

# A socio-legal case study of advocacy and non-advocacy mechanisms established to support the participation of children and young people in non-judicial decision-making processes in Moray.

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A socio-legal case study of advocacy and non-advocacy  
mechanisms established to support the participation of children  
and young people in non-judicial decision-making processes in  
Moray

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A thesis submitted in partial fulfilment of the requirements of the Robert  
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This research study was carried out with the collaboration of Children 1<sup>st</sup> Moray,  
Moray Council and Who Cares? Scotland

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## **Abstract**

The practice of researching children and young people's participation can be an attractive proposition for multiple disciplines within the humanities and is often buttressed by reference to the substantive articles in the United Nations Convention on the Rights of the Child. Many studies may also be premised on children and childhood participation, measured against theoretical concepts such as agency and autonomy and manifestations of those in praxis. Very often, the reviews of procedures are mechanical because the question, or questions posited are restrictive; often neglecting to interrogate the merits of the actual procedure in its accommodation of the participant child or young person. In a judicial decision making process, an individual speaking on behalf of a child or young person will have 'rights of audience' and associated 'magistral duties', such as a Legal Advocate or a Safeguarder; the former professionally qualified for the post and the latter, appointed. The same cannot always be said of the mechanisms and the role holders employed in non-judicial decision making processes, such as non-legal advocates and other support workers.

The premise of this study is to test whether non-judicial decision making processes and the employment of non-legal advocacy and other identified support mechanisms in those processes, contribute to, or reduce the marginalisation of children and young people - in a context in which participation is arguably constrained by legal and other rules, norms and standards. There are then, two areas of focus, firstly, a critique of identified non-legal advocacy and other support mechanisms; secondly a critique of identified non-judicial processes.

As this is a socio-legal thesis, and to answer the question posited, it has been broken down into two linked parts. The first part is an examination of the theoretical concepts of the child, childhood and participatory rights (including advocacy), against a backdrop of applicable treaty, law and policy. The second part of the thesis concentrates on the realpolitik of the foregoing, as informed by empirical field and desk based data and analysis.

## **KEYWORDS**

Children, young people, rights, participation, advocacy, supporter, decision making process

## CONTENTS

Table of Abbreviations.....	iv
Table of Cases.....	v
Table of Legislation.....	vi
Table of International Treaties.....	ix
Table of European Treaties.....	x

## PART I

<b>Introduction.....</b>	<b>1</b>
--------------------------	----------

## CHAPTER 1

### **Participatory Rights (the child and childhood)- theoretical and conceptual components**

1. Introduction.....	10
1.2 Participation and Rights.....	12
1.3 Human Dignity and Autonomy .....	27
1.4 Decision making process.....	43
1.5 Best interests (and Wellbeing) .....	47
1.6 Concept of Childhood .....	57
1.7 The child- the socio-economic and the civil-political.....	67
1.8 Models- strategies and tools emphasising participation.....	79
1.9 Conclusion.....	95

## CHAPTER 2

### **Treaty, Law and Policy**

2.1 Introduction to the UNCRC.....	96
2.2 The European Convention on Human Rights and the European Convention on the Exercise of the Childs Rights .....	103
2.3 Introduction to Scottish law and policy.....	113
2.4 The Universal Periodic Review- CRC Concluding Observations.....	132
2.5 The Nordic (Scandic) example.....	135
2.6 Conclusion.....	137

## CHAPTER 3

### **Advocacy Context and General**

3.1 Introduction.....	140
3.2 Advocacy model/type.....	142
3.3 Chronology-principle-independence.....	150
3.4 The Professional Supporter.....	156
3.5 Conclusion.....	160

## **PART II**

### **CHAPTER 4**

#### **Advocacy, Support Mechanisms**

4.1 Introduction.....	164
4.2 Moray .....	165
4.3 Mechanisms and Support Roles.....	173
4.4 Collaborations.....	187
4.5 Independence and Advocacy.....	189
4.6 Factors affecting agencies, mechanisms and core Roles.....	193
4.7 Family Group Conference and Family Group Decision Meeting .....	205
4.8 Conclusion.....	209

### **CHAPTER 5**

#### **Facilitating agencies, the LIAP procedure affecting practices and principles**

5.1 Introduction.....	211
5.2 Facilitating agencies.....	211
5.3 A personal experience – LAAC.....	226
5.4 The LIAP procedure.....	230
5.5 Rights education in schools.....	264
5.6 Rights education and the effect of subsidiarity and precedence.....	271
5.7 Conclusion.....	281

