supported in all its forms. It was argued that disabled people have the same rights as everyone else in society and impairment must not be used as an excuse to deny people their rights. This model therefore encompasses the need for equality, non-discrimination, and the full inclusion and participation of disabled people.

Riddell suggests that the UNCRPD has been influential in promoting inclusive education.<sup>480</sup> Article 24 stipulates the need for disabled students to 'feel valued, respected, included and listened to'.<sup>481</sup> It requires states to ensure 'an inclusive education system at all levels' which is directed to 'enabling persons with disabilities to participate in a free society' and that disabled children and young people should have access to primary and secondary education 'on an equal basis with others in the communities in which they live'.<sup>482</sup> However, the UK entered a reservation to the effect that children with disabilities could be educated outside their local community if 'more appropriate education provision is available elsewhere'.<sup>483</sup>

McCusker and colleagues suggest that the overall impact of the UNCRPD on social work practice has been limited.<sup>484</sup> They suggest that while it can be harnessed to strengthen rights-based social work practice, local policies and practices are often slow to shift. They argue that legislative change alone is insufficient. Instead, what is needed is a whole-systems change that includes the use of a human rights framework to inform budgeting decisions, minimum core obligations, and a statutory responsibility to fill them.

Within the UK and Scottish context, the Disability Discrimination Act 1995 was significantly extended and amended by the Disability Discrimination Act 2005 and

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479 Thomas, *Female Forms*.

480 Riddell, *Autonomy, Rights and Children*.

481 UNICEF Regional Office for Europe and Central Asia, *Understanding Article 24 of the Convention on the Rights of Persons with Disabilities: Inclusive Education* (Geneva: UNICEF, September 2017).

482 UNICEF Regional Office for Europe and Central Asia, *Understanding Article 24*.

483 UNICEF Regional Office for Europe and Central Asia, *Understanding Article 24*.

484 Pearse McCusker, Lauren Gillespie, Gavin Davidson, Sarah Vicary, and Kevin Stone, 'The United Nations Convention on the Rights of Persons with Disabilities and Social Work: Evidence for Impact?', *International Journal of Environmental Research and Public Health*, 20 (2023).

then replaced by the Equality Act in 2010, bringing in more protection for disabled people. The Disability Discrimination Act 2005 aimed to strengthen disability rights by extending the reach of the 1995 Act to place a duty on local authorities to promote equality for disabled people, known as the Disability Equality Duty. This meant local authorities had to promote equality for disabled people and challenge discriminatory attitudes. With reference to education, the Disability Equality Duty required schools to be proactive in eliminating disability-related harassment and promoting more positive attitudes towards disabled children and young people.

The duty can be considered a key lever in combating the bullying and harassment of disabled children and young people.<sup>485</sup> With specific reference to England, a study by MENCAP found that eliminating discrimination and harassment was not a priority for schools in England.<sup>486</sup> They found that only one in 40 schools had a disability equality scheme and there was confusion in schools over their legal obligations. Indeed, the UK Children's Commissioners found that despite the statutory duties on public authorities to promote positive attitudes towards disabled people and to encourage participation by disabled people in public life, there was limited evidence of the impact of these duties on the lives of disabled people.<sup>487</sup> A more recent study in Scotland further suggested that tackling the bullying and discrimination faced by disabled children and young people remained particularly challenging, given the difficulties in identifying the population.<sup>488</sup>

The 2005 Act reinforced the importance of reasonable adjustments to ensure accessible services for disabled people. Indeed, it is argued that this Act mainstreamed disability rights within local authorities and made it unlawful for a public authority to treat a disabled person less favourably than a non-disabled person in carrying out any of their functions. Specifically, regarding education the Act required qualification-awarding bodies to make reasonable adjustments for access and provision. However, Mepham found that although there was clear anti-discrimination legislation in place, as well as policy initiatives that aimed to improve

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485 Sarah Mepham, 'Disabled Children: The Right to Feel Safe', *Child Care in Practice* 16, 1 (2010), 19–34.

486 MENCAP, 'Just Not a Priority: Schools and Disability Equality' (London: Mencap, 2008).

487 United Kingdom Children's Commissioners, *Report to the United Nations Committee on the Rights of the Child* (2008). Available online: [Report to the United Nations Committee on the Rights of the Child | Children's Commissioner for England](#).

488 Roseann Maguire, Alastair Wilson, and Andrew Jahoda, 'Talking About Learning Disability: Promoting Positive Perceptions of People with Intellectual Disabilities in Scottish Schools', *International Journal of Developmental Disabilities* 65, 4 (2018), 257–264.

the lives of disabled children and young people, these were insufficient to ensure disabled children and young people were able to fully enjoy their rights.<sup>489</sup>

The Equality Act 2010 aimed to address some of these concerns by prohibiting discrimination and harassment based on certain specified protected characteristics:

- race
- sex
- disability
- sexual orientation
- religion or belief
- age
- gender reassignment
- pregnancy and maternity
- marriage and civil partnership.

For the purposes of the Act, 'a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities'.<sup>490</sup>

As well as giving greater legal protection against discrimination, the Act emphasises the legal duty on education providers, employers, and service providers to make reasonable adjustments so disabled people can take part in education, use services, and work. The provision of the Act for schools does not apply in relation to age and marriage and civil partnership.

Publicly funded education providers have a duty under the Equality Act not to discriminate against potential, current, or former students when helping the person access a course at college or university. An education provider could be a university, college, local authority, or school which runs further education courses. All aspects of studying are covered including:

- course admissions
- the provision of education
- access to any benefit, facility, or service

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489 Mepham, 'Disabled Children: The Right to Feel Safe'.

490 Equality Act 2010, Section 6(1).

- exclusions.

Private education and training providers also have duties under the Act.

## 2009–15

### Introduction

This period saw ongoing interest in the lives of disabled children and young people and those with additional support needs. As a result, we see the development and passing of new legislation and the revision and amendment of existing legislation to further enhance the rights and ensure the protection of children and young people. According to Riddell and Weedon, devolution and the independence referendum, which took place in September 2014, had a major impact on education, leading Scottish Ministers to 'decentre' English education, emphasising the difference between the Scottish system and that of the rest of the UK.<sup>491</sup> In addition, the economic crash of 2008 had significant consequences for the delivery of Scottish public services, leading to cuts and restructuring, even in areas seen as national priorities such as education. A series of legislative developments from the mid-2000s have radically altered the concept of additional support needs and have sought to prioritise children's rights.<sup>492</sup> We now turn to discuss these developments in this section.

### Children receiving education in hospital due to mental disorder or learning disability

There was ongoing interest in children and young people experiencing mental disorder who may require to be educated in hospital. In 2009 the Mental Welfare Commission for Scotland published a report based on visits to young people using inpatient and community mental health services.<sup>493</sup> It noted that all specialist inpatient units have education provision on site. However, it found that education was an issue when young people were admitted to a non-specialist ward, even when this was a designated ward for the admission of young people. It was clear from the information gathered that limited access to education was available for some young

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491 Sheila Riddell and Elisabet Weedon, 'Changing Legislation and Its Effects on Inclusive and Special Education', *British Journal of Special Education* 41, 4 (2014).

492 Riddell and Weedon, 'Changing Legislation'.

493 Mental Welfare Commission for Scotland, 'Report from Our Visits to Young People Using In-Patient and Community Mental Health Services in Scotland' (2009). Available online:

[CAMHS\\_report\\_2010.pdf](#).

people, with their own school providing work when contacted. Staff working in non-specialist wards often did not know how arrangements should be made to ensure provision of appropriate education.

The report also identified specific issues for young people with a learning disability and the lack of specialist inpatient facilities for this group of young people, which can result in the admission of a young person with a learning disability to a general adult ward or an adult learning disability ward. These findings are confirmed by Stalker and Moscardini who highlighted the neglect of the social and educational needs both of children who are looked after and those spending prolonged periods of time in hospital.<sup>494</sup>

### **Amendments to additional support for learning legislation**

The 2004 Act was amended by the Education (Additional Support for Learning) (Scotland) Act 2009. Of particular significance was an extension to the definition of a child with additional support needs in Section 1 of the 2004 Act to include any child or young person looked after by a local authority. The education authority must consider whether such a child requires a CSP (Section 6(1)(A) of the 2004 Act). The presumption can be displaced if, in the course of identifying the particular additional support needs of such a child, the education authority forms a view that the child or young person is, or is likely to be, able to benefit from school education without the provision of additional support (Section 1(1)(B) of the 2004 Act).

Other amendments included:

- Parents of children and young people with additional support needs can make out-of-area placing requests, whether or not they have a CSP.
- Parents of children without a CSP but with additional support needs will have access to dispute resolution outside the formal appeals route.
- The definition of additional support is clarified by specifying that it is not limited to an educational environment.
- An advocacy service must be available to parents and young people free of charge for tribunal proceedings.
- Education authorities are required to provide for independent mediation services that cannot include in-house mediation.
- Authorities have a duty to seek and take account of the young person's views

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494 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy'.

in relation to any information provided to an appropriate agency or agencies with regard to them leaving school.

A further change introduced by the 2009 amendments was that a disabled child could request a psychological assessment, as well as the provision of advocacy for parents and disabled children and young people for tribunal appeals, as outlined above. The 2009 Act reflects a growing emphasis on children's rights in Scotland.

### **Changes to the children's hearings system**

Further legislation was passed with the introduction of the Children's Hearing (Scotland) Act in 2011, which came into force in June 2013. A more detailed analysis of its key provisions is provided by Norrie.<sup>495</sup> While the Act is not specifically targeted at disabled children and young people, its emphasis on child welfare and promoting the participation of children aims to ensure that all children, including disabled children and young people, are properly supported within the system. The Act therefore continued Kilbrandon's vision.

Concerns have been raised around the accessibility of the hearings system for disabled children and young people and its effectiveness in offering protection to those disabled children and young people who have experienced abuse.<sup>496</sup> Clarke and Fitzsimmons noted, for example, that the use of speech and language therapists to promote the participation of disabled children and young people within the hearings was not widespread, creating the potential for exclusion and discrimination.<sup>497</sup> This is particularly pertinent given that Stalker and colleagues suggest that the abuse of disabled children and young people is more likely to go undetected.<sup>498</sup> There are several reasons for this, including that practitioners may over-empathise with parents of disabled children and young people. They suggested that considerable change was required to child protection services to make them more accessible to all disabled children and young people.

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495 Norrie, 'Legislative Background to the Treatment of Children and Young People'.

496 Janice McGhee and Susan Hunter, 'The Scottish Children's Hearings Tribunals System: A Better Forum for Parents with Learning Disabilities?', *Journal of Social Welfare and Family Law* 33, 3 (2011), 255–66.

497 Ann Clark and Dermot Fitzsimmons, 'Awareness of and Support for Speech, Language and Communication Needs in Children's Hearings', *Scottish Journal of Residential Child Care* 17, 4 (2018).

498 Stalker *et al.*, 'A Study of Disabled Children and Child Protection'.

## **The Doran Review: providing the right support at the right time?**

Following these developments, the Doran Committee was formed and the Strategic Review of Learning Provision for Children and Young People with Complex Additional Support Needs was published in 2012 with a particular focus on those children and young people with the most complex needs.<sup>499</sup> It considered the role of residential schools for children and young people with complex additional support needs. Doran recognised a lack of consensus around definitions in relation to complex additional needs and called for further data collection and strategic planning. The Doran Review team stated that complex additional support needs should not be interpreted as 'referring solely to the needs of children with multiple physical, sensory and intellectual impairments'.<sup>500</sup> They also recognised that complex additional support needs can arise from any of the four factors outlined in the Code of Practice, discussed earlier in this chapter, and can refer to the complexity of support arrangements required.

The starting point for the review was a recognition of education as a fundamental human right and the key to a more just society. Doran acknowledged that the review had identified 'improvements in learning and care for children and young people with complex additional support needs ... over many decades as a consequence of progressive legislation, policy and practice initiatives'.<sup>501</sup> Likewise,

considerable improvements have been made to residential care over the last decade as a result of developments in approaches to care, education and therapy and relationships with families. Residential placements are often used as part of the support for families to enable positive relationships between child and parent to be maintained. Shared care arrangements between residential schools and families are common.<sup>502</sup>

However, it was noted that many who spoke to the review were disheartened by repeated failures to improve in key areas. This was not helped by the challenging financial climate. The review identified several key issues:

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499 Doran, *The Right Help at the Right Time*.

500 Doran, *The Right Help at the Right Time*, 63.

501 Doran, *The Right Help at the Right Time*, 3.

502 Doran, *The Right Help at the Right Time*, 25–6.

- the need for joined-up and accurate assessment to take a whole-child approach
- issues in gaining the views of children and young people and lack of voice
- variation in policy, terminology, services, and provision across the country
- concern about choice and access to services
- lack of preparation for transition to post-school services
- the need for training and experience in the specific conditions giving rise to additional support needs
- tension between grouping children with varied complex additional support needs together in larger schools, and capacity for smaller units or schools to undertake specialised work
- unhelpful attitudes and values in some organisations and continued polarisation about the concept of inclusion.

Overall, the key message from the review was around the importance of getting the right help at the right time in the right place from a sympathetic and respectful adult who understood the child and did not over-protect.<sup>503</sup>

The review set out a vision that:

- children and young people with complex additional support needs should have access to early integrated assessment
- services offered should be responsive to their changing needs, lead to the best possible outcomes and be delivered where possible in the home community
- there is a presumption of entitlement to the highest quality of services that are inclusive, efficient, equitable in meeting assessed needs and promote optimum inclusion
- local and national provision are complementary and operate with coherence.<sup>504</sup>

It made 21 recommendations grouped into four main themes: culture, complex additional support needs, and expertise; policy, choice, and learning experiences;

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<sup>503</sup> Doran, *The Right Help at the Right Time*, 9–14.

<sup>504</sup> Doran, *The Right Help at the Right Time*, 7.

inter-agency working, planning, and review; and national and local provision and the role of the Scottish Government.

In terms of policy, choice, and learning experiences, the review highlighted the desire to maintain children and young people with their families and in schools in their immediate community as far as possible. It acknowledged that a residential placement would sometimes be deemed necessary. This was particularly the case for some children and young people with social, emotional, and behavioural difficulties who may need to attend these schools on a residential basis, not because the school is at a distance from their homes but because their needs are most likely to be met with 24-hour care and education often over 52 weeks per year. The placement, in such circumstances, would be a placement of choice based on the needs of the child or young person.<sup>505</sup> The review noted that some children and young people attended such residential schools because of decisions of the Additional Support Needs Tribunals for Scotland, or through supervision requirements of the children's hearings system.<sup>506</sup> This reflects the range of children and young people in residential schools with different legal statuses creating a complex and intersecting legal and policy framework within which services and practitioners are required to function.

In relation to national and local provision, the review reiterated the central desire to maintain children and young people within their families and in schools in their communities: 'Whereas in the past national placements were largely either full-time residential or day, now grant-aided and independent schools offer more flexible packages often working closely with the authorities and local provision.'<sup>507</sup>

These packages could involve 52-week or term-time residential education and care, or short-term residential care and education for assessment or intensive enhancement programmes.

The review identified a range of reasons why children and young people are placed in settings other than local authority provision:

Some complex support needs are of such low incidence within authorities that it would not be practical or cost effective for an authority to meet

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505 Doran, *The Right Help at the Right Time*, 25.

