

1 Tuesday, 2 April 2019

2 (10.00 am)

3 LADY SMITH: Good morning, and welcome back to hearings in
4 this inquiry. As you all know, today we embark on
5 a section of the inquiry where we're not looking into
6 a particular case study, but we have expert evidence,
7 two experts, who will be picking up on where they left
8 off when you last heard from them, and also one new
9 expert, Professor Kendrick. No doubt Mr MacAulay will
10 explain where we're going first.

11 MR MacAULAY: The first witness will be Professor Kenneth
12 Norrie, who is being recalled. After Professor Norrie,
13 the intention is to lead Professor Kendrick and
14 thereafter Professor Levitt.

15 PROFESSOR KENNETH NORRIE (recalled)

16 Questions from MR MacAULAY

17 LADY SMITH: Please sit down and make yourself comfortable.

18 Mr MacAulay, when you're ready.

19 MR MacAULAY: Good morning, Professor Norrie.

20 A. Good morning.

21 Q. It's a little time since you've been here: I think it
22 was in November 2017 when you last gave evidence. At
23 that time, one of the pieces of legislation we looked at
24 was the Children (Scotland) Act 1995.

25 A. Yes.

1 Q. If I could take you to your report. In front of you,
2 you will have two green folders and within each of these
3 folders there will be a copy of your report with the
4 inquiry numbers on it. I want you to turn to
5 page LIT.001.6613, which is page 107 of the report
6 itself.

7 Here you have a section headed "Changes since the
8 1995 Act". I think you're beginning to introduce in
9 your report what happened after 1995; is that right?

10 A. Yes.

11 Q. So far as the 1995 Act itself was concerned, I think you
12 said that you didn't see it as indicating a significant
13 change of direction; is that correct?

14 A. That's correct in relation to part 2, which is the
15 public law provisions.

16 Q. If I could take you to the transcript itself, and just
17 to pick up what you said, that's at TRN.001.001.6143.

18 If we scroll down a little bit, you're there talking
19 about the different pieces of legislation that we looked
20 at, like the 1908 Act, 1948 Act and the 1968 Act, which
21 as you told us in your evidence, they did represent
22 a change in direction.

23 A. I think so, yes.

24 Q. And you go on to say:

25 "We kind of assumed the 1995 Act was a big change of

1 direction too, but the more I think about it and see it
2 in the context of the 100 years, part 2 of the 1995 Act
3 [and that's the part we're looking at] wasn't a real
4 change of direction; it was a sharpening of our
5 processes."

6 That's your position?

7 A. Yes.

8 Q. As you go on to say in your report, thereafter there
9 were significant changes; is that correct?

10 A. Yes.

11 Q. And can we turn to the next page of your report. It is
12 at 108 of the report, which is 6614. Here you begin
13 a section headed "The Changing Face of Family". Can you
14 just explain the context here?

15 A. I think the context is that family law traditionally
16 regulated families, but by defining the type of family
17 that it was going to regulate, family law had quite an
18 affirmative effect for the sort of ideal family. Since
19 the very late 1990s and moving into the 21st century,
20 family law has kind of eschewed any desire to socially
21 construct the concept of family -- and not just in this
22 country, it's across the Western world -- and family law
23 sees its role as regulating families that exist rather
24 than families that ought to exist.

25 Q. In that connection, you make reference to, for example,

1 the Civil Partnership Act 2004 --

2 A. Yes.

3 Q. -- and that allowed same sex couples to register their
4 relationship and, indeed, acquire virtually all rights;
5 is that correct?

6 A. Civil partnerships reflected marriage, yes.

7 Q. You go on to say:

8 "The Family Law (Scotland) Act 2006 finally
9 abolished the status of illegitimacy."

10 A. That's right.

11 Q. You go on to say that the Adoption and Children
12 (Scotland) Act 2007 allowed unmarried couples and same
13 sex couples to adopt.

14 A. That's correct.

15 Q. You also mention constitutional changes, and that's at
16 page 6615, page 109. Can you just give us the
17 background here?

18 A. Well, the two most important constitutional changes
19 were, first, devolution, under the Scotland Act 1998,
20 which re-established the Scottish Parliament and really
21 virtually all childcare matters came under the aegis of
22 the Scottish Parliament. The major constitutional
23 difference, of course, between the Scottish Parliament
24 and the British Parliament is that the
25 Scottish Parliament is not a Parliament of unlimited

1 sovereignty, it has its powers limited, particularly
2 limited by the requirement to act within the powers,
3 within the Scotland Act itself, to act consistently with
4 the European Convention on Human Rights, and of course
5 to act consistently with EU law.

6 Q. And the European Convention you also mention here as
7 having an important bearing on family.

8 A. Yes. The second major constitutional development, also
9 in 1998, was the passing by the UK Parliament of the
10 Human Rights Act, which incorporated within our domestic
11 legal system the European Convention on Human Rights.

12 Not only is the Scottish Parliament unable to enact
13 legislation inconsistent and, if it does, such
14 legislation can be struck down by a court of law. It
15 also requires courts to interpret any issue and public
16 bodies to act consistently. The courts have to act --
17 have to interpret legislation consistently insofar as
18 they can possibly do so, consistently with the
19 European Convention.

20 Q. Can I then move on to what you describe as the shift of
21 focus in child protection legislation at 6616, page 110
22 of the report. You introduce this section by comparing
23 and contrasting what the law was and what its purpose
24 was as to what was now happening; is that correct?

25 A. Yes. That's correct. I think there was a change of

1 focus away from looking at how the law should respond to
2 bad parenting to look rather more broadly -- after the
3 realisation that children are harmed outwith the family
4 context, even although that can be a dangerous context
5 for some children, outwith the family context children
6 might be at risk. So the legislation in the early years
7 of this century started looking at the protections to be
8 provided in care settings and any environments in which
9 people are working with children.

10 Q. What you say in that page is that:

11 "Places of safety are not safe because we call them
12 so, but because they are staffed by properly trained,
13 suitably motivated and robustly vetted individuals."

14 A. Yes. We've used this phrase "place of safety" for
15 100 years in the legislation, and a lot of legislation
16 allows us to remove children summarily and put them to
17 places of safety, but they're not safe unless they're
18 properly staffed, properly vetted, and they're
19 appropriate places. That's the point I was making.

20 Q. What you go on to tell us on the next page, 6617,
21 page 111, is that there are two interrelated but
22 distinct streams as to the legislation you were about to
23 look at. Can you develop that for me?

24 A. The two streams are increased regulation on who can work
25 with children, so we've got lists now of persons who are

1 unsuitable to work with children and vulnerable adults
2 now, and we now have processes designed to identify
3 people who should be on such lists. That's the first
4 one.

5 The second one is putting on a national and
6 consistent basis the registration and inspection
7 regimes, particularly for residential establishments.

8 Q. You begin then by looking at the legislation that deals
9 with the limitations on who may work with children.

10 A. Yes.

11 Q. The first piece of legislation you point to is the
12 Protection of Children (Scotland) Act 2003, which came
13 into force in January 2005, although it only remained on
14 the books for about six years; is that right? What was
15 that piece of legislation designed to do?

16 A. Well, that was the piece of legislation that set up the
17 government -- obliged the government to establish a list
18 of persons who were unsuitable to work with children.
19 It's really building upon the Police Act from 1997,
20 which established, originally on a fairly rudimentary
21 basis, the disclosure process which we now have.

22 Q. I think you tell us that that Act was repealed and
23 replaced by the Vulnerable Groups (Scotland) Act 2007.

24 A. Yes.

25 Q. Did that repeal the other Act completely?

1 A. I think so.

2 Q. Can we then look at the 2007 Act? I'll put that on the
3 screen just to pick up one or two points. It's to be
4 found at LEG.001.001.7491.

5 We have it on the screen. We see the title there,
6 2007. If I could take you to what is section 1 at 7496,
7 it's page 1 of the Act.

8 If we scroll down a little bit --

9 LADY SMITH: Mr MacAulay, just one moment: am I able to get
10 this on my screen or not? It's not coming up on my
11 screen.

12 MR MacAULAY: Yes. We should get it on the screen, I think.

13 LADY SMITH: What about all the representatives: are you
14 getting it on your screen without having to go to the
15 big screen?

16 (Pause)

17 I'd really like to be able to read these as we go
18 along. If we have a short break, could you see if
19 we can sort this? Thank you.

20 (10.13 am)

21 (A short break)

22 (10.18 am)

23 LADY SMITH: Thank you very much, that's very helpful.

24 Mr MacAulay.

25 MR MacAULAY: I'm going to take you to look at the 2007 Act,

1 professor. But before I do, can I just take you back to
2 the report and what you say about the explanatory notes
3 to the Act. This is on page 6618 at page 112.

4 A. Yes.

5 Q. Can you explain what -- I think this sets out the
6 intention behind certain of the provisions of the
7 legislation. Can you help me with that? What was the
8 broad impetus here?

9 A. I'm not sure I understand the question.

10 Q. It wasn't a very good question, that's probably why you
11 don't understand it.

12 You set out the explanatory notes to the Act and in
13 particular what the functions to be allocated to the
14 Scottish Ministers were to be. What were these
15 functions?

16 A. It was the Scottish Ministers who were obliged under
17 both the earlier Act and the 2007 Act to keep and
18 maintain the lists of persons who were considered
19 unsuitable to work for children. They had a sort of
20 monitoring function to make sure that the people
21 referred to them actually should be on the list. They
22 have a certain discretion, but obviously when it's
23 a court of law that refers a person, the discretion is
24 much less.

25 LADY SMITH: I can't remember having any discretion at all

1 as to whether, in the days I was sitting in the
2 High Court, I couldn't add somebody to the list. You
3 may be right, there may be some discretion hidden away,
4 but I think routinely, on a daily basis, somebody
5 convicted of an offence relating to children or any
6 sexual offence goes on the list and is notified
7 immediately.

8 A. Okay, that's correct. I was meaning there's more than
9 simply people who are convicted.

10 LADY SMITH: Yes, that's another area that, of course, the
11 court doesn't get involved with.

12 MR MacAULAY: What you talk about there at the bottom of
13 page 6618 and into the following page is that:

14 "This would be run by civil servants and an
15 executive agency, which would consist of a vetting and
16 disclosure unit and also a central barring unit."

17 Is that right?

18 A. Yes, that's correct.

19 Q. If we go back to the Act itself, just to get some feel
20 for how this is set out in the legislation, it's at
21 LEG.001.001.7491 at 7496, which is page 1 of the Act.

22 Is it section 1 really that places the duty on the
23 Scottish Ministers to keep lists?

24 A. That's correct, yes.

25 Q. And we read that:

1 "Ministers must keep the children's list and the
2 adults' list."

3 A. Yes.

4 Q. Can you help me with the two lists? What are they?

5 A. Well, the children's list is the list for people who
6 would have been dealt with under the 2003 Act when the
7 idea was developed from. These are people who it is
8 considered would be unsafe to allow them to work in any
9 sense with children. After the 2003 Act it was
10 recognised that similar considerations might apply for
11 vulnerable adults -- people with dementia would be
12 a typical example but obviously not the only one -- so
13 the 2007 Act has also required the Scottish Government
14 to keep the so-called adults' list and that is for
15 people who would be considered unsuitable to work with
16 vulnerable adults.

17 It is, of course, possible that the same individual
18 would be put on both these lists.

19 Q. And that indeed is what we read on subsection 2 of the
20 Act.

21 A. Yes.

22 Q. There are provisions dealing with how people would be
23 referred to these agencies. But if I could take you to
24 the sections dealing with the inclusion in the list,
25 that's at page 7502 and page 7 of the Act itself.

1 We have a heading "Inclusion in list" and section 14
2 is "Automatic Listing".

3 A. Yes.

4 Q. There are provisions which -- this may cover the sexual
5 offence that Lady Smith mentioned to you, where persons
6 would automatically be placed on the list.

7 A. Yes.

8 Q. You mentioned discretion a moment ago. Section 15,
9 if we scroll down, is this the sort of provision
10 you have in mind where:

11 "Ministers must list an individual in the children's
12 list if, after considering whether to do so, they are
13 satisfied by information relating to the individual's
14 conduct"?

15 A. Yes. Discretion may have been not quite the right word.
16 The Scottish Ministers have to exercise a judgement --
17 judgement might be a better word -- as to whether
18 they've satisfied under the terms of section 15.

19 Q. And there are separate provisions dealing with adults at
20 section 16?

21 A. Yes. So it's not automatic is all I meant.

22 Q. You also mentioned the new vetting and barring scheme.
23 Can you just elaborate upon that, what that involved?

24 A. I think you're talking about the Disclosure Scotland
25 process?

1 Q. Yes.

2 A. What the law now requires is that anybody who seeks
3 employment, either with children or with vulnerable
4 adults -- and not just employment, it might be working
5 in a voluntary group or for a charity or anything like
6 that that brings them into contact with children and
7 vulnerable adults -- they're required to seek
8 a certificate from Disclosure Scotland, which will
9 disclose any red flags, if you like. There's, I think,
10 three categories now of disclosure certificate, and that
11 will involve greater depth, depending on the category,
12 greater depth of information to be revealed.

13 Q. If you go back to the legislation itself at
14 LEG.001.001.7516, that's page 21. Here we have
15 a section, it's part 2 of the Act, dealing with vetting
16 and disclosure, and we're given some information about
17 the scheme. We're told:

18 "Ministers are to administer a scheme under which
19 information about individuals who do, or wish to do,
20 regulated work with children or protected adults is
21 collated and disclosed in accordance with this part of
22 the Act."

23 A. That's correct.

24 Q. We're then given some information about "Participation
25 in the Scheme", a statement of scheme membership, and

1 then "Enquiries about Scheme Membership" at section 47.

2 Is that right? You mentioned earlier that there were
3 three forms of disclosure; is that right?

4 A. I think so, yes.

5 Q. And you do talk about that in your report. It's at the
6 page we had before, 6619, page 113.

7 I'm just looking for -- yes, you mention at
8 paragraph 10, number 10, that:

9 "Part 2 sets out provisions for the vetting element
10 of the new vetting and barring scheme, creating three
11 new forms of disclosure certificate as well as making
12 provisions for a scheme detailing all those individuals
13 working in regulated positions with children and/or
14 protected adults."

15 And so far as the three forms of disclosure would be
16 concerned, would they, as it were, be at an upgoing
17 level, if you like? There's a lower level, a medium
18 level and a higher level?

19 A. Yes, that's correct.

20 Q. I think you do tell us that this vetting and disclosure
21 system came under attack in the courts.

22 A. Yes.

23 Q. Can you just help me with that?

24 A. Yes. While the Act was being drafted there was a lot of
25 disquiet as to the types of offences that should go on

1 a list of offences that required automatic disclosure.
2 The fear was that if you simply specified a single
3 stated offence, within that offence you could have
4 individuals who have been convicted of the offence but
5 nevertheless are a high risk to children and vulnerable
6 adults and at the same time a low risk.

7 A typical example might be a sexual offence, having
8 sex with somebody under age. If you have two
9 15-year-olds having sex with each other, they're both
10 committing a sexual offence which would require to be
11 disclosed, but that tells you a different -- that gives
12 you a different message as to how risky that person is
13 when, let's say, they're now 25, from the situation if
14 it had been a 40-year-old having sex with a 15-year-old,
15 that would give you a different message.

16 So the fear was that it was too limiting and there
17 had been a number of challenges in the courts on the
18 basis, effectively, that the scheme is irrational and
19 isn't sufficiently flexible to capture the true level of
20 risks for particular individuals.

21 Q. Does the passage of time come into this thinking,
22 in that if you have someone, a 15-year-old, for example,
23 who was convicted, let's say, of having sexual
24 intercourse with another 15-year-old, and then, 30 or
25 40 years down the line seeks to apply for a job and is

- 1 barred because of the conviction?
- 2 A. Yes. I can't remember all the details, but my
3 understanding is that there are certain offences, and
4 I think for sexual offences there's effectively no time
5 bar.
- 6 Q. But for other offences, that would be a factor that
7 would come into play?
- 8 A. Yes.
- 9 Q. I think there was a recent case in the Supreme Court
10 where this area of the law was being looked at; is that
11 correct?
- 12 A. That is correct, yes. Could I --
- 13 Q. Yes.
- 14 A. -- quickly remind myself from my notes.
- 15 Q. I think this was after you had prepared your report.
- 16 LADY SMITH: This is R v Secretary of State for the Home
17 Department; the judgment was issued this year.
- 18 A. Right. When I submitted my report in, I think,
19 November 2017, I think at the foot of page 114 of my
20 report I bring in the Court of Appeal decision.
- 21 MR MacAULAY: But it went to the Supreme Court?
- 22 A. It went to the Supreme Court, I think, earlier this
23 year --
- 24 Q. Yes.
- 25 A. -- at the very beginning of 2019.

1 The Supreme Court held, effectively, that the
2 structure of the scheme is fine, is proportionate, but
3 there were two areas where the scheme would be held to
4 be disproportionate. The first was when there's
5 multiple offences, because if there are multiple
6 offences you've got to disclose, and the Supreme Court
7 said that might be disproportionate because it doesn't
8 specify they have to be a series of offences of the same
9 nature.

10 The second area was with youthful offending, which
11 had resulted in warnings and reprimands. They felt
12 that, particularly when dealing with younger offenders,
13 the inability, effectively, to escape this for the rest
14 of their life would have a disproportionate effect on
15 young persons, so it's likely the scheme will require
16 some further amendment.

17 Q. There has been some attempt, has there, to amend the
18 scheme in Scotland?

19 A. Yes, and in England. In fact, the Supreme Court's
20 decision was concerned with the amendments that had been
21 made for England and Wales, and I think in
22 Northern Ireland as well, in that case in respect of the
23 earlier scheme, which had been held to be
24 disproportionate by an earlier Supreme Court decision,
25 as a result of which the Scottish Government passed

1 a remedial order in similar terms to the one that was
2 challenged in the recent Supreme Court decision.

3 Q. You mention the 2015 order, Protection of Vulnerable
4 Groups (Scotland) Act, remedial order number 2, under
5 which certain spent convictions need not be disclosed.

6 A. Yes.

7 Q. But do you say there's still scope for challenge?

8 A. Well, that order was very similar -- it's not completely
9 identical, but it's very similar to the one that had
10 difficulties in the Supreme Court in 2019. I would
11 imagine that the Scottish Government are looking at that
12 and deciding whether anything else needs to be done.

13 Q. You move on then, professor, at page 6621, page 115 of
14 the report, to look at new oversight institutions.

15 A. Yes.

16 Q. Can we look at that? Can you give us the background to
17 the need for such institutions?

18 A. Well, the background is that both registration of social
19 services, social work institutions, social care
20 institutions, both the registration and the inspection
21 of these came from a plethora of different sources.
22 Some had to be registered, inspected by the local
23 authorities, some Central Government, some with
24 Health Services, and standards for each were not
25 necessarily consistent with each other. And of course,

1 there's overlaps with healthcare and social care, which
2 created difficulties.

3 There's also another difficulty in that social
4 services are often provided directly by local
5 authorities, similar social services are provided by
6 voluntary organisations and charities and the like.
7 Local authorities, when they were obliged to inspect the
8 provision of these services, they would be inspecting
9 their own services at the same time as somebody else's
10 services, and sometimes there's financial implications.
11 There was potential clashes of interest, effectively.

12 So it was felt appropriate to really bring the whole
13 registration/inspection regime for all social care
14 within a unified body that would apply similar standards
15 and crucially be independent of any of the providers.

16 Q. Does that bring us then to the first piece of
17 legislation, which was the Regulation of Care (Scotland)
18 Act 2001?

19 A. Yes.

20 Q. If I could look at that. It's at LEG.001.001.8121. So
21 we have the frontispiece of the Act on the screen. If
22 I could take you to section 1 at page 8125, and that's
23 page 1 of the Act.

