

Children looked after by local authorities: the legal framework

Jackie McRae

commissioned for the review of looked after children in Scotland



social work
inspection agency

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1 Introduction

The Social Work Inspection Agency commissioned an overview of the law affecting children under the care or supervision of local authorities, to inform the national review of support for looked after children in Scotland. This report describes key aspects of the law as it applies throughout a child's journey through public care and supervision, and what this means for the children, their families and carers, and the agencies responsible for safeguarding and promoting their welfare.¹ It ends with some comments on how well the legal framework supports good care for looked after children.

What makes up the legal framework?

Legislation passed by the Parliament is not the only source of law in this area. The legal framework draws on the common law, institutional and academic texts and, increasingly, obligations under European and international law. How the courts interpret and apply legislation in legal disputes and criminal cases shapes how social work, education and health services translate their duties and powers into practice.

Legislation

Primary legislation describes, in Acts of Parliament, the roles, responsibilities and legal duties of private individuals and public bodies as decided by elected members of the UK and Scottish Parliaments.² Actions by an individual or organisation which contravene the law may result in their conviction of an offence and a civil or criminal penalty such as a fine or imprisonment, or may lead to awards of damages for victims. *Secondary legislation* gives detailed directions and regulations in 'statutory instruments' which tell organisations how to implement Acts of Parliament. These may impose duties on local authorities and they, too, are enforceable.

¹ Local authorities have statutory duties to safeguard and promote the welfare of people in their area, including children in need of services to support their welfare and development and looked after children in particular. (Social Work (Scotland) Act 1968, s12; Children (Scotland) Act 1995, ss 22 and 17)

² Acts of the UK Parliament (AP) Acts of the Scottish Parliament (ASP)

The Children (Scotland) Act 1995 is the key legislation concerning the care and welfare of children. Part I describes the legal rights and responsibilities of parents for their children, and makes provision for resolving disputes about children between family members. Part II describes arrangements for public services for children in need of protection and support, and the arrangements to deal with children's offending. Part III amends aspects of the Adoption (Scotland) Act 1978. Many other Acts affect how public agencies support and care for looked after children (see Appendix 1). These include disability related legislation, statutes affecting education, housing and health services, regulatory arrangements for care services and statutory provision for aftercare. Data protection legislation sets out how organisations, including public agencies such as local authorities and health services should record, store and share personal information about people.³ Legislation on freedom of information places new duties, in force from January 2005, on Scottish public authorities to provide public access to information they hold.⁴

Common law

Scots law also includes the common law; legal rules derived from the judgments of the higher courts. These rules are binding on courts dealing with later cases. The common law governs how the courts will interpret and apply legislation and also settles disputes about which there is no relevant legislation. In Scotland decisions in the Court of Session will generally provide authoritative statements of the common law in non criminal cases. The House of Lords is the highest court of civil appeal in all three UK jurisdictions.⁵ Judgments by the Law Lords are binding on all lower courts. If the House of Lords rules on a point of law in an English case, in the absence of any Scottish judgement on that issue the decision may be influential in Scots law, as may cases in the English Court of Appeal about legislation or issues common to both jurisdictions. House of Lords judgments may also draw on case law in other common law countries, for example the US, Australia and Canada.

³ Data Protection Act 1998, Schedule 1: Data protection principles and interpretation

⁴ Freedom of Information (Scotland) Act 2002

⁵ UK jurisdictions are: England and Wales, Scotland, and Northern Ireland

European Convention of Human Rights

However well intentioned, compulsory intervention by public authorities' represents a major intrusion into private and family life. The Human Rights Act 1998, an Act of the UK Parliament, incorporated the European Convention into UK domestic law in October 2000. In Scotland incorporation of the European Convention on Human Rights took effect earlier, when the Scottish Parliament was established in 1999.⁶ The ECHR⁷ guarantees to everyone within the jurisdiction of the Council of Europe's member states⁸ rights to life,⁹ liberty¹⁰ and freedom from torture and inhuman and degrading treatment,¹¹ respect for privacy and family life¹² and freedom of expression.¹³ Everyone must have access to a fair trial before an independent and impartial tribunal to resolve disputes or deal with allegations of criminal offences.¹⁴ The Human Rights Act 1998 requires the UK courts to interpret domestic law as compatible with ECHR wherever possible.¹⁵ The Act makes it unlawful for any public authority to act in a way which is not compliant with ECHR¹⁶ and enables individuals claiming breach of their Convention rights to pursue a remedy in the UK courts.¹⁷

The European Court of Human Rights in Strasbourg investigates and determines applications from member states and individual victims alleging breach of Convention rights. The European Court's judgements have been influential in shaping judicial decisions and legislation in the UK. ECHR provides a benchmark against which to measure professional practice in agencies

⁶ The Scotland Act 1998, s29

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as ...

(d) it is incompatible with any of the Convention rights or with Community law ...

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms entered into force in September 1953.

⁸ European Convention on Human Rights, Article 1; member states may also be held accountable for any human rights violations which they commit outwith their own territory – *Louizidou v Turkey* (1995) 20 EHRR 99

⁹ ECHR, Article 2

¹⁰ *ibid*, Article 5

¹¹ *ibid*, Article 3

¹² *ibid*, Article 8

¹³ *ibid*, Article 10

¹⁴ *ibid*, Article 6

¹⁵ Human Rights Act 1998, s3

¹⁶ HRA 1998, section 6

¹⁷ HRA 1998, section 7; *Barret v LBC Enfield* [2001] 2 AC 550

working with families.¹⁸ The protection for family life afforded by the Convention means that even if intervention by a public authority appears to be in a child's best interests, it must be provided for in legislation or the common law, be in pursuit of a legitimate aim, for example to protect a child from significant harm, and the intervention must be limited to that strictly necessary to achieve the legitimate aim sought.¹⁹ Local authorities may act on reasonable concerns about the risk of harm to a child but their action must be proportionate to achieve the child's protection.

Judicial and administrative procedures for making decisions about children's welfare should not infringe Convention rights under Article 6, the right to a fair trial in respect of all civil and criminal matters, or Article 8, the right to respect for private and family life.²⁰ A court order or supervision requirement affecting parental responsibilities and rights is a state action interfering with family life. In these circumstances the child's welfare may be a paramount, but not the only, or even the deciding, consideration. Courts may have to balance the child's interests with other legitimate interests.²¹ ECHR compliant practice requires that decision making processes be transparent and accountable and that parents have an opportunity to participate in important decisions affecting their family life.²² Local authorities must fully inform parents and family members, involve them in plans and decisions and give them sufficient opportunity to make representations and influence decision-making processes.²³

Convention rights apply equally to children and adults. Although ECHR does not distinguish children and parents' rights separately, the European Court of Human Rights has taken into account the United Nations Convention of the Rights of the Child (UNCRC) when interpreting European Convention rights as they apply to children and young people.²⁴

¹⁸ Cameron, K 'Social Work Practice and the Human Rights Act 1998' in Baillie et al (eds) (2003)

¹⁹ Intervention by public authorities in Scotland is provided for under the Children (Scotland) Act 1995. The Act makes the welfare of the child the paramount consideration in decision making by public authorities and states that orders for compulsory intervention should be made only when that seems likely to be better for the child than making no order.

²⁰ *McMichael v UK* (1995) EHRR 205

²¹ Norrie (2001) 'A Child's Right to Care and Protection' in Cleland A and Sutherland E (2001) *Children's Rights in Scotland* paragraph 8.20, p144

²² Kathryn Cameron 'Social Work Practice and the Human Rights Act 1998' in Baillie et al (eds) (2003); Norrie (2001) *supra*

²³ *Dundee City Council, Petitioners* Inner House – Court of Session, Scottish Opinions 27 Feb 2004, per Lady Cosgrove at paragraph 22 (appeal by local authority against sheriff's interlocutor dismissing the local authority's application for a freeing order on the basis that the parents ECHR rights under Articles 6 and 8 had been breached.)

²⁴ Norrie (2001) in 'A Child's Right to Care and Protection' in Cleland A and Sutherland E (2001), p135

National guidance

Legislation allows Scottish ministers the power to say how public authorities should carry out their statutory functions.²⁵ Scottish ministers have prescribed how local authorities should discharge their responsibilities towards looked after children in both secondary legislation²⁶ and guidance.²⁷ Guidance does not impose duties on local authorities. It does not have the force of law. Local authorities have discretion as to whether or not to follow it in any particular case. Where their actions are subject to challenge in the courts, public authorities may have to justify departure from government guidance.²⁸ They should have at least considered the guidance and have good reason for deviating from it.²⁹ The court will determine the significance of failure to follow guidance in each case.³⁰

Structure of this report

This paper maps the legal framework as it applies throughout a child's journey through public care and supervision. It begins with a description of the legal status, rights and responsibilities of children and their families and examines how these are affected by children being looked after. It then describes the routes by which children may become looked after by local authorities and the duties and powers of local authorities and other public services as a consequence. Thereafter it discusses specific issues relating to kinship care and disability. The next section considers the different ways in which children may cease to be looked after and the legal requirements of local authorities and others in providing further support. The report then examines regulation and quality assurance mechanisms for care services. It concludes with an overview of emerging themes and considers how well the legal framework supports good outcomes for looked after children and provides effective redress when things go wrong.

²⁵ Social Work (Scotland) Act 1968, section 5(1): Local authorities shall perform their functions under this Act and under Part II of the Children (Scotland) Act 1995 under the general guidance of the Secretary of State (now Scottish Ministers, by virtue of the Scotland Act 1998, s52(1)).

²⁶ The Arrangements to Look After Children (Scotland) Regulations 1996; The Fostering of Children (Scotland) Regulations 1996

²⁷ Children (Scotland) Act 1995 Regulations and Guidance Volume 2: *Children Looked After by Local Authorities*

²⁸ Scotland's Children: The Children (Scotland) Act 1995 Regulations and Guidance Volume 1: *Support and Protection for Children and their Families*, p viii

²⁹ *Robertson v Fife Council* 2002 S.L.T. 951, per Lord Hope at paragraph 33; The House of Lords upheld an appeal against refusal of leave to apply for judicial review of a local authority's decision not to provide residential and nursing care. The judgement noted that local authorities are required to follow statutory guidance and deviate from it only where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.

³⁰ *F v Kennedy (No 2)* 1993 SLT 1284, per Lord Justice Clerk (Ross) at p1289: The Court of Session held that recommendations in the Cleveland inquiry report described good practice in interviewing children who were thought to have been sexually abused and should in general be followed. However a failure to follow the guidelines did not mean that, when hearing a proof to establish grounds for referral to a children's hearing, a sheriff was not entitled to accept the children's evidence as reliable. (see Kearney 'The Sheriffs and the Sheriff Court' in Baillie *et al* (eds) (2003))

2 Children and parents, responsibilities and rights

Background to children's legislation in Scotland

The UK has a strong tradition of publicly provided welfare services, underpinned by central direction through legislation and guidance, regulation and inspection.¹ In the twentieth century public policy shifted from its Poor Law origins with a focus on removing children from failing parents, providing them with subsistence and equipping them to earn a living, to a concern for children's welfare, resulting in substantial growth in public authorities' statutory responsibilities.²

In England, the Children and Young Persons Act 1969 created new disposals for children who appeared before the courts for offending, including orders placing them in residential care or under supervision, and transferring approved schools to local authority control. In Scotland, the Kilbrandon Committee recommended a unified system of lay tribunals with responsibility for making decisions about both children in need of care and protection and young people who commit offences, the children's hearings, established by the Social Work (Scotland) Act 1968.³

During the last three decades a series of failures in services for children and child deaths focused critical attention on professional practice in child care and protection. At the same time concerns emerged about agencies' emphasis on child protection at the expense of preventive services for families, and research highlighted the poor outcomes for many children in care. Reform of children's legislation across the UK in the late eighties and early nineties sought to tackle these problems and strengthen parents' responsibilities for their

¹ Aldgate J and Hill M (1995) 'Child Welfare in the United Kingdom' in *Children and Youth Services Review* Vol 17 (5) pp 575-597

² Caroline Ball (1998) 'Regulating child care: from the Children Act 1948 to the present day' in *Child and Family Social Work* Vol 3 pp 163-171

³ Scottish Home and Health Department and Scottish Education Department (1964) *Children and Young Persons Scotland: report by the Committee appointed by the Secretary of State for Scotland* (The Kilbrandon Report) Cmd. 2306 (Edinburgh, HMSO)

children. In Scotland the findings of public inquiries into the removal of children in Orkney and child care policies in Fife, and national reviews of family and adoption law, residential care and aspects of the children's hearing system informed proposals for law reform later enacted in the Children (Scotland) Act 1995.⁴ Although Scotland maintained its integrated approach to child welfare and offending, the 1995 Act introduced court orders for children's assessment or removal from their families, and extended parents' and children's rights of appeal against decisions of courts and children's hearings. It removed local authorities' power to acquire parental rights over children in care by Council resolution, without authorisation by a court. Based on the principle that any intervention by a public authority in the life of a child should be properly justified and supported by services from all relevant agencies working in collaboration, legislation sought to make public authorities more accountable to families and to each other.⁵

The Act sought to promote a child-centred ethos, replacing legal terms such as access and custody with 'contact' and 'residence', and sought to remove the stigma of public care by reference to local authorities 'looking after' children. It emphasised that local authorities should act corporately with all departments sharing responsibility for promoting the welfare of looked after children, and work in partnership, with parents and children, and with other agencies providing health and welfare services. The United Nations Convention on the Rights of the Child strongly influenced provisions requiring children to be consulted, and their views to be taken into account, when parents, children's hearings and public authorities make decisions which affect them. Public authorities include local authorities, education and health services and the courts.

Statutory definitions of 'child'

The law has always recognised that, as they mature, children exert increasing independence and control over many aspects of their lives.⁶ When defining a child and whether he or she

⁴ *Report of the Inquiry into the Removal of Children from Orkney* in February 1991 HC Papers 1992-1993 No 195; *Report of the Inquiry into Child Care Policies in Fife* HC Papers 1992-1993 No 191; The Scottish Law Commission (1992) *Report on Family Law* (No 135); Social Work Services Group (1993) *The Future of Adoption Law in Scotland*; The Social Work Services Inspectorate (1992) *Another Kind of Home: a review of residential child care*; *Reporters to Children's Panels: Their Role, Function and Accountability*, The Scottish Office (1992);

⁵ Children (Scotland) Act 1995 Regulations and Guidance Volume 1: *Support and Protection for Children and their Families*, p vii

⁶ Sutherland (1999) p73; For discussion of children's legal capacity see Thomson (2002) pp187-197

can enter into a transaction having legal effect,⁷ the law reflects this evolving capacity.⁸ Legislation provides various upper age thresholds at which a person is defined as a child, according to the objective to be achieved.⁹

A child has legal personality as soon as, but not before, it is born.¹⁰ An unborn child cannot be made the subject of a supervision requirement or a court order, although grounds for legal proceedings once a child is born may be based on parents' acts or omissions during pregnancy.¹¹ Once born a child can own property or engage in legal proceedings through a legal representative, normally a parent. A parent of a child who has sustained pre-birth injury through negligence or fault may sue the responsible person or organisation for damages on the child's behalf, but only if the child is born alive.¹²

Legislation defines the age at which children may take certain kinds of decisions and act independently of their parents or carers in ways that have legal effect.¹³ In Scotland a young person becomes an adult at 18 years.¹⁴ At 16 years young people may choose where they live,¹⁵ may marry¹⁶ and may buy cigarettes,¹⁷ but they may not drive a car until aged 17 years¹⁸ and they may not vote in an election¹⁹ or buy alcohol until aged 18 years.²⁰

A child under 16 has no active 'legal capacity' to enter into legal transactions, essentially prohibiting a child from acting independently of their parents, guardian or carer other than in prescribed circumstances.²¹ The Act provides for the following exceptions:

⁷ 'Transaction' is defined in Age of Legal Capacity (Scotland) Act 1991, section 9 and includes the capacity to make a will, giving consent which has legal effect, and bringing, defending or taking part in civil legal proceedings.

⁸ Sutherland (1999) p 73

⁹ For discussion see Thomson (2002), pp 187-197

¹⁰ Wilkinson and Norrie (1999) 2.32

¹¹ *ibid*, 2.62-2.68

¹² *Hamilton v Fife Health Board* 1993 SC 369

¹³ Age of Legal Capacity (Scotland) Act 1991

¹⁴ Age of Majority (Scotland) Act 1969

¹⁵ Age of Legal Capacity (Scotland) Act 1991, s7

¹⁶ Marriage (Scotland) Act 1977, s1

¹⁷ Children and Young Persons (Scotland) Act 1937, s18 prohibits the sale of tobacco to children under 16 years

¹⁸ Road Traffic Act 1988, s101

¹⁹ Representation of the People Act 1969

²⁰ Licensing (Scotland) Act 1976, s68

²¹ Age of Legal Capacity (Scotland) Act 1991, s1

- a child under 16 may enter into legal transactions of a kind commonly entered into by persons of his age and circumstances, on terms which are not unreasonable. This enables a child under 16 to enter into routine contracts; for example to make minor purchases, travel independently, have a bank account and be employed for part-time work²²
- a child under 16 may consent on his own behalf to any surgical, medical or dental procedure if a qualified medical practitioner deems him capable of understanding the nature and the possible consequences of the procedure or treatment²³
- may instruct a solicitor in connection with any civil matter if he or she has a general understanding of what it means to do so.²⁴ This is unlikely to be a prohibitive test; the child's knowledge that a solicitor could explain the law and represent the child in court is likely to be sufficient to indicate understanding²⁵

These provisions enabling children to consent to medical treatment and to enter into legal proceedings give statutory expression to 'Gillick competence', a concept which stemmed from a House of Lords ruling in an English appeal case, that a child under 16 could give valid consent to medical treatment provided that he or she was sufficiently mature and understood the nature and consequences of such treatment.²⁶

²² ALC(S)A 1991, s2(1)

²³ ALC(S)A 1991, s2(4); see also Children (Scotland) Act 1995, section 90 requiring the child's consent to any examination or treatment ordered by a children's hearing or a court as part of a warrant or supervision requirement

²⁴ ALC(S)A 1991, s2(4A)

²⁵ Cleland and Hall Dick (2001) p119

²⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112; The Department of Health and Social Security issued guidance to area health authorities on family planning services. The guidance included a section dealing with contraceptive advice and treatment for young people under sixteen years which stated that in exceptional cases a doctor exercising clinical judgment should decide whether to prescribe contraception to a young person without parental involvement and consent. Victoria Gillick, who had daughters under 16 years wrote to her local area health authority asking for assurance that, whilst they were under 16 years, her daughters would not be given contraceptive advice or treatment without her knowledge and consent. The area health authority refused to give such an assurance and Mrs Gillick began legal action to have the guidance declared unlawful because it infringed parental rights and duties. After losing at first instance, the Court of Appeal allowed Mrs Gillick's appeal on the basis that a girl under 16 was incapable either of consenting to medical treatment or of validly prohibiting a doctor from seeking the consent of her parents. The Department of Health and Social Security appealed to the House of Lords which ruled by a majority that contraceptive advice and treatment are essentially medical matters. There is no statutory limit on the age of the persons to whom contraceptive facilities might be supplied; that a girl under the age of 16 years had the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment and any parental right to control a child deriving from parental duty was a reducing right which existed only in so far as it was required for the child's benefit and protection and depended on the degree of intelligence and understanding of that particular child and a judgment of what was best for the welfare of the child.

A person over 12 years may:

- make a will²⁷
- consent to the making of an adoption order or an order freeing him or her for adoption (and an order may not be made without the child's consent unless the court dispenses with the child's consent)²⁸
- be presumed to have sufficient age and maturity to instruct a solicitor; if a child has legal capacity to instruct a solicitor, he or she shall also have legal capacity to sue or to defend in any civil proceedings²⁹

A person over 16 years has full legal capacity to enter into any legal transaction. Nevertheless the law recognises that young people need a degree of 'special care and protection' until they reach adulthood.³⁰ Provided the young person is not yet 21 years old, a court may set aside a legal transaction he or she entered into when aged between 16 years and 18 years if the transaction is substantially and materially prejudicial to the young person's interests.³¹ A prejudicial transaction is one which an adult exercising reasonable prudence would not have entered into were they in the young person's circumstances at the time of the transaction, and it has caused or likely to cause substantial prejudice to the young person's interests.³²

The Children (Scotland) Act 1995 describes the duties and responsibilities of parents and public authorities towards children at different stages of their development. The Act also uses a number of different age thresholds when defining a 'child'. For the purposes of Part I of the Act a child is a person under 18 years.³³ However provisions in Part I concerning parental responsibilities and rights, guardianship and legal proceedings in respect of a child's residence define a child as a person under 16 years.³⁴ The parental responsibility to provide guidance to the child subsists until a young person is 18 years old.³⁵

²⁷ ALC(S)A 1991, section 2(2)

²⁸ ALC(S)A 1991, s2(3)

²⁹ ALC(S)A 1991, s2(4A) and 2(4B)

³⁰ Edwards and Griffiths (1997) p 34

³¹ ALC(S)A 1991, s3

³² ALC(S)A 1991, s3(2)

³³ Children (Scotland) Act 1995, s15(2)(a)

³⁴ C(S)A 1995, s1(2)(a),

³⁵ C(S)A 1995, s1(2)(b)

Similarly the definition of ‘child’ varies in Part II of the Act. For the purposes of Chapter 1 concerning support and services for children and their families, including the provision of accommodation for children, and Chapter 4 concerning local authority applications for parental responsibilities orders and miscellaneous issues, a child is defined as a person aged under 18 years.³⁶ For the purposes of Chapter 2 concerning children’s hearings, and Chapter 3 relating to the protection and supervision of children, a child is usually defined as a person under 16 years. However, 16 and 17 year olds may be defined as children under the Act if they are the subject of supervision requirements, or they are have attained the age of 16 but are still of school age and have failed to attend school regularly without reasonable excuse, or if they are subject to court orders made in other UK courts, are now resident in Scotland and the order is given effect as if it were a corresponding order under Scots law.³⁷

In summary, legislation tends to limit protection for, restrictions on, or control over children and young people to those aged less than 16 years. Statutory provision for support and services generally extends to young people under 18 years, especially where targeted towards young people identified as vulnerable or disadvantaged by family or personal problems, disability or other difficulties. In some circumstances, duties and powers to provide support and resources apply to young people well beyond 18 years.³⁸ As they grow up, looked after children have increasing rights to make decisions and act independently, subject to reasonable direction by persons or a local authority with parental responsibility until they reach 16 years. Being looked after does not alter a child’s legal personality or legal capacity.

Parents’ responsibilities and rights

The Act describes the legal responsibilities and rights in respect of children which should be discharged by parents or others with the care of children who are acting in a parental capacity. The parental responsibilities are:

³⁶ C(S)A 1995, s93(2)(a)

³⁷ C(S)A 1995, s93(2)(b)

³⁸ See for example C(S) Act 1995, s29; local authorities’ duties in respect of advice, guidance and assistance for young people formerly looked after by local authorities persist in respect of young people until they are 19 years, and powers to provide assistance until the young person is 21 years. Local authorities may also contribute to the costs of accommodation and maintenance for a young person in full-time education beyond 21 years, until they complete their course (C(S)A 1995, section 30(3)).

- to safeguard and promote the child's welfare
- to provide direction and guidance appropriate to the stage of the child's development
- where a parent is not living with the child, to maintain personal relations and direct contact with the child on a regular basis
- to act as the child's legal representative³⁹

Parental rights correspond to parental responsibilities and are conferred only to the extent required to enable parents to fulfil their parental responsibilities. Parental rights are not enforceable, for example giving rise to liability in damages for breach if these are infringed,⁴⁰ but are more akin to parental powers legitimately exercised in accordance with the welfare of the child.⁴¹ Parents may discharge their responsibilities 'only in so far as compliance is practicable and in the interests of the child'.⁴²

The parental rights are:

- to have the child living with him or to otherwise regulate the child's residence
- to control, direct or guide the child's upbringing (in a manner appropriate to the stage of development of the child)
- to maintain personal relations and direct contact with the child on a regular basis
- to act as the child's legal representative⁴³

The Children (Scotland) Act 1995 defines a child's parents as his or her genetic father or mother, or persons who should be treated as such.⁴⁴ Mothers automatically have parental responsibilities and rights.⁴⁵ Fathers married to the mother at the time of the child's conception, or at any time subsequently also have parental responsibilities and rights.⁴⁶

³⁹ C(S)A 1995, s1

⁴⁰ *McKeen v Chief Constable of Lothian and Borders Police* 1994 SLT 93; a father's unsuccessful action for damages for loss of society of child following police removal of child from father with legal custody and placement with mother who then removed child from the country.

⁴¹ Norrie (1995) pp 36-10

⁴² C(S)A 1995, s1

⁴³ C(S)A 1995, s2

⁴⁴ The legal status of father or mother may be assigned to adoptive parents or parents who have conceived by assisted reproductive treatment by a court under provisions in the Adoption (Scotland) Act 1978 (section 12) or the Human Fertilisation and Embryology Act 1990 (section 30).

⁴⁵ C(S)A 1995, s3(1)(a)

⁴⁶ C(S)A 1995, s3(1)(b)

The Children (Scotland) Act 1995 uses the term ‘relevant person’ to identify people who should be consulted and involved in planning for looked after children and are entitled to have a role in children’s hearings or legal proceedings concerning the welfare and protection of children. A relevant person may be a parent with parental responsibilities or rights, a person who is not a parent but has been given parental responsibilities under Part I of the Act, or a person who appears to ordinarily have charge of, and control over, the child, likely to be a person with whom the child normally resides.⁴⁷

A child’s ‘family’ is defined as including persons with parental responsibility and any other person with whom the child has been living, which may include extended family members without parental responsibility, such as grandparents or indeed people who are not related to the child.⁴⁸ It does not, for the purposes of the Act, include people without parental responsibility with whom the child has never been resident but who may nevertheless be very important to the child.