506 Doran, *The Right Help at the Right Time*, 25.

507 Doran, *The Right Help at the Right Time*, 40.

those needs without external assistance. Some needs require specialist resources and expertise that again would not be practicable for the authority to provide on their own. Some children and young people have needs of such severity and complexity that they exhaust the specialist resources within an authority. In some instances, an authority may be able to meet some of the child's needs but not all, for example meeting education needs may be possible but the child may not have a viable family placement.<sup>508</sup>

The report noted that 'residential placements outwith authorities in the independent and grant-aided special schools have attracted controversy for a number of reasons'.<sup>509</sup> These include negative perceptions about cost and quality, tension between independent providers and local authorities, and fundamental opposition to residential care on the part of some professionals. However, even in a context of negativity and mistrust, significant common ground emerged:

- The complex additional support needs of each child and young person should be the determining factor when considering the future development of services.
- A more strategic approach should be taken to developing services across Scotland, taking full account of the varying contexts of communities.<sup>510</sup>

The report therefore made five recommendations: develop a strategic planning and commissioning process; ensure an effective system of national data collection; provide funding to nationally commissioned services to meet the complex additional support needs of children and young people; review the overall level and distribution of funding provided to non-local authority services; and ensure that grant-aided special schools have the necessary support to prepare for the development of a national planning and commissioning process.<sup>511</sup> The review emphasised the importance of good data collection on disabled children and young people to inform future planning and development of services. This appears to be particularly important when considering the needs of children and young people that are of such

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508 Doran, *The Right Help at the Right Time*, 40.

509 Doran, *The Right Help at the Right Time*, 41.

510 Doran, *The Right Help at the Right Time*, 42–3.

511 Doran, *The Right Help at the Right Time*, 46–7.

a complex nature that existing provision is unlikely to suffice.

It also noted that the Scottish Government had provided additional funding for short breaks and urged that such provision should not be reduced because of budgetary pressures.<sup>512</sup> The review made four recommendations; these addressed guidance on meeting the learning needs of children and young people with complex additional support needs; provision of aids to mobility and communication; the transition from children's to adult services; and the development of a performance management framework.<sup>513</sup>

In relation to culture and expertise, the review made eight recommendations relating to organisational values, qualifications and training, workforce planning, research, and mapping of provision. Four recommendations addressed inter-agency working, planning, and review. These addressed the single plan proposed in the Children and Young People Bill, discussed below, the accountability of local authorities in implementing national policies and legislation, guidance and support for the application of the GIRFEC approach, and improvement of specialist communication skills.

The Scottish Government accepted most of the recommendations of the Doran Review, including those focused on strategic planning, commissioning, and funding of national services. Some of the recommendations focused on local authorities and other agencies. The Scottish Government partly accepted these and proposed to work with agencies to take forward the recommendations.<sup>514</sup>

### **School inspections**

Several school inspections were carried out during this time; a useful summary of reports carried out between 2008 and 2011 was published by Education Scotland in 2012. In relation to special education, 205 inspections covered special units and special schools; these included 35 residential special schools. The report noted that the quality of teaching and learners' experiences continued to improve, with positive relationships between staff and learners being a strong feature of this. In residential special schools and secure care services, these improvements were assisted by the

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512 Doran, *The Right Help at the Right Time*, 28.

513 Doran, *The Right Help at the Right Time*, 29.

514 Scottish Government, *Meeting the Needs of Scotland's Children and Young People with Complex Additional Support Needs: The Scottish Government's Response to the Doran Review* (Edinburgh: Scottish Government, 2012), 15–16.

availability of suitably qualified teachers as well as schools' ability to attract and retain teachers and other specialist staff.<sup>515</sup>

While, in general, children and young people's attainment was improving, there was 'still considerable scope to increase expectations and raise attainment for some children and young people, particularly those with social, emotional and behavioural needs, and those who are looked after'.<sup>516</sup> In terms of schools supporting children and young people to develop and learn, the Education Scotland report went on to say that most residential schools and secure services 'plan opportunities to develop the skills and attributes of the four capacities set out in the Curriculum for Excellence'.<sup>517</sup> However, in many residential schools, there needs to be more account of the care context in curriculum planning. In addition, residential special schools varied in implementing a coherent curriculum across the age range. This was 'partly the result of shorter placements and the impact of interrupted learning experienced by many of these children and young people'.<sup>518</sup> The report also noted that care and education staff were collaborating to 'develop more relevant and progressive approaches to promoting health and wellbeing', including approaches 'that focus on positive attitudes and nurturing'.<sup>519</sup>

Most residential special schools, and almost all secure care services, have now developed initial assessments which involve the use of comprehensive baseline data and careful planning to take forward young people's learning and care needs. In residential special schools, care and education staff jointly support children and young people to achieve their learning targets, but there is considerable scope to develop further shared approaches to supporting the learning of children and young people in care settings.<sup>520</sup>

While the report identified the need to improve partnership working between mainstream and special schools, it noted an improvement in partnerships between schools, local authorities, and relevant agencies, with an increasing understanding of

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515 Education Scotland, *Quality and Improvement in Scottish Education: Trends in Inspection Findings 2008–2011* (Livingston: Education Scotland, 2012), 23.

516 Education Scotland, *Quality and Improvement*, 23.

517 Education Scotland, *Quality and Improvement*, 24.

518 Education Scotland, *Quality and Improvement*, 24.

519 Education Scotland, *Quality and Improvement*, 24.

520 Education Scotland, *Quality and Improvement*, 24.

the importance of GIRFEC. Most independent special schools were beginning to develop better links with placing authorities to establish agreed outcomes for young people.<sup>521</sup>

Despite a shift towards enhanced partnership working with parents, as set out in the Education (Additional Support for Learning) (Scotland) Act 2004, Education Scotland highlights ongoing challenges in partnership working with parents, particularly for secure care services and schools for young people with social, emotional, and behavioural difficulties, but does not provide further details. There was a continuing issue in the consistent provision of CSPs, with particular concern over the needs of 'children and young people who are looked after', young carers, or children and young people with mental health difficulties.<sup>522</sup>

### **Support for people with learning disabilities**

Some of the challenges outlined above around the need for greater partnership working and coordination, and the more meaningful involvement of children and families, are also echoed in support for people with learning disabilities. Following on from the publication of *The Same As You?* in 2000, a new national learning disability strategy, *The Keys to Life*, was published in 2013.<sup>523</sup> The Scottish Government vision for people with learning disabilities is essentially the same as its vision for all its citizens: that everyone, including people with learning disabilities, should be able to contribute to a fairer Scotland where health inequalities are addressed and people are supported to flourish and succeed. People with learning disabilities should be treated with dignity, respect, and understanding, and should be able to play a full part in their communities and live independent lives free from bullying, fear, and harassment. This highlights a theme that has been touched on throughout this report around having the same goals and ambitions for disabled people, including children and young people, as all other citizens. The goal of policy is, therefore, to identify the additional support that people might need to realise their potential.

*The Keys to Life* takes a rights-based approach that has been informed by the UNCRPD and is underpinned by the PANEL principles (participation, accountability, non-discrimination, empowerment, and legality). The PANEL principles are now commonly used by the Scottish Government to facilitate its human rights-based

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521 Education Scotland, *Quality and Improvement*, 25.

522 Education Scotland, *Quality and Improvement*, 25.

523 Scottish Government, *The Keys to Life*.

approach to policy-making. They provide a framework to ensure that human rights are respected, protected, and fulfilled, and emphasise the importance of involving people in decisions that affect their rights. This should ensure accountability, promoting a non-discriminatory approach that aims to empower individuals. Importantly, this approach promotes the grounding of specific actions in legal rights. This is set out in more detail in the national health and wellbeing outcomes framework, published by the Scottish Government in 2015 as part of the statutory guidance accompanying the Public Bodies (Joint Working) (Scotland) Act 2014.<sup>524</sup>

The first implementation framework associated with *The Keys to Life* was produced for 2015–17.<sup>525</sup> It led to a number of developments around healthy lifestyles, improved choice and control, and progress for people with learning disabilities towards greater independence and active citizenship. A further implementation framework was published in 2019.<sup>526</sup> This focused on housing, educational outcomes, accessibility of healthcare, and employment. At the heart of this framework was a commitment that recognised that people with learning disabilities have the same aspirations and expectations as everyone else. They want to play a full part in their communities.

The implementation framework set out several priority themes. Theme 2 related to learning and highlighted the importance of teachers in helping people with learning disabilities to do well in school. It made the following points:

- Teachers need more support to help pupils with learning disabilities.
- Tests and exams do not show what people with learning disabilities do.
- Transitions are difficult for pupils with learning disabilities.

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524 Scottish Government, *National Health and Wellbeing Outcomes: a Framework for Improving the Planning and Delivery of Integrated Health and Social Care Services* (Edinburgh: Scottish Government, 2015).

525 Scottish Government, *The Keys to Life: Implementation Framework 2015–2017* (Edinburgh: Scottish Government, 2019).

526 Scottish Government, *The Keys to Life: Unlocking Futures for People with Learning Disabilities, Implementation Framework and Priorities 2019–2021* (Edinburgh: Scottish Government, 2019).

- People with learning disabilities do not have enough choices at school or college.<sup>527</sup>

It recommends that work with local government is needed 'to improve the consistency of additional support for learning across Scotland, through improved guidance, building further capacity to deliver effective additional support and improving career pathways and professional development'.<sup>528</sup> There is a continued emphasis on collaborative working, and it is recommended that work should be carried out 'in partnership with Education Scotland, the Association of Directors of Education, local authorities, and other leaders on awareness raising to stimulate cultural change within our schools to improve the experiences of pupils with learning disabilities'.<sup>529</sup>

These policy directives are significant as evidence has confirmed that people with learning disabilities face a number of barriers, including lower life expectancy (20 years lower, on average, than the general population) and low employment rates (7 per cent compared to the 73 per cent rate for the general population), which make it more challenging for people to live the lives they want to.<sup>530</sup>

### **The GIRFEC influence: the Children and Young People (Scotland) Act 2014**

The Children and Young People (Scotland) Act 2014 aimed to support the Scottish Government's ambition for Scotland to be the best place to live and grow up in. Some of the key provisions of the Act were as follows:

- Part 1 focuses on rights of children and states that Scottish Ministers must keep under consideration whether there are any steps they could take which would or might secure or further effect in Scotland the UNCRC requirements. They should, if appropriate, take any steps identified.
- Part 3 places a duty on each local authority and the relevant NHS board to jointly prepare a Children's Services Plan. These plans should be prepared with

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527 Scottish Government, *The Keys to Life: Unlocking Futures*, 28.

528 Scottish Government, *The Keys to Life: Unlocking Futures*, 28.

529 Scottish Government, *The Keys to Life: Unlocking Futures*, 29.

530 Maria Truesdale and Michael Brown, *People with Learning Disabilities in Scotland: 2017 Health Needs Assessment Update Report* (Edinburgh: NHS Health Scotland, 2017); Laura Anne Hughes-McCormack, Ewelina Rydzewska, Angela Henderson, Cecilia MacIntyre, Julie Rintoul, and Sally-Ann Cooper, 'Prevalence and General Health Status of People with Intellectual Disabilities in Scotland: A Total Population Study', *Journal of Epidemiology and Community Health* 72, 1 (2018).

involvement of the service providers capable of having a significant effect on the wellbeing of children. Plans should cover services for children generally and for children with specific needs and related services.

- Part 4 sets out the provision of named persons for young people who have attained the age of 18 while at school and remain at the same school or another school.
- Part 5 makes reference to the child's plan.
- Part 9 focuses on corporate parenting. This applies to every child who is looked after by a local authority, is under the age of 25, and who, on their 16th birthday or any subsequent time, is no longer looked after by the local authority. It also applies to a young person who is at least 16 but under 26 and was formerly looked after by a local authority. It also sets out the responsibilities of corporate parents. It is their duty to be alert to matters which adversely affect the wellbeing of children and young people, assess the needs of those children and young people for services and support, promote the interests of those young people, seek to provide opportunities for those children and young people to participate in activities designed to promote their wellbeing, and take such actions as it considers appropriate to help those young people.
- Part 12 sets out services in relation to children at risk of becoming looked after. This includes the provision of relevant services to parents. This might involve providing information, advising or counselling, or taking other action to facilitate the addressing of a matter. An eligible child is one who the authority considers to be at risk of becoming looked after.

The Act was the legal underpinning to GIRFEC. It provided the principles and legal basis for its development. It aimed to improve the way services worked together to support children, young people, and families, and ensure children's rights are respected. It was comprehensive and included sections relating to the rights of children, children's services planning, early learning and childcare, looked-after children, adoption, children's hearings, detention in secure accommodation, and consultation on certain proposals in relation to schools. The Act took a preventative approach and recognised the need for more voluntary engagement with families to ensure this works effectively. Importantly, the Act introduced a child rights and wellbeing assessment.

However, as previously mentioned,<sup>531</sup> Tisdall argued that the concepts of needs and rights are fundamentally different and should not be treated the same. She suggests that the relationship between children's rights and wellbeing remains unresolved in Scottish policy and that wellbeing dominates over rights. She further suggests that the 2014 Act and associated policy do not hold local authorities to account for any breach of children's rights, minimising their impact and creating local discrepancies.<sup>532</sup>

Section 1 of the Act required the Scottish Government to ensure the key principles of the UNCRC (particularly those concerning children's participation rights) are reflected in all relevant legislation. It therefore aimed to incorporate children's rights more fully, in line with the UNCRC. Rights set out in the Act included the right to information, advice, and support, and the child's right to have their voice heard in decisions on assessment and support, and to be involved in resolving disagreements. There were some caveats to this, relating to assessment of capacity. Taylor and colleagues noted that thresholds for disabled children and young people within assessment processes under various pieces of legislation may in fact be higher than for non-disabled children and young people suggesting an inequity of approach.<sup>533</sup> They highlighted that practitioners often felt they did not have the confidence to work with disabled children and young people and their families, a consistent theme throughout this report and perhaps reflective of the nature of generic social work provision and education in Scotland.

Riddell suggests that the 2014 Act was particularly focused on child protection.<sup>534</sup> The Act could be considered very relevant for disabled children and young people as evidence indicates they are significantly more likely to be subject to abuse, harm, or neglect. In March 2010, for example, 5 per cent of children on the child protection register were reported as having some form of disability and 20 per cent were reported as having an unknown disability status.<sup>535</sup> A higher proportion of disabled children and young people may be looked after, in secure care, on the child protection register, subject to school exclusions, or in another educational institution away from the school. Of those in secure care, 81 per cent had an additional support

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531 See [GIRFEC: meeting the needs of disabled and looked after children and young people?](#)

532 Tisdall, 'Children's Rights'.

533 Taylor *et al.*, 'Disabled Children and the Child Protection System: A Cause for Concern'.

534 Riddell, *Autonomy, Rights and Children*.

535 Scottish Government, *Children's Social Work Statistics 2009/10* (Edinburgh: Scottish Government, 2010).

need, 26 per cent of which were social, emotional, or behavioural difficulties.<sup>536</sup>

In July 2014, 15,580 children were looked after by local authorities in Scotland. Of these, local authorities recorded a primary additional support need for 1,893 children (12%). Of those 1,893 children,

- 510 children were recorded as having multiple disabilities
- 274 were recorded as having learning disabilities, with a further 36 having a specific learning disability
- 146 were recorded as having an autistic spectrum disorder
- 94 were recorded as having a physical or motor impairment.<sup>537</sup>

Such were the concerns about the potential risk of abuse or harm towards disabled children and young people that in 2014 the Scottish Government issued a guide on protecting disabled children and young people from abuse.<sup>538</sup> The additional notes for practitioners set out that any concerns should be shared at the first opportunity, either with an appropriate manager or with a designated member of staff with responsibility for child protection within an agency. It also suggested that consideration should be given to inviting children to child protection case conferences, taking account of their age and the potential emotional impact of attending. Furthermore, practitioners may wish to consider whether disabled children and young people may require support to express their views.