24 If we scroll down to the section, can we see here
25 the heading "Constitution of Scottish Commission for the

1 Regulation of Care"?

2 A. Yes.

3 Q. We're told that:

4 "There shall be a body corporate to be known as the
5 Scottish Commission for the Regulation of Care (in this
6 Act referred to as 'the Commission'), which shall ..."

7 And for example:

8 "Exercise the functions conferred on it by this Act
9 or any other enactment."

10 Is this what was commonly known as the
11 Care Commission?

12 A. This was the Care Commission, yes.

13 Q. So this is really pulling together responsibilities, for
14 example, for inspection that had been in the hands of
15 different organisations?

16 A. That's correct, yes.

17 Q. Just in relation to the matter of inspection, if we turn
18 to page 8140, page 16 of the Act, section 25. Have we
19 got there sections -- section 25 dealing with, in quite
20 some detail, the inspection regime?

21 A. That's correct, yes.

22 Q. Just to read the first section:

23 "The Commission may at any time require a person
24 providing a registered care service ..."

25 There were provisions also in relation to

1 registration?

2 A. Yes.

3 Q. "... to supply it with any information in relation to
4 the service which it considers necessary or expedient to
5 have for the purposes of its functions under this Act."

6 If we move on to the next page, page 8141, page 17,
7 do we get some information as to what services at
8 subsection 4 would be subject to the jurisdiction of the
9 Care Commission?

10 A. That's correct.

11 Q. So a care home service, for example, a school care
12 accommodation service, a secure accommodation service,
13 and an independent healthcare service, which provides
14 overnight accommodation?

15 A. That's right.

16 Q. So a broad jurisdiction?

17 A. Yes.

18 Q. We needn't go to the Act itself, but I think there were
19 also provisions in the Act whereby the Care Commission
20 could serve an improvement notice on a provider.

21 A. That's right.

22 Q. What was the purpose behind that provision?

23 A. I think the clue's in the title. As a result of their
24 inspection, if they identified issues which needed to be
25 changed, quite often a Care Commission report would

1 contain recommendations to be taken into account and it
2 would be expected that things might change. But an
3 improvement notice had a more teeth to it because
4 it would require the care service actually to make the
5 improvement that had been recommended.

6 Q. And were there sanctions if such improvements were not
7 carried out?

8 A. There were processes to enforce them, yes.

9 Q. Some of the --

10 A. The ultimate sanction would be the removal of
11 registration. That's in a sense of bit of a nuclear
12 option.

13 Q. The next piece of legislation I want you to look at --
14 and you deal with this at page 6626 of your report,
15 page 120 -- is the Public Services Reform (Scotland) Act
16 2010. I'll put that on the screen: it's
17 LEG.001.001.8441.

18 So we have the 2010 Act on the screen. This, as it
19 were, renames the Care Commission.

20 A. Yes, to the Care Inspectorate.

21 Q. It also covers other areas that we needn't look at.
22 If we look at page 8470, that's page 24 of the Act, and
23 I want to look at section 44. Here we're told at 44(1):

24 "There is established a body to be known as Social
25 Care and Social Work Improvement Scotland (in this Part

1 referred to as SCSWIS)."

2 Which is now known as the Care Inspectorate. That's
3 simply a shorthand name?

4 A. Yes, the Act called it SCSWIS, but nobody was going to
5 say that in real life, so my understanding is they got
6 permission from the Scottish Government fairly early on
7 to sort of market themselves as the Care Inspectorate.

8 Q. And any reason why not the Care Commission or is it
9 just ...?

10 A. I really don't know. I think they wanted to suggest
11 this was something new. I'm not entirely convinced
12 myself that it's significantly different from the
13 Care Commission in terms of what it's actually aiming to
14 do.

15 Q. As we look at the sections, we look, for example, at
16 care services and inspection. These are very similar?

17 A. They're similar. One of the noticeable changes is that
18 healthcare services has been sort of hived off to its
19 own inspectorate, Health Improvement Scotland.

20 Q. And I think you mention that in your report?

21 A. Later on, yes.

22 Q. But if we look at section 47, it's further down the
23 page, we're given a list, in fact, of care services.
24 Moving on to the next page, 8471, page 25 of the Act,
25 and the list goes from (a) to (m) --

- 1 A. Yes.
- 2 Q. -- including a fostering service, of course, that's
3 included.
- 4 A. Yes. And childminding and day care, which I don't think
5 came under the Care Commission.
- 6 Q. So there was a broadening of the jurisdiction?
- 7 A. Yes.
- 8 Q. Perhaps if we just focus on where it is. If we look at
9 page 8473, and that's at page 27 of the Act, moving down
10 to the bottom of the page and section 53 onwards, do
11 we have there a number of provisions dealing with the
12 whole issue of inspections?
- 13 A. That's correct, yes.
- 14 Q. You provide us towards the bottom of page 6626,
15 professor, page 120, with what the Care Inspectorate had
16 to do when carrying out its functions. Can you take us
17 through that?
- 18 A. At the very foot of page 120 of my report?
- 19 Q. Yes.
- 20 A. Yes. The Care Inspectorate was given certain principles
21 in the Act that it had to follow in carrying out all its
22 functions. Perhaps the most important one is:
23 "The safety and well-being of service users to be
24 protected and enhanced."
25 But also:

1 "The independence of service users is to be
2 promoted, diversity of provision is to be promoted, and
3 good practice in the provision of social services to be
4 identified, promulgated and promoted."

5 Q. Again there were provisions in the Act on registration?

6 A. Yes.

7 Q. And the registration would be with the
8 Care Inspectorate?

9 A. Yes.

10 Q. Were there also regulations which would specify those
11 who would not be fit to manage or be employed in
12 a service?

13 A. Yes. That's correct, the 2011 regulations.

14 Q. Again, as with the Care Commission, did the
15 Care Inspectorate have the power to serve an improvement
16 notice on a service?

17 A. It does indeed.

18 Q. We'll move on to page 6630 of the report, page 124 of
19 your report. This is where you look at the role to be
20 played by Healthcare Improvement Scotland, HIS.

21 A. Yes.

22 Q. Can you just provide us with an outline as to what the
23 main function of this body was to be, particularly in
24 connection with services?

25 A. Yes. Very similar to what the Care Inspectorate would

1 do, but with the different factual background and the
2 different actual focus on healthcare services provided
3 independently of the National Health Service and within
4 it, and similarly reflecting the principles that the
5 Care Inspectorate had to use or be aware of.

6 Similarly, Health Improvement Scotland has to:

7 "... take account and be informed by the safety and
8 well-being of service users to be protected and enhanced
9 ... good practice in the provision of services
10 identified."

11 Q. Did it have power also to serve improvement notices?

12 A. Yes.

13 Q. So I think what we've seen, looking at these pieces of
14 legislation, as you mentioned earlier, a quite
15 significant move away from the sort of inspection
16 systems we had before to this independent system of
17 inspection --

18 A. I think the two important things were independence and
19 consistency so that different services were subject to
20 a consistent regime of inspection and registration, and
21 that all of that was done by independent bodies, yes.

22 Q. And given some teeth in the sense that these two bodies,
23 HIS and the Care Inspectorate, had this improvement
24 notice power --

25 A. That's correct.

1 Q. -- to engineer change?

2 A. Yes.

3 Q. Can I then move on to looking with you at the Children
4 and Young People (Scotland) Act of 2014. You discuss
5 that legislation, which has proved to be a little bit
6 controversial, beginning at page 6635 and page 129 of
7 the report.

8 Can you introduce us to this piece of legislation,
9 professor, and what it was seeking to do?

10 A. The Children and Young People (Scotland) Act 2014 had
11 a number -- was the result of a number of different
12 strands of policy development, one of which was to give
13 further impetus to the -- I'm trying to avoid the word
14 "incorporation" -- to bring further the
15 United Nations Convention on the Rights of the Child
16 into policy making for children in Scotland.

17 One of the other main strands of the 2014 Act was to
18 move us further down the road of preventative
19 strategies, by which I mean instead of care services
20 getting involved when there was a need for care, for
21 social services to be able to act to prevent that need
22 from arising in the first place. This had been presaged
23 by the GIRFEC policy framework, which had been around
24 for almost 10 years.

25 Q. That's the getting It right --

- 1 A. "Getting it Right for Every Child", commonly known by
2 the acronym of GIRFEC, yes.
- 3 Q. Just to focus on that: what was that policy seeking to
4 do? It's obviously in the title, Getting it Right for
5 Every Child, but can you give us some feel of what it
6 contained?
- 7 A. Well, it's a framework for encouraging policy makers and
8 practitioners of social services in the broadest sense
9 to ensure that the services that Scotland provides for
10 children are not only suitable for children's needs but
11 also encourage the provision of services in such a way
12 that children do not require compulsory measures of
13 care.
- 14 Q. The other point you make is in relation to the Office of
15 the Commissioner for Children and Young People.
- 16 A. Yes.
- 17 Q. This office was also on the landscape by 2014?
- 18 A. Yes.
- 19 Q. And what was that designed to achieve?
- 20 A. The Commissioner obviously had been established 10 or
21 more years before, but he had very limited powers in
22 dealing with particular individual cases. So the 2014
23 Act enhanced the power of the commissioner in that
24 respect.
- 25 Q. So what you tell us in the report is that:

1 "The 2014 Act sought to give statutory enhancement
2 of the GIRFEC approach of early intervention by
3 requiring local authorities to provide services such as
4 family group decision-making services and support
5 services in relation to parenting of children and their
6 families in their area, if these services would reduce
7 the risk of the children becoming looked-after
8 children."

9 That's the point you made earlier?

10 A. Yes.

11 Q. On page 6636 at page --

12 LADY SMITH: And just to pick up there, it's interesting,
13 this isn't just a power to a local authority: if it
14 wants to provide a particular service on that basis, if
15 such a service would reduce that risk they have to.

16 A. Absolutely, yes. It's quite an important piece of
17 legislation.

18 MR MacAULAY: At the following page, 6636, page 130 of the
19 report, you draw attention to what was said by
20 Lady Hale, Lord Reed and Lord Hodge in a case that went
21 all the way to the Supreme Court in relation to the
22 named person issue.

23 A. Yes.

24 Q. But leaving that aside for the moment, I think you are
25 putting this forward as a good summary of the policy

1 behind the legislation?

2 A. Yes, exactly.

3 Q. Is there much more you haven't said that we can take
4 from what the justices say?

5 A. I think they say it well and eloquently.

6 Q. So I think they list two or three points. The shift
7 away from intervention is one point that is made.

8 A. Yes. The shift away from compulsory intervention or the
9 need for intervention.

10 Q. You say:

11 "The second was a shift away from a legal structure
12 under which the duties of statutory bodies to cooperate
13 with one another were linked to the performance of their
14 individual functions."

15 A. Yes.

16 Q. And you go on to elaborate upon that.

17 This passage finishes up by saying:

18 "The establishment of a new professional role, that
19 of named person, was proposed in order to address those
20 concerns."

21 A. That's correct, yes. The fear had been that the system
22 as it currently operated meant that different bits of
23 information relating to a child might be held by
24 different individuals so that no one individual had
25 a complete picture of the risks to a child or what it

1 might take to ensure that the child never got anywhere
2 near the level of risk. So the government policy was to
3 introduce this new person, this new figure, known as the
4 named person, who would act as the sort of central point
5 and bring together all the different sources of
6 information about the child.

7 Q. You also draw attention to what was said in the division
8 in the Christian Institute case, in particular that the
9 purpose of the named person was to promote, support or
10 safeguard the well-being of the child.

11 A. Yes. Nobody could object to that.

12 Q. Although in fact, the named person scheme did not quite
13 make its way successfully through the Supreme Court?

14 A. Yes, that's correct.

15 Q. Can you help me with that? What was the perceived
16 difficulty with it?

17 A. Well, by the time it got to the Supreme Court,
18 thankfully the objections and difficulties had narrowed
19 down to information sharing.

20 When the bill was going through the Scottish
21 Parliament, there were all sorts of much wider
22 objections to the named person scheme, which kind of all
23 boils down to a fear of the nanny state, the state
24 knowing too much about private individuals.

25 By the time it got to the Supreme Court, the issue

1 was really the consistency of the information sharing
2 provisions in the Act, which are actually essential for
3 the named person scheme to operate. The whole point was
4 to share information. The problem was the consistency
5 of that process for sharing information with --
6 particularly after Article 8 of the European Convention,
7 and the Supreme Court held that there were potential
8 problems. They held quite clearly that the scheme
9 itself and its aims were benign and unobjectionable, but
10 they had problems with the potential clash in relation
11 to the information sharing provisions.

12 They did not hold that the system, as designed,
13 definitely was inconsistent with any wider principle of
14 privacy, but they held that the scheme as originally
15 drafted was so loose that it might potentially operate
16 in a way that was inconsistent with Article 8.

17 Q. Perhaps we should look at the legislation itself because
18 it's always helpful to see how it is set out. It's the
19 Children and Young People (Scotland) Act 2014; we have
20 that at LEG.001.001.4259.

21 It's part 4 of the Act that deals with the named
22 person scheme. That's at page 4278, page 12 of the Act.

23 We see at section 19 what is said at (1):

24 "In this part, a 'named person service' means the
25 service of making available in relation to a child or

1 young person an identified individual who is to exercise
2 the functions in subsection 5."

3 A. Yes.

4 Q. And when we look at subsection 5, moving down the page,
5 summarising, can we see that the functions involve:

6 "... advising, informing or supporting the child,
7 helping the child, or indeed a parent of the child"?

8 A. Yes.

9 Q. And:

10 "... discussing or raising a matter about the child
11 with a service provider or relevant authority"?

12 A. Yes.

13 Q. In relation to information sharing, did these provisions
14 fall foul of what was being said in the Supreme Court or
15 not?

16 A. That statement of functions absolutely did not fall foul
17 of what was said in the Supreme Court. The
18 Supreme Court said these are benign. Scotland has been
19 quite innovative in this process and other countries --
20 I have been to conferences in which other countries have
21 been asking about this innovative process for gathering
22 information in order to allow young people and their
23 parents to be advised and informed and supported, to
24 allow them to be helped, to allow matters to be
25 discussed with a service provider, all with the aim of

1 ensuring that appropriate services are provided to
2 children and young people to avoid them getting into
3 a situation in which rather more interventionist state
4 action would be required.

5 Q. Then if we look to see who the named persons could be,
6 let's look at subsection 3 of this section. We're told
7 that:

8 "An individual falls within the subsection if the
9 individual is an employee of the service provider or is
10 an employee of a person who exercises any function on
11 behalf of the service provider, and the individual meets
12 such requirements as to training, qualifications,
13 experience or position as may be specified by the
14 Scottish Ministers by order."

15 Can you give me some understanding then as to what
16 kind of individual we're looking at here who would fit
17 the named category description?

18 A. Schoolteachers. Really for most children it will be
19 a schoolteacher. For pre-school children it is likely
20 to be a health visitor.

21 Q. Are we to understand then, professor, this would put an
22 additional duty, if you like, on the schoolteacher --

23 A. Yes.

24 Q. -- at whose school the child was at?

25 A. Yes, and it's quite a significant additional burden.

1 Q. Do you know what the attitude of schoolteachers is to
2 this additional --

3 A. Mixed. I mean, inevitably some ... There are some
4 worries that these additional burdens won't be
5 sufficiently resourced. Concerns to that extent have
6 been expressed. The Scottish Government's view is that
7 it's really an enhancement of the sort of pastoral care
8 that virtually every school provides in any case.

9 Q. Just looking at it within the context of the
10 schoolteacher being the named person, would that then
11 cease after the child had left the school?

12 A. Yes. I can't quite remember who takes over as named
13 person for post-schoolchildren. I'm sure I've got it
14 in the report somewhere.

15 Q. Perhaps section 22 might help. This is the continuation
16 of named person service in relation to certain young
17 people. It's still a person at the school, but we go on
18 to read:

19 "Where the young person is a pupil at a grant-aided
20 school or an independent school, the directing authority
21 of the establishment concerned ..."

22 I think that's a different point. I may come back
23 to that, professor. If we look at section 21 of the
24 Act, just to see the -- section 20, rather, "The
25 Pre-school Child". Can we see that at subsection (1):

1 "A health board is to make arrangements for the
2 provision of a named person service in relation to each
3 pre-school child."

4 A. Yes.

5 Q. How was it envisaged that that would work in practice?

6 A. It would work through the health visitor. Most very
7 young children who are registered with GPs have the
8 services of a health visitor. The primary intent,
9 I think, was that it would be an additional duty to that
10 sort of person.

11 Q. The section dealing with information sharing is
12 section 26. Perhaps we can quickly look at that.
13 That's at page 4282 at 16 in the Act.

14 We read there at subsection (1):

15 "A service provider or relevant authority must
16 provide to the service provider in relation to a child
17 or young person any information which the person holds
18 which falls within subsection (2)."

19 And we're then given the sort of information that's
20 likely to be relevant to the exercise of the named
21 person functions in relation to the child or young
22 person, and so on and so forth. What about these
23 provisions? Did they survive the Supreme Court ruling?

24 A. No. The Scottish Government then drafted a bill,
25 effectively, to replace that group of provisions with

1 a quite different group of provisions.

2 Q. And that bill is still a bill?

3 A. It's still a bill, it's still, as I understand it, at
4 stage 1 in the Scottish Parliament. The issue is the
5 new provisions which will replace the provisions that
6 have been passed by the Scottish Parliament. The new
7 provisions are very dependant on the Scottish Government
8 producing a code of practice so that service providers,
9 particularly the named persons themselves, will
10 understand when it's appropriate to share information,
11 and most particularly when it's lawful to do so, when it
12 doesn't breach data protection rules and regulations,
13 acts and regulations.

14 So the code of practice is really the key to
15 unlocking this whole problem. The Scottish Government
16 set up a working group to draft such a code of practice.
17 They are struggling, I think would be an appropriate
18 word, to come up with a code of practice that is
19 user-friendly. You know, you have to have sympathy with
20 a body that's asked to rewrite the Data Protection Act
21 2018 in a way that most parents would understand.

22 Q. I think you did recently provide us with an adjustment
23 to the report, just covering the points you've just
24 made. If I can perhaps put that on the screen:

25 LIT.001.001.7110.

1 If we move down to the second entry -- I think this
2 came in possibly last week.

3 A. Yes, that's right.

4 Q. You may just have covered all of this, but you mention
5 the Children and Young People Information Sharing
6 (Scotland) Bill, which you say is at stage 1 of the
7 parliamentary process.

8 A. Yes.

9 Q. You go on to mention the chair of the Practice
10 Development Panel, in December of last year, being
11 charged with drafting a code of practice. So that code
12 is still in the drafting stage, is it?

13 A. Well, they were charged with drafting a code about
14 a year prior to that, but it was in December 2018 that
15 they provided an update on their progress. The chair of
16 the board wrote a letter -- the chair is
17 Professor Ian Welsh, and he wrote a letter to the Deputy
18 First Minister. I have brought a copy with me -- it's
19 available on the Scottish Government's website under
20 "Named person provision". He explains the difficulties
21 that they're facing, which I have tried to summarise
22 there.

23 Q. That's really in connection with data protection issues,
24 is it?

25 A. Yes.

1 Q. Can you indicate what he says on that in the letter?

2 A. They start off by explaining that:

3 "[Their] objective in drafting the code was to
4 explain how the provision of sharing of information
5 relating to children and young people by or with the
6 named person service, or in connection with the
7 Children's Panel, should be lawfully applied in
8 practice. The code was intended to bring consistency,
9 clarity and coherence to the practice of sharing
10 information."

