

1 Wednesday, 1st November 2017

2 (10.00 am)

3 (Proceedings delayed)

4 (10.21 am)

5 LADY SMITH: Good morning.

6 Can I start by apologising for the delay this
7 morning. You may have been kept informed, but we have
8 taken a little time to ensure that certain documents
9 that will be referred to today are available on the
10 right part of the electronic system that manages the
11 documents. We think it should now all be coming up as
12 and when Mr MacAulay refers to them, as long as he
13 doesn't get there too quickly. I think the first one is
14 ready.

15 MR MacAULAY: I think we are ready, my Lady.

16 Can I then call back Professor Norrie.

17 LADY SMITH: Certainly, thank you.

18 Professor Norrie welcome back. Can I ask you to
19 take the oath again please.

20 PROFESSOR KENNETH NORRIE (affirmed)

21 LADY SMITH: Do sit down and make yourself comfortable.

22 Mr MacAulay.

23 Questions by MR MacAULAY

24 MR MacAULAY: Good morning again, Professor Norrie. When
25 you were here earlier this year you spoke to parts 1 and

1 trouble. The practice in the law before 1968 -- and
2 I think this came out particularly in part 2 of my
3 report -- was very much to remove a child from its
4 home -- if it was being neglected or abused, to remove
5 the child from its home, hopefully find foster care for
6 that child, but keep the child away permanently, or at
7 least in the long-term. It was assumed before this that
8 the way to deal with children in trouble was almost to
9 insulate them from the family environment from which
10 they came.

11 By the 1960s, however, it was apparent, at least to
12 the social work profession, that that's not what
13 happened in practice, that children tended to be removed
14 and they would be returned home. So one of the
15 important things about the 1968 Act is that it attempted
16 to reflect this change in order to perceive children
17 being removed from home as a temporary measure, to
18 create mechanisms to allow the social work services to
19 work with families, rather than against families, and in
20 that way to recognise the fact that children tended to
21 be removed only on a temporary basis. They were going
22 to go back home, but what you needed to do actually is
23 to tackle the underlying problems within the family, the
24 child wasn't to be seen in isolation as somebody to be
25 protected from its family, but the reality was the child

1 would go back to its family and therefore you really had
2 to tackle the underlying issues within the family as
3 a whole. I think that's the underlying policy aims of
4 the 1968 Act.

5 Q. Was the genesis, or at least part of the genesis, of the
6 Act the Kilbrandon report in 1964?

7 A. Yes, to a large extent. What we mainly remember the
8 1968 Act for today is the creation of the establishment
9 of the Children's Hearing System, which was the major
10 outcome from the Kilbrandon Committee report.

11 Q. Yes. So far as the Children's Hearings System is
12 concerned, Kilbrandon did provide views on that but in
13 fact there was a White Paper, I think, that --

14 A. Yes.

15 Q. -- took that a bit further forward.

16 A. That is right. The government, a couple of years after
17 Kilbrandon, produced its White Paper, basically
18 accepting most of the proposals from Kilbrandon, though
19 it departed from Kilbrandon.

20 The Kilbrandon Committee wanted to build upon the
21 1948 Act's approach of having a dedicated Children's
22 Department. The White Paper, on the other hand,
23 suggested that, in fact, you should see social services
24 in the round, and this ties in very much with what
25 I said a few minutes ago about seeing the family as

1 a whole and seeing the child within the context of the
2 family.

3 So what the White Paper suggested was drawing up --
4 creating social services departments or social work
5 departments, as they tended to be called in 1968,
6 dealing with all social issues that faced not only
7 children but families in general.

8 Q. Perhaps if you turn to page 1974 of the report, I think
9 you summarise the first few pages. I think you say
10 there that the 1968 Act and the policy behind it did
11 recognise that there was a place for residential
12 establishments on the care landscape.

13 A. Yes. This was a change in the law and policy in the
14 1968 Act and quite an important one. The 1948 Act had
15 very much taken -- as a result of the earlier
16 Clyde Report, 1946, it had taken the approach that
17 residential care was very much to be discouraged, that
18 the children, if they are removed from their families,
19 should go into a family setting, a foster care setting.
20 That was given legislative preference in the 1948 Act.

21 By the 1968 Act it becomes foster care becomes
22 simply one of the options and not a legislative
23 preference and both the White Paper and Kilbrandon both
24 recognised that there is a place for some children for
25 residential care and that would be a better environment

1 to deal with the particular problems that an individual
2 child faced.

3 Q. But if you look then to page 1975 of the report, towards
4 the top, you indicate there that:

5 "The plan was that there would be one set of rules
6 governing all residential establishments in which the
7 state accommodated children (other than for mental
8 health reasons)."

9 A. Yes, this was another change that -- there were
10 a variety of residential establishments from remand
11 homes, approved schools, local authority, children's
12 homes, voluntary children's homes, and each of these
13 were subject to a different set of rules and
14 regulations.

15 One of the aims of the 1968 Act was to create
16 an overall category of what today we call residential
17 establishments, to which the same types of rules and
18 regulations would apply.

19 Q. And following the 1968 Act, did the term "approved
20 schools" then disappear from the scene?

21 A. Yes.

22 Q. Although I think we know that thereafter there is
23 reference to List D schools.

24 A. Yes.

25 Q. Do you know how that came about?

1 A. I don't actually. I have never found anything in the
2 legal literature or the legal materials that I have been
3 looking at that actually used the phrase "List D
4 schools".

5 Q. I think we understand from other evidence we heard that
6 there was a list kept within the powers that be and on
7 that list what had been approved schools were D on the
8 list and that may be the explanation. In the event,
9 a List D school was effectively a former approved
10 school?

11 A. That is correct. The approval continued, even after the
12 1968 Act.

13 Q. But just looking to the sentence I have read out to you,
14 if we look at the footnote that you have allocated to
15 that proposition, you say in fact that in the event the
16 existing separate rules continued to govern approved
17 schools and children's homes for another 20 years after
18 the passing of the 1968 Act.

19 A. Yes, that is correct. The existing rules applied until
20 such time as new statutory instruments were passed and
21 it really wasn't until 1988 with the Residential
22 Establishment Rules that gave effect to the structure
23 set down in the 1968 Act.

24 Q. You mentioned already there was to be a single agency
25 with oversight of children in care and that was

1 effectively what became the Social Work Department.

2 A. Yes.

3 Q. Does it follow from that that the previous children's

4 departments were subsumed --

5 A. Yes.

6 Q. -- under that new agency?

7 A. Yes, they were absorbed into it.

8 Q. But the Social Work Department wasn't just directed

9 towards the care of children --

10 A. That is right.

11 Q. -- is that right?

12 A. That is right, it is all social services. All social

13 services in the control of the local authorities.

14 Q. If we look at page 1976 of your report, I think you

15 tried to summarise there the major changes contained in

16 the 1968 Act, is that right, moving on in the next

17 couple of pages?

18 A. Yes.

19 Q. Can you just summarise these for us? You talk about the

20 "new administrative structure", for example; is that the

21 Social Work Department?

22 A. Well I have already talked about that structure that was

23 created. There were a number of other things that the

24 1968 Act did. It imposed a number of new duties on

25 local authorities. It built upon some of the duties --

1 it re-enacted some of the duties from the 1948 Act. It
2 built in a number of additional ones.

3 Section 12 of the 1968 Act, for example, imposed
4 a duty on all local authorities to promote social
5 welfare by providing advice, assistance and facilities
6 on such a scale as may be appropriate in their areas.
7 That allowed local authorities to be much more proactive
8 and much more preventative than they had been before.
9 They had duties to -- under the 1948 Act, they had
10 duties to receive children into their care. This was
11 almost suggesting they should go out and look for
12 children who were in trouble in whatever way. They had
13 to promote social welfare in the sense of identifying
14 where there were families in trouble and offer such
15 advice, assistance, and sometimes even financial
16 support, as would avoid the child and the family as
17 a whole getting into such difficulty that more drastic,
18 by which I mean compulsory, measures would be necessary.
19 So I think that's an important set of sections in the
20 1968 Act.

21 Q. You say it is still in force today, section 12?

22 A. Yes, it is.

23 Q. Let's just look at the section itself. It might be
24 helpful. It is at LEG.001.001.2333. That will come on
25 the screen in a moment. Do you have it on your screen,

1 professor?

2 A. I think it is coming.

3 Q. It is now on I think. Section 12(1):

4 "It shall be the duty of every local authority to
5 promote social welfare by making available advice,
6 guidance and assistance on such a scale as may be
7 appropriate ..."

8 Moving on to the next page:

9 "... for their area and, in that behalf, to make
10 arrangements and provide or secure the provision of such
11 facilities including the provision or arranging for the
12 provision of residential and other establishments as
13 they may consider suitable and adequate."

14 A. Yes.

15 Q. I think that's essentially what you reflect in your
16 report.

17 A. Yes.

18 Q. You make reference to what Lord President Rodger said in
19 Robertson v Fife Council. Effectively, he is
20 emphasising the importance of section 12(1).

21 A. Yes.

22 Q. The point you make on that page about --

23 LADY SMITH: Do you want to go back to the text of the
24 report? We have still got the 1968 --

25 MR MacAULAY: Right, we are back to page 1977. I think

1 I took you to what Lord Rodgers said in
2 Robertson v Fife Council. Just moving up a few lines
3 from that, the comment you make, I will read it out:

4 "The social work profession has used the statute
5 imaginatively."

6 Can you explain what you meant by that?

7 A. Yes, I'm quoting other writers at that point. This was
8 an article written by two senior social workers in
9 a book.

10 I think the point they were making there, and in
11 a sense I'm endorsing it, is that section 12 inevitably
12 simply provides the bare bones and that its use really
13 turns on how practitioners on the ground interpret it
14 and apply it.

15 I think they were suggesting that section 12 has
16 been used quite extensively, for example, providing
17 financial support to families to pay rent, things like
18 that. That avoids eviction and homelessness and much
19 more difficult circumstances for the child. Section 12
20 doesn't actually say social services departments can pay
21 rent, but some social work departments certainly took
22 that approach.

23 Q. Moving on to page 1979, as you have touched upon
24 already, towards the bottom of that page, the shift in
25 policy from what had gone before, the boarding out

1 preference that had so marked the Act disappeared and
2 instead the Act simply listed as alternatives the way in
3 which the local authority could discharge their duties.

4 A. Yes.

5 Q. That's Section 21 of the Act?

6 A. That is right. I think that's quite a significant
7 change because the 1948 Act -- there is a lot in the
8 Parliamentary debates on the 1948 Act about how
9 important it was to emphasise foster care, boarding out,
10 as opposed to any other form of care. There are
11 suggestions in 1948 that residential care were dark and
12 forbidding places, and that might well have been true in
13 1948.

14 By 1968 it comes to be recognised that foster care
15 is appropriate for some children, but there will
16 nevertheless be other children that a short period in
17 residential care might be the best way forward.

18 I think this is explained by that word "short" that
19 I said because, again, under the 1948 Act -- and before
20 then it was assumed you take the child away and keep it
21 away effectively until it's grown up. By 1968 it is
22 accepted that sometimes the best approach is to remove
23 a child from a difficult environment for a short period
24 of time to allow social services to work with the
25 families, to resolve whatever -- or ameliorate whatever

1 problems there are to allow the child's quick return
2 home.

3 Q. Can I take you to section 59 of the 1968 Act. That's at
4 page LEG.001.001.2361.

5 A. My page numbers are a bit different than this from
6 what --

7 Q. This is the actual Act I'm taking you to, this section.

8 A. I see.

9 Q. It should come up shortly. I just want to ask you about
10 this section. This part, part IV, is headed
11 "Residential and Other Establishments" and we read:

12 "It shall be the duty of a local authority to
13 provide and maintain such residential and other
14 establishments as may be required for their functions
15 under this Act or arrange for the provision of such
16 establishments."

17 We go on to read that:

18 "[They themselves] could provide such
19 establishments, join with another local authority in
20 providing those establishments, or secure the provision
21 of such establishments by voluntary organisations or
22 other persons, including other local authorities."

23 This was a duty to either do it themselves or
24 arrange for these establishments?

25 A. Yes.

1 Q. I think you tell us in your report -- and while we have
2 the Act in front of us, and this is at 3202 -- I'm
3 sorry. I will just take from your report that the 1968
4 Act restates the welfare principle in relation to the
5 best interests of the child.

6 A. Yes.

7 Q. That is correct, isn't it?

8 A. Yes.

9 Q. I think I was just going to take from you that that's
10 again restated in the 1975 Act that we will look at
11 shortly.

12 A. Yes.

13 Q. 1975?

14 A. 1975. It is reworded in the 1975 Act.

15 Q. If we go back to your own report -- and this is at
16 INQ.001.001.1980 -- you make mention there to the report
17 by Sheriff Kearney into child care policies in Fife.
18 What's the context of that?

19 A. The context of that was that an official committee of
20 inquiry was set up in the early 1990s as a result of
21 a number of complaints that had been made in Fife
22 because it seemed that Fife Regional Council, as it was
23 at that time, had itself adopted a policy strongly to
24 preference foster care and the suggestion had been that
25 it had removed resources from residential care to place

1 resources into foster care. It had -- the was
2 suggestion that the Fife Regional Council had instructed
3 or strongly encouraged the social workers to make
4 recommendations to the children's hearings based on
5 a foster care outcome as opposed to a residential care
6 outcome.

7 The Children's Panel got a bit concerned about that
8 on the basis that it was reducing their range of choices
9 in a very practical way. So this committee was set up
10 under the chairmanship of Sheriff Kearney to look at
11 these policies to see whether they were consistent with
12 the law and he discovered that Fife Council did indeed
13 have a preference for foster care, very similar to what
14 we had seen between 1948 and 1968, and he concluded that
15 it was -- I think the word he used was "simplistic" or
16 "oversimplistic" -- to work on the assumption that
17 foster care is likely to be best. He suggested, and it
18 has to be right, that each case has to be looked at
19 individually without any preconceived notions about what
20 the best outcome is going to be.

21 Q. And that's the policy that underlines the 1968 Act?

22 A. I think so, very much, yes.

23 Q. Can I take you on then to page 1983 of your report. You
24 have already mentioned, reading towards the top of the
25 page, that there was "the creation of this single agency

1 within local authorities" and that's the Social Work
2 Department. But you also mention there that the 1968
3 Act also effected a significant shift of responsibility
4 from central to local government. Can you elaborate on
5 that?

6 A. Yes. What I was referring to there was the fact that
7 before 1968 a number of the registration of services,
8 particularly with approved schools for example, the
9 registration had to be with the Secretary of State, in
10 other words with central government. What the 1968 Act
11 did was to put these sorts of activities, registration
12 and approval of approved schools, in the hands of the
13 local authorities.

14 Q. You also point out that the creation of the Children's
15 Hearing System also placed new obligations on the local
16 authority.

17 A. Yes, that is right. For the first time we are told who
18 has the responsibility to give effect to whatever order
19 the decision-making body makes. Prior to the 1968 Act
20 it was the juvenile courts typically who made orders and
21 these orders were followed but there was no statutory
22 provision actually identifying who had the ultimate
23 responsibility to ensure the order was given effect to.

24 What the 1968 Act does, as part of the creation of
25 the Children's Hearing System, is to impose

1 an obligation on the local authority, and one it has had
2 ever since to give effect, to the supervision
3 requirement.

4 The local authority has been, since 1968, very much
5 involved in the investigative processes that lead to
6 a children's hearing. So the local authorities are
7 obliged to share information with the reporter to draw
8 attention to the reporter if there's any issue of
9 concern that they have discovered, to share the
10 information with the reporter, and to allow the reporter
11 to bring the case before a children's hearing. Once the
12 children's hearing makes its decision, the local
13 authority then is the one with the obligation to give
14 effect to it.

15 The local authority also, since 1968, has had the
16 power to bring the case back. So it has to keep
17 a watching brief on the case because it has the power to
18 bring the case back to a children's hearing, for example
19 if circumstances have changed or if it thinks the
20 supervision requirement in its current form isn't
21 achieving what it is designed to achieve.

22 Q. Indeed, it is the Children's Hearing System that you
23 next address on page 1984 of your report. Indeed,
24 I think you quote yourself and your colleague in
25 discussing it. What you say is -- I think you may have

1 mentioned this before actually -- that the changes
2 introduced by the 1968 Act in this connection were less
3 radical than is sometimes represented. Can you tell us
4 what you mean by that.

5 A. Yes, what I was meaning by that was that the actual
6 outcomes available to the decision-making body remained
7 very much as they were before. What changed was the
8 decision-making body. Prior to 1968 it was the juvenile
9 court, after 1968 it was the children's hearing.

10 But the outcomes that were available were really
11 much the same. The factors that they had to take into
12 account, particularly the welfare of the child, were
13 already there in the law. It wasn't that children's
14 hearings -- of course, the welfare of the child is
15 absolutely central to the decision-making process in the
16 children's hearing but that wasn't new. The juvenile
17 courts had the responsibility, the duty, since the 1930s
18 to take account of the welfare of the child. After 1968
19 it was to use the welfare of the child as the paramount
20 decision-making consideration.

