

This report has been commissioned by The Promise Scotland but is not the work of The Promise Scotland. It is a first draft and intended to be a starter for discussion. On occasion the report uses legal language and terminology that the Independent Care Review concluded must change. Many of Scotland's policies and legislation use these words as they are established in law to reflect a legal process or in reference to a specific data or policies. In those cases, this report uses particular words or phrases to ensure clarity about what is being described and to avoid any confusion with, or misinterpretation of, the report contents.

Over the course of the next few years, the language around Scotland's 'care system' must change in order to keep the promise. This report is a contribution to *how* that change can and must take place.

THE PROMISE REPORT

OUTPUT 1: Understand the current landscape by setting out the legislative framework surrounding the care system in 2024.

Summary of the main legislation (see Table for further information)

The current legislative landscape has evolved primarily from the implementation of the Social Work (Scotland) Act 1968. This was an Act which was comprehensive in so far as it established "social work" as a statutory concept and put in place statutory duties towards vulnerable adults and children. In 1964, it was Lord Kilbrandon who, in his groundbreaking report set out a plan for providing support to children and their families when they were deemed to be in need. He recommended the establishment of the Children's Hearing System which is contained in the Social Work (Scotland) Act 1968. What is also interesting is that this piece of legislation also considered and addressed the needs of vulnerable adults.

Providing something akin to a cradle-to-grave concept, a holistic approach to supporting everyone in society no matter their age.

The Social Work (Scotland) Act 1968 included provision for the promotion of social welfare in Scotland; established the Social Work Committee and Director of Social Work in each local authority; set out local authority duties to children in need; established Children's Hearing system for children in need of compulsory measures of care; and made provision for residential and other establishments. While many of the original provisions have been superseded over subsequent years, it still provides a relevant starting place in respect of social work intervention.

Present provisions still in force in the Social Work (Scotland) Act 1968 are the following:

Section 1 imposes a duty on local authorities to enforce and execute various Acts, including Part 2 of the Children (Scotland) Act 1995 and parts of the Children's Hearings (Scotland) Act 2011.

The Act also appoints at section 3 the Chief Social Work Officer who has certain statutory duties set out in other Acts.

Section 4 allows a local authority to arrange for organisations or other persons to perform any local authority function; and confirms that the local authority have to perform their functions under the Children (Scotland) Act 1995 and Children's Hearing (Scotland) Act 2011 under the general guidance of the Secretary of State.

Section 12 imposes a duty on local authorities to promote social welfare by making available, guidance and assistance, and to secure facilities, including residential establishments and such assistance be given in cash or kind to any relevant person (a relevant person is a person not less than 18 years of age and in need of assistance in kind or cash).

Section 12A imposes a duty on local authorities to assess the needs of a person where it appears to a local authority that any person may be in need of community care services.

Section 29 gives the local authority the power to assist parents, relatives and other connected persons with travelling expenses to see a child in the care of the local authority.

Section 59 provides that local authorities have duties to provide residential and other establishments for their statutory functions including those under part 2 of the Children (Scotland) Act 1995, and Children's Hearings (Scotland) Act 2011.

Section 78 imposes a duty on a person with parental rights and responsibilities to contribute to the maintenance of their children, if the children are in the care of local authority.

Section 86 deals with adjustments between authorities for the costs and expenses incurred by one authority in relation to a person, including a child, ordinarily resident in another area.

In the years following the Social Work (Scotland) Act 1968, further Acts have been brought into force, addressing other fundamental issues affecting children. The following year saw the Age of Majority (Scotland) Act 1969 being enacted reducing the age of majority to 18 years of age. Various Acts have reorganised local government since 1968 with the first, in 1973 creating regional and district councils and centralising social work and education policy. Thereafter, the next substantive piece of legislation affecting a child's status was the Adoption (Scotland) Act 1978 bringing into force the adoption of children. Much of that Act has since been repealed and superseded, but it still contains relevant provisions setting out the meaning of *adoption order*, and the status such orders confer on an adopted child; together also with rules regarding a child's entitlement to pension; insurance; and rights of succession.

1980 saw the Education (Scotland) Act coming into force setting out obligations on education authorities to secure adequate and efficient provision of education to children of

school age. There are provisions setting out what duties they have towards pre-school and further education provision. Section 31 defines school age as between 5 and 16 years.

The Foster Children (Scotland) Act 1984 is an Act to regulate foster care. The Act defines a foster child and sets out the responsibilities local authorities have towards the inspection of foster placements and duties towards foster children. This Act remains in force, interestingly Section 2 states that *"a child is not a foster child while he is being looked after by a local authority"*. It is unclear what, in practical terms, that exception means given that it is a local authority who will arrange for the registration and inspection of foster carers; and who places a looked after children in foster placements.

In 1991 the Age of Capacity (Scotland) Act 1991 came into force making provision as to the legal capacity of persons under the age of 18 years to enter into transactions. Relevant provisions include the general provision in subsection 1 (a) a person under the age of 16 years shall subject to subsection 2 have no legal capacity to enter into any transaction and the person over the age of 16 shall have legal capacity. Section 2 sets out exceptions to the general rule which include that a person over 12 has testamentary capacity; has legal capacity to consent to the making of an adoption order; a person under 16 has capacity to consent to his or her own surgical medical or dental procedure if that person is capable of understanding the nature and consequences; the ability to consent to the storage of gametes; and to instruct a solicitor.

1994 saw further local authority reorganisation in the Local Government (Scotland) Act 1994, which Act established the Scottish Children's Reporter Administration, although those provisions have now been repealed.

The next important piece of legislation relating to children came into force in 1995, the Children (Scotland) Act 1995. This piece of legislation covers both private and public law issues. It regulates in private law, the rights of parents and other relevant third parties in relation to the rights and responsibilities for children.

In Part 1 Sections 1 and 2 define parental rights and parental responsibilities in detail. Part 1 of the Act requires the views of children to be sought when decisions are made for children. Section 11 is an important provision setting out what court orders can be sought to regulate parental rights and responsibilities over children. Section 15 provides that a child for the purposes of Part 1 is a person under the age of 18 years.

It is relevant that almost all parental rights responsibilities cease to exist for a child at the age of 16, except for the parental responsibility to provide guidance to a child, which subsists until the child is 18 years of age. All other parental responsibilities and parental rights exist until the child is 16.¹

In relation to the legislative framework surrounding the care system, Part 2 of the Children (Scotland) Act 1995 remains an important piece of legislation. Part 2 deals with the promotion of children's welfare by local authorities. Important provisions include Section 16 making provision for the welfare of a child, the principle of minimum intervention and the requirement to consider a child's views. Section 17 deals with the duty of the local authority to children looked after by them. Section 17A stipulates that detained children shall be treated as looked after children. Section 22 deals with the promotion of welfare of children in need. Section 23A sets out that in sections 17, 22 and 26A there is now a requirement to consider well-being. Section 25 deals with the provision of accommodation for children and section 26 sets out the manner of provision of accommodation to a child looked after by the local authority. Section 26A brings in important new provisions dealing with *continuing care* for looked after children as they progress towards adulthood. Section 29 similarly deals with aftercare. Section 30 makes provision for financial assistance towards expenses of education or training. With section 31 dealing with the review of the cases of children looked after by the local authority. Section 33 deals with the effect of orders made in different parts of the UK.

¹ The recent Sheriff Appeal case of Glasgow City Council MM [2024] SAC (Civ) 38 the court said that the court could not grant a permanence order for a child over 16 (writer understands that this decision is being appealed by Glasgow City Council)

Provisions dealing with the children needing compulsory measures of the case and the children's hearing system were updated and brought into force in the 1995 Act. Those provisions have been subsequently repealed and enacted in the Children's Hearing (Scotland) Act 2011. However, there do remain a couple of relevant provisions in the 1995 Act, namely section 44 which prohibits the publication of proceedings at children's hearings; section 75, which gives powers to the Secretary of State to deal with secure accommodation; and sections 76 and subsequent sections which deal with exclusion orders. Section 93 contains the interpretation provisions.²

The Criminal Procedure (Scotland) Act 1995 is a consolidating Act. Included in that is that the Scottish Government are responsible for children under the age of 16 and young people aged 16 to 18 on compulsory supervision orders who are sentenced under solemn procedures and placed in secure care (see sections 205 and 208). Section 205 deals with punishment for murder. Section 207 deals with the detention of young offenders, persons between 18 to 21. Section 208 deals with the detention of children convicted on indictment. That section provides that a child may be detained in such place and on such condition as the Secretary of State directs.

New provisions have been brought which deal with the detention of children under sections 205 and 208, they confirm that the Scottish Ministers may not direct under section 205 orders or as the case may be section 208, that a child would be detained in a prison or young offenders' institution. The Scottish ministers may direct that a child be detained in secure accommodation.

In terms of secondary legislation important provisions were introduced in 1996 regarding residential establishments, in the Residential Establishments Child Care (Scotland) Regulations 1996. These regulations arise from provisions in the Social Work (Scotland) Act 1968. The regulations deal with provisions for the management of residential establishments where a child who is looked after by a local authority may be placed. Part II of the

² Guidance was also introduced to accompany this piece of legislation, in the form of 4 separate volumes of guidance.

Regulations deals with the conduct of residential establishments; they are required to be run in a way which is conducive to the best interests of the children resident there. Each establishment is required to prepare a statement of their functions and objectives, setting out the responsibilities of managers. It makes provisions for minimum health and safety, education and recording requirements.

The Human Rights Act 1998 incorporated the European Convention of Human Rights into UK law.

The Adults with Incapacity (Scotland) Act 2000 came into force in 2000. While it is an Act dealing with incapacity of adults, the statutory definition of adult within that Act is a person who has attained the age of 16 years.

The year 2000, also saw the coming into force of the Standards in Scotland's Schools etc Act 2000. This Act brought in provisions aimed at raising standards in Scotland's schools. It established new duties and rights in respect of education, including, in Section 1 the right of a child to a school education (this corresponded with the duty set out in the Education (Scotland) Act 1980 on Education Authorities to provide education). The establishment of the right to education reflects the domestic law of Scotland and is enshrined in ECHR and in the UN Convention on the Rights of the Child. School age is defined, in section 31 of the Education (Scotland) Act 1980 as a person has attained the age of five years and not attained the age of 16 years.

Section 2 imposes a duty on education authorities; in providing school education the aim is to make school education develop the personality, talents etc of the child or young person. This is to be central to the direction of a school education. Education authorities are to be under a duty to make provision of education for the development of the individual child. Education authorities are also to take account of the child's views when making decisions that would significantly affect them.