### **CHAPTER 6**

#### **Research Methodology, methods and interview stage and methods**

6.1 Introduction.....	287
6.2 The adoption of the socio-legal.....	288
6.3 Negotiations, dilemmas and re-negotiations.....	290
6.4 Ethics and confidentiality.....	299
6.5 Interview Stage.....	304
6.6 Questions and themes.....	315
6.7 Personal experiences of the researcher.....	320
6.8 Conclusion.....	322

<b>Conclusion.....</b>	<b>324</b>
------------------------	------------

<b>Appendices.....</b>	<b>336</b>
------------------------	------------

<b>Bibliography.....</b>	<b>352</b>
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## **Table of Abbreviations**

ALC (S) A 91	Age of Legal Capacity (S) Act 1991
C (S) A 16	Carers (Scotland) Act 2016
CELCIS	Centre of Excellence for Looked After Children in Scotland
CH (S) A 11	Children’s Hearings (Scotland) Act 2011
CYPCS	Children and Young Persons Commissioner for Scotland
CYP (S) A 14	Children and Young Persons (Scotland) Act 2014
C (S) A 95	Children (Scotland) Act 1995
CCYP (S) A 03	Commissioner for Children and Young People (Scotland) Act 2003
CE (S) A 15	Community Empowerment (Scotland) Act 2015
CRC (UNCRC)	United Nations Convention on the Rights of the Child
E (ASL) (S) A) 09	Education (Additional support for Learning) (Scotland) Act 2009
EA 10	Equality Act 2010
FOIS	Freedom of Information Scotland (Act) (and Request)
GIRFEC	Getting it Right for Every Child
HRA 98	Human Rights Act 1998
LIAP	Local Integrated Assessment and Planning Process
LAAC	Looked After and Accommodated Child (and young person)
MH (C&T) (S) A 03	Mental Health (Care & Treatment) (Scotland) Act 2003
NHS (Trust)	National Health Service (Trust)
PB (JW) (S) A 14	Public Bodies (Joint Working) (Scotland) Act 2014
RRSA	Rights Respecting Schools Award (Unicef)
SA 98	Scotland Act 1998
SCCYP	Scottish Commissioner for Children and Young People
SIAA	Scottish Independent Advocacy Alliance
SW (S) A 68	Social Work (Scotland) Act 1968
T (S) A 14	Tribunals (Scotland) Act 2014
WC? S	Who Cares? Scotland

## Table of CASES

<i>Christian Institute and others (Appellants) v The Lord Advocate (Respondent)</i> (Scotland), [2016] UKSC 51.....	43, 44
<i>Gover v Gover</i> Outer House 11 July 1969, 1969 SLT (Notes) 78 (Lord Thomson) .....	51
<i>James &amp; Others v United Kingdom</i> (1986) 8 EHRR.....	108
<i>Handyside v United Kingdom</i> 7 <sup>th</sup> December 1976, 1 EHRR.....	108
<i>Shields v Shields</i> 2002 SLT 579.....	123
<i>Wyper v NLC</i> [2013] ASNTS –DDC- 1 July 2013.....	278, 324
<i>Rasmussen v Denmark</i> (1984) 7 EHRR.....	108
<i>Sahin v Germany</i> (Application no. 30943/96) .....	105
<i>Belgian Linguistics</i> (1968) 1 EHRR 252.....	106, 108



## Table of Legislation

### Scottish Parliament Statutes

Mental Health (Scotland) Act 1960.....	151
Social Work (Scotland) Act 1968.....	49, 120, 160
Mental Health (Scotland) Act 1984.....	152
Law Reform (Parent and Child) (Scotland) Act 1986, c9.....	119
Age of Legal Capacity (S) Act 1991.....	37, 50, 314
s 1.....	50, 76, 153, 314
s 2 (4) (a).....	153, 314
Mental Health (Detention) (Scotland) Act 1991.....	152
Children (Scotland) Act 1995.....	9, 119, 120, 121, 122
s 11 (7) (a) and (b).....	122, 123
s 11 (10).....	123
Criminal Procedure (Scotland) Act 1995 .....	50, 152
Disability Discrimination Act 1995.....	278
Scotland Act 1998.....	106, 112, 113, 115
s 7 (1) (a) and (2).....	42, 41, 118
s 44.....	115
s 54 (1) and (2) (a) and (b) and (3).....	116
s 57 (2) .....	41, 42, 117, 271
s 29.....	113
s 35.....	113
Freedom of Information (Scotland) Act 2002.....	263
Commissioner for Children and Young People (S) Act 2003.....	91, 102, 112, 139
Land Reform (Scotland) Act 2003, asp 2.....	188
Mental Health (Care and Treatment) (Scotland) Act 2003.....	128, 222
s 122.....	127
s 259 (1) .....	130, 153, 155, 172, 216, 217
Education (Additional Support for Learning) (Scotland) Act 2004.....	231, 237, 282
s 14A.....	172
Smoking, Health and Social Care (Scotland) Act 2005 asp 13.....	78
s 4 (d).....	78
Protection of Vulnerable Groups (Scotland) Act 2007.....	194, 300, 305