Unmarried fathers

In Scotland, birth fathers who are not married to the child’s mother do not have automatic parental rights and responsibilities. They have parental rights and responsibilities as the father on the child’s birth certificate on or after 4th May 2006.⁴⁹ They may also acquire parental responsibilities and rights by formal agreement with the mother⁵⁰ or by a court order.⁵¹

Unmarried fathers do have some rights to be involved in children’s hearings. If resident with the mother, the unmarried father is entitled to attend all stages of the hearing⁵² and receive copies of information and reports.⁵³ He may be defined as a relevant person. He may also fall within the Act’s definition of ‘family’ and therefore be someone with whom a local authority looking after a child should promote contact.⁵⁴ He may be appointed as the child’s guardian of the child.

⁴⁷ C(S)A 1995, s93(2)(b) (a)(b)(c)

⁴⁸ C(S)A 1995, s93(1)

⁴⁹ Family Law (Scotland) Act 2006, s23, amending the C(S)A 1995, s3

⁵⁰ C(S)A 1995, s4

⁵¹ C(S)A 1995, s11

⁵² children’s hearings (Scotland) Rules 1996, rule 12(1)

⁵³ *ibid*, rule 5(3)(b)

⁵⁴ C(S)A 1995, s93 (1)

Unmarried fathers have no right to consent or refuse consent to an order freeing the child for adoption or an adoption order. Nevertheless a court hearing a freeing application, must consider whether the unmarried father has any intention of applying for any parental responsibilities and rights and whether the application would be likely to be refused, before making any freeing order.⁵⁵ Sheriff Court and Court of Session rules provide for notice of freeing application to be given to any person claiming to be the child's father if the local authority knows his whereabouts.

Either parent or any person with parental rights and responsibilities may exercise a parental right without the consent of any other person with the same rights unless this is prohibited by decree or deed, essentially a court order or a document with legal effect.⁵⁶ Non resident parents with parental responsibilities and rights may act as a child's legal representative.⁵⁷ Young parents who are themselves under 16 years have parental responsibilities and rights and may exercise these to the extent that they have legal capacity to do so.⁵⁸ For example the legal capacity of young parents to act as their child's legal representative transfers to the young person's own legal representative that is the young person's parent, guardian or equivalent.⁵⁹ Parent(s) may appoint a guardian, in the event of their death,⁶⁰ and the appointed guardian acquires all the parental responsibilities and rights until the child attains 18 years.⁶¹

Effect of being looked after on parental responsibility and rights

Looking after a child imposes duties on the local authority and gives the local authority the necessary powers required to fulfil those duties. It does not affect the child's legal status, or remove or reduce the responsibilities and rights of any other person in respect of the child.⁶² Neither does a local authority acquire parental responsibilities and rights when a

⁵⁵ Adoption (Scotland) Act 1978, s18(7)

⁵⁶ C(S)A 1995, s2 (2)

⁵⁷ *Kelly v Kelly* 1997 SLT 896; a married father raised an action on behalf of his unborn child seeking to prevent the mother from terminating her pregnancy. The action was unsuccessful because a foetus has no legal persona and no right in law to continue to exist in the womb of the woman carrying it, but this case confirmed that a non-resident father with parental responsibilities and rights could act as a child's legal representative.

⁵⁸ ALC(S)A 1991, section 1(3)(g)

⁵⁹ Norrie (1995) pp 36-10

⁶⁰ C(S)A 1995, s7

⁶¹ C(S)A 1995, s 8(5)(a); note that parental rights last only until a child is 16 years

⁶² Norrie (1999) 16.04 p 510

supervision requirement or court order is made. This contrasts with the position in England and Wales, where the local authority acquires parental responsibility for a child subject to an interim or full care order and shares this with the child's parent(s). Although the parents do not lose their parental responsibility, the local authority may determine the extent to which parents may exercise their parental responsibility.⁶³ In Scotland only a children's hearing or a court may limit parents' exercise of their parental responsibilities and rights. A supervision requirement or child protection related order may temporarily affect how a parent exercises their responsibilities and rights, by directing where a child may reside, regulating a parent's contact or limiting their powers to make decisions on behalf of the child. In practice the local authority has considerable discretion in how they discharge their statutory responsibility to give effect to a supervision requirement. Parents may do anything that is incompatible with a court order or supervision requirement.⁶⁴

Parental responsibilities and rights may be reduced or removed only by the making of

- an order under section 11 of Part I of the Act
- a parental responsibilities order⁶⁵
- a order freeing the child for adoption⁶⁶
- an adoption order⁶⁷

There are very few requirements placed upon parents when their child is looked after. They must keep the local authority informed of their whereabouts. Anyone who has parental responsibilities for the child must inform the local authority of their change of address without unreasonable delay.⁶⁸ Parents may not remove their child from a placement suddenly or without warning if he or she has been accommodated for more than six months.⁶⁹ Any person with parental responsibility may have to contribute to the cost of their child's maintenance whilst looked after by the local authority away from home, even if the child is

⁶³ Children Act 1989, s33(3)

⁶⁴ C(S)A 1995, s3(4)

⁶⁵ C(S)A 1995, s86

⁶⁶ Adoption (Scotland) Act 1978 s18(5)

⁶⁷ Adoption (Scotland) Act 1978, s12

⁶⁸ C(S)A 1995, s18(1) and (2); Intentional failure to comply may lead to conviction and a Level 1 fine

⁶⁹ C(S)A 1995, s25(7)

being looked after against the parent's wishes.⁷⁰ Persons on income support are exempt from liability for their child's maintenance. If the child is over 16, he or she may be liable to contribute to the cost of his or her own maintenance.

The local authority must notify a parent or any other person with parental responsibility or any relevant person when they decide to end a placement and the date on which the placement was, or will be, terminated.⁷¹

Parenting orders

The Scottish Parliament has introduced new powers to require parents to take specific action in order to better meet their children's needs.⁷² If a child or young person is involved in persistent antisocial or criminal behaviour, or action is needed to improve his or her welfare, a court may make a parenting order requiring a parent to comply with any requirements specified in the order for up to 12 months.⁷³ The parent must also attend counselling or guidance sessions as directed by the local authority responsible for supervising the order, for up to three months whilst the order is in force.

Before deciding whether to make a parenting order, the court should seek and have regard to the child's views, give the parent an opportunity to be heard and consider information about the parent's family circumstances.⁷⁴ It should look at any voluntary action the parent has taken to address the child's problems and any other parental behaviour it thinks relevant.⁷⁵ Children whose parents are subject to a parenting order may or may not be looked after by the local authority. Nevertheless it is likely that the local authority or the children's hearing will have had previous contact with the child and family. A parenting order may be applied for only when all attempts at persuading or supporting the parents to act voluntarily in support of their child have failed.

⁷⁰ Social Work (Scotland) Act 1968, s78

⁷¹ The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 19(2)

⁷² Antisocial Behaviour etc. (Scotland) Act 2004, Part 9, ss102-117

⁷³ AB(S)A 2004, s102-103

⁷⁴ AB(S)A 2004, s108

⁷⁵ AB(S)A 2004, s109

In 2005 the Scottish Executive issued non statutory guidance on the legal provisions for parenting orders to the agencies required to implement the orders.⁷⁶ The Scottish Executive plans to issue further non statutory guidance giving advice to professionals and practitioners about when and how to use parenting orders later in 2006.

Adults with incapacity

Legal incapacity, for example because of learning disabilities or mental health problems does not affect a person's status as a parent. In considering any intervention in the affairs of an adult with incapacity there is a requirement to consult and have regard to the views of the person's nearest relative, primary carer and anyone else with an interest in the adult's welfare or the proposed intervention.⁷⁷ This should include any children affected by their parent's incapacity. The local authority has a duty to look after a child where there is no one able to provide suitable accommodation or care for whatever reason.

⁷⁶ Scottish Executive (2005) *Guidance on Parenting Orders – Antisocial Behaviour etc (Scotland) Act 2004*

⁷⁷ Adults With Incapacity (Scotland) Act 2000, s1(4)

3 Becoming looked after

Legal decision-making

The law relies on well-established legal principles, rules and presumptions which shape decisions made by courts. Some are derived from case law, others from scientific hypotheses and research findings and yet others reflect the political ideologies underpinning policy from which legislation emerges.¹ Some legal presumptions stem from leading decisions in private law proceedings concerning disputes between parents about their care of and contact with children. Public law proceedings concerning children's welfare depend first and foremost on professionals' assessment of children's needs. Nevertheless 'private law' presumptions may be influential in shaping judicial decisions, particularly where these involve disputes about contact and placement between the local authority, parents and extended family. Child welfare decision-making is also feeling the increasing influence of the European Court of Human Rights.

In making decisions about looked after children, local authorities, courts and children's hearings must have the child's welfare as their paramount consideration.² Children's hearings and the courts decide whether to authorise intervention by local authorities and consider plans for children at risk or in trouble, and the courts make decisions about children's long-term future for example where local authorities are seeking parental responsibilities orders or adoption, and hear appeals by parents and children against disposals by children's hearings or lower courts. Legal decision-making will depend on the facts and circumstances in each case but will also be informed by what courts think important in determining their best interests.

¹ Christine Piper (2000) 'Assumptions about children's best interests' *Journal of Social Welfare and Family Law* 22(2); Norrie (1999) 10.09-10.10

² C(S)A 1995, s16 and s17(1)(a)

Importance of family relationships

Children’s legislation reflects some key policy assumptions about parenting and the state’s responsibility to promote children’s welfare.³ These are that families should normally be responsible for the upbringing of their children, that parents should share that responsibility, and that, so far as is consistent with safeguarding and promoting the child’s welfare, public authorities should promote the upbringing of children by their families.⁴

Scottish courts have considered that stability and continuity of relationships and care is likely to be in a child’s best interests and in private law proceedings have favoured maintenance of the status quo, unless this is demonstrably likely to put a child at risk.⁵ Where there are competing claims between parents and extended family or foster carers both Scottish and English courts have also attached importance to children being brought up by their natural parents wherever possible and evinced ‘a certain preference’ for mothers’ residence rights.⁶ But the courts will give priority to maintaining stability for the child with the result that ‘the longer a settled environment has lasted, the more that will be required to persuade the court that alteration in his present circumstances will better enhance his or her welfare’.⁷

Presumption in favour of contact

The Children (Scotland) Act makes explicit that a parent who is not living in the child’s household should maintain personal relations and direct contact with the child on a regular basis.⁸ This reflects the underpinning principle that parents should normally be responsible for the upbringing of their children and should share that responsibility, even if parents separate.⁹ Local authorities have a duty, so far as is consistent with their duty to promote children’s welfare, to promote the upbringing of children in need by their parents.¹⁰

³ C(S)A 1995, s2(2) and s22(1)(b)

⁴ Children (Scotland) Act 1995 Regulations and Guidance *Support and Protection for Children and their Families* pvii

⁵ *Brixey v Lynas* 1994 SLT 847; *J v C* [1970] AC 668

⁶ Norrie (1999), 10.19-23, 10.15

⁷ Norrie (1999), 10.17; *Osborne v Matthan* 1998 SLT 1264

⁸ C(S)A 1995, s1(1)(c)

⁹ Children (Scotland) Act 1995 Regulations and Guidance *Support and Protection for Children and their Families* pvii

¹⁰ C(S)A 1995, s22(1)(b)

Where children are looked after away from home the frequency and quality of contact will have a significant impact on the likelihood of reunification and reintegration into their family.¹¹

Support for parental contact is strong in both domestic and European law. ECHR case law states that, in taking action to protect a child from harm, member states have a margin of appreciation, in the exercise of statutory discretion. However, even if removing a child from his or her parent's care is both legitimate and necessary, the local authority should consider carefully whether any further restrictions on parental rights and access are absolutely necessary because of the risk that these will effectively curtail family relationships between the parents and children.¹²

Until the early 1980s parental contact with children in care was entirely at the discretion of local authorities. Even after legislative change social workers and courts failed to effectively promote parental contact despite evidence of its importance for reunification.¹³ The Children Act 1989 introduced a presumption of parental contact with a right of appeal against any proposed termination of contact. This is mirrored in the later Scottish legislation. Some commentators argue that a 'pro-contact' orientation takes insufficient account of contextual factors such as the possibility of domestic violence or relevant family socio-economic characteristics, at least in private law proceedings.¹⁴ If anything there remains a tendency for local authorities, in view of practical and administrative constraints, to limit contact with children looked after to the primary carer and to overlook the importance of involving other family members and fathers in particular.¹⁵

¹¹ Millham, S, Bullock, R, Hosie, K and Little, M (1986) *Lost in Care: The Problems of Maintaining Links between Children in Care and their Families* (Gower, Aldershot): DHSS research study, quoted in Ball (1998)

¹² *Johansen v Norway* Application no: 00017383/90, 07.08.1996, paragraph 64; 1997 23 EHRR 33

¹³ Amendment to child care legislation in 1983 required local authorities to notify parents of any intention to terminate contact with their child in care and enabled parents to apply to a court for an access order, see Ball (1998)

¹⁴ Piper (2000) p 264

¹⁵ The Scottish Executive (2002) *Growing Support; A Review of Support to Vulnerable Families with Young Children*, Chapter 3, paragraph 72 and The Scottish Executive (2002) *Its Everyone's Job to Make Sure I'm Alright*; Chapter 3, paragraph 3.34

Identity

The local authority must have regard to the child's religious persuasion, racial origin and cultural and linguistic background when making any decision with respect to a child who is, or is about to be, looked after.¹⁶ European law prohibits discriminatory treatment in respect of any of the Convention rights.¹⁷ Taken together these provisions should give sufficient protection for a child's personal, cultural and social identity whilst they are looked after. However Scottish local authorities do not consistently record information about the ethnic and cultural origins of families with whom they work, and are not well placed to provide for their needs.¹⁸ National guidance states that the needs of a child looked after away from home are likely to be best met in a family with a similar racial, religious, cultural and linguistic background. Where this is not possible, the guidance states that both foster carers and social workers should have, or obtain, the knowledge and understanding they need to help the child maintain his or her heritage.¹⁹

The Scottish Executive has issued non statutory advice to local authorities about meeting the needs of looked after children linked to personal and social identity. This advises that before placing a child, a systematic assessment will be necessary which should include how the child's racial, religious, cultural and linguistic needs will be addressed whether placed at home, in foster care, in residential care or with adoptive parents.²⁰

Routes into being looked after

Children may be looked after by local authorities on a voluntary basis, because they are provided with accommodation at their parent's or their own request, or there is no person with parental responsibilities and rights able to care for him, or to do so would promote and safeguard the child's welfare. They may be looked after because they are subject of a court

¹⁶ C(S)A 1995, s17(4)(c)

¹⁷ ECHR, Article 14

¹⁸ The Scottish Executive (2002) *Growing Support*, Chapter 1, paragraphs 17-19; Chapter 2, paragraph 20 and The Scottish Executive (2002) *Its Everyone's Job to Make Sure I'm Alright* Chapter 2, paragraph 2.3, Chapter 7, paragraphs 7.54-7.55

¹⁹ Children (Scotland) Act 1995 Regulations and Guidance Volume 2: *Children Looked After by Local Authorities*, Chapter 3, paragraph 83, p 62

²⁰ Social Work Services Inspectorate (1998) *Valuing Diversity: Having Regard to the Racial, Religious, Cultural and Linguistic Needs of Scotland's Children* The Scottish Office

order or compulsory measures of supervision. In Scotland a child under compulsory measures of supervision may be looked after by a local authority whilst living at home with his or her family. In other UK jurisdictions a child living at home subject to a supervision order is not 'looked after', although children subject to care orders remain looked after if placed with parents while a care order is in force.²¹

The use of voluntary and compulsory routes into public care follows different patterns in Scotland and England. Following implementation of the Children Act 1989 the proportion of looked after children under compulsory arrangements fell significantly in England and Wales, although the number of care and supervision orders is now increasing. In contrast after implementation of the Children (Scotland) Act 1995, the use of voluntary arrangements to look after children declined from 30% in 1992 to 23% of all looked after children in 2002.²²

Accommodation provided on a voluntary basis

Parents may ask a local authority to provide a child or young person with accommodation. The local authority may provide accommodation on a voluntary basis for a child under 16 years only with the consent of persons who have parental responsibilities and rights.²³ The local authority must provide accommodation for a child in their area if it appears that he or she needs it because no one has parental responsibility for him or her, he or she is lost or abandoned, or whoever has been looking after the child can no longer do so.²⁴ In all other circumstances the local authority may provide accommodation for a child if they consider that would safeguard and promote his welfare.²⁵

A young person aged 16 years may consent to being accommodated.²⁶ The local authority may provide accommodation for a young adult aged between 18 and 21 years if the local authority thinks that would safeguard and promote his or her welfare.²⁷ The local authority's

²¹ Children Act 1989, section 22(1) and Children Order (Northern Ireland) 1995, section 25(1); both define children looked after as children in the care of the local authority or provided with accommodation by the local authority

²² McGhee, J and Francis J 'Protecting children in Scotland: examining the impact of the Children (Scotland) Act 1995' Child and Family Social Work 2003 (8) p140

²³ C(S)A 1995, s25(6)

²⁴ C(S)A 1995, s25(1)

²⁵ C(S)A 1995, s25(2)

²⁶ C(S)A 1995, s25(7)(a)

²⁷ C(S)A 1995, s25(3)

duties in respect of looked after children under 18 years would apply in these circumstances, but only to the extent that the young adult consents to the local authority discharging its statutory responsibilities.

Any parent or person with parental responsibilities may remove a child accommodated on a voluntary basis from a placement at any time, unless there is a residence order requiring the child to reside with another person and that person has asked the local authority to accommodate the child.²⁸ When a child has been looked after away from home for more than six months, a person with parental responsibilities and rights must give at least fourteen days notice in writing of any intention to remove the child from local authority accommodation.²⁹

Compulsory measures of supervision and court orders

A child subject to a supervision requirement made by a children's hearing, or an order, authorisation or warrant made by a court or children's hearing or an order from a court in another part of the UK and living in Scotland, is deemed to be looked after by the local authority.³⁰ An order made by a court in England and Wales or Northern Ireland will have effect as if it were a supervision requirement made by a children's hearing.³¹ The child may be residing at home or directed to reside in accommodation provided or arranged by the local authority.³²

A local authority is required to give effect to a supervision requirement made by a children's hearing.³³ Nevertheless it is not uncommon for local authorities to fail to implement their statutory duties in respect of supervision requirements. One review of young people under supervision found that in a fifth of cases there was no social worker allocated to work with the young person.³⁴

²⁸ C(S)A 1995, s25(6)

²⁹ C(S)A 1995, s25(7)

³⁰ C(S)A 1995, s17(6)

³¹ The Children (Reciprocal Enforcement of Prescribed Orders etc. (England and Wales and Northern Ireland)) (Scotland) Regulations 1996

³² Norrie (1995) 36-49

³³ C(S)A 1995, section 71(1)

³⁴ Audit Scotland (2002) *Dealing with offending by young people: performance audit*

If the child is living at home or with relatives or friends the local authority should check whether the child is actually living there and take reasonable steps to ensure that the child is complying with any conditions imposed by the supervision requirement.³⁵ Although regulations allow a local authority to place a child with his or her parent(s) they must not place the child with a parent from whom the child was removed by virtue of an order, authorisation or warrant made under Part II of the Act, and any placement with parents shall be subject to the terms of any supervision requirement or other order, authorisation or warrant under Part II. Essentially this means that a local authority may not ignore a court's or children's hearing direction to place a child away from home. Nevertheless if a local authority is unable to immediately implement a condition of residence as directed by a hearing they may make suitable alternative arrangements for up to 22 days from the date of the hearing's decision, and, if unable to place the child as directed within that period must refer the child's case to the reporter for a review hearing.³⁶

Effect of court orders

The Children (Scotland) Act 1995 introduced court orders for the purposes of assessment and protection of children at risk of significant harm.³⁷ A local authority may apply to a Sheriff for a court order authorising assessment or removal of a child from his or her carers,³⁸ or an order excluding from the child's household a named person who poses a risk to the child.³⁹ Children subject to a child protection order or a child assessment order are looked after by the local authority for the duration of the order.

³⁵ C(S)A 1995, section 71(2)

³⁶ children's hearings (Transmission of Information etc.) (Scotland) Regulations 1996, Regulation 4

³⁷ There is no statutory definition of 'significant harm'; to reach a threshold which warrants a court order authorising compulsory assessment or a child's removal from home, the child must be suffering or likely to suffer harm which is serious and not of a minor, transient or superficial nature (Norrie (2004) p114). This is a matter to be determined in the light of all the circumstances of the case and will depend on a wide range of factors, including the nature and extent of the alleged harm, the child's age and stage of development, any protective factors within the child's family; the availability of alternative courses of action; the parents' willingness to cooperate with statutory agencies and allow access to the child where necessary, and the views and wishes of the child. See Guidance and Regulations Volume 1 *Support and Protection for Children and their Families* p 60-61

³⁸ C(S)A 1995, s55 -child assessment order (CAO); C(S)A 1995, s57 -child protection order (CPO)

³⁹ C(S)A 1995, s76 - exclusion order; an exclusion order provides for the exclusion of a named person from the child's household or immediate environs as an alternative to the child's removal from his or her family, provided that a safe adult continues to reside in the family home who is capable of caring for the child appropriately. As this order relates to an adult rather than a child it will not be discussed here. See Children (Scotland) Act 1995 Guidance and Regulations Volume 1 *Support and Protection for Children and their Families* p 66-71

A child assessment order requires any person in a position to do so (usually a parent or person with whom the child is residing) to:

- produce the child to an officer of the local authority or someone authorised by the local authority to perform an assessment
- permit that person or any other authorised person to carry out an assessment in accordance with the order
- comply with any other conditions of the order⁴⁰

The child assessment order may specify where the child is to be kept and for how long, and include directions as to contact with any person during the assessment.

Any person who has serious concerns about a child's safety or welfare may apply to a sheriff for a child protection order. A child protection order requires any person in a position to do so to produce the child to the applicant (usually, but not always, a local authority). The order authorises the removal and keeping of the child in a place of safety or the prevention of the child's removal from a place in which he is being accommodated. It may include a direction prohibiting any person's contact with the child or impose conditions on contact with the child as the sheriff considers appropriate.⁴¹ The order may also include direction in relation to the exercise or fulfilment of any parental responsibilities or rights in respect of the child if necessary to safeguard and promote the child's welfare; this may include directions in relation to examination of the physical or mental state of the child, assessment or interview or any resulting treatment.

If the applicant is not a local authority, he or she must give notice of the making of a child protection order to the local authority in which the child normally lives and to the principal reporter. If, in an urgent situation, it is not immediately practicable to make an application to a sheriff, a justice of the peace may authorise a local authority to remove a child to a place of safety for up to 24 hours, or a police officer may act to remove a child to a place of safety. Equally these short-term emergency measures may prevent any person from removing a child from where he or she is then accommodated.⁴²

⁴⁰ C(S)A 1995, s55(3)

⁴¹ C(S)A 1995, s58

⁴² C(S)A 1995, s61

A child who is the subject of a child assessment order or a child protection order, or subject to emergency measures for his or her protection is looked after during the period of the order or authorisation, unless the local authority has no responsibilities in relation to the order. If a local authority is not the applicant for a child protection order or authorisation of emergency child protection measures and is neither providing accommodation for the child, nor assigned a role in implementing the order or authorisation, the child is not 'looked after'. For example medical staff or a hospital trust could apply for a child protection order and the child remain in hospital, pending consideration of the case by the children's hearing.

In any event, the local authority will quickly become involved because it has a duty to assist the principal reporter's initial consideration of the child's case, provide information for any children's hearing,⁴³ and give effect to certain disposals by the reporter or the children's hearing.⁴⁴ In practice the majority of child protection order applications are made by local authorities.

Court orders and other measures for the child's protection do not confer parental responsibilities on the local authority or remove parental responsibilities and rights from the parent or carer, but effectively determine how they should be carried out in the interim.⁴⁵ This contrasts with the Children Act 1989 in which an order equivalent to the Scottish child protection order confers parental responsibility on the applicant local authority who shares it with the parent for the duration of the order (and any subsequent interim or full care orders).⁴⁶

Research into the use of these new court orders for the protection of children found significant reduction in the use of emergency orders for children's removal, although some rise from 1997 and very limited use of child assessment orders and exclusion orders. Practitioners reported that the provisions appeared to have brought about greater scrutiny and rigour in decision-making about children's removal, and a perception that the Act had enhanced parents' rights. Nevertheless despite stronger powers for parents and children to challenge hearings' and courts' decisions, practitioners suggested that parents and children

⁴³ C(S)A 1995, s56(2) and s56(7)

⁴⁴ The Reporter may refer the case to a local authority with a view to their making arrangements for the advice, guidance and assistance of the child and family on a voluntary basis (C(S)A 1995, section 56(4)(b)); or a children's hearing may make a supervision requirement, or continue the hearing and issue a warrant to keep the child in a place of safety (C(S)A 1995, s69) which may require the local authority to place the child in a residential or other establishment.

⁴⁵ Norrie (1995) pp 36-111

⁴⁶ Children Act 1989, s44(4) – emergency protection order

are not well-equipped to make use of new provisions for ‘procedural justice’ and the threshold of risk before local authorities intervene is potentially too high.⁴⁷

In summary, the routes into being looked after are twofold. Parents may choose that their child be looked after by a local authority, and some young people over 16 years may opt to be looked after. Or children and young people may be compelled to be looked after by a court or children’s hearing against their own, or their parents’ wishes. Children may also be looked after whilst still living at home but only on a compulsory basis. The local authority’s duties and powers in respect of children in these diverse circumstances are the same.

Children may change from being looked after on a voluntary basis to being looked after on a compulsory basis and back again. In most cases parents retain all parental responsibilities and rights for looked after children, but if children are subject to court orders or compulsory measures of supervision their exercise of parental responsibilities and rights is subject to any terms and conditions imposed by a court or children’s hearing.

When does the local authority acquire parental responsibilities?

The local authority will acquire parental responsibilities and rights for a minority of children,⁴⁸ in respect of whom a court has granted a parental responsibility order⁴⁹ or an order freeing the child for adoption.⁵⁰ The child remains looked after whilst subject to a parental responsibility order and the local authority continues to have the same duties towards him or her as with all looked after children, with additional duties and powers as set out in Part I of the Children (Scotland) Act 1995. The right to consent, or to refuse consent, to an order freeing the child for adoption or an adoption order remains with the parent(s) and does not transfer to the local authority.⁵¹ A child subject to a freeing order is not ‘looked after’.