2001 saw the implementation of the Regulation of Care (Scotland) Act 2001, although most of those provisions have since been repealed by the Public Services Reform (Scotland) Act 2010.

The Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 brought in provisions to require bodies responsible for schools to prepare and implement strategies relating to accessibility, for pupils with a disability, of school education, and to make provision in respect of educational records of school pupil.

The Local Government (Scotland) Act 2003, introduced in Part 3 the power to advance well-being. This Act confirmed that a local authority has the power to do anything which it considers likely to promote or improve the well-being of its area and persons within that area or either of those. The power includes the power to incur expenditure; give financial assistance to any person; enter into arrangements with any person; cooperate with or facilitate the Activities of any person; exercise on behalf of any person any functions of that person; and provide staff, goods, materials, facilities, services or property to any person.

Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 were introduced in secondary legislation to provide guidance on how to support young people moving into adulthood. It defines compulsorily supported person, meaning a young person to whom a local authority is obliged to provide advice, guidance and assistance in terms of section 29 of the 1995 Act. It also defines "currently looked after person" meaning a person who is over school age but is less than 18 years of age and who is being looked after by a local authority; and a "discretionarily supported person" being a young person to whom, after a pathway assessment, a local authority has agreed to provide advice, guidance and assistance in terms of section 29 (5) of the Children (Scotland) Act 1995 Act or, a young person to whom the local authority has agreed to continue to provide advice, guidance and assistance after the person reaches the age of 26 in terms of section 29 (5) (B) all of the Children (Scotland) Act 1995 Act. The regulations deal with the involvement of a young person in the *pathways* process; the preparation for when a young person is no longer

looked after by a local authority; and the pathways assessment; pathway plans; reviews of plans; and appeal provisions.

The aim of the Regulations 2003 is to provide a set of rules for throughcare and aftercare services to young persons. It also seeks to reinforce the parenting responsibilities of local authorities for young persons who have been in their care and to emphasise the importance of providing support through the transition to adulthood.

There accompanying guidance for the regulations it highlights local authorities' powers and duties continue towards young persons until that young person is prepared and ready for the time when they are no longer looked after.

In the following years a number of other pieces of legislation touched on duties towards children, for example, Homelessness etc. (Scotland) Act 2003 which introduced regulations specifying rules on the unsuitability of certain accommodation for homeless persons, with additional restrictions where those homeless persons had dependent children.

2003, also saw the enactment of the Commissioner for Children and Young People (Scotland) Act 2003. This Act establishes and set out the functions of the Commissioner for Children and Young People in Scotland. The Commissioner's role includes carrying out investigations and reporting to the Scottish Government.

The Further and Higher Education (Scotland) Act 2005 includes provisions which set out duties in relation supporting access to further education. It defines "support needs", noting that the need for support is linked to a person's ability to access and participate in fundable further or higher education as compared with other people of the same age group. Section 85 recognises that students experience barriers in accessing and participating in learning for many reasons and may therefore require support. Such barriers may arise from factors relating to social, cognitive, emotional, psychological, linguistic, disability, ethnicity or family and care circumstances. These support needs may range from relatively mild and temporary through to those which are complex and enduring.

While the Mental Health Care and Treatment (Scotland) Act 2003 is an Act primarily making provision for the mental health of adults, it also makes provision for services for patients under 18 years of age. Relevant sections include section 23 Provision of services and accommodation for certain patients under 18: Section 29 Relationship between duties under sections 25 to 27 and duties under Social Work (Scotland) Act 1968 and Children (Scotland) Act 1995. Child in the Act is defined as a person who has not attained the age of 18 years.

The Educational (Additional) Support for Learning (Scotland) Act 2004 sets out duties on local authorities and other agencies to assess monitor and support any child who requires additional support in order to engage in education. Amendments made in the Education (Additional) Support for Learning (Scotland) Act 2009 clarified that all looked after children are automatically considered to have additional support for learning needs, and they must be assessed to determine whether or not they require a Coordinated Support Plan.

Another piece of legislation principally dealing with adults, but containing relevant provisions on the rights of children, is the Anti-Social Behaviour etc. (Scotland) Act 2004. Section 4 of that Act makes provision for anti-social behaviour orders. There are specific conditions which have to exist before the sheriff will make an order, including that the specified person is at least 12 years of age. Where specified person is a child, before making an order, the sheriff has to seek advice from a Children's Hearing and in determining the matter, shall have regard to the advice. Section 12 also provides the sheriff with the power to refer cases to a Children's Hearing. Section 18 of the Act provides that a child for the purposes of Part 2 of the Act is a person who is under the age of 16 years.

The Family Law (Scotland) Act 2006 introduced legislation regarding the rights of unmarried married fathers to obtain parental rights and responsibilities for children. It amended the terms of Section 3 of the Children (Scotland) Act 1995 accordingly, a father whether or not married to the mother at the time, both at the child's birth or subsequently if the father is registered as the child's father on the child's birth certificate, then the father will have parental rights and responsibilities.

2006 also saw the implementation of the Residential Establishments Child Care (Scotland) Regulations 2006 bringing in rules for the conduct of residential establishments and setting out matters to be included in its statements and objectives.

The Protection of Vulnerable Groups (Scotland) Act 2007 replaced the former disclosure system and set out when PVG certificates are required for those working with children.

Another important piece of legislation affecting children, is the Adoption and Children (Scotland) Act 2007. This Act updated the law regarding adoption and permanence planning for children who will not be returned to their parents' care. It also updated the rules under which adoption agencies operate. The Act introduced permanence orders, being a new legal order designed to secure greater stability for a child within a long-term care placement, where again the child was not going to be returned to his parents and where adoption was not an appropriate outcome for the child.³

In 2009, another important piece of legislation was enacted in secondary legislation, namely the Looked After Children (Scotland) Regulations 2009. Part II deals with care planning for looked after children. It sets out details' provisions for planning and assessment process for children who are looked after. The schedules set out lists of factors to be included in the child's plan. It requires a local authority to prepare the child's plan. There is also now a duty place sibling together. There are provisions for looked after children who are looked after at home; in kinship care; in foster care; and in residential care. It considers fostering and kinship care allowances. Makes provision for emergency care. It requires the preparation of plans for children and the review of those plans. The regulations underpin many of the looked after child processes in operation today.

2009 also saw the coming into force of the Adoption Agencies (Scotland) Regulations 2009. These regulations set out the steps which adoption agencies are required to take before

³ In the recent case of SAC case re Note 1 above.

making decisions about individual adoption cases. The regulations set out requirements for adoption panels. In addition, they set out regulations on the assessment of prospective adopters and also, the duties on adoption agencies when considering adoption for a child; applications for permanence orders; and placement for adoption. There are rules on case records. In relation to permanence orders with authority to adopt, it includes how the views of children dependent on age and maturity must be taken into account, as well as those of other relatives.

There are a number of other regulations dealing with adoption including, the Adoption (Disclosure of Information and Medical Information about Natural Parents) (Scotland) Regulations 2009; Adoption (Designation of Overseas Adoptions) Order 1973/19; Adoption (Recognition of Overseas Adoptions) (Scotland) Regulations 2013/310 (Scottish SI); Adoption Agencies (Scotland) Regulations 2009/154 (Scottish SI); Adoption Support Services and Allowances (Scotland) Regulations 2009/152 (Scottish SI)

In 2010, the Public Services Reform (Scotland) Act 2010 was brought into force. This is an Act which sees the establishment of Social Care and Social Work Improvement Scotland with scrutiny functions in relation to care services and social work services.

Another important piece of legislation relating to Scotland's children, was introduced in 2011, the Children's Hearing (Scotland) Act 2011. The Act was designed to modernise and streamline the hearing system through a number of structural reforms and the establishment of the public body Children's Hearing Scotland. It saw the introduction of a standalone piece of legislation for the children's hearing system and associated bodies. It had previously been contained in the Children (Scotland) Act 1995. Part 1 created the National Convenor and Children's Hearings Scotland. Part 2 sets out the provisions for the Reporter and SCRA. Parts 3 to 16 deal with grounds, investigations, bringing children to a children's hearing, safeguarders, child assessment, child protection orders, referrals to the children's hearing, applications to the sheriff, implementation of orders, and appeals. There are miscellaneous other matters including vulnerable witnesses, taking of evidence and availability of legal aid.

Emanating from the Children's Hearing (Scotland) Act 2011 are a number of rules and regulations. These include rules of procedure, transfer of children to Scotland, provision of information by the Principal Reporter, child protection and emergency measures, children's advocacy services, compulsory supervision orders further provisions, implementation of secure accommodation authorizations, movement restriction conditions, rehabilitation of offenders, review of contact directions and definition of relevant persons, safeguards panel.

In 2013 the Social Care (Self-directed Support) (Scotland) Act 2013 came into force. This Act obliges a local authority to have regard to the principles that a person must have as much involvement as the person wishes in relation to the assessment of the person's needs for support or services and the provision of support or services for the person. A person must be provided with any assistance that is reasonably required to enable the person to express any views that that person may have about the options for self-directed support and to make an informed choice when choosing an option for self-directed support. A local authority must collaborate with the person in relation to the assessment of the person's needs for support or services and the provision of support or services for that person. Section 8 of the Act deals with the choice of options for children and family members and this section applies where a local authority is to provide services under section 22 of the Children (Scotland) Act 1995 to a child or a member of a child's family. The local authority must give the supported person the opportunity to choose one of the options for self-directed support unless the authority considers the supported person is not eligible to receive direct payments.

The Secure Accommodation (Scotland) Regulations 2013 set out definitions and parameters for secure care. Included in these rules is that the welfare of children in secure accommodation must be safeguarded and promoted. What information must be supplied to Children's Hearing by a local authority recommending the inclusion of a secure accommodation authorisation. It also makes provision for children being detained under section 44 of the Criminal Procedure Act and the use of secure accommodation. It also provides for appeals against secure accommodation; the review of the use of secure accommodation; and the requirement to keep records.