21 Q. But you do go on to point out that there were important
22 changes nevertheless, for example, the fact that the
23 children's hearing retained jurisdiction over a case --

24 A. Yes.

25 Q. -- unlike the juvenile court.

1 A. That is right. Again, it is not quite a watching brief
2 but the juvenile court would make its decision and it
3 might be time limited or it might not be time limited,
4 but it never came back to the juvenile court unless
5 something else happened.

6 The design of the Children's Hearing System is very
7 much focused on bringing the child back to a review
8 hearing, at least on an annual basis, and often much
9 more regularly than that.

10 Q. And if you just --

11 LADY SMITH: I'm sorry, if I can just intervene for
12 a moment: correct me if I'm wrong, but I don't remember
13 the juvenile court having the power to do anything like
14 what a children's hearing can do in the context of
15 a supervision order, which can be very flexible
16 according to the needs of the individual child, if
17 compulsory measures of care are not being determined on.
18 That's not just coming back for review but hearing what
19 the plan is by the local Social Work Department to do in
20 supporting the family or checking on the child, or am
21 I forgetting something the juvenile court did do?

22 A. The juvenile court was able effectively to put the child
23 under supervision.

24 LADY SMITH: Right.

25 A. It could access the Probation Service. I think the

1 wording in the legislation was that the child could be
2 placed under the supervision of a probation officer, so
3 it was very much tied into the Probation Service, which
4 achieved, in a sense, similar sort of outcomes from what
5 we now would call a compulsory supervision order.

6 LADY SMITH: Except that some children weren't in trouble,
7 to use a colloquialism, themselves; the problem was they
8 were not being properly looked after or another child in
9 the house was doing something that caused concern.

10 A. That is right. But the juvenile courts had the power to
11 access the Probation Service not only for child
12 offenders.

13 LADY SMITH: Right.

14 A. One of the big political debates in the 1968 Act was
15 whether the Probation Service should come within the
16 Social Work Departments or should be kept separate and
17 the government were very strongly of the view that the
18 Probation Service should be absorbed within the social
19 work structures and the end result for the Children's
20 Hearing System is that, in a sense, we did little more
21 than change terminology, so instead of talking about
22 supervision of a probation officer, we talked about
23 supervision; it was the local authority that provided
24 the supervision and they had access to the
25 Probation Service.

1 LADY SMITH: But it then perhaps lost its association with
2 the criminal justice departments which probation
3 officers traditionally had?

4 A. That is right, yes.

5 LADY SMITH: I see, thank you.

6 MR MacAULAY: Then, on page 1985 of the report, you point to
7 another change and I think you think that this might
8 have been the most important of all and that's the
9 increased emphasis that the system placed on the child
10 and the family participating in the decision-making
11 process; is that correct?

12 A. Yes. The design of the children's hearing has always --
13 the very fact it is called "the children's hearing", you
14 hear children, it's a slightly superficial way of
15 putting it, but it has always been a central feature
16 that the panel members at the hearing will speak to the
17 child, will speak to the parents who are attending and
18 of course the parents have an obligation, a statutory
19 obligation, to attend the hearing.

20 So the whole design of what happens at the
21 substantive hearing is that you talk to the parents,
22 talk to the child, take account of the child's views and
23 allow them to participate in a much more fluid and,
24 hopefully, much more effective manner than would ever be
25 possible in a proper court setting.

- 1 Q. I think there have been more recent changes, for
2 example, in relation to Legal Aid and so on, for the
3 Children's Hearing System.
- 4 A. Yes.
- 5 Q. But in essence has the system changed in any fundamental
6 way from the time that you have been talking about?
- 7 A. Since 1968? I think there has been a remarkable
8 consistency in the way the Children's Hearing System has
9 operated. As time has gone on we have become more
10 conscious of the need for due process, of the need to
11 ensure effective participation, and that's when Legal
12 Aid stuff was -- came in after the Children's Hearing
13 (Scotland) Act (2011). But the underlying philosophy,
14 the underlying principles that the children's hearing
15 was established with are really very much alive and well
16 in practice today.
- 17 Q. I think at some point there was a provision that
18 a safeguarder could be provided for a child; is that
19 correct?
- 20 A. Yes.
- 21 Q. But that was really to protect the interests of the
22 child rather than affect the underlying philosophy of
23 the --
- 24 A. It doesn't affect the underlying philosophy.
- 25 The safeguarder came in under the 1978 Act but was

1 not given effect to until 1986. Both the 1995 Act and
2 the 2011 Act slightly changes what the safeguarder is
3 for. It has never been entirely clear from the
4 legislation precisely what a safeguarder is for, except
5 to safeguard the interests of the child and how you
6 interpret that really depends on particular
7 safeguarders, I suspect.

8 Q. On that same page, 1985, you again mention the
9 supervision order and in particular you say that the
10 home supervision order has become the more common
11 outcome imposed.

12 A. Yes.

13 Q. Is that in accordance with the general philosophy of the
14 1968 Act, trying to keep children in contact with
15 families?

16 A. I suppose it would be. I hadn't really thought of it in
17 that light. I think what the 1968 Act, or what the
18 creation of the Children's Hearing System, did was to
19 allow, much more favourably, the child actually to
20 remain at home, so that -- the point is to identify the
21 problems that this child has, if these problems can be
22 dealt with while the child is at home under supervision,
23 then all the better.

24 That actually maybe reflects a real change from the
25 Probation Service to a sort of supervision service

1 because, prior to 1968, supervision of a probation
2 officer certainly had been possible for decades, but it
3 wasn't probably the outcome in the majority of cases.

4 After 1968 it very quickly became -- and I think
5 Professor Kendrick's work shows this, I am sure I cite
6 that somewhere.

7 Q. You do.

8 A. It showed that home supervision where the child was
9 allowed to stay at home, social services came in and
10 provided the help and support while the child was at
11 home, that very quickly established itself as the result
12 in the majority of cases and perhaps the vast majority
13 of cases.

14 Q. You do say it has its limitations --

15 A. Yes.

16 Q. -- halfway down that paragraph.

17 A. Yes.

18 Q. Are you able to expand upon that?

19 A. Again, that's to lead into a quotation from Gilmour and
20 Giltinan, the two authors I was citing earlier.

21 They point out that, under the legislation at least,
22 the word "supervision" is used quite a lot, but there's
23 nothing in the legislation to tell us what supervision
24 actually means. It is therefore left to the Social Work
25 Department or social workers on the ground to design

1 appropriate help and support that will assist the child
2 and the limitations I was referring to was really the
3 limitations of legal guidance as to what's expected from
4 typically home supervision.

5 Once you remove a child from home, I would hope it
6 is rather clearer what's expected in terms of what you
7 have to provide with the child. But it is perhaps less
8 so when the child is -- remains at home. You could have
9 anything from a social worker coming in about the house
10 once a week, once every fortnight, to a very much more
11 intensive programme of work with any individual child.

12 Q. I suppose once a child is removed then the options
13 become foster care or residential care, essentially.

14 A. Well, that is right, yes.

15 Q. In the next section, at page 1986 of the report,
16 professor, you look at the Children Act 1975. Can you
17 just provide us some background into that particular
18 statute?

19 A. Well, the Children Act was -- as I think I say in my
20 report, or I quote somebody saying in my report, it
21 started out life primarily as -- with the intent of
22 making certain amendments to the adoption legislation,
23 but while it was going through, there was a number of
24 amendments that were attached to it.

25 Adoption, of course, doesn't come within the remit

1 of this Inquiry, but there were a lot of additions in
2 the 1975 Act that it was presumably felt convenient to
3 deal with at the time.

4 One we have already mentioned, the introduction of
5 safeguarders into the Children's Hearing System. That
6 came in in the Children Act (1975), though, as I said,
7 it wasn't actually given effect to until 10 or 11 years
8 after that.

9 Q. We will perhaps look at that. If we look at the Act, it
10 is LEG.001.001.3189, I think. That will come on your
11 screen. I think we have to start at the beginning of
12 the Act; I was actually going to go to the section.

13 It is at page 3141. That gives us the Act. We have
14 the Children's Act (1975) and if you turn to Delium
15 page 3189 -- it doesn't matter, I think we are having
16 problems with the technical stuff, but effectively what
17 the 1975 Act did in this connection was to amend the
18 Social Work (Scotland) Act by introducing a new 34A
19 section dealing with this issue of a safeguarder.

20 A. Yes.

21 Q. But the ten-year gap between the enactment of the 1925
22 Act and the introduction of the procedure, can you
23 explain why there was such a gap?

24 A. No, I can't. I am sure you have already noticed that it
25 is quite a common phenomenon for some reason that in

1 this area of law the primary legislation gives the power
2 to do things and then it doesn't come into force for
3 a decade or more. There's lots of examples throughout
4 this whole area.

5 Q. Can we then move on to what is section B in this report
6 and that's the section where you start looking at the
7 regulatory structures governing the accommodation of
8 children in the period 1968 to 1975.

9 A. Yes.

10 Q. You begin by looking at boarding out and fostering and,
11 as you point out section 5, I think it is subsection 3,
12 empowered the Secretary of State to make regulations
13 governing how local authorities would exercise their
14 boarding out functions.

15 A. Yes.

16 Q. You then draw attention to the regulations you mentioned
17 earlier I think, the Boarding Out and Fostering
18 (Scotland) Regulations (1985).

19 A. Yes.

20 Q. Up until 1985 then would the regulations that governed
21 fostering and boarding out be the regulations we looked
22 at under part 2 of your report?

23 A. Yes, that is right.

24 Q. And these were the Boarding Out of Children (Scotland)
25 Regulations (1959)?

- 1 A. That is right.
- 2 Q. So, again, we have this gap between the enactment of the
3 1968 Act and the regulations during which the older
4 regulations would still apply?
- 5 A. Yes.
- 6 Q. Can we just remind ourselves as to what was contained in
7 these before we move on. That means I will have to take
8 you back briefly to part 2 of your report, if I can do
9 that. If you look at this -- this is in
10 INQ.001.001.0114.
- 11 Again, we can deal with this quickly because we have
12 looked at it already, but there were provisions in 1959
13 dealing with the suitability of the foster homes.
- 14 A. That is right.
- 15 Q. Also, if you look at regulation 7, a vetting provision
16 in effect.
- 17 A. Yes.
- 18 Q. If we move on to page 0117. Again we can remind
19 ourselves that, for regulation 13, that there were
20 provisions in relation to the visitation of children
21 placed by local authorities.
- 22 A. That is correct.
- 23 Q. Can we see that, at this time, the timescale was that
24 a child boarded out would be, within the first 2 months
25 and thereafter at intervals of not more than 3 months,

1 be visited?

2 A. Yes.

3 Q. Can we then, against that background, look at the 1985
4 regulations. You start to look at these towards the
5 bottom of page 1988 of your report. If we go back to
6 that.

7 The first point you make is you give us a definition
8 of how "to foster" was defined in the regulations; is
9 that right?

10 A. That is correct, yes.

11 Q. Can you tell us what that is?

12 A. I'm not sure I'm understanding what you are asking.

13 Q. I think you give us a definition of what was meant --

14 A. In the 1985 regulations?

15 Q. Yes.

16 A. Yes. That defined the phrase "to foster" as:

17 "To arrange for a child to live as a member of the
18 family of a person who is not the child's parent or
19 guardian or who undertakes care for him other than in
20 accordance with the Adoption Agency Regulations."

21 It includes boarding out, which was the phrase used
22 in the 1968 Act.

23 Q. But is this the first time we get a definition of what
24 "to foster" means?

25 A. I suppose, yes.

1 Q. You go on to talk about fostering panels and approvals
2 of foster parents.

3 A. Yes.

4 Q. Can you tell us about what the provisions were for that.

5 A. Yes, the previous law -- it did have a vetting process
6 but -- and it listed the -- 1959 and earlier regulations
7 had listed the types of environment in which children
8 ought not to be boarded out and it also imposed on the
9 local authorities a requirement to visit potential
10 foster parents beforehand and just check that they would
11 be suitable. But there was no specification of what
12 amounted to suitability.

13 So, one of the, I think, very important developments
14 in the 1985 regulations was that local authorities were
15 required to set up fostering panels who were responsible
16 then for the vetting -- the pre-fostering vetting of
17 potential foster carers. For people who wanted to
18 become foster carers, these panels would be the ones
19 that would make the appropriate investigations into
20 their suitability and make recommendations as to whether
21 they were appropriate people.

22 Q. If we look then at the regulations themselves,
23 LEG.001.001.4008, we can see on the front page of the
24 regulations that they came into operation on
25 1 April 1986.

- 1 A. Yes.
- 2 Q. If you turn to page 4009, are regulations 4 and 5
3 dealing with the appointment and composition of
4 fostering panels?
- 5 A. That is correct, yes.
- 6 Q. You have mentioned what these are and can we read 5:
7 "A care authority shall satisfy itself that the
8 numbers, qualifications or experience of individual
9 members of a fostering panel will enable it effectively
10 to discharge its functions under regulation 6."
- 11 A. That is right.
- 12 LADY SMITH: But that would mean you might not have
13 consistency between one authority and another --
- 14 A. Yes.
- 15 LADY SMITH: -- as to what sort of people they felt were the
16 people that ought to be on their fostering panels.
- 17 A. That's absolutely correct.
- 18 LADY SMITH: One authority might say, "We want people with
19 qualifications and experience in X, Y, Z," and another
20 might say, "We just want people who are prepared to do
21 this and are interested in children".
- 22 A. Yes, that's absolute correct. There was quite
23 an interesting case yesterday, an opinion issued by
24 Lord Brailsford, actually on kinship care --
- 25 LADY SMITH: Yes.

1 A. -- but in a sense it is just the same as this. This was
2 a judicial review from, I think it was, grandparents who
3 had sought to be appointed as kinship carers.
4 Lord Brailsford pointed out -- and I didn't make much of
5 it in my report -- maybe when I am rewording it up
6 I will make a wee bitty more than this. But he pointed
7 out exactly the point you made: that it is left to the
8 panels to come to their own opinions about these matters
9 and that there's not necessarily any appeal mechanism
10 for somebody who feels disadvantaged or prejudiced
11 against, though the availability -- this was a case of
12 judicial review -- the availability of judicial review
13 of the local authority's decision is there. But that's
14 the only mechanism by which you could challenge
15 a decision of a fostering panel either to appoint
16 somebody as a foster parent or to remove their
17 appointment, or as kinship carer.

18 LADY SMITH: Yes.

19 MR MacAULAY: I think another innovation you point to is
20 that the care authority was now obliged to enter into
21 a written agreement with the foster parents.

22 A. Yes, that is right.

23 Q. There are provisions which indicate what should be
24 contained in such agreements?

25 A. That is right.

- 1 Q. I think later on we may come to this: there was
2 provision in such agreements that there shall be no
3 corporal punishment.
- 4 A. Yes, that came later. That came in the 1990s when these
5 regulations were replaced by equivalent similar
6 regulations, which, on this particular point, is much
7 the same, but as part of the agreement the foster carers
8 had to agree. I think it was 1996. As part of the
9 agreement they had to undertake not to visit corporal
10 punishment on the children they were caring for.
- 11 Q. So this would be a difference between the parents'
12 right, if you want to call it that, of chastisement, the
13 birth parent's right of chastisement's and a foster
14 parent at that point in time --
- 15 A. After 1996, that would be potentially quite
16 a significant difference. It is actually all of a one
17 with what has happened since 1968 with foster carers.
18 They have come to be recognised much more, in the later
19 decades, as performing a professional function.
20 Previously before 1968 they were seen as providing
21 a family environment. Particularly after the 1985
22 regulations, foster carers had to adopt a much more
23 professional attitude to the role. They had to keep
24 records, for example, they had to liaise with the social
25 services department. They were no longer statutorily

1 obliged to befriend the child, of course one hopes it is
2 a friendly atmosphere, but just there is an increasing
3 professionalisation of the role. Professionals, since
4 the mid-1980s, have not been allowed to hit children and
5 so foster carers are fitting very much more into that
6 category rather than a substitute family.

7 LADY SMITH: Of course, as you are probably aware,
8 Professor Norrie, there has been Employment Tribunal
9 litigation querying what the employment status now is of
10 a foster parent --

11 A. Yes.

12 LADY SMITH: -- worker, employee, because then certain
13 rights would flow if it is established that they are one
14 or the other --

15 A. That has been an ongoing issue. The Scottish Children's
16 Reporter Administration some years ago challenged the
17 recognition -- before the 2011 Act -- of foster carers
18 as relevant persons within the Children's Hearing
19 System --

20 LADY SMITH: I remember that.

21 A. -- on the ground that they were employees and that's
22 excluded from the definition of relevant person.

23 MR MacAULAY: Another point you make -- and this is on
24 page 1991 -- is that now, under these regulations,
25 a child who is placed with a foster parent, the care

1 authority was obliged to provide certain information to
2 the foster parent about the child.

3 A. Yes.

4 Q. For example, background, health and emotional
5 development, and so on.

6 A. Yes.

7 Q. You tell us also that part of that information would
8 include information about the child's own wishes about
9 the placement.