If a parent, or anyone else with parental responsibilities and rights has been deprived of parental responsibilities and rights by a court order, they may not apply for an order seeking residence or contact with the child. Otherwise any person who claims an interest may apply, including third parties such as grandparents.⁵²

⁴⁷ McGhee, J and Francis, J (2003) ‘Protecting children in Scotland: examining the impact of the Children (Scotland) Act 1995’ *Child and Family Social Work* 8, pp 33-142

⁴⁸ 4% of children looked after in 2002-2003 (Children’s Social Work Statistics 2002-2003, The Scottish Executive, table 2)

⁴⁹ C(S)A 1995, s86

⁵⁰ Adoption (Scotland) Act 1978, s18(5)

⁵¹ Norrie (1999) 17.13

⁵² *Beagley v Beagley* 1984 SLT 202 HL, see Jamieson (1995) p 85

4 Local authorities' legal duties towards looked after children

General duties

When looking after a child the local authority is required to safeguard and promote his or her welfare,¹ and to make use of such services as would be available for children were they cared for by their parents.² The local authority must also take steps to promote appropriate personal relations and direct contact between the child and any person with parental responsibilities.³ In discharging its responsibilities the local authority must consult with, and have regard to the views of the child, his or her parents, any person with parental rights and any other person whose views may be relevant when making decisions,⁴ and it must take account of the child's religious persuasion, racial origin and cultural and linguistic background.⁵

Although the child's welfare must generally be the paramount consideration, the local authority may exercise their powers with respect to a looked after child in a manner inconsistent with that general duty, in order to protect members of the public from serious harm.⁶

Scottish ministers may prescribe the manner in which local authorities discharge their responsibilities towards looked after children and have done so in both secondary legislation and guidance,⁷ which contains detailed descriptions of good practice in supporting looked after children and their families.⁸

¹ C(S)A 1995, s17(1)(a)

² C(S)A 1995, s17(1)(b)

³ C(S)A 1995, s17(1)(c)

⁴ C(S)A 1995, s17(3) and (4)(a) and (b)

⁵ C(S)A 1995, s17(4)(c)

⁶ C(S)A 1995, s17(5)

⁷ The Arrangements to Look After Children (Scotland) Regulations 1996; The Fostering of Children (Scotland) Regulations 1996

⁸ Children (Scotland) Act 1995 Regulations and Guidance Volume 2: Children Looked After by Local Authorities

The local authority may terminate the placement where for any reason it appears to the local authority that it is no longer in a child's best interests to remain in a placement and shall make arrangements to terminate the placement as soon as is practicable.⁹

Children looked after by the local authority are included in the indicative list of children whose needs local authorities should consider in planning their services.¹⁰ All these duties apply whether the child is looked after at home, in residential or foster care or in a residential school.¹¹ For example the local authority may facilitate contact with an absent parent for a looked after child living at home under local authority supervision.

Children's views and wishes

Irrespective of the basis on which the child is looked after, every child has the right to an opportunity to indicate whether he or she wishes to express views, to express those views and to have them taken into account in any decision-making processes affecting him or her.¹² This right applies in both children's hearings and court proceedings, and in local authority administrative decision-making processes.¹³ It is qualified only by constraints of practicality and the need to take account of the child's age and maturity when having regard to his or her views. Even if a child's views cannot practicably be sought before the local authority applies for a child protection order, it must seek and have regard to his or her views when the child becomes looked after.

For this statutory right to have practical effect children and young people will usually need skilled support from adult carers and professionals. Guidance states that public services should be planned and delivered on the basis of partnership with parents and children and sets out the professional practice required to achieve this. Consulting children and taking account of their views is a dynamic and continuing process, not an event, and should

⁹ The Arrangements to Look After Children (Scotland) Regulations, regulation 19

¹⁰ Children (Scotland) Act 1995 Regulations and Guidance Volume 1: *Support and Protection for Children and their Families* Chapter 2 Annex A (p 15)

¹¹ C(S)A 1995, s17(6)

¹² For overview of the statutory requirements to consult with children in legal and administrative proceedings see Marshall, K, Tisdall, E. Kay M., Cleland, A with Plumtree, A (2002) *'Voice of the Child' Under the Children (Scotland) Act 1995: Giving due regard to children's views in all matters that affect them* Volume 1, Mapping Paper (The Scottish Executive CRU, Edinburgh)

¹³ C(S)A 1995, ss16 and 17(3) and (4) [s16 - duty upon courts and children's hearings; ss17 (3) and (4)]

permeate all legal and local authority decision-making. Children, and their parents and other relevant family members, should have sufficient information at an early stage both verbally and in writing, including advice about, and the opportunity to discuss the various consequences of decisions they may take. They should be actively involved in assessments, decision-making meetings, reviews and case conferences and should be given help to express their views and to prepare their own written reports or statements for meetings. Professionals should listen to and take account of their views. There should be clear and accessible means for children and parents to challenge decisions with which they disagree and to make a complaint, with access to independent advocacy. Administrative arrangements, for example the location and timing of meetings, should take account of both parents' and children's needs.¹⁴

Provision for children's needs

The law requires local authorities to make appropriate arrangements to meet the child's educational needs and to ensure continuity of education.¹⁵ When placed away from home the child has the right to be brought up in accordance with his or her religious persuasion.¹⁶ The local authority must ensure medical assessment of the child's health status and need, and ensure that arrangements are in place for the provision of health care, including medical and dental care and treatment.¹⁷ Any placement in a residential setting must be demonstrably appropriate to the child's needs.¹⁸

Right to contact with family

When a child is looked after away from home he or she is entitled to contact with any family member who has parental responsibility for him or her.¹⁹ There is no statutory duty upon the local authority to promote direct contact with people who do not have parental responsibility for the child. In practice local authorities should help the child sustain any

¹⁴ Children (Scotland) Act 1995 Regulations and Guidance Support and Protection for Children and their Families Chapter 1 pp 5-6; Chapter 6 p 34

¹⁵ The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 5(2)(c)

¹⁶ *ibid*, regulation 5(3)

¹⁷ *ibid*, regulation 13

¹⁸ *ibid*, regulation 5(2)(d)

¹⁹ C(S)A 1995, s17(1)(c)

significant relationships with relatives and friends that are likely to promote his welfare or facilitate the upbringing of the child by his family.²⁰ The local authority may provide travelling, subsistence and other expenses to any parent, relative or other person connected with a looked after child to enable contact if the person would not be able to visit the child without undue hardship.²¹

Sibling relationships

Sibling relationships are important in sustaining children's personal identity and supporting stability in placements.²² Brothers and sisters in care are too often placed separately and many do not have contact with each other whilst in care. Failure to protect sibling relationships for looked after children may breach ECHR rights to respect for their family life.²³ Local authorities must place siblings together wherever possible, and, if this is not appropriate or feasible, the children should be placed in foster homes as near together as is appropriate or practicable. Siblings placed in different residential establishments should have regular contact.²⁴

The legal requirement to place siblings together is qualified by the need to ensure that this is consistent with coexisting duties to safeguard and promote the child's welfare and to ascertain the child's views. Any decision to place siblings separately or deny contact should be justified on welfare grounds.²⁵ Guidance stipulates that where it is not practicable or in the best interests of siblings to be placed together frequent contact should normally be arranged and reunification considered at each statutory review.²⁶

Some sheriffs hearing children's cases are now scrutinising local authorities' plans for placement of siblings, reasons for decisions to place children separately and arrangements to ensure continuing contact.²⁷

²⁰ C(S)A 1995, s22(1)(b)

²¹ Social Work (Scotland) Act 1968, s29

²² June Thoburn (2002) Quality Protects Research Briefing No 5 *Adoption and Permanence for Children who Cannot Live Safely with Birth Parents or Relatives*, DOH

²³ Beckett S and Hershman D (2001) 'The Human Rights Implications for Looked After Siblings' April [2001] Family Law

²⁴ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 5(4)

²⁵ *Re S (Contact: Application by Sibling)* [1998] 2 FLR 897 established that the welfare of the child with whom a brother or sister sought contact would be the paramount consideration of the court.

²⁶ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities*, paragraphs 19-20, p 5

²⁷ Sheriff Brian Kearney, personal communication

5 Throughcare

Effective care planning and review should ensure that the child's needs are properly met throughout the period of being looked after, and should enable the local authority to meet its statutory responsibility to prepare the child and his or her family for the time when the child is no longer looked after by the local authority.²⁸ Guidance defines throughcare as planning for the period when the child is no longer looked after and tends to focus on older young people.²⁹ Throughcare should also encompass co-ordination and management of children's care from their first becoming looked after to the point at which they are no longer looked after. It includes planning transitions across developmental stages and between placements, as well as equipping older children and young people with skills for independent living. Essentially the aim is to make sure that the young person leaving care has the personal and social skills to achieve healthy, happy independent adulthood. This requires that care planning take a long-term view.

Local authorities have legal duties to prepare written plans for the care and supervision of looked after children in consultation with their parents and carers and other agencies involved with the childcare. They are required to review these at regular, prescribed intervals. The purpose of care planning and review is to ensure that the local authority is properly discharging its duties to safeguard and promote the child's welfare, ensure that the child's needs are properly met throughout the period of being looked after, and to prepare the child and his or her family for the time when the child is no longer looked after by the local authority.

²⁸ C(S)A 1995, s17

²⁹ *Supporting Young People Leaving Care in Scotland: Regulations and Guidance on Services for Young People Ceasing to be Looked After by Local Authorities* The Scottish Executive (2004), paragraph 1.1

³⁰ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 3, Schedule 1

Care planning

For every looked after child, the local authority is required to formulate a care plan to address his or her immediate and longer term needs, whether he or she is looked after away from home or living at home under supervision.³⁰ To inform the care plan the local authority is legally required to collect and record in writing the following information: details of the child's family and household, his personal and social development; nationality, race, religion and language; legal status, medical and educational history; contact with members of the child's family and other significant people who do not live with him or her, and information about the child's interests and hobbies. The plan must be in writing³¹ and agreed with the person(s) with parental responsibilities for the child.³² National guidance advises that the care plan should be in the form of a signed written agreement and it should be a practical document written in plain language setting out the responsibilities of the local authority, the child, persons with parental responsibility and any other relevant person.³³

For every looked after child, including those on home supervision, the care plan must include details of the local authority's plans for the child, services to be provided immediately and in the longer term to meet the child's needs for care, education and health and the respective responsibilities of the child, and any relevant person including the child's parents or others with parental responsibility.³⁴ Care plans for children under home supervision should reflect the fact that the child's day-to-day care is undertaken by his or her family.³⁵

If a child is placed away from home the plan should include details of the type of accommodation to be provided, the contribution of parents or other persons to the child's day-to-day care and arrangements for involving the child and his or her family in decision-making. It should also include details of arrangements for the child's contact with persons with parental responsibility and reasons for any restrictions on contact. And finally the care plan should also state the expected duration of arrangements and the steps which should be taken in bringing the placement to an end when appropriate.³⁶

³¹ *ibid*, regulation 3(2)

³² *ibid*, regulation 6(4)

³³ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities* paragraph 16, pp 4-5

³⁴ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 6(1)(a), Schedule 2, Part I, 1-3

³⁵ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities* Chapter 2, paragraph 5, p 40

³⁶ *ibid*, regulation 6(1)(b), Schedule 2, Part II, 4-8

In developing a care plan the local authority must consider the following specific issues:

- alternatives to looking after the child³⁷
- whether a change in the child's legal status is necessary³⁸
- contact arrangements³⁹
- health arrangements⁴⁰
- educational needs and continuity of provision⁴¹
- appropriateness of any proposed placement in a residential establishment with reference to the unit's functions and objectives⁴²

Scottish research and inspection findings indicate that, despite a comprehensive statutory framework for care planning with stipulations about the content and form of the care plan and the involvement and agreement of the child and relevant persons, local authorities' performance is patchy at best and many looked after children do not have care plans in place.⁴³

Placing a child away from home

If the local authority provides accommodation for the child, whether on a voluntary or compulsory basis, the local authority may place the child in a foster family, or in a residential establishment.⁴⁴ When a local authority is looking after a child other than by virtue of a supervision requirement, and intends to place a child with a family, relative or friend they are generally required to place children with approved foster carers, unless placing the child in an emergency or making a short-term immediate placement for up to six weeks.⁴⁵ A residential establishment means an establishment managed by a local authority, a voluntary organisation or any other person which provides residential accommodation for children for the purposes

³⁷ *ibid*, regulation 4(2)(b)

³⁸ *ibid*, regulation 4(2)(c)

³⁹ *ibid*, regulation 5(2)(a)

⁴⁰ *ibid*, regulation 5(2)(b)

⁴¹ *ibid*, regulation 5(2)(c)

⁴² *ibid*, regulation 5(2)(d)

⁴³ Murray, C., Hallett, C., McMillan, N. and Watson, J. (2002) *Children (Scotland) Act 1995: Home Supervision* p 122 [<http://www.scotland.gov.uk/library5/education/homesupervision.pdf>]; HMIE and SWSI (2001) *Learning with Care: the education of children looked after away from home by local authorities* (The Scottish Executive, Edinburgh) Chapter 3, paragraphs 3.6-3.11

⁴⁴ C(S)A 1995, s26(1)(a)(i) and s26(1)(b)

⁴⁵ Fostering of Children (Scotland) Regulations, regulation 12

of the Social Work (Scotland) Act 1968 or the Children (Scotland) Act 1995.⁴⁶ This definition includes a residential school, now defined as a ‘school care accommodation service’.⁴⁷ The local authority may also make any other arrangements for the child’s accommodation it thinks appropriate.⁴⁸

If the local authority is looking after a child who is subject to a court order or compulsory measures of supervision, it may place the child with a parent or another person with parental responsibility who is not a parent, and must do so if directed to do so by a children’s hearing, as a condition of residence attached to a supervision requirement.⁴⁹ It may not place the child with a parent or other person with parental responsibility if the child is being accommodated on a voluntary basis.⁵⁰

The local authority may provide accommodation by placing the child with a relative or any other suitable person, which may include a friend of the family or a neighbour.⁵¹ These provisions empower the local authority to foster a child with a person whom he or she knows well and ensure minimum disruption to the child’s relationships and existing routines if this does not expose him or her to the risk of significant harm. However when a looked after child is placed with a relative or a family friend, the carer must be approved as a foster carer unless the placement is an immediate placement, made in an emergency and will not last more than six weeks, or the placement is a condition of a supervision requirement.⁵² The care plan and placement arrangements must take account of the terms of any order by a court or children’s hearing.⁵³ The local authority should take ‘such steps as they consider reasonable’ if it appears that a condition of a supervision requirement that a child should reside in accommodation provided by the parents or relatives of the child or by any person associated with them or the child is not fulfilled.⁵⁴

⁴⁶ C(S) A1995, s93(1) and s34(2)

⁴⁷ Regulation of Care (Scotland) Act 2001, s2(4); ROC(S)A 2001 repeals and replaces provisions in the Social Work (Scotland) Act 1968 requiring the registration of certain residential grant aided and independent schools in which the whole or a substantial part of its functions is to provide persons with personal care or support, alongside any education which the school provides.

⁴⁸ C(S)A 1995, s26(1)(c)

⁴⁹ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 16

⁵⁰ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 16(2); prohibits the placement with parents of children accommodated under C(S)A 1995, s25

⁵¹ C(S)A 1995, s26(1)(a)(ii) and (iii)

⁵² The Fostering of Children (Scotland) Regulations 1996, regulation 14

⁵³ The Arrangements to Look After Children) Scotland Regulation, regulation 6(3) and 16(3)

⁵⁴ C(S)A 1995, s71(2)

In making decisions about where to place a child for whom they provide accommodation the local authority have a legal obligation to consult and have regard to the views and wishes of the child and his or her parents. The local authority is required to notify both parents and any relevant person of the beginning and end of any placement of a looked after child, unless that person has already received a written copy of the child's care plan.⁵⁵ The local authority may withhold details of the placements whereabouts or a foster carer's name and address if to do so is considered to be in the child's best interests or a children's hearing prohibits disclosure of information.⁵⁶

The local authority's contact with looked after children away from home

Secondary legislation stipulates the minimum levels of contact that the local authority should have with a child whom they look after away from home. The local authority must visit the child within one week of placement.⁵⁷ Thereafter the child should be visited at regular intervals of not more than three months,⁵⁸ and may need to be visited more often, as frequently as needed to safeguard and promote the child's welfare and support the carers.⁵⁹ In any event the local authority should visit when reasonably requested to do so by the child or foster carer.⁶⁰ The local authority must ensure that a written report of any visit to the foster child is completed and that these are considered by the local authority in any review of the child's case.⁶¹

Legislation does not stipulate the nature of the contact and whether this should be with a social worker. Statutory guidance describes the purpose of visits to the child in placement: to monitor the placement with a view to safeguarding the child's welfare, to find out whether the agreed range and standard of services are being provided, to review the child's progress and provide support to all parties.⁶² The guidance makes explicit the expectation that the child's social worker will carry out these statutory visits.⁶³

⁵⁵ The Arrangements to Look After Children) Scotland Regulations 1996, regulation 7(d)(i)

⁵⁶ *ibid*, regulation 7(d)(ii) and (iii)

⁵⁷ *ibid*, regulation 18(a)(i)

⁵⁸ *ibid*, regulation 18(a)(ii)

⁵⁹ *ibid*, regulation 18(a) (iii)

⁶⁰ *ibid*, regulation 18(a)(iv)

⁶¹ *ibid*, regulation 18(b)

⁶² Children (Scotland) Act 1995 Regulations and Guidance Volume 2 Children Looked After by Local Authorities Chapter 1, paragraph 78, p 17

⁶³ *ibid*, Chapter 1, paragraphs 76-79

The local authority's contact with looked after children under home supervision

There is no statutory minimum level of contact with a child under home supervision but national guidance states that when a children's hearing makes a supervision requirement the local authority should allocate a social worker to the child, who should arrange to visit the family immediately where the child is thought to be at significant risk, and in any case within two weeks of the supervision requirement being made. The guidance also recommends a minimum of fortnightly contact for at least the first three months of the supervision requirement.

In 1999 the Scottish Executive issued national standards for agencies working with the children's hearings which require that local authorities give effect to home supervision requirements within 15 working days of a hearing's decision.⁶⁴ Only a third of local authorities met this standard in 2002-2003.⁶⁵

Review of child's case

Legislation requires local authorities to review the case of every looked after child at regular intervals, whether they are placed away from home or residing with their family under home supervision.⁶⁶ This enables the local authority, the child's family and the child, depending on his or her age and maturity, to measure his or her progress in placement or under home supervision. Guidance suggests that one of the functions of the review is to provide an opportunity to oversee and make accountable the work of the professional staff involved.⁶⁷ This accountability must be not only to the employing local authority or partner agencies but to the child and family involved.

⁶⁴ The Scottish Executive (2001) Blueprint for the Processing of children's hearing Cases: Inter-agency Code of Practice and National Standards (2nd edition) (The Stationery Office, Edinburgh); Standard 15 - The local authority will give effect to supervision requirements with no condition of residence within 15 working days of date of issue by the children's hearing (Target 100% compliance).

⁶⁵ Time Intervals Standards; review of compliance reported in Children's Hearings Representative Group (2003) Report on children's hearings Time Intervals 2002-2003 (see <http://www.scotland.gov.uk/library5/education/cht03.pdf>)

⁶⁶ C(S)A 1995, s31

⁶⁷ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 Children Looked After by Local Authorities Chapter 1, paragraph 81, p 18

The review is legally required to consider whether the care plan is being carried out effectively, and whether there is any need to change or add to the care plan.⁶⁸ When reviewing the care plan the local authority is required to consider the nature of services being provided, any alternatives to looking after the child and whether the local authority should seek a change in the child's legal status. When considering and revising the care plan the local authority must consult with the child and his or her parents and any other relevant person and have regard to their views. They must also have regard to the child's religious persuasion, racial origin and cultural and linguistic background.⁶⁹

Timetable for reviews

For children being looked after away from home, the local authority should arrange a first statutory review within six weeks of the beginning of the placement, and hold a second review within three months.⁷⁰ These short timescales should facilitate focused planning and active work with the child and family, subject to early reconsideration with a view to helping a child return home as soon as possible. This is important in view of research findings that the likelihood of a child returning home to his or her family declines the longer he or she remains in public care.⁷¹ Thereafter reviews should be held at not more than six-monthly intervals.⁷²

For looked after children living at home the local authority should review their case within three months of beginning to look after the child, and at not more than six-monthly intervals thereafter.⁷³

Guidance suggests that reviews have differential status according to whether or not a child is subject to a supervision requirement. It describes the review for a child accommodated on a voluntary basis as a decision-making forum and differentiates these reviews from those

⁶⁸ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 8(2)(a)

⁶⁹ *ibid*, regulation 8(2)(b)

⁷⁰ *ibid*, regulation 8(1)

⁷¹ Research in England has shown that the longer a 'looked after' child is accommodated away from home, the higher the chance that the child will remain in care. see Rowe, J and Lambert, L (1973) *Children Who Wait* London, Association of British Adoption Agencies; Millham, S, Bullock, R, Hosie, K and Little, M (1986) *Lost in Care: The Problems of Maintaining Links between Children in Care and their Families* (Gower, Aldershot)

⁷² *ibid*, regulation 9(1)(a)(b) and (c)

⁷³ *ibid*, regulation 9(2)(a) and (b)

for children subject to compulsory measures of supervision.⁷⁴ The child's statutory review is legally obliged to consider all the matters stipulated in secondary legislation and take decisions regarding these. Some decisions made by reviews may require consideration and endorsement by a children's hearing before they can be implemented, if these have a bearing on conditions attached to a supervision requirement. The review should consider whether a review children's hearing is necessary before any changes to a care plan can be implemented if these affect conditions attached to a supervision requirement, for example about a child's placement or contact with relevant persons, or attendance at a particular school.

The local authority should not normally move a child from a placement named in a condition of residence attached to a supervision requirement, without seeking a review children's hearing. This may be necessary when, for example, a foster placement breaks down suddenly, and the local authority must act quickly to safeguard and promote the child's welfare. This may place the hearing in a difficult position if a return to the previous placement is no longer possible, or it would not be in the child's best interests to subject him or her to a further change of placement. Unilateral action by a local authority might give grounds for judicial review for example, of a local authority's decision, to place a looked after child with prospective adopters against the parents' wishes without seeking a review children's hearing.

The local authority is required to refer a child to the principal reporter when they think any significant change to the child's legal status may be needed, when they are considering placing the child for adoption, or because a condition in the supervision requirement is not being complied with.⁷⁵ Before doing so the local authority should arrange a statutory review.⁷⁶ Significant changes in the child's legal status include variation or termination of a supervision requirement, the local authority applying for a parental responsibilities order, an adoption order or an order freeing the child for adoption. The local authority should also carry out a statutory review for any looked after child subject to a supervision requirement before a review children's hearing convened at the request of the child or his or her parents, or following notice of an intention to take the child to live outside Scotland by any relevant person, or a children's hearing which has been convened to consider new grounds of referral.⁷⁷

⁷⁴ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After* by Local Authorities Chapter 1, paragraph 85, p 19

⁷⁵ C(S)A 1995, section 73(4) and (5)

⁷⁶ The Arrangements to Look After Children) Scotland Regulations 1996, regulation 9(3)

⁷⁷ *ibid*, regulation 9(3)

Guidance states that a local authority should arrange a review if considering a recommendation to restrict or terminate contact between the child and persons with parental responsibility, although this is not a statutory requirement.⁷⁸ Therefore for children looked after under compulsory measures of supervision the children's hearing has the lead role in making significant decisions about children's care and support, will consider any proposals for substantial change to care plans and will review progress at least annually. The English Court of Appeal sought to introduce a similar common law power of review for the courts where important aspects of care plans were not implemented for children subject to care orders, but the House of Lords overruled the development.⁷⁹ Guidance recommends that social work departments monitor compliance with statutory timescales for review. It also recommends that local authorities monitor who attends reviews, the content of reviews, what decisions are made and whether these are subsequently implemented.⁸⁰

⁷⁸ *ibid*, paragraph 48, p 11

⁷⁹ *In Re s (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 A.C. 291; An appeal by a parent against the making of final care orders where the local authority had failed to carry out aspects of the care plan submitted to the court. The Court of Appeal determined that the framework for care orders could potentially be in breach of ECHR Articles 8 and 6 and therefore introduced a new procedure in which the court identified and 'starred' essential milestones of a care plan. If a starred milestone was not achieved within a reasonable time after the date set at trial, the local authority was obliged to inform the child's guardian of the position. Either the guardian or the local authority would then have the right to apply to the court for further directions. The court also laid down guidelines giving judges wider discretion to make an interim care order and defer making a final care order. The local authority concerned and the Secretary of State for Health appealed. The House of Lords ruled that the Children Act 1989 did not empower the courts to interfere with how the local authority discharged its parental responsibility once a final care order was made, and that the court had no power to introduce new requirements which had the effect of amending legislation passed by Parliament. Parents who claimed that failure to implement a care plan breached their Article 8 rights could raise an action under section 7 of the Human Rights Act 1998 and therefore there were other appropriate remedies in place.