The Children and Young People (Scotland) Act 2014 is another fundamental piece of Scottish children's legislation. This Act is in 18 Parts. Amongst those 18 parts, it contains provisions dealing with the Commissioner for Children. Enabling the Commissioner to investigate the extent to which a service provider has had regard to the rights, views and interests of an individual child or young person. It has important provisions in relation to children's service planning. The named person. It sets out requirements for the preparation of a child's plan. The Children and Young People (Scotland) Act 2014 shifted the focus of public service resources towards the early years of a child's life and early intervention whenever a family or young person's needs help, and cooperation between services. It contains provisions dealing with early years learning; childcare; the power to provide preschool education; daycare and out of school care. There are duties in relation to corporate parenting. It amends the Children (Scotland) Act 1995 in relation to increasing rights to aftercare and continuing care. It contains provisions in relation to services for children at risk of becoming looked after. There are further provisions in relation to support for kinship care. Importantly, it also sets out provisions in relation to the assessment of well-being and what is known as the GIRFEC principles "getting it right for every child" children's model framework on to a statutory footing⁴.

Following on from the coming into force of the Children and Young People (Scotland) Act 2014 a number of associated regulations followed, including:- The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2015 which amends the 2003 regulations, bringing them up to date with the changes made to section 29 of the 1995 Act brought in by the new provisions in the 2014 Act. The Aftercare (Eligible Needs) (Scotland) Order 2015 makes further provision in relation to the aftercare for young people under changes to section 29 of the Children (Scotland) Act 1995. Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2015 saw an extension to the categories of eligible preschool children, in terms of the definition in section 47 of the Children and

⁴ In 2015 the Scottish Government published 'National Guidance on Part 13: Support for Kinship Care' under the Children and Young People (Scotland) Act 2014

Young People (Scotland) Act 2014 (which imposes a duty on education authorities to secure early years learning certain 2-year-olds). The Support and Assistance for Young People Leaving Care (Scotland) Amendment Regulations 2015 made further provision to the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003. The Children and Young People (Scotland) Act 2014 (Consequential Modifications) Order 2016, makes amendments to benefit regulations affected by the changes to continuing care. The Kinship Care Assistance (Scotland) Order 2016 brings in provisions about the duties and functions of local authorities in respect to kinship care assistance. Article 3 provides a local authority must have regard to the well-being of the child in the consideration of the provisions of kinship care assistance. The Children and Young People (Scotland) Act 2014 Relevant Services in Relation to Children at Risk of Becoming Looked After (Scotland) Order 2016 introduces provisions dealing with relevant services including providing services for family group making decision. There are also provisions regarding the Child's Plan (Scotland) Order 2016.

The Education (Scotland) Act 2016 introduced additional responsibilities on Scottish ministers and local authorities to have regard to the need to reduce inequality of outcomes, whether arising out of socioeconomic disadvantage or otherwise, when exercising their functions relating to school education. It also provides certain children with rights to question support needs they may have in order to make the most of their learning while at school. Section 1 introduces a new section 3A into the Standards in School in Scotland Act 2000 in relation to pupils experiencing inequalities of outcome and the Scottish Minister's duty in relation to that.

The Carers (Scotland) Act 2016 makes provisions for carers, which include the identification of a carer's needs for support through adult care support plans and young carer's statements. There is also provision for support to carers and enabling involvement in certain services. Young carers are defined as anyone under 18 or 18 if still at school.

The Community Justice (Scotland) Act 2016 seeks to establish a new model for community justice services, having local delivery partnership and collaboration *at its heart*.

In 2017 the Child Poverty (Scotland) Act 2017 came into force. This Act sets targets relating to the eradication of child poverty. It includes provisions which require plans to be made and reports to be provided in relation to whether those targets are being met. It established the Poverty and Inequality Commission.

The Age of Criminal Responsibility (Scotland) Act 2019 raised the age of criminal responsibility to 12 years.

The Children (Scotland) Act 2020 is an Act which seeks to make important changes to a number of issues including obtaining the views of children, in relation to orders sought in the Children (Scotland) Act 1995, the Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011. These provisions are not yet fully in force. Changes are being made in relation to taking account of children's views, how their views are sought; and explaining decisions to children. The Act removes the presumption that a child aged over 12 is considered mature enough to give their views, now where a younger child, who is capable of forming a view and wishes to give their views are able to do so. Further provisions are also made regarding the protection of vulnerable witnesses and special measures when giving evidence.

The Act puts on a statutory basis the duty to promote contact between looked after children and their siblings (Section 13 amending section 17 of the Children (Scotland) Act 1995). The Act also makes provision that siblings' views should be sought when decisions are being made in relation to a looked-after child. Section 14 inserts a new section into the Children's Hearings (Scotland) Act 2011 so that when a children's hearing is deciding whether or not to make a direction regulating contact, they now have to also consider whether or not there should be contact between the child and their siblings and between a child and a relevant person.

The Act also clarifies the law to the effect that a child under 16 can seek an order for contact with another child under 16.

It established a register for child welfare reporters and also curators ad litem. At section 9, it adds a provision for the regulation of contact services.

It makes amendments to the Children (Scotland) Act 1995 section 11 in relation to the appointment of curator ad litem and provides that a court can only appoint a curator ad litem for the child where it considers that it is necessary to do so to protect the child's interests.

Section 21 amends the Children's Hearings (Scotland) Act 2011 and inserts a new section 100A (not yet in force) that imposes on the Scottish Ministers the duty to ensure the availability of child advocacy services.

A further important provision (not yet in force), is section 22 which inserts new provisions into section 11 of the Children (Scotland) Act 1995, where a section 11 order has not been complied with, and where the court is considering contempt of court, or to vary or discharge the order, the court must seek to establish the reason for the failure, and give the child concerned an opportunity to express the child's views.

Section 31 which is not yet in force, imposes on the Scottish Ministers a duty to review the ability of children to effectively participate in the making of decisions in relation to matters where there is a statutory duty to seek the child's view, in terms of the Children (Scotland) Act 1995, Adoption and Children (Scotland) Act 2007, and Children's Hearings (Scotland) Act 2011.

The Disclosure (Scotland) Act 2020 came into force.

2024 saw the coming into force of the Children Care and Justice (Scotland) Act 2024 making provision in relation to a number of important matters affecting children. In Part 1 the main change brought in by the Act is that the definition of child in section 199 of the Children's Hearings (Scotland) Act 2011, has been amended so that all young people under the age of

18 will be children for the purposes of the children's hearing system. There are other changes to the 2011 Act made by Part 1 including placing a duty on children's hearings to have due regard to the effects of trauma on children. Part 2 deals with children who are involved in the criminal justice system when suspected or accused of offences or when involved as victims or witnesses. Included in Section 19 is that under eighteens will no longer be detained in young offenders' institutions. Where they are detained in secure accommodation, section 24 provides that local authorities will have to treat those children as looked after children. Part 5 makes changes to the meaning of child in the Antisocial Behaviour etc. (Scotland) Act 2004, so that child is a person under 18, (except in the case of parenting orders where it remains under 16).

2024 saw the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 becoming law. This Act incorporates into Scots law the rights and obligations set out in the UNCRC. It also brings in related provisions to ensure compliance with the duties relating to the UNCRC. Included in the Act is section 6 which confirms that the Acts of public authorities are to be compatible with the UNCRC requirements. Section 17 deals with children's rights and well-being impact assessments and sets out when the Scottish Ministers have to prepare such assessments.

OUTPUT 2: What legislative changes would simplify the landscape and make it easier for children, families, care-experienced adults and the workforce to understand?

Findings or core conclusions to be drawn from the assessment in Output 1 above?

The Hearing System Working Group shared their findings in a Report in May 2023 (Hearings for Children) in relation to the redesign of the Children's Hearing. To consider what legislative changes need to be brought into force, consideration needs to be had as to how the Promise can be kept.

There are a significant number of different rules in our care system.

Integral to the Scottish care system is the Children's Hearing System. The Children's Hearing System was brought in by the Social Work (Scotland) Act 1968. The Social Work (Scotland) Act 1968 was forward-looking for its time, it did not only create the Children's Hearing System, but its reach went wider and set out duties to support vulnerable adults, children and probation. It looked to provide a universal community-based, welfare service. It aimed to effect change at both an individual and community level⁵

In the years since the Social Work Scotland Act 1968 came into force, the statutory framework has however developed in an increasingly detailed and comprehensive fashion. There is no longer one Act which covers support and compulsory protection, there is a multitude of Acts. This paper considers children in the care system.

We now have statutes imposing duties on agencies before a child comes into the hearing system (Children's Hearings (Scotland) Act 2011; Children and Young People (Scotland) Act

⁵ Scottish Government National Care Service - social work contextual paper (published 30 September 2022), Historical Context

2014) while a child is in the hearing system (e.g. Children (Scotland) Act 1995; Children's Hearings (Scotland) Act 2011; Adoption and Children (Scotland) Act 2007; and Children (Scotland) Act 2020) and after that child has left the hearing system (e.g. Children (Scotland) Act 1995; Adults With Incapacity (Scotland) 2000; Children and Young People (Scotland) Act 2014).

Acts and associated regulations which seek to address issues such as early intervention to prevent harm; children's planning; and secure accommodation for children.

Acts regulating the education of our children have increasingly sought to ensure that children in the care system are entitled to an education which addresses any vulnerabilities due to being looked after or from suffering disadvantage. (including Social Work (Scotland) Act 1968; Education (Scotland) Act 1980; Standard's in Scotland's Schools etc Act 2000; Education (Additional Support for Learning) Act 2009; Children and Young People (Scotland) Act 2014)

Policy concepts such *Getting it Right for Every Child* and Wellbeing have been enshrined in law, setting out in statute a policy framework for how Scottish authorities will assess a child's needs. (Children and Young People (Scotland) Act 2014)

International conventions on human rights and the rights of the child have been enshrined in law. (Human Rights Act 1998 and United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024)

Overarching principles relating to children's views, minimum intervention and the child's welfare being the paramount consideration, for many decisions affecting a child, which can be seen as a *golden thread* running through much of the legislation. These rights belonging to children have been finessed over the years, as children are better understood and respected. (Children (Scotland) Act 1995, Adoption and Children (Scotland) Act 2007, and Children's Hearings (Scotland) Act 2011)

Additionally, as the years have passed an increasing understanding of the vital importance of reporting on outcomes has begun to feature in legislation, so we can understand what has worked and what we still need to do. (including Standard's in Scotland's Schools etc Act 2000, Commissioner for Children and Young People (Scotland) Act 2003, Children's Hearings (Scotland) Act 2011, Children and Young People (Scotland) Act 2014, Children (Scotland) Act 2024)

There are recurring themes during the history of the legislation, which are now to some extent spread across numerous different but related pieces of legislation. Issues such as supporting each child in order to remove inequality do not just feature in social work practice or health, but they are also set out in specific legislation for the education of Scotland's children; for young carers; and in criminal legislation. How we support our vulnerable children when they move on to adulthood features can also be found in different legislation in relation to how we deal with those young people through social work support; higher and further education; state benefits; and criminal justice.