11 The problem lies in the clarity issue. They've
12 taken the view that the code of practice would only be
13 useful if it was understandable, and you know, that has
14 to be correct. But they're finding it very difficult to
15 draft something that accurately captures the rules
16 in the Data Protection Act, now 2018, and the GDPR, the
17 General Data Protection Regulations.

18 What they've decided to do is to set up a sort of
19 working group, focus groups, to test their design of
20 these codes. They're going to do that -- the letter
21 from December 2018 says they're going to start doing
22 that in early 2019. So I would imagine that process is
23 still underway at the moment.

24 Q. And as you point out in this little addition, really
25 there is no timetable that would give you any sense as

1 to when in the future this might come back to the
2 statute book?

3 A. No.

4 Q. You sound disappointed about that, Professor Norrie; are
5 you a fan of the scheme?

6 A. I have always been a fan of the named person scheme.
7 I think it was an innovative and imaginative design.
8 I was disappointed in the Supreme Court's decision,
9 obviously I understand there are data protection issues,
10 but nevertheless ... I think one way of looking at
11 these things is to ask yourself: who loses out if we get
12 it wrong? Who loses out if we share too much
13 information? Parents lose out because state bodies
14 in the widest sense know a little bit more about them
15 than they need to know, so they lose out if we share too
16 much.

17 If we don't share enough, children lose out, and
18 children lose out, in my assessment, in a much more
19 serious way than simply having information shared with
20 schoolteachers.

21 Q. Can I then leave the named person scheme aside and cover
22 another topic that you cover in your report. That's the
23 topic with the label "Corporate parenting". If we turn
24 to 6642 of your report, that's page 136. Can you
25 introduce us to this topic, professor?

1 A. Yes. The idea of corporate parenting is to give
2 recognition to the fact that children who have been
3 looked after in the technical legal sense, looked-after
4 children, tend to be disadvantaged. The state has
5 provided protection for them and dealt with the
6 particular crisis that has arisen and has required them
7 to become looked-after children, but at the end of the
8 day, when they cease to be looked after-children, they
9 are seriously, seriously disadvantaged.

10 If you look, for example, at the education
11 statistics, the further and higher education statistics,
12 I read recently that something like 76% of the general
13 population of post 16-year-old young people go into
14 further or higher education; for looked-after children,
15 it's 36%.

16 Q. A big difference.

17 A. That's a huge, huge difference. That is something we as
18 a society ought to be deeply ashamed of. The corporate
19 parenting idea is to tell to a whole host of different
20 bodies: pay attention to these facts and try to
21 accommodate the needs of children and young people who
22 are moving out of the looked-after system, recognising
23 that they have been disadvantaged and we want in some
24 way to provide an element of compensation to make the
25 transition into adulthood just that little bit easier,

1 to provide the help and support and encouragement and
2 advice that children who have not been in the
3 looked-after scheme almost certainly get from their own
4 parents.

5 Universities and colleges, further and higher
6 education, they're all named persons, for example. Just
7 to give you one personal example, I had a quick look to
8 see what my own employer, Strathclyde University, what
9 their corporate parenting strategy is. They provide
10 that for any student who comes to Strathclyde University
11 and has been a care-leaver, they're entitled to access
12 a variety of mentoring support services to help them
13 become accustomed to student life. Then, at the end of
14 their time as students, we waive the fees for graduation
15 and these sorts of expenses.

16 That's just one tiny little example, but of course
17 the range of corporate parents is very broad and each
18 corporate parent has an obligation to design a strategy
19 to indicate what sort of help and support and service
20 they're going to provide for care-leavers.

21 Q. Let's look at some of the statutory provisions then,
22 professor. We're back to the Children and Young People
23 (Scotland) Act 2014.

24 A. Yes.

25 Q. We've already had that on the screen: LEG.001.001.4259.

1 I want to take you to page 4297, which is page 31 of the
2 legislation.

3 Can we move down to section 56? This is the section
4 of the Act dealing with corporate parents.

5 Subsection 1:

6 "The persons listed, or within a description listed,
7 in schedule 4 are corporate parents for the purposes of
8 this part [of the Act]."

9 And we're told that that can be modified. I'll come
10 back to the responsibilities in a moment, but if we go
11 to the schedule at page 4333, that's page 67 of the Act.

12 We're looking at a list beginning with the
13 Scottish Ministers at the top of the list. Local
14 authorities are mentioned, health boards, if we move
15 down to number 7, and if we turn over the page to 4334,
16 it's an extensive list, there are some 24 items.

17 Number 18 is the Scottish Legal Aid Board. I was
18 trying to work out how that fits into the scheme as
19 a corporate parent. Maybe you can help me with that.

20 A. The Scottish Legal Aid Board, as you well know, provides
21 Legal Aid and it has various children's schemes which
22 were established after the Children's Hearing (Scotland)
23 Act 2011. It has certain discretions -- not always, but
24 sometimes it has certain discretions as to when
25 Legal Aid is available. I have not looked at their

1 corporate parenting policy. Each of these bodies has to
2 specify a policy.

3 Q. Is that the -- that's not the corporate plan, that's an
4 in-house policy?

5 A. It has to have an in-house corporate parenting policy.
6 I don't know what the Scottish Legal Aid Board's --
7 I have not looked at their policy for how they're going
8 to satisfy their corporate parenting responsibilities,
9 but I would imagine it's something that would take
10 account of the particular needs of children and young
11 people whenever they're faced with legal process that
12 they need Legal Aid for.

13 Q. If we go back to the body of the Act, we're moving on to
14 section 57, it's at page 4298, page 32 of the Act
15 itself.

16 It is section 57, the application of this part to
17 children and young people.

18 A. Yes.

19 Q. We're told:

20 "This part applies to every child who is looked
21 after by a local authority and every young person who is
22 under the age of 26 and was, on the person's 16th
23 birthday, or at any subsequent time, but is no longer
24 looked after by a local authority."

25 So we're looking at, as you said, looked-after

1 children.

2 A. Yes, and care-leavers.

3 Q. Section 58, as we have that on the screen, there's

4 a list of what are called corporate parenting

5 responsibilities, for example, at (c), to promote the

6 interests of those children and young people. So

7 there's quite a detailed list of responsibilities.

8 A. Yes. I think (d) is an important one:

9 "To seek to provide those children and young people
10 with opportunities to participate in activities designed
11 to promote their well-being."

12 The point is that children who are or have been
13 looked after are quite simply less able to access the
14 opportunities that other children are. So it's a really
15 important part of being a corporate parent that
16 corporate parents encourage and make available and seek
17 to provide, as it says, these opportunities to
18 participate in whatever. Of course, it will depend on
19 what the corporate body is, what opportunities it has.

20 Q. You've given your own example of Strathclyde University.

21 Can you help me with how would the looked-after child,
22 who needs a corporate parent, who would he or she meet
23 up with that corporate parent? How would that happen in
24 practice?

25 A. Well, it would depend on who the corporate parent is.

1 Police Scotland are corporate parents. Very few
2 looked-after children will go and seek the police to
3 perform -- they would come into contact with these
4 bodies for other reasons, whether it's the police,
5 a Health Service, an education service. The obligation,
6 I think, however, is on the corporate body to be
7 proactive, to be aware that the people they are dealing
8 with, the young people that they are dealing with, might
9 be or are a looked-after child or a care-leaver, and to
10 make available -- I think the onus will very much be on
11 the corporate body rather than on the child to go
12 seeking the help.

13 Q. If I perhaps just finish off this little section and
14 move on to the next page, 4299 at 33. Section 59 talks
15 about the planning by corporate parents; is this what
16 you meant by the policy?

17 A. Yes.

18 Q. It's a policy or plan that has to be kept under review?

19 A. That's correct, yes.

20 Q. The other point I think you make in your report -- and
21 I think you see this as important -- section 60, which
22 is "Collaborative working among corporate parents".

23 A. Yes.

24 Q. Do you see that as an important provision --

25 A. Absolutely, yes.

1 Q. -- in practice?

2 A. Yes.

3 Q. Why is that?

4 A. Well, children and young people have complex needs. All
5 children and young people have complex needs. We
6 structure ourselves and we structure our corporations to
7 provide particular needs, but nearly always life isn't
8 like that. Life goes across a whole variety of
9 different individuals. That, I think, is why it's
10 important that corporate parents recognise that and deal
11 appropriately with each other when they're dealing with
12 one particular individual.

13 Q. This scheme hasn't been in place for very long; it was
14 set up by the 2014 Act.

15 A. Yes.

16 Q. Have you any sense as to how it is performing?

17 A. I think it's rather too early at the moment. My
18 understanding of the aim of the corporate parenting
19 scheme is it's a long-term aim to ease the transition of
20 young people who have had challenging upbringings, to
21 ease them into appropriate and sensible and productive
22 adulthood. But you can really only tell the extent to
23 which that's going to work in the long term.

24 I don't know if it's quite the same point, but there
25 certainly is evidence already that early intervention

1 has had an effect. In the past few years, the numbers,
2 for example, of referrals to children's hearings have
3 declined, the number of applications for permanence
4 orders has declined, even though overall the number of
5 cases, contentious appeal cases have increased, but the
6 number of applications have declined.

7 There certainly is a feeling that intervening early
8 in order to divert children away from the need for more
9 interventionist action has actually been successful.
10 But that really all comes back down to the thinking
11 behind Getting it Right for Every Child.

12 LADY SMITH: Mr MacAulay, is this a convenient point to take
13 the morning break?

14 MR MacAULAY: It is, and we'll start looking at migration.
15 (11.35 am)

16 (A short break)

17 (11.50 am)

18 LADY SMITH: Mr MacAulay.

19 MR MacAULAY: Professor, along with the main report you have
20 also provided four appendices to the inquiry covering
21 emigration, corporal punishment, international law, and
22 remedies.

23 Can I begin by looking at the first appendix, which
24 deals with emigration of children. We find that at
25 LIT.001.001.6842. That's page 336 of the report.

1 You begin by observing that:

2 "The practice of institutions sending children
3 abroad primarily in parts of the British Empire was well
4 established long before any statutory authority came
5 into play"; is that right?

6 A. Yes.

7 Q. Can you give us some background to that?

8 A. There's evidence that poor and indigent children were
9 being sent to North America even before American
10 independence. It's really in the 19th century, however,
11 that this became very much a practice. There were
12 a number of institutions established, being in the
13 second half of the 19th century, charitable
14 institutions, specifically designed to pay for the
15 passage of children from this country to other parts of
16 the British Empire.

17 Q. Was Canada in particular, towards the latter part of the
18 19th century and into the beginning of the 20th century,
19 a particular --

20 A. Yes, really up until the First World War, Canada was the
21 major destination for these children, yes.

22 Q. You draw attention, in fact, to a Scottish case,
23 McFadzean v Kilmacolm School Board, which centred on an
24 issue of a deed of trust which was dated 1876 and that
25 was the deed of trust setting up Quarriers Homes; is

1 that correct?

2 A. That's correct, yes.

3 Q. One thing you draw attention to there is the form of
4 agreement which persons who would want to have their
5 children at the home had to sign. Can you tell us about
6 that?

7 A. Quarriers Homes, even though today we see it as a nice
8 little place, a little village for children, in
9 Renfrewshire, one of its main purposes was to provide
10 for the emigration of children, for the removal of
11 children from Scotland, poor and destitute children from
12 Scotland to Canada. It originally started, I think,
13 really as a mechanism to encourage that.

14 It subsequently developed, of course, to be a full
15 children's home within Scotland, but for the first
16 50 years or so of its existence, one of its primary aims
17 was to take children to Canada, and if parents wished to
18 place their child with Quarriers, they had to sign this
19 form, which purported to give consent to the removal of
20 their child to Canada.

21 Q. You use the word "purported "there, professor; can you
22 perhaps explain why you're hedging your bets on that
23 one?

24 A. Yes. I didn't go into this too much in my report, but
25 since submitting it, I've been thinking about it really

1 quite a lot. The bottom line is you can't just take
2 somebody else's child and send them away permanently to
3 another country. You just can't do that.

4 Q. Legally, you're talking here about the law?

5 A. I am talking legally, yes. It follows that to do so,
6 there has to be some legal authority, and there's
7 a number of sources of that legal authority, one of them
8 being the parents' consent to the child being removed
9 from the jurisdiction. But I'm unconvinced that at the
10 end of the 19th century and for most of the 20th century
11 that was legally efficacious.

12 There's a general principle in Scots law that what
13 we call the patria potestas is non-delegable: you can't
14 give your children away, you can't give up your own
15 parental responsibilities, it's not lawful, it's not
16 legally competent for a parent to say, "I transfer all
17 my responsibilities to somebody else".

18 If that is so, then the parental consent given for
19 at least some children in Quarriers is dubious at best.

20 Q. There you're dealing with those children who had
21 parents?

22 A. Absolutely, yes.

23 Q. What about children who went into Quarriers who were
24 truly orphans? How do you see the legalities there from
25 the Quarriers perspective?

1 A. True orphans or children who had been abandoned and
2 their parents simply had disappeared or couldn't be
3 found or whatever, children who are without any form of
4 parental protection, there's literature from the time in
5 which it is clear that the officials at Quarriers made
6 big efforts, particularly within the city of Glasgow, to
7 seek out waifs and strays, children who were sleeping
8 rough, street children, that sort of child, who had --
9 who either were true orphans in the sense that both
10 their parents were dead or their parents had simply
11 abandoned them. These children too were offered
12 places -- Offered places at Quarriers with the intent to
13 emigrate them to Canada.

14 That brings us to the potential second source of
15 legal authority for that, which is the child's own
16 consent. Once you're talking about the child's consent,
17 you have to ask which child is capable of providing that
18 consent in Scots law.

19 Q. And in law, as a matter of capacity then, if you're
20 looking at children, I think we draw a distinction
21 between girls and boys --

22 A. That's correct. Until 1991, in terms of legal capacity
23 to perform legal transactions, such as give consent to
24 these sorts of things, the common law of Scotland, right
25 up until 1991, drew a distinction and said boys under

1 the age of 14 had no capacity, girls under the age of 12
2 had no capacity.

3 Q. So if, for example, a boy of 10 was to be transported to
4 Canada and had no parents, that boy would be incapable
5 of giving consent as a matter of law?

6 A. In my view it's very clear that a boy under 14 or a girl
7 under 12 had no capacity in Scots law to consent to
8 their removal to another jurisdiction.

9 Q. So what legal authority did Mr Quarrier have then to
10 transport that kind of child to Canada?

11 A. I rather suspect the very shaky legal authority that was
12 relied upon was the fact that nobody challenged the
13 practice. Remember the sort of children that we are
14 dealing with: if it's a parent who has placed a child
15 with Quarriers, knowing that the intent is to send the
16 child to Canada, that parent is highly unlikely then to
17 challenge the process. But a large number of these
18 children are children whose parents had abandoned them,
19 so the parents in practice, not in law but in practice,
20 have no interest in challenging them.

21 It's stated in Fraser's "Parent and Child", the late
22 19th century great textbook on the law of parents and
23 children, the Lord Advocate had no interest. Relying on
24 his authority as representing the Crown as
25 parens patriae, the Lord Advocate would have no interest

1 in challenging a decision relating to the welfare of the
2 child. So the end result of all of that is that there
3 was simply nobody with the ability, legal or practical,
4 to challenge the fact.

5 I think the other thing to bear in mind is these
6 charitable institutions, by and large, I suspect,
7 thought they were doing the right thing and didn't
8 expect to be challenged and assumed -- and actually
9 probably society as a whole thought this was a good
10 thing.

11 LADY SMITH: Professor Norrie, just remind me, take a girl
12 of 12. If she had entered into a contract under the age
13 of 12 and she wanted to challenge it later, did it have
14 to be under the age of -- sorry, after the age of 12,
15 it would be during the quadriennium utile, if I remember
16 rightly. Was that only financial transactions or was
17 her consent to being migrated something that, if she had
18 known about, she could later have challenged in Canada
19 or wherever?

20 A. I'd need to sit and think about that.

21 LADY SMITH: Perhaps I need to look at that as well.

22 A. Clearly, if the girl was below 12, the transaction is
23 void.

24 LADY SMITH: Over 12, she had a power to enter into
25 contracts?

1 A. Yes.

2 LADY SMITH: But there were circumstances in which contracts
3 could be unstitched later on, weren't there?

4 A. That's true, for four years after the attaining of
5 majority, originally 21 and then 18, on the ground that
6 it was a prejudicial transaction.

7 The cases are nearly all commercial type
8 transactions. I'm not aware of any case in which it's
9 a really personal thing like this.

10 I think the closer analogy might be choosing your
11 own curators because that effectively is what's
12 happening. The child, after 12 or 14, is under the
13 curatory of originally a parent. But there are legal --
14 there's a recognition in books like Fraser, for example,
15 that a minor child can actually change their curator,
16 and I suspect for a 13 or 14-year-old girl, effectively
17 you might say she's choosing Mr Quarrier as her curator.

18 But curatory is simply giving authority, it's not
19 entering into the transaction, it's giving consent to
20 the transaction. The girl over 12, she would be the one
21 that would be choosing her own domicile.

22 LADY SMITH: Yes. But the reality seems to be the law
23 wasn't providing for teenagers, such as we're thinking
24 about here, having second thoughts and wanting to come
25 back to Scotland or wanting provision to be made for

1 them to compensate in some way for the fact it's been
2 a pretty bad deal at the other end?

3 A. Yes, the law is not making any sort of provision. The
4 other thing to remember, of course, is that in these
5 days, certainly in the 19th century, and for much of the
6 20th century, Canada is very, very far away. And
7 of course, after the Second World War it was Australia.
8 That meant -- up until the 1970s, going to Australia
9 meant six or seven weeks on a boat. So the physical
10 chances of coming home were very, very much restricted.

11 LADY SMITH: Yes.

12 MR MacAULAY: If we then go back to your report at
13 page 6843, this is page 337, you're there referring to
14 what was said by the Morton Committee in 1928 in
15 connection with migration. I think your conclusion is:

16 "At least to modern eyes, what is said there does
17 not read as placing children's welfare at the forefront
18 of official consideration"; is that correct?

19 A. That's very correct. The sentence goes on:

20 "It is a manifesto for settling the Empire with
21 suitable stock."

22 Can I give you a further piece of information, which
23 isn't in the report? I just happened to be reading it
24 just a few weeks ago. There was a parliamentary debate
25 in the House of Commons, an adjournment debate, so it

1 didn't lead to anything, in 1959, on the very issue of
2 emigration. It had been raised because a number of MPs
3 didn't think local authorities were using the powers
4 under the Children Act (1948) sufficiently. May I read
5 what a couple of MPs said?

6 LADY SMITH: Please do.

7 A. I can give you the citations later. It's a House of
8 Commons debate from 9 February 1959, so it's 30 years
9 after the Morton report.

10 "Sir Archer Baldwin [who was no relation to the real
11 Baldwin] said the Australians are very anxious to fill
12 the open spaces. They know full well that if we and
13 they do not fill the open spaces, the day will come when
14 the overspill from the Asiatic countries will arrive.
15 Because of that, the Australian authorities are anxious
16 that Australia's population should be increased,
17 especially with Britishers."

18 He was a backbencher. The government responded and
19 the Undersecretary of State for Commonwealth Relations
20 in the same debate said:

21 "We are anxious to ensure that people of British
22 stock play a full part in the development of our great
23 sister country in the Commonwealth."

24 I think we can take "British stock" to be a racial
25 description: they're meaning white stock. All of that

1 affirms really what I'm saying in my report, that even
2 although a number of charitable individuals, I think
3 genuinely, thought they were giving children a chance
4 for a good life, the governmental encouragement had
5 different motivations. They were not thinking about the
6 welfare of the children, they were thinking about
7 settling the British Empire with as many white people as
8 possible.