⁸⁰ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities*, Chapter 1, paragraph 115, p 24

6 Kinship care

Legal status of relatives and friends

A relationship by blood or marriage, other than parenthood does not confer any responsibility for a child on the related person. Extended family relationships have legal significance only for the law on testamentary succession, incest and prohibition of marriage between certain relatives.¹ Relatives, other than parents, have no automatic parental responsibilities and rights unless they have been appointed by a parent as the child's guardian, or they have been awarded any or all of the parental rights and responsibilities by a court.² Extended family have no automatic rights to contact with looked after children and no standing in legal proceedings concerning children. They may not refuse consent to a child's adoption and adoption removes all existing legal relationships with birth family relatives, including grandparents.³ After consulting on proposals for reform of family law the Scottish Executive decided against giving extended family members' additional rights to contact on the basis that these should be determined by a court according to the circumstances of each case, taking into account the child's views and welfare.⁴

Nevertheless a person with whom the child lives may have significant responsibilities towards the child even if they do not have parental responsibilities and rights. The Act defines a child's family as including 'anyone with whom the child has been living'.⁵ This may include people not related to the child. A person, other than a foster carer, may acquire an obligation to

¹ Sutherland (1999), pp 160-162

² C(S)A 1995, section 7 and section 11

³ Sutherland (1999), pp 159-162

⁴ The Scottish Executive (2004) *Family Matters: Improving Family Law in Scotland*, section 4 – Contact between children and wider family (Edinburgh, HMSO)

⁵ C(S)A 1995, section 93(1)

financially maintain a child if they accept the child into their family.⁶ Any person over 16 years of age who has charge of, or control over, a child under sixteen years is required to do what is reasonable in the circumstances to safeguard and promote a child's health, development and welfare. They may consent to medical treatment if necessary.⁷ The duty to safeguard and promote the welfare of a child in their care, implies that a person with charge and control, but without parental responsibilities has the right to act in such a way as to fulfil that responsibility.⁸

The legislative requirement of a person with charge and control to safeguard and promote the child's welfare applies to relatives with short- and long-term care of the child. It may also include people with whom the child does not reside, if they have substantial care of the child at other times, such as grandparents providing respite care.⁹ It does not apply to a person who has care or control of a child in school, such as a teacher or classroom assistant.¹⁰

The statutory concept of a relevant person is significant here too. The status of relevant person confers the right to be notified of, receive grounds of referral for and attend a children's hearings.¹¹ Relevant persons may respond to grounds put by a children's hearing, have a representative assist them at a hearing and be legally represented in related court proceedings.¹² They also have rights of appeal against decisions made by a hearing and may apply for the suspension, pending appeal, of any supervision requirement made.¹³ The local authority must notify 'relevant persons' of a child's placement away from home.¹⁴ The decision as to whether a person is a relevant person may be made prior to a hearing taking place, by the principal reporter, by a children's hearing, or a court.¹⁵

⁶ Family Law (Scotland) Act 1985, section 1(1)(d); this may apply to, for example, a step-parent without parental responsibilities and rights or a parent's cohabitee

⁷ C(S)A 1995, section 5

⁸ Norrie (2004) p 19

⁹ Norrie (1997) p 12

¹⁰ C(S)A 1995, section 5(2)

¹¹ C(S)A 1995, s45; children's hearing Rules (Scotland)1996, rule 7 – notification of children's hearings to relevant persons ... rule 18(b) – notification of statement of grounds of referral

¹² C(S)A 1995, s 65; children's hearings (Scotland) Rules, rule 11 – representation for the purposes of assisting ... relevant persons; C(S)A 1995, s92 – entitlement to legal aid

¹³ C(S)A 1995, section 51

¹⁴ The Arrangements to Look After Children (Scotland) 1996, Regulation 7(d)

¹⁵ Norrie (2004) p 88 (Scottish SW Legislation – Annotation to C(S)A 1995 - C198.11)

A person who ordinarily has charge of, and control over, a child, other than by reason only of his employment, but does not have parental responsibilities may nevertheless be a relevant person for the purposes of a children's hearing and other legal proceedings.¹⁶ Long-term foster carers may be relevant persons.¹⁷ The person must be 'exercising control over the child' at the time of the hearing and at the time of exercising any right deriving from status as a relevant person.¹⁸ A person who does not meet the criteria for definition as a relevant person has no right to be heard in a hearing or related proceedings. However, any person who claims to have a legitimate interest in the child may apply separately for a court order for example regarding contact or residence.¹⁹ Persons with an interest may include grandparents or other relatives.

In defining a 'relevant person' therefore, the law generally recognises the importance of relationships with relatives and significant others according to the extent of their contribution to the child's day-to-day care. Where a relative or any other person is providing substantial care and support to the child, he or she is both required and entitled to be fully informed and participate in legal decision-making processes about the need for compulsory measures of supervision and what form these might take.

Legislation requires local authorities to consult 'any ... person whose views the local authority consider to be relevant', before deciding to look after a child.²⁰ However, the emphasis in administrative decision-making is on involving birth parents. There is a requirement to agree the care plan with a parent, or, in the absence of parent(s), a person ordinarily with charge or control over the child. Parents are defined as genetic or legal parents²¹ or persons with parental responsibilities. It is clearly good practice to involve relatives caring for a child in care planning and statutory reviews, but there is no legal requirement to do so if the local authority is actively involving the child's parents. A Scottish study found little consistency, even within authorities, about the status of, or support for, extended family placements. In some cases family carers were closely involved in planning for children; in others they were not sufficiently informed or involved in planning or decision-making for the child, being consulted as 'carers' only on the child's progress in their care.²²

¹⁶ C(S)A 1995, s93(2)(b)(c)

¹⁷ *JS and TK v MN and Principal Reporter* Inner House, Court of Session 8 February 2002

¹⁸ (Jamieson p82, quoting *Kennedy v H* 1988 SLT 586)

¹⁹ C(S)A 1995, s11(3)(i)

²⁰ C(S)A 1995, s17(3)(d)

²¹ C(S)A 1995, s15(1)

²² The Scottish Executive (2002) *Growing Support; A Review of Support to Vulnerable Families with Young Children*, Chapter 3, Working with extended families – paragraphs 65-71

Placement of looked after children with relatives

When placing children in domestic households, local authorities should generally place them with approved foster carers.²³ The local authority may place the child with a relative or any other suitable person, such as a neighbour or family friend.²⁴ The local authority may make an immediate placement with a relative or a friend who is not an approved foster carer for a maximum of six weeks, if they are satisfied that the foster placement is the most suitable way of meeting the child's needs, they have completed the necessary preliminary enquiries and have reached a written agreement with the carer about the child's care and arrangements for the placement.²⁵ Thereafter they should ensure that if the placement is to continue the carer is approved as a foster carer.

If the child is subject to a supervision requirement, the local authority may recommend to a children's hearing that the child be placed away from home with a relative or friend providing that the other requirements of an immediate placement with a relative or friend have been fulfilled. If the hearing attach a condition of residence with a relative or friend who is not an approved foster carer to a supervision requirement the placement may last longer than six weeks without the local authority having to approve the carer as a foster carer.²⁶ Guidance suggests that these placements with persons who are not approved foster carers should be distinguished from other foster placements.²⁷ In England and Wales legislation prescribes that a relative or friend caring for a looked after child, who does not have parental responsibility for him or her, should be designated a local authority foster parent.²⁸ The Children Act 1989 places a specific duty on local authorities in England and Wales to place a child with a parent, person with parental responsibility or a relative, friend or someone otherwise connected to the child unless that is not practicable or consistent with the child's welfare.²⁹ Regulations make provision for the assessment of carers in these placements and support for the placement including contact with the child and carers at intervals equivalent to those in other placements.³⁰

²³ Fostering of Children (Scotland) Regulations 1996, regulations, 3 and 12

²⁴ C(S)A 1995, section 26(1)(a)(ii) and (iii)

²⁵ Fostering of Children (Scotland) Regulations 1996, regulation 14

²⁶ *ibid*, regulation 15

²⁷ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities*, Chapter 2, paragraph 117, p 69

²⁸ Children Act 1989, section 23(3) (also excludes relatives in whose favour a residence order had been in force prior to the child having been looked after)

²⁹ Children Act 1989, section 23(6)

³⁰ Placement of Children with Parents etc. Regulations 1991

In Scotland there is no statutory presumption in favour of a child being placed with a parent, relative or friend where possible and appropriate. Guidance describes accommodating a child on a voluntary basis with a relative or friend as likely to be unusual, and states that such arrangements should be a matter for negotiation between parents and relatives, with assistance from a social work department to facilitate this if necessary.³¹ Guidance also states that a placement with relatives or friends should be the preferred placement for a child subject to a parental responsibilities order, and that carers for children subject to parental responsibilities orders should be approved foster carers. This indicates a degree of ambivalence about formalising the role of extended family in supporting vulnerable children and confusion about the locus of responsibility of the local authority. The local authority is required to have the child's welfare as its paramount consideration in considering the suitability of any placement.³² Whether the child is looked after on a voluntary or compulsory basis should be irrelevant in determining whether or not to place a child with a relative or friend. If the local authority considers that a child in need requires accommodation to safeguard and promote his or her welfare, placement with a friend or relative, if feasible, may be a less intrusive method of promoting and safeguarding the child's welfare than placing the child with strangers. If such a placement looks likely to last longer than six weeks the local authority should take steps to approve the carer, unless the child is subject to a supervision requirement with a condition of residence with that carer. Approval is not legally required in those circumstances although training and support for the carers equivalent to that of approved foster carers may be required to safeguard and promote the child's welfare and as a matter of good professional practice. Supervision of the placement by regular visits at prescribed intervals remains a statutory requirement.³³

Payment to kinship carers

The local authority may place a child with a family, a relative or other suitable person on such terms as to payment by the local authority or other person as the local authority may determine.³⁴ This gives the local authority absolute discretion as to the rates of payment to any carers, including foster carers, for any child whom they look after. The Fostering Network (TFN), representing foster carers, has set national rates of payment. Local authorities may have regard to these rates but are not legally required to adopt them. Whilst most Scottish adoption

³¹ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities*, Chapter 3, paragraph 35-37, p 52

³² C(S)A 1995, section 17(1)(a)

³³ The Arrangements to Look After Children (Scotland) 1996, Regulation 18

³⁴ C(S)A 1995, section 26(1)(a)

agencies base their fostering allowances on TFN's rates, there is wide variation in payment for services provided by carers.³⁵ In many instances local authorities pay carers who are relatives or friends lower rates for fostering a looked after child. The legality of this has been tested in both English and Scottish courts.

In England the principle has been established that relative carers looking after children on behalf of the local authority should receive the same rates of remuneration as unrelated foster carers.³⁶ The English Administrative Court quashed a local authority's policy to pay family carers lower rates on the basis of procedural impropriety.³⁷ Although this, by itself, could have disposed of the case the judge went on to state that the policy itself was unlawful because it imposed an arbitrary and inflexible limit on the amounts paid to relative foster carers and the level of payments were fixed so low as to conflict with the welfare principle. The court ruled that the policy was not one which a reasonable local authority would impose and it was discriminatory, affecting both short-term foster carers who are relatives and looked after children who are fostered by relatives rather than non-relatives. It also failed to comply with the ECHR tests of 'proportionality' and 'necessity' when there is interference by a public authority with a Convention right. The policy breached Article ECHR 14 because it made fostering a looked after child less attractive for relatives, and did not take into account the financial needs of the foster family and whether it would interfere with the child's and carer's right to respect for family life under Article 8. The claimants were awarded damages.

In Scotland a similar application to the Court of Session for judicial review was made by a relative with whom a local authority had placed, separately, two groups of children whom they

³⁵ Triseliotis, J., Borland, M. and Hill, M. (1999) *Fostering Good Relations: A Study of Foster Care and Foster Carers in Scotland* Social Work Research Findings No. 34 The Scottish Executive

³⁶ *R (L and Others) v Manchester City Council; R (R and Anor) v Manchester City Council* 2001 WL 1476308 Applications for judicial review were made on behalf of several children by their guardians ad litem as 'litigation friends', challenging the legality of a local authority's policy to pay short-term foster carers who were friends or relatives of the children concerned at a much lower rate than non related foster carers. When providing financial assistance to carers the local authority treated looked after children which it placed with friends or relatives in the same way as children in need living with friends and relatives, not placed by the local authority. This entailed a framework of discretionary payments to a specified yearly maximum per child, with a preference for one-off grants rather than weekly maintenance allowances. The local authority justified that policy as ensuring that payments to carers who were friends or relatives did not act as a disincentive to apply for residence orders on financial grounds alone. The claimants argued that the policy was irrational and breached the children's Article 8 and 14 rights under the European Convention of Human Rights. The children in these cases had similar needs to other children looked after by the local authority because of poor parental care and needed more than subsistence care to allow them to recover. The policy created a financial 'underclass of children who did not get the level of support which a rational policy would provide and whose foster carers would be under financial pressure to go out to work.

³⁷ The Council's standing orders did not provide delegated authority for officials to impose the policy without involvement of elected members, and the local authority would have to either agree a new policy at Social Services Committee or ratify the existing one

were looking after following the making of child protection orders and supervision requirements.³⁸ The carer challenged the local authority's decision to pay a lower allowance than that received by non related foster carers, for the second group of children placed under a link carer scheme, citing similar grounds to those in the English case. The Scottish court ruled that legislation gives a local authority 'virtually unfettered discretion' as to payment of carers for looked after children and that Article 8 did not confer a freestanding right for carers to any financial support from the state.³⁹

The court considered the English ruling but held that the cases were different. The English case concerned long-term rather than short-term relative carers and challenged the legality of a policy rather than, as in the Scottish case, the application of a link carer scheme. However the argument that there is a significant difference between care provided by relative link carers and that provided by unrelated foster carers, and the conclusion as a result that relatives will always require fewer resources may be difficult to sustain. The case was not appealed. Although an outer house judgement by a single judge, not binding other courts,⁴⁰ this is the most authoritative interpretation of the law as it currently stands, and is discouraging of equivalence between kinship carers and foster carers.

³⁸ *MC or V, Petitioner v South Lanarkshire Council* 30th January 2004 (Scottish Opinions February 2004)

³⁹ In considering whether the local authority's decision amounted to discriminatory treatment of relative carers to the extent of breaching Article 14, the court applied the *Michalak* test established in an English Court of Appeal case (*London Borough of Wandsworth v. Michalak* 2002 WL 226161, per Lord Justice Brooke at paragraph 20). It asked whether the facts of the case fell within the ambit of one or more of the Convention rights and held that there was potential for engagement of Article 8 in this case, which merited testing at a full hearing. If a Convention right was engaged, was there different treatment as respects that right between the petitioner and other persons put forward for comparison, in this case 'foster carers'? The claimant argued that she had been treated differently because she was related to the children, and unfairly as she received much less than would be paid to foster carers. The Council argued that link carer's allowances could be paid to people who were unrelated to children and the higher payments to foster carers were made not because they were unrelated but because they were part of a statutory scheme. The court concluded that this was arguable and would also have merited a hearing. The claimant's case failed on the third question; were the chosen comparator group, foster carers, in an analogous situation? The court held that the claimant would not be able to establish that unrelated foster carers were an analogous comparator group, because of significant differences between a link carer and a foster carer; the link carer scheme was for temporary care where there was already an established relationship or family tie and foster care provided for 'a long-term substitute arrangement for a child's family life'; family carers may be entitled to state benefits, where foster carers are not; statutory regulations regarding fostering did not apply to the link carer's scheme. The state has a wide margin of appreciation in relation to social and economic policy and the court was required to apply a restrictive interpretation of comparator groups in these circumstances. The fourth element of the *Michalak* test was also one that should be tested at a hearing had the case not failed on the third element of the test. If different treatment between two analogous groups could be established does that difference have an objective and reasonable justification, pursue a legitimate aim, and did the differential treatment bear a reasonable relationship of proportionality to the aim sought. This is essentially the human rights tests of necessity and proportionality. The court also acknowledged that ECHR jurisprudence gives a margin of appreciation to state contracting parties in the area of discrimination and the courts should defer to the decisions of the state provided these are reasonable.

⁴⁰ *Farrell v Farrell* 1990 SCLR 717 in which a sheriff held that he was entitled to regard an outer house decision as highly persuasive only

7 Roles and responsibilities of other agencies

Co-operation between agencies

Primary legislation requires other agencies to co-operate with the local authority in supporting children in need or at risk of harm.¹ If a local authority considers that another local authority, a health board or any other person authorised by Scottish ministers could help the local authority exercise any of their functions under Part II of the Children (Scotland) Act 1995 they may ask that agency for help and the agency must comply, provided that the request is compatible with their own statutory or other duties and obligations and does not unduly prejudice the discharge of any of that agency's functions. The requirement to co-operate spans local authority functions for the support, supervision and protection of children and young people.²

Neither guidance, nor regulations specify the range of persons who may be authorised by Scottish ministers to comply with local authorities requests for help in discharging their functions under Part II of the Act.³ Lack of clarity in these areas may compound practical difficulties in achieving effective inter-agency co-operation. Difficulties may arise in relation to the responsibilities of agencies providing generic services, such as general practitioners (GPs) and community health services for providing additional services for looked after children, although many health boards now make special arrangements to assess and provide for this group.⁴

There has been a history of legal disputes between social services and other authorities, including disputes between different departments of the same local authority, about the

¹ C(S)A 1995, s21

² C(S)A 1995, s21(1)

³ C(S)A 1995, s21(2)(d)

⁴ NHS Performance Assessment Framework returns (2003) – Dr de Caestecker, personal communication

responsibilities of different agencies under the Children Act 1989.⁵ English courts have endorsed housing authorities' refusal of requests under the Children Act 1989 to assist homeless families, placing the responsibility for the families' subsequent accommodation on social services.⁶ They have held that social services departments cannot use the requirement for co-operation between authorities in the Children Act 1989 to seek assistance and resources from another service within the same local authority.⁷ In contrast, more recently the Administrative Court quashed a housing authority's decision to refuse a request from the social services department in the same local authority that a family with disabled children be given priority for rehousing.⁸

In the event of legal dispute and in the absence of Scottish precedent, Scottish courts may draw on the English courts' interpretation of similar provision in the Children Act 1989.⁹ Review of public services in Scottish local authorities confirms that similar issues have arisen between departments, within the same local authority, and between local authorities and other agencies about the extent of responsibilities for supporting children in need and their families. There is evidence that co-operation between different agencies can be poor.

⁵ *R v. Northavon District Council, Ex parte Smith* [1994] 2 A.C. 402 – a housing authority provided temporary accommodation for a homeless family with five children. The housing authority assessed the family as intentionally homeless and therefore ineligible for permanent housing. Under s27 CA 1989, the Social Services Department requested that the housing authority rehouse the family as the children were in need. The housing authority declined, advising that assistance would be limited to short-term accommodation and advice about obtaining private rented accommodation. Following judicial review the House of Lords held that the housing authority's response was reasonable in the light of its statutory duties under housing legislation and that s27 imposed a duty of co-operation with the social services department with which the housing authority's proposed more limited course of action was consistent; *Re T (Judicial Review: Local Authority Decisions Concerning Child in Need)*, [2004] 1 F.L.R. 601 – a local authority requested an assessment by a voluntary agency of the risk posed by a young person with sexually aggressive behaviour. The assessment concluded that the young person might, without help, become a paedophile and recommended a residential placement. The local authority approached health and education services for a contribution towards funding of the placement. The education authority delayed a decision until there had been an assessment of educational need which did not proceed. The local authority then decided to make provision for the young person locally without a residential placement. The young person sought judicial review of the local authority's decision. The Court of Appeal quashed the decision as based on a lack of co-operation between the agencies concerned and reliant on the availability of services rather than T's needs.

⁶ *R(On the Application of S) v London Borough of Wandsworth, London Borough of Hammersmith and Fulham, London Borough of Lambeth* 2001 WL 1346981

⁷ *R. v Tower Hamlets LBC Ex p. Byas* (1993) 25 H.L.R. 105; A had five children and held a secure local authority tenancy. In 1990 an order for possession was obtained against her and she was later found to be intentionally homeless. The local authority's social services department made a request under the Children Act 1989, s. 27 to the housing department to accommodate A and her family. The housing department refused to assist. A appealed against refusal of leave to apply for judicial review, unsuccessfully. The Court held that s. 27 of the Children Act 1989 did not apply where one department of a local authority sought help from another department within the same authority.

⁸ *R(On the Application of Selcuk V) v. London Borough of Southwark* 2001 WL 1040318

⁹ Children Act 1989, section 27

Agencies duplicate assessments, often without services then being provided. Support may be provided too late and strong stigma attaches to some public support.¹⁰

National guidance emphasises that local authorities should act corporately in discharging their responsibilities.¹¹ A court has interpreted the requirement to co-operate narrowly, limiting the responsibility of the agency from which help is requested by the local authority to making a reasonable response compatible with its own duties and priorities.¹² This case appears to suggest that a local authority does not have to agree to a request from another local authority to help it fulfil its obligations under a supervision requirement.¹³ The requirement to co-operate spans local authority functions under Part II of the Act which includes provision for the protection and supervision of children as well as their support.¹⁴ Excluding assistance from another local authority in giving effect to a supervision requirement seems at odds with the policy expressed in guidance that authorities should co-operate with each other, involve the voluntary and independent sector in planning specialist provision across local boundaries, and, where appropriate, establish shared services for children under supervision.¹⁵

Joint resourcing and management of local authority and health services

Integrated approaches to community care for older people and other vulnerable groups, formerly promoted through policy and guidance documents, is now enshrined in statute. NHS bodies and local authorities may now make payments to each other for expenditure

¹⁰ The Scottish Executive (2002) *Growing Support*; The Scottish Executive (2001) *For Scotland's Children: Better integrated services for children*; The Scottish Executive (2000) *The Same As You? A review of services for people with learning disabilities*

¹¹ Children (Scotland) Act 1995 Regulations and Guidance Support and Protection for Children and their Families, see pviii and Chapter 2, paragraph 37, pp 13-14

¹² *S v Stirling Council* 2000 SLT 979: a 17 year old, subject to a supervision requirement and resident in a children's home, wished to reside in another local authority area in accordance with her care plan. Her supervising local authority asked the receiving local authority to provide the young person with accommodation under s25 of the C(S)A 1995. The local authority placed the young person in temporary bed and breakfast accommodation. The young person sought judicial review of the decision not to provide her with residential accommodation. The petition for judicial review was dismissed on the basis that the receiving local authority had to consider whether compliance with the request was compatible with their statutory or other duties and obligations and there was no freestanding obligation to accede to the request without reference to the impact on those duties and obligations.

¹³ Norrie (2004)

¹⁴ C(S)A 1995, section 21(1)

¹⁵ Children (Scotland) Act 1995 Regulations and Guidance Volume 1 Support and Protection for Children and their Families Chapter 2, paragraph 36, p13 and Volume 2 Children Looked After by Local Authorities, Chapter 2, paragraph 25, p 45

incurred which assists or improves the discharge of their respective functions, and may enter into joint arrangements entailing the delegation of their respective statutory functions to the other.¹⁶ These powers are subject to regulation by Scottish ministers.¹⁷ Although the provisions apply in the first instance to community care services, regulations could apply the exercise of these powers to services for children in future.

Scottish ministers may direct a local authority or NHS body to enter into joint arrangements for the delegation of their functions if that would be likely to bring about improvement in the exercise of the functions in question, and they may also direct any of the respective bodies to make payments to the other.¹⁸ These provisions remove any perceived organisational or budgetary prohibitions on pooled budgets or joint management of services.

Notifications to other agencies

Placement of a looked after child

If a local authority provides accommodation for a child, whether on a voluntary or compulsory basis, it must notify the local education authority and the health board of the placement as soon as reasonably practicable. If the child is to be looked after in a foster or residential placement or placed with a relative or any other person outwith the area of the placing authority, the local authority must notify the local authority in whose area the child will be placed. It must also notify the education authority and health board in that area.¹⁹ If the placement is not intended to last more than 28 days the requirement to notify the education authority may be waived unless the child being looked after has significant medical or educational needs, and the requirement to notify the health board may be waived unless the child has a problem of medical significance or is below compulsory school age. Neither legislation nor guidance states the purpose of notification to other agencies but implicitly notification should ensure that appropriate educational and health care provision is quickly available for looked after children moving into a new area. This may require transfer of

¹⁶ Community Care and Health (Scotland) Act 2002, sections 13, 14 and 15

¹⁷ The Community Care (Joint Working etc.) (Scotland) Regulations 2002

¹⁸ *ibid*, section 17

¹⁹ The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 7

records or resources between areas. The agency receiving notifications should have systems in place for responding to these. For example young children receive routine child health screening and surveillance in their early and pre-school years. Health visiting services should therefore be informed of any pre-school child's presence in their area. Guidance recommends notification of all placements to other agencies regardless of whether they are intended to last less than 28 days.²⁰ Most health boards now have dedicated health care provision for looked after children and a co-ordinator to aggregate information about notifications of placements.²¹

Incidents, serious illness or injury and deaths of looked after children

The carer(s) with whom a child is placed must inform the placing local authority immediately if the child runs away or someone removes him or her from the placement.²² They must inform the local authority if the child suffers an illness or injury likely to result in death or serious disability, or if the child dies. Thereafter the local authority must inform every person with parental responsibility for the child so far as is reasonably practicable.²³ If a child dies whilst looked after the local authority must notify any parent, unless the child was residing with that parent at the time of the death.²⁴ The local authority must also notify Scottish ministers of the death.²⁵

²⁰ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities*, Chapter 1, paragraph 74, p16

²¹ NHS Performance Assessment Framework returns (2003) - Dr Linda de Caestecker, personal communication

²² The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 14(1)(c)

²³ *ibid*, regulation 14(1)(a) and (b)

²⁴ *ibid*, regulation 15(1)(b) and 15(2)

²⁵ *ibid*, regulation 15(1)(a)

8 Health care

General statutory framework for NHS care

Scottish ministers have a general duty to promote a comprehensive and integrated health service in Scotland, to secure improvement in the physical and mental health of the people of Scotland and the prevention, diagnosis and treatment of illness.²⁶ In exercising their respective functions health boards, local authorities and education authorities are required to co-operate with one another to secure and advance the health of the Scottish people.²⁷ More recent legislation makes explicit that health boards should also co-operate with one another in planning and providing health services, empowering one health board to provide services for another, and to make joint arrangements for provision with one or more health boards.²⁸ Health boards have a duty to promote public involvement in the NHS and should consult people for whom they are providing particular services.²⁹

Scottish ministers have a duty to promote improvement in the physical and mental health of the people of Scotland and are empowered to take any steps required to do so. To achieve this, ministers may provide financial assistance to, or enter into arrangements with any person, which may include a local authority or voluntary organisations.³⁰ Where Scottish ministers consider that an NHS body is failing to provide a service or service standards are poor they may intervene and direct that the specific function be performed for a specified duration and to a specified extent.³¹

²⁶ National Health Service (Scotland) Act 1978, s1

²⁷ *ibid*, sections 13 and 13A

²⁸ NHS Reform (Scotland) Act 2004, s5

²⁹ *ibid*, s7

³⁰ *ibid*, s9

³¹ *ibid*, s8

Health care for children placed away from home

Secondary legislation requires the local authority to include consideration of health care arrangements in making a care plan.³² Information about the child's health history, current state of health and development and existing arrangements for his or her medical or dental care must be gathered to inform the care plan.³³ The local authority must ensure arrangements are made for the child to be medically examined by a doctor ideally before placing a looked after child and, if not, as soon as possible thereafter, and obtain a written medical report on the child's health status and health care needs.³⁴ The requirement to arrange a medical examination before or shortly after placing the child is waived where the child has been medically examined and assessed within the three month period immediately before the child begins to be looked after away from home. However, if the child has legal capacity to consent to examination or treatment on his or her own behalf, any medical examination or any care and treatment may only be carried out if the child consents.³⁵ The local authority should notify the receiving health board of the child's placement in their area³⁶ and ensure that arrangements are made to provide the child with health, medical and dental care during the placement.³⁷

Mental health

Mental health legislation, which commenced in 2005, requires that health and social care professionals and others providing mental health treatment and care and other related services to a child or young person under 18 do so in a manner that best secures the welfare of the young patient.³⁸ They must take into account a wide range of matters including the views and wishes of the young patient, those of their parents, carers or guardian and any other legal representatives, inform and involve the patient as fully as possible in decisions about their care and have regard to his or her age and gender, religious persuasion, racial

³² The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 5(2)(b)

³³ *ibid*, Schedule 1(9)

³⁴ *ibid*, regulation 13

³⁵ *ibid*, regulation 13(3)

³⁶ *ibid*, regulation 7

³⁷ *ibid*, regulation 13(2)

³⁸ Mental Health (Care and Treatment) (Scotland) Act 2003, s2

origin, cultural and linguistic background and membership of any ethnic group. They should consider the needs and circumstances of the young person's carers and ensure that carers are fully informed to assist their care of the young patient. Health boards must act to provide the maximum benefit of the patient whilst ensuring minimum restriction of their freedom, and treatment of the patient must not discriminate against patients in comparison with non-patients.³⁹

Health boards will also have a duty to provide appropriate services to meet the needs of children and young people with mental health problems who are admitted to hospital. This duty provides an entitlement to each child to have their particular needs met, rather than the generality of services.⁴⁰ The relevant education authority must ensure that the child receives appropriate education whilst staying in hospital.⁴¹ Any person with functions under the Mental Health Act must now take steps to mitigate any impairment of parental relations or reduction of contact caused by either's admission to hospital.⁴² In essence this places a responsibility on health services to consider parent and child relationships in its care of patients and make arrangements to alleviate any adverse effect caused by separation and mental health problems. For example when a parent of a young child is admitted to hospital the health board should ensure that there are appropriate facilities for contact including where necessary overnight stays, and support to the mentally ill parent or child to benefit from contact where necessary.