The additional notes for practitioners are significant, as research with child protection practitioners found that some believed that a higher threshold for intervention was applied for disabled children and young people and that disclosures made were sometimes minimised.<sup>539</sup> Disability was often seen as being a more significant risk than neglect, and communication issues were raised as an area of concern, presenting a potential barrier to disclosing harm or accessing support. This suggests that further training for staff was necessary. A further challenge related to the locus

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536 Scottish Government, *Children's Social Work Statistics 2009/10*.

537 Scottish Government, 'Children's Social Work Statistics 2013/14 and Additional Tables', in Louise Hill, Claire Baker, Bernadette Kelly, and Sandra Dowling, 'Being Counted? Examining the Prevalence of Looked-after Disabled Children and Young People across the UK', *Child and Family Social Work* 22, 1 (2015), 287.

538 Scottish Government, *National Guidance for Child Protection in Scotland (2014). Additional Notes for Practitioners: Protecting Disabled Children from Abuse and Neglect* (Edinburgh: Scottish Government, 2014).

539 Stalker *et al.*, 'A Study of Disabled Children and Child Protection'.

of responsibility for child protection. This was often unclear with questions being raised over who was responsible for protecting disabled children and young people.

These challenges were described as persistent. Whilst there was a widespread commitment among Scottish practitioners to child-centred practice, the authors argued that getting it right for every child does not mean treating every child the same. At the time, there was a long way to go to get things right for disabled children and young people. They suggested that consideration must be given to adapting practice, assessment, and intervention for children and young people with a range of additional needs. They noted that professionals often lack confidence in working with disabled children and young people and fear getting it wrong, particularly when children have communication impairments. They suggested child protection workers need more training on disability, and disability workers need more training on child protection. They concluded by pointing out that all disabled children and young people should be given the attention and support they need to have their voices heard and be meaningfully included in the child protection system.<sup>540</sup>

### **The impact of ill health**

Fleming found that children with chronic health conditions have more frequent absences from school and are more likely than peers to have additional support needs.<sup>541</sup> In addition, children treated for depression, epilepsy, or ADHD experienced poorer academic attainment, with those with ADHD significantly more likely to be excluded from school. Overall, Fleming's analyses suggested that children with chronic conditions are likely to experience significant educational and health disadvantage. He suggests that further work is needed to develop more effective interventions to reduce their disadvantage.

Closs argued that absence from school for medical reasons has been a somewhat neglected area in policy terms and suggested that strategies were required to support children and young people who could not attend school due to illness.<sup>542</sup> In 2015 the Scottish Government produced specific guidance on the education of

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540 Taylor *et al.*, 'Disabled Children and the Child Protection System: A Cause for Concern'.

541 Michael Fleming, 'Using Scotland-wide Record Linkage to Investigate the Educational and Health Outcomes of Children Treated for Chronic Conditions' (PhD thesis, University of Glasgow, 2017).

542 Alison Closs, 'Absence for Medical Reasons: A Neglected Issue in Scottish Educational Policy', *Scottish Educational Review* 32, 2 (2000), 131–41.

children unable to attend school due to ill health.<sup>543</sup> The guidance stated that a child or young person absent from school through ill health may receive treatment in a variety of settings, such as a paediatric hospital, an adult hospital, a mental health facility, their own home, or in a different school. In some cases, this may mean that the child or young person travels to a hospital located beyond the local authority area in which they live or are educated. Education may be provided in any or all of these settings, and the responsibility for doing so remains with the child or young person's home authority, even if the services are delivered by specialist outreach services of the local authority in which the hospital is located (host authority). The guidance was based on a number of key principles:

- Good communication between staff across education and health boards, child, parent, and carer is vital.
- Awareness: parents must communicate their child's absence due to illness to the school.
- Assessment: medical assessment will influence the scale and scope of educational provision that may be planned and provided.
- Agreement for governance arrangements must be reached.
- Education provision: a programme of learning activities and support should be developed in conjunction with other professionals.

## 2016–25

### Introduction

During this period there is a distinct shift in emphasis with a further commitment to promoting and protecting the rights of disabled people and children. At the beginning of this period Scottish policy aimed to drive forward the commitment to implementing the UNCRPD. Stopping short of incorporating this in legislation, the Scottish Mental Health Law Review (the Scott Review) recommended the strong alignment of the principles of the UNCRPD, aiming to promote autonomy, decision-making, and support.<sup>544</sup> To demonstrate its commitment to these principles, the Scottish Government committed to establishing a new Mental Health and Capacity

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543 Scottish Government, *Guidance on Education for Children and Young People Unable to Attend School due to Ill Health* (Edinburgh: Scottish Government, 2015).

544 Lord John Scott KC, *Scottish Mental Health Law Review: Final Report* (Edinburgh: Scottish Government, 2022). Available online: <https://psychrights.org/Countries/UK/220930ScottishMentalHealthLawReviewFinalReport.pdf>.

Reform Programme to coordinate and drive further changes in line with the review's recommendations.<sup>545</sup>

This final period cannot be considered without acknowledging the impact of the Covid-19 pandemic. According to Couper-Kenney and Riddell, it was particularly difficult to uphold the rights of disabled children and young people as set out in the UNCRPD during the pandemic.<sup>546</sup> They found that disabled children and young people were badly impacted by school closures, and this raises questions as to whether the government took sufficient steps to safeguard the rights of vulnerable groups. Many parents noted the additional work that they had to do on behalf of their disabled children and young people, such as providing 1:1 support and creating structures within the home to suit each child. Disabled children and young people's right to be included on the same terms as others in their community (Article 7 UNCRPD) was not always upheld. The limitations of digital education were also powerfully illustrated during the pandemic, underlining Zhao's acknowledgement that online learning, while offering opportunities for some students, is unlikely to work for other groups of children.<sup>547</sup>

### **Making Scotland fairer for disabled people**

The Scottish policy commitment to implementing the UNCRPD is set out in *A Fairer Scotland for Disabled People* (2016), which sets out national priorities and measures progress on these.<sup>548</sup> The associated Action Plan was launched in 2016 and was developed and written with the direct involvement of disabled people and disabled people's organisations. It outlined five main policy ambitions for changing the lives of disabled people and ensuring their human rights are realised:

- support services that meet disabled people's needs
- decent incomes and fairer working lives

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545 Scottish Government, *Scottish Mental Health Law Review: Our Response* (Edinburgh: Scottish Government, 2023).

546 Fiona Couper-Kenney and Sheila Riddell, 'The Impact of COVID-19 on Children with Additional Support Needs and Disabilities in Scotland', *European Journal of Special Needs Education* 36, 1 (2021), 20–34.

547 Yong Zhao, 'Tofu is not Cheese: Rethinking Education amid the Covid-19 Pandemic', *ECNU Review of Education* 3, 2 (2020), 189–203, cited in Couper-Kenney and Riddell, 'The Impact of COVID-19', 33.

548 Scottish Government, *A Fairer Scotland for Disabled People: Our Delivery Plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities* (Edinburgh: Scottish Government, 2016).

- places that are accessible for all
- protected rights
- active participation.

According to the Scottish Government, *A Fairer Scotland for Disabled People* is rooted in the UNCRPD and recognises that the human rights of disabled people must underpin all activity across the range of policy and legislation which affects them.

The UN conducted an inquiry into the UK Government's progress on implementation of the UNCRPD.<sup>549</sup> The inquiry concluded in November 2016 and found systematic violations of the convention: 'The committee considers that there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been met in the State Party ... Several measures have disproportionately and adversely affected the rights of persons with disabilities.'<sup>550</sup>

This suggests that there may be challenges with universal versus individualised approaches to policy and legislation development and that universal approaches can sublimate or, worse, hide the needs of those with disabilities within an overly broad agenda. This lack of specificity and identification of the needs of disabled people and sub-populations of disabled people, for example those with learning disabilities or visual impairments, can undermine the aims of policy and legislation.

The Scottish Government responded to the findings of the Inquiry by emphasising its distinctive policy agenda and reaffirming its commitment to a rights-based approach, set out in *A Fairer Scotland for Disabled People*.<sup>551</sup> The UK Government has responded to the recommendations within this inquiry extensively, most recently in 2022 when it emphasised its commitment to promoting the rights of disabled people. This UK-wide response set out a number of actions and activities that have been implemented, including a commitment from the Scottish Government to develop a new Disability Equality Strategy to be co-designed with disabled people's

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549 UN Committee on the Rights of Persons with Disabilities, *Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland Carried out by the Committee under Article 6 of the Optional Protocol to the Convention: Report of the Committee* (Geneva: United Nations, 2016).

550 UN Committee on the Rights of Persons with Disabilities, *Inquiry Carried out by the Committee*, paragraph 113.

551 Scottish Government, *A Fairer Scotland for Disabled People*, 2016.

organisations.<sup>552</sup> Further analysis is needed to assess the impact of these developments.

### **Further provision to enhance the rights of disabled children and young people and those with additional support needs**

Continuing with the theme of enhanced and legally enforceable rights, the Education (Scotland) Act 2016 further amended the Education (Additional Support for Learning) (Scotland) Act 2004 so that those with additional support needs and disabilities had enhanced and legally enforceable rights.<sup>553</sup> The main changes involved determining the capacity of children and young people with regard to decision-making, support services for children, assessment of wellbeing, and making a complaint.<sup>554</sup> In relation to the capacity of children and young people, the 2016 Act extended certain rights relating to identification, planning, and review of their educational needs to children who are 12 and over and have capacity. For the purposes of the 2004 Act, a child has capacity if they have the maturity and understanding to carry out an act and understand the information that informed the Act, and if they can make, communicate, and understand a decision and retain the memory of the decision. It further states that a child should not be considered to lack capacity due to issues of communication if that can be addressed by providing human or technological support.<sup>555</sup>

The 2016 Act also introduced a requirement to provide a support and advocacy service for children aged 12 and over to understand and exercise their rights and required an education authority or tribunal to consider how a child's involvement in decision-making affects their wellbeing. Finally, the Act streamlined the process of making a complaint to Scottish Ministers.<sup>556</sup>

In 2017 the Scottish Government published updated health and social care standards

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552 UK Government, *UN Committee on the Rights of Persons with Disabilities 2016 inquiry – UK 2022 follow-up report* (2022). Available online: [The UK's 2022 follow up report to the 2016 Inquiry by the UN Committee on the Rights of Persons with Disabilities](#)

553 Couper-Kenney and Riddell, 'The Impact of COVID-19'. See also sections [Key provisions under the Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#) and [Amendments to additional support for learning legislation](#) for an overview of other amendments made to the 2004 Act.

554 Children in Scotland, *Factsheet: Education (Scotland) Act 2016* (Edinburgh: Children in Scotland, 2017).

555 Education (Additional Support for Learning) (Scotland) Act 2004, Section 3 as amended by the 2016 Act.

556 Children in Scotland, *Factsheet*.

in *My Support, My Life*.<sup>557</sup> The standards and outcomes were published in exercise of the Scottish Ministers' powers under Section 50 of the Public Services Reform (Scotland) Act 2010 and Section 10H of the National Health Service (Scotland) Act 1978. They did not replace previous standards and outcomes relating to healthcare that had already been produced under Section 10H of the National Health Service (Scotland) Act 1978, but they did replace the *National Care Standards*, published in 2002 under Section 5 of the Regulation of Care (Scotland) Act 2001.

Live from April 2018, the standards were underpinned by five principles: dignity and respect; compassion; be included; responsive care and support; and wellbeing. The Care Inspectorate and Healthcare Improvement Scotland take the standards into account when carrying out their inspections and quality assurance functions, and when making decisions about care and health services that are, or are applying to be, registered. The standards promote five core outcomes:

- I experience high-quality care and support that is right for me.
- I am fully involved in all decisions about my care and support.
- I have confidence in the people who support and care for me.
- I have confidence in the organisation providing my care and support.
- I experience a high-quality environment if the organisation provides the premises.

Under Outcome 1, in the wellbeing section, it is noted that all those in residential care should be 'supported to achieve [their] potential in education and employment if this is right for [them]'.<sup>558</sup>

As well as those receiving education in residential care, the government continued to be mindful of the needs of those children and young people receiving inpatient mental health care because of learning disabilities or autism. In 2017 it published a report on mental health inpatient care that highlighted that a significant proportion of young people were admitted to adult wards in hospital. Concerns were raised about the perceived lack of staff expertise, and age-appropriate physical

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557 Scottish Government, *Health and Social Care Standards: My Support, My Life* (Edinburgh: Scottish Government, 2017).

558 Scottish Government, *My Support, My Life*, 7.

environment, education, and activities.<sup>559</sup> More recent statistics suggest that the situation appears to have improved and in 2023–4, there was a reduction in the number of admissions of young people under the age of 18 to non-specialist, primarily adult wards in Scotland.<sup>560</sup> There was also a noted improvement in the provision of education for children and young people, from 10 per cent of children and young people receiving education in 2022–3 to 15 per cent in 2023–4, although it was acknowledged that children were sometimes too unwell to engage with education or in hospital for too short a time for this to be organised.

### **The Independent Care Review: listening to even the quietest voices**

A further key development was the commencement of the Independent Care Review in February 2017.<sup>561</sup> The purpose of the three-year review of the care system for children and young people in Scotland was to understand how to better provide effective, nurturing, and loving care and support. The review listened to the voices of children and young people, alongside paid and unpaid care workers. Over 5,500 voices were listened to, over half of whom were children and young people who had experienced the care system. It is not clear how many were disabled, and therefore the extent to which those with disabilities contributed to the review is unknown. In addition, the review analysed existing law, policy, and research and commissioned specific research to fill any gaps in knowledge.

The review highlighted the importance of relationships and associated these with successful transitions, which were also linked to safety and timing. It also focused on the importance of advocacy to ensure the voices of children and young people were heard. This fits well with expectations set out in the UNCRC, in particular, Articles 2, 12, 19, and 23 in relation to non-discrimination, protection from all forms of abuse, self-expression, and participation. In accordance with the UNCRC, the review set out that any actions taken must be in the best interests of the child and should include an evaluation of the possible impact of any decision on the child or children concerned. Children and young people should also have their views considered when determining what is in their best interests. The Independent Care Review

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559 Scottish Government, *5 Year Survey of Need for Mental Health Inpatient Care for Children and Young People in Scotland with Learning Disability and/or Autism: Full Report* (Edinburgh: Scottish Government, 2017).

560 Mental Welfare Commission for Scotland, 'Children and Young People Monitoring Report 2023–24: Admissions of Young People Under the Age of 18 to Non-Specialist Wards in Scotland' (2024). Available online: [Children and young people monitoring report 2023-24](#).

561 [Independent Care Review – The root and branch review of Scotland's care system](#).

acknowledged that the voices of all children and young people are not always heard and stated that: 'Scotland must make particular effort to understand and act upon quieter voices including infants and non-verbal children and those with learning disabilities. No group should ever be considered "hard to reach".'<sup>562</sup>

The Independent Care Review concluded in 2020 with the publication of *The Promise*. Before considering *The Promise* in greater detail, the following section reviews key developments relating to the education of children and young people with additional support needs.