10 A. Yes.

11 Q. Can I then just look at the issue of monitoring under
12 these regulations. If I could take you to
13 LEG.001.001.4014. We should be looking at
14 regulation 18, where we have some information as to what
15 monitoring the care authority should put in place in
16 connection with a placement made under the Act. Can you
17 just summarise the position for us.

18 A. Yes, the local authority, the care authority, which is
19 the local authority, is obliged to take steps. It is
20 obliged to be proactive and take such steps as are
21 necessary to satisfy itself that the placement continues
22 to be in the interest of the child. So it is an ongoing
23 obligation to ensure that it is satisfied that the
24 interests of the child are served -- continue to be
25 served by the child remaining where it is.

1 To do so, the care authority is obliged to ensure
2 that the child is visited one week -- within one week of
3 the child actually being placed with the foster carers
4 and thereafter at intervals of not more than 3 months
5 and any other occasion it thinks it is necessary.

6 Q. I think that's something of a change from the 1959
7 regulations where I think the first visit was to be
8 after 2 months --

9 A. That is right, yes.

10 Q. -- and thereafter at intervals of 3 months.

11 A. Yes. Of course, before 1959 it was at intervals of
12 6 months. So we are gradually, as the decades go by,
13 requiring more visits, more monitoring of the placements
14 to ensure that they continue to be appropriate for the
15 child.

16 Q. You also touch upon -- this is at page 1993 of your
17 report -- the termination of the placement. So there
18 may come a point in time when the placement of a child
19 may be terminated.

20 A. Yes.

21 Q. What reasons would have a bearing on that?

22 A. The local authority, as part of these monitoring
23 obligations that we just looked at, has to be
24 continually asking itself: does it continue to be in the
25 best interests of the child to be here?

1 As soon as the answer to that question is "no", the
2 local authority is obliged to bring that placement to
3 an end. The answer would be "no", I suppose, when it
4 comes to the view that some other arrangement, either
5 a different placement or allowing the child back home or
6 perhaps a residential placement, would actually be
7 better for the child's interests.

8 Q. I want to return to fostering shortly because I want to
9 follow it through rather than break up and look at other
10 types of care. But perhaps before doing that, can
11 I just take you to what is section D of your report,
12 which is headed "Preparing for the Future" at page 2024.
13 I just want to look at this because I'm going to move on
14 beyond 1995 in a moment.

15 A. Yes.

16 Q. You tell us there that in the early 1990s there was
17 a number of policy developments that suggested the whole
18 system of looking after children required what you call
19 a substantial overhaul.

20 A. Yes.

21 Q. Can you give us some understanding of what these were.

22 A. Yes, I have already mentioned one of them, the Kearney
23 report, into how practice operated in Fife was one of
24 the elements. There was the Orkney situation, in,
25 I think -- which blew up in February 1991, if I remember

1 correctly, which suggested there were underlying
2 problems.

3 There had also been a report by the Chief Inspector
4 of Social Work Services, Mr Skinner, who was looking at
5 residential care. That in a sense reflected very much
6 the issues that came out from the Kearney report. There
7 were other cases, I think, which I have not mentioned.

8 There was a case in Ayrshire in which children had
9 been kept away from their parents for a very, very long
10 number of years and it was then discovered by new
11 evidence that they ought not to have been, but there was
12 no legal mechanism to deal with that sort of situation.

13 So there were a whole host of issues in particular
14 parts of the country which all seemed to come together
15 in the early 1990s at the same time the government was
16 looking at what became part 2 of the 1995 Act. In any
17 case, they all sort of fed into each other and then, of
18 course, we got the 1995 Act.

19 Q. You mentioned the Orkney Inquiry by Lord Clyde.

20 A. Yes.

21 Q. There is one part I want to take you to and I will put
22 the report on the screen, it is LEG.001.001.6528. One
23 of the issues that Lord Clyde addressed in his report
24 and his recommendations was to do with the profession of
25 the social worker.

1 A. Yes.

2 Q. If we turn to page 6878 at paragraph 19.8 -- it is
3 paragraph 19.8 where Lord Clyde is considering what he
4 calls:

5 "One critical area for reappraisal is the scope of
6 basic qualifying training."

7 I think you are aware of what Lord Clyde is
8 addressing here, professor.

9 A. Yes.

10 Q. If we read on towards the bottom, what he says is that:

11 "Training to work with a wide variety of clients who
12 now seek social services, including the complex work in
13 matters of child sexual abuse, which has only recently
14 acquired a considerable prominence, cannot be adequately
15 undertaken in two years. A three-year course appears to
16 be common in other Member States of the EEC ..."

17 So he is envisaging there that the training course
18 of two years, which I think was the course available at
19 that time, was not adequate.

20 A. Yes.

21 Q. He does make a recommendation -- if we turn to
22 page 6905. If we look at recommendation 172, what he
23 says is:

24 "A three-year qualification course for social
25 workers should be introduced as soon as possible."

- 1 A. Yes.
- 2 Q. To your knowledge, has that happened?
- 3 A. Most universities that offer a social work programme
4 offer it at undergraduate level as a three-year
5 programme, but that's not a legal requirement to become
6 a social worker -- my mind has gone blank as to the body
7 that governs the social work profession in Scotland.
- 8 Q. Social Work Services Group?
- 9 A. The Social Work Services Group or Council -- the one
10 that governs the social work and you have to be
11 registered with them to be a registered social worker --
12 They still require a minimum of two years. So it is
13 possible to become a qualified social worker in
14 two years. As I say, most universities in Scotland will
15 offer a programme that is three years, but it is not
16 a legal requirement.
- 17 Q. If we look at your report then, if we go back to your
18 report, at INQ.001.001.2027, it is towards the bottom of
19 the page, and you say that:
- 20 "Many of the recommendations in the Clyde Report ...
21 were given effect to by the Children (Scotland) Act
22 (1995); the extended qualification course for social
23 workers was not, at a continuing cost to the most
24 vulnerable members of our society."
- 25 A. Yes.

1 Q. So the context to that is the way you have explained it:
2 the course may be available, but it is not necessary to
3 do three years to get the qualification?

4 A. That is correct. There will be social workers
5 practising in Scotland, qualified social workers
6 practising in Scotland, who have done a two-year
7 programme. I suspect the majority have done
8 a three-year programme, but that may be a matter you
9 want to explore further with the likes of
10 Professor Kendrick.

11 MR MacAULAY: Yes, I will.

12 My Lady, that might be an appropriate point for
13 a short break.

14 LADY SMITH: Very well. We will have a break now, please,
15 for 15 minutes before we resume again.

16 (11.35 am)

17 (A short break)

18 (11.50 am)

19 LADY SMITH: Mr MacAulay.

20 MR MacAULAY: My Lady.

21 I am going to go back to fostering,
22 Professor Norrie, but before I do, I want to take you to
23 part 4 of your report, so I can see how the law
24 developed from 1995 to the present day.

25 We can find part 4 of the report at page 2260. Just

1 to remind ourselves, here you are dealing with the
2 position post-1995?

3 A. Yes.

4 Q. At 2262 you quote from Gilmour and Giltinan in
5 connection with the 1968 Act. Can you tell us what
6 message you are seeking to provide us with there?

7 A. Yes. I suppose the message is that the Social Work
8 (Scotland) Act (1968) had, in a sense, outlived to
9 a large extent its usefulness, though quite a lot of it
10 is still extant in our law.

11 As a result of a number of these reports that I was
12 talking about just before the break are a pretty severe
13 re-enactment of what we have with amendments was
14 required and that led ultimately to part 2 of the
15 Children (Scotland) Act 1995.

16 Q. And that's the part we are particularly concerned with
17 here --

18 A. Yes.

19 Q. -- because part 1 still deals with other matters.

20 A. Yes.

21 LADY SMITH: There had also been the arrival of the UN
22 Convention on the Rights of the Child at the time,
23 hadn't there?

24 A. Yes, very much so.

25 LADY SMITH: The principles of which are strongly reflected

1 in the 1995 Act.

2 A. That is right, yes.

3 MR MacAULAY: On page 2263 you quote from Lord Fraser of
4 Carmyllie when he was, I think, presenting the bill at
5 the second reading.

6 A. Yes.

7 Q. Essentially can you summarise what message he was
8 conveying?

9 A. He was trying to really summarise what this part of the
10 Act aimed to do, which was really to sharpen up the
11 powers and responsibilities of local authorities
12 primarily and also to make a number of amendments to the
13 Children's Hearing System, to a large extent, as
14 her Ladyship has just said, to make sure that we were
15 entirely consistent with the United Nations Convention
16 on the Rights of the Child and probably also the
17 European Convention on Human Rights. That wasn't
18 specifically explained there, but this was the aim of
19 the amendments to the Children's Hearing System. It
20 wasn't a fundamental restructuring of that by any means
21 but a number of changes just to ensure our consistency
22 with particularly the UN convention.

23 LADY SMITH: Yes. Just thinking of the convention -- the
24 Human Rights Convention, by this time there had been the
25 challenge that went all the way to Strasbourg by parents

1 who weren't getting access to documents for children's
2 hearings, McMichael -- I was going to say Carmichael --
3 which did alert quite a number of people to the need to
4 think Human Rights Convention in the context of
5 litigation to do with children and children's hearing
6 cases in the way they had never done before.

7 A. That's absolutely right. The decision in McMichael came
8 out in about July 1995, as this bill -- I think it was
9 in committee stage at the time. So there was a number
10 of amendments subsequently, particularly in relation to
11 access to -- that tended to come in with the regulations
12 afterwards.

13 LADY SMITH: Of course, the challenge had arisen before
14 1995 --

15 A. Yes.

16 LADY SMITH: -- with the parents who were determined that
17 the Convention was not being accorded with.

18 A. Yes, and they were right.

19 LADY SMITH: Yes, they were. It is very, very hard to
20 protect your own position in the hearing if you don't
21 know what's in the documents they are looking at.

22 MR MacAULAY: So to pick up the point he makes, for example
23 he does talk about in that first paragraph of more being
24 required to take account of a child's view in reaching
25 a decision.

- 1 A. Yes.
- 2 Q. He also, I think in the next paragraph, talks about
3 local authorities having additional powers to provide
4 assistance to young people up to the age of 21; has that
5 been changed since then?
- 6 A. Yes, it has. The Children and Young People (Scotland)
7 Act (2014) increased that age to --
- 8 Q. 26?
- 9 A. 26.
- 10 Q. He goes on to say that children's hearing would retain
11 their central position in connection with child welfare.
- 12 A. Yes.
- 13 Q. Perhaps to pick up a point in the penultimate paragraph
14 on page 2264. I think this follows up on one of
15 Lord Clyde's recommendations, that what was then called
16 a place of safety order would be given a new name and
17 that's a child protection order.
- 18 A. That is right -- with review and appeal mechanisms
19 written into the design.
- 20 Q. I think you think that perhaps the most radical change
21 then in the Act itself was the much increased focus on
22 listening to children.
- 23 A. Yes, possibly "radical" is putting it a bit strongly,
24 but I think that's -- with hindsight, part 2 of the 1995
25 Act isn't a radical restructuring of how we do things,

1 but it does contain a number of really important
2 developments, particularly designed to take account of
3 things like the United Nations Convention on the Rights
4 of the Child.

5 Listening to children had always been inherent
6 within the Children's Hearing System, but there's a much
7 greater focus in the 1995 Act than you will find in the
8 1968 Act in the regulations on listening to children.
9 There is much more about how you go about acquiring the
10 views of the child. There is much more about giving the
11 child a chance to express their views, to check that
12 these views are accurate, to allow the child to write
13 down what their views are and present a sort of written
14 statement instead of being asked to speak in front of
15 a room of strangers. There's all of that in the 1995
16 Act and the regulations that followed fairly soon after.

17 Q. If we wrote this in the Act itself -- and if I can put
18 that on the screen, it is at LEG.001.001.0138. If we
19 turn to page 0155, we start to look at part 2. We can
20 see that part 2 is headed:

21 "Promotion of children's welfare by local
22 authorities and by children's hearings [etc]."

23 A. Yes.

24 Q. If we just look at section 16, we can see that:

25 "Where under or by virtue of this part of this Act,

1 a children's hearing decides or a court determines any
2 matter with respect to a child, the welfare of that
3 child throughout his childhood shall be their or its
4 paramount consideration."

5 Then we read on:

6 "In the circumstances mentioned in subsection (4)
7 below, a children's hearing, or as the case may be the
8 Sheriff, taking account of the age and maturity of the
9 child concerned, shall so far as practicable: (a) give
10 him an opportunity to indicate whether he wishes to
11 express his views."

12 And so on. Does this reflect essentially what you
13 have been saying about giving the child the opportunity
14 or a greater opportunity of expressing a view?

15 A. Yes. It was probably only implicit under the previous
16 law that the child had a chance to speak, but it is made
17 very, very clear.

18 You go through this three-stage process. It is
19 unfair to demand of children that they express views so
20 you give them an opportunity to say whether they want to
21 express views. If they do, you give them the
22 opportunity, and then you have regard to these views.
23 It is a much tighter formulation than anything that went
24 before.

25 Q. If we move on to section 17 at page 0156. Again, this

1 is in connection with a local authority and at 17(1) we
2 see:

3 "Where a child is looked after by a local authority
4 they shall, in such manner as the Secretary of State may
5 prescribe ..."

6 We read about safeguarding, welfare and so on. At
7 subsection (3) we read:

8 "Before making any decision with respect to a child
9 whom they are looking after, or proposing to look after,
10 a local authority shall, so far as is reasonably
11 practicable, ascertain the views of the child."

12 So again it is reflected there.

13 A. Yes.

14 Q. Also the parents if one reads on, the views of the
15 parents.

16 A. This is a more significant change than the earlier one.
17 The earlier one tightened up the requirement to take
18 account of the child's views. The notion of the welfare
19 of the child had always been in our law for
20 decision-making bodies such as the courts and children's
21 hearings; what this provision does is impose that
22 obligation on the local authorities too, to take
23 account -- to make the welfare of the child their
24 paramount consideration.

25 Q. Moving on to the next page of your report then at

1 INQ.001.001.2266. Towards the top of the page you
2 mention there that there was some suggestion that there
3 ought to be an advocacy service for children and young
4 persons.

5 A. Yes.

6 Q. Who made that decision, where did that come from?

7 A. That came out of a report which the Scottish Government
8 or Scottish Executive at the time had commissioned
9 looking at the practicality of children giving their
10 views to examine to what extent that worked in practice.

11 That report, published in 2006, indicated a number
12 of practical problems for children. It is all very well
13 having the legislation saying children can express
14 views, but the reality is that a lot of children,
15 perhaps particularly the types of children who come
16 before a children's hearing, tend to be far less
17 articulate than most adults that will be sitting around
18 that table. So in that report, one of its
19 recommendations was that an advocacy service would be
20 very useful to assist children in properly
21 participating.

22 Q. I think you identify the report in footnote 13 on that
23 page.

24 A. Yes.

25 Q. "Big words and big tables," etc.

1 A. Yes.

2 Q. You tell us in your report that, as yet, this provision
3 has not been -- or this recommendation has not been
4 followed through into any form of legislation.

5 A. Well, it did go into legislation. It went into the
6 Children's Hearings (Scotland) Act of 2011 but it is one
7 of the -- I think it may now be the only provision in
8 the 2011 Act which has not yet been brought into force.

9 Q. Do you know why that is?

10 A. There have been a number of pilot studies done about how
11 an advocacy service would operate. There's -- I think
12 they have identified issues -- I don't know where the
13 Scottish Government is at the moment as to when they are
14 likely to introduce this valuable provision.

15 LADY SMITH: And yet, if the child is involved in some way
16 in a litigation for the court, there will be cover to
17 provide a curator ad litem for the child and represent
18 the child separately from parents.

19 A. Yes. I'm not convinced that the difficulties are -- we
20 are not reinventing the wheel here, which I think is
21 basically your point. I'm not convinced that the
22 difficulties justify the delay. I'm not sure why it's
23 taking us so long to get here.

24 LADY SMITH: Is it possible there is a concern about cost?

25 A. That's always possible. But none of these things come

1 cost free.

2 MR MacAULAY: You go on, on page 2267 of your report, to
3 look at the concept of and duties towards what you call
4 the "looked-after child".

5 The notion of the looked-after child, I think that's
6 taken over from the notion of a child in care; is that
7 right?

8 A. Yes. Though I think -- after 1995, it is more than just
9 a terminological difference.

10 Q. It is defined?

11 A. It becomes a term of art. The 1995 Act defines who is
12 a looked-after child and from that both the legislation
13 and the secondary legislation sets down a whole range of
14 duties toward looked-after children.

15 Q. Let's see how this is reflected in the Act then. If we
16 turn to the 1995 Act again at LEG.001.001.0156. If we
17 look at section 17(1) we can read that:

18 "Where a child is looked after by a local authority
19 they shall, in such manner as the Secretary of State may
20 prescribe: (a) safeguard and promote his welfare (which
21 shall, in the exercise of their duty to him, be their
22 paramount concern)."