Welfare of children admitted to hospital for more than three months

If a child is in hospital or other accommodation provided by a health board, private hospital or nursing home has had, or is likely to have had no contact with a parent or other person with parental responsibilities for a continuous period of three months or more, the person responsible for the accommodation must notify the local authority in whose area the hospital or accommodation is located of the child's circumstances.⁴³ In practice the responsible person is likely to be the hospital manager or a responsible medical officer.

³⁹ *ibid*, s2(5) – requires health boards to have regard for children and young people to those matters set out in section 1(3) and 1(5) and 1(6) of the Act

⁴⁰ *ibid*, s23

⁴¹ *ibid*, s277

⁴² *ibid*, s278

⁴³ C(S)A 1995, s36

Parental contact is defined as direct contact with a person with parental responsibilities (that is, not just cards or telephone calls). The local authority is then required to inquire into the child's circumstances and take reasonable steps to find out if the child's welfare is adequately safeguarded and promoted whilst he or she is in hospital or health care accommodation and consider whether it should exercise any of its functions in respect of protecting or promoting the welfare of children under the Act. This may include providing accommodation for the child, referring the child to the reporter or providing services to the child or his or her family.

The local authority may authorise a person to enter premises run by health services in its area and to inspect the agency's records, in order to find out whether the agency has fulfilled its duty to notify the local authority of children with whom there has been no parental contact.⁴⁴

⁴⁴ C(S)A 1995, s36(5)

9 Education

Many looked after children's experience of education and performance is one of disruption and underachievement.⁴⁵ A survey of a sample of young people leaving care in Scotland found that most had experiences of truancy (83%) and exclusion (71%) and almost two thirds had no standard grade qualifications.⁴⁶ Most recent statistics confirm that 60% of 16 and 17 year old care leavers did not achieve any qualifications, with those looked after at home even less likely to achieve than those placed away from home.⁴⁷ This is in stark contrast to the general population of school leavers of whom less than ten percent left school without any qualifications.

Legal framework for education

Every child of school age has the right to be provided with school education provided or arranged by an education authority.⁴⁸ Education authorities are responsible for the education of children in their area. This includes children placed in schools outside their area who nevertheless belong to the education authority area because their parents are ordinarily resident there.⁴⁹

For each child in school an education authority must secure that the education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential. The education authority must, as far as is reasonably practicable, have due regard to the views of children and young people in

⁴⁵ Hunt, R (2000) Quality Protects Research Briefing No 1 The Educational Performance of Children in Need and Children Looked After, DOH

⁴⁶ Dixon, J and Stein, M (2002) Scotland's Children: Children (Scotland) Act 1995 Research Findings No 3: A Study of Throughcare and Aftercare In Scotland

⁴⁷ The Scottish Executive *Children's Social Work Statistics 2002-2003*

⁴⁸ Standards in Scotland's Schools etc. Act 2000, s1

⁴⁹ Education (Scotland) Act 1980, s23(3)

making decisions that significantly affect them.⁵⁰ In addition, under provisions yet to be commenced, education authorities must make adequate and efficient provision to meet any needs for additional support which a child or young person has, and make appropriate arrangements to review the child's additional support needs and the provision made.⁵¹

Legislation also places both an obligation on parents to provide education for their children⁵² and a duty on education authorities to secure adequate and efficient provision of school education for their area.⁵³ If a parent has enrolled his or her child in a state school that fulfils the parental obligation to provide education. Thereafter the parent must ensure their child's regular attendance.

There is no statutory definition of 'full-time education' to which a child is entitled. Education authorities should ensure that local authority schools are open for a minimum of 190 weekdays per school year.⁵⁴

Planning for looked after children's educational needs

Education authorities should ensure that looked after children have the same opportunities as all other children for education, including further and higher education, and access to other opportunities for their personal and social development.⁵⁵ When beginning to look after a child the local authority must include information about the child's educational history and arrangements for his or her education in the care plan.⁵⁶ The care plan should also include details of services to be provided to meet the child's educational needs.⁵⁷ The local authority must also inform, ideally before placement and certainly within 28 days, the local education authority in which a child is placed away from home. This requirement also applies to short-term placements for less than 28 days if a child has significant educational needs or is below compulsory school age.⁵⁸

⁵⁰ SISSA 2000, s2

⁵¹ Education (Additional Support for Learning) (Scotland) Act 2004, s4

⁵² Education (Scotland) Act 1980, s30

⁵³ E(S)A 1980, s1(1)

⁵⁴ Schools General (Scotland) Regulations 1975, regulation 5; school year means a period of twelve months commencing on 1st of August of any year – *ibid*, regulation 3

⁵⁵ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities* paragraph 61, p 14

⁵⁶ The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 3(2)(a)

⁵⁷ *ibid*, regulation 6(1), Schedule 2 Part I (Matters to be addressed in the care plan)

⁵⁸ *ibid*, regulation 7

A joint inspection by Her Majesty's Inspectorate of Education (HMIE) and the Social Work Services Inspectorate (SWSI) of the education of looked after children in five Scottish local authorities found that care plans were not always in place and did not usually address educational needs and goals in any detail. Some schools were unaware of pupils who were looked after. The Scottish Executive recommended that a senior member of school staff should maintain an overview of looked after children's progress and take responsibility for ensuring that appropriate measures are in place for supporting the children's education. Assessment for approval of foster or relative carers should include consideration of the capacity to provide an educationally rich environment for children placed. Children looked after in residential units should receive the same level of educational support which caring, well-resourced parents would provide.⁵⁹

Exclusion

Although looked after children are only a small proportion of schools' population they account for a disproportionate number of exclusions, particularly when placed away from home. Of the sample of 50 looked after children in the joint inspection, 42% had been excluded from their school at least once.⁶⁰ In 2002-2003, 3% of all pupils were excluded from local authority schools; 50 in every thousand school pupils. This compares with an exclusion rate of 227 per thousand looked after children, significantly higher than in other groups of vulnerable pupils.⁶¹

Parents have a right to appeal against their child's exclusion from school.⁶² Young people over sixteen may also appeal against their exclusion.⁶³ Children who have legal capacity to instruct a solicitor now have equivalent rights of appeal against their exclusion. Although children aged 12 years and over are presumed to be of sufficient age and maturity to have such capacity, these rights of appeal may extend to younger children where it can be demonstrated that they have a general understanding of what it means to instruct a solicitor.⁶⁴

⁵⁹ The Scottish Executive (2000) *Learning with Care: the education of children looked after away from home by local authorities*

⁶⁰ *Learning With Care*, Chapter 4, paragraph 4.9

⁶¹ Exclusions from Schools, 2002/03 February 17, 2004 (revised version September 2, 2004) The Scottish Executive (see Table 9 for exclusion rates)

⁶² Education (Scotland) Act 1980, section 28H; definition of parent includes guardian and any person who is liable to maintain or has parental responsibilities in relation to, or has care of a child or young person(E(S)A 1980, s135)

⁶³ Standards in Scotland's Schools Act 2000, s41

⁶⁴ Age of Legal Capacity (Scotland) Act 1991, s2 (4A)

Children's rights of appeal against exclusion are particularly important for looked after children as foster or residential carers have no rights of appeal against exclusion on their behalf. HMIE and SWSI recommended that local authorities should ensure that looked after children are advised of their right of appeal against exclusion from school, and that the local authority provide appropriate support to children to appeal, if they wish to do so.⁶⁵

Any person may make a complaint to Scottish ministers that an education authority, the managers of a school or educational establishment or other persons have failed to discharge any of their statutory duties relating to education and, if the complaint is substantiated ministers may make an order declaring them to be in default of their duty and requiring them to discharge their duty by a specific date.⁶⁶ If they do not ministers may make appropriate arrangements for the discharge of the duty, recovering any expenses from the authority, the school or other persons, or the Lord Advocate may apply to the Court of Session for an order of specific implement requiring the relevant authority or other persons to perform their duty. A child's carers or advocate may therefore complain to an independent authority about an education authority, school or other service's failure to make appropriate education provision for a child.

Professionals such as educational psychologists and teachers have a common law duty of care towards their pupils as well as their employers, to exercise their functions with reasonable skill and care. Education authorities may be held vicariously liable for negligent professional performance of that duty.⁶⁷ Therefore in the event of other avenues of redress having failed a child or young person may have cause to sue an education authority or establishment for damages where negligent failure to provide for his or her educational has caused demonstrable harm.

⁶⁵ Learning With Care op cit. Chapter 4, para 4.9

⁶⁶ Education (Scotland) Act 1980, s70

⁶⁷ *Phelps v Hillingdon Borough Council* [2001] 2 A.C. 619 An English House of Lords case which considered the extent to which education authorities have a duty of care towards their pupils giving rise to liability for damages in the event of failure of performance and ruled that they may be held liable for their employees negligent performance of professional duties. In four conjoined cases claimant pupils claimed damages for negligent assessment and inadequate provision for their educational needs resulting in impairment of their development and academic attainment.

Truancy

The education authority may require a parent to account for a child's repeated absence from school and, in the event the authority is not satisfied either with the child's attendance or with any alternative arrangements the parent(s) may have made for the child's education, it may make an attendance order, requiring the parent to ensure the child's attendance at a named school.⁶⁸ A parent's continued failure to ensure their child's attendance, without reasonable excuse, is an offence and may result in prosecution in the sheriff court.⁶⁹ The parent remains legally accountable even if the child is not resident in their household.⁷⁰ The offence of failure to ensure a child's attendance at school was formerly one of strict liability, and applied if the fact of non attendance was proven, regardless of any efforts the parent may have made to tackle his or her child's truancy. However, incorporation of ECHR may have tempered the effect of the legislation. Using the requirement in the Human Rights Act 1998 to read legislation wherever possible as compatible with ECHR, a sheriff has reinterpreted provisions in the Education (Scotland) Act 1980 as compatible with the right to be presumed innocent under Article 6 of the European Convention, concerning the right to a fair trial.⁷¹ The sheriff gave a wide meaning to the term 'reasonable excuse' so that a parent may now present evidence of their own relevant circumstances and actions in defence, rather than solely those of the child.

A child's failure to attend school regularly without reasonable excuse is one of the grounds for referral to the reporter or to a children's hearing. If established this may lead to the child being looked after by the local authority. Guidance exhorts social work departments and education departments to work together to ensure that they fulfil their statutory duties. Nevertheless children's panel members and professionals suggest that the hearing system is less effective for children and young people referred for non-attendance at school. Truancy cases are referred to hearings when patterns of non-attendance are already entrenched. Disagreements between social work and education departments about which is best placed to tackle truancy problems and limited resources to implement hearings' decisions inhibits their effectiveness.⁷²

⁶⁸ E(S)A 1980, section 37

⁶⁹ E(S)A 1980, section 35(1)

⁷⁰ See Norrie (1999) 12.03: 'The duty to provide efficient education for a child rests on both parents and it is no defence in the event of failure that the child was in the care of a third party.'

⁷¹ O'Hagan v Rea 2001 SLT (Sh Ct) 30

⁷² Christine Hallett and Cathy Murray Deciding in Children's Interests Social Work Research Findings no 25

In summary there are no specific provisions relating to education for looked after children in statute or common law by virtue of their status as a looked after child. However there is a statutory framework of individual entitlement to state education tailored to each child's assessed needs and geared towards helping them fulfil their full potential. There are independent mechanisms for enforcement of the duties placed on education authorities with potential recourse to Scottish ministers or the courts in the event of poor performance. For looked after children effective implementation depends on support from parents or substitute carers to exercise their rights to an adequate and appropriate education. Education and social work professionals and in some instances carers, have low expectations of looked after children's performance and attainment and that practice and provision in education, and resources to support children's learning in foster and residential care reflects those low expectations.⁷³

Access to specialist services for looked after children

Legislation makes clear that local authorities have a duty to safeguard and promote the welfare of looked after children. That entails making use of services which would be available to children looked after by their parents, including for example specialist health services and support for learning. Care plans should include details of health care and educational needs and provision to meet these needs. Local authorities are required to ensure that arrangements are made for a looked after child to be provided with health care services including medical and dental treatment. For most routine NHS services and mainstream education this is uncontroversial. A GP, with whom a looked after child is registered, will provide essential primary care and refer children to specialist medical or healthcare services. Education authorities make provision for children's schooling. The local authority only has to refer the child to the appropriate professional forum or setting.

Education legislation provides for the recovery, by an education authority or the managers of an independent school not conducted for private profit, of the costs of education provided for a child placed in their area by another education authority.⁷⁴ However legislation does not prescribe how non emergency specialist health care services to meet children's

⁷³ *Learning With Care*, paragraphs 5.5, 7.6, 8.8

⁷⁴ Education (Scotland) Act 1980, s23(2)

extraordinary needs or services not routinely provided by primary care teams should be funded or provided for looked after children, if it is not provided for in the residential establishment in which the child is placed.

The Scottish Executive Health Department has issued revised guidance on establishing where responsibility lies for commissioning health care for individuals in the event of disputes between health boards about specialist care for children placed out of their home area.⁷⁵ National guidance to the NHS identifies the health board in which the child's placement is situated as responsible for arranging health care for looked after children, whether or not the child usually resides in that area.⁷⁶ For children attending day or residential schools for pupils with special educational needs, including pupils with physical or learning disabilities or emotional and behavioural difficulties, the responsibility for arranging health care, other than general school medical services, rests with the health board in which the child normally resides with his or her family, the 'home' health board. This also applies to looked after children in such schools, placed by social work services or placed under joint arrangements agreed by social work, health and education services.⁷⁷ If a child in a special residential school requires specialist treatment the health board in which the child ordinarily resides is responsible for the provision of such care. The guidance identifies these different arrangements as related to the potentially high costs of specialist treatment and equipment which special schools may entail for their local health board. In contrast the responsibility for providing all health services to boarding schools catering for pupils without special educational needs remains with the health board in which the facility is located, rather than the home health board.⁷⁸

If it is not practical for the home health board to provide the care needed where the child is residing they should provide funding for the treatment to be provided by the health board where the child is living. However, this kind of funding transfer may not be sufficiently secure to enable a health board to sustain low volume, high cost specialist services.

⁷⁵ NHS HDL(2004)15 Establishing the Responsible Commissioner: Guidance for NHS Scotland

⁷⁶ *ibid*, paragraph 46

⁷⁷ *ibid*, paragraph 44

⁷⁸ *ibid*, paragraph 43

Difficulties arise when the treatment required is not readily available in either the home health board, or the health board in which the child is residing. Some children are then placed in areas without access to the specialist health services they need and the home health board is unable to provide an appropriate service at a distance.

Essentially the onus is placed on the local authority to ensure arrangements are in place for health care for looked after children but there is no equivalent statutory responsibility placed on health boards to ensure the particular needs of this vulnerable group are met. There are few individual entitlements to health care in legislation and the primary means of redress for failure to provide for an individual child's needs is judicial review, or, where resulting harm to the child can be established, legal action for damages.

10 Children with disabilities

The Children (Scotland) Act 1995 revised the legal framework for assessment and support for children affected by disability, either their own or that of someone in their household or family. Services for children with disabilities had tended to focus on needs related to the disability and were generally provided within the spectrum of community care services for adults. The aim of the legislation was to reorient services for children with disabilities to ensure that they supported children to lead as normal lives as possible, minimising the impact of disability on their welfare and development. Many of the new unitary local authorities realigned their services for children with generic children's services.

Definition of disability

There is more than one definition of disability in statute. The most recent and comprehensive is that in the Disability Discrimination Act 1995 which defines a disabled person as 'a person who has a physical and mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.¹ This entails consideration of four elements: (1) is a clinically recognised impairment present? (2) does this have adverse effect on day-to-day functioning? (3) is this effect substantial? and (4) long-term?²

Guidance on the definition of disability suggests that an impairment must be clinically recognised. An adverse effect on day-to-day functioning requires one or more of the following to be affected: mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, perception of the risk of physical danger. The adverse effect must be more than minor or trivial and to be considered long term should have lasted, or be likely to last more than 12 months or be permanent.³

¹ Disability Discrimination Act 1995, s1(1)

² Nisbet, Ian 'Disability and the Law' in Baillie *et al* (eds), (2003) *Social Work and the Law in Scotland* (Wales, Palgrave/OUP), pp 116 -117

³ Disability Rights Commission (2002) *Disability Discrimination Act 1995 Code of Practice: Rights of Access – Goods, Facilities, Services and Premises* – See Appendix 'The Meaning of Disability' This is a statutory code prepared at the request of the Secretary of State for Education and Employment and applies to Scotland, England and Wales

Statutory framework

Local authorities are required to safeguard and promote the welfare of children in need in their area and promote their upbringing by their families by providing a range and level of services appropriate to the children's needs.⁴ Children who are disabled, or affected by disability, are included in the statutory definition of children in need.⁵ Services for these children must be designed to minimise the adverse effect of disability on the child and enable them to lead, as far as possible, normal lives.⁶ Children who are affected adversely by disability should have access to local community-based resources for non disabled children provided by social work, health and education services, as well as specialist services to meet their needs. Wherever possible they should be supported in mainstream nurseries and schools, use generic health services for child surveillance, screening and health promotion and have access to the same range of services as non disabled children.⁷ There is a statutory presumption that all children should be educated in mainstream schools unless, in what are presumed to be rare situations, mainstream education would not be suited to the aptitudes and ability of the child, or would be unduly disruptive to the education of other children or would be prohibitively expensive.⁸ If these exceptional circumstances arise, before making any alternative arrangements for special education the local authority must take into account the views and wishes of the child and his or her parents.⁹

More generally the law requires that disabled people have equal access to goods, facilities and services for the public and provides protection from and financial compensation for less favourable treatment of disabled people in employment and access to services.¹⁰ From October 2004 all providers of goods and services must make reasonable adjustment to their provision to enable equal access by disabled people, including children.¹¹

⁴ C(S)A 1995, s22

⁵ C(S)A 1995, s93(4)

⁶ C(S)A 1995, s23(1)

⁷ *Children (Scotland) Act 1995 Regulations and Guidance Volume 1* Support and Protection for Children and their Families Chapter 6 – Children and Disability, paragraphs 32,37,41,53

⁸ Standards in Scotland's Schools etc. Act 2000, s15

⁹ SISSA 2000, s15(4)

¹⁰ Disability Discrimination Act 1995

¹¹ DDA 1995, s21

Assessment

Statutory provision for assessment was introduced in 1990, in order to foster a needs led, rather than service allocation, approach to care for older people and other vulnerable care groups. Therefore assessment is a legal as well as professional concept.¹² Local authorities have statutory duties to assess the needs of disabled people for support and services.¹³

To ensure that local authorities effectively discharge their general duties towards children affected by disability they are required to assess a child's needs when requested to do so by the child's parent or guardian.¹⁴ The local authority is also required to assess the needs of any person, whether or not they are themselves a child, who provides a substantial amount of care for the child on a regular basis, have regard to results of that assessment and take into account the carer's views when making decisions about what services or support the local authority should provide to meet the child's needs.¹⁵ Where a child or young person is providing regular and substantial care for a disabled adult, such as a parent, they have a legal right to an assessment of their ability to provide, or continue to provide, care and the results of that assessment should be taken into account in deciding what services the disabled adult may need.¹⁶ The local authority is required to inform eligible child or adult carers of disabled children or adults of their entitlement to assessment of their ability to continue providing care.¹⁷

In addition all disabled people, including children, are entitled to assessment of their needs in respect of the following services:¹⁸

- practical assistance in their home (home help); provision or assistance in obtaining recreational facilities
- provision of lectures, games, outings or other recreational facilities outwith the home
- assistance in taking advantage of educational facilities
- transport to and from home in relation to certain services provided by the local authority

¹² Petch, Alison 'Care in the Community' in Baillie et al (eds), (2003) *Social Work and the Law in Scotland (Wales, Palgrave/OUP)*, p126

¹³ Social Work (Scotland) Act 1968, s12A, as inserted by the NHS and Community Care Act 1990, s55

¹⁴ C(S)A 1995, s23(3)

¹⁵ C(S)A 1995, s24

¹⁶ Community Care and Health (Scotland) Act 2002, ss9 and 10, amending the Social Work (Scotland) Act 1968 and the C(S)A 1995 respectively

¹⁷ *ibid*, ss 10 and 11, see also CCD 2/2003 Community Care and Health (Scotland) Act 2002: New Statutory Rights for Carers – Guidance

¹⁸ Disabled Persons (Services, Consultation and Representatives) Act 1986

- aids and adaptations to the home to improve safety, comfort or convenience
- facilitation of holidays
- provision of meals
- provision of or assistance in obtaining a telephone¹⁹

This assessment of needs for specific services is not equivalent to an assessment of need under children's or community care legislation. Children affected by disability may be subject to a number of statutory assessments and guidance encourages local authorities to carry out these concurrently or combine different agencies' assessments.²⁰

Local authorities may legitimately take resources into account when after assessing needs they decide what services to provide for an individual, but they may not alter the level of services provided without undertaking a further assessment of the client's needs.²¹ They must also consider the client's wishes when deciding what to provide, rather than merely imposing the cheapest option available.²²

¹⁹ Chronically Sick and Disabled Persons Act 1970, s29(2) as amended by the Chronically Sick and Disabled Persons (Scotland) Act 1972

²⁰ Children (Scotland) Act 1995 Regulations and Guidance Volume 1 *Support and Protection for Children and their Families* Chapter 6, paragraph 14, p 32

²¹ *R v Gloucester County Council and the Secretary of State* [1997] A.C. 584; A local authority carried out an assessment of the community care needs of an elderly, infirm man in September 1992. He needed home care for shopping, collecting his pension, laundry, cleaning and meals on wheels. Two years later the council told him that, because the money allocated by central government had been reduced and there was not enough to meet demand, his cleaning and laundry services would be withdrawn. He, with others, successfully brought proceedings against the council for judicial review. On appeal the House of Lords ruled that in assessing an applicant's need for a service, the degree of that need and the necessity to make arrangements to meet it, a local authority had to balance the severity of the applicant's disabling condition against the cost of those arrangements and the availability of resources. Resources were therefore a proper consideration in deciding what services to provide. However services should not be withdrawn without a further reassessment of the client's needs at that time.

²² *R v Avon County Council ex p M* [1994] 2 F.L.R. 1006; M suffered from Down's Syndrome and the local authority was required to make arrangements for his care. In 1989 the council began to assess M's needs, and M was placed at a training unit for two years. In June 1991, M was offered a place at Milton Heights and he and his family wanted him to reside there permanently. Milton Heights was not a placement within the council area. The council refused to provide the necessary funding for the placement and subsequently decided on an alternative placement. M sought a review of that decision, and in January 1992, the local review panel recommended a placement at Milton Heights. The council rejected the review panel's recommendation, and M sought judicial review. The Council agreed that M's case would be looked at by a further review panel, with a report from two experts. In January 1993, the panel decided that M's entrenched position regarding his wish to go there and his likely adverse reaction to any alternative placement formed part of his psychological needs, that his needs were best met by a placement at Milton Heights and that the council should fully fund the placement. The following week, the council rejected that recommendation. M applied for judicial review of the council's decision. The Court held that the National Health Service and Community Care Act 1990 s. 47 required the community care services provided for M to be suitable to his individual needs, which included his psychological needs. M's wish to be placed at Milton Heights was part of his psychological needs. The council could not overrule the review panel's recommendation without a substantial reason, and without having given the recommendation the weight it required. The strength, coherence and apparent persuasiveness of the recommendation had to be addressed head on if the council were lawfully to depart from it and the council's decision was quashed.