### **A renewed focus on the presumption of mainstreaming and additional support needs**

The Scottish Government issued further guidance on the presumption to provide education in a mainstream setting in 2019.<sup>563</sup> The guidance, while not the first to refer to the presumption of mainstreaming, first introduced by the Standards in Scotland's Schools etc. Act 2000 was intended to bridge the gap between legislation, policy, and lived experience.

The guidance aimed to support

- (a) improved outcomes and the delivery of excellence and equity for all children and young people
- (b) meeting the learning needs of all young people and
- (c) an inclusive approach which identifies and addresses barriers to learning for all children.<sup>564</sup>

It aimed to empower children, young people, parents, carers, teachers, practitioners, and communities. The guidance was based on the principle that children and young people should generally be educated in mainstream schools, rather than special schools, unless there are strong reasons to do otherwise. A subtle change in language use here is worth noting. Use of the wording 'strong reasons to do otherwise' could be taken as an indicator of the strength of commitment to

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<sup>562</sup> Independent Care Review, *The Promise* (Glasgow: Independent Care Review, 2020), 32.

<sup>563</sup> Scottish Government, *Guidance on the Presumption to Provide Education in a Mainstream Setting* (Edinburgh: Scottish Government, 2019).

<sup>564</sup> Scottish Government, *Guidance on the Presumption to Provide Education in a Mainstream Setting*, 4.

mainstreaming by the Scottish Government. The key points of the guidance included:

- inclusive education: there was a presumption in favour of inclusive education, which means children with disabilities or additional needs should be supported to attend mainstream schools, wherever possible. This promotes equality and social integration.
- personalised support: schools were encouraged to provide personalised support to ensure that students with additional needs could fully participate in the curriculum. This may include adjustments, specialist services, or tailored teaching methods.
- assessment and decision-making: the decision to place a child in a special school should be based on a thorough assessment of their needs, taking into account their personal circumstances, the suitability of the mainstream environment, and the resources available to support them.
- Parental Involvement: parents and carers should be involved in the decision-making process and be consulted about their child's needs and educational provision.

In 2019, following a public consultation, the Scottish Government published Scotland's ten-year strategy for learning provision for children and young people with complex additional support needs.<sup>565</sup> Six of the 21 recommendations made by the Doran Review<sup>566</sup> addressed funding for and commissioning of services. To address these recommendations, a strategic commissioning project was established, supported by a project board. A National Strategic Commissioning Group (NSG) was set up involving key stakeholders, including children and parents.<sup>567</sup> Building on the Scottish vision for inclusive education, the aim of the strategy was 'to improve outcomes for children and young people with complex additional support needs through strategic commissioning of services, with a particular focus on the provision of education'.<sup>568</sup> Given the complexity of formulating a clearly bounded and universally accepted definition of 'complex additional support needs', the NSG used a working description that included:

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565 Scottish Government, *The Right Help at the Right Time in the Right Place: Scotland's Ten Year Strategy for the Learning Provision for Children and Young People with Complex Additional Support Needs* (Edinburgh: Scottish Government, 2019).

566 See [Doran Review: providing the right support at the right time?](#)

567 Scottish Government, *Right Help at Right Time*, 10.

568 Scottish Government, *Right Help at Right Time*, 7.

- children and young people in receipt of a Co-ordinated Support Plan
- children and young people aged 3–18 who do not have a Co-ordinated Support Plan but who have been assessed as stage 3 or 4 by a local authority under a staged intervention model
- children and young people aged 3–18 who attend a grant-aided or independent special school.<sup>569</sup>

The strategy set out the scope of the services to be commissioned and the commissioning process. The first phase of the strategy focused on service leadership, education services, practitioner professionalism, parental engagement, assessment of children’s progress, service improvement, and performance information.<sup>570</sup> The strategy also addressed early learning and childcare, health and wellbeing, and children’s rights.

Following on from this, the Morgan Review of Support for Learning was published in 2020.<sup>571</sup> Its remit was to consider the implementation of the additional support for learning legislation. It considered:

- how additional support for learning (ASL) works in practice, across early learning and childcare centres, primary, secondary and special schools (including enhanced provision, services and units)
- where children and young people learn within the balance of provision set out above, recognising that not all local authority areas have all of these provisions
- the quality of learning and support, including overall achievement and positive destinations achieved post-school
- the different approaches to planning and assessment to meet the needs of children and young people
- the roles and responsibilities of support staff, teaching staff,

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<sup>569</sup> Scottish Government, *Right Help at Right Time*, 9.

<sup>570</sup> Scottish Government, *Right Help at Right Time*, 14–19.

<sup>571</sup> Angela Morgan, *Support for Learning: All Our Children and All Their Potential* (Edinburgh: Scottish Government, 2020).

leadership role, education authorities and national agencies

- the areas of practice that could be further enhanced through better use of current resources.<sup>572</sup>

The review went to great lengths to engage with children and young people, parents and carers with direct and lived experience, and practitioners. Children and young people were supported to share their experiences through, for example, a focus group, a meeting with members of the Scottish Youth Parliament, a meeting with representatives from the Children's Parliament, and a meeting with Young Ambassadors for Inclusion.<sup>573</sup>

Children and young people highlighted the importance of inclusion in their schools and communities. They stressed the importance of the following:

- Meaningful relationships between children and young people and staff are important for learning.
- A willingness to adapt teaching methods to children and young people's learning styles, needs, and varying pace and challenge.
- School needs to be a safe place.
- All school staff need to have more knowledge and understanding of additional support needs so they can meet everyone's needs.
- Children and young people with additional support needs don't want to be underestimated for their ability and capability. Their additional support need should not define them.
- More understanding and empathy from peers would improve the learning experience.
- Timely responses to bullying were important for children and young people.
- Support for children and young people with additional support needs must be consistent. It should be available when people need it, and all

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572 Morgan, *Support for Learning*, 7–8.

573 Morgan, *Support for Learning*, Annex B.

staff should make sure they support a child or young person in the same way. There are multiple examples of neither happening.

- Communication needs to improve. Primary and secondary schools need to talk to each other. There also needs to be more communication between schools, other organisations that provide support, and children and young people.
- Children and young people need to feel involved in information sharing as part of decision making. Children and young people have their own views on what works for them and what support they need.
- Additional Support for Learning needs to be adequately funded to ensure everyone gets the support they need when they need it.<sup>574</sup>

The review therefore recommended that: 'Children and young people must be listened to and involved in all decision making relating to additional support for learning. Co-creation and collaboration with children, young people and their families will support more coherent, inclusive and all-encompassing policy making, which improves implementation, impact and experience.'<sup>575</sup>

The review found that there is a lack of understanding and recognition of the range of issues and conditions that entitle young people to support. It identified variation in the reporting of needs across the country because the national definition of additional support needs allows wide interpretation.<sup>576</sup> Highlighting the broad and holistic definition of education and vision of learning in Articles 28 and 29 of the UNCRC, as discussed earlier, the review considered that: 'the additional support for learning legislation primarily designates responsibility for its implementation to Education Authorities, limiting the focus of attention and understanding of additional support for learning on education and academic achievements and on the education system'.<sup>577</sup>

The focus on formal qualifications means that other forms of progress are overlooked and this 'devalues and demoralises children and young people who learn

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574 Morgan, *Support for Learning*, 13.

575 Morgan, *Support for Learning*, 14.

576 Morgan, *Support for Learning*, 17.

577 Morgan, *Support for Learning*, 18.

and achieve in other ways'.<sup>578</sup> Morgan argued that the language associated with additional support needs often focuses on deficits and is therefore potentially stigmatising and excluding – despite being widely viewed as more inclusive than its predecessor, special educational needs – and often misses children or young people's interests, aspirations, and talents.<sup>579</sup>

While the principles of inclusion and the presumption of mainstreaming are strongly supported, the review found that 'far too many children and young people report feeling isolated, lonely, rejected, sometimes actively disliked or uncared for'.<sup>580</sup> The review called for a rebalancing across the four principles of inclusion, that children and young people must be present, participating, supported, and achieving in line with the principles of GIRFEC. In relation to the presumption of mainstreaming, the review identified increasing levels of need and complexity of need. It considered that 'the concept of "mainstream" needs to be redefined and repositioned for the profile of children and young people as they are now and are projected to be in the future'.<sup>581</sup> The review identified a strong call for responsive child-centred provision that needed 'a system that has flexible and permeable edges'.<sup>582</sup>

In the context of increasing levels of need and the impact of austerity on public services, the review highlighted the way that the processes of the legislation 'have become distorted to manage levels of need and demand'.<sup>583</sup> In particular, there was concern around inequality, whereby some parents are more able to effectively advocate on behalf of their child: 'There is agreement across all perspectives that the children and young people who are most likely to be prioritised for resource are those whose parents and carers are able and willing to strongly and persistently advocate on their behalf'.<sup>584</sup>

The review also emphasised that 'the other significant factor, which prioritises identification and response in providing support, is in how the child or young person communicates through their behaviour'.<sup>585</sup> The corollary of this is that children who have additional support needs that do not affect others are sometimes overlooked,

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578 Morgan, *Support for Learning*, 19.

579 Morgan, *Support for Learning*, 20.

580 Morgan, *Support for Learning*, 23.

581 Morgan, *Support for Learning*, 24.

582 Morgan, *Support for Learning*, 26.

583 Morgan, *Support for Learning*, 27.

584 Morgan, *Support for Learning*, 29.

585 Morgan, *Support for Learning*, 29.

suggesting a further way in which disabled children and young people and those with additional support needs can be hidden. This is supported by the work of Riddell and Weedon who argue that children living in the most disadvantaged areas experience cumulative disadvantage, are more likely to attract stigmatising labels, and do not have the additional resources needed to improve educational outcomes.<sup>586</sup> In its consideration of resources, the review highlighted the impact of austerity and poverty on families and on public services and their capacity. It stressed the need for early intervention and prevention.<sup>587</sup> The review also considered the impact on key working relationships between professionals and coordination of services.

Variable relationships between local authorities and grant-aided special schools (GASS), which provide support to children and young people with complex or multiple additional support needs, were also explored. There is concern that GASS provision is only considered when a child or young person has experienced repeated failure in mainstream or other specialist provision. This reduces the impact their specialist expertise can achieve in prevention.<sup>588</sup>

Overall, the Morgan Review identified the need to maintain focus on the inclusion agenda for additional support needs because of a loss of specialist expertise and practice experience, and a dilution of attention to barriers to learning.<sup>589</sup> In considering the workforce and development, the review emphasised the commitment and determination of some teachers, staff, and managers in the effective implementation of additional support for learning. However, some professionals are not signed up to the principles of inclusion and the presumption of mainstreaming, while others are disillusioned. The review drew attention to gaps in knowledge and training. There is a minimal requirement to address additional support for learning in initial teacher education, and the ability to develop relationships of trust needed for work with vulnerable children is often overlooked. Despite their key role, pupil support assistants feel undervalued and unsupported.<sup>590</sup>

While policy and guidance underline the importance of effective working relationships between parents, carers, and schools, and there were examples of

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586 Riddell and Weedon, 'Social Justice'.

587 Morgan, *Support for Learning*, 34.

588 Morgan, *Support for Learning*, 38.

589 Morgan, *Support for Learning*, 32

590 Morgan, *Support for Learning*, 40–3.

excellent partnership working, the review 'heard from many parents and carers about their negative experiences of being disregarded, not listened to or blamed for their child's behaviour'.<sup>591</sup> The review addressed a range of issues to improve practice in partnership working with parents and carers.

The review stated that:

unmet needs and an inability to express intense difficult feelings can result in a child or young person expressing these through verbal or physical aggression ... The overall evidence and analysis support the conclusion that the issues that have emerged around relationships and behaviour are the symptoms and consequence of all the intermeshed barriers to successful implementation of Additional Support for Learning.<sup>592</sup>

This led the review to conclude that the theme of relationships and behaviour should not be separated out but integrated into the response to the various themes of the review. It highlighted the importance of a positive school culture and positive relationships.

The review stressed that: 'the themes of inclusion, participation and understanding of rights have emerged very strongly as areas that need strengthening to provide a robust rights-based framework for implementation of Additional Support for Learning'.<sup>593</sup>

It emphasised the importance of effective planning processes but noted that the preparation of a plan is 'not an outcome, but a useful record of discussion and decisions to provide the basis for reviewing the specific support necessary for a child or young person to thrive in their learning'.<sup>594</sup> It also found that there is widespread misunderstanding by parents, carers, and professionals about the purpose of the CSP and its relationship to other planning mechanisms.<sup>595</sup>

Overall, it would appear that while the general direction of travel for education for disabled children and young people has seen an increased focus on rights, inclusion,

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591 Morgan, *Support for Learning*, 46.

592 Morgan, *Support for Learning*, 51.

593 Morgan, *Support for Learning*, 55–6.

594 Morgan, *Support for Learning*, 57.

595 Morgan, *Support for Learning*, 58.

and participation, the Morgan Review suggests that there is still a long way to go before additional support for learning is both visible and equally valued within the Scottish education system.<sup>596</sup> As it stands, additional support for learning appears to be overly dependent on a small number of committed individuals, and this has resulted in uneven and inconsistent implementation that means that not all young people are being supported to achieve their full potential.

This is supported by research undertaken by the Scottish Government that found several key issues affecting the education of those with additional support needs in Scotland.<sup>597</sup> The study was undertaken among 11 schools across Scotland including independent schools. It involved 202 participants, including 91 children and young people with additional support needs, 18 parents and carers, 73 school staff (including class teachers, pupil support staff, and senior leaders), and 20 stakeholders from the wider support system. Reflecting on the ten years since the publication of the Doran Report, participants highlighted a perceived reduction in resources and the challenges these created for staff and pupils, including limited opportunities to engage with the broader community and less availability of support from educational psychologists and other allied health professionals.

There were also concerns over the way national policy on placements of children and young people in schools was implemented, as well as limited access to appropriate training opportunities for professionals, including peer training and learning from children and young people. Participants appeared to have a high awareness of policy developments pertaining to children and young people with additional support needs; however, there was often a perceived conflict between the aims of different policies, such as the presumption of mainstreaming and GIRFEC.

Key indicators for successful work with children and young people with additional support needs were also explored with participants. For parents and carers their focus was on staff. They believed that effective relationships were the most prominent factor in ensuring that children thrive in their education. For staff, leadership was thought to be integral to good practice. Both school staff and pupils were concerned that the physical environment should promote wellbeing, including outdoor space, quiet space, natural light, and resources such as swimming pools.

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596 TES Reporter, 'Additional Support: Not Visible or Equally Valued', *TES*, 21 June 2020.

597 Scottish Government, *Research into Provision for Pupils with Complex Additional Support Needs in Scotland* (Edinburgh: Scottish Government, 2022).

This research concluded that in the ten years since the Doran Review, the landscape for supporting and educating children and young people with additional support needs had changed substantially. However, it suggested that policy alone cannot deliver positive outcomes for children and young people with additional support needs, as demonstrated by the parents and carers within the study, suggesting that despite positive, aspirational policy their children were struggling to have their needs met to enable them to thrive.