23 And we can read on. If we move on to subsection (6)
24 on the next page, 0157, can we see there that any
25 reference in this chapter of this part to "a child who

1 is looked after by a local authority" is to "a child",
2 and we have (a), (b), (c) and (d) including, for
3 example:

4 "... for who they are providing accommodation under
5 section 25 of this Act."

6 A. That is right and that provision has been amended in
7 light of subsequent legislation.

8 Q. The reference to section 25, I can just follow that
9 through, at page 0161. This is the section that -- this
10 is section 25(1) and I just focus on this because it is
11 the first one that has been mentioned. This is a child
12 for whom no one has parental responsibility, is lost or
13 abandoned, or the person who has been caring for him is
14 prevented from providing him with suitable
15 accommodation.

16 A. Yes.

17 Q. If we then go back to your report, and if I take you to
18 page 2270 of the report, you have a section there
19 dealing with duties of local authorities. In
20 particular, you make some reference to section 19 of the
21 Act.

22 A. Yes.

23 Q. Can you just elaborate upon that provision for us?

24 A. Well, section 19 imposes on the local authority a fairly
25 general duty to have policies and to publish and keep

1 under review their plans for how they are going to
2 satisfy their obligations under the Act. It is not so
3 much focused on an individual child but the approach of
4 an individual local authority.

5 Q. You also mention that the 1995 Act imposed a new
6 obligation in relation to local authority co-operating
7 with each other.

8 A. Yes, they had to co-operate with each other.

9 Q. In connection with what?

10 A. In connection with the satisfaction of the obligations
11 in part 2.

12 Q. On page 2271 you are looking there, I think, at what one
13 might call -- in the second paragraph in particular --
14 aftercare. That's the paragraph beginning:

15 "Local authorities [are] obliged to find
16 accommodation."

17 That's in a position where no one has parental
18 responsibility for the child?

19 A. Yes, that is the section 25 -- the one we looked at
20 a minute ago.

21 Q. In the next -- if you look at page 2272, you provide
22 some information in relation to new orders that have
23 been made available by the 1995 Act.

24 A. Yes.

25 Q. The child protection order, for example.

1 A. Yes.

2 Q. Can you tell us about that? What does that do?

3 A. Well, the Child Protection Order came out of the
4 Clyde Report into the Orkney situation. It tightened up
5 very substantially what until then had been called the
6 "place of safety order". It is an emergency provision
7 allowing the state to act on really on an emergency
8 basis to remove a child from a situation of danger even
9 before that has been proved before a court of law.

10 The point of a Child Protection Order is that the
11 child will be kept away from their normal residence for
12 a very, very limited period of time until the eighth
13 working day after the order is made. Within that period
14 of time there is a chance to challenge the need for the
15 child to remain away from their parents. On the eighth
16 working day there has to be a children's hearing and
17 then the normal children's hearing process kicks in at
18 that stage.

19 On the eighth working day, if the hearing considers
20 that a child needs to remain away from their parents
21 during the hearing process, until a final decision is
22 made, then there's orders that the hearing can make. It
23 is not a Child Protection Order; that's the emergency
24 process that applies for that very limited period of
25 time.

1 Q. The next order you mention is the parent al
2 responsibilities order which replaced the old parental
3 rights resolutions under which a local authority could
4 assume to itself.

5 A. Yes.

6 Q. My recollection is that you weren't particularly keen on
7 that previous provision, but I may have misunderstood
8 that.

9 A. No, I don't think you misunderstood me at all. The old
10 resolution, assuming parental responsibilities, or
11 parental powers, was a process whereby the local
12 authority simply resolved to itself to take parental
13 power from the parents and vest them in themselves.
14 There were mechanics to challenge that and, if you
15 challenged it, it then went to a court of law, but it
16 was a pretty strong process and a very extreme outcome
17 to be done without any judicial involvement whatsoever.

18 It had been introduced in the 1948 Act, it survived
19 until the 1995 Act, and it had always come in for some
20 criticism. But the 1995 Act got rid of that process and
21 introduced a different process which still allowed the
22 local authority to acquire to itself parental
23 responsibilities and parental rights. The crucial
24 difference is they had to go to court to ask for them.

25 Q. On page 2273, you mention that there was a wholly new

1 type of order created which is the child assessment
2 order; can you tell us a little bit about that one?

3 A. Yes. It is a sort of preliminary order where --
4 sometimes there is a suspicion that there is a problem
5 with the child, perhaps in its health or development,
6 but the parents are refusing any access towards the
7 child. Previously the only way of dealing with that
8 situation was to say if the child -- if you are not
9 giving us access to your child, there's something
10 suspicious going on, so we can remove the child.

11 What the new order does is say, it is suspicion only
12 at this stage, we need to assess what the child is, we
13 don't necessarily need to remove the child, as with
14 a Child Protection Order, but we need to find out a wee
15 bitty more. So the court can make this new order,
16 a child assessment order, which simply allows the child
17 to be taken away for an assessment and the expectation
18 is that the child will be returned very speedily after
19 the assessment is done.

20 Q. I should perhaps have also taken you to the previous
21 paragraph where you mention the change made to the
22 parental responsibility orders by the Adoption of
23 Children (Scotland) Act (2009) --

24 A. Yes.

25 Q. -- which created the new permanence order.

1 A. Yes, that is right.

2 Q. What was the effect of the change?

3 A. Well, the parental responsibilities orders, under the
4 1995 Act, were superseded. That order was effectively
5 abolished and the new permanence order was put in its
6 place. The permanence order, in a sense, replaced two
7 different types of order: the parental responsibilities
8 order under the 1995 Act and also what used to be called
9 freeing orders under the adoption legislation. They
10 were sort of brought together into this really much more
11 flexible order that can be designed to deal with a whole
12 host of different situations.

13 The overall effect for a lot of children subject to
14 these orders is very similar to the parental
15 responsibilities order. The local authority will have
16 most of the parental responsibilities and rights but it
17 is rather more flexible -- the permanence order is
18 rather more flexible because under the old order the
19 local authority got everything. With the permanence
20 order the local authority will get what they need and
21 under the ancillary provisions, if certain parental
22 responsibilities or rights have to go to the foster
23 parents, they will get that. If the birth parents
24 should have some responsibilities maintained, they will
25 be able to maintain that.

1 The only crucial thing that the local authority
2 always has is right to determine the child's residence.
3 So the permanence order is rather more flexible than the
4 old parental responsibilities order.

5 LADY SMITH: You make the permanence order sound rather
6 easier to understand, so far as interpreting the
7 legislation is concerned, than I seem to recall having
8 to do in an Inner House case not all that long ago.
9 Would I be right? It takes a little bit of careful
10 manoeuvring through the wording of the legislation to
11 really get to the bottom of what they were trying to
12 achieve.

13 A. The legislation is not structured in a most accessible
14 fashion.

15 LADY SMITH: It is a very diplomatic way of putting it, if
16 I may say so.

17 A. But we have had decisions from both the Inner House and
18 the Supreme Court which have been very, very helpful in
19 clarifying what's actually going on here.

20 MR MacAULAY: The final order you touch upon, and created by
21 the 1995 Act -- this is on page 2274 of your report --
22 is the exclusion order and indeed you again quote
23 Lord Fraser in connection with that particular type of
24 order. What were they designed to do?

25 A. Well, the thinking behind the exclusion order,

1 I suppose, is good. What was presented to Parliament
2 was the scenario that a child might have been abused by
3 an abuser within the household. Might. There's no
4 proof at the moment. The child might have been abused.
5 Before 1995 the only option in that scenario is to
6 remove the child.

7 The purpose of the exclusion order is to give the
8 choice: either you remove the child or you remove the
9 suspected abuser. It was felt it would open up the
10 choices available to local authorities.

11 Q. You do not appear to have welcomed them with open arms
12 at the time from what you have confessed to in the
13 report?

14 A. Yes. I have always been a bit worried about exclusion
15 orders -- primarily, we are talking about protecting
16 children and it is important obviously that we protect
17 children as vigorously as we can. But at the moment we
18 are still talking about allegations and it always struck
19 me that it was a big thing to remove somebody from their
20 own home on the basis of an unproven allegation. In
21 a sense, with children, when a local authority had
22 removed the child, the local authority have
23 an obligation then to accommodate that child somewhere
24 else, but there was no obligation on the local authority
25 to accommodate the abuser. So simply excusing the

1 alleged abuser from the family home on the basis of
2 an allegation, to allow appropriate investigations to go
3 forward, I could understand why that was perceived as
4 a disproportionate action to take.

5 Q. You say that they have only been used very rarely.

6 A. Yes.

7 Q. Is that a matter of fact, is it?

8 A. I think it is a matter of fact because it is a choice.
9 Local authorities have the choice of what would be the
10 appropriate mechanism. What's become much more common
11 is a child assessment order to see the extent to which
12 a child actually has been abused.

13 LADY SMITH: So these are being commonly used?

14 A. The child assessment orders?

15 LADY SMITH: The child assessment orders.

16 A. Much more commonly than exclusion. I don't know the
17 figures but they are a recognised and used part of
18 social work practice.

19 LADY SMITH: Thank you.

20 MR MacAULAY: You summarise on that page, 2274, the changes
21 brought about by the 1995 Act. Can you perhaps put into
22 words what you are saying there in that final paragraph?

23 A. The final paragraph on 2274?

24 Q. Yes.

25 A. "Changes Since the 1995 Act." What I'm doing here --

1 and it is really an introduction to the next section, in
2 the structure of the overall report. What I'm trying to
3 do is to say that all the changes, possibly apart from
4 the new orders which we have just been talking about,
5 all the changes in the 1995 Act are not a radical
6 restructuring -- in part 2 anyway -- of what went
7 before.

8 I personally have found it really interesting doing
9 this report, looking at all of the legislation from the
10 20th century. The 1908 Act, the 1948 Act, the 1968 Act
11 really involved a change of direction. We kind of
12 assumed the 1995 Act was a big change of direction too,
13 but the more I think about it and see it in the context
14 of 100 years, part 2 of the 1995 Act wasn't a real
15 change of direction; it was a sharpening of our
16 processes. It was taking account of the -- particularly
17 the UN Convention. It was putting things in more modern
18 language and all of that was good.

19 I think the real changes have come since 1995. What
20 I was trying to say was that 100 years of legislation,
21 up to and including the Children (Scotland) Act (1995),
22 is focused on the parent, focused on the potential risk
23 that the child is facing from the parent.

24 That is appropriate because children, sadly, are
25 most at risk from -- the statistics show that most

1 children who are injured are injured at the hands of
2 their parents. So that focus is right.

3 But since the turn of the millennium what has
4 happened is that the legislative focus has changed into
5 another direction and the legislative focus has turned
6 towards the risks children face not from their parents,
7 but from other people who are responsible for their
8 charge and care.

9 There's really three elements to that. The first
10 one comes from the Protection of Vulnerable Children Act
11 of 2001 or 2003.

12 MR MacAULAY: 2001.

13 A. 2001, which was then extended a few years later to the
14 Protection of Vulnerable Groups (Scotland) Act.
15 Basically what that did was to require the Scottish
16 Government to create a list of people unsuitable to work
17 with children and also it makes it a criminal offence
18 for organisations to employ somebody who is on this
19 list.

20 So we are protecting children from those who are
21 working with children because of their unsuitability.
22 It is all to do with -- it ties in with the
23 Disclosure Scotland position.

24 So that's one strand of that. The other strand is
25 the oversight institutions. Local authorities generally

1 had to monitor and register and inspect places where
2 children were accommodated. All that was brought
3 together with the creation of the Care Commission in the
4 Regulation of Care (Scotland) Act (2001), then
5 re-enacted and widened out with the Public Services
6 Reform (Scotland) Act (2010) which replaced the
7 Care Commission with the big long phrase, which we now
8 call the --

9 Q. The Care Inspectorate.

10 A. -- Care Inspectorate, simply.

11 This is now a national body responsible for the
12 monitoring of residential establishments and other care
13 services. So that is the second strand.

14 The third strand I think is the creation of new
15 sexual offences, the so-called position of trust sexual
16 offences where people are in positions of trust in
17 relation to young people, anybody under the age of 18 --
18 the normal age of sexual consent is 16, of course, but
19 it becomes a criminal offence for anybody in a position
20 of trust over a person under the age of 18 to have
21 sexual relations -- defined very, very broadly -- with
22 such persons.

23 So we see in all of these things that have all
24 happened in the first decade of this century, the
25 legislative focus is away from parents and towards other

1 people around the children who have responsibilities
2 towards children and young people.

3 Q. There you are talking essentially about protecting
4 children from their protectors; that is how you put in
5 your report.

6 A. Yes.

7 Q. Also there is this new oversight regime quite
8 independent from local authority or government.

9 A. Yes.

10 Q. I will come back to that part of your report later.
11 I think you probably summarised it for me already but
12 I will just revisit that later on.

13 I want to go back to foster care because you may
14 remember we left foster care in the period 1968 to 1975.
15 I want to now look at the post-1995 position in relation
16 to foster care and just follow that through all the way
17 and up to date.

18 I think for your report you can pick this up at
19 page 2289, so we are in part 4 of the report and you
20 begin looking at foster care at page 2289. If you move
21 on to page 2290, do you tell us that the 1985
22 regulations which we looked at earlier today, were
23 revoked from the 1st April and replaced by the Fostering
24 of Children (Scotland) Regulations (1996).

25 A. That is right.

1 Q. Were there also regulations, I think enacted the same
2 day, dealing with the -- called the Arrangements to Look
3 After Children (Scotland) Regulations (1996)? So there
4 are two sets of regulations in connection with foster
5 care.

6 A. Yes. The Arrangements to Look After Children (Scotland)
7 Regulations were rather broader because they dealt with
8 all looked-after children. The fostering regulations
9 were focused in on a particular type of looked-after
10 children, that is the child who was going into foster
11 care.

12 Q. But it was the Arrangements to Look After Children
13 Regulations that, in particular, dealt with the
14 monitoring --

15 A. That is right.

16 Q. -- aspect of foster care?

17 A. Yes.

18 Q. If we turn to page 2290 of the report, under the heading
19 "Fostering of Children (Scotland) Regulations (1996)",
20 one point you make here is that the reference to
21 boarding out has, as it were, dropped out of the
22 equation; is that correct?

23 A. Yes.

24 Q. If we look at the regulations quickly; these are at
25 LEG.001.001.1577. We have them on the screen.

1 If you turn to regulation 4. Again, can we see that
2 we have, as we saw before, a provision dealing with --
3 that's headed "Approval of Foster Carers" and provisions
4 dealing with the appointment and composition of
5 fostering panels.

6 A. That is right yes.

7 Q. If we go on to read at section 6 about the functions of
8 the fostering panel.

9 A. Yes.

10 Q. How had this developed the previous position in relation
11 to fostering panels? Was there any significant change?

12 A. I'm not sure there was a huge significant change, no.

13 It brought them up to date, sharpened them. I think
14 regulation 6 allows the recommendation to be one or
15 other of these categories, either the particular child
16 or any child or a category of child. I think that's
17 new.

18 Q. If we read on to page 1579, the heading at regulation 8
19 is dealing with agreements with foster carers. You have
20 that on the screen:

21 "A local authority which approves a foster carer
22 under regulation 7 shall enter into a written agreement
23 with the foster carer regarding the matters and
24 obligations set out in schedule 2 and such other matters
25 as may be appropriate."

1 Again, there is provision here for there being
2 a written arrangement between the foster carer and the
3 local authority.

4 A. Yes.

5 Q. If we look at schedule 2 at page 1585, do we have here
6 a list headed "Matters and obligations in foster carer
7 agreements"?

8 A. That is right.

9 Q. If we read down to item 6, can we see here that the
10 foster carers agree not to administer corporal
11 punishment to any child?

12 A. That's a new provision which didn't appear earlier.

13 Q. If we turn to page 2293 of your report then, professor.
14 You have a section here dealing with placement decisions
15 and you tell us that the local authority could only
16 place a child with a person who had been approved as
17 a foster carer. Were there certain prohibitions then
18 still in play at this time?

19 A. Yes. At this time the household had to consist of a man
20 and a woman living together and acting jointly together,
21 or a man and a woman living and acting alone.

22 Q. If you turn to page 2294 you make reference here to
23 a provision that the 1996 regulations also allowed local
24 authorities to enter into arrangements with voluntary
25 organisations to discharge their duties in relation to

- 1 fostering.
- 2 A. That is right.
- 3 Q. Clearly they would have to carry out some checks that
- 4 the voluntary organisations were able to perform that
- 5 sort of function.
- 6 A. Yes, because the primary responsibility still rests with
- 7 the local authority. This provision simply allows the
- 8 local authority to satisfy their own legal requirements
- 9 by delegating effectively certain functions to the
- 10 voluntary organisation.
- 11 Q. Do you know how this worked in practice?
- 12 A. No.
- 13 Q. But what you do tell us is that the arrangements were
- 14 required to be reviewed on an annual basis.
- 15 A. Yes.
- 16 Q. There was also some monitoring responsibility over the
- 17 child even when placed by the voluntary organisation?
- 18 A. Yes. The local authority retained ultimate
- 19 responsibility.
- 20 Q. Can I then look at the other 1996 regulations that
- 21 I mentioned to you, and that's the Arrangements to Look
- 22 After Children (Scotland) Regulations (1996), as I said,
- 23 enacted on the same day. You, I think, look at these at
- 24 page 2268 of your report, towards the bottom of that
- 25 page.