Looking after children affected by disability (respite care)

Local authorities provide a range of services for children in need affected by disability including respite services, enabling a child's carers to have a break from caring and to enable the child experience new things. Respite services may include support provided within a child's home, daytime care or leisure activities and occasional overnight stays or regular periods of care with an approved foster carer or in a children's residential unit. The generic duties in respect of looked after children who are disabled described in earlier sections apply, other than with regard to accommodation for the purposes of providing respite care. If a local authority provides a child with respite care which comprises accommodation and care away from his or her home for more than 24 hours in any one period the child is looked after by the local authority for the duration of the placement and the regulations governing such placements apply.²³ Regulations allow a planned respite care arrangement involving a series of placements at the same place to be treated as a single placement for the purposes of compliance with statutory requirements for care planning, review and monitoring the placement.²⁴ Guidance states that multiple placements treated as a single placement should normally be with the same carer or in the same residential establishment. The length and timing of each placement within a series of placements need not be specified in advance providing for a flexible approach to accommodating the child.

The regulations apply to a planned series of placements in any one year. No single placement within the series should last longer than four weeks and the total duration of the placements should not exceed 120 days. These timescales have the effect of ensuring the flexibility required to plan and provide short breaks when the child and family needs them but are designed to prevent the child spending lengthy periods in local authority accommodation without regular reconsideration of their needs.

In the event that a child remains in a respite placement for longer than four weeks the regulations would apply in full to that and any subsequent placement. Similarly if a child spends more than 120 days in total (the equivalent of four months) in accommodation provided by the local authority, the regulations will be reapplied to that and any other placements. This does

²³ C(S)A 1995, section 25(8) and 17(6)

²⁴ The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 17

not prevent the local authority from providing respite care for longer periods than those specified. The regulations should enforce careful planning and monitoring of how well sometimes lengthy periods of respite are meeting the child's needs.

The requirement for a medical examination before a child is placed away from home applies only at the beginning of a series of short-term placements and there is no need for annual re-examination with each new series of short-term placements.²⁵

Entitlement to direct payments

Since 1996 local authorities have been empowered to make payments to disabled people to enable them to arrange and purchase for themselves the support and services that the local authority has, following assessment, decided that they need.²⁶ Entitlement to direct payments was later extended to disabled children and young people enabling disabled 16 and 17 year olds and a disabled parent of, or a disabled person with parental responsibility for, a child in need to receive direct payments to purchase children's services.²⁷ Direct payments are available to adults and children who suffer from illness or mental disorder or are substantially handicapped by any deformity or disability.²⁸ The scheme was further extended, with effect from June 2003, to give local authorities a duty, rather than a power, to offer all eligible disabled people aged 16 and over direct payments, instead of arranging services for them.²⁹ A representative, such as a parent, may consent to, receive and alter direct payments on behalf of an eligible person who does not have capacity to consent to receive direct payments.³⁰ From April 2005 all community care and children's services client groups will be eligible for direct payments.³¹

²⁵ *ibid*, regulation 17(3)

²⁶ Social Work (Scotland) Act 1968, ss 12B and 12C, as inserted by The Community Care (Direct Payments) Act 1996

²⁷ Regulation of Care (Scotland) Act 2001, section 70 - applies direct payments to services for children by amending section 12A of the Social Work (Scotland) Act 1968 to include services, other than assistance in cash, provided for children under section 22 of CS(A)95, and amends section 5A to remove the exclusion of children's services from the definition of community care services for the purposes of section 12A

²⁸ Social Work (Scotland) Act 1968, section 94(1)(b)

²⁹ Community Care and Health (Scotland) Act 2002, section 7

³⁰ Social Work (Scotland) Act 1968 12B(1B); See also the Community Care (Direct Payments) (Scotland) Regulations 2003, regulation 3 specifying who may receive direct payments on behalf of an eligible person

³¹ Scottish Executive Circular CCD1/2004 Direct Payments Policy and Practice Guidance

Disabled young people and the parents of disabled children may use direct payments to purchase respite care. If a parent arranges overnight respite care directly with a provider the child will not be looked after by the local authority. Recipients of direct payments are not required to use regulated or registered services.

Disability discrimination legislation

After a process of incremental implementation, the remaining provisions of legislation prohibiting discrimination against disabled people will come into force in October 2004. The Disability Discrimination Act 1995 applies to discriminatory treatment of disabled people in employment, in the provision of goods and services and the provision of education. Local authorities including social work services are subject to the legislation. The Act identifies two forms of discrimination: (1) less favourable treatment, and (2) failure to make reasonable adjustments to enable access and uptake of appropriate opportunities, facilities and services.

Organisations must make reasonable adjustments by changing practices, policies or procedures which may inhibit access by disabled people, by providing enabling auxiliary aids or services, or by providing an alternative acceptable way of accessing services.

Discriminatory treatment may be 'justifiable' and therefore not unlawful if the service provider reasonably believes that others might be at risk, the disabled person lacks legal capacity, they would otherwise be unable to provide the service to the public, their failure relates to the provision of the service to the disabled person or to others or there would be greater cost in providing an individualised service to the disabled person.³²

Local authorities and managers of independent, grant-aided and self-governing schools are required to prepare and implement accessibility strategies to improve access to school education for children and young people with disabilities.³³ The strategies should increase disabled pupils capacity to participate in the curriculum, improve access to the physical environment and improve schools' communication with disabled pupils. Employers may be held liable for discriminatory acts of employees unless they took all reasonably practicable steps to prevent discrimination.³⁴

³² DDA 1995, section 20(4); see Nisbet, p119

³³ Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002

³⁴ DDA 1995, s58

11 Pathways through local authority care

Permanent substitute care

There is no legal limit on how long a child may be looked after by a local authority, whether on a voluntary or compulsory basis. However where a child is looked after away from home and there is no realistic prospect of the child's return to his or her birth family, the local authority should put in place stable and legally secure arrangements for the child's long-term care. The needs of young children are likely to be best met in a permanent placement with a substitute family. Older children also need stability and security but their needs may require a range of responses depending on their circumstances.

Traditionally the policy and legal framework has sought to promote stable long-term care for looked after children, through adoption, which terminates existing family relationships. In the light of evidence that parents and other family members who cannot safely look after their children can nevertheless make a continuing contribution to their positive development and welfare,¹ professional practice has adopted a more flexible approach. After extensive review and consultation,² the Scottish Executive has introduced a Bill in the Scottish Parliament to reform adoption law.³

¹ Monteith, M and Cousins, W (2003) 'The Importance of Stability in the Lives of Looked After Children: A Study of Under-5s in Northern Ireland' in *Child Care in Practice* Vol.9 No. 1 pp 62-72

² The Scottish Executive launched a review of adoption policy in April 2001. The Adoption Policy Review Group published its first report in 2002 which focused practice considerations: *Adoption Policy Review – Report Phase 1* (<http://www.scotland.gov.uk/library5/education/apr1-00.asp>) The second phase of the review examined the legal framework for adoption and reported to Scottish Ministers in June 2005: *Adoption – Better choices for our children* (<http://www.scotland.gov.uk/Publications/2005/06/27140607/07362>). The Scottish Executive then consulted on proposals for legislative reform: *Secure and safe homes for our most vulnerable children – proposals for action on adoption, fostering and permanence* (<http://www.scotland.gov.uk/publications/2005/06/29170235/02372>).

³ *Adoption and Children (Scotland) Bill*, introduced on 27th March 2006.

Parental responsibilities orders

A parental responsibilities order may be appropriate to secure a child's settled placement in the long-term, or to enable the local authority to acquire appropriate decision-making powers when it is no longer necessary for a child to be subject to compulsory measures of supervision but he or she cannot return to live with his or her family of origin. The local authority may apply to a sheriff for an order awarding them parental rights and responsibilities.⁴ A parental responsibilities order has the effect of transferring parental responsibilities and rights from the child's parent(s) or any other person with parental rights and responsibilities. The local authority acquires all parental responsibilities and rights other than the right to agree to an application or order relating to adoption of the child.⁵

A sheriff may make a parental responsibilities order where he is satisfied that each relevant person:

- agrees that the order should be made
- he or she is not known, cannot be found or is incapable of agreement
- is withholding agreement unreasonably, or has persistently failed to safeguard and promote the child's health, development and welfare, or, if the child is not living with the relevant person, failed to maintain a personal relationship with the child
- has seriously ill-treated the child and as a consequence of the ill-treatment the child is unlikely to return to the care of that person

The local authority may place the child with relatives or the child's parents,⁶ but the local authority retains the right to direct where the child shall reside and with whom he or she has contact until the child reaches 16 years, subject to the views and wishes of the child and the requirement that any action by the local authority is consistent with its duty to safeguard and promote the child's welfare. A parental responsibilities order lasts until the child reaches 18 years and the child remains looked after by the local authority whilst subject to a parental responsibilities order.

⁴ C(S)A 1995, section 86

⁵ C(S)A 1995, section 86(3)

⁶ C(S)A 1995, section 87(2)

The local authority must allow the child reasonable contact with any relevant person, that is anyone who had parental responsibilities and rights, or who had charge and control of the child, before the making of the order, and also any person in whose favour there had been a residence or contact order in respect of the child. The child, the local authority or any person with an interest may apply to a sheriff for an order allowing contact with the child at any time and the sheriff may make an order regarding contact with the child even if no one has applied for such an order.⁷

Adoption

The legal framework for adoption is currently set out in the Adoption (Scotland) Act 1978 as amended by subsequent legislation. An adoption order creates in law new parental relationships for the child, giving adoptive parents rights and responsibilities and extinguishing the responsibilities and rights, and any duty to financially maintain the child vested in a birth parent or guardian.⁸ On application by a local authority a court may make an order declaring a child free for adoption and this too has the effect of removing parental responsibilities and rights from the child's parent(s) or guardian and transferring these to the local authority.⁹ If the child has not been adopted within 12 months after a freeing order has been made, the child's parent may apply to the court to have the order revoked so that he or she may resume his or her parental responsibilities and rights.¹⁰

The definition of a looked after child¹¹ does not include children freed for adoption and therefore they are not looked after by the local authority, although the local authority acquires parental responsibilities and rights in respect of the child. Some 'freed' children will be subject to supervision requirements and these children are looked after. If a placement is not made within six months of the order declaring the child free for adoption the local authority must review the child's case, and carry out further reviews at least every six

⁷ C(S)A 1995, section 88

⁸ Adoption (Scotland) Act 1978, section 12

⁹ *ibid*, section 18

¹⁰ *ibid*, section 20

¹¹ C(S)A 1995 17(6)

months thereafter until the child is placed with prospective adopters.¹² There is no statutory requirement for care planning for children prior to their adoption, or for periodic review for children placed but not adopted. BAAF recommends that local authorities should treat children freed for adoption as they do children looked after and undertake planning and review to the same standards.¹³

Policy approaches to permanence fluctuate between welfare approaches promoting partnership with birth parents and families and those promoting adoption as the most effective way of securing children's right to a permanent family. The latter has gained ground in Britain and the US but the former is more prominent in Australia. Neither should be exclusive. Adherence to one or other position may have unforeseen consequences; a particular emphasis on adoption may make parents reluctant to seek early help, and inhibit working in partnership with families; too great an emphasis on care in families of origin may expose some children to unacceptably high risks.¹⁴

The Adoption and Children (Scotland) Bill currently before the Scottish Parliament includes a new legal order, the permanence order, enabling a sheriff, on application by a local authority, to allocate parental rights and responsibilities between the local authority and other people interested in the child's welfare including carers and birth parents.¹⁵ The Bill also proposes that birth parents whose parental rights and responsibilities have been removed may apply for continuing contact with a looked after child.¹⁶ These and other provisions in the Bill hold out the prospect of a more flexible approach to substitute long-term care for looked after children.

¹² Adoption Agencies (Scotland) Regulations 1996, regulation 21

¹³ Alexandra Plumtree (personal communication)

¹⁴ see Parkinson, P (2003) 'Child Protection, Permanency Planning and Children's Right to Family Life' *International Journal of Law, Policy and the Family* Vol. 17 (2) pp 147-172

¹⁵ Adoption and Children (Scotland) Bill, s84

¹⁶ Adoption and Children (Scotland) Bill, s100

12 Leaving care

The law requires local authorities to support certain young people whom they have previously looked after. Local authorities must provide aftercare, in the form of advice, guidance and assistance, to any young person aged between 16 and 19, who was looked after by the local authority at, or after, the time he or she ceased to be of compulsory school age, unless it is clear that the young person does not need that help. Local authorities may also provide aftercare to young people aged 19 to 21 years if they ask for help.¹ Regulations distinguish between these two groups of young people as ‘compulsorily’ or ‘discretionarily’ supported. Assistance may include financial help or other resources such as a place to stay. Regulations may specify different provision for different areas.² Local authorities do not have any statutory duties to assist young people who were no longer looked after by the time they ceased to be of compulsory school age.

A study of Scottish practice found that most local authorities offered a planned programme of throughcare but many eligible young people had not received one and had left care without a clear statement of their needs for continuing support. Provision varied throughout Scotland. Some local authorities were extending and improving services for young care leavers. The researchers identified a need to strengthen links between services within local authorities and with other agencies, and to improve management information and quality assurance.³

Recently changes in the law have sought to strengthen support for children leaving care.⁴ Homeless 16 and 17 year olds are now deemed to be in priority need for housing by local authorities.⁵ The Scottish Executive has recently issued revised guidance on throughcare

¹ C(S)A 1995, s29

² *ibid*, s73(4)

³ Dixon, J and Stein, M (2002) *A Study of Throughcare and Aftercare Services in Scotland* Social Work Research Findings No. 3, The Scottish Executive CRU

⁴ Regulation of Care (Scotland) Act 2001, s73

⁵ Homelessness etc. (Scotland) Act 2003, s1(2)(b)

and aftercare for young care leavers.⁶ Financial support for 16 and 17 year olds formerly looked after by local authorities has transferred from the Benefits Agency to local authorities.⁷ Scottish ministers have exercised their statutory power to make regulations in respect of aftercare provision and entitlement, assessment of need and complaints procedures.⁸ These specify who should be consulted in assessments of need, how assessments should be conducted and recorded and the considerations to which the local authority should have regard in assessing need.⁹

The local authority which looked after the child retains statutory responsibility for providing aftercare, even if the young person moves to another local authority area.¹⁰ Guidance encourages the responsible authority to remain directly involved, minimising the need for a receiving authority to have contact with the young person, but exhorts local authorities to collaborate with each other in providing aftercare. It states that the young person should receive the same standard of care or services from a receiving local authority who assumes responsibility for supporting the young person as that they could have expected from the authority which had looked after them.¹¹

The local authority must carry out an assessment of the needs of any person entitled to aftercare, or who is asking for help, who is over 19 years of age and was previously entitled to aftercare.¹² The local authority may not delay support or financial assistance to a young person entitled to aftercare until an assessment of the young person is complete and a care plan in place, but should provide such help as it considers the young person needs in the interim.¹³ Secondary legislation requires that when assessing young people the local authority should seek and have regard to their views and enable them to participate in meetings considering their needs.¹⁴

⁶ The Scottish Executive (2004) *Supporting Young People Leaving Care in Scotland: Regulations and Guidance on Services for Young People Ceasing to be Looked After* <http://www.scotland.gov.uk/library5/education/syplc.pdf> by Local Authorities

⁷ Children (Leaving Care) Act 2000, s6

⁸ Regulation of Care (Scotland) Act 2001, ss 73(2) and 73(3)

⁹ The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (No. 608)

¹⁰ *ibid*, regulation 2 (interpretation of responsible authority)

¹¹ The Scottish Executive (2004) *Supporting Young People Leaving Care in Scotland: Regulations and Guidance on Services for Young People Ceasing to be Looked After* paragraphs 5.1-5.3 1.13

¹² Regulation of Care (Scotland) Act 2001, s73 – inserts s29(5) of the Children (Scotland) Act 1995

¹³ The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (No. 608), regulation 13

¹⁴ *ibid*, regulation 3

The assessment should be completed within three months of the young person becoming eligible for aftercare or the young person requesting help from the local authority.¹⁵ Following an assessment, the local authority must, within 21 days, prepare a plan for the young person's support, called a 'pathway plan'. This should describe how the local authority proposes to meet the young person's needs, and state when, and by whom, each aspect of the plan will be implemented.¹⁶ One person, called a 'pathway co-ordinator', should co-ordinate the assessment. The pathway co-ordinator tasks are:

- to advise and support the young person and ensure that he or she is properly consulted
- participate in assessment of the young person's needs, planning their aftercare and periodic reviews of the plan
- to co-ordinate the provision of services for the young person
- to monitor his or her progress and well-being

The pathway co-ordinator is also required to keep written records and ensure that the young person has a copy of the assessment and understands its contents.¹⁷ Local authorities must also arrange for an independent person to support and advocate for the young person if they request one and the pathway co-ordinator should liaise appropriately with the young person's supporter.¹⁸ To assist local authorities to fulfil their statutory obligations, national guidance encourages the use of assessment and planning materials prepared by the Scottish Throughcare and Aftercare Forum and Barnardo's.¹⁹

Local authorities must establish a complaints procedure for young people who have, or have had, a statutory entitlement to aftercare.²⁰ This should include provision for appeals by young people against a local authority's decision to refuse advice, guidance and assistance under the provisions in children's legislation for children who were formerly

¹⁵ *ibid*, regulation 9

¹⁶ *ibid* regulations 10 and 11

¹⁷ *ibid*, regulation 4

¹⁸ *ibid*, regulation 5

¹⁹ The Scottish Executive (2004) *Supporting Young People Leaving Care in Scotland: Regulations and Guidance on Services for Young People Ceasing to be Looked After* paragraph 1.13

²⁰ Regulation of Care (Scotland) Act 2001, s73, amends the Children (Scotland) Act by inserting section 29(6)

looked after. The revised guidance emphasises local authorities' role as corporate parents, and states that the support to care leavers should be equivalent to that provided by parents to their children. This may need to continue well after a young person reaches adulthood at 18 years of age. Support should adapt to meet the young person's changing needs and include accommodation and financial support as well as advice and assistance. As a corporate parent the duties in respect of young care leavers apply to all departments of the local authority and agencies with whom they work.²¹

Financial support for young people leaving care

Legislation has extended powers of local authorities to make payments for or towards the maintenance of a child who is residing with and being cared for, other than as a foster child, by a person other than the parent of the child until they are 18 years old, rather than, as formerly, 16 years.²² However regular financial support to young care leavers entitled to aftercare is limited to young people who were looked after away from home for a period of, or periods totalling, 13 weeks or more since the age of 14, unless there are exceptional circumstances.²³ Short-term respite placements are not counted in the calculation of the 13 week eligibility period.

Maintenance for young people in full-time education

Local authorities have a discretionary power to make grants to a young person aged 16 to 21 years formerly looked after by the local authority, to enable him or her to meet expenses connected with a course of education or training, and to contribute to the accommodation and maintenance of the young person in any place near where he may be employed or looking for work, or receiving education or training. They may continue to make such a grant or contributions to the young person beyond the age of 18 years until he completes the course of education or training.²⁴ This enables a young person leaving care to be supported through college or university. Social Work Services Inspectorate and Her Majesty's

²¹ The Scottish Executive (2004) *Supporting Young People Leaving Care in Scotland: Regulations and Guidance on Services for Young People Ceasing to be Looked After* paragraphs 1.4-1.5: Pathways assessment

²² ROC(S) A 2001, s71, amending the Children Act 1975, s50

²³ The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003, regulation 13

²⁴ C(S)A1995, s30

Inspectorate for Education found that some local authorities had no clear policies on financial support to young care leavers in full-time further or higher education. Decisions about their support were taken on an ad hoc basis, presenting an additional barrier to educational aspiration. The inspection team recommended that local authorities make specific financial arrangements for maintaining young people until they complete their studies.²⁵

Local authorities are not permitted to financially maintain young people over 16 years of age living with their families, unless the young person would have been entitled to social security benefits but are excluded from receipt of benefit because they were formerly looked after by the local authority.²⁶ Any financial or other support to a young person aged between 16 and 18 years should not be less than the value of security benefits that the young person would have been entitled to.

²⁵ *Learning with Care*, paragraph 9.16

²⁶ The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (No. 608), regulation 13(2); exclusion from social security benefits – section 6, Children (Leaving Care) Act 2000

13 Monitoring performance

The Chief Social Work Officer

Regional local authorities were required to establish a Council committee to oversee social work services, and to appoint a professionally qualified Director of Social Work.¹ Local government reorganisation in 1994 removed these statutory requirements enabling the new unitary authorities to align functions such as housing and social work in multi-purpose service departments managed by officers with a range of professional or administrative qualifications. Local authorities must now have a Chief Social Work Officer (CSWO) with a qualification in social work to ensure that the local authority carries out professional responsibilities appropriately.²

National guidance states that the CSWO should have oversight of all social work services provided or purchased by the authority.³ The CSWO is also accountable for certain decisions taken by the local authority. For example a child may not be placed in secure accommodation without authorisation from a children's hearing unless the CSWO is satisfied that the criteria for such an authorisation are met, that a secure placement is in the child's best interests and that the proposed placement is appropriate to the child's needs.⁴ The CSWO is responsible for ensuring an independent mechanism for the regular review of the case of any child placed in secure accommodation.⁵

The CSWO is required to have attained one of the following qualifications: (i) the Certificate of Qualification in Social Work; (ii) the Certificate in Social Services; or (iii) the Diploma in

¹ Social Work (Scotland) Act 1968, s2 (repealed by the Local Government (Scotland) Act 1994)

² Local Government (Scotland) Act 1994, s45, amending s3 of the Social Work (Scotland) Act 1968

³ Circular SWSG 2/95 CSWO: Responsibilities

⁴ The Secure Accommodation (Scotland) Regulations 1996, regulation 6: Children subject to certain supervision requirements – interim placement

⁵ *ibid*, regulation 15: Review of the use of secure accommodation

Social Work, or their approved equivalents in previous qualifications or other jurisdictions.⁶ The post of CSWO is designated as a ‘child care position’. A person who has been convicted of certain offences against children, or who is deemed unsuitable to work with children may not apply for, offer to do, accept or do any work related to the post of CSWO.⁷

Regulation of services

National inspectorates in social work,⁸ education⁹ and a central advisory body in the NHS¹⁰ separately inspect social work and related services, schools, including residential special schools, and hospital services for vulnerable people including older people and people with learning disabilities or mental illness.

Until recently local authorities and health boards were separately responsible for regulating day care and residential services for adults and children provided by the voluntary and independent sectors, and residential homes providing nursing care. In 2001 legislation was enacted providing for independent regulation and inspection of all social care and some independent health services by a national non departmental public body, the Scottish Commission for the Regulation of Care (the Care Commission).¹¹ The Care Commission has statutory responsibility for furthering improvement in the quality of care services and now regulates and inspects adoption, fostering and day care services for children provided by local authorities and independent providers in the voluntary and private sectors, and will, in future, inspect certain services which require approval by Scottish ministers, such as secure accommodation for children and voluntary adoption agencies. Residential schools for children with special educational needs which provide care and support to their pupils such as to bring their services within the definition of a care service will also be inspected by the Care Commission.¹²

⁶ The Qualifications of Chief Social Work Officers (Scotland) Regulations 1996, regulation 3

⁷ Protection of Children (Scotland) Act 2003, s11 (Schedule 2, paragraph 6(c))

⁸ Social Work Inspection Agency (SWIA)

⁹ HMI Education (HMIE), formerly Her Majesty’s Inspectorate of Schools

¹⁰ formerly the Scottish Health Advisory Service (SHAS); its functions are now discharged by a non-departmental public body, NHS Quality Improvement Scotland

¹¹ Regulation of Care (Scotland) Act 2001, s1

¹² ROC(S)A 2001, s2(4)

Scottish ministers are required to prepare and publish care standards for services subject to regulation by the Care Commission and review them when appropriate, in consultation with appropriate persons or groups of persons.¹³ Standards for all the services subject to regulation by the Care Commission are underpinned by common core principles, developed on behalf of Scottish Ministers by the National Care Standards Committee: dignity, privacy, choice, safety, realising potential, equality and diversity. These principles specify service users' personal rights which should be promoted by providers' compliance with the care standards. The Care Commission must have regard to the standards in making any decision about registration, inspection and regulation of a care service. The courts will also consider the standards when considering appeals or prosecutions for offences under the Act.¹⁴

Scottish ministers also have extensive powers to make regulations imposing requirements on care services, in consultation with appropriate stakeholders¹⁵ and any regulations must be approved by the Scottish Parliament.¹⁶ The Commission may impose a range of sanctions for non compliance with standards and regulations including improvement notices,¹⁷ condition notices¹⁸ and withdrawal of registration.¹⁹ The standards should be taken account of in proceedings for urgent cancellation of registration of services,²⁰ or an appeal by a local authority against a decision of the Commission,²¹ or in respect of any registration offence under the Act.²² In determining whether to register an applicant the Commission may take into account the requirements of any other enactment it considers relevant.²³

New regulations prescribe requirements for the conduct and management of care services.²⁴ These supersede earlier regulations made under the Children (Scotland) Act 1995 relating to

¹³ ROC(S)A 2001, s5

¹⁴ ROC(S)A 2001, ss 5(3) and 5(4)

¹⁵ ROC(S)A 2001, ss 28 and 29

¹⁶ ROC(S)A 2001, s81

¹⁷ ROC(S)A 2001, s10

¹⁸ ROC(S)A 2001, s13

¹⁹ ROC(S)A 2001, s12

²⁰ ROC(S)A 2001, s18

²¹ ROC(S)A 2001, s39

²² ROC(S)A 2001, s 5

²³ ROC(S)A 2001, 9(2)(b)

²⁴ The Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 No 114

residential establishments for children.²⁵ The earlier regulations remain in force but aspects of these now apply only to residential units controlled or managed by a local authority, because the provisions under which other voluntary and independent sector establishments were registered have been repealed.²⁶ For example the legal requirements to include certain matters in a statement of functions and objectives now apply only to local authority children's homes.²⁷ The remainder of the regulations continue to apply to all establishments which provide residential accommodation for children.²⁸

The new regulations cover broadly the same areas for the purposes of the Care Commission's regulatory responsibilities, including provision regarding the fitness of managers and, employees, and suitability of premises and facilities.²⁹ They introduce a requirement for care providers to prepare, in consultation with the service user and, where appropriate, any representative, a written personal plan for each service user within a month of having started to provide the service, describing how the person's health and welfare needs will be met.³⁰ The provider should review the personal plan with the service user regularly, at least once within every six month period, and make any necessary revisions. This duty is in addition to the local authority's statutory duty to prepare a written care plan for every child looked after, although in practice one should meet the requirements of the other.