Linking education to human rights, the Children and Young People's Commissioner Scotland submission to the Scottish Parliament's Education, Children and Young People Committee suggested that the presumption of mainstreaming was a positive step towards delivery on international human rights treaty obligations and a step towards creating a more inclusive education system, community, and nation.<sup>598</sup> Yet they argued that disabled children and young people and children with additional support needs continue to be unfairly subjected to practices that impact negatively on their education, as well as their PSD. Because their needs are not being met, they are not always able to access a full curriculum, experiencing part-time timetabling and informal school exclusion practices. The commissioner stated that:

Our view that what many disabled children and young people (and those with other support needs) in Scotland experience is integration, at best, not inclusion and that this is the cause of many of the concerns which are being raised about the presumption of mainstreaming. Anecdotal information suggests that there has been a reduction in the number of classroom support assistants and specialist teachers to support inclusion, however changes to the way information is collected and recorded makes it difficult to establish the facts in relation to this.<sup>599</sup>

The commissioner went on to highlight that:

A lack of effective support, and insufficient progress in implementing the structural changes outlined in UNCRPD General Comment 4, results in an education system which fails to realise all children's right to an education

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598 Children and Young People's Commissioner Scotland, 'Additional Support for Learning in Scotland'. Submission to Scottish Parliament Education, Children and Young People Committee (2023). Available online: [Additional Support for Learning in Scotland - The Children and Young People's Commissioner Scotland](#).

599 Children and Young People's Commissioner Scotland, 'Additional Support for Learning'.

which develops their 'personality, talents and mental and physical abilities to their fullest extent' (UNCRC Article 29(1)(a)). It has an often devastating impact on the child's wellbeing, including their physical and mental health (UNCRC Article 24 and UNCRPD Article 25). It inevitably impacts on their parents and on their interactions at school with peers and staff. In some cases, it manifests as distressed behaviour in school and/or at home.<sup>600</sup>

This submission by the commissioner suggests that while a commitment to mainstream education has been set out in policy, this has not been achieved in practice. It seems that the increasingly complex needs of children and young people, alongside resource constraints that have actively reduced the support available, mean that children's experiences of mainstream education are often unsatisfactory and potentially damaging to their health and wellbeing.

### **The Promise: a watershed moment for care-experienced children and young people?**

As discussed earlier, the Independent Care Review took place from 2017 to 2020 and listened to over 5,500 voices with more than half of these belonging to people with experience of care, including children and young people. This culminated in 2020 with the launch of The Promise and the publication of seven reports based on the findings from the review.<sup>601</sup> These reports focused on the need to reform the care system to more effectively meet the needs of children and young people and to ensure that those with lived experience and their families and carers are involved in these reforms. Indeed, despite aspirational policy objectives the review found that too often children and young people experienced the care system as fractured, bureaucratic, and unfeeling.

Several comments are made in the main Promise document regarding the needs of disabled children and young people. These coalesce around trying to promote the inclusion of disabled children and young people and their families in all aspects of their care. For example, an acknowledgement of the complexity of engaging with the voices of babies, infants, and children with additional support needs or disabilities is made alongside the importance of acting on their wishes. The Promise also

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600 Children and Young People's Commissioner Scotland, 'Additional Support for Learning'.

601 Independent Care Review, *The Promise, The Pinky Promise, The Plan, The Money, Follow the Money, The Rules, and The Thank You* (Glasgow: Independent Care Review, 2020).

acknowledges that all families with disabled children and young people should have access to appropriate support, a recognition that parents with learning disabilities can be supported to parent effectively, and the importance of skilled advocacy to facilitate the inclusion of disabled children and young people in decisions about their care. The main document also laid out five founding principles:

Voice: The importance of the voices of children are recognised and considered to be central to decision making, a process which must be focused on children and those they trust.

Family: The importance of children remaining with their families where appropriate is emphasised alongside a requirement for support to make this happen.

Care: If children cannot stay with their families, all efforts must be made to keep them together with their siblings.

People: The people working with children and young people should help them reach their full potential.

Scaffolding: The Promise Progress Framework brings together data to help understand how Scotland is progressing towards keeping The Promise.<sup>602</sup>

The principles aim to ensure that all children in Scotland can grow up feeling loved, safe, and protected.

The Promise Scotland – a non-statutory company set up to coordinate the implementation of recommendations – produced a briefing paper on residential care in 2020.<sup>603</sup> The briefing paper acknowledged that for some children and young people, residential homes and schools can be the correct place to live, particularly for those who would find the intensity of family settings to be overwhelming. Several areas were identified as being particularly important. For example, the importance of nurturing and positive relationships within residential settings was emphasised. It was argued that staff should be supported to work with children and young people in a way that was relational rather than procedural, with an emphasis on non-stigmatising

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602 Independent Care Review, *The Promise* (Glasgow: Independent Care Review, 2020), 9.

603 The Promise Scotland, 'Residential Care' (2020). Available online: [keepthepromise-residential-care.pdf](#).

and trauma-informed care. A further prominent theme in relation to residential care was the need to promote the involvement of children and young people.<sup>604</sup> Key action points were as follows:

- Residential settings must operate with a cohesive set of values that uphold the rights of the children they are caring for. These values must be therapeutic, recognising that children require thoughtful, supportive relationships to heal and develop.
- The needs of children living in residential settings must inform the development of any rules within those settings.
- Children may have good quality relationships with sessional as well as core staff.
- Young people who leave care may wish to retain relationships with staff.
- Staff must be recruited on the basis of values rather than educational qualifications.
- Children must not be further stigmatised and any rules that do so must end.
- Residential settings must be supported and resourced to keep places open in line with continuing care legislation.
- The inspection of residential settings must focus on children's experiences of relationships. Inspections must be led primarily by what those living in residential settings say and how they feel they are being cared for.<sup>605</sup>

The first Promise implementation plan, published in 2022, acknowledged the impact of Covid-19 on policy implementation and focused on joining up children's policy with an emphasis on prevention.<sup>606</sup> More recently, Plan 24–30 has been produced to

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604 The Promise Scotland, 'Residential Care'.

605 The Promise Scotland, 'Residential Care' (2020), 4. Available online: [The Promise Scotland | Transforming how Scotland cares for children, families, and care-experienced adults](#).

606 Scottish Government, *Keeping the Promise to All our Children, Young People, Adults and Families* (Scottish Government, 2022), 4

ensure Scotland keeps The Promise by 2030.<sup>607</sup> The Plan considers progress to date and sets out priorities to ensure targets can be met by 2030. Who Cares? Scotland published an update on the progress of The Promise in 2024 providing a concerning picture about lack of progress, dilution of aims, and data gaps.

Our report has unveiled positive progress on areas such as keeping brothers and sisters together, addressing stigma in the care system and the work underway to reshape the youth justice system. However, it has highlighted that much more work needs to be done within all the priority areas. With key concerns on the lack of progress in education, restraint and the monetisation of care.<sup>608</sup>

Notably, neither the briefing paper on residential care nor Plan 24-30 specifically mentions disabled children and young people although the Who Cares? review of progress provides important context for disabled children and young people who may be looked after and educated in residential settings.

Following on from The Promise, the Children (Scotland) Act 2020 set out a range of changes to the Children (Scotland) Act 1995 and, in some instances, to other family law legislation. It focuses on supporting children's participation in court cases, particularly in decision-making about where they live. However, at the time of writing, much of the Act remains unimplemented, despite significant work undertaken by the Children and Young People's Commissioners for Scotland who noted that:

Our office's work on this Bill represented the culmination of almost a decade's work on children's ability to participate when decisions are made about who they live with and what contact they have with non-resident parents and (in the case of looked after children) their siblings ... It also significantly improves the capacity for decisions to be made in a way which fully respect children's right to participate in decision making and their best interests. The 2020 Act led the way for the sort of change we hope to continue to see following incorporation of the UNCRC into

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607 The Promise Scotland, 'Plan 24-30' (2024). Available online: [Plan 24-30- Scotland's route-map to keeping the promise](#).

608 Who Cares? Scotland, Plan 21-24: 'Is Scotland Keeping the Promise?' (2024). Available online: [Home - Who Cares? Scotland](#).

Scots law. We are obviously extremely disappointed by the fact that much of the 2020 Act has not been commenced.<sup>609</sup>

Given what we know about the experiences of disabled children and young people and those with additional support needs and their increased likelihood of being involved in court proceedings, they may be disproportionately disadvantaged by the lack of progress with this Act. The commissioner goes on to acknowledge the impact of the Covid-19 pandemic on the implementation of the Act as well as capacity issues in organisations caused, in part, by the implementation of The Promise.<sup>610</sup> This illustrates a capacity issue where the competing demands of different pieces of legislation and policy implementation become unsustainable for those responsible for implementing them. Indeed, it could be that the commitment to implement this legislation was overshadowed by the commitment made in the Scottish Government Programme for Government in 2020 to UNCRC incorporation into domestic legislation.

### **Ongoing concerns around child protection**

The Scottish Government published, in 2021, the *National Guidance for Child Protection in Scotland*, which acknowledged and considered issues for disabled children and young people in more detail than previous guidelines had done. The starting point is that disabled children and young people are children first and foremost and that 'each child has unique potential. Their needs must be considered in the context of a holistic assessment of the child and the intersecting strengths and risks in their world.'<sup>611</sup>

With reference to terminology the guidance noted that it used the term 'disabled children and young people', in line with *A Fairer Scotland for Disabled People* (2016). Disabled children and young people include those with a broad range of physical, emotional, developmental, learning, communication, and healthcare needs: 'The term is applicable when these needs have a substantial and long-term impact on a child's

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609 Equalities, Human Rights and Civil Justice Committee, 'Non-implementation of Acts of the Scottish Parliament'. Submission of the Children and Young People's Commissioner Scotland, December 2024. Available online: [Non-implementation of Acts of the Scottish Parliament | Scottish Parliament Website](#).

610 Equalities, Human Rights and Civil Justice Committee, 'Non-implementation of Acts of the Scottish Parliament'.

611 Scottish Government, *National Guidance for Child Protection in Scotland 2021 – updated 2023* (Edinburgh: Scottish Government, 2023), 140.

ability to engage fully in normal day-to-day activities. Some children (and some adults) are affected by disabilities and developmental delays that have never been assessed or diagnosed.<sup>612</sup>

This is a very broad and potentially inclusive definition. The use of identity-first language demonstrates the influence of the social model of disability and an acknowledgement of the impact of structural and societal barriers, although this is not necessarily clear in the description given.

The guidance noted that children with communication impairments, behavioural disorders, learning disabilities, and sensory impairments may be more vulnerable to abuse and neglect. It emphasises that disabled children and young people have an equal right to be safe and acknowledges that structures, processes, and attitudes may open or close doors to safety. It is argued that the experience of disabled children and young people must be central, and their views and feelings must be considered when making decisions that affect them. The communication needs of some disabled children and young people were highlighted, and it was noted that they must have the support they need to communicate. Those with profound communication difficulties will need special consideration to 'ensure attunement to their experience, and attention to ensure their wellbeing and safety'.<sup>613</sup>

The guidance highlights that 'protecting disabled children and young people is a shared responsibility for all involved, requiring close collaboration between education and health as well as specialist practitioners, those leading child protection investigations, parents or carers and advocacy services'.<sup>614</sup>

A review of Children's Services Plans suggests that further work is needed to support disabled children and young people. Section 8(1) of the Children and Young People (Scotland) Act 2014 requires every local authority and its health board partners to jointly produce a three-year plan for children's services, including residential schools for children with additional support needs. As part of their commitments set out in Part 3 of the 2014 Act, the Scottish Government undertook a review of Children's Services Plans covering the 2023–6 planning cycle.<sup>615</sup> The report highlights areas of

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612 Scottish Government, *National Guidance for Child Protection in Scotland 2021*, 140.

613 Scottish Government, *National Guidance for Child Protection in Scotland 2021*, 140.

614 Scottish Government, *National Guidance for Child Protection in Scotland 2021*, 140.

615 Scottish Government, *Scotland's Children's Services Plans 2023–2026 Review: Improving Outcomes for Children, Young People and Families* (Edinburgh: Scottish Government, 2025).

strength, improvement, and examples of good practice identified from the analysis of 30 Children's Services Plans. Relevant findings suggest that:

- Less than half of the plans produced provided examples of consultation with disabled children and young people or their representative organisations.
- Priorities relating to improving services and supports for disabled children and young people were noted in only 5 of the 30 plans reviewed.
- A disability strategy was amongst the least mentioned in the plans reviewed (n=5).

It is evident from this review that whilst progress on children's services planning is being made, progress is less clear for the services and supports provided for and to disabled children and young people. This supports the previously made observation that universal policy approaches result in less focus on disabled children and young people.

### **Progress for disabled people in Scotland**

A similar picture emerges when considering the situation of disabled people in Scotland more broadly. The latest *Fairer Scotland Progress Report*, published in 2021 (following subsequent progress reports in 2016 and 2019), identified progress in several key areas:

- An increased number of people are choosing and controlling their support via self-directed support.
- There is a people-led policy panel of people with lived experience of adult social care.
- The Independent Living Fund (ILF) Transition Fund (2016–19) raised the upper age limit from 21 to 25, with an increased number of applications. ILF has made over 3,500 grants averaging over £2,000 each.
- A Scottish Government resource for disabled children and young people was launched in 2019. This is a rights-based online resource developed through a process of co-design and co-production. It provides clear and accessible information on national policies, entitlements, rights, and the provision of various forms of support that

may be available to disabled children and young people and their families.

- The Scottish Government has worked with disabled people's organisations and Police Scotland to raise awareness of hate crime and encourage greater reporting of disability hate crimes.
- Equally Safe now recognises the intersectionality of disability and gender-based violence. An action plan has been produced to improve education on sex and healthy relationships and consent. This is being adapted into an easy read version, with materials on relationships, sexual health, and parenting being added to the Relationships, Sexual Health and Parenthood national online resource for teachers.<sup>616</sup>

Ongoing concern around poor attendance at school as a result of ill health was acknowledged with the publication of guidance by the Scottish Government in 2023.<sup>617</sup> This sets out the requirements placed on education authorities to make special arrangements for all disabled children and young people who are unable to attend school due to ill health. As discussed previously, this requirement was initially set out in the Standards in Scotland's Schools etc. Act 2000, as part of a commitment to mainstreaming, and states that special arrangements should be made for all affected children or young people to receive their education at an appropriate place without the requirement to attend school. If the period of absence is longer than five days, alternative arrangements for education should begin immediately. The young person's own school and local authority in which the family or child live normally would be responsible for making these arrangements, except in some cases where a child or young person is receiving treatment in a hospital outside of their family home local authority. In these cases, the home local authority should make arrangements for the local authority where the hospital is based to provide school education through hospital outreach.

The rights of disabled children and young people were the focus of research by the Care Inspectorate in 2024. The resulting thematic review explored how well local authorities were applying GIRFEC principles to ensure disabled children and young

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616 Scottish Government, *Progress Report: A Fairer Scotland for Disabled People* (Edinburgh: Scottish Government, 2021).