- 1 A. Yes.
- 2 Q. As you mentioned a little while ago, it is these
3 regulations in particular that deal with monitoring and
4 visitation.
- 5 A. That is right.
- 6 Q. So if we look at the regulations on LEG.001.001.4004 --
7 we are having difficulty in finding this. If I just
8 read regulation 18 out to you, professor:
- 9 "A local authority in relation to any placement
10 shall ensure that the child and, if fostered, the person
11 with whom he is fostered is or, as the case may be, are
12 visited on their behalf within one week of the placement
13 and thereafter at intervals of not more than
14 three months."
- 15 A. That is right.
- 16 Q. Do we have there a similar type of arrangement for
17 monitoring as we had seen in the 1985 regulations?
- 18 A. Yes.
- 19 Q. If we go back to your report at 2269, again, do we have
20 here under these regulations a provision that the local
21 authority had to make a care plan?
- 22 A. That is right, yes, for the individual child.
- 23 Q. Was this -- is this new or is this -- had this been --
24 I can't remember now myself --I had written, "This is
25 new", but perhaps it is not.

1 A. I kind of think it is new as well, but I'm not
2 100% sure. It is certainly a really significant
3 development that the local authority is required, once
4 the child is placed, to know what it is going to do with
5 this child in the future rather than just place a child
6 somewhere and hope for the best. There has to be a care
7 plan, a plan for the future, what is this placement
8 actually going to achieve for this child. Is the child
9 going to -- is it going to be a temporary placement,
10 and, if temporary, what's our mechanism for bringing the
11 child back home.

12 Of course, at this stage, we are becoming much more
13 conscious of ECHR requirements to work towards the
14 reintegration of the child with the family. I think
15 that is the context in which the care plan becomes
16 really important.

17 Q. Moving on from these regulations, the next regulations
18 that were relevant --

19 A. The more I think about it, this is new from the
20 Arrangements to Look After Children Regulations because
21 it doesn't appear in the -- these apply to all children
22 who are what previously we would call "in care".

23 Q. You mention on page 2269 the Looked-after Children
24 (Scotland) Regulations which came into force on
25 28th September 2009. Are these the relevant regulations

1 for the present day or do either of the other two sets
2 of regulations remain in force?

3 A. The 2009 regulations overtook the -- not the
4 Arrangements to Look After Children Regulation (1996),
5 but the --

6 Q. The other ones? The fostering of children --

7 A. The fostering regulations.

8 Q. But the 2009 regulations are then, as it were, the
9 regulations that are still in place in relation to
10 certain aspects of fostering.

11 A. Yes.

12 Q. For example, if I put that on the screen at
13 LEG.001.001.8405, and if I could take you to page 8415,
14 again, if we look at part 6, do we have provisions
15 dealing with the appointment and composition of
16 fostering panels?

17 A. That is right.

18 Q. This is a device, if you like, that now has been in
19 place for quite some time as a device.

20 A. Yes.

21 Q. No doubt it has been elaborated as time goes on.

22 A. Yes.

23 Q. But essentially the same principle?

24 A. Yes.

25 Q. I think we also have in these regulations provisions in

1 relation to entering into a written agreement with the
2 foster parents.

3 A. Yes.

4 Q. Can I take you to regulation 48. That's on page 8430.
5 Here we have a regulation dealing with arrangements with
6 registered foster services. We can read:

7 "Each local authority may individually or jointly
8 enter into arrangements with one or more registered
9 fostering services for the purposes of carrying out the
10 functions mentioned in paragraph 2 in relation to
11 children who are looked after by them."

12 Can you explain what this is designed to do?

13 A. That is designed, I suppose, for efficiency so that each
14 local authority and each registered foster service -- to
15 ensure, if there's an overlap of provision, the local
16 authority can -- any local authority can combine their
17 resources, as it were, to achieve the outcome.

18 Q. If we look at regulation 49, it is on that same page,
19 that's headed "Visits by local authorities". This
20 regulation applies where:

21 "... by virtue of an arrangement made under
22 regulation 48, a registered fostering service places
23 a child with a foster carer in accordance with these
24 regulations."

25 If we move on to page 8431, do we see the local

1 authority must arrange for one of their officers to
2 visit the child within 28 days of a placement?

3 A. That is right. That's again emphasising that it is the
4 local authority that has the ultimate responsibility
5 here.

6 Q. Under the 2009 regulations, or by that time, were there
7 any constraints on who could be a foster parent?

8 A. The technical constraints were lifted in 2009. Prior to
9 2009 there had been a long-established provision
10 preventing same-sex couples from ever being foster
11 parents, foster carers. That was finally removed as
12 an exclusion in 2009 and all we are left with is the
13 vetting process of the fostering panel that will vet
14 each individual or couple who apply to assess their
15 suitability to act as foster carers without any
16 preconceived notions about who is worthy of doing such
17 activities.

18 Q. Going back to the regulations at page 8429 -- I'm
19 looking now at regulation 46, the one that's headed
20 "Local authority visits: Child in placement". Can we
21 see first of all at subsection (1) that:

22 "This regulation applies where a child has been
23 placed by a local authority."

24 A. Yes.

25 Q. We are then given a list. It covers more than foster

1 care, but can we see that it is kinship carer, with
2 a foster carer, by virtue of regulation 39(1), which
3 I think is to do with emergencies --

4 A. Yes.

5 Q. -- and also in a residential establishment?

6 A. That is right.

7 Q. Reading on can we see that when a child has been placed
8 by a local authority in any of these positions, then the
9 child and their carer are visited within one week of the
10 placement, and thereafter at intervals of not more than
11 three months.

12 A. That is right.

13 Q. That again reflects what we have seen before in the
14 previous regulations of the sort of time frames that we
15 are dealing with for visits.

16 A. Yes, time frame and regularity.

17 Q. Can I go back to the -- just on that, I think so far
18 I have taken you up to date in relation to what one
19 would call foster care. Of course, there are things
20 like private fostering and kinship care as well that one
21 has to have regard to when one is looking at foster
22 care.

23 Looking first of all at private fostering. I think
24 to remind ourselves, private fostering is where
25 children, not boarded out by a local authority, and

- 1 looked (sic) after by a known relative --
- 2 A. Yes.
- 3 Q. -- and usually for a reward or always for reward.
- 4 A. The reference to reward was -- which had always been
- 5 there since the regulations started in the late 19th
- 6 century -- the reference to reward was removed by the
- 7 Social Work (Scotland) Act (1968) and since then any
- 8 private placement, by which I mean non-state required
- 9 placement of a child to be brought up on at least
- 10 a long-term basis with somebody who isn't a relative of
- 11 yours, that would now come within the definition of
- 12 private fostering and subject to the legislation dealing
- 13 with that.
- 14 Q. Can I take you to what you tell us in your report then
- 15 about private fostering in the period post-1968. That's
- 16 at INQ.001.001.1994. So we are going back to part 3 of
- 17 your report.
- 18 A. Yes.
- 19 Q. You tell us, and I think we saw this last time you gave
- 20 evidence, that it was the Children Act (1958) that
- 21 regulated private fostering arrangements.
- 22 A. Yes.
- 23 Q. You tell us also there that the Social Work (Scotland)
- 24 Act (1968) amended the 1958 Act.
- 25 A. That is right.

1 Q. Can you elaborate upon that?

2 A. There were a number of amendments, the provision
3 requiring the local authority -- yes, the local
4 authority to take account of the welfare of the child
5 was significantly tightened up with a new section 1(a)
6 put into the 1958 Act, which required the local
7 authority to secure the welfare of the child in their
8 area -- of children in their area who are foster
9 children, with "foster children" being defined as
10 privately fostered children as well as a duty to cause
11 the child to be visited. This had been in our
12 legislation since 1908, that caused the child to be
13 visited from time to time and give advice as may be
14 required.

15 All children who were looked after for more than
16 six days were included in this unless it was a sort of
17 family arrangement that you go away for a week's holiday
18 with your best friend's children, that sort of thing.

19 Finally, as I have already mentioned, the references
20 to reward were removed. So that had the effect of
21 really expanding out quite significantly the scope of
22 the private fostering legislation.

23 Q. But can we read on page 1994 that, insofar as visitation
24 is concerned, there was a change and whereas before
25 visitation had been compulsory, it was now a matter of

- 1 expediency? I suppose that is your point.
- 2 A. Yes, that was a slightly odd -- I don't really
3 understand that. The wording has changed so that
4 visitation had to be when the local authority thought
5 appropriate. The previous legislation had required the
6 local authority to visit from time to time. It didn't
7 specify the times but there was an obligation on them
8 and now they were to visit when they considered it
9 expedient and I suppose they could have thought there is
10 no need to visit.
- 11 Q. Of course, this is in stark contrast to the monitoring
12 arrangements for children placed by local authorities.
- 13 A. Very, very much, yes. Private fostering at this stage
14 was subject to much more minimal regulation than public
15 law fostering.
- 16 Q. I think as we move on we see that that does change.
- 17 A. Yes.
- 18 Q. But so far as the 1975 Act, if you turn to page 195 of
19 your report, is concerned, did that also introduce
20 a change in relation to restoring the obligation of the
21 local authority to visit foster children?
- 22 A. Yes, it permitted regulations to require the local
23 authority to visit privately fostered children. That
24 was in 1975 and we did get regulations in 1985. Again,
25 it was a sort of ten-year wait for the provisions to be

1 given effect.

2 Q. You do mention there I think what you call a "sustained
3 critique" of private fostering being published in 1973.

4 A. Yes.

5 Q. What was the -- by "our home and trading in children",
6 what was the thinking there? What was --

7 A. Well, the starting point was, I suppose, the worry that
8 had always bedevilled this area of social practice is
9 that if you pay somebody else to bring up your child, it
10 is monetising the care of children in a way that is
11 potentially troublesome for children.

12 What this book does is quite clearly show that
13 the risks of children being brought up in a foster care
14 environment are the same, irrespective of whether it is
15 public law or a private law fostering. But the author
16 points out very clearly that the regulation of public
17 law fostering is very, very detailed -- and getting
18 increasingly detailed as the decades go by -- but the
19 regulation of private fostering is little more than
20 an obligation to visit by the local authority from time
21 to time.

22 His basic conclusion, which has to be right, is that
23 there's really no justification for that distinction, if
24 you look at it from the child's perspective.

25 Q. You go on then to mention, Professor Norrie, the fact

1 that the 1958 Act was repealed by the Foster Children
2 (Scotland) Act (1984).

3 A. That is right.

4 Q. There were regulations made under that Act, the Foster
5 Children (Private Fostering) Children Regulations
6 (1985), which came into force on 1st April 1986.

7 A. Yes.

8 Q. Did this change the landscape then for private
9 fostering?

10 A. It did. It brought it much, much closer -- brought the
11 legal regulation of private fostering much closer -- not
12 identical but certainly much closer to the regulation
13 for public law fostering.

14 It includes a list of disqualifications, for
15 example, for people who are not permitted to act as
16 foster carers. It makes the visiting regime much
17 clearer than it had been before. Instead of requiring
18 local authorities to visit from time to time, it
19 specifies when visits are to be -- and I think it is
20 still at six months after the initial thing, so it is
21 not the same as public law fostering but it is closer,
22 it is substantially closer.

23 Q. These are the regulations, I think you tell us, that are
24 still in force today?

25 A. These are in force. It has kind of been the forgotten

1 element of the foster care system that there has not
2 really been amendments since the mid-1980s.

3 Q. But on the issue of visiting, you do address this on
4 page 1998 of the report.

5 A. Yes.

6 Q. I think here you are in fact quoting from your own work
7 with Professor Wilkinson on "Parent and Child".

8 A. Yes, I did not think there was any point in re-wording
9 it.

10 Q. I fully understand that. But at 15.48 you say:

11 "The duties laid upon the local authority of
12 securing the welfare of the foster children within its
13 area ..."

14 But you go on to say halfway down:

15 "Regulations provide that a foster child is to be
16 visited within one week of the placement or within one
17 week of notice being given to the local authority under
18 section 5.2 ..."

19 We have to bear in mind the placement is not with
20 the local authority, so the local authority has to be
21 told that the placement has taken place.

22 A. Yes.

23 Q. "... and thereafter in the case of a child who has lived
24 with a foster parent for less than one year at intervals
25 of not more than three months and in any other case at

1 intervals not more than six months."

2 That's where you got your six months from?

3 A. Yes.

4 Q. It has been tightened up?

5 A. Yes.

6 Q. But not comparable to --

7 A. It is not completely parallel, no.

8 MR MacAULAY: My Lady, just looking at the time it is

9 12.59 --

10 LADY SMITH: That would be a convenient place to stop so we
11 will stop now for the lunch break.

12 How much longer do we expect to need

13 Professor Norrie for?

14 MR MacAULAY: I have warned Professor Norrie that he may
15 have to re-visit us, and I am sure he would be made very
16 welcome, because there is a possibility we will not
17 finish today.

18 I'm aware your Ladyship --

19 LADY SMITH: I can't sit beyond 4 o'clock today. If it was
20 going to be reasonably possible to finish this afternoon
21 then I would say to come back at 1.50 pm but I think in
22 the usual way we will just make it 2 o'clock. Thank
23 you.

24 (1.00 pm)

25 (The luncheon adjournment)

1 (1.57 pm)

2 LADY SMITH: Mr MacAulay.

3 MR MacAULAY: Yes, my Lady. Before lunch, professor, we
4 were looking at private fostering. Just one final point
5 on that and that's to pick up what you say at page 2298
6 of your report.

7 The final section there is headed "Private
8 fostering" where you indicate that the rules in the
9 Foster Children (Scotland) Act (1984) continue to govern
10 private fostering but that local authority functions in
11 relation to private fostering have been required to be
12 registered since 2001 first with the Care Commission and
13 then with the Care Inspectorate --

14 A. Yes.

15 Q. -- and they have an overriding oversight as you are
16 aware.

17 A. Yes, they do.

18 Q. Can I then look briefly at the notion of kinship care
19 and you address that at page 2297 of this part of the
20 report. Here we have to have regard again to the
21 Looked-after Children (Scotland) Regulations of 2009 and
22 perhaps you can just flesh out for us what these
23 regulations do in this connection.

24 A. Well, before 2009, if a child was to be accommodated in
25 a private home, with a family, that was foster care and

1 it was possible for members of a child's family to be
2 accepted as a foster carer. Alternatively what very
3 frequently happened was that another family member, very
4 often a grandparent for the child when the family was in
5 difficulty or a relative of the child would step in and
6 say, well, instead of the child going off to stay with
7 strangers, I can look after this child. The difficulty
8 with that is that such a person had no -- there was no
9 financial arrangement where its foster carers would get
10 expenses and all that sort of thing.

11 So the thinking behind the foster -- the kinship
12 care provisions of the 2009 regulations was to recognise
13 that the extended family members really ought to be
14 regarded or ought to be able to access the funding of
15 foster carers but be recognised not as strangers to the
16 child, which they weren't, but actually offer some sort
17 of -- offer an alternative within the extended family
18 and become kinship carers who are controlled in
19 virtually the same way as foster carers are and
20 particularly they can access the expenses and funding
21 that's available.

22 Q. Before this though, the kinship carer, if I can call the
23 carer that, the grandmother or aunt or whatever, would
24 not have been under the radar, so to speak, for a local
25 authority in the sense of local authority oversight or

1 would he or she be?

2 A. They might be. If, for example, it was a child who was
3 placed with, let us say, a grandparent under the term of
4 our -- a supervision requirement imposed by the
5 children's hearing, then the local authority would be --
6 would certainly have a lot of input then. But sometimes
7 the grandparent would step in as a way of avoiding any
8 increased state involvement and then in that situation
9 the local authority would have far less access and
10 responsibility.

11 Q. Can we look quickly at the 2009 regulations then,
12 professor. That's at LEG.001.001.8405. That's where
13 they begin and I want to take you to 8413 and
14 regulation 10. That provides that:

15 "A local authority may make a decision to approve
16 a person mentioned in paragraph 2 as a suitable carer
17 for a child who is looked after by that authority in
18 terms of 17(6) of the 1995 Act, which carer shall be
19 known as 'a kinship carer'."

20 A. Yes.

21 Q. Can we see that the term "kinship carer", however, is
22 a broader term than simply referring to a relative?

23 A. Yes.

24 Q. We see at (a):

25 "A person who is related to the child or (b)

1 a person who is known to the child and with whom the
2 child has a pre-existing relationship."

3 That could be a non-relative?

4 A. That could be a non-relative, a neighbour, for example,
5 who has been very closely involved with the child in the
6 past.

7 Q. As you just mentioned a few moments ago, the other
8 provisions of this piece of legislation -- these rules,
9 rather -- also apply particularly in relation to
10 monitoring.

11 A. Yes.

12 Q. If we look at regulation 46 -- I think we looked at this
13 this morning at page 8429 -- does that provide, in
14 terms, at 46(1)(a), that the regulation applies to
15 a placement with a kinship carer?