So, the first finding would be the most obvious, that we now have a plethora of Acts regulating the care system.

There is complication and complexity in our current set of rules

The current statutory framework in place for Scotland's care system dates back over 50 years. Starting with the Social Work (Scotland) Act 1968, since then there have been multiple Acts, statutory instruments and guidance documents brought into force and published about the care system and duties owed to children and their families. These have added to or have amended the law surrounding the care system.

There are now at least 67 Acts of Parliament which relate, to some extent, to the care system and children within it. There is a multitude of secondary legislation enacted in support of primary legislation. There is an abundance of supporting guidance, both statutory and non-statutory published to support our understanding of how to discharge duties arising from

the law, and also, in relation to aspects of practice which are integral to the care system but are not enshrined in law (for example see guidance on Child Protection).

Some of the primary Acts amend earlier Acts. Some of the Acts have been repealed in large sections but contain some, still relevant, statutory provisions. Some of the statutory regulations require an assessment of one Act, with reference to earlier Acts. It can be confusing to navigate and identify relevant provisions. It is challenging for practitioners, agents and other professionals to understand statutory obligations owed to children and their families without a large amount of analysis being done to find relevant provisions and associated guidance.

An example of the complexity could be a young person moving towards adulthood, with a cross-border issue about funding, and question marks over the young person's capacity. In such a situation there are a number of relevant Acts, Orders and guidance to consider. In this case they would include Social Work (Scotland) Act 1986 section 86 Adjustments between authority providing accommodation etc., and authority of area of residence; Guidance on the recovery of expenditure on accommodation and services under Section 86 of the Social Work (Scotland) Act 1968; The Children (Scotland) Act 1995 17 Duty of local authority to child looked after by them, 26A Provision of continuing care: looked after children, and 29. After-care; The Aftercare (Eligible Needs) (Scotland) Order 2015; Children and Young People (Scotland) Act 2014 Guidance on Part 11: Continuing Care; The Children and Young People (Scotland) Act 2014 Guidance on Part 10: Aftercare; Supporting Young People Leaving Care in Scotland Regulations and Guidance on Services for Young People Ceasing to be Looked After by Local Authorities (2004 Guidance); and The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003. Considering these issues for this young person would be time-consuming and complicated.

Another example can be found in the long-term planning for a child who is not going home, relevant Acts and regulations in such a case would include at least the Children (Scotland) Act 1995 (Part 2 setting out local authorities' duties and Part 1 setting out parental rights and responsibilities, and section 11 orders), Children's Hearing System 2011, Adoption and

Children (Scotland) Act 2007, Looked After Children (Scotland) Regulations 2009, and the adoption and fostering regulations.

There is no obvious “one-stop” guide telling workers what relevant Acts, orders and guidance are to be considered when making decisions.

So, put short, the second finding, is the large number of Acts, orders and guidance and the changes made to them over the last 56 years, which has led to a confusing set of rules, not easily understood or accessible to children, families, their advisors and the workforce.

Disparate Acts may lead to a lack of focus on key provisions.

After the Social Work (Scotland) Act 1968 was brought into force the next major piece of legislation for children to be enacted was the Children (Scotland) Act 1995. It sets out private and public law provisions. The private law provisions are also important to public law provisions. The private law narrates parental rights and parental responsibilities, and they also make provision for the very wide-ranging orders regulating parental rights and responsibilities which can be sought under section 11. Such orders can be sought and used as a basis for long term planning for children in the care system. These provisions are also material to applications for adoption and permanence proceedings in the Adoption and Children (Scotland) Act 2007.

Of particular relevance under this heading is that a permanence order can be tailored to the individual child, however what often happens in practice is that the local authority will take all parental rights and responsibilities (except for contact) when seeking a permanence order; the law was drafted to be flexible with the local authority only needing the mandatory provisions and the remaining rights and responsibilities could be left with parents or shared with carers if that was in the best interests of the child. These rights could also be shared with others. Parental rights and responsibilities provisions are in the Children (Scotland) Act 1995 and the permanence provisions are in the Adoption and Children (Scotland) Act 2007, so the provisions on parental rights and responsibilities being in a different Act leads to a

lack of focus on what permanence orders could look like. The forerunner to the permanence order was the parental responsibilities order and its provisions were contained in the Children (Scotland) Act 1995.

Part 2 of the Children (Scotland) Act 1995 is entitled “Promotion of Children’s Welfare by Local Authorities and by Children’s Hearings, etc.”. (Most of the rules on Children’s Hearings in the Children (Scotland) Act 1995 have been repealed since 2011)

Part 2 provides a straightforward set of rules and duties that local authorities owe to children who are looked after by them. These rules are key to providing services for children in the care system. For example, they set out rules in section 17 of the duties of local authorities to children looked after by them; section 25 rules on accommodation; sections 26 and 26A the manner of provision of accommodation to children and young persons looked after by the local authority; and after care for children moving into adulthood.

The Children and Young People (Scotland) Act 2014 is seen as a landmark Act, which amongst its other reforming Parts, it establishes a statutory planning process for children’s services, with an emphasis on prevention, early intervention and cooperation between public services. Introduces the requirements of a Named Person and Child’s Plan and places the statutory planning process of Scotland’s overarching children’s policy framework, Getting it Right for Every Child (GIRFEC), onto a statutory footing. While children do not have to “looked after children” to benefit from the provisions in this Act, the provisions of the Act also affect “looked after children”.

The rules in Part 2 of the Children (Scotland) Act 1995 relate to looked after children, these rules are straightforward, but they do not refer to the assessment of wider concepts now enshrined in other Acts about the care system. The reference to Wellbeing which is now an important concept as set out in the Children and Young People (Scotland) Act 2014 features only at section 23A and only refers the reader to Children and Young People (Scotland) Act 2014 to understand the concept of wellbeing. Getting it Right for Every Child (GIRFEC),

which is Scotland's overarching children's policy framework, and which was placed onto a statutory footing does not appear at all in the provisions of the Children (Scotland) Act 1995.

Another example is the Looked After Children (Scotland) Regulations 2009 these are principal regulations used in care planning for children to be or being looked after by local authorities. Regulation 4 sets out the assessment to be carried out for a child and Regulation 5 refers to the child's plan. It considers children in different placements. Makes provision for the review of the child's plan. The Schedules set out the information to be contained in a child's plan, and review. Nowhere in the regulations is there any reference to the concept of wellbeing or Getting it Right for Every Child (GIRFEC). The preamble does not direct the reader to the existence of Children and Young People (Scotland) Act 2014. The existence of these policies and the Children and Young People (Scotland) Act 2014 is absent from the regulations, despite the importance of these regulations in setting out how to assess a looked-after child.

This is also the case when considering the application of the Children's Hearings (Scotland) Act 2011. The word wellbeing appears once in section 181 of the Children's Hearings (Scotland) Act 2011 in terms of reporting.

The importance of what is in the Children and Young People (Scotland) Act 2014 is not therefore readily apparent when using Children (Scotland) Act 1995, Children's Hearings (Scotland) Act 2011 or Looked After Children (Scotland) Regulations 2009. Without clear signposting to the Children and Young People (Scotland) Act 2014 in Children (Scotland) Act 1995, Children's Hearings (Scotland) Act 2011 or Looked After Children (Scotland) Regulations 2009 there is a risk that the policy framework in the Children and Young People (Scotland) Act 2014 is not given the focus required.

The third finding is therefore, as the concepts of wellbeing and GIRFEC are fundamental to the assessment process of children in the care system, and as Children (Scotland) Act 1995 is the starting point for local authorities in discharging their duties to looked after children, there is a disconnect between the statutory policy and rules used to care for children, given

the failure to properly link Children and Young People (Scotland) Act 2014 with other important Acts and the Looked After Children (Scotland) Regulations 2009.

Duplication of Principles

What could be considered to be the fundamental and principal primary legislation, are arguably,

1. Children Scotland Act 1995
2. Adoption and Children (Scotland) Act 2007
3. Children's Hearing (Scotland) Act 2011
4. Children and Young People (Scotland) Act 2014.

All of those Acts, except for the Children and Young People (Scotland) Act 2014 contain provisions about the views of children, minimum intervention and the welfare principle. The Children (Scotland) Act 2020 also makes important amendments to the Children (Scotland) Act 1995, Adoption and Children (Scotland) Act 2007, and Children's Hearings (Scotland) Act 2011 in relation to children's views.

There is therefore a duplication of the overarching principles which are repeatedly set out in the principal Acts relating to the care system; and these important principles do not appear in the Children and Young People (Scotland) Act 2014.

Provisions in Children (Scotland) Act 2020 not replicated in other decision-making forums.

The Children (Scotland) Act 2020 contains provisions which do not appear to have been replicated across all of the care system:

The Children (Scotland) Act 2020 amends section 11 of the Children (Scotland) Act 1995. Section 20 requires a court to provide an explanation of its decision to the child, where the

court is making or varying a section 11 order. The court must ensure that the decision is explained to the child. This section is not replicated Part 2 of the Children (Scotland) Act 1995 or Children's Hearings (Scotland) Act 2011. In the Children's Hearings (Scotland) Act 2011 there is a duty on the panel to explain their decisions where they are being made. In Part 2 of the Children (Scotland) Act 1995, and also, in Children and Young People (Scotland) Act 2014 decisions are being made in a different setting, many by social workers when preparing the child's plans, in Looked After Children (Scotland) Regulations 2009 reviews, or child protection meetings. There is no statutory obligation to discuss with children the decisions which are being taken for them in those forums. Those decisions can be material to that child's life, yet there is no duty to explain the decision to the child.

Section 21 imposes a duty to ensure the availability of child advocacy services in section 11 proceedings under the Children (Scotland) Act 1995. There is a similar right in the Children (Scotland) Act 1995. There are no reciprocal arrangements for the use of child advocates in decision-making in other forums, such as child protection or looked-after reviews, or removal to secure accommodation under section 75 of the Children (Scotland) Act 1995.