617 Scottish Government, *Supporting Disabled Children, Young People and Their Families: Guidance*. (Edinburgh: Scottish Government, 2023).

people have their needs met and their rights promoted and protected.<sup>618</sup> The review wished to understand the experiences and views of disabled children and young people regarding social work services in Scotland with a focus on how well their rights were being upheld and respected. Core to the approach was 'the UNCRC and UNCRPD and the principle of disabled children and young people fully enjoying their rights on an equal basis with non-disabled children and young people'.<sup>619</sup>

Surveys were carried out with social work teams across all 32 local authorities in Scotland, focusing on how well they felt they supported disabled children and young people. Teams also reviewed their information systems to gather data already held on disabled children and young people. Publicly available data and research was also reviewed. Four case study sites were identified, and children, young people, and their families took part in interviews.<sup>620</sup> The Care Inspectorate acknowledged that the policy and legislative context that impacts on the lives of disabled children and young people is 'varied and complex'.<sup>621</sup> While it identified aspects of good practice, the experiences of disabled children and young people were variable. It also noted that the landscape across Scotland within which services for disabled children and young people and their families are delivered has changed due to the Covid-19 pandemic and continues to change with the current cost-of-living crisis. Demographic changes, difficulties in recruitment and retention of staff, and an increase in complexity and demand limit the capacity of social workers to work in a way that promotes early intervention and prevention, relationship-based practice, and focus on needs and outcomes rather than resources. The review also recognised the variability in service provision and outcomes for disabled children and young people that had been recorded across the UK.

Several key messages came from the report. These were mapped against the relevant articles from the UNCRC:

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618 Care Inspectorate, *Disabled Children and Young People's Experiences of Social Work Services: A Thematic Review* (Dundee: Care Inspectorate, 2024). Available online: [Thematic review of services for disabled CYP.pdf](#).

619 Care Inspectorate, *Disabled Children and Young People: Thematic Review*, 1.

620 Care Inspectorate, *Disabled Children and Young People: Thematic Review*.

621 Care Inspectorate, *Disabled Children and Young People: Thematic Review*, 7.

- The importance of respectful relationships in building a culture of listening and respecting the views of disabled children and young people. (Article 12, UNCRC)
- Too often the views, feelings and wishes of disabled children and young people were not being heard. (Article 12, UNCRC)
- Receiving the right support and help at the right time from social work services can help disabled children and young people grow and develop. (Articles 15, 23, 31, UNCRC)
- Increasing complexity and high demand for services was outweighing the availability of supports. (Articles 6, 15, 23, UNCRC)
- Meaningful choice of support was not always provided. (Articles 12, 23, UNCRC)
- The wellbeing of parents and carers who routinely provide care and support must be promoted. (Article 18, UNCRC)
- Consistency is required in assessment, planning, and reviews to properly address the needs of disabled children and young people. (Article 6, Article 23, UNCRC)
- Transitioning to adult services requires more predictability and certainty. (Article 23, UNCRC).
- High workloads and poor retention of staff challenged staff teams.
- The social work role was not well understood by families or other professionals.
- Reliable data and a shared definition of disability was not available to aid in informing future budgets and planning. (Article 7, 31, UNCRC)<sup>622</sup>

The review stressed the significant impact of these barriers on children and young people, many of whom feel their voices are not heard or valued in decision-making processes. These experiences are in clear

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<sup>622</sup> Care Inspectorate, *Disabled Children and Young People: Thematic Review*, 12–28.

contradiction to the rights outlined in both the UNCRC and the UNCRPD.

The review concluded by acknowledging that social work services often do not have the capacity to intervene early to uphold children's rights and to prevent situations from getting worse. In addition, support was not equally available to all disabled children and young people, and some found that their voices were not heard. The pressure on the system has meant that sometimes there has been an over-reliance on parents and carers who are not well supported themselves. Better experiences come from positive relationships, and social work services need to be available at the right time as part of a well-coordinated approach with other relevant services. Social work services continue to face funding challenges that often mean statutory and safeguarding responsibilities need to be prioritised. This means that disabled children and young people who do not fall into these categories find their needs are not prioritised.

The report concluded by suggesting that better systems and more robust monitoring were needed:

Scotland has an obligation to ensure that effective local and national systems are in place to protect the rights of disabled children and young people. This includes best use of children's rights impact assessments and improving the collection and analysis of disabled children and young people's data in social work and more widely. This would help to identify gaps, better plan to meet needs and protect children's rights.<sup>623</sup>

Overall, the report suggested that GIRFEC is well understood and the aspirations of The Promise and the incorporation of the UNCRC offer real possibility for change. However, the Scottish Government and public authorities must work alongside disabled children and young people and their families to collectively uphold and respect the rights of disabled children and young people and their families. The report recommended the following actions:

- The views of disabled children and young people and their families must be considered as part of service mapping, understanding unmet need, and service planning.

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623 Care Inspectorate, *Disabled Children and Young People: Thematic Review*, 34.

- A robust approach to gathering and analysing data on disabled children and young people must be implemented, both in social work services and wider. This must be used effectively to inform service planning and improvement.
- Action must be taken in response to the views of disabled children and young people and their families to ensure gaps in service provision are addressed.
- The role of social work services in providing care and support to disabled children and young people must be clearly defined and understood across agencies. Clear and accessible information should be available and communicated to children and their families. This should include eligibility criteria.
- Opportunities for effective early intervention should be strengthened.
- Opportunities for play and friendships, along with other areas that are important to children, should be maximised. This will need a collective and holistic response.
- Adequate resourcing must be made available to enable services to develop and improve.<sup>624</sup>

## **Disabled children and young people and the transition to adulthood**

There are several issues that arise as disabled children and young people make the transition from childhood to adulthood. This can be a particularly challenging time for disabled children and young people and for those who are looked after and accommodated.<sup>625</sup> Transitions can take place across different settings, and previous research has focused on the transition from one school setting to another, from school to post-school,<sup>626</sup> from being looked after to living independently, and from children's to adult services. With respect to education, Haughey found that special

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624 Care Inspectorate, *Disabled Children and Young People: Thematic Review*, 33.

625 Mark Priestley, Parvaneh Rabiee, and Jennifer Harris, 'Young Disabled People and the "New Arrangements" for Leaving Care in England and Wales', *Children and Youth Services Review* 25 (2003), 863–90.

626 Gillian MacIntyre, 'The Potential for Inclusion: Young People with Learning Disabilities Experiences of Social Inclusion as They Make the Transition from Childhood to Adulthood', *Journal of Youth Studies* 17, 7 (2014), 857–71.

schools were generally better at planning for transition than mainstream schools, but could still improve, and transitions were especially poor for pupils at residential special schools.<sup>627</sup> Stalker, meanwhile, noted that young disabled people have the same goals and aspirations for their transitions as everyone else.<sup>628</sup> Yet some professionals view transition more narrowly and focus on the transition from children's to adult services. Some young people, particularly those with very high support needs, have often been excluded from transition planning meetings. Young people often find it difficult to find clear information about post-school options. According to Stalker and Moscardini

a major problem for planners, practitioners, parents and young people is the plethora of policy documents and initiatives and how they relate to one another. This has created confusion, with families struggling to find a clear pathway through the process. A succinct summary of service providers responsibilities and young people's rights is missing.<sup>629</sup>

Alves and colleagues note that disabled children and young people are more likely to experience troubled transitions out of care, including lower rates of reunification with family, more difficulties in the transition to independent living, fewer opportunities for continuing studies and/or finding employment and having enough to be self-sufficient.<sup>630</sup>

An acknowledgement of the importance of transitions for disabled young people was provided by the Scottish Government within the *2019 Progress Report on A Fairer Scotland for Disabled People*.<sup>631</sup> The report provided information on the Independent Living Fund Transition Fund that was opened in 2017. It stated that:

The Scottish Government is committed to equality for disabled children and young people in Scotland and to ensuring that all children can

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627 A. Haughey, 'Report on Implementation of School to Post-school Transitional Planning for Children and Young People with Additional Support Needs 2009–2011'. Unpublished report to the Scottish Government, cited in Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy'.

628 Kirsten Stalker, *Young Disabled People Moving into Adulthood in Scotland* (York: Joseph Rowntree Foundation, 2002).

629 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy', 36.

630 Alves *et al.*, 'Systematic Review of Residential Care'.

631 Scottish Government, *A Fairer Scotland for Disabled People: Progress Report 2019* (Edinburgh: Scottish Government, 2019).

achieve their potential. We recognise that effective solutions to the problems and barriers faced by disabled people must be drawn from the lived experience of disabled people. An important priority for including young disabled people is ensuring that they are supported at transitional points in their lives.<sup>632</sup>

The *National Guidance for Child Protection in Scotland* (2021) also acknowledged some of the difficulties that disabled young people face at the point of transition and noted that:

Significant transitions require assessment and must be planned in good time, together with parents and carers, in accordance with applicable local procedures. These are phases of heightened and predictable vulnerability, as children move between services or life stages. Disabled children and young people and young adults must be provided with appropriately adapted learning methods and resources so that they can help to keep themselves safe as they grow up.<sup>633</sup>

A practice insight on the topic of transitions was drafted to illustrate and explain key practice considerations, to offer a resource, prompt reflection, and signpost selected sources.<sup>634</sup> All of this work around transitions culminated in a *National Transitions to Adulthood Strategy for Disabled Young People: Statement of Intent*.<sup>635</sup> The statement focused on the need for disabled young people to have multi-agency support during the transition to adulthood, including education, social work, health, and the third sector. The statement also recognised the challenges faced by disabled young people in transitioning to adult services. The statement was effectively a way for the Scottish Government to consult a range of agencies and disabled young people on potential future priorities around transitions, including the promotion of choice and control in the process, ensuring the provision of clear and coherent information, good joint working across sectors, and collecting data more consistently to measure progress and improvement. The consultation on the statement ended in

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632 Scottish Government, *Progress Report 2019*, 11.

633 Scottish Government, *National Guidance for Child Protection in Scotland 2021*, 142.

634 Scottish Government, *National Guidance for Child Protection in Scotland 2021 – updated 2023: Practice Insights* (Edinburgh: Scottish Government, 2023).

635 Scottish Government, *National Transitions to Adulthood Strategy for Disabled Young People: A Statement of Intent* (Edinburgh: Scottish Government, 2023).

November 2023, and the results were published in May 2024.<sup>636</sup> The recurrent themes explored in the analysis of the consultation were in response to five closed questions:<sup>637</sup>

- The importance of the role of parents/carers was highlighted, and there was a sense that their role should be formalised and extended within the strategy, particularly for those disabled young people with complex needs.
- It was acknowledged that not enough choice or availability of support was available across the country, including further education.
- The term 'complex needs' was used without clarity of definition; however, many respondents felt that this group's needs were unlikely to be met in the proposed strategic framework.
- Significant challenges were noted during the transitions process, particularly in accessing health supports/services where often there were drops in provision.

The Scottish Government produced detailed guidance on transitions for disabled young people and their families in 2023.<sup>638</sup> The guidance is a recognition of the changing information needs of disabled young people and their families and aims to support families to ensure the transition process is as smooth as possible, although further evaluation will be needed to determine how effective this has been.

### **Disabled children and young people: deprivation of liberty and secure care**

In the final years of this period increased recognition has been given to disabled children and young people and those with additional support needs in secure care. Overall, very little is known about disabled children and young people who have been deprived of their liberty – either in secure settings or more broadly.

The UN published a global study on children deprived of liberty in 2019, which highlighted that children should grow up in a family environment where they experience love, protection, and security.<sup>639</sup> Where this is not possible the state

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636 Scottish Government, *National Transitions to Adulthood Strategy: Analysis of Engagement on the Statement of Intent* (Edinburgh: Scottish Government, 2024).

637 The five closed questions were: Do you agree that the meaning we have given to transition to adulthood is the correct one for the strategy?; Do you agree that the meaning we have given to disabled people is the correct one for the strategy?; Do you agree that the vision for the strategy is correct?; Do you agree that the priorities are the correct ones for the strategy?; Do you have any other comments on the statement of intent?

638 Scottish Government, *Supporting Disabled Children, Young People and Their Families: Guidance*.

639 United Nations, *Global Study on Children Deprived of Liberty* (Geneva: United Nations, 2019).

should ensure they grow up in a family-type environment. They state that placing children in institutions where they may be deprived of their liberty is difficult to reconcile with the UNCRC. They also note that disabled children and young people are significantly over-represented in institutions, estimating that as many as one in three children in an institution is a disabled child.

The report suggests that, globally, a minimum of 1.3 to 1.5 million children are deprived of their liberty each year.<sup>640</sup> Of those, the largest number are in institutions (430,000–680,000), followed by those in the administration of justice (410,000), in migration-related detention (330,000), in armed conflict situations (35,000), and for national security reasons (1,500). An additional 19,000 children are living with their primary caregivers in prisons. Disabled children and young people are deprived of their liberty so they can access services that should be delivered in the community such as education, healthcare, or rehabilitation, as families often lack the social or financial resources they need to provide care for their children. It argues that this represents a unique disability-specific form of deprivation of liberty, in that based on having an impairment (or the presumption of an impairment), disabled children and young people are 'placed in institutions, involuntarily committed to mental health facilities, detained in forensic facilities and/or detained at home and other community settings. This happens across a range of states that differ in economic and social status or legal tradition, but all make assumptions that stem from the medical model of disability.'<sup>641</sup>

Disabled children and young people who are deprived of their liberty are then at heightened risk of violence, abuse, and exploitation, which may include restraint, or being shackled, secluded, or beaten by staff as a form of control or punishment.<sup>642</sup> It is suggested that several factors may lead to the deprivation of liberty:

The pathways that unnecessarily lead children to be separated from families include socioeconomic conditions, discrimination, family violence and lack of access to essential services (e.g., health, education, rehabilitation, treatment). Some children end up in institutions owing to the incorrect application of the best interests' principle. Systems favouring institutions are sometimes characterized by profit motives or

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640 United Nations, *Children Deprived of Liberty*.

641 United Nations, *Children Deprived of Liberty*, paragraph 33.

642 United Nations, *Children Deprived of Liberty*.

commodification of the care of children. Many States lack gatekeeping systems, which are necessary to prevent the placement of a child in care outside of the immediate family and to ensure that any such placement is suitable to meet the child's needs and preferences.<sup>643</sup>

The report suggests that institutions are often characterised by living arrangements that are inherently harmful to children. This might include separation from families, forced co-habitation, lack of individual care and love, a lack of caregiver responsiveness, and a lack of self-determination:

In principle, the United Nations, in its Guidelines for the Alternative Care of Children (General Assembly resolution 64/142) envisages that States should refrain from institutionalising children who are in need of care, protection, education, rehabilitation or treatment. Where the immediate family is unable to care for a child with disabilities, Article 23 (5) of the Convention on the Rights of Persons with Disabilities requires States to 'undertake every effort to provide alternative care within the wider family, and, failing that, within the community in a family setting'.<sup>644</sup>

More specifically in Scotland, children and young people in secure care represent a very small group, with only 78 places being available since 2023. Secure care aims to provide intensive support, care, and education within a nurturing environment to children and young people who have been placed there through the children's hearing system or by the criminal justice system, having been remanded or sentenced via powers of the chief social work officer or temporary police powers. Young people will only be placed in secure care when it has been assessed as necessary and in their best interests that they are cared for in a setting that keeps them and others safe. Statistics published by the Scottish Government in 2024 suggest that there is an overall downward trend of children in secure care:

- During 2022–23, there were an average of 59 children in secure care accommodation – down 20% from an average of 74 children in 2021–22.
- 154 admissions to secure care accommodation took place during

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643 United Nations, *Children Deprived of Liberty*, paragraph 63.

644 United Nations, *Children Deprived of Liberty*, paragraph 92.

2022–23 – a 3% increase from the previous year (149).