16 A. That is correct.

17 Q. We then see the monitoring arrangements of one week and
18 three months and so on.

19 A. Kinship care and foster care, yes.

20 Q. Can I then, having taken foster care from beyond the
21 1968 Act effectively to date in all its terms, can I now
22 look at residential establishments and take you to
23 page 2000 of your report.

24 Here, you are setting out what Lord Hughes said in
25 the course of the second reading debate in the

1 House of Lords when the Social Work (Scotland) Bill was
2 being considered.

3 A. Yes.

4 Q. He makes some observations here in relation to what the
5 bill was designed to do in relation to residential care.
6 Can you just summarise for us what he was seeking to
7 say?

8 A. Yes, I think what was intended was to move away from the
9 situation in which there are particular types of
10 residential establishments each with their own rules and
11 regulations and to move to a situation in which the
12 registration and monitoring and assessment of
13 establishments was the same across the board and at the
14 same time allow a much broader variety of establishments
15 both, residential and daycare, both for children and for
16 other vulnerable people.

17 So it was these sort of two things, making uniform
18 monitoring and uniform registration, but at the same
19 time allowing all the various different types of
20 establishment to focus on the different issues and
21 different needs that vulnerable people have.

22 Q. Were there then, in due course, regulations enacted to
23 reflect this?

24 A. There were in due course, yes; we waited about 20 years.

25 Q. So up until then the regulations we looked at

1 previously, namely, the Administration of Children's
2 Homes (Scotland) Regulations (1959) and the Approved
3 Schools (Scotland) Rules (1961), which had their own
4 regimes, remained in place?

5 A. They remained in place, yes.

6 Q. Both these regulations had provisions in relation to
7 monitoring and visitation?

8 A. Yes.

9 Q. I think we looked at these previously but at least,
10 I think, in relation to both, that after the placement
11 visits there was to be at least a visit once a month.
12 So there were fairly short time frames?

13 A. Yes.

14 Q. But the regulations then that revoked these regulations
15 were the Social Work (Residential Establishments)
16 Childcare Regulations of 1987?

17 A. That is correct.

18 Q. You begin looking at these on page 2003 of your report.

19 A. Yes.

20 Q. Again, perhaps I can ask you about the delay of
21 20 years: do you have any insight into that?

22 A. I mean not really. I can only speculate that because
23 institutions already had the rules and regulations
24 governing them that it might have been perceived as no
25 immediate need. The 1970s was a volatile political

1 period where perhaps less social legislation was
2 achieved than in other decades, but that's speculating
3 only.

4 But again I repeat what I said earlier this morning:
5 this is by no means uncommon in this area. For a lot of
6 what we have been looking at, we have had primary
7 legislation and then waited ten years or more for that
8 to be fleshed out and brought into force.

9 Q. Can we then just look fairly quickly at the regulations
10 themselves. I know you cover them in your report but if
11 we turn to LEG.001.001.6191. So we note that they came
12 into force on 1st June 1988.

13 Just looking perhaps first of all to the
14 interpretation section, section 2:

15 "'Care authority' for these regulations means
16 a local authority or voluntary organisation responsible
17 for the welfare of a child where regulation 3 applies."

18 A. Yes.

19 Q. When we look at regulation 3, we can see that is on
20 page 6192. We read that:

21 "This part of these regulations shall apply to any
22 residential establishment which supplies residential
23 accommodation for children and: (a) is controlled or
24 managed by a local authority; (b) is one of which
25 a person required to be registered under section 61 of

1 the Act is a school, which is registered voluntarily in
2 accordance with section 61(a) of the Act."

3 This reflects the intention of the 1968 Act in that
4 all establishments would be residential establishments?

5 A. Yes.

6 Q. Although, as we know, what was known as an "approved
7 school" was then given the label "List D schools".

8 The next provision then -- the next regulation, 5,
9 this is new, isn't it?

10 A. Yes, it is.

11 Q. What is this designed to do? This is the statement of
12 functions and objectives.

13 A. Yes. Flowing from the hope under the 1968 Act that
14 different establishments would focus on a variety of
15 different specialisms and different services that they
16 could provide, it is required here that each
17 establishment actually has a statement -- actually draws
18 up a statement of what it thinks it can offer. So
19 there's the statutory requirement to have and keep under
20 regular review a statement of its functions and
21 objectives. It is designed obviously to help planning
22 for a child's future when recommendations, for example,
23 go to a children's hearing. You can recommend this
24 particular establishment because the functions in this
25 establishment meet the needs of this particular child.

1 So it is actually a really, really valuable provision.

2 Q. And we see that these statements of functions and
3 objectives were to be prepared within six months of
4 these regulations coming into force.

5 A. Yes.

6 Q. For all these residential establishments?

7 A. For all residential establishments, yes.

8 Q. If we look at regulation 5(2) on page 6193 can we read
9 there that at 2(a) that:

10 "The managers shall ensure that the person in charge
11 of the establishment reports in writing to them at
12 intervals of not more than 6 months on the
13 implementation of the statement of functions and
14 objectives ..."

15 A. Yes. That's designed, I think, to keep the managers'
16 minds on track, to be constantly monitoring whether they
17 are actually meeting what they are setting out to do.

18 Q. Do we read at (b) that indeed the managers were to make
19 arrangements ensure that each residential establishment
20 was visited on their behalf at intervals of not more
21 than 6 months to furnish them with a report on the
22 implementation of the statement?

23 A. That is correct, yes.

24 Q. While we have the regulations in front of us, professor,
25 if we turn to regulation 10 on page 6194, we have here

1 a provision dealing with discipline. Can we read that
2 discipline had to be covered within the statement of
3 functions and objectives --

4 A. Yes.

5 Q. -- but in any event that the arrangements were not to
6 authorise the giving of corporal punishment?

7 A. That is correct.

8 Q. So corporal punishment no longer in these residential
9 establishments?

10 A. No.

11 Q. If we turn to regulation 15 on page 6195, we see there
12 a provision that requires there to be maintained
13 a logbook which would include, for example, details of
14 disciplinary measures and indeed before that do we also
15 see that there are provisions for the maintaining of
16 personal records of the children?

17 A. Yes.

18 Q. Regulation 16, that's headed "Monitoring of registered
19 establishments"; again, I think this is a new provision.

20 A. Yes, I think it is.

21 Q. It is designed to have an additional monitoring level,
22 as it were, by the authority that grants the
23 registration.

24 A. The local authority yes.

25 Q. That would not apply to the local authority then in that

- 1 they are the grantor of the registration?
- 2 A. Yes, this is for --
- 3 Q. A voluntary organisation?
- 4 A. What we previously called voluntary homes and the like,
- 5 residential establishments run by other than local
- 6 authorities which had to register, be registered with
- 7 local authorities and they became managers and had the
- 8 responsibilities that we have looked at. But the local
- 9 authority itself, in addition to that, also had to
- 10 satisfy themselves, by intervals of at least annually,
- 11 that the operation of the residential establishment
- 12 continues to conform to the requirements of the
- 13 registration, including that it continues to meet what
- 14 it has set out itself as its statement of functions and
- 15 objectives.
- 16 Q. Then with regard to monitoring and visitation, if we
- 17 look at regulation 23 at page 6198, I think we are
- 18 becoming rather familiar with these sorts of time
- 19 frames, but can we see here that the care authority --
- 20 that would include not just the local authority but the
- 21 managers of another organisation --
- 22 A. Yes.
- 23 Q. -- as we saw from the interpretation section --
- 24 A. Yes.
- 25 Q. -- shall:

1 "... take such steps as are necessary to satisfy
2 itself that any placement made under this part of the
3 regulations continues to be in the interests of the
4 child and in particular shall ensure that child is
5 visited ..."

6 And we have one week:

7 "... and thereafter at intervals of three months."

8 So very similar to what we have seen before.

9 A. Uh-huh.

10 Q. If we go back to your report then, professor, I think we
11 have covered the points you make up to about page 2007.

12 What you tell us there, that's on 2007, is that
13 these regulations that we have been looking at remained
14 in force until they were revoked by the Residential
15 Establishments -- Child Care (Scotland) Regulations
16 (1996). They came into force on 1st April 1997.

17 A. That is right.

18 Q. It is to those that I now want to turn to try to follow
19 this on a chronological basis.

20 If we turn to page 2298 of your report. You begin
21 looking again at residential establishments towards the
22 bottom of the page. If we move on to the next page,
23 2299, you repeat the fact that the 1987 regulations were
24 superseded and you have there some discussion on the
25 regulations that replaced them. Are these regulations

1 to any extent still in force today?

2 A. The 1997 regulations are, yes.

3 Q. 1996 --

4 A. I beg your pardon, the 1996 regulations which came into
5 force in 1997.

6 Q. Again, the 1996 regulations, do they apply to all
7 residential establishments?

8 A. Which are either controlled or managed by a local
9 authority or are registered or were registered under the
10 1968 Act and then under the Regulation of Care Act and
11 its successors.

12 LADY SMITH: Does that cover them all? Are there any left
13 out of that list?

14 A. No. Effectively not.

15 LADY SMITH: But that is the source of the regulation?

16 A. Yes.

17 MR MacAULAY: Let's just look at some aspects of these
18 regulations and we begin -- the regulations begin at
19 LEG.001.001.0064.

20 Can we see, when we look at regulation 2, that we
21 are now into the language of "looked after", following
22 upon the 1995 Act?

23 A. That is right.

24 Q. Turning to the next page, 0065, again, we have a
25 provision that's at regulation 5 dealing with the

1 statement of functions and objectives. Is there any
2 significant change here from what we had before?

3 A. I don't think so, no.

4 Q. But if we go on to regulation 8 on page 0066. This is
5 dealing with -- the heading is:

6 "Appointment and vetting of staff in residential
7 establishments."

8 Is this new?

9 A. That is new, yes.

10 Q. Can you tell us about that? What was this designed to
11 do?

12 A. Well, this is beginning to get into the provisions that
13 I was talking about earlier in looking at the people who
14 are responsible for the care of children on
15 a professional basis. There previously had -- people
16 applied for jobs and they went through the normal
17 interviewing process to get a job. What this now tries
18 to do is to make sure that all residential
19 establishments have an appropriate vetting process to
20 try to identify not just whether this person is capable
21 of doing this job but also kind of looking at their
22 background to ensure that they are a suitable and safe
23 person to be working in such an environment with
24 vulnerable people.

25 Q. And looking at regulation 16 at 0068, again, do we have

1 a provision here dealing with the monitoring of
2 registered establishments by -- at this point in time by
3 the local authority?

4 A. That is right, yes.

5 Q. I think you do tell us in due course this has come under
6 the auspices of the Care Commission and the
7 Care Inspectorate.

8 A. Yes, after 2003, when the 2001 Act came into force.

9 Q. Again, I think we are familiar with the timescale. Has
10 the timescale changed, with intervals of not more than
11 a year?

12 A. That is right.

13 Q. It is the timescale that at least we have there. So far
14 as visitation provisions are concerned, would these
15 still be governed by the Arrangements to Look After
16 Children of (Scotland) Regulations (1996) that we looked
17 at earlier.

18 A. That is correct, yes.

19 Q. These regulations that we looked at do not deal with
20 visitation.

21 A. They don't deal with visitation of individual children.
22 What we see in regulation 16 is that's a visit to the
23 establishment to see that the establishment had been
24 run -- that the visitation provisions for individual
25 children still come within the Arrangements to Look

- 1 After Children regs.
- 2 Q. Moving on from there, we then look at the Looked-after
3 Children (Scotland) Regulations (2009) that we looked at
4 earlier.
- 5 A. Yes.
- 6 Q. We needn't go back to it, but I think we noted in
7 regulation 46 that residential establishments were also
8 included within the monitoring provisions.
- 9 A. Yes.
- 10 Q. Can I touch, not for too long, on what you call -- refer
11 to in your report as secure accommodation?
- 12 A. Yes.
- 13 Q. Going to page 2007, that's in part 3 of the report, you
14 have a section there and you discuss this, I think, for
15 a number of pages which are in fact headed "Secure
16 accommodation". Can you just elaborate upon that for us
17 and what you set out in these pages?
- 18 A. Okay. I think the first thing to remember with secure
19 accommodation is that these are sort of subsets of
20 residential establishments --
- 21 Q. So you can have for example a voluntary children's home
22 within which there may also be a secure section?
- 23 A. That is correct. Crucially, the regulations dealing
24 with residential establishments will apply to that
25 special part.

1 The earliest reference to secure accommodation that
2 I could find, though it wasn't called that then, that
3 I could find was in the Approved Schools (Scotland)
4 Rules of 1961, which allowed the Secretary of State to
5 approve the use of a particular part of what we now call
6 a residential establishment as a special section, which
7 is slightly woolly phrase and it is easy to miss,
8 I think, from today's perspective what's actually going
9 on.

10 But that particular rule was sort of amended later
11 on and the term "secure accommodation" -- the precise
12 term "secure accommodation", the first I could find was
13 in the Children Act (1975).

14 More importantly there was developments in the
15 European Court of Human Rights. There was a case
16 involving English legislation which was taken to the
17 European Court of Human Rights on the ground that people
18 could be kept in -- they could be locked in a particular
19 place, putting it bluntly, without the legislation
20 actually specifying why. The European Court held,
21 unsurprisingly, perhaps, with today's perspective,
22 that's inconsistent --

23 LADY SMITH: With the Article 5, I imagine.

24 A. Particularly Article 5. So the particular provision in
25 the mental health legislation was amended but, in

1 addition, these special sections in children's homes
2 were looked at and we got provisions in the Health and
3 Social Services and Social Security Adjudications Act
4 (1983), which is the bit that amended the Scottish
5 legislation.

6 That laid down criteria for the placing of a child
7 in what we now term and what was called -- termed then
8 "secure accommodation", which means you can actually
9 lock the door behind the child and keep the child in
10 this place.

11 The criteria created in 1983 effectively still
12 applies today, although it is different legislation.

13 Q. But that involved the children's hearing being involved,
14 did it, and making a residential supervision
15 requirement?

16 A. Yes, that is correct, though for a period the criminal
17 court could also require a child to be placed in secure
18 accommodation.

19 Q. But was it the involvement either of the court or of the
20 children's hearing that would make the arrangement ECHR
21 compliant?

22 A. What made it ECHR compliant was the fact that the
23 legislation specified the criteria. That was the point
24 that was missing before. So now we have the criteria.
25 There had been subsequent developments, of course, in

1 the Children's Hearing (Scotland) Act (2011).

2 There was a slight worry, which I was partly
3 responsible for, because I wrote an article saying this
4 is seriously worrisome, but the Court of Session
5 disagreed.

6 LADY SMITH: I do not think it was me, professor!

7 A. The whole process of placing a child there never was
8 a requirement of the children's hearing. They could
9 only authorise it and the actual decision made was the
10 chief social work officer.

11 I worried about whether that satisfied the
12 requirement that you have a tribunal making these
13 decisions. What the 2011 Act did was to include
14 an appeal process both for the placing of a child in
15 secure accommodation and indeed also removing a child
16 from secure accommodation. So as the years have gone
17 by, there have been more protections and due process
18 type protections placed into the secure accommodation
19 system.

20 Q. I think you have in fact covered what you have said in
21 part 3 of your report, but if we bring it up to date
22 then and look at what you say in part 4 at page 2301,
23 towards the bottom what you tell us is:

24 "The regulation of residential accommodation
25 contained in the Residential Establishments -- Child

1 Care (Scotland) Regulations (1996) and the Looked-after
2 Children (Scotland) Regulations (2009), considered
3 above, apply in whole to those parts of such
4 establishments as are secure accommodation."

5 But there are also additional rules?

6 A. Yes.

7 Q. If we look at the additional rules, can you tell us
8 a little bit about these? I think you go on to look at
9 them on page 2302.

10 A. Yes. We have had a number of sets of Secure
11 Accommodation (Scotland) Regulations in 1983, 1996 and
12 the most recent ones are 2013.

13 The most important part of that, I think, is the
14 obligation on the managers of the residential
15 establishment to ensure the welfare of the child is
16 safeguarded and promoted and that the child's education,
17 development and control is designed in a way that is
18 conducive to his or her best interests.

19 Reviews of the child's case, and particularly the
20 reviews of the placing of the child in secure
21 accommodation, rather than a non-secure part of the
22 residential establishment, is required at a rather
23 greater frequency for, I think, perfectly obvious
24 reasons than a child who is in the open part of the
25 unit.

1 Q. Perhaps if we just pick up on that in relation to what
2 may be the up-to-date position. If we look at the
3 Secure Accommodation (Scotland) Regulations (2013) --
4 that's at LEG.001.001.6074 -- and turn to regulation 13
5 on page 6081. This may be the provision you had in mind
6 at 13.1:

7 "The chief social work officer of the appropriate
8 local authority, in consultation with the head of unit,
9 must ensure that where a child is detained or kept in
10 secure accommodation by virtue of regulation 11 or 12,
11 arrangements are made by them to review the child's case
12 (a) within 7 days of the child's placement ..."