9 Q. Can we then look to see when legislation did focus on
10 emigration? If you turn to page 6844 of your report,
11 that's at page 338, I think you tell us, for example,
12 the Prevention of Cruelty to Children and Protection of
13 Children Act 1889, that did not mention emigration.

14 A. It did not, no. It allowed children to be committed to
15 the care of fit persons and it granted to fit persons
16 full powers that parents have. Now, it's possible to
17 interpret that that since parents can emigrate their
18 children, though they can't delegate the
19 patria potestas, but since parents can emigrate with
20 their children --

21 Q. With their children?

22 A. Yes, exactly. So I don't actually think we can take
23 very much from the 1889 Act.

24 Q. Then if we turn to the 1891 Act, I think that is when we
25 first see reference to emigration in a piece of

1 legislation; is that right?

2 A. Yes.

3 Q. I'll put the Act -- it's literally one section on the
4 screen, it's LEG.001.001.2261.

5 If we scroll down a little bit, can we see it's
6 effectively one section? So clearly it was enacted to
7 deal with that particular issue of emigration.

8 A. Yes. If you actually go up a little so you see the long
9 title, this is:

10 "An act to assist the managers of reformatory and
11 industrial schools in advantageously launching into
12 useful careers the children under their charges."

13 This is in a sense what today we'd call an aftercare
14 provision. Children have been in industrial and
15 reformatory schools and their managers are now making
16 provision for their after care. Earlier legislation
17 relating to reformatory and industrial schools allowed
18 managers to apprentice children out or to place female
19 children in domestic service, that sort of thing.

20 This expands upon that, but then it has also added
21 in -- I've looked at the parliamentary debates for this
22 Act, but I have not actually found any discussion of how
23 the emigration bit was added in, but it adds in to what
24 previously existed, these three words "or by
25 emigration", so the child can be disposed of after they

1 leave school by apprenticing, putting them into domestic
2 service, or by emigration.

3 Q. So if I just read most of the provision at (1):

4 "If any youthful offender or child detained in or
5 placed out on licence from a certified reformatory or
6 industrial school conducts himself well, the managers of
7 the school may, with his own consent, apprentice him to
8 or dispose of him in any trade, calling or service, or
9 by emigration ..."

10 And it goes on to deal with:

11 "... notwithstanding the fact that his period of
12 detention has not expired ..."

13 It goes on to say:

14 "... provided that where he is to be disposed of by
15 emigration and in any case unless he has been detained
16 for 12 months, the consent of the Secretary of State
17 shall also be required for the exercise of any power
18 under this section."

19 A. Yes.

20 Q. Can we touch upon one or two points? First of all,
21 although I don't think you covered this fully in your
22 report, the consent of the child is also required?

23 A. That's true, yes.

24 Q. We see that specified.

25 A. Yes. Children, certainly in reformatory schools and

1 industrial schools too, as I said, we are really talking
2 about aftercare when the child will be leaving that
3 school. So for probably the vast majority of them,
4 these are children who have moved from pupillarity into
5 minority.

6 Q. But if it was a boy of 13, he would not have capacity --

7 A. Yes, that's true.

8 Q. -- whereas a girl of 13 would?

9 A. Would, yes.

10 Q. But there are these two hurdles, if you like, in the
11 section: the consent of the child and the consent of the
12 Secretary of State --

13 A. Yes.

14 Q. -- to justify emigration?

15 A. Yes. Plus the assessment of the managers that the child
16 conducted himself or herself well. But I'm not sure
17 that was ever used as a ... I don't know what judgement
18 has been made there.

19 LADY SMITH: I wonder if that would apply more to passing
20 the children on for apprenticeship in a trade, calling
21 or service here in Scotland, for example.

22 A. That's exactly where it's traced to. If you look at the
23 earlier legislation from industrial and reformatory
24 schools where this sort of provision appears, it makes
25 much more sense. A child who conducts himself well can

1 be placed out on apprenticeship or placed into domestic
2 service, or farm service, or whatever, because they're
3 an appropriate person to do so.

4 LADY SMITH: The prospects of them being a good worker are
5 looking all right?

6 A. Yes. It makes far less sense once you bring in
7 emigration.

8 MR MacAULAY: And even less sense if you're talking about
9 much younger children?

10 A. Absolutely, yes.

11 Q. If we then move on to the 1904 Act --

12 A. Sorry, on that point, with much younger children, that's
13 an important point because section 1 of the 1891 Act,
14 I keep referring to it as an aftercare provision, but
15 it's actually more than that. It says:

16 "Notwithstanding that his period of detention has
17 not expired."

18 So as soon as you're in the school, you're eligible
19 for emigration.

20 Q. The next piece of legislation I want to take you to is
21 the Prevention of Cruelty to Children Act 1904. That
22 begins at LEG.001.001.2196.

23 That's the Post Office Act we're looking at; did
24 I give the wrong number?

25 LADY SMITH: It's below there, it's chapter 15. It was that

1 wonderful era when legislation was short and sharp and
2 to the point and we didn't need endless volume space on
3 our bookshelves.

4 MR MacAULAY: If I take you to page 2201, page 1904 of the
5 Act, if we move up a little bit and get the beginning of
6 section 6 -- page 37, rather.

7 We have that on the screen. We read there:

8 "Where a person having the custody, charge or care
9 of a child under the age of 16 years has been convicted
10 of committing in respect of such child an offence of
11 cruelty within the meaning ..."

12 And so on:

13 "... committed for trial or bound over to keep the
14 peace towards such child by any court, that court ...
15 may, if satisfied on inquiry that it is expedient so to
16 deal with the child, order that the child be taken out
17 of the custody, charge or care of the person so
18 convicted, committed for trial or bound over and be
19 committed to the custody of a relation of the child or
20 some other fit person."

21 And you've already mentioned this particular type of
22 provision.

23 A. Yes.

24 Q. That fit person then could include a relation as well?

25 A. Originally, I think the structure of the earlier

1 legislation was designed -- you take a child away from
2 the person who has been cruel to it and commit it to the
3 care of a relation --

4 Q. Yes.

5 A. -- or other fit person if there's no relation available.
6 One of the really important things about the 1904 Act
7 is that the concept of "fit person" is expanded to
8 include charities and voluntary organisations.

9 Q. Such as Quarriers, for example?

10 A. Such as, for example, Quarriers.

11 Q. If we turn to the next page, 2202, page 38,
12 subsection 5, do we read that:

13 "A Secretary of State, in any case where it appears
14 to him to be for the benefit of a child who has been
15 committed to the custody of any person in pursuance of
16 this section, may empower such a person to procure the
17 emigration of the child, but except with such authority
18 no person to whose custody a child is to be committed
19 shall procure its emigration."

20 Can you help us with this provision? This is new?

21 A. This is entirely new. What we were talking about before
22 was limited to children who were in industrial schools
23 or reformatory schools, but of course the provision in
24 this act and the earlier act and the slightly later act
25 gave the court a number of options. The child could be

1 sent to an industrial school or the child could be
2 committed to the care of a fit person. So they're still
3 living in society in a familial environment -- "familial
4 environment" was the original design.

5 As I said a minute ago, one of the important things
6 about the 1904 Act is that it expanded the concept of
7 fit person to include charitable organisations, so
8 children could be committed into the care of an
9 institutional environment as well as a familial
10 environment, irrespective if they're committed to the
11 care of a fit person, the Secretary for Scotland, who
12 would be the appropriate Secretary of State here, was
13 empowered by this provision to authorise the -- to
14 empower that fit person to procure the emigration of the
15 child.

16 Q. So are we to imagine that if we take the example of
17 a child being sent to Quarriers on the back of a court
18 order, that Mr Quarrier would then be in a position to
19 approach the Secretary of State and procure the
20 emigration? So to that extent the Secretary of State
21 was still involved in the process?

22 A. The Secretary of State -- effectively, the
23 Secretary of State's permission has to be granted,
24 in the same way. It's structured a wee bit differently,
25 but the effect, I think, is the same: you need the

1 consent of the Secretary of State for the emigration of
2 that child.

3 Q. We'll see in a moment in the 1908 Act how this provision
4 and the provision for reformatory and industrial schools
5 comes together.

6 A. Yes.

7 Q. Do we see here that there is no mention of the consent
8 of the child?

9 A. Yes, absolutely.

10 Q. We'll see the same, I think, when we come to look at the
11 1908 Act, where we have the provision dealing with the
12 consent of the Secretary of State and the child in the
13 context of reformatory and industrial schools. But no
14 reference to consent in this equivalent provision?

15 A. That's correct.

16 Q. What do you make of that?

17 A. In a sense, your guess is as good as mine as to why that
18 distinction is made. I kind of suspect it's one of
19 these accidental things that legislation tends to be
20 repeated and expanded in each of its manifestations. We
21 had the original industrial and reformatory schools
22 legislation, saying the child had to consent to be
23 apprenticed out, emigration was put into that, that
24 package, with consent and was then translated into the
25 1908 Act. But something new came along in 1904, a fit

1 person emigration, and that perhaps wasn't thought out
2 carefully enough, it doesn't contain anything about the
3 child's consent, but that is simply again the 1908 Act
4 and that is simply repeated in the 1908 Act. So you've
5 got the 1908 Act, which tries to bring it all together
6 but actually repeats two separate provisions from the
7 past.

8 Q. This may come back to a point you have yourself made,
9 professor, but the provision in the 1891 Act, you have
10 described as a kind of aftercare provision --

11 A. Mm-hm.

12 Q. -- dealing with a particular class of children. This
13 provision applies to all children and therefore could
14 catch within its ambit very young children?

15 A. Absolutely, yes.

16 Q. Could it have been thought that consent may not have
17 been relevant to these children and that's why we have
18 this?

19 A. Perhaps, yes.

20 Q. Let's look at the 1908 Act. We find that at
21 LEG.001.01.0312. That's at page 453, I think.

22 Yes, we have it on the screen. The section I want
23 to take you to is at 0322. That's at page 463.

24 Section 21 essentially repeats what we've looked at
25 in section 6 of the 1904 Act.

1 A. Yes.

2 Q. If we move on to page 0323 at page 464, can we see at
3 subsection 6, again it repeats in essence what we'd seen
4 before in the 1904 Act?

5 A. Yes.

6 Q. Then if I take you to section 70. That's at page 0343,
7 page 484.

8 If we just scroll down a little bit, we have
9 section 70. In essence, section 70 repeats section 1 of
10 the 1891 Act, dealing with the consent of the child and
11 also the consent of the Secretary of State.

12 A. Yes.

13 Q. So these, I think, are the two provisions that you
14 mentioned that have been taken from different previous
15 statutes and put into the one statute.

16 A. Yes.

17 Q. Does that then take us up to -- if I go back to your
18 report, actually, page 6846 -- that's page 340 of the
19 report -- you go on to look at the 1932-1969 position.
20 Before looking at that, can we see from what we've
21 looked at so far that the parents' consent does not
22 feature at all in these provisions?

23 A. That's correct.

24 Q. Can we then look at the position in the 1932 Act.
25 That's at LEG001.001.0450. It's page 644 of the volume.

1 So we're looking at the Act and we can remind ourselves,
2 this was the Act that abolished industrial and
3 reformatory schools and introduced the concept of
4 approved schools.

5 A. Yes.

6 Q. If we look at section 6 at page 0454, page 648 of the
7 volume, this is the provision that deals with "Juveniles
8 in need of care or protection". Again, there's a court
9 process involved in that; is that correct?

10 A. Yes.

11 Q. The other section, which I think is new, on page 0457,
12 section 7, at page 651 -- we're looking at here
13 a provision where the parent or guardian of the child in
14 certain circumstances, through the court, can argue that
15 the child should be sent to an approved school for
16 a particular period.

17 A. Yes.

18 Q. This was a new provision?

19 A. Yes.

20 Q. But as we look at these provisions, the court is
21 involved in that whole process, whether it's section 6
22 or section 7?

23 A. Yes.

24 Q. Then if we move on to section 19, page 0462 -- and
25 that's page 656 of the volume -- we're looking at

1 section 19 and if we read down to the bottom,
2 subsection 7, can we read there:

3 "The Secretary of State, in any case where it
4 appears to him to be for the benefit of a boy or girl
5 who has been committed to the care of any person, may
6 empower that person to arrange for his or her
7 emigration. Except with the authority of the
8 Secretary of State, no person to whose care a boy or
9 girl is committed shall arrange for his or her
10 emigration."

11 That's fairly similar to some of the language that
12 we've seen before?

13 A. It is, yes.

14 Q. Then if we move on to the next page, at page 0463,
15 that's page 657, do we read:

16 "Provided that the Secretary of State shall not
17 empower a person to arrange for the emigration of a boy
18 or girl unless he is satisfied that the boy or girl
19 consents, and also that his or her parents have been
20 consulted or that it is not practicable to consult
21 them."

22 So we are seeing some new material here.

23 A. Yes. There are two elements to that. The first,
24 obviously, it's bringing in the child's own consent, so
25 that brings fit person emigrations into the same process

1 or procedural requirements as school manager emigrations
2 that the child has to consent. That in itself brings,
3 I think, has to bring the same limitation, which is the
4 child has to have capacity to consent. So I read this
5 to prohibit the emigration of any boy or girl -- boy
6 below the age of 14 or girl below the age of 12.

7 The second element, of course, is parents for the
8 very first time in any of these provisions get a look
9 in, but it's a pretty limited sort of look in. The
10 parents have to have been consulted, full stop. They
11 have no veto over the matter. You simply have to
12 consult the parents.

13 Q. Of course, it goes a little beyond that because it also
14 says:

15 "... or if it is not practicable to consult."

16 So for example if you're not able to trace the
17 parent, that would mean there would be no consultation?

18 A. Yes.

19 Q. If you look at the words dealing with the
20 Secretary of State, looking to what you have said,
21 professor, "unless he [the Secretary of State] is
22 satisfied". So the first hurdle, you would say, is
23 capacity?

24 A. Mm-hm.

25 Q. But even beyond capacity, the Secretary of State has to

1 be satisfied that the boy or girl is in fact consenting.

2 A. Yes. I can't remember which of the later provisions,
3 but it later on appears that that consent has to be in
4 writing.

5 Q. Yes. I think we'll come to that.

6 A. Right. But yes, the Secretary of State has to be
7 satisfied in some way.

8 LADY SMITH: Just thinking about the position of the parents
9 who are consulted, it's very easy in the modern world to
10 envisage that if they disagreed with what had been
11 decided about their child, there would be means to
12 challenge it, for example by way of judicial review, and
13 that would be almost automatic that they might be
14 advised that that's a step they could take. But this is
15 many years ago and it was before the culture of easily
16 challenging public decisions, governmental decisions, so
17 the parents no doubt would be left with the feeling they
18 had no remedy.

19 A. I'm absolutely sure that would be the case. Even if the
20 parents were well-informed, a defence from the public
21 authority would be: we consulted, we have done what the
22 statute required us to do. It would be very difficult
23 to say: you consulted and did something irrational
24 thereafter.

25 LADY SMITH: And whilst no doubt somebody would point out to

1 me, ah, but the Wednesbury decision was in 1931, it took
2 many years for it to be recognised that a wide range of
3 public decision-making could be challenged under the
4 principles that we've since developed from that early
5 associated provincial picture houses case.

6 MR MacAULAY: The next piece of legislation you look at is
7 the 1937 Act, but from my reading of that, that doesn't
8 add anything to the 1932 Act provisions, it simply is
9 consolidating --

10 A. It's consolidating. The 1932 Act did not repeal the
11 1908 Act, though it amended it very, very substantially.
12 The 1937 Act consolidates both the new rules in the 1932
13 Act and the existing rules in the 1908 Act to one
14 consolidating statute.

15 Q. The next piece of legislation is the 1948 Act; is that
16 correct?

17 A. Yes.

18 Q. So far as the legislation is concerned, is its prime
19 focus is on children who have been committed to care via
20 the courts?

21 A. That's correct.

22 Q. We know from this inquiry that many children were put
23 into care that did not go through the court system; how
24 do they fit into this legislative scheme?

25 A. Well, I see them fitting in in the same way that

1 children were treated before legislative authority was
2 granted, in other words before the 1891 Act. It was
3 a practice that was adopted but actually based on very,
4 very shaky legal ground in terms of either the consent
5 of the parent, which I'm very dubious about, on the
6 child's own consent, and if it's the child's own consent
7 you're only talking about older children.

8 Q. But the consent provisions we've looked at then --

9 A. They only apply in relation to children who are subject
10 to some court order, either putting them into what had
11 become an approved school or committing them to the care
12 of a fit person, either an individual or a charitable
13 institution.

14 Q. So the Quarriers children who were either taken off the
15 streets or handed in by families, they would not be
16 covered by these provisions?

17 A. They would not be covered by these provisions at all,
18 no.

19 Q. Can we then move on to look at the 1948 Act. That's at
20 LEG.001.001.0389.

21 If we look at page 0405, and that's page 14. That's
22 maybe the wrong reference. LEG.001.001.0389. While
23 we're waiting for that, professor, you deal with this on
24 page 6849 of your report, and that's page 343.

25 A. Yes.

1 Q. We now have the Act on the screen. If I can take you to
2 section 17, which is at page 0405, that's page 14 of the
3 volume. Let's scroll down a little bit.

4 This is the side note:

5 "The power of local authorities to arrange for
6 emigration of children."

7 A. Yes.

8 Q. And are there some changes here to what we had before?

9 A. Well, the whole point of the 1948 Act is to very
10 substantially increase the role of local authorities,
11 not to take away from voluntary organisations who were
12 regarded as doing good work, but to empower local
13 authorities to take on more and more of that.
14 Section 1, of course, required local authorities to
15 receive into their care any children who needed that.

16 What section 17 does:

17 "A local authority may, with the consent of the
18 Secretary of State, procure or assist in procuring the
19 emigration of any child in their care."

20 Not necessarily -- building upon a point you made
21 a minute or two ago, not necessarily children who have
22 been committed to the care of the local authority by any
23 court order, but any child in the care of a local
24 authority, however they come.

25 And of course, there's compulsory means and

1 voluntary means, even today, in which a child can go
2 into the care and be looked after by a local authority.
3 Any child in the care of a local authority becomes,
4 under section 17 (1), eligible to be emigrated by that
5 local authority with the consent of the
6 Secretary of State.

7 Q. Are you saying that would include children who had been
8 committed via the courts?

9 A. Yes.

10 Q. Let's take, for example, a child through the court
11 system is sent to Quarriers.

12 A. If the child had been committed to the care of the local
13 authority --

14 Q. Before going to court?

15 A. If the child had been committed by the court to the care
16 of the local authority and that local authority
17 exercised that care by placing the child in an
18 institution run by a voluntary organisation such as
19 Quarriers, that child would still be in the care of the
20 local authority and would still be within the parameters
21 of section 17.

22 Q. I follow that. Let's take the other example we've used
23 in the past, the child who's taken along to Quarriers by
24 a family member --

25 A. Yes.

- 1 Q. -- not placed by the local authority.
- 2 A. Yes.
- 3 Q. Indeed, we've had evidence, particularly with other
4 institutions, where that happened up to a particular
5 point in time and certainly over this period. What
6 about those children?
- 7 A. Yes, I don't see that they would be covered by
8 section 17 of the 1948 Act.
- 9 Q. So the trigger is a child being in the care of the local
10 authority for this provision?
- 11 A. Yes.
- 12 Q. If we read on into subsection 2, can we see that there
13 had been a certain development here and that is that:
14 "The Secretary of State shall not give his consent
15 under this section unless he is satisfied that
16 emigration would benefit the child, and that suitable
17 arrangements have been or will be made for the child's
18 reception and welfare in the country to which he is
19 going."
- 20 Just stopping there: that's new?
- 21 A. That is new.
- 22 Q. Can we just get some understanding as to how would you
23 see this working in practice? How would the
24 Secretary of State be able to satisfy himself that, as
25 it says in the Act, the child's welfare -- suitable

1 arrangements would be made for the child's welfare in
2 Canada or Australia, wherever it may be?