Transitional arrangements provide that establishments registered under repealed provisions are deemed to be registered, and therefore subject to regulation under, the new arrangements pending the outcome of any application for renewal of registration.³¹

Part III of the 1996 regulations imposes duties on local authorities with respect to residential placements. These include the requirement to provide the person in charge with written information about the child and agree arrangements to safeguard and promote the child's welfare including family contact, education and health care with the person in charge.

²⁵ The Residential Establishments – Child Care (Scotland) Regulations 1996,

²⁶ Social Work (Scotland) Act 1968 (ss 60-68)

²⁷ The Residential Establishments – Child Care (Scotland) Regulations 1996, Part II, regulation 5(1)

²⁸ The Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 No 114, regulation 2 – 'interpretation'; 'residential establishment' has the meaning given to that term by section 93(1) of the 1995 Act.

²⁹ The Regulation of Care (Requirements as to Care Services)(Scotland) Regulations 2002

³⁰ *ibid*, regulation 5

³¹ The Regulation of Care (Scotland) Act 2001 (Commencement No. 2 and Transitional Provisions) Order 2002 No. 162 (C. 8)

Enforcement of local authorities statutory duties

If local authorities fail to carry out their statutory duties in respect of looked after children there are few effective sanctions or remedies for looked after children and their families. Those that do exist are often cumbersome, slow and expensive, with no guarantee of a good outcome for the child or family concerned.

Complaints procedures

Service users may complain to the local authority which is legally required to have a procedure for considering representations and complaints about any of their social work functions including child care services.³² The procedure should be consistent with national directions and guidance and include an element of independent review if the service user is not satisfied with the local authority's initial response.³³

The Children's Commissioner

The Office of Commissioner for Children and Young People was established to promote and safeguard the rights of children and young people. Primary legislation prescribes the following functions:

- to promote awareness and understanding of the rights of children and young people
- to keep under review the law, policy and practice relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such law, policy and practice
- to promote best practice by service providers
- promote, commission, undertake and publish research on matters relating to the rights of children and young people³⁴

³² Social Work (Scotland) Act 1968, s5B

³³ Social Work (Representations Procedure) (Scotland) Directions 1996 *check*; Circular SWSG 5/1996

³⁴ Commissioner for Children and Young People (Scotland) Act 2003, s4

The Commissioner does not have powers to investigate individual cases, but may carry out an investigation into whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people.³⁵ Such investigations must raise an issue of particular significance to children and young people generally or to particular groups of children and young people and not duplicate work that is properly the function of any other person, such as a regulatory or inspection body.³⁶ The Commissioner is independent of the Scottish Executive and Parliament, and will report annually to the Scottish Parliament on the exercise of her functions.

The role of the Commissioner is still evolving and the office is consulting children and young people on its forward priorities. Amongst issues emerging early in its development are concerns from looked after young people and staff about pressure upon young people to leave care before they reach 18 years.

The Public Service Ombudsman

The Office of Public Service Ombudsman (OPSO) was established in 2002 to consider complaints about public services.³⁷ Service users may apply to the public services ombudsman to investigate the handling of their case by the local authority if there has been an administrative failure, failure to provide a service or failure in a service provided.³⁸ If a complaint is upheld the ombudsman may require the local authority to provide an apology and take action to put right any injustice that has occurred. This may include financial reimbursement for any losses the claimant has sustained and modest financial redress. The ombudsman may also require the local authority to take more general action to prevent the problem reoccurring including changing their policy or procedures. Reports of investigations by the ombudsman will be published. Failure to co-operate with the ombudsman or to take action in respect of the ombudsman's investigation could result in application to the Court of Session who may deal with the person as if the person had committed a contempt of court in relation to the Court of Session.³⁹

³⁵ CC&YP Act 2003, s7(1)

³⁶ CC&YP Act 2003, s7(2)

³⁷ Scottish Public Services Ombudsman Act 2002

³⁸ *ibid*, s5

³⁹ *ibid*, s14

Judicial remedies

Anyone may apply to the Court of Session for judicial review of a decision or action by a local authority. The function of judicial review is to scrutinise the exercise of power by public agencies where an individual alleges that the authority has acted unfairly or illegally. The process is not an appeal against the public authority's decision or action but a consideration of whether the decision made by the public authority was legal, that is within its statutory powers, properly taken according to appropriate procedures and, taking into account all the relevant circumstances, within the range of decisions a reasonable public authority could make. Incorporation of ECHR has added the tests of lawfulness and proportionality to judicial review, so that the court will assess whether the decision was in pursuit of a lawful aim and whether the decision or action taken went beyond that which was strictly necessary to achieve the lawful aim. The court may set aside the original decision and remit it back to the public authority to reconsider appropriately in the light of the court's judgement.

Legal liability for injury and loss

A person who suffers personal injury, including physical, emotional or mental injury or financial loss may raise a legal action for damages against the person or organisation responsible. Traditionally cases brought for harm caused by the actions or omissions of public services such as social work or the police have been unsuccessful.⁴⁰ Courts have tended to resist holding public services liable for harm to individuals as not in the public interest because the fear of legal action rather than the demands of the service would direct practice, and bring about defensive practices. Also contesting such actions would direct public money away from services. More recently the English appeal court has held that following incorporation of ECHR into UK domestic law it will no longer be lawful to hold that public authorities do not owe a duty of care to children when investigating suspected child abuse

⁴⁰ *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633

or bringing care proceedings. Each case must now be determined on its own facts.⁴¹ This judgment extends local authorities accountability, through the courts, to their service users. Although not binding on Scottish courts this judgment is likely to be influential in deciding similar cases involving compulsory measures of care and supervision in Scotland. It does not affect claims arising before incorporation of ECHR.

Therefore a local authority may now be more likely to be held liable for personal injury suffered by a person in their care or using their services. If a looked after child experiences poor standards of care or multiple placements because of poor planning or suffers abuse because of negligent professional practice, and, as a consequence, their emotional development and subsequent mental health is impaired, a local authority may be found liable for damages.⁴² However there are a number of hurdles to a successful claim. The injured person must establish that the local authority owed the claimant a duty of care to avoid the injury complained of, that the authority breached the duty of care and the alleged injury is a consequence of the breach.

Local authorities may also be held vicariously liable for injury caused by the wrongful act of their employee. Liability will depend on the connection between the wrongful act and the employment. If the wrongful act was authorised by the employer, or closely linked to the

⁴¹ *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151; This Court of Appeal judgment concerned three conjoined appeals in respect of claims for damages as a result of clinical negligence in responding to allegations of child sexual abuse and Munchausen's by proxy. The appellants argued that application of the 'public policy test to deny public authority liability breached these families' Article 6 Convention rights to a fair trial, and that examination of the facts would have revealed breaches of Article 8 rights. The appeals failed. The court considered the extent of any duty of care by healthcare professionals or social workers. It reviewed the ECHR judgements and confirmed that a preliminary assessment by the domestic court of whether it was fair, just and reasonable to impose liability did not breach Article 6. The ECHR cases indicated that there was no general immunity in the UK precluding the applicants from suing the relevant public authorities - they had had access to the courts to consider the basis of their claims under the general principles of the law of negligence. The problem was that if the preliminary procedure determined that it was not fair, just and reasonable to hold the public authorities liable, the applicants had no remedy and that could amount to a breach of Article 13. However the Human Rights Act 1998 now make public authorities' liability for breach of Convention rights directly justiciable in domestic courts and a series of domestic and ECHR decisions indicate that such claims will require examination of the facts in most circumstances. On appeal, the House of Lords affirmed that in some circumstances public authorities will have a duty of care toward the children on whose behalf they intervene.

⁴² *Barret v LBC Enfield* [2001] 2 AC 550; A young person had been made the subject of a care order aged 10 months and remained in local authority care until he was seventeen years old. He raised an action against the local authority alleging that he suffered severe psychological problems as a result of the local authority's negligent mishandling of his case. He argued that the local authority failed to plan for his adoption by another family, had failed to adequately plan and monitor his care, and mismanaged an attempt at rehabilitation with his mother. As a young adult he had serious difficulties with relationships, substance abuse and self harm and was poorly equipped for employment. The House of Lords ruled that there was a case to answer overturning previous decisions that local authorities could not normally be sued for negligent failures in professional practice.

range of activities for which the person was employed, or the employment provided an opportunity for the wrongful act the employer may be held liable, even if there was no fault on the employer's part. For example if a residential care worker has responsibility for the care and supervision of a vulnerable young person and sexually abuses them, the employing organisation may be held liable for any injury to the physical or mental health of the young person and be required to pay damages.⁴³

New statutory provisions for enforcement

Formerly supervision requirements made by children's hearings placed obligations only upon the child subject to compulsory measures. Primary legislation gives children's hearings new powers to place such duties on a local authority as may be required to enable a child to comply with the requirement. Such duties may include directions to secure or facilitate the provision of specified services for the child, other than those normally provided by a local authority.⁴⁴ Where duties have been imposed on a local authority as part of a supervision requirement, the local authority must perform those duties.⁴⁵ Neither legislation, nor guidance gives examples of what duties may be imposed, giving wide discretion to the hearing.

Where it appears to a children's hearing that a local authority has failed to give effect to a supervision requirement, for example by failing to perform duties imposed on it by the terms of the requirement, the hearing may direct that the principal reporter give notice to

⁴³ *Lister v Hesley Hall* [2001] UKHL 22 – The claimants were resident in a boarding house attached to a school owned and managed by the defendants between 1979-1982. The warden of the boarding house, without the defendants' knowledge, systematically sexually abused the claimants. They claimed damages against the managers of the school. The House of Lords ruled that there was a sufficiently close connection between the work that the warden had been employed to do and the abusive acts for those acts to be regarded as having been committed within the scope of his employment and the defendants should be held vicariously liable for them; *DS v Gloucestershire County Council* [2001] Fam. 313; conjoined cases in which the plaintiffs appealed against an earlier judgement that they could not sue the local authorities who had looked after them as children. The plaintiffs, now adults, had been in the care of their respective local authorities and placed with foster carers. They alleged that they had been sexually abused by their foster fathers and brought actions against the local authorities claiming damages for personal injury, including psychiatric damage, suffered as a result of the negligence and breach of the local authorities' duty of care towards them. The Court held that the question to be considered in child abuse cases was the nature of the actions and the decisions of the local authority which were said to have been negligent and whether these amounted to a breach of an existing duty of care to which the alleged damage could be linked. The first case disclosed reasonable grounds for bringing the claim which had a real prospect of success and therefore the appeal was upheld and the case against the local authority allowed to proceed. The evidence in the second case indicated that it had no real prospect of success and therefore the appeal was dismissed.

⁴⁴ Antisocial Behaviour etc. (Scotland) act 2004, section 136, amending the C(S)A 1995, sections 70 and 71

⁴⁵ Children (Scotland) Act 1995, s71(1A), as inserted by ASB Act 2004, s136

the local authority that he or she intends to apply to a sheriff for an order compelling the local authority to give effect to the supervision requirement.⁴⁶ The local authority then has twenty one days within which to comply with the duty. The hearing should reconvene twenty eight days after notifying the local authority. If it then appears that the local authority is still failing to give effect to the supervision requirement the hearing may direct the principal reporter to apply to a sheriff for the order compelling compliance with the supervision requirement.⁴⁷ If granted the sheriff's order is final. Failure by the local authority to comply with the terms of any order would be treated as contempt of court.

A comparable power of enforcement in relation to provision of education has been enacted, enabling a children's hearing to refer to Scottish ministers where it appears that an education authority is failing to make appropriate educational provision for an excluded pupil.⁴⁸

The Scottish Executive has issued detailed guidance on these provisions.⁴⁹ This states that the Executive expects the majority of cases to be resolved by discussion and agreement between the local authority and partner agencies, or the reporter, preferably without recourse to the new legislative provision.⁵⁰ The guidance directs panel members to use their powers only in circumstances where the local authority's failure is likely to have a serious impact on the young person. These include failure to allocate a social worker or to deliver key services or support measures.⁵¹ SCRA reports that there have been no applications under either of these provisions since commencement in January 2005.

⁴⁶ C(S)A 1995, s70(7A), as inserted by ASB Act 2004, s136

⁴⁷ C(S)A 1995, s70(7D) and (7E), as inserted by ASB Act 2004, s136

⁴⁸ ASB etc. Act 2004, section 137

⁴⁹ The Scottish Executive (2005) Guidance on Local Authority Accountability

⁵⁰ *ibid*, paragraphs 16 and 22

⁵¹ *ibid*, paragraph 43

14 Managing information

Disclosure of personal information

Data protection legislation governs the collection, recording, storage and disclosure of personal information. Such information held about individuals cannot normally be used for purposes other than those for which it was originally supplied without the individual's consent. Personal data covers both facts and opinions about a living individual which might identify that person.¹ Disclosure of personal information must comply with statutory data protection principles.² Unauthorised disclosure of personal data is an offence.³

Article 8 of the ECHR guarantees respect for a person's private and family life, his home and his correspondence. Disclosure of personal information breaches that right unless it complies with the human rights tests of necessity and proportionality: the disclosure must be in accordance with the law, or necessary for the protection of an individual, or is in the public interest. Unless there is a lawful basis for disclosing information, such as the subject having given consent or compliance with a legal requirement to disclose, the information should not be shared.

There are several important exceptions to this.⁴ Data may be disclosed to safeguard national security, to prevent or assist the detection of crime, or to protect the vital interests of the person. This last provision is usually interpreted as 'protecting life and limb'. Common law also has a concept of medical confidence, which impacts on capacity to share personal health information. The General Medical Council only allows doctors to share information to prevent or detect a serious crime, i.e. murder, rape or serious assault. Common law enables the disclosure of information where this is necessary to protect a vulnerable person from harm. If there is reasonable concern that a child may be at risk of harm this will always override a

¹ DPA 1998, s1(1)

² Data Protection Act 1998; see Schedule 1 – The Data Protection Principles

³ DPA 1998, s55

⁴ DPA 1998 and related guidance

professional or agency requirement to keep information confidential.⁵ All professionals and service providers have a responsibility to act to make sure that a child whose safety or welfare may be at risk is protected from harm and this is enshrined in professional and ethical codes of conduct. In some circumstances the police have powers to request professionals to disclose information.

Right of access to personal information

An individual may request access to personal information held about him or her by an organisation.⁶ Personal information includes local authorities' case records about looked after children, required by secondary legislation.⁷ The organisation must describe what information it holds about the person, where it has come from, why the information is being stored and how it will be used including with whom it will or may be shared. If the personal information held by the organisation is the only basis on which a decision which will significantly affect the individual will be made, the person designated to manage data held by the organisation, the data controller, must tell the person how and why the information is used to make the decision.

A request for access to personal information under data protection legislation places certain legal requirements on the recipient organisation and is therefore a transaction having legal effect. Young people over sixteen have legal capacity to access personal information. The right of access extends to children under 16 years of age who understand what it means to exercise that right and the public authority should consider whether a younger child has sufficient understanding to do so. A person aged 12 years of age or over is assumed to be sufficiently mature to have such understanding.

If a child does not have sufficient understanding to make his or her own request, a person with parental responsibilities and rights can request access to the records acting on the child's behalf as their legal representative.⁸ An agency may refuse a parental request for personal information when the circumstances fall within prescribed exemptions.⁹ Where an agency considers that granting access to a parent is likely to result in serious harm to anyone,

⁵ See The Scottish Executive (2003) *Sharing Information: A Guide to Good Practice* (Edinburgh, HMSO) [<http://www.scotland.gov.uk/library5/health/sicr.pdf>]

⁶ DPA 1998, s7

⁷ The Arrangements to Look After Children (Scotland) Regulations 1996, regulation 11

⁸ Children (Scotland) Act 1995 Regulations and Guidance Volume 2 *Children Looked After by Local Authorities*, Chapter 1, paragraph 129 p 27

⁹ 5(3) and 5(4) of the Data Protection (Subject Access Modification) (Social Work) Order 2000 (S.I.2000/415)

it may refuse access. The parent, acting on the child's behalf, may then make an application to the courts or the Information Commissioner for access.

Different legislation governs children and young people's access to their medical and health records.¹⁰ Patients, including children who are capable of understanding the nature of the application to see their health records, are entitled to access unless a health professional believes that access would cause serious harm to the physical or mental health of the patient or any other individual. Where children do not have the requisite understanding their parent or another person with parental responsibility may access the child's health record if the health professional considers that access is in the child's best interests. Information in the health record provided by another party may also be withheld unless the third party has consented to its disclosure.¹¹ Parents have a right to access their child's educational records for inspection free of charge within fifteen days of a request in writing, and are entitled to have a copy of the record subject to payment of a fee.¹² Children and young people have no statutory right of access to their educational records.

Freedom of information

Members of the public have had access to information held by Scottish public authorities since 1st January 2005.¹³ Scottish public authorities include central and local government, health services, the Scottish Children's Reporter Administration (SCRA) and the police.¹⁴ The framework for access to public information is overseen by the statutory office of Scottish Information Commissioner,¹⁵ and is governed by statutory codes of practice on how public authorities should respond to requests for access¹⁶ and all aspects of their records management.¹⁷ Certain information is exempt from the requirement for public access, including personal information or information¹⁸ given in confidence.¹⁹

¹⁰ Access to Health Records Act 1990

¹¹ Blackie, J and Patrick H 'Medical Treatment' in Cleland A and Sutherland E (2001) *Children's Rights in Scotland*; paragraphs 11.46-11.51 p 223-224

¹² The Pupils' Educational Records (Scotland) Regulations 2003, regulation 5

¹³ Freedom of Information (Scotland) Act 2002, s1

¹⁴ *ibid*, Schedule 1 – Scottish Public Authorities

¹⁵ *ibid*, s42

¹⁶ *ibid*, s60

¹⁷ *ibid*, s61

¹⁸ *ibid*, s38

¹⁹ *ibid*, s36

15 Rights to appeal

A looked after child or his or her parents may appeal against a decision of a children's hearing to a sheriff within three weeks of the date of the hearing. The child or a relevant person may also appeal against the decision of a sheriff to the sheriff principal, and thereafter to the Court of Session, by way of stated case either on a point of law, or in respect of any irregularity in the conduct of the case.¹ An appeal against a sheriff's decision to a higher court therefore cannot reopen discussion on the facts of the case but is confined to dispute about how the sheriff has interpreted, or applied, the law.² There is no right of appeal to a higher court against a sheriff's decision to make a child protection order or a children's hearing's decision to continue a child protection order. A person with parental rights or other relevant person may make an application to have a child protection order varied or set aside before the children's hearing on the second working day after implementation of the order or within two working days of a hearing's decision to continue a child protection order.³

ECHR Article 8 rights to respect for privacy and family life imposes obligations to ensure effective involvement and representation of parents in administrative as well as judicial decision-making about children.⁴

Legal aid and representation

Free legal representation for those who cannot afford it, where that is necessary for satisfactory presentation of a party's case, is a pre-requisite of fairness in the determination of civil rights or obligations or criminal charges, as guaranteed by the European Convention.⁵ Children and young people, their parent(s) and any relevant person are entitled to legal aid

¹ C(S)A 1995, s51

² *Melon v Hector Powe Ltd* 1980 SC 188, per Lord Emslie at 198

³ C(S)A 1995, s60(7)(b) or (c) and s60(8)

⁴ The Honourable Mr Justice Munby 'Making Sure the Child Is Heard Part 2- Representation' June [2004] *Family Law* 427

⁵ ECHR, Article 6

including representation by a solicitor and, where appropriate, counsel in connection with proceedings before a sheriff in respect of a child protection order or a child assessment order, or an exclusion order, an appeal to the sheriff against the decision of a children's hearing or a proof hearing before a sheriff in respect of grounds for referral or a review of a finding that grounds are established on the basis of new evidence, and an appeal to the sheriff principal or Court of Session.⁶

A child or relevant person is entitled to legal advice before having to attend a children's hearing, either free or at a reduced cost under the subsidised legal advice and assistance scheme.⁷ This advice is designed to inform the child and family about their rights at a hearing and to give them advice about how to respond to the grounds for referral. Legal advice and assistance is free only to persons with a disposable income of less than £197 a week or a person directly or indirectly in receipt of income support or other state benefits and a disposable capital of less than £1,370.⁸

Free legal advice for persons eligible under the advice and assistance scheme is limited to a ceiling cost of £80, or £150 where the solicitor providing advice is satisfied that the matter is likely to be resolved only by preparing for proceedings in a civil court for which legal aid is available, it is likely, on the information provided to him, that the applicant will qualify on financial grounds for civil legal aid; and it is reasonable in the circumstances of the case.⁹ This is more likely to be the case where the child or parents are denying grounds of referral.

In 2003-2004 the number of grants of advice and assistance for all matters under the Children (Scotland) Act 1995 increased by 9% in comparison with the previous financial year and the number of grants of legal aid made by the courts increased by 18%. Expenditure increased by 8% to £600,000 but the average cost per case remained the same at £101 per case.¹⁰ Nevertheless overall expenditure on children's cases fell by 19% to £2.7 million, reversing an upward trend since 1997. Payments to advocates decreased by 38%, compared with the previous year. The average case cost fell by 27% to £1,069.¹¹

⁶ C(S)A 1995, s92

⁷ Legal Aid (Scotland) Act 1986, Part II: Advice and Assistance

⁸ LA(S)A 1986, s8

⁹ The Advice and Assistance (Financial Limit) (Scotland) Regulations 1993, SI No. 1993/3187 (S.309), Regulation 4(b)

¹⁰ Scottish Legal Aid Board *Annual Report 2003-2004*, p 17

¹¹ Scottish Legal Aid Board *Annual Report 2003-2004*, p 17

The £3.3 million expended on advice and assistance and legal aid for children is slightly over 2% of the total annual expenditure of £146 million on publicly funded civil and criminal legal assistance.

Legal aid is not usually available for representation of children or families at children's hearings other than in prescribed circumstances. Children's hearings' procedures are intended to facilitate children's involvement and where children are able to contribute effectively legal representation may not be necessary. Nevertheless evaluative research indicates that children's and families' participation in children's hearings is limited, children's contributions to hearings are often brief and family members find hearings stressful and intimidating.¹² The Court of Session has ruled that the blanket exclusion of legal aid for a child to be legally represented at a children's hearing amounted to a breach of ECHR Article 6(1). The Court stated that appointment of a safeguarder as an alternative to legal representation was inadequate, because the child has no right to have a safeguarder appointed and the function of a safeguarder is '... to safeguard the "interests" of the child and not to vindicate his rights'.¹³ The Court dismissed the contention that routine involvement of lawyers would erode the welfare centred non adversarial ethos of the hearings, noting that lawyers currently attend hearings as representatives for children or relevant persons under existing rules, either *pro bono* or for those children and families who can afford to pay for representation.¹⁴ The Court of Session did not envisage that every child appearing before a hearing would always be entitled to free legal representation, but that it should be available in circumstances where it is required in the interests of justice so that a child may present their case effectively.¹⁵

A children's hearing may now appoint a legal representative for a child if it appears that legal representation is required to allow the child to effectively participate at the hearing, or it seems likely that the hearing may consider authorising the child's placement in secure accommodation.¹⁶ The national review of the children's hearings system proposes a new duty

¹² Deciding in Children's Interests Social Work Research Findings No 25, The Scottish Office, 1998

¹³ *S v Miller* 30th March 2001 Lord President's opinion, paragraph 37

¹⁴ children's hearing (Scotland) Rules 1996, rule 11

¹⁵ *ibid*, paragraph 40

¹⁶ The children's hearings (Legal Representation) (Scotland) Rules 2002 (SSI 2002, No 63)

on the Scottish Children's Reporter Administration to ensure the provision of legal representation for children, where this is necessary, under current criteria, to protect their rights. The Executive proposes that the reporter be required to identify cases where a legal representative may be appropriate and to initiate the appointment.¹⁷

Legal commentators have pointed to the influence of assumptions about the negative effect upon children of direct participation in legal proceedings.¹⁸ These operate to limit children's expression of views other than through third parties such as curators and reporting officers, whose primary task is to assist the court rather than represent the child's views and wishes. Children's access to legal aid and representation is limited, with most civil applications related to personal injury claims and family actions in which parents are acting on children's behalf.¹⁹

¹⁷ The Scottish Executive (2005) *Getting it right for every child*, proposal 19

¹⁸ Piper, C (2000) 'Assumptions about Children's Best Interests' in *Journal of Social Welfare and Family Law* 22(3) pp 261-276

¹⁹ Alison Cleland 'The Child's Right to be Heard and Represented in Legal Proceedings' 188 – quoting unpublished research by Fiona Keen

16 Overview of the framework

In Scots law children's rights to support, protection and services generally flow from statutory duties placed on public authorities from which rights may be implied.¹ There are few provisions in law specifically for looked after children as a discrete group. Nevertheless there are significant legal rights and entitlements, such as those relating to legal capacity, education and health services, which apply equally to looked after children, as to any other child. To realise their rights, the law giving rights and entitlements to all children should be given adequate effect for looked after children. There are statutory provisions requiring local authorities to provide services to safeguard and promote the welfare of children who are in need of care and attention by virtue of their vulnerability, which includes children who are looked after.²

The statutory framework for assessment, planning and review of children's care, whether placed away from home or under supervision at home, is comprehensive. This framework is underpinned by statutory principles. These place the child's welfare as the paramount consideration in decision-making by any public authority including courts and children's hearings. They require consultation with, and involvement of children, parents and other people important to the child, and permit only the least coercive intervention by any public authority necessary to safeguard and promote the child's welfare.³

Secondary legislation provides, in directions and regulations, statutory minimum requirements for information gathering to inform assessments. It prescribes the scope and substance of planning for children's care and supervision. It sets minimum standards for local authorities'

¹ Norrie (2001) 'A Child's Right to Care and Protection' in Cleland A and Sutherland E (2001) *Children's Rights in Scotland* p132

² Children (Scotland) Act 1995, s22; children in need are defined as '...a child...in need of care and attention because (i) he 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, under or by virtue of this Part [Part II of the Children (Scotland) Act 1995] services by a local authority; (ii) his health or development is likely significantly to be impaired, or further impaired, unless such services are so provided; (iii) he is disabled; or (iv) he is affected adversely by the disability of any other person in his family [C(S)A 1995, s93(4)]

³ C(S)A 1995, s16

contact with looked after children. And it describes requirements for consultation with children and families and their participation in the planning and review of their support by public agencies. Compliance with the regulations ought to ensure a consistent standard of local authority practice.