13 That is quite a tight time frame.

14 A. Well, yes. Usually, it is a planned entry to secure
15 accommodation, so they are unlikely to have difficulty
16 in keeping to that time frame.

17 Q. By that I mean it is very much having regard to the fact
18 that things might change quickly.

19 A. Yes.

20 Q. At (b):

21 "At such times as appear to them to be necessary or
22 appropriate in light of the child's progress."

23 So there's flexibility built into the system?

24 A. Yes and I think that really imposes an obligation to
25 constantly be monitoring the child's progress. The very

1 fact that the child has been locked up, to keep that
2 a proportionate response, you really have to be
3 monitoring that regularly to ensure that the child is
4 kept there for as short a period as is conducive to its
5 own welfare.

6 Q. The fallback is (c):

7 "In any event at intervals of not more than
8 3 months."

9 And while we have the --

10 LADY SMITH: Of course, unlike a child, as sometimes
11 happens, who is dealt with through the criminal justice
12 process and may have a sentence imposed to be a specific
13 amount of time in a young offenders institution, if you
14 place a child in secure accommodation in this system,
15 there's no preordained terminus --

16 A. End point, that's absolutely right.

17 LADY SMITH: So I suppose one has to be even more acutely
18 aware of, amongst other things, human rights obligations
19 than in the criminal justice process.

20 A. Yes, and that makes it all the more important that you
21 do have these regular monitoring provisions and regular
22 decisions that the child can return, usually to an open
23 part of the establishment.

24 Q. While we have the regulations before us, if we turn to
25 regulation 15 of the 2013 regulations at 6082, do we see

1 here, without looking at the detail, that records must
2 be kept in respect of a child placed in secure
3 accommodation?

4 A. Yes.

5 Q. A number of items are listed, including at (e):

6 "Any reviews undertaken with respect to the
7 placement by virtue of ..." certain provisions of the
8 2011 Act?

9 A. That is correct.

10 Q. I think, as you tell us on page 2303 of your report,
11 secure accommodation is seen as a care service under the
12 Public Services Reform (Scotland) Act (2010).

13 A. Yes.

14 Q. So therefore it is subject to the inspection regime of
15 the Care Inspectorate?

16 A. That is right, and before that the Care Commission.

17 Q. The next, I think, short topic I want to discuss with
18 you relates to borstals and young offenders institutions
19 within the same context we have been talking about.

20 If we go back to part 3 of the report, page 2012.
21 This is a section where you look at borstals and young
22 offenders institutions over two or three pages.

23 Can you just elaborate for us what you are setting
24 out there?

25 A. What I suppose I'm trying to set out is the move from

1 what was called borstal institutions to what were called
2 young offenders institutions. It was slightly difficult
3 to do because the primary legislation at different
4 periods in time used the two phrases to mean the same
5 thing but at different -- there wasn't a clear cut-off
6 point that what previously were borstals are now young
7 offenders institutions. The original use of young
8 offenders institutions included borstal institutions,
9 included remand centres and detention centres.

10 So what I was overall trying to do -- and it
11 actually might be clearer once I have brought all the
12 things together in a unified form. What I was trying to
13 do was trace the secondary legislation from the borstal
14 rules, from the earliest -- which I think were 1911
15 through 1946 and onwards, to the Young Offenders
16 (Scotland) Rules (1965) and thereafter the Prisons and
17 Young Offenders Institution Rules (1996) and (2013), or
18 some such date.

19 Q. 1994, I think.

20 A. 1994, 2006 and 2011. Basically I'm trying to find the
21 sequence of secondary legislation providing the rules
22 for what we now call young offenders institutions.

23 Q. The term borstal was gone now?

24 A. Yes.

25 Q. Just to pick up one or two points -- and I don't think

1 there is a huge change here from what we saw before.
2 For example, on page 2014, force was not to be used
3 against what was referred to as an inmate unless
4 unavoidable.

5 A. Yes.

6 Q. For example, "Compelled to do so in self defence", is
7 one of the examples you give.

8 A. Yes.

9 Q. You also point out that the medical officer had
10 an important role to play.

11 A. Yes, that is right.

12 Q. Can you tell us a little bit about how that was
13 envisaged to work.

14 A. I mean the medical officer was a person that appears in
15 the early legislation for a whole variety of
16 establishments and I have not looked closely at the
17 adult prison situation, but certainly in approved
18 schools, borstals, children's homes, all of these
19 things, the medical officer seemed to be quite
20 an important person, in terms of visiting, to ensure not
21 only sort of a healthy environment and not only to
22 ensure the physical health of the individual child, but
23 also he or she had sort of a welfare element to what
24 they were looking at as well.

25 Q. I think you mentioned this before, that in those

1 institutions that were dominated by self-regulation, the
2 medical officer would bring in a degree of independence.

3 A. That is right, yes. That perhaps was less evident with
4 borstals because they were always visiting committees in
5 the way they were with prisons, so you got that sort of
6 independent viewpoint in these institutions, rather more
7 than you would with approved schools that didn't have
8 visiting committees as such.

9 Q. That indeed is what you say at page 2015 in the second
10 paragraph, that:

11 "The visiting committee was required to meet at the
12 institution at least once a quarter and the members
13 thereof to visit and inspect the institution
14 frequently."

15 A. Yes.

16 Q. And moving on they were also required to investigate,
17 hear and investigate any request or complaint made by
18 the inmates.

19 A. Yes.

20 Q. Then moving on to what you say in part 4, this is at
21 2304. If we can go back a page. You have a section --
22 it is 2303 where you have coupled together here remand
23 centres and young offenders institutions and what -- is
24 this a continuation of the discussion in connection with
25 what we looked at a few moments ago?

- 1 A. It really is, yes.
- 2 Q. Moving on, going on to page 2304, you also make
3 reference to the rules that are currently in place but
4 there is little substantive difference between the 1994
5 and 2011 rules.
- 6 A. That is correct.
- 7 Q. One point you make under reference to the Prisons and
8 Young Offenders Institutions Rules (1994) to (2011) is
9 this notion of seeking to eliminate within the
10 institution discrimination; do you see that?
- 11 A. Yes.
- 12 Q. That falls upon the governor?
- 13 A. That is a responsibility imposed on the governor. It
14 was new in 1994 and had been repeated, though it has
15 been amended rather after the Equality Act.
- 16 Q. Looking to the role of the visitation committee, on
17 page 2306, by now the visiting committee has to be
18 established and, since 1988, at least one-third of the
19 membership thereof, not less than two, must be women and
20 the visiting committee is required to meet at the
21 institution at least once a quarter and at least two
22 members must visit the institution at least fortnightly.
23 So that has been tightened up somewhat from what had
24 been there before?
- 25 A. Yes.

1 Q. We also see provisions about investigating complaints.

2 Perhaps while we are on this section, if you turn to
3 page 2307, that's the next page. Before I look at that
4 I was going to look at places of safety, but my eye has
5 just focused on the sentence at the top of the page
6 where you say:

7 "The role of the visiting committee in making
8 recommendations for early release, found in the previous
9 Young Offenders (Scotland) Rules ... was not replicated
10 in the 1994 or subsequent rules."

11 Do you know why that was?

12 A. No.

13 Q. Places of safety is the next item that you address.

14 A. Yes.

15 Q. Can you tell me a little bit about what they are --

16 LADY SMITH: I wonder if the explanation for that is it --
17 "it" being the 1965 -- they pre-dated the statutory
18 provisions about the right to apply for early release
19 and the right to early release in short sentences and so
20 on. That could be the 1993 Act.

21 A. Could be, yes.

22 MR MacAULAY: Perhaps we will look at that and see if
23 that's --

24 LADY SMITH: The Prisoners and Criminal Proceedings
25 (Scotland) Act (1993) may have your answer.

1 MR MacAULAY: Moving on to places of safety. Here you are
2 referring to the 1995 Act as defining a place of safety.

3 A. Yes.

4 Q. Can you give me some feel for what's involved here?

5 A. It had slightly troubled me throughout that all the
6 legislation, going back to 1889, rather blithely talks
7 about taking a child to a place of safety. Now if that
8 place of safety was an establishment such as we have
9 covered, such as we have been talking about, clearly the
10 regulations applicable to that applied and provided some
11 protection to the child in that place but it slightly
12 troubled me that the concept of place of safety was
13 rather broader.

14 So I have tried to trace the usages of the phrase
15 and what it actually has meant throughout the time.

16 The crucial thing comes with the Clyde Report into
17 the Orkney case because Lord Clyde explores what was
18 then called "the place of safety order" and of course he
19 made recommendations for them.

20 But the overall result, I think, is that the
21 regulation of place of safety still even today depends
22 simply on its definition and its definition is, as well
23 as establishments, which we can regulate -- which are
24 regulated even today, there's "or other suitable place".

25 I suppose the saving grace of a place of safety is

1 that it is likely the child is kept there for a minimal
2 length of time before more long-term provision is made.

3 Q. As you envisage it, it could be an police station?

4 A. Yes.

5 Q. But as you have said, you would like to think that the
6 child would not be kept in a police station for too
7 long?

8 A. Yes.

9 Q. The next provision in this part of the report is the
10 heading "Protection against sexual exploitation".

11 I know you deal with also protection against sexual
12 exploitation in a mental health context, but this is
13 outwith that context. This is a more general context?

14 A. This is much, much broader.

15 Q. Is this what you touched upon this morning?

16 A. Yes, that is right.

17 Q. Can you develop that for us.

18 A. The protection in mental health establishments has been
19 very long established. We have had it for 100 years or
20 so where it has been recognised that a resident in
21 a mental institution is just so vulnerable to
22 exploitation that, even if they give consent to sexual
23 activity, the risk of that being illegitimate in some
24 way is it just too great and so we need to have criminal
25 offences against that.

1 That wasn't applied to other vulnerable categories,
2 particularly vulnerable children, and the start of it
3 was in the Incest and Related Offences (Scotland) Act
4 1986, which tried to plug a loophole in the incest
5 legislation dealing with step-parents, basically, or the
6 cohabitants of the resident parent. If that person had
7 sex with a person under the age of 16 -- obviously, if
8 it was under the age of 16, it is a crime in any case,
9 but rather more protection was given in the sense that
10 the penalties might be a bit greater with somebody that
11 you are living with. So that was the 1986 -- but it was
12 limited to persons in a position of trust in your
13 household. It seems to me that could capture, at that
14 time, the foster carer which again might be a gap in the
15 incest legislation.

16 Further and more important in creating a much wider
17 offence was the Sexual Offences (Amendment) Act of 2000
18 which has now been transposed into the Sexual Offences
19 (Scotland) Act (2009), which creates a very specific and
20 really quite broad offence in the 2009 Act of sexual
21 abuse of trust, where a person who is in
22 a relationship/position of trust over a person under the
23 age of 18 will not be able lawfully to have -- to
24 indulge in any sexual activity with the person under the
25 age of 18.

1 Q. This is what you set out on page 209. It is the first
2 main paragraph where you talk about the 2009 Act. As
3 you, there is the sexual offence of trust for any person
4 over the age of 18 to engage in sexual activity with a
5 person under 18.

6 A. That is right.

7 Q. So the person who is breaching the trust is someone who
8 is over 18.

9 A. Yes.

10 Q. This was one of the recommendations made by the
11 Law Commission earlier on, I think, was it? You say the
12 rationale for this was earlier explained by the Law
13 Commission report in 2007.

14 A. That was the report that led effectively to the Sexual
15 Offences Act of 2009. But in fact they are giving
16 a justification for the crime that had been created in
17 the UK legislation in 2000. The whole point of it, and
18 I think they give a very nice justification even
19 irrespective of the issue of consent, irrespective of
20 whether there's some issue about age or mental capacity
21 of the child, is that a person who holds a position of
22 trust over someone else really ought not to be using
23 that position for the purposes of indulging in sexual
24 activity.

25 Q. So consent -- if the child or the young person is able

- 1 to consent, it is neither here nor there?
- 2 A. It is neither here nor there. It is like having sex
3 with a 15 year old: they may well be able to consent, as
4 a result of which the crime is not rape, but
5 nevertheless our society ought not to allow persons to
6 do that, so whether or not they consent is irrelevant to
7 the commission of the offence itself.
- 8 Q. This would be relevant, as indeed you point out, if the
9 young person was a resident in a home --
- 10 A. Yeah.
- 11 Q. -- or any other accommodation where care is being
12 provided by a local authority or any other organisation.
- 13 A. Yes. I don't think I have given the definition in the
14 report but the definition of a position of trust is
15 really very, very broad. It includes schoolteachers,
16 for example, even though there's no connection with any
17 particular accommodation with the child.
- 18 Q. Perhaps coming to the end of this section, what about
19 defences or a defence to this, because you do talk about
20 that on page 2310 --
- 21 A. Yes.
- 22 Q. -- and the spectrum of reasonable belief?
- 23 A. Yes. There is two defences. That the person over 18
24 reasonably believed that the other person was under 18,
25 or that there was no position of trust, if that's

1 a reason. But I think the onus is on the accused to
2 establish that.

3 The second defence is that either the parties are
4 married or in civil partnership with each other or
5 a sexual relationship had already come into existence
6 before the position of trust arose.

7 Q. The next chapter I want to discuss with you,
8 Professor Norrie, relates to independent boarding
9 schools. Again, we touched upon that the last time you
10 gave evidence and you follow that through in these two
11 parts of your report.

12 A. Yes.

13 Q. If we begin in part 3 at 2018. You, I think, remind us
14 about there in relation to what was contained in the
15 Education (Scotland) Act (1980), and you say the Act is
16 still in force today.

17 A. That is right.

18 Q. In particular there are provisions about registration?

19 A. Yes.

20 Q. Can you elaborate upon that?

21 A. The registration provisions were first introduced in
22 1945/1946. They were repeated in the 1962 Act and are
23 now contained in the Education (Scotland) Act (1980)
24 when the Act was first enacted. It wasn't much
25 different from what had gone before in the 1962 and

1 earlier registration -- earlier provisions.

2 The 1980 Act originally required that all
3 independent schools be registered with the Registrar of
4 Independent Schools in Scotland, which was an officer of
5 the Secretary of State for Scotland.

6 There's regulations, the Registration of Independent
7 Schools (Scotland) Regulations from 1957, so even by
8 1980 they were relatively elderly, but they continued to
9 apply which set out the information that needed to be
10 supplied in the registration process. Once registered
11 it was possible for the Secretary of State to remove
12 registration on establishment of various conditions
13 including, for example, that efficient and suitable
14 instruction was not being provided, or that the premises
15 were unsuitable, or that the accommodation was
16 inadequate, or that the proprietor or any teacher was
17 not a proper person to be a proprietor.

18 But this was, at this stage in the story, a sort of
19 retrospective action. Once registration had taken
20 place, once the school was up in operation, registration
21 could be taken away on -- by the Secretary of State on
22 these conditions.

23 "Proper person" wasn't defined in 1980 or indeed in
24 1957, where the original regulations come from. There
25 was of course an appeal mechanism at this stage for what

1 was then called the Independent Schools Tribunal.

2 Q. So far as inspection was concerned, that I think was
3 also governed by the Education (Scotland) Act (1980).

4 A. That is right, yes.

5 Q. I can put that on the screen. The Act begins at
6 LEG.001.001.6910. If we turn to section 66 and that's
7 at 6965 -- there is a technical glitch, so I will just
8 read this out to you:

9 "The Secretary of State shall have power to cause
10 inspection to be made of every educational
11 establishment ..."

12 That would include a boarding school?

13 A. Yes. The nature of the definition of "educational
14 establishment" brought that in.

15 Q. "... at such intervals as appeared to him to be
16 appropriate, and to cause a special inspection of any
17 such school or junior college to be made whenever he
18 considers an inspection to be desirable."

19 So it was a fairly flexible provision in relation to
20 inspection, there were no timescales as we have seen in
21 other establishments?

22 A. That is right and it was a slight loosening -- perhaps
23 a substantial verbal loosening -- from what had gone
24 before in that, as you have quoted, section 66 gives the
25 Secretary of State power; the previous legislation had

1 imposed upon the Secretary of State a duty.

2 Q. Yes, okay. Well I think that's what you point out in
3 your report at page 2020 under the heading of
4 "Inspection of boarding schools", where the Education
5 (Scotland) Act (1946) had imposed a duty, whereas we are
6 now looking at a power.

7 A. Yes.

8 MR MacAULAY: If your Ladyship were thinking about having
9 a break --

10 LADY SMITH: I was just about to suggest we might take
11 a 5-minute break now.

12 MR MacAULAY: -- to give the stenographers a break.

13 (3.05 pm)

14 (A short break)

15 (3.10 pm)

16 LADY SMITH: Mr MacAulay.

17 MR MacAULAY: My Lady.

18 Before the adjournment, Professor Norrie, we had
19 been looking at independent boarding schools.

20 A. Yes.

21 Q. If I could take you to page 2311 of your report.

22 A. Yes.

23 Q. You have a section there where you point to amendments
24 to the 1980 Act and in particular to the standards in
25 Scotland's Schools Act (2000).

1 A. Yes.

2 Q. You say that there are two important amendments to the
3 registration rules which were made by the 2000 Act,
4 which came into force on 13th October 2000.