3 A. Honestly, I have no idea how it would work in practice.
4 It's obviously a really important principle that if
5 you're going to send a child to another country, you are
6 pretty confident that that child is going to a suitable
7 place. There's nothing in the Act or any subsidiary
8 legislation that I've found as to how the
9 Secretary of State is to go about satisfying himself
10 that these suitable arrangements have been made.

11 I suspect that what happens is that if a local
12 authority wishes to do this -- and actually very few of
13 them did, local authorities -- they would simply draw up
14 a report saying, "We've identified an institution", by
15 this stage usually in Australia, "We've identified an
16 institution that will receive this child", without ...
17 I mean, today we would very much be looking at: is that
18 institution suitable for that particular child? Is it
19 going to meet the needs of that child?

20 I suspect in 1948, if there was an institution with
21 a place available in Australia or wherever it was, the
22 Secretary of State -- I suspect that the
23 Secretary of State would deem himself satisfied.

24 Q. Reading on, we see a similar sort of provision to what
25 we had before, that:

1 "The parents or guardian of the child have been
2 consulted or that it's not practical to consult them."

3 A. Yes.

4 Q. I can't remember if guardian was mentioned in the
5 previous provision, but certainly here we have a mention
6 of "guardian". What do you take the word "guardian" to
7 mean here?

8 A. Right. This is a UK statute, the 1948 Act. The word
9 "guardian" has a much broader and looser meaning in
10 English law than it has in Scots law. It's a word of
11 actually not much meaning in Scotland. We have never
12 really had the concept of guardian of a child.

13 So I think the interpretation of it would have to be
14 relatively broad and not too legal. We talk about
15 curators and tutors, certainly in 1948, rather than
16 guardians. So I would imagine the proper interpretation
17 of it is someone with care and control of -- in fact of
18 the child rather than a legal obligation.

19 Q. If we read on, again we have a provision that the child
20 consents.

21 A. Yes.

22 Q. But there's an extra bit now:

23 "Provided that where a child is too young to form or
24 express a proper opinion on the matter, the
25 Secretary of State may consent to his emigration

1 notwithstanding that the child is unable to consent
2 thereto in any case where the child is to emigrate in
3 company with a parent, guardian or relative of his, or
4 is to emigrate for the purpose of joining a parent,
5 guardian, relative or friend."

6 What do you make of that provision?

7 A. I was reading quite recently the emigration chapter from
8 the Northern Irish Historical Abuse Inquiry, and they
9 discuss this provision. I might be able to provide the
10 appropriate citation some time. It's in there, they've
11 got a chapter in one of their appendices. They discuss
12 actually the effect of this and they make the point that
13 in Scotland, the interpretation of the requirement to
14 emigrate in the company of a parent or guardian, or for
15 the purposes of joining a parent or guardian, might have
16 a much more limiting effect.

17 I think the overall thrust of the provision is that
18 if the Secretary of State is convinced this child is
19 going either as part of a family or a family unit, or is
20 going out to join a family or a family unit, then we
21 don't need the consent of that child.

22 Q. Let's take this example: a very young child, a 5 or
23 6-year-old, who would not be able to give consent and is
24 to be emigrated along with a senior person from the
25 institution in which he or she is a resident. From what

1 you have said about the definition of "guardian" being
2 given a broad interpretation, would you say that that
3 situation would be covered by this provision?

4 A. I think it was designed to be covered in exactly that
5 way, yes.

6 LADY SMITH: What about the definition of "guardian" in the
7 interpretation section, section 59, which tells us that:
8 "'Guardian' means a person appointed by deed or will
9 or by order of a court of competent jurisdiction to be
10 the guardian of a child"?

11 End story. It might be much tighter, mightn't it?

12 A. That is a tight definition.

13 LADY SMITH: It's a section that applies to the whole of the
14 Act and it's got the usual saving provision:

15 "... except where the context otherwise requires
16 ..."

17 But at first blush it would be stretching matters,
18 I would have thought, to say, "Ah well, in section 17(2)
19 a much wider interpretation of 'guardian' was intended".

20 A. I think if you look at the Northern Irish report ...

21 LADY SMITH: Have they looked at this?

22 A. They specifically say that the word "guardian" in
23 England, Wales and Northern Ireland tended to be given
24 a wide and loose -- that was I think the phrase they
25 used -- meaning, whereas in Scotland the practice was to

1 give the word a narrower meaning, and the UK Government
2 didn't like that.

3 MR MacAULAY: I'll pick up her Ladyship's point in a moment.

4 This Act did not apply to Northern Ireland, of course.

5 A. That's true.

6 Q. If we look at section 59, which raises an important
7 point. It's at 0432. That's page 41 of the volume.

8 (Pause)

9 A. I can give you the Northern Irish citation.

10 LADY SMITH: Thank you.

11 A. In their report it is volume 2, chapter 6, paragraph 56.

12 LADY SMITH: Thank you.

13 A. They discuss the different interpretations of the word
14 "guardian".

15 MR MacAULAY: We now have section 59 on the screen and
16 if we move down to the guardian definition, as
17 her Ladyship has mentioned:

18 "'Guardian' means a person appointed by deed or will
19 or by order of a court of competent jurisdiction to be
20 the guardian of a child."

21 So that's a tight definition. So retracing our
22 steps, that would not cover the senior member from the
23 institution that the child was resident in, unless the
24 court had been involved?

25 A. I think it should not.

1 Q. Okay. If a boy aged 10 were to be migrated with
2 a sister who was 14 or 15, a relative who was capable of
3 giving consent, would that be covered by this provision?

4 This brother and sister, one young, one a bit older?

5 A. I don't think there's any limitation to who a relative
6 is, so it would be covered.

7 Q. There is a definition for relative and we have to go
8 somewhere else to find what it means, but:

9 " 'A relative' has throughout Great Britain the
10 meaning assigned to it by section 220 of the Public
11 Health Act 1936."

12 But one would imagine that a sibling would be
13 considered to be a relative?

14 A. Yes. I mean, there's another word in section 17, the
15 very last word:

16 " ... guardian, relative or friend."

17 "Friend" is a pretty loose sort of concept. I think
18 in the Parliamentary debates there was an attempt to
19 remove that provision on the ground that there was no
20 guarantee that either a relative or a friend would be
21 a suitable person. But the amendment was withdrawn on
22 the assurance of the government that local authorities
23 would not send children to people who were unsuitable.
24 I don't think I mention that in my report, but it's
25 in the Parliamentary debates on the 1948 Act.

- 1 Q. I think it was envisaged that at this time that there
2 would be in any event regulations --
- 3 A. Yes.
- 4 Q. -- built on the emigration provisions --
- 5 A. Yes.
- 6 Q. -- and they did not appear for many, many years.
- 7 A. About 30 years.
- 8 Q. In particular, I think the regulations -- it was
9 envisaged that the regulations would address in
10 particular the role played by voluntary organisations in
11 emigration.
- 12 A. Yes.
- 13 Q. And that didn't happen, in effect it didn't happen
14 before the emigration of children from Scotland ceased?
- 15 A. That's correct.
- 16 Q. Can I then take you back to your report, professor.
17 That's at page 6849. That's page 343 of the report
18 itself.
- 19 If we scroll down to the bottom of the page, that's
20 where in fact you address the power to make regulations.
21 If you go over to the next page, 6850, page 344, it was
22 never in fact exercised in relation to Scotland,
23 although I think it was exercised south of the border.
- 24 A. Yes.
- 25 Q. You then draw attention to what Lord Justice Ward said

1 in a case, R v Barnet London Borough council. Can you
2 take us to that? What was the context of this?

3 A. I can't remember the context of that case, I'm sorry.

4 Q. Can I just take you to what he actually says because
5 it's the last couple of sentences where he is talking
6 about the emigration programme and he says in the third
7 last line:

8 "I believe the last group of children were sent out
9 to Australia in 1967 but it was not until January 1982
10 that any regulations were made to control this
11 pernicious export."

12 A. Yes.

13 Q. So that's how he describes it.

14 A. Yes. I think when he uses the date 1967, he is,
15 I think, referring to children emigrated under the
16 Children Act (1948), that is to say children emigrated
17 by local authorities.

18 Q. Yes. And the regulations he refers to, as we see from
19 the footnote, are the regulations that were passed in
20 1982 --

21 A. Yes.

22 Q. -- long after the practice had finished?

23 A. Yes.

24 Q. Do you know why it was thought necessary to enact
25 regulations long after the emigration programmes had

- 1 finished?
- 2 A. Well, I can only speculate that it was ... Even
3 although very few local authorities or voluntary
4 organisations were emigrating children, it was still on
5 the statute books that they had the power to do so. And
6 while it was on the statute books that they had the
7 power to do so, it was sensible to have regulations
8 controlling particular -- these ones -- particularly for
9 voluntary organisations, it was sensible to have some
10 sort of regulation of the power. Because even though
11 the practice had sort of dried up by 1970, if the power
12 was still there, things can change in the world and the
13 practice might reemerge.
- 14 Q. To finish up on this then, professor, you cover the
15 period on page 6850 of your report, November 1969 to
16 April 1997, after the 1968 Act had been passed, and you
17 tell us that the 1968 Act did have a provision dealing
18 with emigration; do you know if it was ever invoked?
- 19 A. I looked for statistics to see but I couldn't find any
20 and I rather suspect it wasn't used.
- 21 Q. You conclude this section by saying:
22 "This provision remained parts of Scots law until
23 1 April 1997 when it was repealed under reference to the
24 Children (Scotland) Act 1995."
- 25 A. That's correct.

1 MR MacAULAY: My Lady, that's 1 o'clock.

2 LADY SMITH: Very well. We'll stop now for the lunch break.

3 (1.00 pm)

4 (The lunch adjournment)

5 (2.00 pm)

6 LADY SMITH: Good afternoon.

7 Mr MacAulay, are we ready to resume?

8 MR MacAULAY: We are, my Lady. The next topic I want to
9 take you to, professor, is that of corporal punishment
10 of children. If I can turn to your report at
11 LIT.001.001.6852; that's page 346.

12 Here in appendix 2, you introduce us to this topic.

13 Can you just take us to the historical position?

14 A. The historical position was that a right of chastisement
15 inherent in parents was allowed by the common law of
16 Scotland recognised by the common law of Scotland,
17 though it was never unlimited. I cite Erskine, who
18 wrote in the 18th century, and Fraser, who wrote in the
19 19th century. Fraser says:

20 "The purpose of chastisement has to be educative and
21 designed to further the welfare of the child."

22 So while that sanctions it also limits the right.

23 At common law we had that. It was given statutory
24 recognition, I think for the first time in the
25 Prevention of Cruelty to and Protection of Children Act

1 1889, which we touched upon earlier today. That
2 basically says in section 14 that nothing in the Act is
3 designed to take away the right of parents to punish
4 their children. That formulation was repeated in the
5 subsequent child cruelty statutes until the Children and
6 Young Persons (Scotland) Act of 1937, where it manifests
7 itself in section 12(7) -- again, parents and others
8 with the right of chastisement and nothing in the Act
9 takes away that right. That was a statutory provision
10 in our legislation until 2003, when that particular
11 provision was removed.

12 Q. Against that overview, do you tell us towards the bottom
13 of the page, page 6852, that:

14 "Corporal punishment was lawful but only when both
15 (i) aimed at chastisement in the sense of educative
16 punishment and (ii) within a moderate and reasonable
17 level of severity."

18 A. Yes.

19 Q. And you have taken that from the common law?

20 A. Yes. I have.

21 Q. I think from what you've said, the various bits and
22 pieces of legislation, the 1889 Act, the 1908 Act and
23 the 1937 Act, were essentially saying the same thing?

24 A. Yes, I think so, yes.

25 Q. Let's then look at the 1937 Act. That's at

1 LEG.001.001.0530.

2 You mentioned section 12. Perhaps we could go to
3 page 0545, which is page 9 of the volume. The section
4 is headed "Offences", and the side note tells us it's
5 broadly dealing with cruelty to persons under 16.

6 A. Yes.

7 Q. We've seen this before, but just to read a bit of (2):

8 "If any person who has attained the age of 16 years
9 and has the custody, charge or care of any child or
10 young person under that age wilfully assaults,
11 ill-treats, neglects, abandons, or exposes him or causes
12 or procures him to be assaulted, ill-treated, neglected,
13 abandoned or exposed ... shall be guilty of an offence."

14 A. Yes.

15 Q. You mentioned subsection 7. If we turn to page 0547,
16 that's on page 11 of the volume --

17 A. It's worth noting, I think, section 12(1), which you
18 just quoted: effectively, other than some terminological
19 changes, it remains in force today.

20 Q. Today?

21 A. Section 12(1), the offence.

22 Q. The ill-treatment offence?

23 A. Yes.

24 Q. So then if we move to section 12(7), we now have that on
25 the screen, and reading that:

1 "Nothing in this section shall be construed as
2 affecting the right of any parent, teacher [and I'll
3 come back to teachers] or other person having the lawful
4 control or charge of a child or young person to
5 administer punishment to him."

6 Punishment here means punishment as accepted as
7 legal by the common law; is that how you interpret it?

8 A. Yes, that's how I interpret it.

9 Q. Reasonableness then comes into the equation; is that
10 right?

11 A. Very much so.

12 Q. You discuss that on page 6853. Can you just look at
13 that then? How is that to be approached?

14 A. Well, as I say in my report, the concept is never
15 static. What is reasonable in one society may not be
16 reasonable in another society. What is reasonable in
17 1920 may not be reasonable in 2019. It changes as
18 society changes and our notions of what is reasonable to
19 expect children to put up with change.

20 Q. You move on to look at the Criminal Justice (Scotland)
21 Act 2003.

22 A. Yes.

23 Q. That, as you tell us, repealed section 12(7) of the 1937
24 Act, but not section 12(1)?

25 A. Not section 12(1), the offence is still there. The

1 common law defence of reasonable, what has come to be
2 called "reasonable chastisement", is still there, but
3 its statutory manifestation in section 12(7) has gone.
4 Section 51 of the Criminal Justice (Scotland) Act 2003
5 tries to give some guidance as to what is unacceptable.
6 So if any act comes within section 51, such as shaking
7 and the use of an implement, you cannot argue that is
8 reasonable.

9 Q. So the section at subsection 1 talks about a justifiable
10 assault.

11 A. Yes.

12 Q. That's the term that's used?

13 A. Yes.

14 Q. Is that to mean reasonable chastisement?

15 A. An assault that is justified by the exercise of the
16 parental right of reasonable chastisement.

17 Q. As you've said, and we needn't look at the detail, (a),
18 (b), (c), (d) and (e) provide some guidance as to when
19 the boundary might be crossed.

20 A. Yes.

21 Q. Duration and frequency, for example, is one of the
22 examples; the age of the child is another.

23 A. Yes.

24 Q. But as you just pointed out, there are certain types of
25 physical punishment that are not acceptable?

- 1 A. That will never be reasonable in that sense, yes.
- 2 Q. If we turn over to page 6854 of your report, page 348,
3 you mention:
4 "... a blow to the head, shaking or the use of an
5 implement."
6 A. Yes.
- 7 Q. Implement; there's no definition of that?
- 8 A. I don't think so: belts, sticks, books, whatever. When
9 the 2003 Act was going through, or that part of it was
10 going through, and again in much more recent debates,
11 opponents of this sort of thing always talk about
12 a "loving smack". So certainly in 2003, the legislature
13 was quite keen to ensure that anything other than the
14 use of an open hand would be unacceptable.
- 15 Q. A slap across the ear, according to this definition,
16 would be unacceptable?
- 17 A. Yes. That would be a blow to the head.
- 18 Q. So essentially, this is narrowing the use of a hand on
19 another part of a child's body?
- 20 A. Yes.
- 21 Q. You quote yourself there, along with
22 Professor Wilkinson, as to whether the change brought by
23 the Criminal Justice (Scotland) Act 2003 was that
24 radical.
- 25 A. Other than these specifications of things which are

1 quite unacceptable, the list in subsection 1 of the
2 factors the court needs to take into account, these are
3 the sorts of factors that the courts were taking into
4 account in determining what was reasonable in any case,
5 and that led to our comment that, actually, it's not
6 that radical a change.

7 Q. But was this legislation designed to address ECHR
8 concerns?

9 A. Yes, it was.

10 Q. And did it?

11 A. Well, probably, yes.

12 Q. But I think now this is being looked at again.

13 If we jump ahead for a moment or two --

14 A. Yes.

15 Q. -- to what's called the smacking ban, I think is how
16 it's described, and that's an ongoing discussion within
17 Parliament.

18 A. Yes. There is a private members' bill that has
19 government support to go very much further than the
20 2003 Act went and actually to remove entirely the
21 defence of reasonable chastisement so that if a parent
22 assaults a child, the parent is potentially open to
23 prosecution for assault, leaving it then to the
24 prosecuting authorities or the courts to determine
25 whether what happened amounted to an assault or not, but

1 there's no additional protection that a parent can
2 bring, saying: yes, I assaulted the child but that is
3 justifiable because of my common law defence of
4 reasonable chastisement.

5 Q. You make the point on this page, in fact, that the UN
6 Committee on the Rights of the Child more than once has
7 been critical of the United Kingdom --

8 A. Yes.

9 Q. -- in this area.

10 A. Yes, that's correct. The European Court of Human Rights
11 has never explicitly said all hitting of children is by
12 definition contrary to their rights, probably under
13 Article 8, but the UN Committee on the Rights of the
14 Child has on at least two occasions strongly urged the
15 United Kingdom Government to remove this defence from
16 our law.

17 Q. You move on, on the next page, to schoolteachers; that's
18 at page 6855, page 349 of the report. Indeed, you make
19 the point that most of the earlier cases at, least
20 involved, teachers rather than parents.

21 A. Yes.

22 Q. And the test, however, is the same?

23 A. The test is exactly the same and the statutory
24 manifestation, which you've already quoted, applies to
25 parents and teachers.

- 1 Q. Where does the teacher derive the power, the legal
2 power, to engage in reasonable chastisement?
- 3 A. There's some academic debate as to where the teacher
4 acquires their power. It seems to have been assumed it
5 was an inherent part of educating the child and the
6 teacher's duty to maintain discipline. Until relatively
7 recently it was unquestioned that part of maintaining
8 discipline might include inflicting physical punishment
9 on children. So it was not that the teacher was in loco
10 parentis to the parent who was exercising any
11 parental -- it was a self-standing --
- 12 Q. It wasn't a delegated power?
- 13 A. No, it wasn't a delegated thing, no. There's a good
14 article, I cite at page 349, from 1972, in the
15 Juridical Review that explores that very point.
- 16 Q. That's the article by Wallington?
- 17 A. Yes.
- 18 Q. But again, as you point out, as far as the teacher is
19 concerned, the teacher is entitled to administer
20 chastisement when the pupils deserve it? That's what
21 you have said in the report. Perhaps you're quoting
22 Lord President Boyle there.
- 23 A. I'm quoting, yes.
- 24 LADY SMITH: I think that's the quotation, 1848.
- 25 A. Yes.

1 MR MacAULAY: But even in 1848, the Lord President is also
2 seen to be saying:

3 "It must be moderate and without any cruel or
4 vindictive feeling or passion."

5 A. Absolutely. It was never an unlimited right. Erskine
6 and Fraser pointed that out in the 18th and
7 19th centuries.

8 Q. But in any event, although there are these cases
9 involving schoolteachers, very few were successful?

10 A. Very few?

11 Q. Very few cases of prosecution were successful.

12 A. Very few prosecutions were successful, yes.

13 Q. And that's something you point out at page 6856?

14 A. Yes. What I say, and I think it must be right, is that
15 the courts were deeply reluctant to get into the
16 nitty-gritty of schoolroom discipline. You can imagine
17 the difficulties that they would face.