Section 30 contains amending provisions dealing with delay in proceedings likely to prejudice a child's welfare, and amends the Children (Scotland) Act 1995, Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011, and it provides that when considering the child's welfare, the court has to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose. There are no reciprocal provisions in the Children and Young People (Scotland) Act 2014 where matters relating to wellbeing needs and support are being considered for a child, before the child's case has progressed to formal statutory intervention under the Children's Hearings (Scotland) Act 2011. There is also no duty when a local authority is holding a Looked After Children (Scotland) Regulations 2009 or Child Protection review to consider this question yet delays at this stage can be more crucial to a child's outcomes.

Section 31 provides that the Scottish Ministers must review the ability of children to effectively participate in the making of decisions in relation to any matters where the court

or the children's hearing have a duty to give a child the opportunity to express their views. The review must consider the resources required to ensure the effective participation of children. Children's views are sought in other forums, for example when a local authority is preparing and reviewing a child's plan and Looked After Children (Scotland) Regulations 2009 reviews, placing a child in secure accommodation. There is no statutory provision requiring the Scottish Ministers to review the child's ability to participate in the making of decisions in forums other than the courts and the children's hearing system.

"Child's Plans"

The term "child's plan" appears twice. It appears in the Children and Young People (Scotland) Act 2014 at Part 5, which requires a child's plan to be prepared where a wellbeing need has been identified for the child and there needs to be targeted intervention for the child. Section 34 specifies the content of what should be in the child's plan. The "child's plan" also appears in Looked After Children (Scotland) Regulations 2009 at regulation 5. The purpose of child's plans in the Looked After Children (Scotland) Regulations 2009 are for children who are to be or are already looked after children. Regulation 4 sets out what the local authority must make an assessment of. These plans are prepared for quite different purposes. The Act and regulations impose different requirements about which is to be contained in each one. This is not satisfactory. There is the likelihood that the use of the words "child's plan" for different purposes could cause confusion to children, families and the workforce. It could also lead to errors in what is contained in the required plan for the child.

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

Section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 provides that Acts of public authorities have to be compatible with the

UNCRC requirements. Section 6 explains that this means it is unlawful (subject to subsection (4)) for a public authority to Act, or fail to Act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements.

Subsection (2) defines a "relevant function" as a function that is within the legislative competence of the Scottish Parliament to confer on the authority, and is conferred by an Act of the Scottish Parliament, a Scottish statutory instrument originally made wholly under a relevant enabling power, a provision in a Scottish statutory instrument originally made partly under a relevant enabling power, provided that the provision itself was either originally made under the relevant enabling power, or inserted into the instrument by an Act of the Scottish Parliament or subordinate legislation made under a relevant enabling power, or a rule of law not created by an enactment.

In subsection (3), "relevant enabling power" means a power to make subordinate legislation conferred by a provision in an enactment of a kind mentioned in that subsection, unless the provision was inserted by an enactment of a kind that is not mentioned in that subsection.

Subsection (4) states that subsection (1) does not make unlawful doing or failing to do something if the authority was required or entitled to Act in that way by words that are not contained in an enactment of a kind mentioned in subsection (2)(b), or are contained in such an enactment having been inserted into it by an enactment of a kind that is not mentioned in subsection (2)(b).

A number of the principal Acts which deal with children and the care system are not Acts of Parliament which were made by the Scottish Parliament and therefore the statutory requirements of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 will not apply to them.⁶

⁶ Elaine Sutherland, How to Increase the Impact of the UNCRC, Article in Scottish Legal News 25 January 2024

*As noted by E Sutherland in *How to Increase the Impact of the UNCRC* the new Act "does not apply to Westminster statutes even if they address devolved matters in a Scotland-only context. So, for example, the Children (Scotland) Act 1995 is outwith its reach. As a result, the various provisions of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 – notably, the public authority duty to Act in a way that is compatible with the UNCRC requirements (s.6) and the need to interpret a statute in a manner that is compatible with these requirements (s.24) – do not apply to such excluded statutes."*

This important piece of legislation does therefore not apply to the Social Work (Scotland) Act 1968, the Children (Scotland) Act 1995, and other legislation from the UK Parliament.

Definition of a Child

This issue also relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 and Article 1 which states that for the purposes of the convention, a child means every human being below the age of 18 years. (see Schedule to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024).

A number of the current Acts in force are arguably not compliant with Article 1.

The Children (Scotland) Act 1995 provides in sections 1 and 2 that almost all parental rights and responsibilities expire when a child is 16 years of age. Re-assessment of the purpose of parental rights and responsibilities and how long they should last for, having regard to the fact that the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 defines a child as a human being under 18 needs to be considered. This question

<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.scottishlegal.com/articles/elaine-e-sutherland-how-to-increase-the-impact-of-the-uncrc-incorporation-scotland-act-2024%23%3A~:text=3DThe%2520United%2520Nations%2520Convention%2520on,the%2520existing%2520child%2520law%2520legislation.&ved=2ahUKEwjK4LTS2cqJAxWMXkEAHVZpIboQFnoECBoQAw&usg=AOvVaw1KFOaLKS1oXVtmEuHF1X9>

has wider implications for other Acts. In England, parental responsibilities last until a child is 18.

Section 26A of the Children (Scotland) Act 1995 dealing with the provision of continuing care for looked-after children, refers to an “eligible person” who ceases to be looked after by a local authority; in this context “an eligible person” is defined as a person who is at least sixteen years of age, and is not yet such higher age as may be specified.

Section 93 defines a child as a person under the age of 16 years, which would include a child where an exclusion order was to be sought in section 76.

The Adults with Incapacity (Scotland) Act 2000 defines an adult as a person who has attained the age of 16 years. At present parents for incapax children can make decisions for their children until 16. Thereafter formal orders found in the Adults with Incapacity (Scotland) Act 2000 would be required to make decisions for incapax persons between 16 -18 as adults. The Adults with Incapacity principles for decisions being made under that Act are different to the principles made under the legislation for children (i.e. the best interests/welfare test does not apply in Adults with Incapacity legislation).

School age in the Education Acts is defined as 5 to up to 16 years of age.

The anti-social behaviour provisions have been amended to include children up to the age of 18, except for parenting orders which apply to children up to the age of 16 years.

Permanence orders cannot be granted for children between the age of 16 – 18 years; although it appears that a child could be adopted until the age of 18 years. A child is defined in section 119 of the Adoption and Children (Scotland) Act 2007 as a person up to the age of 18 years, but a recent case has held that a Permanence Order cannot be granted for a young person who is 16 or 17 years of age.

In addition, the Foster Children (Scotland) Act 1984 defines a foster child as a child under 16 years; if there are children who are foster children in terms of this Act, then they have no rights under this Act once they reach 16 years, and the associated provisions enabling a local authority to impose conditions on a foster carer under the Act would also no longer be enforceable.

The Children (Scotland) Act 1995, sections 1 and 2 deal with parental rights and parental responsibilities. These provisions became law after the Scottish Law Commission published its *Report on Family Law (Scot Law Com No 135) May 1992*. As part of their consultation, they considered the United Nations Convention on the Rights of the Child, and the English Children Act 1989. The 1989 Act deals with the concept of parental responsibility, and in England it exists until the child is 18.

The Commission in their report refers to the United Nations Convention on the Rights of the Child Article 1 as in the following terms *“which define a child in Article 1 as a human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier.”*

The terms of Article 1 as set out in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 are therefore different to the terms of Article 1 in the UNCRC. All persons under 18 are children for the purposes of the 2024 Act. All persons under 18 are not necessarily children having regard to the United Nations Convention on the Rights of the Child. Sections 1 and 2 of the Children (Scotland) Act 1995, only impose the parental responsibility to provide guidance until the child is 18, all other responsibilities and parental rights expire at 16.

The definition of parental rights and parental responsibilities contained in sections 1 and 2 of the Children (Scotland) Act 1995 now sits uncomfortably against the provisions of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

The Child Protection Guidance considers these issues, in relation to the person as a child and also as an adult and suggests that *"1.16 Where a young person between the age of 16 and 18 requires support and protection, services will need to consider which legal framework best fits each persons' needs and circumstances."*⁷

Given the implementation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 there now perhaps needs to be an assessment of the law relating to parental rights and parental responsibilities. Should changes be made to sections 1 and 2 of the Children (Scotland) Act 1995?

Child protection

Child Protection is not a statutory concept in Scotland, but it is recognised as a concept and is set out in non-statutory national guidance. Child protection investigations are triggered when a child is deemed to be at risk of significant harm.⁸

Significant harm appears in provisions in the Children's Hearings (Scotland) Act 2011, where an order for a child protection order or child assessment is sought. *Significant harm* is not however the test for bringing a child into the hearing system.

In section 60 of the Children's Hearing (Scotland) Act 2011 if a local authority considers it likely that a child *is in need of protection, guidance, treatment or control and might be necessary for a compulsory supervision order*, the local authority *must* make all necessary inquiries into the child's circumstances and then provide that information to the Reporter.

There is no statutory duty in any of the Scottish Acts that a local authority must investigate a child's circumstances where a child is deemed at risk of significant harm.

⁷ **National Guidance** for Child Protection in Scotland 2021 - updated 2023

⁸ **National Guidance** for Child Protection in Scotland 2021 - updated 2023

The English Children Act 1989 at section 47 imposes on local authorities a duty to investigate a child's circumstances where they have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm, to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

Statutory guidance in England defines Child protection as part of safeguarding and promoting the welfare of children, and for the purpose of this [the English statutory guidance] an activity that is undertaken to protect specific children who are suspected to be suffering, or likely to suffer, significant harm⁹. This includes harm that occurs inside or outside the home, including online.

So, it is notable that in England the *duty* on local authorities to investigate the circumstances affecting a child is when they consider that the child may be suffering *significant harm*. It is under section 47 that the investigation may lead to child protection investigations, case conferences and reviews; *and also*, applications to court for a child in terms of the Children Act 1989 (the Scottish equivalent being the referral to the Children's Reporter under section 60).

The English provisions would appear similar to the duty to investigate under section 60 of the Children's Hearing (Scotland) Act 2011, but the test in each section is in different terms with England using the "significant harm" and Scotland using "likely that a child is in need of protection, guidance, treatment or control and might be necessary for a compulsory supervision order to be made."

The Scottish National Guidance says that *Child protection refers to the processes involved in the consideration, assessment and planning of required action, together with the actions themselves, where there are concerns that a child may be at risk of harm. Child protection guidance provides overall direction for agencies and professional disciplines where there are*

⁹ Working Together to Safeguard Children 2023 A guide to multi-agency working to help, protect and promote the welfare of children December 2023

concerns that a child may be at risk of harm. Child protection procedures ... are initiated when police, social work or health professionals determine that a child may have been abused or may be at risk of significant harm."