5 A. Yes.

6 Q. Can you just develop that for me: what do you have in
7 mind?

8 A. Yes, the two important amendments in this aspect of the
9 2000 Act are as follows: the first one is that the
10 grounds for refusing registration were expanded and in
11 particular the idea that the person -- that a person,
12 the proprietor or a teacher in school, is not a suitable
13 person becomes a ground. Previously that was a ground
14 to remove registration that had already been granted
15 and, you know, what that meant was that you couldn't
16 stop a school being registered just because the people
17 were -- the people running it were unsuitable, but you
18 could stop them continuing.

19 What this amendment does, and it is a valuable one,
20 is to allow the original registration to be refused on
21 the ground that the person is not suitable.

22 Of course, at this time we are beginning to get the
23 disclosure rules so that it is easier to identify
24 somebody who is not a suitable person. So that was the
25 first important amendment in 2000.

1 The second is that one of the issues or complaints,
2 as it is called, that can allow the Scottish
3 ministers -- it is now the Scottish ministers -- to
4 require the school to change in some way is that the
5 welfare of a pupil attending the school is not
6 adequately safeguarded or promoted. This is really the
7 first time we get, in independent schools, a requirement
8 to focus in on the welfare of the individual pupil.

9 Q. If we look at the Act itself at LEG.001.001.8267. If we
10 go first to page 8280 and regulation 24 towards the
11 bottom of the page. Is that the provision you had in
12 mind in connection with the registration effectively
13 amending the 1980 Act?

14 A. That is right, yes.

15 Q. Moving on to page 8281, and moving to regulation 25,
16 just moving down the page, again, this is an amendment
17 to the 1980 Act --

18 A. That is right.

19 Q. -- where, as I think you just said, the welfare of
20 a pupil attending the school is not adequately
21 safeguarded and promoted there.

22 A. Yes.

23 Q. That's new in this context?

24 A. That is new in this context; it is the welfare of
25 a pupil. So it requires you to look at individual

1 children and if there's a circumstance in which
2 an individual child's welfare is not -- it is much more
3 focused than just "welfare of children"; it is
4 "an appropriate safe environment".

5 Q. It is focused on the individual child?

6 A. I think it is because it is the welfare of a pupil
7 attending the school, yes.

8 Q. If we now go back to your report then, professor, at
9 page 2312. Here you look at the School Education
10 (Ministerial Powers and Independent Schools) (Scotland)
11 Act (2004) and what you tell us is that the registration
12 rules, no doubt as amended, as indicated in the 1980
13 Act, were substantially restructured by the 2004 Act
14 which came into force on 31st December 2005. Can you
15 just take us through that and what the significant
16 differences were?

17 A. The section numbers and the additional subsections mean
18 that today it reads a very different piece of
19 legislation than when originally passed, though the
20 governing legislation remains the 1980 Act.

21 The important -- one of the most important things is
22 that, prior to these amendments in 2004, originally the
23 Secretary of State, then the Scottish ministers, could
24 grant registration and then could withdraw registration
25 on particular grounds, but it wasn't specified the

1 grounds upon which registration would be granted.

2 This was added into the 1980 Act by I think --
3 I can't see which section it is. One of the sections in
4 the 2004 Act said that the Scottish ministers can grant
5 an application only if they are satisfied of various
6 conditions and basically these are the conditions which
7 could justify withdrawal of registration, but it is sort
8 of put in the reverse, if you see what I mean.

9 Q. One of these being the welfare of such pupils being
10 adequately safeguarded --

11 A. That is right. In other words, the Scottish ministers
12 must be satisfied right at the beginning that the
13 establishment of a new school, to be registered for the
14 first time, that they are satisfied that the welfare of
15 the pupils will be safeguarded and promoted.

16 Q. I think -- we can look at the Act. It is
17 LEG.001.001.8099. If we scroll down a little bit, we
18 can see that it is rather deceptive in that it seems to
19 be rather a short act but in fact it is longer than it
20 looks because of all the amendments that are made to the
21 1980 Act --

22 A. Yes, it is section 4.

23 Q. -- which is on page 8104.

24 Towards the bottom where we can see it is dealing
25 with registration and if we move on to 8105, we see

1 reference to the welfare point and that is inserting
2 98(a) and 3(b) into the 1980 Act.

3 A. Yes, that's it.

4 Q. If we now move on to the next page in your report --
5 actually, perhaps while we have the Act on the screen
6 and go back to page -- the page we had up. I think it
7 was 8104, the previous page, and move down to the
8 bottom. The meaning of an independent school has been
9 changed -- or had this happened before?

10 A. No. This is where the words "five or more" are
11 repealed. Previously, the definition of educational
12 establishment and school in the 1980 and previous
13 legislation included all independent schools, so as long
14 as they had five or more pupils.

15 These words are now removed so that an independent
16 school that has four, three, two or even one pupil is
17 covered. I'm not entirely sure how this fits in with
18 homeschooled pupils, which would be the normal situation
19 in which you have got an environment in which there are
20 one or two pupils.

21 Q. However then, if we move on to page 2313 on the second
22 main paragraph of your report, you say that:

23 "On the same day as the 2004 Act was brought into
24 force also came into force the Registration of
25 Independent Schools (Scotland) Regulations (2005), which

1 had replaced [the 1957 regulations]."

2 A. And themselves shortly replaced thereafter by the same
3 regulation, 2006.

4 Q. Within six months, I think.

5 A. Yes.

6 Q. I wondered why that was.

7 A. I don't know.

8 Q. So these are the regulations now that continue to apply
9 today?

10 A. Yes.

11 Q. On that page, 2313, you talk about particular
12 information that is required to be supplied about the
13 schools' child protection policy and procedure.

14 A. Yes.

15 Q. Can you elaborate upon that? This is new?

16 A. This is new. It requires schools to have in place
17 a policy for child protection issues. The other thing
18 that's new here, I think, is that we now have a much
19 more clearer picture of what is a fit person because of
20 course the Police Act of 1997, allowing the issuing of
21 criminal records certificates, has been brought into
22 force by this stage.

23 So as part of your child protection policy, the
24 schools have to have and to specify a process for
25 ensuring that the people they employ have clean

1 disclosure records, basically.

2 Q. If we then look at the regulations themselves at
3 LEG.001.001.7765 and pick that up. If we -- this is
4 contained in a schedule, if you turn to page 7768 first
5 of all. This sets out in the schedule particulars of
6 the information that applications for the registration
7 for such schools would require to contain.

8 Turning on to the next page, 7769, do we see at
9 paragraph 9G the provision on child protection policy
10 and procedure that you have just mentioned?

11 A. Yes, that is right.

12 Q. In particular including a statement of the schools'
13 policy and practice on seeking criminal records
14 certificates under part V of the 1997 Act; that is the
15 Police (Scotland) Act?

16 A. Yes.

17 Q. The Police Act. If we turn to page 2315 of your report,
18 can we see there that the Independent Schools Tribunal
19 was abolished by the 2004 Act?

20 A. That is right.

21 Q. So that any appeal would now go to the sheriff
22 principal?

23 A. That is correct. I think that remains the case even
24 after the Court Reform (Scotland) Act. It is an appeal
25 that goes to the sheriff principal rather than the

1 sheriff appeal court.

2 Q. Can we look now at the inspection regime for independent
3 boarding schools beyond the 1980 Act that I think I took
4 you to earlier.

5 A. Yes.

6 Q. I think what's relevant here now is the Children
7 (Scotland) Act (1995); is that right? If we turn to
8 page 2317 of your report.

9 Do you tell us on page 2317 that the Children
10 (Scotland) Act (1995) inserted a new section into the
11 1980 Act obliging school inspectors to inspect boarding
12 accommodation --

13 A. That is correct yes.

14 Q. -- whether provided by independent schools or indeed any
15 other schools.

16 A. That is right.

17 Q. The intention behind the inspection, as you tell us, is
18 to determine whether the pupils' welfare is adequately
19 safeguarded and promoted.

20 A. That is correct.

21 Q. So certainly for independent boarding schools, that is
22 new?

23 A. That is in addition to anything that went before.

24 Q. We also have a provision about inspection in the
25 Standards in Scotland's Schools Act (2000). Again, you

1 touch upon that in the next paragraph on page 2317.

2 A. Yes.

3 Q. What was the position there?

4 A. Well, HM Inspectors of Education inspected educational
5 provision at schools and what this amendment from the
6 2000 Act does is to allow the -- really just to close
7 the feedback loop as it were. It allows them to give
8 advice to Scottish ministers on any particular matter
9 that's been brought to their attention during the
10 inspections.

11 Q. As you point out in the next paragraph, the
12 Care Commission and subsequently the Care Inspectorate
13 took over those functions in 2011.

14 A. That is right.

15 Q. Can I now talk about mental health. Again, you
16 mentioned that before when you gave evidence before.
17 Let's go to page 2021 of part 3 of the report.

18 We move on to page 2022 and look at the text. As
19 you set out there towards the top of the page, the
20 Mental Health (Scotland) Act (1960) that you have
21 already described established the Mental Welfare
22 Commission.

23 A. Yes.

24 Q. That had powers of investigations which included
25 visiting patients.

- 1 A. That is correct.
- 2 Q. But you go on to say that that Act was replaced by the
3 Mental Health (Scotland) Act (1984)?
- 4 A. Yes.
- 5 Q. That, as you point out, continued the operation of the
6 Mental Welfare Commission.
- 7 A. Yes.
- 8 Q. Did that change the landscape in relation to the
9 investigatory powers of the Mental Health Commission?
- 10 A. I do not think the 1984 Act changed things very
11 significantly, no.
- 12 Q. You go on to talk about, for example, on the next page,
13 page 2023, the powers of detention and who could be
14 detained under the 1984 Act -- and that persons over the
15 age of 16 could be made the subject of a guardianship
16 order. That then gave the guardian some rights over the
17 individual; is that correct?
- 18 A. Yes.
- 19 Q. Could you just develop that for me?
- 20 A. Well, the right of the guardian under these regulations
21 was to determine where the child -- where the ward was
22 to reside. That was really the extent of the right.
23 There were obligations, more importantly, to safeguard
24 the ward's interests.
- 25 Q. So far as the local authority was concerned, did that

- 1 have a general supervision right over the patient?
- 2 A. Well yes. The local -- and quite often the local
3 authority would be the guardian in any case, but the
4 local authority irrespective had an obligation to visit
5 the patient, I think, every three months.
- 6 Q. I think every three months is what you tell us. On the
7 next page actually, on 2024, you mention sexual offences
8 in relation to mental health patients and you simply
9 say, I think, the offences in the 1960 Act were repeated
10 in the 1984 Act.
- 11 A. That is right yes. It changed later on but the 1984 Act
12 is fairly similar to the 1960 Act for our purposes.
- 13 Q. Can we then move on to how matters developed. If we
14 turn to page 2318 of your report, about halfway down you
15 have a section here headed "Children and young persons
16 accommodated under the mental health legislation."
- 17 Can you now just take us through these -- you
18 discussed this for a number of pages, including special
19 offences in relation to mental health patients. Can you
20 just take us through these sections?
- 21 A. I suppose one of the most important structural changes
22 in the 2003 Act was the establishment of the Mental
23 Health Tribunal for Scotland, which is the -- it used to
24 be the sheriff that did the business, now it is
25 a specific tribunal with, I think, a legal chairman and

1 at least one of the side members is medically -- usually
2 qualified in psychiatry. That's the body that will make
3 compulsory treatment orders including compulsory
4 detention orders.

5 We still have the Mental Welfare Commission that
6 carries on under the 2003 Act. It is given, I think,
7 a rather wider range of duties than it had previously.
8 It has, for example, to monitor how the Act operates in
9 practice across Scotland and it is required to promote
10 best practice across Scotland.

11 So I think that's all new. It's also -- there was
12 an amendment in the Public Services Reform (Scotland)
13 Act (2010) which obliges the Mental Welfare Commission
14 to act in a manner which seeks to protect the welfare of
15 persons who have a mental disorder and to raise concerns
16 that it has with the Care Inspectorate.

17 What's aimed at here is to try and integrate the
18 role of the Mental Welfare Commission, which in a sense
19 is a policy role, with the monitoring functions of the
20 Care Inspectorate. That comes after 2010.

21 Q. So far as visiting is concerned, after 2010 what's
22 referred to as "commission visitors" may investigate the
23 case of individual patients --

24 A. That is right yes.

25 Q. -- and must visit as often as they think appropriate?

1 A. Yes.

2 Q. I can you also point out that there are duties on health
3 boards and local authorities in this context. Can you
4 develop that for me -- that's on page 2319 --
5 particularly in relation to provision of accommodation
6 and care and support?

7 A. The local authority is obliged -- given various duties
8 under the 2003 Act. The local authority of course is
9 the body that seeks compulsory treatment orders before
10 the Mental Health Tribunal and they also have
11 obligations to provide secure care and support for
12 persons with mental disorders and that includes
13 residential accommodation, personal care and personal
14 support.

15 This is really dealing with circumstances in which
16 people need to be looked after but not necessarily in
17 a hospital setting. The responsibility for the hospital
18 setting, of course, falls to the NHS and in
19 a non-hospital setting it falls to the local authority.

20 The Children (Scotland) Act (1995) also imposes
21 duties on children in need onto the local authority --
22 and "children in need" is defined to include anyone who
23 has any child who has a mental disorder. Local
24 authorities are obliged to provide services that will
25 minimise the effect of that disability on the child.

1 Q. The monitoring and inspection then of mental health
2 facilities rested with the Care Commission initially but
3 you tell us, from August 2010, Healthcare Improvement
4 Scotland has taken over that function.

5 A. As far as the hospital settings are concerned, the
6 Healthcare Improvement Scotland -- the organisation
7 called Healthcare Improvement Scotland, which is the
8 sort of health care equivalent to the Care Commission
9 which looks at social services. And they, Healthcare
10 Improvement, are the monitoring body for hospital
11 environments but their duties really reflect very much
12 the duties of the Care Commission in residential --
13 non-medical residential establishments.

14 Q. Then would it be the Care Inspectorate that would have
15 that function in relation to non-medical?

16 A. That is right, yes.

17 Q. Then on page 2321, you look at the issue of special
18 offences in relation to mental health patients. I think
19 here there have been some changes to what we have looked
20 at before.

21 A. Yes. Before 2003 it was a fairly blunt approach adopted
22 to the protection from sexual exploitation and the end
23 result before 2003 was that any sexual activity with
24 a patient -- any sexual intercourse, I beg your
25 pardon -- with a patient was a criminal offence.

1 That effectively meant that a mentally disabled
2 person was unable to enjoy a sex life lawfully even
3 although they might -- even though they are mentally
4 disabled, they might have the capacity to consent to
5 sexual activity.

6 So the offences in the 2003 Act tried to be much
7 more subtle, much more sophisticated in their design,
8 and so in one sense the offences are broadened out to
9 include any sexual act, but the crime is a sexual act
10 with a mentally disordered person who either did not
11 consent or was unable to consent to that particular act.
12 If they can consent and they do so, then the act can
13 take place.

14 We have always got to bear in mind when we are
15 dealing with children that there are all sorts of other
16 sexual offences protecting children from sexual
17 activity.

18 Q. I think you also tell us that an offence known as sexual
19 abuse of trust of a mentally disordered person is also
20 on the landscape.

21 A. Yes.

22 Q. Is that not similar but different to what you said
23 before about someone being in a position of trust in
24 connection with an individual?

25 A. Yes, it is trying to do the same thing. That then all

1 came under the Sexual Offences (Scotland) Act (2007).

2 Q. Perhaps, finally in connection with looking at offences
3 generally, if you turn to page 2324. You point out that
4 section 315 of the 2003 Act makes it an offence for:

5 "... any individual employed in or contracted to
6 provide services in or to a hospital, any manager of
7 a hospital, provider of a care service, or person
8 providing care or treatment (otherwise than under
9 a contract or as a volunteer for a voluntary
10 organisation) to ill-treat or wilfully neglect
11 a mentally disordered person."

12 A. That is right. The important difference here is that
13 before 2003 there had been a peculiarly wide defence to
14 that, which is that you did not do the act in bad faith
15 and that went from the 2003 Act, so that if you wilfully
16 ill-treat or neglect a mentally disordered person, the
17 offence is established.

18 MR MacAULAY: My Lady, I am now going to move on to
19 a different chapter.

20 LADY SMITH: That might be a sensible place to stop.

21 MR MacAULAY: Professor Norrie has to come back in any event
22 and this might be a good time to adjourn.

23 LADY SMITH: I'm sorry we have not been able to finish
24 today, Professor Norrie, but we have made very good
25 progress. Thank you for everything that you have

1 addressed today and we will see you again hopefully
2 without too much delay.

3 Very well, we will rise now until 10 o'clock
4 tomorrow morning when we will hear from --

5 MR MacAULAY: Mr Dolan is first tomorrow morning.

6 LADY SMITH: Thank you.

7 (3.45 pm)

8 (The Inquiry adjourned until 10.00 am
9 on Thursday, 2nd November 2017)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

PROFESSOR KENNETH NORRIE (affirmed)1

 Questions by MR MacAULAY1

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25