Key themes

Considering the legal framework and relevant research and inspection findings together, key themes emerge as significant in shaping public authorities' care and support for looked after children. These influence the experiences of, and outcomes for, looked after children and their families:

- interpretation and application of the 'minimum intervention' principle
- incorporation of the European Convention of Human Rights into domestic law
- the interface between Parts I and II of the Children (Scotland) Act 1995
- the contribution of the child's wider family
- the role of national guidance
- the public perception of what it means to be looked after

The minimum intervention principle

The Children (Scotland) Act requires courts and children's hearings to consider whether the making of an order or supervision requirement is likely to bring about a better outcome for the child than making no order. Courts in both private and public law proceedings are required to apply the same test.⁴ This has been variously described as: the 'no order' or minimum intervention principle,⁵ the non-intervention principle⁶ and the principle of minimum necessary intervention.⁷ These statutory provisions limit compulsory intervention by the state in the legal relationships between parents and children to the minimum necessary to ensure adequate safeguards for children.

⁴ C(S)A 1995, ss11(7) and 16(3)

⁵ Edwards and Griffiths (1997) p 194

⁶ Tisdall (1997) p 85

⁷ See Hill, M (2002) 'Introduction: adoption and fostering in Scotland' in M Hill (ed) *Shaping Childcare Practice in Scotland* London, BAAF quoted in Kendrick, A, 'Children Looked After in Residential and Foster Care' in Baillie et al (eds) (2003) *Social Work and the Law in Scotland*

Minimum intervention as expressed in the Act relates to judicial decision-making by courts and children's hearings. However, minimum intervention also appears as a guiding principle for professional practice. Statutory guidance states that one of the themes in support of the legislative framework for children's support and protection is that, so far as is consistent with safeguarding and promoting the child's welfare, public authorities should promote the upbringing of children by their families and any intervention by a public authority in the life of a child must be properly justified and supported by services from all relevant agencies working in collaboration.⁸

Local authorities have a general duty to provide services for children in need.⁹ Services for individual children provided on a voluntary basis at their families' request are characterised as 'family support'. Intervention designed to establish whether the child is in need of compulsory measures of supervision, is characterised as 'child protection', and in the first instance takes the form of investigative assessment.¹⁰ When concerns about a child's safety are substantiated, this may lead to a child's registration on the child protection register, bringing into play an administrative framework for inter-agency planning and monitoring, underpinned by national and local guidance. It may also lead to the child's referral to the reporter or the children's hearing. In the light of the serious consequences of child abuse and criticism of local authorities and other agencies in reports of public inquiries into child deaths, public services have tended to prioritise effort and resources on child protection, rather than preventive support services.

Extensive research into statutory child protection processes, linked to implementation of the Children Act 1989, identified an unhelpful dichotomy between family support for children in need and child protection for children at risk of abuse and neglect.¹¹ Studies found that local authorities' emphasis on child protection inquiries brought too many families into the child protection system when the child's primary need was for services and family support. Concurrently the emphasis on investigation of alleged abuse meant that families became angry, alienated and bewildered, received little support, and scarce social work resources were expended with little apparent benefit.¹²

⁸ The Children (Scotland) Act 1995 Regulations and Guidance Volume 1: *Support and Protection for Children and their Families* Volt 1, p vii

⁹ C(S)A 1995, Part II, Chapter 1 – Support for Children and their Families

¹⁰ C(S)A 1995, Part II, Chapter 3 – Protection and Supervision of Children, section 53 and sections 55 preliminary and investigatory measures, 57 – measures for the emergency protection of children

¹¹ Department of Health (1995) *Child Protection: Messages from Research* (London, HMSO) – overview of 20 research studies

¹² *ibid*, pp 54-55

Findings from audit and inspection indicate that Scottish local authorities' response to families in difficulty is similarly determined by whether a child is assessed as a child in need or a child at risk. As a consequence intervention may focus too narrowly on risk without sufficient consideration of needs, or vice versa.¹³ Activity defined as child protection is prioritised over preventive, remedial or therapeutic support, limiting intervention to families where there is a need for compulsory measures of supervision and reinforcing an emphasis on evidence gathering for compulsory intervention. Other agencies begin to frame referrals in terms of child protection in order to obtain services for vulnerable families. As a result fear, often unjustified, of their children's removal hinders families in difficulty from seeking early help.¹⁴ This is a false dichotomy. Assessment of the action needed to safeguard and promote a child's welfare requires consideration of both risk and needs, and intervention to address both aspects; reducing risk and meeting needs.

To limit as far as possible local authorities' compulsory interference with family life demands that they invest more effort earlier, offering 'maximum support' to help parents discharge their parental responsibilities and rights effectively before a family reaches the threshold for compulsory measures. If the local authority's intervention does not improve the child's welfare and the grounds for compulsory measures of supervision exist, the minimum intervention principle does not justify continuing intervention on a voluntary basis even if the parents co-operate. That would deprive children of the protection of the children's hearings and the courts, and deprive families of their right to subject the local authority's assessment of the need for intervention to independent review by a judicial tribunal.

At present public authorities' interpretation of the minimum intervention principle conflates judicial intervention affecting the legal relationships between parents and children with local authorities' statutory responsibilities to support and protect children. In a context of resource pressures, applying the minimum intervention principle raises the threshold for accessing help from the local authority far too high. But where parents co-operate with the local authority's intervention but still fail to meet their children's needs, 'minimum intervention' as it is presently interpreted, risks placing parents' rights over children's safety.

¹³ The Scottish Executive (2002) *Its Everyone's Job to Make Sure I'm Alright* Chapter 4, 4.50-4.53; The Scottish Executive (2002) *Growing Support*, Chapter 2, paragraphs 3-23

¹⁴ The Scottish Executive (2002) *Growing Support*, Chapter 3, paragraphs 36-44

Human rights

Looking after children represents significant interference by a public authority in family life. Incorporation of the ECHR into domestic law now makes unlawful any action by a public authority which breaches a Convention right.¹⁵ Public authorities include local authorities, health services, courts and children's hearings. Compulsory intervention in family life must be justified, not only in terms of domestic statute, but also within the terms of ECHR. Failure to do so may give rise not only to judicial review of a public authority's decisions but also, now, to legal proceedings in the domestic courts for reparation and damages.¹⁶

A court order or supervision requirement affecting a person's parental responsibilities and rights is a state action interfering with family life and therefore engages Article 6 rights to a fair trial. Decision-making processes must be transparent and accountable and parents must have an opportunity to participate in important decisions affecting their family life.¹⁷ ECHR compliant practice requires the local authority to fully inform and involve parents and family members of plans and decisions and to give them sufficient opportunity to make representations and influence decision-making processes.¹⁸

Professionals' practice needs to be considered in terms of human rights compliance at each stage of assessment, planning, implementation and review, taking into account the individual circumstances and needs of the child and family concerned. Local authorities may act on reasonable concerns about the risk of harm but the action must be proportionate to achieve the child's protection, without undue interference with the family's Article 8 rights to respect for their family life. In these circumstances the child's welfare may be a paramount, but not the only or even deciding consideration, and courts may have to balance ensuring the child's welfare with other legitimate interests.¹⁹

¹⁵ Human Rights Act 1998, s6

¹⁶ HRA 1998, s7

¹⁷ Kathryn Cameron 'Social Work Practice and the Human Rights Act 1998' in Baillie *et al* (eds) (2003) *Social Work and the Law in Scotland*; Norrie (2001) *supra*

¹⁸ See *Dundee Cite Council Petitioners*. Inner House - Court of Session, Scottish Opinions 27 Feb 2004, per Lady Cosgrove at paragraph 22 (appeal by local authority against sheriffs interlocutor dismissing the local authority's application for a freeing order on the basis that the parents ECHR rights under Articles 6 and 8 had been breached.)

¹⁹ Norrie (2001) 'A Child's Right to Care and Protection' in Cleland A and Sutherland E (2001) *Children's Rights in Scotland* paragraph 8.20, p 144

Interface between Parts I and II of the Act

In England and Wales, children's legislation codified child law in one statute with overarching principles applying to all legal proceedings affecting children. English courts are empowered, with parental consent, to make a family assistance order in private law proceedings, requiring the local authority to provide advice, guidance and assistance for the family for up to six months if the court considers that the child's welfare requires it.²⁰ By contrast, in Scotland there is a tradition of distinct separation between Parts I and II of the Children (Scotland) Act 1995 as relating to private law and public law proceedings respectively.²¹

The two parts were developed and drafted separately with Part I originating in a Scottish Law Commission report on family law reform with recommended provisions appended to the report. Part I deals primarily with disputes between private individuals about the care of children, frequently between separating parents. The court must judge between options which may be finely balanced, either of which may meet a child's welfare needs adequately. Part II proceedings, on the other hand, are concerned with establishing the nature and extent of risk or harm to which a child may be exposed and the appropriate role for the relevant public authorities to play in protecting the child and promoting his or her welfare. Local authorities may not apply for public law orders for residence or contact. This is designed to prevent public authorities circumventing carefully worked out procedures and provisions which safeguard families from unwarranted intervention.²² Public law is characterised as dealing with the relationships between private individuals and the state. Part II provisions prescribe the range and nature of actions which local authorities may take in respect of children in need and at risk.

In reality the two parts are interdependent. Part I sets out the parental responsibilities and rights which may be vested in a local authority by provisions in Part II, by the making of a parental responsibilities order or an order freeing the child for adoption under the Adoption (Scotland) Act 1978. There is provision for a sheriff or a judge dealing with a private law action to refer a child to the reporter if he or she considers that one of the grounds indicative

²⁰ *ibid*, s16

²¹ Wilkinson and Norrie (1999) paragraph 9.57

²² Norrie (2003) An overview of the Children (Scotland) Act 1995: SCRA National Training (unpublished paper)

of a need for compulsory measures of supervision are satisfied, and the ground will be treated as having been established for the purposes of referral to a children's hearing.²³ And, although local authorities are prohibited from applying for an order under Part I of the Act, it is possible that another public authority could do. For example a health board might apply for a specific issue order in respect of medical treatment if a parent refused consent.²⁴

When a question regarding the welfare of a child arises the Children Act 1989 enables an English court to make any order whether a 'private' or 'public' order in any family proceedings, whether or not the order has been asked for.²⁵ The Children (Scotland) Act 1995 contains similar provision.²⁶ In Scotland, sheriffs have been reluctant to make 'private law' orders when a supervision requirement is in force. But a supervision requirement cannot place directions or responsibilities upon adults involved with the child. To make a placement with a relative legally secure, the child must continue to be looked after or the relative carer must make a private law application in separate legal proceedings whilst a suspension requirement remains in force. Local authorities rarely provide support for relatives in doing so and may play no part, even if they have parental responsibilities and rights for the child.

The Adoption and Children (Scotland) Bill proposes a new permanence order to secure permanence for looked after children when adoption is not appropriate. This order gives the local authority parental rights and responsibilities and allows the court to allocate rights and responsibilities to other adults including the child's carers or birth parents.²⁷ If a child is securely placed with relatives there may not always be a need for the local authority to retain parental responsibilities. A more flexible approach to the use of Section 11 orders in Scottish public law proceedings, in addition to the proposed permanence order, would provide courts with a wider range of options when making decisions about the long-term care of looked after children with kinship carers, subject to existing safeguards.

²³ C(S)A 1995, s54

²⁴ Blackie, J and Patrick, H 'Medical Treatment' in Cleland A and Sutherland E (2001) *Children's Rights in Scotland*

²⁵ Children Act 1989, s9

²⁶ Children (Scotland) Act 1995, s11(3)(b)

²⁷ Adoption and Children (Scotland) Bill, s84; see also Alexandra Plumtree (2003) *Choices for Children in Fostering and Adoption: a discussion paper on legal issues* Adoption Policy Review Group pp 13-15

Recent court decisions have weakened the wall between Parts I and II of the Act. It is now established, albeit in the sheriff court and therefore not binding on subsequent courts, that a local authority looking after a child may become a party to private law proceedings and provide relevant information to inform the court's decision.²⁸ And in holding applications for contact and residence orders in respect of a child under supervision as competent, the Court of Session has stated that 'the two Parts of the Act do not operate as separate and distinct schemes ... the primary purpose which underlies both Parts, and is either explicit or at least implied throughout, is to ensure the welfare of the child.'²⁹

The contribution of a child's wider family

Statutory provisions for planning, monitoring and supervision of placements for looked after children apply to kinship care. Local authorities have diverse approaches to recruiting and supporting extended family to provide care for looked after children, and involving them in care planning.³⁰ Kinship carers may be no more involved in decision-making than unrelated foster carers. They may have limited training and support to cope with their role, and usually receive a much lower rate of financial support.³¹ Kinship placements offer the potential to maintain existing attachments, relationships and routines. Equally there may be additional pressures arising from the carers' relationship to the child's birth parents, the immediate or emergency nature of many such placements and lack of preparation and training for the task of caring for children who may have experienced trauma, separation and disruption.

The legal framework relating to 'relevant persons' for the purposes of children's hearings offers a model for policy on kinship care. The legal requirement to consult, inform and involve relevant persons in children's hearings reflects the nature and extent of their involvement and contribution to a child's welfare. Rather than just a resource to help the local authority provide appropriate accommodation for a looked after child, the kinship carer should be

²⁸ *McLean v Dornan* 2001 SLT (She Ct) 97; a grandparent sought parental responsibilities and rights and a residence order in respect of a looked after child subject to a supervision requirement placed with foster carers. The local authority intended that the child's foster carers would adopt him and a freeing application was already underway. The local authority sought to enter the private law proceedings to provide defences against the grandparent's application. On appeal the sheriff principal held that although a local authority may not apply for an order under section 11 of C(S)A 1995 this should not prevent the views of a local authority being taken into account by a court when dealing with an application by a person who is entitled to seek such an order if the local authority has responsibilities in relation to the child to whom the application relates.

²⁹ *P v P* 2000 SCLR 477, at 483

³⁰ The Scottish Executive (2002) *Growing Support; A Review of Support to Vulnerable Families with Young Children*, Chapter 3, paragraphs 68-70

³¹ Broad, B (2001) 'Kinship Care: Supporting children in placements with extended family and friends' *Adoption & Fostering* Volume 25 Number 2 (2001)

treated as a key supportive adult for the child alongside professionals in the decision-making network. When it is clear a child cannot live with his or her birth family the local authority should consult kinship carers about longer term plans and fully involve them in decision-making. Proportionate intervention requires that the local authority should provide practical as well as emotional support to enable the relative or friend to assume parental responsibilities and rights commensurate with the child's welfare, rather than continuing to rely on compulsory intervention. Where kinship carers have acquired parental responsibilities, local authorities generally withdraw practical and financial support, but this is a matter of practice rather than a legal requirement.

The role of statutory guidance

Statutory guidance does not impose duties on local authorities. However public authorities are required to have regard to such guidance and should take account of other documents such as codes of practice and national standards. They may be required to justify departure from it in legal or other proceedings where a user of services has suffered loss or damage as a result. Much of the guidance issued for implementation of the Children (Scotland) Act 1995 remains pertinent and is still in force as guidance issued under statute. There is evidence that local authority social workers are not making routine use of guidance.³² Guidance on support, care and protection for children now needs revision to take account of ECHR and make more explicit the links between statutory requirements and expected outcomes for children. It should be made much more readily accessible to practitioners and students.

Looked after or not looked after?

There is some confusion about the legal status of children placed away from home when a placement is linked to more than one set of statutory responsibilities, for example to educate children³³ or to support disabled children through provision of respite care.³⁴ Some argue that to treat children placed in educational or respite placements as looked after by the local authority compromises parental responsibility.

³² Murray et al (2002) *Children (Scotland) Act 1995: Home Supervision*

³³ Children in residential special schools may have their placement specified in a Record of Needs as appropriate to meet their needs. An education authority may secure provision of boarding accommodation for pupils for whom education as boarders is considered by the education authority and their parents as desirable [Education (Scotland) Act 1980, s7(6)]

³⁴ Joseph Rowntree Foundation Research Findings No 420 (April 2000) *Disabled Children at Residential School*; Joseph Rowntree Foundation Research Findings No 378 (March 1998) *Disabled Children and the Children Act 1989*

Being looked after has no effect on the child's legal status or on the responsibilities and rights of parents, other than the constraints which may be imposed by conditions attached to a supervision requirement. Being looked after places certain duties in respect of the child, and his or her family, on the local authority, with a view to ensuring the child's welfare needs are met appropriately. A child is looked after by virtue of any of the provisions set out in section 17(6) of the Children (Scotland) Act 1995. The education authority is part of the local authority and the local authority is providing accommodation for the child, albeit for the purposes of attending appropriate education. Equally social work services may place a child in a residential school in order to meet their social and emotional needs and, if not subject to compulsory measures, he or she will be placed under the provisions of the Children (Scotland) Act 1995 enabling the local authority to provide accommodation for the child.³⁵

It is for the local authority to determine whether it is providing accommodation for a child under one or other of its statutory powers, under children's or education legislation. That may lead to children in the same circumstances, residing in the same place being deemed to be looked after or not, depending on which decision-making process within the local authority led to their placement. Where children are receiving substantial care and support alongside education in a residential setting the status of being looked after provides important safeguards for their welfare.

The question for the local authority is whether, in the absence of a legal duty to provide accommodation, it should exercise its powers to provide accommodation for a child to safeguard and promote his or her welfare. If so the child is looked after by the local authority throughout the period he or she is residing in accommodation provided or arranged by the local authority and is not in his or her parents' or family's care. This renders the local authority accountable to the child and family (and the courts) for the performance of their duties, but does not affect the child or family's status at all. Being looked after does not infringe or erode parental responsibilities and rights in any way.

³⁵ Children (Scotland) Act 1995, s25

Conclusion

The statutory framework for looked after children is comprehensive. But inevitably it focuses on process; on what things should be done. Real protection for children's rights and welfare depends on how well, and to what effect, local authorities implement their legal duties. Research and inspection provides evidence that local authorities' compliance with existing law, for example to complete care plans, to give good effect to supervision requirements, to place children in suitable placements and to keep brothers and sisters together is often not good enough. More law or different law is, of itself, unlikely to improve practice.

Furthermore the impact of services is affected by the availability of resources and support from other agencies, for which the legal framework is weak, both in statute and application. There are few potential sanctions upon public authorities, in social care, education and health services, which fail to perform their statutory duties properly. When sanctions are available they depend on service users raising legal actions in the courts. Although important, both to remedy injustice and clarify the law, legal proceedings are cumbersome, slow and expensive. The victims of failures in public services may be least well equipped to use such remedies. And the damage is already done. To deliver effective support, improve outcomes for looked after children and secure their legal rights requires a stronger knowledge and understanding of their existing legal responsibilities amongst practitioners, and that agencies help them meet these responsibilities to good effect.

Appendix 1 – Relevant legislation and guidance

Primary Legislation

Access to Health Records Act 1990
Adoption (Scotland) Act 1978
Age of Legal Capacity (Scotland) Act 1991
Age of Majority (Scotland) Act 1969
Anti-social Behaviour (Scotland) Act 2004 (commencement date)
Children (Leaving Care) Act 2000
Children (Scotland) Act 1995
Children Act 1989
Children and Young Persons (Scotland) Act 1937
Community Care and Health (Scotland) Act 2002
Criminal Justice (Scotland) Act 2003
Data Protection Act 1998
Disability Discrimination Act 1995
Disabled Persons (Services, Consultation and Representatives) Act 1986
Chronically Sick and Disabled Persons Act 1970
Chronically Sick and Disabled Persons (Scotland) Act 1972
The Community Care (Direct Payments) Act 1996
Education (Scotland) Act 1980
Education (Additional Support for Learning) (Scotland) Act 2004 (to be commenced in September 2005)
Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002,
Family Law (Scotland) Act 1985
Family Law (Scotland) Act 2006
Freedom of Information (Scotland) Act 2002 (full commencement in January 2005)
Homelessness etc. (Scotland) Act 2003

Human Rights Act 1998
Local Government (Scotland) Act 1994
Marriage (Scotland) Act 1977
Mental Health (Care and Treatment) (Scotland) Act 2003
National Health Service (Scotland) Act 1978
NHS Reform (Scotland) Act 2004
Regulation of Care (Scotland) Act 2001
Social Work (Scotland) Act 1968
The Scotland Act 1998
Scottish Public Services Ombudsman Act 2002
Standards in Scotland's Schools Act 2000

Secondary Legislation

The Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006 (SSI 2006, No. 212)
Scottish Statutory Instrument 2004 No. 203 The Freedom of Information (Scotland) Act 2002 (Commencement No. 3) Order 2004
Data Protection (Subject Access Modification) (Social Work) Order 2000 (S.I.2000/415)
The Arrangements to Look After Children (Scotland) Regulations 1996, Regulation 19(2)
The Children (Reciprocal Enforcement of Prescribed Orders etc. (England and Wales and Northern Ireland)) (Scotland) Regulations 1996
The Fostering of Children (Scotland) Regulations 1996
Adoption Agencies (Scotland) Regulations 1996, regulation 21
The Secure Accommodation (Scotland) Regulations 1996
Placement of Children with Parents etc. Regulations 1991
The children's hearings (Legal Representation) (Scotland) Rules 2002 (SSI 2002, No 63)
The children's hearings (Scotland) Rules 1996
The children's hearings (Transmission of Information etc.) (Scotland) Regulations 1996
The Community Care (Joint Working etc.) (Scotland) Regulations 2002
The Pupils' Educational Records (Scotland) Regulations 2003

The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (SSI 2003, No. 608)
The Homelessness etc. (Scotland) Act 2003 (Commencement No. 1) Order 2003 (SSI 2003, No 609)
The Qualifications of Chief Social Work Officers (Scotland) Regulations 1996 (SSI 1996, No 515)
The Regulation of Care (Scotland) Act 2001 (Commencement No. 2 and Transitional Provisions) Order 2002 No. 162 (C. 8)
The Regulation of Care (Requirements as to Care Services)(Scotland) Regulations 2002 (SSI 2002, No 114)
The Residential Establishments – Child Care (Scotland) Regulations 1996
Social Work (Representations Procedure) (Scotland) Directions 1996

Statutory Guidance

Children (Scotland) Act 1995 Guidance and Regulations Volume 1 *Support and Protection for Children and their Families*
Children (Scotland) Act 1995 Regulations and Guidance Volume 2: *Children Looked After by Local Authorities*
NHS HDL(2004)15 Establishing the Responsible Commissioner: Guidance for NHS Scotland
The Scottish Executive (2004) *Supporting Young People Leaving Care in Scotland: Regulations and Guidance on Services for Young People Ceasing to be Looked After*
Scottish Executive Circular CCD1/2004 Direct Payments Policy and Practice Guidance
Circular SWSG 5/1996 Complaints Procedures
Circular SWSG 2/95 CSWO: Responsibilities

National Care Standards

Care Homes for Children and Young People
Foster Care and Family Placement Services
School Care Accommodation Services

Appendix 2 – European Convention of Human Rights

For the purposes of the Human Rights Act 1998 “the Convention rights” means the rights and fundamental freedoms set out in-

- (a) Articles 2 to 12 and 14 of the Convention,
 - (b) Articles 1 to 3 of the First Protocol, and
 - (c) Articles 1 and 2 of the Sixth Protocol,
- as read with Articles 16 to 18 of the Convention.

[HRA 1998, section 1]

RIGHTS AND FREEDOMS

ARTICLE 2 RIGHT TO LIFE

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3 PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4
PROHIBITION OF SLAVERY AND FORCED LABOUR

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term “forced or compulsory labour” shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

ARTICLE 5
RIGHT TO LIBERTY AND SECURITY

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6 RIGHT TO A FAIR TRIAL

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

*ARTICLE 7
NO PUNISHMENT WITHOUT LAW*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

*ARTICLE 8
RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*ARTICLE 9
FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION*

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

*ARTICLE 10
FREEDOM OF EXPRESSION*

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

*ARTICLE 11
FREEDOM OF ASSEMBLY AND ASSOCIATION*

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

*ARTICLE 12
RIGHT TO MARRY*

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

*ARTICLE 14
PROHIBITION OF DISCRIMINATION*

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

*ARTICLE 16
RESTRICTIONS ON POLITICAL ACTIVITY OF ALIENS*

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17
PROHIBITION OF ABUSE OF RIGHTS

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18
LIMITATION ON USE OF RESTRICTIONS ON RIGHTS

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

THE FIRST PROTOCOL
ARTICLE 1
PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2
RIGHT TO EDUCATION

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3
RIGHT TO FREE ELECTIONS

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

THE SIXTH PROTOCOL
ARTICLE 1
ABOLITION OF THE DEATH PENALTY

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

ARTICLE 2
DEATH PENALTY IN TIME OF WAR

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

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Children looked after by local authorities: the legal framework

This report, commissioned by the Social Work Services Inspectorate, now the Social Work Inspection Agency, provides an overview of the legal framework for children looked after by local authorities in Scotland. It is published as one of several supporting documents for a wider review of services and outcomes for looked after children, the main report of which is entitled *Extraordinary Lives*. Originally prepared in September 2004 as a reference document for the SWIA review team, it is now updated and comprises two parts. Part One identifies the key issues. Part Two explores these issues in more detail and provides a reference to key legal requirements for social work and legal practitioners involved with children who are looked after.

The key messages of this report are that the current legislative framework for looked after children is comprehensive and adequate to meet the needs of those with responsibilities for their care and protection. However, managers and practitioners working with looked after children require an improved knowledge of the law, and a greater understanding of how to use it to help them meet their responsibilities.

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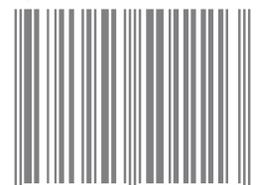
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