- On average, 37 children were from within Scotland (down 10% on 2021–22) and 22 were from outside Scotland (down 33% 2021–22).
- On 31 July 2023, there were 60 residents in secure care accommodation, continuing the downward trend since 2019 and the lowest number of residents at year end since recording began.
- Of these, 36 (60%) were male and 24 (40%) were female. The largest proportion of residents were aged 16 or over (43%), followed by 14-year-old residents (27%) and 15-year-old residents (22%).
- Just over a quarter of residents (28%) had a recorded disability.
- For the 60 residents in secure care accommodation on 31 July 2023, 23% had a length of stay between 6 months to under 1 year, with a further 20% staying between 3 months to under 6 months or between 1 month to under 2 months respectively.<sup>645</sup>

These figures tell us very little about the 28 per cent of children and young people with a recorded disability in secure care, and it is unclear what is meant here by disability or what their range of needs might be. This is a considerable percentage of disabled children and young people within this population, warranting further exploration of why they have arrived in secure care and the extent to which their education will be provided appropriately whilst they are accommodated in this setting. Gough suggested that there was variation in how local authorities approached education and other aspects of care in secure care settings, with ineffective links to health care also noted.<sup>646</sup> She suggests that the kind of trauma experienced by young people in secure care is likely to mean that many have additional support needs.

Overall, children's rights were not considered to be effectively protected in secure care<sup>647</sup> and the Scottish Government responded to these concerns via the Children's

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645 Scottish Government, *Children's Social Work Statistics: Secure Care 2022–23* (Edinburgh: Scottish Government, 2024).

646 Alison Gough, *Secure Care in Scotland: Looking Ahead: Key messages and call for action* (Glasgow: CYCJ, 2016).

647 Gough, *Secure Care in Scotland*.

Rights and Wellbeing Impact Assessment (CRWIA): Secure Care Pathway and Standards Scotland, published in 2020.<sup>648</sup> This document aims to provide practitioners with clearer expectations to effectively meet the outcomes of this vulnerable group of children and young people. Notably, Standard 34 states that children and young people in secure care must 'benefit from a wide range of high quality educational, vocational and community-based experiences and qualifications'.<sup>649</sup> However, it should be noted that Harris and Riddell found that the potential of the CRWIA system to protect children's rights had not been fully realised.<sup>650</sup>

### **The formalisation of human rights within Scottish legislation and policy**

It appears that centring the rights of children and young people (and particularly disabled children and young people) is more important than ever. Yet any developments in relation to human rights enactment in Scotland is currently taking place within a context of political and financial uncertainty. The Scottish Government made its commitment to promoting the human rights of their citizens clear by proposing to pass a new Human Rights Act. The intention was to incorporate four separate UN treaties:

- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Discrimination Against Women
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Rights of People with Disabilities.

The proposed Act was intended to feature key fundamental rights including the right to life; freedom from torture and from inhuman or degrading treatment or punishment; the right to liberty and security of person; the right to education; the right to non-discrimination in the exercise of rights; and rights belonging to children, women, persons with disabilities, on race, for older people, and for LGBTI communities. New duties would be placed on public bodies to report progress on and comply with these rights.

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648 Scottish Government, *Children's Rights and Wellbeing Impact Assessment (CRWIA) Secure Care Pathway and Standards Scotland* (Edinburgh: Scottish Government, 2020).

649 Scottish Government, *Secure Care Pathway and Standards Scotland* (Edinburgh: Scottish Government, 2020), 8.

650 Harris and Riddell, 'Ensuring Rights Matter'.

These intentions were first set out in the First Minister’s Advisory Group on Human Rights Leadership in 2018.<sup>651</sup> The group worked to develop recommendations for a statutory framework that would bring internationally recognised human rights into domestic law to protect the human rights of every member of Scottish society. The group considered a wide range of rights including civil, political, economic, social, and cultural rights. The group also set out a commitment to actively consider the incorporation of the UNCRPD into Scots law. The report published by the group was based on three guiding principles:

- (1) non regression from the rights currently guaranteed by membership of the EU.
- (2) Keeping pace with future rights development within the EU.
- (3) Continuing to demonstrate leadership in human rights.<sup>652</sup>

Despite this work, the future of human rights legislation in Scotland is currently uncertain, and the 2024–5 Programme of Government did not include the Scottish Government’s ‘flagship’ Human Rights Bill.<sup>653</sup> The Scottish Government believes that providing minimum legal standards linked to UN treaties in areas such as housing, education, health, standards of living, and so on will increase social justice and provide a platform for policy-making in Scotland. The Scottish Government’s National Taskforce for Human Rights, chaired by Professor Alan Miller, made recommendations for a broader statutory human rights framework.<sup>654</sup> However, a Supreme Court judgment on the UNCRC (Incorporation) (Scotland) Bill meant that the scope of the Act had to be narrowed to devolved matters of the Scottish Parliament. This has raised questions around how a new Human Rights Bill would deal with policy areas that are currently governed by UK Acts of Parliament.

Key stakeholders who had worked alongside the government for around a decade to

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651 First Minister’s Advisory Group on Human Rights Leadership, *Recommendations for a New Human Rights Framework to Improve People’s Lives. Report to the First Minister*, 2018. Available online: [First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf](#)

652 First Minister’s Advisory Group on Human Rights Leadership, *Recommendations*, 7.

653 Angus Evans and Nicki Georghiou, ‘The Human Rights Bill – Why Has the Scottish Government Not Legislated and What Happens Next?’ (2024). SPICe Spotlight. Available online: [The Human Rights Bill – why has the Scottish Government not legislated and what happens next? – SPICe Spotlight | Solas air SPICe](#).

654 Scottish Government, *National Taskforce for Human Rights: Leadership Report* (Scottish Government, 2021).

develop the proposed Human Rights Bill expressed deep disappointment. For example, the Human Rights Consortium wrote to the First Minister on behalf of over 100 organisations which argued that the decision was 'highly regrettable' and a 'dismissal ... of the very real and pressing human rights issues facing people in Scotland'. The Chair of the Scottish Human Rights Commission, Professor Angela O'Hagan, stated that: 'abandoning the Bill denies people access to justice to ensure their human rights are fully realised, from a safe home to decent food and good health and social care'. Some key stakeholders, such as Making Rights Real, have pulled out from further discussions with the government because of 'broken promises'.<sup>655</sup>

Progress on children's rights has been better, however, and the Scottish Government formalised its commitment to human rights and inclusive practice for children by passing the UNCRC (Incorporation) (Scotland) Act in 2024. The Children and Young People's Commissioner Scotland notes that 'this Act is the most important thing Scotland has done to protect the rights of children and young people'.<sup>656</sup> The main function of the Act is to ensure that the rights of babies, children, and young people are protected within Scots law. Children, young people, and their representatives will have the power to go to court to legally enforce their rights, and the Children and Young People's Commissioner Scotland and the Scottish Human Rights Commission will have powers to take legal action to protect children's rights.

The Scottish Government issued guidance on taking a children's human rights approach in 2024.<sup>657</sup> This guidance provides information to support local authorities and other relevant organisations to consider the effective implementation of a human rights approach in their services for children. It introduces the UNCRC and links to other relevant policy areas. The guidance explores methods to embed a children's human rights approach in practice including decision-making, budget allocation, inclusive communication, child-friendly complaints, and advocacy. It should enable local authorities to meet their obligations under the Children and Young People (Scotland) Act 2014 and the UNCRC Child (Incorporation) (Scotland)

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655 Evans and Georghiou, 'The Human Rights Bill'.

656 Children and Young People's Commissioner Scotland, *Incorporation of the UNCRC*. Available online: [Incorporation of the UNCRC - The Children and Young People's Commissioner Scotland](#).

657 Scottish Government, *Guidance on Taking a Children's Human Rights Approach* (Edinburgh: Scottish Government, 2024).

Act 2024. Section 1 of the 2024 Act places a duty on public authorities not to act incompatibly with the UNCRC requirements.

Inclusive communication and advocacy are particularly relevant for disabled children and young people, and the guidance lays out the importance of ensuring effective communication strategies for disabled children and young people, providing examples of and case studies on how this can be achieved. Advocacy is currently a right for children in certain circumstances under other legislation such as within the Mental Health (Care and Treatment) (Scotland) Act 2003 (Section 259), and they may also have the right to be informed about the use of advocacy, for example by the Chair of the Children's Hearing under Section 122(2) of the Children's Hearing (Scotland) Act 2011. There are various forms of advocacy that could be used to ensure the voices of disabled children and young people are heard.<sup>658</sup>

Article 13 of the UNCRC gives children and young people the right to seek, receive, and impart information in a variety of formats, including graphic and verbal information. The Scottish Government has produced an inclusive communication guide for local authorities to assist in the goal of achieving a rights-based inclusive communication strategy, making links to its duties under the Equality Act 2010, which makes it unlawful for public authorities to discriminate, harass, or victimise employees and people who use services because of protected characteristics such as disability.<sup>659</sup>

Given the current policy and financial context set out in this chapter, it remains to be seen whether the UNCRPD will be incorporated into Scots law via legislation in the same way as the UNCRC or whether it can be implemented via policy and how effective this will be. It is also too soon to assess the impact of the incorporation of the UNCRC and further research to monitor its impact will be needed.

## **Discussion and implications of legislative and policy developments from 1995 to 2024**

This final period has been a time of major legislative and policy development that is characterised by attempts to codify human rights and anti-discriminatory measures

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658 For a more detailed overview of these, see Ailsa Stewart and Gillian MacIntyre, *Advocacy: Models and Effectiveness* (Glasgow, IRISS, 2013). Available online: [Advocacy: Models and effectiveness](#).

659 Scottish Government, *Principles of Inclusive Communication: An Information and Self-assessment Tool for Public Authorities* (Edinburgh: Scottish Government, 2011).

into law and policy.<sup>660</sup> There was a change in how children and young people generally, and disabled children and young people in particular, were viewed and treated in law. There has been a shift from a concern with parents' rights over their children to a focus on their responsibilities to safeguard and protect their children, increasing children's rights to their own identity, voice, and decision-making. It is argued that securing these rights was the culmination of many years of campaigning by different pressure groups, as well as the influence of various rights-based international treaties. External pressure for change and improvement in the lives of disabled children and young people has driven progress, albeit slowly. We can also see the influence of the social model of disability, and this has been explicitly referenced by policy-makers and legislators as an underpinning rationale for change during this time. This suggests that there has been a shift in focus from individual deficit to an approach that acknowledges the structural and societal barriers that combine to reinforce the impact of disability. We argue, however, that while lip service has been paid to this approach, this does not always translate into policy or filter down into practice to improve the lives of disabled children and young people.

While there has been a much greater willingness to listen to the voices of disabled children and young people and provide opportunities and pathways for them to be involved in decision-making and to influence policy and legislative developments, there have been limitations around these developments. Riddell and Weedon have highlighted the limitations of legislative and policy developments, arguing that they did not go far enough to result in a real shift in power from professionals to families. They have argued that legislative change during this period reinforced existing inequalities and did not go far enough to ensure that children and young people and their families from the most disadvantaged backgrounds had greater opportunities to participate and influence decision-making. Using the example of the Additional Support Needs Tribunal, implemented as part of the 2004 Act, they argue that this is more accessible to families with greater resources, likely to be the more materially well-off, often middle-class families.<sup>661</sup> Dispute resolution as well as access to appropriate services and support are potentially only available to those who can advocate effectively for themselves or who have parents who are able to do so on

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660 For example, the Disability Discrimination Acts 1995 and 2005, the Equality Act 2010, and the Mental Health (Care and Treatment) (Scotland) Act 2003.

661 Riddell and Weedon, 'Additional Support Needs Policy'.

their behalf.<sup>662</sup> This may exclude disabled children and young people from more disadvantaged backgrounds.

Another key theme during this period relates to the collection of data on disabled children and young people, and there have been various attempts to improve this. It has been possible to bring together data from a much greater range of sources than previously, and this has given us a clearer insight into the numbers of disabled children and young people in Scotland. It has also given us a greater understanding of where these children and young people live and how their educational needs are catered for in a range of settings. However, writers including Stalker and Moscardini and McTier have continued to raise concerns about the quality of data available, highlighting ambiguities around how disability is defined and measured across different settings. This ambiguity can be illustrated by the difference between the estimated number of disabled children and young people between 2011 and 2022, where the number of disabled children and young people has risen from 5 per cent in 2011 to 8 per cent in 2022.<sup>663</sup> It is unclear whether this reflects a significant increase in disability during this period or represents a better understanding of what constitutes disability, greater transparency in where disabled children and young people are located, the pathologisation of a broader range of conditions, or simply better data collection.

This has made it challenging to provide a clear and consistent picture of the numbers of disabled children and young people who are being educated in residential settings across Scotland, despite both the UNCRC and the UNCRPD emphasising the need for improved data collection to ensure that the needs of disabled children and young people are recognised and appropriately responded to. These challenges have been acknowledged by the Scottish Government, which has developed a Health and Social Care Data Strategy to tackle some of the challenges around accessibility and consistency.<sup>664</sup> It is hoped this will provide professionals and service users with confidence about the robustness and confidential nature of data. Nonetheless, the challenges with identifying the population of disabled children and young people remain, and geographical variations in data collection and definitional ambiguity

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662 Riddell and Weedon, 'Additional Support Needs Policy'.

663 McTier, 'Taking Action to Improve the Collection of Statistics'.

664 Scottish Government and COSLA, *Greater Access, Better Insight, Improved Outcomes: A Strategy for Data-Driven Care in the Digital Age* (Edinburgh: Scottish Government, 2023).

contribute to this lack of clarity.<sup>665</sup> We argue that the most significant implication of this limited data is the impact on planning and resourcing of appropriate services to effectively meet the needs of this population.

There has been a significant shift in language and terminology during this period with a move from special educational needs to additional support needs. This signifies a move away from a deficits-based approach towards a more inclusive understanding that acknowledges that all children may have additional support needs at some point in their educational career. The move to additional support needs can therefore be seen to reflect a consideration of the impact of the broader social and contextual factors that give rise to the need for support rather than a specific deficit within the individual. This means that children categorised as having additional support needs will include those who are not disabled, providing less clarity on this population and subsuming the needs of disabled children and young people within a broader paradigm where their specific needs may be hidden or overlooked. This illustrates the dilemma when considering whether universal policies that target all children, as evidenced in approaches such as GIRFEC, as opposed to those that offer targeted or specialist provision to disabled children and young people are most effective. Currently, provision for disabled children and young people does not stand alone and is often applied equally to all children. This may create greater inequality for disabled children and young people, particularly for those from more vulnerable or disadvantaged backgrounds.

This tension – between a children first-approach or acknowledging that not all children are the same and that the additional needs of disabled children and young people need to be recognised – risks separating or othering disabled children and young people, stigmatising and creating the opportunity for discrimination, exclusion, or simply being overlooked within more universal policy developments.<sup>666</sup> A review of services and the impact of GIRFEC specifically on disabled children and young people in 2013 suggested steps on how to mitigate a universal approach that did not adequately meet the needs of disabled children and young people.<sup>667</sup>

Thinking specifically about the provision of education during this period, the

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665 McTier, *Are Disabled Children and Young People Visible?*

666 Stalker and Moscardini, 'A Critical Review and Analysis of Current Research and Policy'.

667 Children in Scotland, *Developing an Outcomes Model*.

presumption of mainstream education rather than a readiness to participate has become standard, and special education should now be considered only in very specific circumstances. An analysis of policy and legislative changes, however, suggests an ongoing willingness to accept that the need for specialist provision for disabled children means that they may be placed in segregated or residential settings. This is particularly true for children with the most complex needs where health and care needs cannot be separated from educational needs. There is a recognition that for these children, education and support may need to be provided on a 52-week-per-year basis, often within a residential setting. Indeed, it is argued that to suggest otherwise represents a misunderstanding of mainstreaming policies.