18 Q. You draw reference to what Lord Guthrie said in
19 Gray v Hawthorn. That's a case where there was
20 a conviction and it was sustained?

21 A. Yes.

22 Q. Halfway down the page he says:

23 "In general it is true to say that the court
24 will not review the exercise of these disciplinary
25 powers by a schoolmaster, since it cannot interfere with

1 what falls within the scope of his discretion. If what
2 the schoolmaster has done can truly be regarded as an
3 exercise of his disciplinary powers, although mistaken,
4 he cannot be held to have contravened the criminal law.
5 It is only if there has been an excess of punishment
6 over what could be regarded as an exercise of
7 disciplinary powers that it can be held to be an
8 assault."

9 A. Yes.

10 Q. So it's a question of -- very much fact-driven in
11 a sense as to --

12 A. Fact driven but I think the courts are giving
13 schoolteachers what might be -- what is described in
14 other contexts as a generous ambit of reasonable
15 disagreement.

16 LADY SMITH: What's also interesting, and I think this is
17 correct, Lord Guthrie ties it to the need to look for
18 the relevant mens rea: was there evil intent, did this
19 teacher have in mind deliberately harming the child, or
20 had the teacher so lost control that they didn't care
21 whether they harmed the child or not, which is
22 fundamental to Scottish criminal law.

23 A. Yes, and we must remember that the charge is assault and
24 evil intent is the essence of assault, so that's what
25 they have to -- that's what a prosecutor beyond

1 reasonable doubt has to establish and that probably
2 explains why there's so few successful cases because
3 that's quite a difficult thing for a prosecutor to
4 establish.

5 MR MacAULAY: You then move on to look at others who may be
6 acting in loco parentis. This is at page 6857, page 351
7 of the report. And you begin by looking at foster
8 carers. How has the law looked upon foster carers?

9 A. Well, foster carers could be regarded as acting in loco
10 parentis. If you go back to section 12(7) ...

11 Q. That's on page 347 of the report.

12 A. I can't remember the precise quotation, but ...

13 "The defence of reasonable chastisement inherent in
14 parents and teachers and other persons with charge or
15 control."

16 I might have got the words a bit wrong.

17 Q. Sorry, yes, you're looking at section 12(7)?

18 A. 12(7):

19 "Any person having lawful control or charge of a
20 child or young person."

21 That to me would clearly include a foster parent.
22 I think it would be difficult to argue that they're not.
23 I cite an early English case, Liverpool Society for the
24 Prevention of Cruelty to Children v Jones, where the
25 judge explains that the whole point of what is now

1 section 12(1) is to include as a potential offender any
2 person who in fact, irrespective of the precise nature
3 of the legal relationship, is looking after that child;
4 a consequence of that is that they're entitled to rely
5 on the defence in section 12(7).

6 Q. And the language of 12(7) is:

7 "... affecting the right of any parent, teacher or
8 other person having the lawful control or charge of
9 a child"?

10 A. Yes.

11 Q. And you would include foster care parents in that
12 category?

13 A. Oh, I think so, yes.

14 Q. You also, however, draw attention to regulations that we
15 looked at previously, and in particular the Children
16 (Boarding Out), et cetera, (Scotland) Rules and
17 Regulations 1947 and the impact they may have on this
18 area.

19 A. Yes.

20 Q. What's the relevance of these regulations?

21 A. These regulations explicitly provide:

22 "The foster parent shall not administer
23 indiscriminate or harsh punishment."

24 I'm not sure I see any difference in any addition,
25 any further limitation to the law than the normal

1 interpretation of reasonable chastisement already
2 carries.

3 Q. You then move on, professor, to look generally at
4 residential establishments and we'll look at specifics
5 in a moment. But you begin by saying:

6 "The position of children in approved schools,
7 remand homes, local authority homes and voluntary homes
8 was very different."

9 And that's because regulations set parameters --

10 A. Yes.

11 Q. -- for chastisement?

12 A. Yes, that's correct.

13 Q. So if we look then at voluntary and local authority
14 homes -- we'll look at the 1959 regulations in a moment,
15 but before those regulations, what was the position?

16 A. Before 1959, I think there were no regulations
17 explicitly covering children's homes as opposed to
18 schools.

19 Q. So would they then be covered by the common law?

20 A. So they would have to be covered by the common law, yes.

21 Q. The Administration of Children's Homes (Scotland)
22 Regulations 1959 did impose parameters on the corporal
23 punishment of children?

24 A. To a limited extent, that's right. They provide, for
25 example, that corporal punishment would only be used

1 exceptionally. Again, I'm not sure just exactly what
2 that adds to the law but it does, I think, require those
3 potentially administering corporal punishment to stand
4 back and think about whether it's truly justified.

5 Q. We looked at the regulations before, we didn't go back
6 to then, but I think you'll recollect that a number of
7 different options were provided.

8 A. Yes.

9 Q. And then the final option, as you say, the exceptional
10 option being corporal punishment; that may indicate that
11 there had to be a thought process and not just simply
12 a reaction.

13 A. I think so, yes.

14 Q. Approved schools, you address on page 6859. Again,
15 you're looking at regulations relevant to those
16 institutions. What you tell us is that:

17 "Corporal punishment by a light tawse was permitted
18 under the Children and Young Persons (Scotland) (Care
19 and Training Regulations) 1933, though only rarely on
20 girls."

21 A. Yes.

22 Q. So there are some limitations being brought in?

23 A. I think they're much more specific limitations, both
24 in the 1933 regulations and in the replacement under the
25 Approved Schools (Scotland) Rules of 1961, limiting who

1 can administer corporal punishment, who has to be
2 present when it's administered, the number of strokes,
3 where on the body strokes can be given, these sorts of
4 things. It's much, much more detailed.

5 From our eyes today, there's a surprising amount
6 written in the regulations as to how corporal punishment
7 is to be administered in approved schools.

8 Q. Does that indicate that there was a desire to control
9 how corporal punishment was to be --

10 A. I think it does. I think it symbolises a recognition of
11 vulnerability and a recognition that this might be
12 abused if it's not subject to pretty detailed
13 regulation. Again, it's important because, as we saw
14 with the schoolteachers, they're given a wide ambit of,
15 well, "Well, I thought 20 strokes of the belt was
16 reasonable", and a judge might say, "Well, it's a bit
17 excessive, but, you know, within the disciplinary
18 needs ..." That's just not to be permitted in approved
19 schools: it's explicitly laid down how many strokes,
20 who's to be -- all that. So I see it very much in terms
21 of control and recognising that there really is the
22 vulnerability to abuse of this defence.

23 Q. Remand homes you also look at, which had their own
24 rules. The first point you make is that corporal
25 punishment was not permitted in relation to girls in

1 remand homes --

2 A. Yes.

3 Q. -- but it was permitted in connection with boys.

4 A. Yes. It's not dissimilar to whipping, which was
5 permitted in Scots law until the 1940s, but only on boys
6 as a punishment for offences.

7 Q. Then the final area you look at under this general head
8 is that of borstals and what you call approved probation
9 hostels.

10 So far as borstals were concerned, what is the
11 position there in relation to corporal punishment?

12 A. Well, the rules listed the punishments but did not
13 include corporal punishment, and I think that's because
14 of the age of the young people who were in borstals.
15 They'd be above 16 by that stage and really -- remember
16 the 1937 Act is very much protecting children under the
17 age of 16. In borstals you've got young people over the
18 age of 16. It's so close to a prison environment, and
19 of course you don't have corporal punishment in prisons.

20 Q. The subsequent rules, I think the 1967 rules, actually
21 went on to elaborate what was meant by certain aspects
22 of corporal punishment.

23 A. Yes. I read that as a doubt as to whether some types of
24 physical control of the inmates could be held to amount
25 to corporal punishment or not. So you've got striking,

1 cuffing and shaking. That might be seen as either
2 control of rowdy inmates or actually as physical
3 punishment, and we're told corporal punishment is not
4 allowed and that includes these specified things.

5 Q. You then have a section, professor, dealing with the
6 abolition of corporal punishment.

7 A. Yes.

8 Q. And let's look at schools first of all then. How did
9 that develop?

10 A. Well, that came from a decision of the European Court of
11 Human Rights, the Campbell and Cosans v UK case, which
12 I think was in 1982, and it was a Scottish case. The
13 European Court formally rejected the claim that this was
14 contrary to Article 3, but they did hold that the
15 problem was that allowing corporal punishment in schools
16 didn't give sufficient scope for parents' philosophical
17 convictions against it. So that was the decision. The
18 United Kingdom, who defended the case, lost it under
19 Protocol 1, parents' conscience.

20 So the government thought, well, we could write in
21 a sort of conscience clause, but I think the education
22 departments all thought it would be a bad idea to have
23 some children in a single classroom able to be punished
24 corporally and others not.

25 LADY SMITH: Also as a matter of practicality they'd have to

1 check with every parent whether they were allowed to use
2 corporal punishment on their child or not, all their
3 children, because they may have a different belief for
4 some children as opposed to others.

5 A. Absolutely, and of course you might have one parent
6 holding one thing and the other parent holding the
7 other. The whole thing would have been a nightmare. So
8 very sensibly -- and I think the only practical response
9 to Campbell and Cosans was to simply prohibit corporal
10 punishment in schools; it was limited, of course, at
11 that time to public schools.

12 MR MacAULAY: By public, do you mean in state schools?

13 A. I mean state schools, public schools.

14 LADY SMITH: Those paid for by the public purse?

15 A. Yes.

16 MR MacAULAY: Was this then by legislation in 1986?

17 A. That's correct, the Education (No. 2) Act.

18 Q. What about other places like residential establishments?
19 What was the position there?

20 A. For residential establishments, the regulations came in
21 in 1988, so it was just a couple of years after dealing
22 with schools. Staff at residential establishments were
23 prohibited under the Social Work Residential
24 Establishment Childcare (Scotland) Regulations from
25 inflicting corporal punishment.

- 1 Q. That was 1988?
- 2 A. That was 1988.
- 3 Q. What about fee-paying schools then?
- 4 A. Fee-paying schools came a little later, I think with the
5 Standards in Scotland's Schools, et cetera, Act 2000,
6 which was one of the earliest pieces of legislation of
7 the Scottish Parliament. That effectively took away the
8 common law defence from all schools, not just public
9 schools, but private schools as well.
- 10 Q. We've touched already on parents and what's happening at
11 the moment in relation to the so-called smacking ban.
12 Foster carers, what happened there?
- 13 A. Foster carers too lost their so-called right, though
14 I think that wasn't until the Fostering of Children
15 (Scotland) Regulations 1996, so it's a little later.
16 Foster carers traditionally had been seen as
17 quasi-parents and if parents had the right to bring up
18 their children in a way that included corporal
19 punishment, foster children who were supposed to be
20 integrated in the family and treated the same -- I think
21 that was the thinking. So foster carers hung on to the
22 power of corporal punishment slightly longer than
23 teachers or those in residential establishments. But by
24 1996, it was recognised, I think, that that's an
25 unsustainable position.

1 Q. I think we'd seen when you gave your evidence previously
2 that local authorities would enter into agreements with
3 foster parents in any event --

4 A. Yes.

5 Q. -- over matters like corporal punishment?

6 A. Yes, that's correct.

7 Q. And that finally brings us to what you describe in the
8 report on page 6862, page 356, as the Children (Equal
9 Protection from Assault) (Scotland) Bill 2017. Is this
10 the private members' bill that you mentioned earlier?

11 A. It is, yes. It's been given government support, but the
12 last time I looked it was still sort of languishing,
13 I think, in a committee in the Scottish Parliament.
14 It's not proceeded quite as fast as many people wanted,
15 but it has pretty general support, I think, within the
16 Parliament.

17 Q. Can I take you back? There's a question I've been asked
18 to put to you, professor.

19 At 6859, I think, is the ... ah yes, it's the
20 point -- if you look at the "Approved School" section.
21 You also indicate under reference to the Training
22 Regulations 1933 -- I think we may have seen this when
23 we saw the regulations -- that in relation to
24 punishments, records were to be kept of the punishments
25 that were inflicted --

1 A. Yes.

2 Q. -- in either a punishment book or something similar?

3 A. That's correct.

4 Q. And we see that provision in relation to keeping
5 records, I think, also in the 1959 regulations that we
6 looked at.

7 A. Yes.

8 Q. Can I then move on to the third topic you look at in the
9 appendices, and that's the topic of international law
10 relating to children. You begin your discussion on that
11 topic at page 6864, which is page 358 of the report.

12 You provide us with an overview, first of all, of
13 the relevance of international law to national law.

14 A. Yes.

15 Q. Can you just give us the background to that?

16 A. Very briefly, I'm not an international lawyer myself,
17 but very briefly, there's in a sense two forms of
18 international law: what is called customary
19 international law, which is an inherent part of any
20 legal system, and international law that is derived from
21 treaty.

22 International law that's derived from treaty, any
23 international conventions, whether from the UN or
24 the Council of Europe or whomsoever, isn't directly
25 enforceable in Scots law, unlike a principle of

1 customary international law. So a treaty or
2 a convention would have to be in some way brought in to
3 our legislation, and there's a huge variety of
4 mechanisms for bringing international treaties into
5 domestic law.

6 Q. I think you touched upon this already, that the UK and
7 Scottish Parliaments would take full account of
8 international law when drafting legislation so as to be
9 compatible with international --

10 A. Yes, that's correct. There are procedural mechanisms
11 under the Scotland Act, for example, to ensure that
12 these issues are dealt with before legislation goes
13 before the Scottish Parliament. Of course, the UK
14 Parliament has -- because they use the word "sovereign",
15 it claims the ability to legislate irrespective of
16 consistency with any international convention, but the
17 Scottish Parliament does not have that freedom.

18 Q. When legislating, the Scottish Parliament would also
19 seek to be compatible with international law?

20 A. Yes, absolutely, I think it's one of the
21 responsibilities of the Advocate General, I think.

22 Q. Can I then take you to the European Convention on Human
23 Rights and how that impacts or not, as the case may be,
24 on children's rights? You begin your discussion of that
25 at page 6866 of the report.

1 You begin by looking at the case of Kaur v
2 Lord Advocate. I think Lord Ross was the judge in that
3 case.

4 A. Yes.

5 Q. He wasn't particularly receptive of the European
6 Convention of Human Rights having an impact on Scots
7 law.

8 A. Yes, that's right. The traditional approach to any
9 international convention would be that it helps in the
10 interpretation of statutory law and there would be
11 a presumption that if you had two plausible
12 interpretations, one consistent and one inconsistent,
13 the court would tend to go for the consistent
14 interpretation. That proposition is much more settled
15 and worked out by the English courts and it was less
16 clear that that was so in the Scottish courts.

17 Lord Ross used the Kaur case to really cast some
18 doubt as to whether that was a proposition that would
19 apply at least in relation to the European Convention on
20 Human Rights. Lord President Hope in one of his very
21 last judgments as Lord President took the opportunity to
22 say that the approach manifested by Lord Ross was
23 actually not the correct approach for the Scottish
24 courts and the position as I've described for English
25 law would be the appropriate one and always had been in

1 fact the appropriate one in Scotland too.

2 LADY SMITH: It's interesting to look back, is it not, to
3 see between 1980 and 1996 how thinking and practice had
4 shifted enormously? And in fairness to Lord Ross,
5 Lord President Hope was very careful to say:

6 "It is now clearly established that we now have to
7 recognise that this is the way we approach legislative
8 interpretation."

9 So far as I can recall, the decision in Kaur by
10 Lord Ross at the time was accepted as making sense.

11 A. It was not one that created a gasp of surprise.

12 LADY SMITH: No, no.

13 MR MacAULAY: I don't think Lord Ross was on his own in that
14 thinking in Scotland at least.

15 LADY SMITH: Yet by 1996 it would have been surprising if
16 that thinking was still being paid heed to in the
17 Inner House by that stage. It doesn't look like very
18 long when you look back, but it signified quite an
19 enormous development in a relatively short period.

20 A. Yes, I think that's right.

21 MR MacAULAY: What you say if you move on to page 6867,
22 having looked at what was said by Lord Hope in the
23 T, Petitioner case, you go on to say, towards the bottom
24 of the page, that:

25 "The Human Rights Act 1998, taken together with the

1 Scotland Act, have, since the latter came into effect in
2 1989, given the European Convention on Human Rights
3 a special position in law."

4 A. Yes, it's very different from any other international
5 convention, I think. The Scotland Act -- this is more
6 for policymakers and legislators -- explicitly prohibits
7 the Scottish Parliament from legislating inconsistently
8 with the ECHR and, of course, there are mechanisms to
9 tease that issue out before any bill gets presented.

10 The Human Rights Act, of course, passed in the same
11 year, has a very, very strong statement of legislative
12 construction in it that really requires -- "insofar as
13 it is possible to do so", I think is the phrase -- it
14 requires courts to interpret legislation consistently.
15 So it's no longer a case of just balancing two equally
16 plausible interpretation, you always go for the
17 interpretation that is consistent insofar as that is
18 possible to do so without actually breaking the words of
19 the legislation.

20 LADY SMITH: And Scottish Ministers may not act in
21 contravention with the Convention either.

22 A. Scottish Ministers, the Scottish Parliament, public
23 bodies as a whole, yes.

24 MR MacAULAY: If I take you to page 6868 of the report,
25 page 362, the way that you put it in the second

1 paragraph:

2 "The Human Rights Act 1998 makes it unlawful for any
3 public authority to act in a way that is incompatible
4 with a Convention right (unless it is required to do so
5 by primary legislation)."

6 And you go on to say:

7 "A 'public authority' is defined to include any
8 person, certain of whose functions are functions of
9 a public nature."

10 And a local authority and indeed a voluntary
11 organisation, you say, would be a function of a public
12 nature.

13 A. I think so, yes.

14 Q. Can we then look at "Children's Rights in International
15 Law". This is not new, professor; these rights have
16 been recognised in international law?

17 A. There have been international conventions on children's
18 rights for almost 100 years now.

19 Q. If you move on to --

20 A. Have they been particularly effective is another
21 question, but the international treaties have been
22 there.

23 Q. If we move on to page 6869 at page 363 of the report,
24 one of the first instruments that you draw attention to
25 is that adopted by the League of Nations in 1924 and

1 that's the Declaration of the Rights of the Child. So
2 that's a long -- that's been on the books for a long
3 time?

4 A. Yes, 95 years.

5 Q. You have set out five principles that have been taken
6 from this declaration of rights; is that correct?

7 A. That's the whole declaration, in fact.

8 Q. Well, 2, for example:

9 "The child that is hungry must be fed."

10 A. Yes.

11 Q. "The orphan and the waif must be sheltered and
12 succoured."

13 A. Yes:

14 "The delinquent child must be reclaimed."

15 I think, that is a really important part of that.

16 Q. We can see these are fundamental principles --

17 A. Yes.

18 Q. -- in relation to the care of children?

19 A. Yes. And fundamental in terms of the obligation of the
20 state.

21 Q. Yes.

22 A. The primary responsibility for the care of the child
23 lies with parents, but sometimes parents don't fulfil
24 these. The state has an obligation to feed the hungry,
25 to nurse the sick, to reclaim the delinquent child. The

1 state has that responsibility.

2 Q. The second of the principles that you have highlighted
3 in particular -- the hungry being fed, the delinquent
4 child being reclaimed, and the orphan and waif being
5 sheltered and succoured -- you have raised the question
6 yourself in the report.

7 "To what extent have these principles fed into any
8 of the legislation that was enacted thereafter?"