All local authorities are responsible for maintaining a central child protection register for all children who are the subject of an inter-agency Child Protection Plan. The guidance states that the register has no legal status. The guidance states that *"This is an administrative system for alerting practitioners that there is sufficient professional concern about a child to warrant an inter-agency Child Protection Plan."*

The decision to place a child on the Register should be made following multi-agency assessment and a Child Protection Planning Meeting.

1.88 A child may be placed on the register if there are reasonable grounds to believe or suspect that a child has suffered or will suffer significant harm from abuse or neglect, and that a Child Protection Plan is needed to protect and support the child.

The child's name and details will be noted on the Register. The guidance says that the local authority "should" notify the child's parents or carers about the information held on the register and who has access to it.

The guidance sets out who can make use of the register. The Scottish Government maintain a list of contacts for relevant agencies in the UK.

The equivalent to the register in England is the Child Protection Plan, child protection procedures emanate from section 47 of the Children Act 1989, the procedures are set out in statutory guidance. In Scotland the guidance for child protection is non-statutory.

In Scotland Child protection is a non-statutory concept, which, is multi-agency, and can lead to a child being placed on the child protection register. A child protection plan drawn up will lead to agency involvement with families. It puts in place an increased system of involvement

with families; meetings with multi-agencies and reviews. While families and children are invited, they are not provided with access to legal aid in order to access legal representation to these meetings or to challenge the decisions made.

Scottish Child Protection rules appear to add an additional layer of assessment using a differently worded test about risk, namely either “harm” or “significant harm”. It is not clear how high this harm is? It is also not clear where this risk of harm sits against the statutory test in section 60 of the Children Hearings (Scotland) Act 2011.

It is not clear why this different test exists, although it might lie in the fact that the English Children Act 1989 was in force first and it introduced the test of significant harm, if the child protection procedures arose out of that Act together with access to child protection registers, then perhaps Scotland used the same provisions to be in step with England. In England, however the Child Protection process is part of the assessment process, which may lead to statutory measures being sought and risk of significant harm places a statutory duty under section 47 on local authorities to carry out investigations, and where it is found to be the case that a child is suffering significant harm then that might lead to the local authority seeking statutory care orders for the child. Child protection and significant harm are linked in England to section 47.

This is not the case in Scotland. The equivalent provision of section 47 in Scotland is section 60 of the Children Hearings (Scotland) Act 2011 which has a different test.

It is not entirely clear why Scotland has child protection rules which set a different test than section 60. If Child Protection is to be an additional level of assessment and protection for children consideration should be given to the test to be applied, and why it is different to the statutory one in section 60. This should be justified and explained. Consideration should be given to whether child protection rules should be clarified to confirm that it aligns with section 60.

Secure Accommodation

Statutory provisions about secure accommodation are set out in three different Acts.

Section 151 of the Children's Hearings (Scotland) Act 2011 deals with the implementation of secure accommodation authorisation when a child is subject to a relevant warrant or order (i.e. compulsory supervision order; interim Compulsory Supervision Order, medical examination order; and warrant to secure attendance). Section 85 provides the meaning of a secure accommodation authorisation. A children's hearing can attach secure accommodation authorisation to any of these orders or warrants, thereafter it is for the chief social work officer of the implementation authority and the head of the establishment to determine if the authorisation shall be implemented, and the child shall be placed in secure accommodation.

Section 83 (6) sets out the legal criteria for a hearing to authorise a placement in secure accommodation.

Section 152 deals with secure accommodation placement in other circumstances, where a relevant order or warrant such as set out earlier is in place, but no secure accommodation authorisation was made by a hearing, the chief social work officer and the head of an establishment can determine that the child should be placed in secure accommodation. Where a child is placed in secure accommodation in terms of section 152, then the reporter must be notified, immediately and must arrange a hearing in 72 hours for the child.

Provisions can also be found in section 75 of the Children (Scotland) Act 1995 which gives the Secretary of State powers to place a child in secure accommodation where the child is not subject to a compulsory supervision order, interim compulsory supervision order, medical examination order or warrant to secure attendance (all within the meaning of the Children's Hearings (Scotland) Act 2011) but who is being looked after by a local authority. A child can be placed in secure accommodation without a secure accommodation authorisation, if this happens the chief social work officer has to immediately notify the reporter, and the reporter has to arrange a hearing within 72 hours. The reporter must

investigate the case and decide whether or not to bring the child to a hearing if a hearing is to be arranged then it must be arranged within 72 hours of the child being placed in secure accommodation.

The Sheriff under section 44 of the Criminal Procedure (Scotland) Act 1995 also has the right to detain a child in secure accommodation.

Relevant regulations include the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013/212 (Scottish SI) and the 2015 Amending regulations apply.

Implementation of authorisation for secure accommodation is the decision of the chief social work officer for the implantation authority, and it also required the consent of the person in charge of the particular establishment. The child and relevant person have also to be consulted, and their views obtained and recorded. In addition, they are to be advised of their rights of appeal. They can appeal the implementation order being imposed by the children's hearing, and they can also appeal the decision to implement the authorisation.

The Commissioner for Children and Young People in Scotland investigated whether local authorities were complying with their duties under the secure accommodation regulations and found that there was little evidence of children being consulted with during the first 72 hours of being placed in secure accommodation, and even where their views were taken, they were routinely not recorded. Children were not also advised of their rights to appeal, the commissioner found that there had been a significant number of children who had therefore been deprived of their liberty.¹⁰ Given the nature of secure accommodation that it removes the liberty of the young person it is arguably more important that the rights of the child should be scrupulously ensured when taking Action to move or keep a child in secure accommodation.

¹⁰ <https://www.cypcs.org.uk/wp-content/uploads/2021/06/Secure-Investigation.pdf>

The Sheriff under section 44 of the Criminal Procedure (Scotland) Act 1995 also has the right to detain a child in secure accommodation.

The Guidance is not all uptodate

In using statutory and other guidance, reliance is still made on guidance that was published more than 20 years ago. While legal provisions have often moved on, for example rights of young people to aftercare and continuing care, the guidance which practitioners are still referred to, in part, relates to guidance published in 2003, before the provisions in section 26A of the Children (Scotland) Act 1995 provision of continuing were introduced into law and the amended after-care provisions were brought into force. The writer considers that the 4 Volumes of Guidance published in 2003 following on from the Children (Scotland) Act 1995, was very well written; clear; accessible; and felt comprehensive at that time to be used and accessed by practitioners. It is now out of date in parts, but still accessible on the Scottish Government Website as a resource to be used and still referred to by the Scottish Government as a relevant resource.

The use of language is not always consistent

The use of the word *throughcare* still features in the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 Explanatory Note and the Supporting Young People Leaving Care in Scotland Guidance. The word does not appear anywhere in the 1995 Act. It is therefore unclear what in law “throughcare” is for children in the care system. The words *aftercare* and *continuing care* are defined in the Children (Scotland) Act 1995. If throughcare as a term is still relevant it would be sensible to define it in law, to make clear what it is as a legal concept.

Foster Children (Scotland) Act 1984

The Foster Children (Scotland) Act 1984 should be reviewed. The review should consider which children could be subject to this Act, and in what circumstances; and who could be a

foster carer under this Act; and how do the provisions of this Act sit against the requirements of fostering set out in the Looked After Children (Scotland) Regulations 2009.

Options for Clarifying the Current Legislative Landscape around the Care System and how that could be achieved.

At present the fundamental issues affecting the landscape in legislation for care experienced children could be set out under the following general headings.

1. Universal services accessible for everyone includes such provision as standard health care, and education available to all children.
 - a. Education preschool and 5-18
 - b. Health provision
2. Early help - support needed but not social work involvement
 - a. Additional health assistance
 - b. Additional educational support
3. Services for children at risk of becoming looked after
 - a. Informal social work support - including being placed on the Child Protection Register.
 - b. Part 12 Children and Young Persons (Scotland) Act 2014
4. Agency involvement of children on a statutory basis
 - a. The looked after child
 - b. Children's hearing system
 - c. Long-term planning for children not going home - permanence
5. Moving on from statutory involvement as a child and as a young adult.
 - a. Adoption,
 - b. End of compulsory measures
 - c. Private law measures section 11 order
 - d. Adulthood
6. Other material matters
 - a. Mental health legislation
 - b. Criminal justice

7. Overarching principles

- a. Wellbeing
- b. GIRFEC
- c. Welfare as the paramount consideration/the child's best interests
- d. Views of children
- e. Minimum intervention
- f. Reporting provisions to see how well Scotland is doing.

At present and as noted above, provisions for children in the care system are contained in a range of different Acts, with the main Acts being, the Social Work (Scotland) Act 1968, Children (Scotland) Act 1995, Adoption and Children (Scotland) Act 2007, Children's Hearings (Scotland) Act 2011, Children (Scotland) Act 2020 and now also the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

There is no one defining and overarching Act which sets out the majority of the provisions for children in the care system. This fact can be contrasted with the English statutory system, which is not so cluttered. While there is more than one Act dealing with children in the English care system, the Children Act 1989 is the overarching Act, and within it, it deals with the private law for children (equivalent to Part 1 of the Children (Scotland) Act 1995); and then Part 2 of the Children (Scotland) Act 1995, and thereafter it has the equivalent provisions for seeking care orders in that Act (our equivalent would be the Children's Hearings (Scotland) Act 2011), children in care moving from care into adulthood and aftercare services; it also has provisions for secure accommodation. The Children Act 1989 Act was in force shortly before the Children (Scotland) Act 1995, and the two Acts had similarities at that time. They both started with private law for children and moved into public duties, and both contained provisions allowing the seeking of statutory orders through court or the hearing system. The original Children (Scotland) Act 1995 contained the children's hearing provisions, and the Children Act 1989 still contains their equivalent provisions. While England has since then enacted other standalone Acts, as can be seen earlier in this paragraph the Children Act 1989 still contains the main provisions for children coming to the care system, all the way through it and moving into adulthood.

How could the legislation be changed to make it easier to understand: -

Option 1:

Would be to take forward the Promise Bill by tidying up the existing pieces of legislation, orders and guidance necessary to bring forward those changes. The primary Act which may require amendment would be the Children's Hearings (Scotland) Act 2011. Other Acts which may also be amended would be the Children (Scotland) Act 1995 and the Children and Young People (Scotland) Act 2014.