At the same time, there has been an ongoing emphasis on mainstreaming, with increasingly strong messages about its value being communicated. There has been increased acknowledgment that even where this is assessed as not being appropriate, it is vital that children and young people who are being educated in segregated or residential settings have access to appropriate curriculum content and other opportunities and resources. Overall, across the periods analysed, similar messages and priorities were being repeated in policy and legislation. This suggests that policy is not always implemented effectively or as intended and raises questions over whether simply repeating the same message can be considered an effective way to promote change.

This period has also seen an increase in external scrutiny of services via regulation and inspection legislation, including the development of care standards with which services – such as residential settings – were required to comply. This enabled a useful picture to develop of some of the positives within residential settings, including the move to single-occupancy bedrooms, improved protocols to deal with challenging behaviour, and different approaches to this that could be shared across the sector. The importance of multi-disciplinary working was also illuminated by the inspection process, particularly the need for effective communication and information sharing. This process also highlighted areas for development across the sector. For example, one recurrent challenge identified by inspections was that staff in residential settings did not have access to detailed information about the specific needs of disabled children and young people for whom they were caring nor the skills and expertise to meet those needs. This suggests a need for the availability of better support, training, and advice services for staff.

For professionals, service providers, and families there was a plethora of new relevant legislation and policy that impacted on disabled children and young people to understand and implement. There was also significant overlap across the policy and legislative landscape, making it a confusing and fragmented picture to navigate. Adding to this complexity is an understanding of the differing legal status of disabled children and young people in residential care, creating an even more complex picture for staff and organisations. Understanding the legal status of a disabled child or young person, particularly one who is looked after or educated away from home, is important given that those who do not have formal looked-after status are likely to have fewer safeguards and rights than those who do. This creates an intricate policy and legislative framework for professionals which could lead to inconsistent and fragmented approaches being taken and patchy implementation. It should also be considered that when a new policy, such as The Promise, is launched then previous policy priorities become less well-resourced, hindering progress. An example of this was the implementation – or lack thereof – of the Children (Scotland) Act 2020, which key stakeholders felt was not sufficiently resourced due to resources being diverted towards the implementation of The Promise.

Sustained periods of austerity were experienced in the late 1990s and throughout the early 2000s, with local government funding and public-sector spending experiencing significant cuts. This meant retrenchment of existing services and increased challenges for professionals and families alike. This is particularly important given the findings of the Morgan Review, where the single biggest driver for the successful education of disabled children and young people was, according to parents, a good consistent relationship with well-informed and motivated staff. It is difficult to maintain those relationships within a service that has been reduced due to financial constraints and cuts. The pressure these cuts place on professional staff in education, health, and social care cannot be overestimated. Increased workloads and poor staff retention further impacted provision.

Despite the plethora of policy and legislative changes during this period there is less clear evidence around education attainment for disabled children and young people within residential education. There is some evidence of improvement and of a commitment to maintaining family life where possible, recognising the benefits of this.<sup>668</sup> Where this is not possible there is a strong commitment to caring for children

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668 Scottish Government, *2025 National Improvement Framework and Improvement Plan* (Edinburgh: Scottish Government, 2025).

in a home-like environment within local communities with support to maintain and develop positive and healthy relationships. There have also been several developments that recognise children's rights to access an appropriate educational curriculum with adequate choice and opportunities, as well as additional support to close the attainment gap. Significant challenges remain, however, one of which was the inconsistent review and monitoring of child attainment levels across different sectors, which often appeared to depend on the child's legal status. It appears that there is more focus on the experience of looked-after and accommodated children, rather than children who are looked after on a voluntary basis. Children with poor health who may or may not be categorised as disabled also demonstrate poor educational attainment in residential care settings and appear to be often overlooked.

While significant progress has been made in ensuring that all children and young people receive appropriate support at the right time, the specific needs of disabled children and young people, as well as the varying needs of those with different disabilities, are not adequately addressed within the current legislative and policy framework for education in residential establishments. The shift from an assumption of segregation to a presumption of mainstreaming and the emergence of the social model of disability has repositioned disabled children and young people from the fringes of society and seen them moving towards full inclusion as is their right. Despite this, it seems that disabled children and young people are still at the margins of our consciousness.<sup>669</sup> While there have been positive developments, this analysis shows that for disabled children and young people, there are still several areas of concern.

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669 Jennifer Cousins, 'Disability: Still Taboo in Family Placement?', *Adoption & Fostering* 33, 2 (2009), 54–65.

## **Chapter 6 – Conclusion**

We set out to consider the specific legislative and policy landscape influencing the education of disabled children and young people in residential settings in Scotland and discovered this to be a very challenging proposition. The interconnectedness of relevant legislation and policy across agency, sector, and professional boundaries makes this a complex, fragmented landscape with many aspects often in direct conflict with each other and difficult to disentangle.

Furthermore, there often appears to be an implementation gap between policy ambitions and how these are understood and interpreted in practice. Aspirational policy directives are important in reimagining the best possible outcomes for disabled children and young people but there are questions around how these can be translated into good practice. The evidence considered in this report suggests that there has been variation in policy interpretation and implementation and limited resources attached to implementation. Practitioners often lack confidence and knowledge of the relevant legal and policy frameworks that should inform their work with disabled children and young people and their families. It is also critical to acknowledge the challenges that a lack of a clear definition of disability, the potential for conflation of additional support needs and disability, and limited clarity on the breadth of the population under consideration bring to the development and implementation of policy and legislation in this area.

One of the most striking insights from this review is that while the ambition to treat all children equally is commendable, it risks undermining the very outcomes we seek to improve. Disabled children and young people require tailored approaches to engagement, assessment, intervention, and practice – approaches that reflect the complexity and individuality of their experiences. To deliver meaningful support, professionals must be equipped with the right tools, knowledge, and confidence to work effectively with these groups. When the distinct needs of disabled children are absorbed into broad, universal policy frameworks, their visibility diminishes – and so too does the attention to the specific support they require.

### **Summary of response to aims of the project**

We finish this report by summarising how the aims and objectives for the review have been met, along with recommendations for future policy and practice development:

- To set out and describe relevant legislation and policy on the education in residential settings of children and young people with disabilities and additional support needs in Scotland.

What is evident is that the relevant legislation and policy framework is extensive and intersects across responsibilities within several agencies including health, social work, justice, and education. This creates the potential for confusion and a lack of clarity over duties and responsibilities for agencies and practitioners. The needs of disabled children and young people are often subsumed within broader legislation and policy for all children, and as such the specific functions relating to their needs can be lost, minimised, or difficult to identify. Codes of practice and regulations provide some clarity and specificity over how the various pieces of legislation and policies should be implemented. This can, however, be difficult to locate, and, as different policy agendas and priorities emerge, keeping track of the changes and maintaining momentum may also be challenging.

- To identify changes in language and terminology over time, considering the reasons for this and potential implications of these changes.

It is evident in the time frames explored within this report that the language and terminology used to describe and discuss disabled children and young people has evolved over time and reflects the influence of the social model of disability, the social relational model, and the emergence of rights-based models spurred by international treaties and conventions that have been incorporated into or significantly informed Scots law. Alongside this repositioning of disabled children and young people, the impact of pressure groups, particularly of disabled people themselves via the disability movement, on the development of the use of less stigmatising and discriminatory language and terminology cannot be overestimated. The significance of these can be seen in the elaboration of rights-based policy and the enumeration of children's rights in developments such as GIRFEC. If language reflects the cultural and social attitudes towards groups, then the value attached to disabled children and young people has increased significantly over the last 80 years.

- To establish any implementation gaps between legislation, policy, and practice, and to highlight any apparent reasons for this.

There are several key factors that impact on the implementation gap between legislation, policy, and practice. As noted throughout the report, limited and

inconsistent data on the population of disabled children and young people and their location creates challenges in attaching resources to the development of appropriate services. There are further gaps in practitioner knowledge around different disabilities, what they mean and what impact they may have on a child, and a lack of specificity regarding different types of disability in policy. Geographical variations in implementation also suggest varying interpretations of what the policy demands of services. The use of an omnibus term such as 'disability' can preclude consideration of the needs of specific groups of disabled children and young people and may contribute further to this implementation gap, given that the needs of some disabled children and young people may be largely hidden or overlooked. The needs of those with physical disabilities can be significantly different from those with learning disabilities, for example. Knowledge of the myriad of legislation, policy, regulation, and reporting mechanisms regarding children and young people with disabilities varies across the relevant workforce, with high caseloads and poor retention rates also influencing practice. There is evidence to suggest that competing policy and legislative priorities become unsustainable for those responsible for implementing them. As new priorities emerge, often with funding attached, existing policy aims garner less attention and focus from professionals and organisations.

This implementation gap must also be considered with reference to the different routes into residential education that are experienced by disabled children and young people and those with additional support needs. It has been possible to identify several factors that make residential education more likely for disabled children and young people. These include situations where children's health needs are so complex that they need 24-hour care that cannot be separated from their need for education. It also includes situations where children require a placement over 24 hours and over 52 weeks of the year for their own safety or the safety of others. Sometimes this might take place in a secure setting. Children who experience social, emotional, and behavioural difficulties are likely to be over-represented in this category. There are also those disabled children and young people who require care in residential settings for their own care and protection. This may be on a voluntary or involuntary basis and set out by the children's hearing system or the courts. Disabled children and young people in each of these groups will have different legal statuses which means they might be subject to decision-making across various legal frameworks. This can lead to variation in how children's rights are protected and their educational attainment promoted.

All of this leads us to consider the extent to which change can be brought about by policy implementation alone and it has been suggested that legislation and policy on their own are not enough to ensure that disabled children and young people can fully enjoy their rights. A clear policy implementation framework alongside sufficient resourcing and the reframing of whole systems to a rights-based approach is therefore required to ensure improved outcomes. Rights do not exist in isolation, however, and must be considered alongside the social and cultural aspects of the lives of disabled children and young people. The relationship between rights and wellbeing may in fact create a policy tension, as noted by Tisdall, who suggests that wellbeing often takes precedence over rights yet is not legally enforceable in the same way as upholding rights can be.<sup>670</sup> This raises questions around whether the aim of current policy, whilst embracing the minimum standard of rights, also seeks to give consideration to broader, less tangible concepts such as love and relationships, identified as important by children and young people themselves.

This review has underscored the complexity and fragmentation of the legislative and policy landscape governing the education of disabled children and young people in residential settings in Scotland. While there has been commendable progress in promoting inclusion and embedding rights-based approaches, significant challenges remain in ensuring that these ambitions are consistently realised in practice.

A central issue is the lack of robust and consistent data collection. Without reliable information on the number, location, and specific needs of disabled children and young people, it is difficult to plan, resource, and evaluate services effectively. This data gap contributes to the broader implementation gap and undermines efforts to ensure equitable access to education and support.

The legal status of children and young people in residential settings further complicates service provision. Depending on whether a child is placed voluntarily, through the children's hearing system, or in secure care, their rights and access to education may vary significantly. This variation can lead to inconsistencies in how rights are upheld and how attainment is monitored, reinforcing the need for clearer statutory guidance and inter-agency coordination.

While policy increasingly recognises the importance of listening to children and young people, mechanisms for doing so are often underdeveloped or inconsistently

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<sup>670</sup> Tisdall, 'Children's Rights'.

applied. Ensuring that disabled children and young people are not only heard but actively involved in shaping their educational experiences is essential to a truly rights-based approach. Central to this is the need to see the child as a child first and disabled second. This perspective challenges deficit-based models and calls for a holistic understanding of each child's identity, strengths, and potential. It also aligns with the broader cultural shift towards valuing relationships, love, and wellbeing.

Finally, the tension between universal and individualised approaches to policy development must be addressed. While universal frameworks promote consistency and inclusion, they must be flexible enough to respond to the diverse and complex needs of individual children. A one-size-fits-all approach risks overlooking those whose needs do not fit neatly within standard categories.

In conclusion, meaningful change will require more than policy reform alone. It demands a well-resourced, clearly defined implementation framework, a commitment to listening to and involving disabled children and young people, and a cultural shift that places their rights, relationships, and individuality at the heart of practice. For future policy and legislative development, based on the evidence explored within this report we recommend considering the following issues.

- Clear and consistent data collection mechanisms on type of disability are required to inform appropriate resource provision and ensure appropriate support and education for professionals.
- A clear, shared definition of disability should be developed that considers the needs of different groups of disabled children and young people to inform future legislative and policy development. Care must be taken, however, to avoid becoming overly focused on ascertainment which can lead to an individualised approach that concentrates unduly on deficits, creating stigma and discrimination. The views of disabled children and young people should be sought on this.
- As resources are often linked to policy, if there is an overly broad definition of disability, it is likely that some groups of disabled children and young people may remain hidden and their needs unaddressed. Mechanisms to compensate for this challenge need to be considered.
- A central repository of legislation, policy, and advice as it relates to disabled children and young people should be established, providing a source for practitioners and agencies to consult regarding the implications of new

requirements as they emerge. There are different organisations, such as the Children's Commissioner, the Mental Welfare Commission, or the Scottish Commission for People with Learning Disabilities, that currently provide valuable and concise briefing papers and advice on changes and developments. However, this may be considered somewhat fragmented in its current format.

- Research programmes or at a minimum regular knowledge exchange events should accompany new policy and legislative implementation to establish any gaps and challenges at an early stage in order that these can be addressed.

## Appendix – Search strategy

Initial searches were carried out using the Google Scholar advanced search function and the following databases from the Social Sciences Premium Collection:

- Applied Social Science Abstracts (ASSIA)
- Social Science Citation Index
- Scopus

We also consulted the following educational databases

- Education Abstracts
- British Education Index

Grey literature was searched for using the following:

- OVID Social Policy and Practice Database
- Social Care Online (although nothing further has been added to this database since 2022)
- Care Knowledge (a professional development platform and excellent source of grey literature)
- Global Think Tanks (filtering by organisational type)

To access relevant legislation, policy documents, and other government and parliamentary reports and materials we accessed the UK Parliament and Scottish Government websites. These were particularly helpful with data from the mid-2000s onwards. We also consulted relevant Hansard materials and used the ProQuest UK Parliamentary Papers to access material from before 2000. This allowed us to access House of Commons material from 1715 to 2010.

We used several search terms that included the following key words: 'education', 'disability', 'residential', 'legislation', 'policy', 'disabled children and young people', 'disabled young people', 'Scotland'. We utilised Boolean operators 'AND', 'OR', and 'NOT' to improve the accuracy of our searching.

An example search term using the Social Science Premium Collection was as follows:

(education OR school OR boarding school) AND (children OR adolescents OR young people) AND (residential OR residential care OR boarding OR residential school) AND (disability OR disabled OR special educational needs OR special needs OR additional

needs OR additional support needs) AND (UK or Scotland or England or Wales or Northern Ireland).

This search generated 125 results. We took the decision to include other UK nations within our searches as it was likely that they may include material that was relevant to the Scottish context. This was particularly important for materials published prior to devolution. Abstracts and Executive Summaries were initially screened for relevance and only those papers and documents that were considered relevant to the terms of this work were read in their entirety.