9 What's the answer to that?

10 A. In the Parliamentary debates on the 1932 Act and the
11 1937 Act, there's no mention of this. That really is as
12 far as I can go. There may have been governmental
13 thinking that was aware of this, but it was certainly
14 never made explicit. Nevertheless, I think the 1932 and
15 1937 Acts reflect to a very large extent what the
16 declaration -- the 1924 declaration is saying. There's
17 certainly no obvious gaps.

18 Q. Of course there are provisions there that were designed
19 for the protection of children.

20 A. Yes.

21 Q. You move on in the next page, 6870, to indicate that in
22 1959 a much expanded version of the 1924 declaration was
23 adopted; that became the United Nations Declaration of
24 the Rights of the Child 1959?

25 A. That's correct, yes.

1 Q. Again, you have set out, over the next page or so, two
2 or three pages, the provisions of the declaration;
3 is that right?

4 A. That's correct.

5 Q. Is that the full declaration?

6 A. That's the full declaration.

7 Q. It begins by saying:

8 "The declaration of the rights of the child to the
9 end that he may have a happy childhood and enjoy for his
10 own good and for the good of society the rights and
11 freedoms herein set forth and calls upon parents, upon
12 men and women as individuals, and upon voluntary
13 organisations, local authorities and national
14 governments to recognise these rights and strive for
15 their observance by legislative and other measures
16 progressively taken in accordance with the following
17 principles."

18 So that's addressing a whole host of different
19 bodies?

20 A. Yes, absolutely, bodies and individuals, the whole of
21 society in all its many manifestations.

22 Q. We can read for ourselves what the rights are, but for
23 example at 2:

24 "The child shall enjoy special protection."

25 And looking to the end:

1 "The best interests of the child shall be the
2 paramount consideration."

3 A. Absolutely. I think this is the ...

4 "The child shall enjoy special protection."

5 The importance of this, it's round about the same
6 time as the Universal Declaration of Human Rights, but
7 this is recognising children are different, children
8 need more in the way of protecting of their rights than
9 adults do.

10 Q. Moving on to the following page, 6871, page 365 of the
11 report. At item 6:

12 "The child, for the full and harmonious development
13 of his personality, needs love and understanding."

14 That's fairly fundamental?

15 A. I think it's fairly fundamental. I think it's not
16 something the law can enforce, but it's a fundamental
17 proposition of morality.

18 Q. It goes on to say:

19 "He shall, where possible, grow up under the care
20 and under the possibility of his parents and, in any
21 case, in an atmosphere of affection and of moral and
22 material security."

23 So if you were to plant this into a voluntary
24 organisation, even though those are not the parents who
25 are doing the caring, would this provision anticipate

1 that the atmosphere would be one of affection and moral
2 and material security?

3 A. I would certainly hope so. This is an aspiration, as
4 the whole thing is -- as the preliminary statement
5 suggested, this is for the whole of society, for anybody
6 who's looking after and dealing with children: be aware
7 of children's needs, not just for physical security but
8 for emotional security and the ability to develop their
9 own potential.

10 Q. The next provision, 7, deals with education:

11 "The child is entitled to receive education, which
12 shall be free and compulsory, at least in the elementary
13 stages."

14 A. Yes.

15 Q. If we move on to the next page, 6872, page 366 of the
16 report, at 9 we're told:

17 "The child shall be protected against all forms of
18 neglect, cruelty and exploitation."

19 Again, a fundamental proposition, you might think.

20 A. Fairly fundamental and a proposition that is more
21 readily enforceable by law.

22 Q. You then go on, professor, to mention some other
23 international treaties. You list these on that page and
24 moving on to the following two pages. I think you're
25 saying these are not as relevant as what we've just been

- 1 looking at but they're nevertheless relevant in their
2 own sense.
- 3 A. They're not designed for children as their main focus.
4 For example, the Convention on the Elimination of
5 Discrimination Against Women is designed with females as
6 the focus, but each of these has something somewhere
7 in the convention that recognises that children need
8 special independent recognition within -- we saw, again,
9 as the example, the CEDAW, the Convention on the
10 Elimination of Discrimination Against Women, the child
11 issue is that it proscribes betrothal and marriage of
12 children, so it's children male and female. The issue
13 is protecting discrimination against women, but that
14 plays out in a particular way for children. And for
15 each of the other ones, it's similar.
- 16 Q. On page 6874 -- this is page 368 of the report -- you
17 mention a convention which had been signed but not
18 ratified at the time of the writing of the report.
- 19 A. Yes.
- 20 Q. I think the position has now changed, but just to focus
21 on what the convention is: this is a convention, the
22 Council of Europe's Convention on the Protection of
23 Children Against Sexual Exploitation and Sexual Abuse.
- 24 A. Yes.
- 25 Q. And it requires the screening of people working with

1 children, programmes to support victims, and the
2 criminalisation of child prostitution, pornography,
3 grooming and sex tourism. I think when you wrote the
4 report, that had not been ratified.

5 A. It had not been ratified by the United Kingdom, yes. It
6 was in force but it had not been ratified by the
7 United Kingdom.

8 Last summer, the summer of 2018, the United Kingdom
9 did ratify that convention. I don't really know what
10 the delay was because all of the things -- the
11 criminalisation of child prostitution and pornography
12 and grooming and the screening of people working with
13 children -- we actually already had that in our
14 legislation, so it wasn't one of these conventions that
15 we would have to pass legislation before we were in
16 a position to ratify it. So I don't really know what
17 the delay in ratifying that was. But the point is it
18 has now been ratified and is in force for the
19 United Kingdom, too.

20 Q. You provided that information to us last week,
21 professor, and I'll read out what you said:

22 "The UK ratified the Council of Europe's Convention
23 on the Protection of Children Against Sexual
24 Exploitation and Sexual Abuse on 29 June 2018 and it
25 came into force in this country on 1 October 2018."

1 A. Yes.

2 Q. We then come, I think, to look at a rather important
3 document and that's the United Nations Convention on the
4 Rights of the Child.

5 A. Yes.

6 Q. And I think indeed you say that this is by far the most
7 important and far-reaching source of international law
8 relating to children; is that correct?

9 A. That's correct, yes.

10 Q. Can you explain your thinking here?

11 A. Well, first, unlike many of these other conventions,
12 it is focused very specifically on children. It's a bit
13 like the 1959 declaration but it's much more powerful
14 than the earlier Declaration of the Rights of the Child
15 because there's a monitoring -- I wouldn't say an
16 enforcing mechanism but there's certainly a monitoring
17 mechanism attached. It's also much longer -- that's why
18 I haven't given the whole thing, unlike I've given the
19 whole provisions for the previous ones. This is a much,
20 much longer and much more detailed convention. But
21 crucially, it has these monitoring provisions. There's
22 a mechanism set up here by the UN Committee on the
23 Rights of the Child, will produce reports and allow each
24 member state to comment on the progress it's made in
25 terms of fulfilling the requirements and the

1 UN Committee will produce what are called concluding
2 comments or concluding remarks, expressing where
3 progress still needs to be made.

4 Q. I think you mentioned, is that the committee you
5 mentioned earlier in connection with the smacking or
6 parental chastisement?

7 A. Yes, that's right.

8 Q. So far as the UK is concerned then, can we see that it
9 entered into force on 2 September 1919 and has been
10 ratified by all members of the United Nations other than
11 the USA?

12 A. 1991, not 1919.

13 Q. I'm sorry, yes, on 16 December 1991. But the USA has
14 not ratified this?

15 A. The USA has not ratified it. There's a prohibition on
16 capital punishment for those who are children and there
17 are various states in the United States of America which
18 allow capital punishment from the age of 16. My
19 understanding is that the federal authorities in the
20 United States don't believe they have the power to tell
21 states to change it, and therefore they're unable to
22 ratify the convention. But it's the only country in the
23 world that feels itself unable to do so.

24 Q. Moving on to the following page at 6875, page 369 of the
25 report, you provide us with a fairly lengthy quote from

1 Lord Hughes in the case of R v Secretary of State for
2 Work and Pensions. What was being addressed here?

3 A. Well, he was exploring what the effect of the
4 UN Convention on the Rights of the Child is on domestic
5 law. He was talking about English law but I don't see
6 any difference here in Scotland. He gave firstly the
7 sort of traditional, "It's of interpretive help", but he
8 also pointed out that -- and this is an important,
9 relatively modern development -- he also pointed out
10 that:

11 "The European Court of Human Rights has in the past
12 10 years or so come to increasingly rely on the
13 UN Convention when the European Court is addressing
14 issues of compatibility with its own Convention."

15 So they're using the -- the Strasbourg judges are
16 using the UN Convention with increasing regularity and
17 it's becoming ... not quite incorporated but it's
18 becoming much more -- more and more important in our
19 domestic legal system via the Human Rights Act by that
20 mechanism.

21 Q. You point out on that page that:

22 "The directly protected provisions of the Convention
23 are found in a number of different articles --"

24 A. Yes.

25 Q. "-- and recognises that the primary duty to look after

- 1 children falls to parents."
- 2 A. Yes. That's been a proposition throughout all of these
3 international conventions.
- 4 Q. But you go on to tell us on the following page that:
5 "In addition, the Convention requires the state to
6 have in place sufficient legal procedures that will
7 allow the state to take such protective measures as are
8 necessary."
- 9 A. That's right.
- 10 Q. And that's an important provision?
- 11 A. That's a very important provision.
- 12 Q. Indeed, you go on to say that that's a positive
13 obligation on the state.
- 14 A. Absolutely, yes, and, I think it's probably worth
15 mentioning, it's not one that the United Kingdom has
16 been criticised for not fulfilling.
- 17 Q. You go on to mention that in relation to one of the
18 reports that was produced by the committee that
19 originally the United Kingdom had entered some
20 reservations --
- 21 A. That's correct.
- 22 Q. -- but the reservations were withdrawn, I think.
- 23 A. There were four reservations when the United Kingdom
24 signed in 1991; they've all subsequently been removed.
- 25 Q. One was in relation to children's hearings?

1 A. Yes.

2 Q. What was the issue there?

3 A. It was interim provisions because the children's hearing
4 had and has the power, though the terminology has
5 changed somewhat, to keep children in a place of safety,
6 even before any grounds of referral had been
7 established.

8 There were doubts expressed -- I'm not convinced the
9 doubts were realistic, but that's a whole other issue
10 but there were doubts expressed as to whether that would
11 stand in light of the provisions in the UN -- so really,
12 just for safety's sake, that reservation was put in.

13 By the 1995 Act, the Children (Scotland) Act 1995,
14 there were appeal mechanisms introduced to these sort of
15 interim orders or interim processes, and having an
16 appeal mechanism was deemed sufficiently robust to allow
17 us to remove the reservation and that's what happened.

18 MR MacAULAY: My Lady might be thinking of giving the
19 stenographers a short break.

20 LADY SMITH: That would work very well just now. We'll take
21 the afternoon break now.

22 (3.02 pm)

23 (A short break)

24 (3.10 pm)

25 MR MacAULAY: Before the break we were talking about the

1 United Nations Convention on the Rights of the Child and
2 I think you tell us in your report -- and you may have
3 touched upon this already -- that:

4 "That Convention acquired a special provision [if
5 you like] within our legal system because of the Young
6 People (Scotland) Act of 2014."

7 A. Yes.

8 Q. And if you go on to your report at page 6878 -- that's
9 page 372 -- you explain why that is. Perhaps you can
10 just elaborate upon that.

11 A. The 2014 Act required the Scottish Government to keep
12 under consideration whether there are steps that they
13 could take which would or might secure better or further
14 effect in Scotland of the ECHR requirements. The
15 Scottish Government has to report to the
16 Scottish Parliament every three years about the steps
17 it's taking further to give effect to the provisions in
18 the UNCRC.

19 In a sense, this was a compromise. There was quite
20 a lot of pressure on the Scottish Government to
21 incorporate the Convention of the Rights of the Child
22 into Scottish domestic law in the same way that the ECHR
23 was.

24 That's an idea which I've heard the First Minister
25 revive recently. Personally, I'm not convinced it's

1 a particularly sensible approach. The ECHR was written
2 to be justiciable. The Convention of the Rights of the
3 Child was not and I think it would be very difficult for
4 lawyers to take from the UNCRC directly enforceable
5 legal propositions.

6 It's much more aspirational. It's designed with
7 a focus on governments and state bodies to do right for
8 children rather than to give individuals enforceable
9 obligations, so there is an ongoing political debate
10 over the current status of the UNCRC.

11 Q. Can we then look briefly at the European Convention on
12 Human Rights and what impact, if any, that has on
13 children's rights. You begin by saying on page 6879
14 that:

15 "At least on a simple reading [as you put it] this
16 is not a child-friendly treaty."

17 A. Yes. Yes, it's not designed -- it was never designed
18 with children as its focus. There are very few actual
19 mentions of young people anywhere in the substantive
20 provisions of the European Convention. There's
21 something in Article 5 about juveniles who are charged
22 with offences and there's something in Protocol 7 that
23 when you're dealing with marriage you have to take
24 account of the interests of the child. But there's very
25 little -- there's virtually no recognition that children

1 require more protection than adults, which of course is
2 the basis of the UN Convention on the Rights of the
3 Child.

4 What that meant is that for a very long time the
5 European Court would conflate the interests of children
6 with the interests of adults, and in many, many cases,
7 right up until this century -- you know, if a parent and
8 child were separated and there was a claim, this is
9 contrary to the right to family life, the typical
10 approach of the European Court was to analyse that claim
11 in relation to the parent and then say, "Well, if it's
12 compatible or not compatible for the parent, the same
13 issue arises with the child, so we don't really need to
14 look at the child".

15 And that was a very typical, long-term approach of
16 the European Court. That, I have to say, has changed
17 quite substantially in the past 15 or 20 years and the
18 European Court is becoming much more assiduous in taking
19 account, as I've already said, of the UN Convention on
20 the Rights of the Child, bringing in the concept of the
21 welfare of the child in determining whether there's been
22 a breach in all sorts of different contexts.

23 Q. And you have set this out in the next few pages of the
24 report.

25 If we move on to page 6881, under reference to the

1 Osman case, page 375 of the report, there you say:

2 "A positive obligation on the state was also found
3 to arise from Articles 2 and 3 in the Osman case."

4 Effectively what was the point in that case? The
5 point in that case in connection with -- was it in
6 connection with a child who had been seriously injured?

7 A. A child had been seriously injured, the child's father
8 had been killed by somebody. That wasn't by the state,
9 so it wasn't the state breaching an obligation in that
10 sense, but the right to life under Article 2 and the
11 right to be free from inhuman and degrading treatment
12 under Article 3. The European Court developed the
13 notion -- that actually imposes positive obligations on
14 the state to protect children and adults, indeed, from
15 other people, other individuals visiting that sort of
16 treatment on the child or the adult.

17 Q. Subject, I think, to the principle of reasonableness?

18 A. Yes.

19 Q. You have set out a number of cases over the next number
20 of pages, setting out how, depending on the facts, the
21 case can be made out against -- some cases are, some are
22 not, is I think what you've set out?

23 A. That's right. The issue is one of reasonableness: was
24 it reasonable for the state authorities to recognise
25 that the child was at such risk, either of death or

1 inhuman treatment, that the state had to act immediately
2 to protect the child? Or was it reasonable for the
3 state to be unaware of these circumstances? And
4 depending on which side of the line the case falls will
5 determine whether there's actually a breach of the ECHR
6 or not.

7 Q. If we turn to page 6882 -- that's page 376 of the
8 report -- here you're looking at Article 8. As we know,
9 Article 8 protects the right -- to have respect for
10 private and family life and this has been held to
11 encompass protection of physical integrity as well as
12 personal privacy.

13 A. Yes.

14 Q. You go on to say:

15 "This is important."

16 A. Well, I think it is important because Article 8 is of
17 much broader scope than Article 3. Physical integrity
18 is a -- an attack on physical integrity covers a much
19 broader range of things than inhuman or degrading
20 treatment, which is a relatively ... torture comes into
21 it as well. There has to be something very, very
22 extreme before there's a breach of Article 3 and it has
23 to be an extreme risk before a positive obligation under
24 Article 3 arises.

25 Article 8, however, because it's much broader, it

1 gives a much greater scope for a positive obligation on
2 the state to protect children from a risk to their
3 physical integrity.

4 Q. And you draw attention to a Swedish case, I think, on
5 page 6883, where it was held that Article 8 had been
6 breached --

7 A. Yes.

8 Q. -- because Swedish law did not adequately protect
9 a 14-year-old girl from the voyeurism of her stepfather.

10 A. Yes. I think there's no doubt that that would not have
11 reached the level of severity to amount to inhuman or
12 degrading treatment, but it breached the girl's
13 Article 8 rights and because there was nothing in
14 Swedish law that -- there was no provision in Swedish
15 law that could really protect the child from that sort
16 of behaviour, even though it was unacceptable behaviour.
17 There was a breach, and incidentally, of course, as
18 I say in my report, they took account of the Convention
19 on the Protection of Children Against Sexual
20 Exploitation. They used that to help interpret or
21 inform them as to the extent of the Article 8
22 protection.

23 Q. Your summary then at the end of that page 6883,
24 professor, can you summarise the position for us?

25 A. The European Convention, what I say is it has provided

1 international protection since at least 1953. Since
2 1998, it has become of increasing significance in
3 domestic law because the 1998 Act incorporated the
4 European Convention into our domestic law. That was
5 round about the time that the European Court started
6 taking children's rights much more seriously than it had
7 done before.

8 Q. Very well.

9 Can we then move on to the final appendix,
10 appendix 4, where you're looking at the whole issue of
11 remedies, both criminal and civil, and also I think
12 criminal injuries compensation as well.

13 A. Yes.

14 Q. Beginning with criminal law then, we've seen already,
15 I think, provisions in the legislation where criminal
16 sanctions are mentioned. But at common law, what
17 conclusions do you come to?

18 A. The common law had a crime of neglect of duty. The
19 important thing was that there had to be a pre-existing
20 duty. What this meant was that somebody could be
21 criminally charged with not doing something, not
22 providing some sort of protection in respect of somebody
23 they have a duty to provide that protection to when they
24 wouldn't have any criminal liability for omitting,
25 typically omitting to do the same act in relation to

1 somebody they didn't have a duty -- and the typical
2 example to that would be a parent and a child. A parent
3 has pre-existing moral and legally enforceable duties to
4 look after their children. If a parent neglects that
5 duty or does something that is cruel, then it's the
6 breach of that duty that founds the criminal liability
7 at common law.

8 Q. We've seen the statutory manifestations of that in the
9 legislation.

10 A. Yes.

11 Q. We've looked at section 12(7) for example.

12 A. Yes, it started in 1889. With remarkable consistency
13 the wording of the legislation has maintained itself
14 into the 1937 Act, section 12(1), which, with very
15 little change, actually, still exists today. So we've
16 had virtually 130 years of more or less the same
17 provision.

18 Q. You cover the statutory provisions on page 6885 --
19 that's page 379 -- through to page 6889 -- that's
20 page 383 of the report -- and I think by and large we've
21 covered these provisions in what we've already covered.

22 But in relation to case law then, you deal with
23 that, moving on from page 6889 onwards. How were the
24 cases being dealt with by the courts?

25 A. I think the first thing to note as far as the case law

1 is concerned, certainly the early case law, but it
2 reflects itself in the modern world -- the first thing
3 to note is that the statutory crime is not really much
4 different from the common law crime. It simply gives
5 effect, gives statutory effect, to what was the common
6 law position. So I think that's the first thing to
7 notice.

8 The second thing to notice is that even although the
9 statutory offence talks about "wilful acts and
10 neglects", what has to be wilful, what has to be
11 intention is the intention to do the act or not to do
12 the act, but it's not required that there be intent to
13 cause the harm.