The benefits of Option 1 would likely be that changes to the hearing system and the associated amendments could be brought into force more quickly and all that would be needed would be amendment to the primary Acts and regulations. The existing Acts are in place already. Brand new law would not require to be drafted. Consultation would be easier. It would not require a wholesale reworking of the Acts in place at present. It would be quicker, and easier to bring in such an Act.

The disbenefits of such an approach is that children, families care experienced adults and the workforce, would still have a system that is complicated to navigate through. Criticism about the number of Acts and regulations made at present would not change.

The issues set out above would not necessarily be addressed if such a piece of legislation were to be enacted. Particular issues which would not be addressed would be :- The fact that Children (Scotland) Act 1995 is a UK Act would mean that it would continue not to be subject to the provisions of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024. The lack of clarity over the Child Protection would remain. The fact that secure accommodation provisions are not being properly implemented at present would also not change.

The failure to have one Act to ensure “focus” on all relevant provisions would not be achieved.

The duplication of some issues, for example, two different types of child’s plans would continue.

The overarching concept that all children are persons under 18 would not be reviewed.

Assessment as to whether parental rights and responsibilities in their current form was still appropriate would not be considered.

The fact that provisions of the Children (Scotland) Act 2020 increase the obligations on public bodies to ensure that the child’s voice is heard and the other protections put in place in that Act, namely, to ensure that there is a higher quality of participation by other bodies and persons involved in decision making for children, would continue to sit in a separate piece of legislation.

So would the principles of GIRFEC and Wellbeing sit in a different piece of legislation, the emphasis on providing early intervention before formal statutory intervention would not sit in the same Act, and the focus of early intervention would not be so aligned in legislation with the change to the children’s hearing system.

Executive Summary for Option 1

take forward the Promise bill by tidying up the existing pieces of legislation, orders and guidance necessary to bring forward those changes

the benefits:-

- ability to make statutory changes more quickly
- only amending existing legislation
- less consultation is required to make changes
- use the existing statutory framework

disbenefits:-

- important Acts would remain separate and disparate
- there would remain a significant number of different Acts and regulations and the system would remain complicated
- disparate Acts would risk leading to a lack of focus on key provisions
- important but related issues affecting children would remain in different Acts for example local authorities' duties for looked after children and education duties
- overarching principles would appear in some Acts but not others leading to a lack of focus - welfare principle, children's views, and minimum intervention
- Wellbeing and GIRFEC would not be notably central to the statutory duties affecting Scotland's children
- Some Acts would not be UNCRC-compliant
- Child Protection would continue to be non-statutory and lack clarity of role in the system
- Important updating provisions brought in with the Children (Scotland) Act 2020 would still sit in a separate legislation
- Some terms and language would remain inconsistent
- UNCRC definition of a child would not consistently apply to all Acts
- Secure accommodation rules would continue to be spread across different Acts and inhibit focus on ensuring its rules are fully adhered to
- There would not be an opportunity to consolidate and update regulations and guidance

Option 2:

Would be to use this point in time, and all the work of the Promise, to carry out a wholesale exercise consolidating all relevant Acts and having one primary piece of legislation for all of Scotland's children including care-experienced children.

The attraction of such a piece of legislation is that children, families, care-experienced adults and the workforce would have one Act to work from. It would be easier to use. It would be much more practical to use. Regulations could be made under it. Guidance also. Having one umbrella Act would have the value of giving everyone a clear starting point to work from. Given that there are over 60 relevant Acts and at least that number again, of secondary legislation which impact the lives of our care-experienced children, which extend over a period of time in excess of 50 years, and provide practitioners, families and their advisors with a disparate set of rules and regulations, which are not easy to follow or even identify, then Option 2 could be used to put in place an overarching and comprehensive set of rules in one Act, encapsulating as at 2024, a set of rules which take care of Scotland's children from birth to adulthood, and which aims to ensure that all of Scotland's children will be placed on the same statutory footing as each other, and all are equally entitled to receive good standards of health, care, and education which meet the statutory wellbeing and GIRFEC criteria, and which adhere to the international conventions on human rights and the rights of a child which Scotland are parties and subject to.

Such an Act could include rules on such matters as education, health, poverty and homelessness, and so would see a holistic approach being taken to support Scotland's children and moving to address in one Act fundamental drivers that cause or exacerbate poor outcomes for children in Scotland.

It would provide a statutory framework which is user-friendly for practitioners, families and their agents and is one which does not have users getting lost in a labyrinth of rules and regulations.

It would also provide an opportunity to use consistent language and take out language which is not clear. Use of words such as *throughcare* which appear in the regulations but not the Act could be removed. There would be a chance to define concepts in one Act, giving clarity.

There would be the opportunity to make all relevant legislation *Scottish Parliament legislation* thus ensuring that the provisions of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 applied to all provisions affecting children.

There would be the opportunity to consolidate or retain certain concepts such a child's plan, in order that it was clear what was to be contained in each.

The potential conflict between the test in child protection of *significant harm* and the test in section 60 "*child is in need of protection, guidance, treatment or control and might be necessary for a compulsory supervision order*" of the Children's Hearings (Scotland) Act 2011 could be considered and reviewed. This would provide the opportunity to consider if the tests needs to be standardised, and if not why not. Also, consideration could be given to making child protection measures statutory or making the guidance relating to these procedures statutory. It would provide an opportunity to consider what rights children and families should be provided when child protection measures have been commenced.

The provisions of the Children (Scotland) Act 2020 could be brought into the new Act and this would ensure that these provisions would be clearly embedded in the provisions to be found in the longer standing and principal "working Acts" - setting out more clearly the responsibilities of ensuring that children are involved in their decision making, by the taking of their views, by ensuring that welfare reporters are properly qualified, and enquiring that children are able to obtain advocates in all setting where decisions are being made about them. It could also add focus on the rights of and importance of relationships of siblings.

Placing permanence orders in the same Act as parental responsibilities and parental rights would ensure focus on what parental rights and parental responsibilities exist and could

encourage greater consideration of what rights and responsibilities could be shared in permanence orders.

The concern of the Child and Young Persons Commissioner that secure accommodation regulations were not being properly implemented having regard to the rights of the child could be more fully enacted in primary legislation, given that these provisions are the most draconian affecting a child it would better ensure that a real focus on upholding the child's rights if placed in secure accommodation were respected and rights of appeal were clearly signposted for the child.

Since the Education (Scotland) Act 1980 there have been ongoing education provisions which clearly set out the value of education to care for experienced children and the importance of education duties which support looked after children to obtain the best educational provisions possible thereby enhancing the life chances of those children. There now exists not only statutory provisions confirming that children in mainstream education have to be assessed as individuals and their individual needs have to be identified and provided for, but also that there is now specialist provision for children with additional support needs. Educational provisions being contained in the new Act would ensure that the right to education was tightly aligned with local authorities' other duties towards children in the care system.

The greater involvement in health especially in providing for early years support for families and the increased understanding of the importance of this public body to provide essential support for such families could be set out in one Act.

Consolidating our Acts into one piece of legislation would bring the statutory concepts such as wellbeing and GIRFEC together. Where those concepts are seen as these running through the lives of Scottish children, it would seem sensible to place them in one primary Act alongside the other Acts which contain the day-to-day duties owed to looked after children and children who may become looked after.

It would place the concept of the child as a human being under 18 front and centre to the children in the care system. It would set a comprehensive tone about how Scotland sees its children and how it sees the duties towards those children.

It may also allow an opportunity to streamline resources for investigation and reporting where there were provisions set out in one Act, thereby avoiding the duplication or than one agency having duties of inspection and reporting.

Disbenefits: Consolidation of all Acts would be a complicated and time consuming exercise. It may take a long time to achieve such a piece of legislation.

What may however be seen as problematic to such an approach would be the tension between which Acts should be part of the consolidation exercise.

There are over 60 Acts, some Acts have more relevance than others to these children in the care system. Some Acts contain some relevant provisions but other provisions which are not so relevant to children. For example, Mental Health legislation, community empowerment.

Some Acts have concepts which cover other areas of social work, for example the provisions appointing a chief social work officer in the Social Work (Scotland) Act 1968 apply not only to matters involving children but also adults.

Acts relating to the education of young people clearly cover care-experienced children, but also relate to children who do not fall into that category, and they also have provisions which are not necessarily related to issues involving the care system and children directly, and therefore it would be arguable that such provisions may not be relevant to one overarching Act and may lead to a cluttering up of that Act. To try and consolidate everything might lead to an Act which is trying to do too much.

Other concerns could be that different agencies assess, inspect and consider different issues when undertaking investigation and reporting duties. It may be difficult to ensure that all needs and issues are covered such that only one organisation is needed to carry out all

inspections and reporting duties. Bringing these roles together may lead to a loss in assessment and reporting skills and width.

In addition, Acts such as the Carer's Act, AWI, Mental Health, are primarily Acts of Parliament which were enacted to deal with adults, and it is questionable whether these Acts would be better left separate.

Executive Summary for Option 2

carry out a wholesale exercise consolidating all relevant Acts and having one primary piece of legislation for children for care experienced.

The benefits:-

- One Act - containing all relevant provisions; Holistic
- It would remove a significant number of different Acts and regulations by enacting one Act, and the system would be much less complicated to navigate for families and practitioners
- One Act would lead to focus on key provisions
- One Act would ensure that important and related issues affecting children would sit side by side in one Act, for example local authorities' duties for looked after children and education duties would sit together
- overarching principles would appear in one Act giving focus to the welfare principle, children's views, and minimum intervention
- Wellbeing and GIRFEC would sit alongside statutory duties and embed these frameworks with those duties
- The Act would ensure that all relevant provisions are UNCRC-compliant
- Child Protection could be reconsidered become a statutory duty or be set out in statutory guidance
- Important updating provisions brought in with the Children (Scotland) Act 2020 would be embedded into the new Act
- Terms and language could be reviewed to ensure consistency
- The UNCRC definition of a child could be made to consistently apply to all relevant provisions in one Act
- Secure accommodation rules would be contained in one part of the new Act making it easier to ensure its rules are fully adhered to, and accessible
- There would be an opportunity to consolidate and update regulations and guidance
- It could provide one "set of standards" in one Act for all of Scotland's children
- It could include wider issues such as poverty and homelessness to ensure that these material matters which impact Scotland's children are embedded in an overarching piece of primary legislation for children containing a comprehensive set of rules for children
- Bringing public law and private law together in one Act when considering permanence order and the use of parental rights and parental responsibilities
- Including in one Act education provision for children; which would bring in this fundamental right of a child to sit alongside other fundamental rights of children and duties on authorities
- Setting out statutory rights to health care for children and duties to provide suitable health care
- Streamline investigation duties
- Streamline reporting duties

The disbenefits :-

- Consolidating all Acts would take time and be complicated
- Consolidating all relevant Acts would still require assessment of which Acts, some provisions affecting children sit in Acts primarily for adults
- including all matters relating to early provision for families, looked after duties, health and education might lead to an Act which is unwieldy and trying to do too much
- streamlining reporting and investigation commitments may lead to inadequate reporting and investigations of different matters, with different thresholds and may not be as effective in identifying valuable data

Option 3:

Would be a more focused piece of consolidating legislation. The third option would identify the principal Acts relating to children in care and bring these Acts together to consolidate them into one primary Act. The principal Acts affecting care experienced children, are namely,

1. Social Work (Scotland) Act 1968
2. Children Scotland Act 1995
3. Adoption and Children (Scotland) Act 2007
4. Children's Hearing (Scotland) Act 2011
5. Children and Young People (Scotland) Act 2014.
6. Children (Scotland) Act 2020
7. United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

The benefit of such an approach would be that there would be one principal Act dealing with children including children in the care system. To bring these Acts together would ensure that a lot of the provisions considered in Option 2 would be brought under one Act.

It is suggested that it could provide a starting place with the appointment of the chief social work officer, the Scottish Minister's ability to make statutory guidance, and a general duty to provide assistance if necessary; then it could move on to deal with parental rights and responsibilities and private law orders.

The terms of the Children and Young People (Scotland) Act 2014 could be brought in, in terms of early intervention and multi-agency support. The policy framework for assessment could be spelt out in the new Act.

Part 2 of the Children (Scotland) Act 1995 sets out the day-to-day duties of local authorities to look after children, together with the duties to children moving to adulthood.

The new Act would include the provisions for children coming into the Children's Hearing System. The advantage of this would be that the duties on local authorities to investigate risks to children would be clearly set out and understood within that new Act. The language about significant harm could be reconsidered alongside the current section Children's Hearings (Scotland) Act 2011 test to investigate. The potential conflict between the test in child protection of *significant harm* and the test in section 60 "*child is in need of protection, guidance, treatment or control and might be necessary for a compulsory supervision order*" of the Children's Hearings (Scotland) Act 2011 could be considered and reviewed. This would provide the opportunity to consider if the tests needs to be standardised, and if not why not. Also, consideration could be given to making child protection measures statutory or making the guidance relating to these procedures statutory. It would provide an opportunity to consider what rights children and families should be provided when child protection measures have been commenced.

There would be an opportunity to clarify the duties of the local authority to investigate children who are in need of care and protection, and the question of whether there should be additional provisions for children suffering from or likely to suffer significant harm could be considered in the new Act thereby addressing the uncertainty which exists about the status of child protection measures.

It would provide a statutory framework which would be user-friendly for practitioners, families and their agents and is one which does not lead to users getting lost in a labyrinth of rules and regulations.

Such a new Act would provide a more consistent framework for children's rights and duties towards children in one piece of legislation.

It would also provide an opportunity to better ensure the use of consistent language and remove language which is not clear. Use of words such as *throughcare* which appear in the

regulations but not in the Act could be removed. There would be a chance to define concepts in one Act, giving clarity.

There would be the opportunity to consolidate or retain certain concepts such as a child's plan, in order that it was clear what was to be contained in each.

The provisions of the Children (Scotland) Act 2020 could be brought into the new Act and this would ensure that these provisions would be clearly embedded in the provisions to be found in the longer standing and principal "working Acts" - setting out more clearly the responsibilities of ensuring that children are involved in their decision making, by the taking of their views, by ensuring that welfare reporters are properly qualified, and enquiring that children are able to obtain advocates in all setting where decisions are being made about them. It could also add focus on the rights of and importance of relationships of siblings.

Placing permanence orders in the same Act as parental responsibilities and parental rights would ensure focus on what parental rights and parental responsibilities exist and could encourage greater consideration of what rights and responsibilities could be shared in permanence orders.

The guidance could also be brought up to date with a comprehensive set new guidance being prepared for new Act.

The concern of the Child and Young Persons Commissioner that secure accommodation regulations were not being properly implemented having regard to the rights of the child could be more fully enacted in primary legislation, given that these provisions are the most draconian affecting a child it would better ensure that a real focus on upholding the child's rights if placed in secure accommodation were respected and rights of appeal were clearly signposted for the child.

Consolidating these principal Acts into one piece of legislation would bring the statutory concepts such as wellbeing and GIRFEC together. Where those concepts are seen as these

running through the lives of Scottish children, it would seem sensible to place them in one primary Act alongside the other Acts which contain the day-to-day duties owed to looked after children and children who may become looked after.

It would place the concept of the child as a human being under 18 front and centre to the children in the care system. It would set a comprehensive tone about how Scotland sees its children and how it sees the duties towards those children.

Another benefit (and one that would also be relevant to Option 2) is that the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 only applies to statutes passed in the Scottish Parliament. It does not apply to statutes which have been passed by Westminster, and therefore it is understood that Acts such as the Children (Scotland) Act 1995 would be outwith its reach. Therefore, various provisions of the 2024 Act, for example, the public authority duty to act in a way that is compatible with the UNCRC requirements (s.6) and the need to interpret a statute in a manner that is compatible with these requirements (s.24) – do not apply to such excluded statutes, and so would not apply to the Children (Scotland) Act 1995. Elaine Sutherland suggests that to address this issue and ensure that the child law statutes are United Nations Convention on the Rights of the Child compliant is to codify them into one statute passed in the Scottish Parliament. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 would apply to the new statute ¹¹. Bringing a new Act under Option 3, could ensure that important UK provisions are brought into force by the Scottish Parliament thereby ensuring that the provisions in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 applied to all relevant and material provisions affecting children in the care system. This would also ensure that the role of the Commissioner for Children and Young People would be expanded to bring Actions and become involved in cases involving

¹¹ Elaine Sutherland, How to Increase the Impact of the UNCRC, Article in Scottish Legal News 25 January 2024 (<https://www.scottishlegal.com/articles/elaine-e-sutherland-how-to-increase-the-impact-of-the-uncrc-incorporation-scotland-act-2024>)

duties previously not caught by the United Nations Convention on the Rights of the Child. Given that the Children (Scotland) Act 1995 is an Act of the UK Parliament and given the number of duties imposed on local authorities arising under that Act, then the new Act would achieve more comprehensively the aims of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

A new Act under Option 3 would not be as complicated to bring forward as an Option 2 Act when considering all the relevant provisions which need to be included for example criminal law, mental health and education. It would also be an easier transition when considering the duties on agencies to investigate and reporting. It may also allow an opportunity to streamline resources for investigation and reporting where there were provisions set out in one Act, thereby avoiding the duplication or than one agency having duties of inspection and reporting.

Disbenefits: Consolidation of these main Acts would be more complicated and time-consuming exercise than Option 1.

Option 3 would still require some navigating to do so for the children, families and the workforce when looking at issues which fell outside the new Acts, for example, some criminal justice matters, education, and young carers rights.

Another concern is that different agencies assess, inspect and consider different issues when undertaking investigation and reporting duties. It may be difficult to ensure that all needs and issues are covered such that only one organisation is needed to carry out all inspections and reporting duties. Bringing these roles together may lead to a loss in assessment and reporting skills and width.

Education would not be included. Since the Education (Scotland) Act 1980 there have been ongoing education provisions which clearly set out the value of education to care for experienced children and the importance of education duties which support looked after children to obtain the best educational provisions possible, thereby enhancing the life

chances of those children. There now exists not only statutory provisions confirming that children in mainstream education have to be assessed as individuals and their individual needs have to be identified and provided for, but also that there is now specialist provision for children with additional support needs. Going with Option 3 would mean that the opportunity to align educational provisions with local authorities' other duties towards children in the care system would be missed.

Executive Summary for Option 3

- identify the principal Acts relating to children in care and bring these Acts together and consolidate them in one primary Act (Social Work (Scotland) Act 1968 ; Children Scotland Act 1995; Adoption and Children (Scotland) Act 2007; Children's Hearing (Scotland) Act 2011; Children and Young People (Scotland) Act 2014; Children (Scotland) Act 2020; UNCRCISA 2024)

The benefits:-

- Option 3 Act consolidating the principal Acts - not as holistic as Option 2 but still containing many of the most relevant provisions under one Act
- It would still remove a significant number of different Acts and regulations by enacting an Act under Option 3 and the system would be much less complicated to navigate for families and practitioners
- It would less time-consuming than Option 2 and the principal Acts used would provide a starting framework to consolidate into one Act
- Option 3 Act would lead to a focus on key provisions
- Overarching principles would appear in the Option 3 Act giving focus to the welfare principle, children's views, and minimum intervention
- Wellbeing and GIRFEC would sit alongside statutory duties and embed these frameworks with those duties ; Overarching principles easily identified and aligned to the "working sections", including GIRFEC and wellbeing
- Option 3 Act would ensure that all relevant provisions are UNCRC-compliant
- Child Protection could be reconsidered become a statutory duty or be set out in statutory guidance
- Important updating provisions brought in with the Children (Scotland) Act 2020 would be embedded into the Option 3 Act
- Terms and language could be reviewed to ensure consistency
- The UNCRC definition of a child could be made to consistently apply to all relevant provisions in one Act
- Secure accommodation rules would contained in one part of the new Act making it easier to ensure its rules are fully adhered to, and accessible
- There would be an opportunity to consolidate and update regulations and guidance
- It could provide one "set of standards" in one Act for all of Scotland's children
- Bringing public law and private law together in one Act when considering permanence order and the use of parental rights and parental responsibilities
- It would Streamline investigation duties
- It would Streamline reporting duties

The disbenefits :-

- More time-consuming than option 1
- Not all relevant Acts would be brought under this option. - not as comprehensive as Option 2
- Some navigating around other relevant Acts is still required
- Investigations and reporting would not be as streamlined
- Education would not be included in this Act
- Criminal justice would sit outside this Act
- It not include wider issues such as poverty and homelessness to ensure that these material matters which impact Scotland's children are embedded in an overarching piece of primary legislation for children containing a comprehensive set of rules for children