14 This has manifested itself in a couple of cases in
15 which the perpetrator of the injury actually didn't have
16 the mental capacity to intend to harm. So for example,
17 you've got a couple of cases with educationally
18 challenged parents who make very, very bad judgements
19 but nevertheless, if they do the act intentionally, they
20 can potentially be prosecuted.

21 The third element from the case law -- and this is
22 really from the 1960s onwards -- the focus has been to
23 a large extent on the issue of likelihood of harm
24 because that's a requirement in the statute. So the
25 cases have been asking -- looking at the circumstances:

1 is it likely? Whether or not the child is harmed or not
2 is a completely irrelevant question, the question for
3 the existence of the crime is: is the act or neglect
4 likely to cause the child harm? And if the prosecutors
5 can show that there is a likelihood, then the crime can
6 be found to be established.

7 Q. You draw attention to a Scottish case, JM v Brechin, at
8 page 6893, so 387 of the report. That's a very recent
9 case in fact, 2015.

10 A. Yes.

11 Q. Moving on to page 6894 -- and this is a case that was
12 dealt with by Lord Carloway, looking in particular at
13 what was meant by the word "wilfully" and whether or not
14 to what extent that could be linked to an accused's
15 awareness of likely consequences. What did
16 Lord Carloway conclude in that case?

17 A. Well, Lord Carloway concluded that the law had, for
18 a very long time, been relatively settled and the
19 importance of this case is that it reaffirms what I said
20 a few moments ago. It doesn't develop it, but it
21 reaffirms the fact that the word "wilful" in terms of
22 section 12 requires an intent to perform the conduct
23 whether negative or positive. The mental element of
24 this crime is not intent to injure at all, it's not evil
25 intent in the sort of common law requirement for

1 assault; it is simply intent to do or not to do the act.

2 If you go back to the common law proposition, it was
3 based on neglect of duty, not neglect of duty with the
4 intent of actually causing injury. So Lord Carloway --
5 and I give quite a long quotation from him because
6 I think he summarises the position perfectly clearly,
7 that this is what our law has for long said and he was
8 affirming that that was the case as a correct
9 interpretation of section 12(1).

10 Q. This was a case where a father had, by lifting each of
11 his twin children, broken their ribs --

12 A. Yes.

13 Q. -- or fractured ribs.

14 A. His defence was he'd done something stupid and he
15 accepted he'd done something stupid --

16 Q. He didn't intend to cause the damage.

17 A. -- but he didn't intend to injure his own children. And
18 Lord Carloway said, "I'm sorry, but that's not the
19 nature of this crime: you intended to do what you did.
20 You intended to lift your children up and dangle them,
21 and there was a likelihood of injury". And it's the
22 likelihood that's the thing that makes it a crime.

23 LADY SMITH: Another example might be a parent who intends
24 to leave the house with no other adult in it, leaving
25 a baby behind for eight hours --

1 A. Yes.

2 LADY SMITH: -- intending to drive to go somewhere and
3 knowing they won't be back within eight hours. They
4 don't actually do anything to the child, but they do
5 something that is quite deliberate that has clearly a
6 risk to the child inherent in it.

7 A. But again, in that sort of scenario, you take account of
8 all the circumstances to see how likely it is that
9 injury is going to be caused to the child. If you leave
10 a 14-year-old child for eight hours in a very safe
11 environment, that might not be likely.

12 LADY SMITH: Absolutely.

13 A. An 8-month-old child, you might well get a very
14 different answer.

15 LADY SMITH: Indeed.

16 A. I think one of the cases that Lord Hope dealt with was
17 leaving a child in a car.

18 LADY SMITH: The seat belt case, yes. It comes very close
19 to looking for, in effect, criminal negligence:
20 a failure to take reasonable care when you have a duty
21 to take reasonable care to such an extent that it's
22 criminal.

23 A. Yes.

24 MR MacAULAY: And here we're looking at a section 12
25 offence. You told us recently that the

1 Scottish Government are consulting on changes that are
2 to be made to --

3 A. Yes. They consulted, I think, in the autumn of 2018.

4 There was a concern that section 12 -- and it comes from
5 the 1881 Act, so the language is relatively archaic, and
6 they started off wondering whether we should update
7 this, but one of the particular issues -- the Act talks
8 about one of the harms being "mental derangement". Now,
9 that's a very old-fashioned sort of word and it's very
10 unclear -- I couldn't find any cases in which that
11 phrase had been even judicially discussed, far less
12 defined. There was the fear in the Scottish Government
13 that the phraseology just isn't sufficient to capture
14 enough types of neglect.

15 They really want to capture emotional neglect and
16 it's no accident, I think, that last year was passed the
17 Domestic Abuse (Scotland) Act, which I think just came
18 into force last week. One of the important elements of
19 that is to make emotional abuse in a domestic setting
20 a crime, so a similar sort of thinking is being fed into
21 section 12.

22 This concept of -- what's the phrase they have in
23 section 12, emotional derangement, mental derangement --
24 just is not adequate to deal with the sort of abuse that
25 probably ought to be covered in the modern world.

1 Q. And this consultation you say took place last year?

2 A. Autumn 2018, yes.

3 Q. And we're now waiting for some response?

4 A. I have not seen the response. Normally when they do
5 a consultation, they then publish a response after
6 they've analysed all the consultation responses. I have
7 not yet seen such a response. I've had discussions with
8 various civil servants about this and they are hoping to
9 push forward with it in relatively short order.

10 LADY SMITH: Are they are still thinking in terms of making
11 it a crime, emotional neglect of a child?

12 A. Yes.

13 LADY SMITH: It is really difficult to capture in statutory
14 language, isn't it?

15 A. You see, that is the problem. Just ensuring that you're
16 criminalising things that ought to be criminalised and
17 not just parents who are not doing a particularly good
18 job of it.

19 MR MacAULAY: Can we then move on to look at criminal
20 injuries compensation, professor. You begin looking at
21 that at page 6895 of the report. You provide some
22 history as to how the Criminal Injuries Compensation
23 Scheme came into being and, in particular, that it was
24 in February 1964 that a White Paper was issued in this
25 connection; is that right?

- 1 A. That's right.
- 2 Q. There was a particular focus -- I think the point you
3 make was there was a particular focus in relation to
4 crimes of violence and to what extent, if at all, sexual
5 abuse of particular types would fit into that category.
- 6 A. Yes, yes, there were a number of cases throughout the
7 1960s and 1970s, because the scheme, which was
8 non-statutory at the time, focused very much on that
9 concept of crime of violence and just the extent to
10 which it meant violence was -- proved problematic and
11 contentious.
- 12 Q. One of the points you look at is what was known as the
13 "same-roof rule".
- 14 A. Yes.
- 15 Q. Can you just elaborate on that for us?
- 16 A. The original scheme excluded from criminal injuries
17 compensation an injury that was suffered by a person who
18 lived in the same household as the perpetrator. The
19 thinking behind it -- and I think I quote Lady Dorian in
20 a relatively recent case, *MA v Criminal Injuries*
21 *Compensation*, she explains the thinking behind the
22 same-roof rule. There was basically a fear that if you
23 give one family member compensation for an act of
24 another family member, the other family member is
25 actually getting some benefit from that. That's kind of

1 it in a nutshell.

2 By 1979, it was felt that that rule was actually
3 unjustified, so they removed the rule in 1979, but
4 crucially did not make it retrospective; that has been
5 a contentious issue.

6 Q. I think Lady Dorian's decision was that, it not being
7 retrospective was not unacceptable, to put it in neutral
8 terms, and she didn't allow a challenge of that to be
9 successful.

10 A. That's correct.

11 Q. Has the position changed since then?

12 A. Well, round about the time that the Inner House gave
13 that decision, there was a similar decision in the
14 English Court of Appeal, which actually came to the
15 reverse conclusion on exactly the same question with
16 exactly the same rule, but the English Court of Appeal
17 determined that this was a disproportionate limitation.
18 As a result of that, there were a couple of things
19 happened. The British Government then re-examined the
20 thing and decided in, I think, December 2018 that they
21 would make the abolition of the same-roof rule
22 retrospective back to 1964, which is when the scheme was
23 set up, and as a consequence of that, Lady Dorian's case
24 I think had been marked for appeal to the Supreme Court,
25 but that was withdrawn in January of 2019 as a result of

1 the government's declaration.

2 I think also, in February of 2019, the amended
3 scheme was put before Parliament.

4 Q. In short then, what happened is that in Scotland it has
5 been accepted that one could backdate to 1964?

6 A. That is now the case, yes.

7 Q. If we turn to page 6897, you have a section here dealing
8 with civil liability in delict. You begin by, I think,
9 going back in time somewhat to what was written by
10 Guthrie-Smith in 1864. That's discussing the direct
11 liability of magistrates; is that right?

12 A. Yes.

13 Q. How are you fitting this into --

14 A. Well, I was trying to look for the origins of what
15 we would see today as local authority liability for
16 actions. That's why I went -- and the early
17 institutional works, there was nothing of use there.
18 Guthrie-Smith is really quite a good wee textbook from
19 1864 and it talked about liability of magistrates, so
20 I started there.

21 Q. And you looked also at Glegg on Reparation, which is an
22 older book as well?

23 A. Yes.

24 Q. And Glegg does talk about a public authority, for
25 example, being liable for defects in streets and so on?

1 A. Yes, that's right, and it struck me you could use that
2 proposition for local authority homes and local
3 authority schools as well.

4 Q. You go on to tell us -- this is at page 6899 -- or draw
5 attention to the expansionary judgments, as you describe
6 them, in the 1960s to the 1980s, *Dorset Yacht*, for
7 example, and you mention *Donohue v Stevenson*, which was
8 a bit earlier. But what's happening here, what's the
9 change that you see?

10 A. Well, the change is that the House of Lords,
11 particularly in these cases, is using *Donohue v*
12 *Stevenson*, which is the basic neighbourhood principle,
13 and saying in these public authority cases there's no
14 speciality and we can simply apply the neighbourhood
15 principle in *Donohue v Stevenson*.

16 The sort of high point of that, which I only refer
17 to in a footnote, *Anns v Merton Borough Council*.
18 Perhaps the *Junior Books* case in Scotland as well is
19 probably the high point of "you just apply the normal
20 principles".

21 Since then the House of Lords and the Supreme Court
22 have very much backtracked and said, well, there are
23 areas where there really are policy considerations that
24 we have to take into account which limit the scope of
25 public authority liability.

1 Q. What you say on page 6899, having in particular looked
2 at Dorset Yacht, is that:

3 "Those responsible for the management of running
4 children's homes or schools and those with the care and
5 control with whom they reside, such as foster carers,
6 will nearly always owe a duty of care to take reasonable
7 steps to avoid such injuries to their charges as may
8 reasonably be foreseen."

9 A. That's correct, yes. I'm only hesitating because
10 I think ... I think that's a perfectly sound
11 proposition. Since then the issue of, not exactly
12 immunity, but the issue of limiting liability to public
13 authorities has become much more prominent.

14 Q. Talking about direct liability, which you move on to
15 talk about on page 6900. You begin by saying that:

16 "Local authorities or voluntary organisations might
17 be found to be directly liable for their own faults and
18 failing to ensure the safety of children in residential
19 establishments run by them and this might be due, for
20 example, to employing insufficiently qualified staff",
21 as an example.

22 A. Yes.

23 Q. It's the direct fault of the local authority, albeit
24 that it may be the staff member that has caused the
25 damage?

1 A. If they staff an institution they run unreasonably by
2 not providing sufficient but not providing sufficient
3 staff so that the institution can run effectively and
4 safely, then there's potential civil liability there for
5 their own direct fault in failing to provide appropriate
6 service.

7 Q. You go on to say at 6901 towards the top of the page
8 that:

9 "More recently claims have tended to found on the
10 alleged negligence of local authorities failing to act
11 quickly enough to prevent harm befalling their charges
12 or conversely acting too readily when the perceived harm
13 was in fact illusory."

14 A. Yes.

15 Q. So that's two sides of the same coin?

16 A. Exactly, yes.

17 Q. Can I then take you to vicarious liability, where the
18 law has moved on somewhat in very recent times. Can you
19 just look at that? This is the vicarious liability, if
20 you take, for example, a local authority being
21 vicariously liable for the acts of foster parents, for
22 example.

23 A. Yes.

24 Q. Can you look at that with me? How has that developed?

25 A. I think the big development came with the House of Lords

1 decision in *Lister v Helsey Hall* because prior to that
2 vicarious liability was relatively narrowly drawn.
3 There was a kind of distinction drawn if the employee
4 had gone off on a frolic of his own and then the
5 employer would not be vicariously liable. In *Lister*,
6 the issue was one of the employees sexually abused
7 children at a children's home and the defence of the
8 institution was, well, we didn't employ him to sexual
9 abuse children, that was certainly not part of his
10 duties. And of course, they weren't. But the House of
11 Lords expanded the notion of vicarious liability to
12 capture this sort of case. It's really a question of:
13 have they created an environment in which this harm is
14 possible?

15 Q. Yes.

16 A. So they were held vicariously liable in that case.

17 The position with foster carers has always been
18 quite ambiguous because it's clear that foster carers
19 are not employees. There's a case, for example, in the
20 children's hearings system, I can't remember whether
21 I mentioned it in my report, but it arose in a different
22 context as to whether a foster carer could be a relevant
23 person for the purposes of accessing a children's
24 hearing and employees are excluded. This is under the
25 1995 Act where employees are excluded and foster carers

1 claimed, "We are not employees", and the Inner House
2 said, "No, of course you are not employees, so you can
3 be a relevant person". So the legal position of foster
4 carers has always been slightly unclear in law.

5 Certainly in the 1930s, the regulations are based on
6 the assumption that foster parents, which is the
7 language, are parents, they're creating a familial
8 environment for the child and bringing this child into
9 their family to be a family member, without very much
10 guidance from the local authority.

11 As time has gone on, the local authority has
12 provided more and more guidance, and of course since the
13 1980s we've had foster care agreements and policies that
14 are specified in some detail in the legislation, and
15 local authorities have had more and more control over
16 foster carers.

17 The whole thing, of course, came to a head in
18 England in the Armes decision in 2017, the case got to
19 the Supreme Court -- that's Armes v Nottingham County
20 Council. That was a child who'd been sexually and,
21 I think, physically abused by her foster carer, the
22 person who was supposed to be looking after her.

23 The law courts held that the foster carer/foster
24 child relationship was not one that the local authority
25 had sufficient control over that it created potential

1 for vicarious liability. The Supreme Court said, no,
2 that's just not right, there is indeed sufficient
3 control by the local authority that if harm is caused to
4 the child, they can be vicariously liable for that.

5 Q. And that was different to the line taken by the
6 Inner House in Scotland?

7 A. It is, yes.

8 Q. And I think the case is the Hedron case.

9 A. Yes, Hedron. Was that Lady Paton?

10 Q. Lady Paton was in the Outer House. I think she went for
11 the pursuer but I think the Division reversed that when
12 that was reclaimed.

13 A. That was a really complex case because there were
14 a whole variety of potentially liable groups.

15 LADY SMITH: There's also in the background, I think,
16 considerable anxiety about the impact of employment law
17 on foster parents. If one was to go too far down the
18 route of talking about the local authority being able to
19 direct and make requirements of them, then you're into
20 all the employment rights and it could make fostering
21 circumstances unworkable.

22 A. There's a really difficult balance to be struck. There
23 is no question that, from the 1960s, the role of
24 a foster carer has become much more professionalised.
25 There's now compulsory training for foster carers,

1 there's much more weeding out of inappropriate foster
2 carers. There's the ability to remove people from the
3 list of appropriate foster carers and there's challenges
4 under judicial review provisions -- there have been
5 challenges both in Scotland and England for removal from
6 that. The whole role is a much, much more
7 professionalised one than it was 30 years ago.

8 On the other hand, we have never yet got to the
9 situation that foster carers are employees of the
10 local authority. I'm not an employment lawyer, but it
11 seems to me that the way we are going, it would not
12 surprise me if foster carers eventually became
13 recognised in that category, in the way that Uber
14 drivers ...

15 LADY SMITH: Or at least with the rights of workers, even if
16 not the full employment rights, yes.

17 MR MacAULAY: Just to be clear, we have in England the
18 Supreme Court decision in Armes, which has gone one way
19 and in Scotland the Hedron case which has gone the
20 other, and the Scottish position, at least so far as the
21 Scottish courts themselves are concerned, has not been
22 resolved.

23 A. It has not been resolved. I should be very surprised if
24 the Inner House took a different road in terms of
25 defining the parameters of vicarious liability from that

1 which the Supreme Court has taken.

2 Q. Historically, vicarious liability has been looked at in
3 the same way both north and south of the border?

4 A. Yes.

5 Q. The final section of this part of your appendix deals
6 with what you call the standard of care. I want to deal
7 with this fairly quickly. Can you summarise for me what
8 you're seeking to set out in this particular section?

9 A. Yes. What I'm trying to set out here is simply there
10 are whole books written on these sorts of topics. What
11 I'm trying to set out here is to give recognition to the
12 fact that just because a relationship of care exists and
13 harm has been caused, it doesn't mean to say there's
14 civil liability. Civil liability only arises when there
15 has been a failure to achieve a particular standard of
16 care. The classic definition of that is reasonable
17 care: you have to do that which is reasonable in all the
18 circumstances of the case.

19 Each case, to a very large extent, is fact dependant
20 and it's a matter of the judgment of the court as to
21 whether the standard, the appropriate standard, has been
22 met or has not been met.

23 Q. Likewise with breach of statutory duty, which you
24 address at 6908, there are certain tests that require to
25 be surmounted if you're to establish that a statutory

- 1 duty also was to impose civil liability?
- 2 A. Yes.
- 3 Q. You set these out at page 6908 through to 6911?
- 4 A. Yes.
- 5 Q. And you also make reference to some of the case law on
6 that topic?
- 7 A. Yes, I thought it was important to cover that because,
8 of course, in the child protection situation, the vast
9 majority of the duties owed by local authorities and
10 indeed voluntary organisations now are contained in
11 statute, so there's at least the potential of a claim
12 for breach of statutory obligation as well as common law
13 liability.
- 14 Q. The final section of this section, page 6911, looks at
15 compensation under the European Convention of Human
16 Rights. I think in short what you're saying is,
17 normally, to establish the breach is in itself
18 sufficient --
- 19 A. Yes.
- 20 Q. -- but on occasion damages can be and have been awarded?
- 21 A. That's correct. They're not compensatory damages in the
22 way that a claim for delict would lead to
23 compensatory -- that's not its purpose. It's really
24 just to symbolise that harm has been suffered.
- 25 Q. And that perhaps explains why the figures themselves are

1 really at a low end of the scale?

2 A. Yes. The whole point of the European Convention on
3 Human Rights is to change the law, to change practice,
4 not to compensate people for hurts.

5 MR MacAULAY: Very well, professor. Thank you very much
6 indeed for that today and indeed for the contribution
7 you have made to the inquiry.

8 My Lady, I haven't been sent any questions to be put
9 to the professor and I think that probably concludes his
10 evidence.

11 LADY SMITH: Are there any outstanding applications for
12 questions?

13 Professor Norrie, I am now able to let you go, but
14 with my deeply grateful thanks for all the work you have
15 done in this area, that you've been able to present so
16 clearly and relevantly for our purposes. It's really
17 valuable to us, so thank you very much.

18 A. Thank you.

19 (The witness withdrew)

20 LADY SMITH: That concludes the evidence for today. We'll
21 sit again at 10 o'clock tomorrow morning when
22 Professor Kendrick will be here.

23 MR MacAULAY: That's so, my Lady.

24 LADY SMITH: I will rise now.

25 (4.00 pm)

1 (The inquiry adjourned until 10.00 am
2 on Wednesday, 3 April 2019)
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PROFESSOR KENNETH NORRIE (recalled)1

Questions from MR MacAULAY1