Education (Additional support for Learning) (Scotland) Act 2009.....	216, 217, 218
s 10 (1) (2) .....	155, 159, 216, 217
Children's Hearings (Scotland) Act 2011.....	50, 53, 122
s 83 (1) (2) (7) .....	50, 51, 154, 314
s 122.....	159, 173, 215, 226
Social Care (Self-directed Support) (Scotland) Act 2013 asp 1.....	170
Children and Young People (Scotland) Act 2014.....	102, 124, 208
s 1 (a) (b) .....	91, 92, 125
s 5 .....	112, 139
s 6.....	139
s 19.....	41, 42
s 21 (1) .....	40, 231
s 22 (2) .....	40, 231
s 32.....	41
s 33 (6) (b).....	253
s 33 (7) .....	253
s 35 (6) .....	253
s 57.....	214
s 66 (2) (c) (i).....	214, 226
s 68.....	208
s 96.....	126
Community Empowerment (Scotland) Act 2015, asp 6.....	187
s 5.....	188
Procurement Reform (Scotland) Act 2014, asp 12.....	171, 172
Public Bodies (Joint Working) (Scotland) Act 2014.....	167, 188, 232
s 58.....	180
Scottish Elections (Reduction of Voting Age) Act 2015 asp 7.....	72, 82
Carers (Scotland) Act 2016.....	223
s 34.....	191, 192
Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016 asp 3.....	76
Social Security (Scotland) Act 2018 asp 9.....	155
s 6.....	155, 156
<b>Westminster Statutes</b>	
Sex Discrimination Act 1975 (repealed).....	274

Misuse of Drugs Act 1971	
s 23 (2) (b) (c).....	76
Race Relations Act 1976 (repealed).....	274
Road Traffic Act 1988	
s 163.....	76
Children Act 1989 and the Children (Northern Ireland) Order 1995.....	120
Mental Health (Patients in the Community) Act 1995.....	152
Data Protection Act 1998.....	263
<i>to be replaced by the Data Protection Act 2017 18<sup>th</sup> May 2018</i>	
Human Rights Act 1998.....	115
s 3.....	116
s 4.....	113
s 6.....	117, 118
s 7.....	117
s 19.....	111, 125
Art 8.....	41, 42
Art 14.....	106
Mental Health Act 2005.....	147
Mental Capacity Act 2005.....	147
Equality Act 2010.....	27, 273
s 84 (a).....	277
s 149 (1) (a) (b).....	275
s 149 (7) .....	191, 275
<b>Welsh Measures</b>	
Rights of Children and Young Persons (Wales) Measure 2011.....	132
s 1.....	90
Social Services and Well-being (Wales) Act 2014.....	90, 91
<b>Swedish statute</b>	
The Children Act 1981	
s 33 .....	45

## Table of Treaties

### International

UN General Assembly, Universal Declaration of Human Rights, United Nations, 217 (III) A, 1948, Paris.....	28, 67
Art 1.....	28, 105
Art 25.....	62
International Covenant on Civil and Political Rights 1966 ( <i>adopted in 1976</i> ) .....	67
International Covenant on Economic Social and Cultural Rights 1966 ( <i>adopted in 1976</i> ) .....	67
United Nations Convention on the Rights of the Child- Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.	
UNCRC.....	5, 96
Art 1.....	153, 314
Art 2.....	5, 132
Art 3.....	51, 231, 254
Art 12.....	231, 254
Art 13.....	230
Art 14.....	107, 109, 231, 265
Art 17.....	230
Art 19.....	77
Art 24.....	72, 77
Art 25.....	72
Art 27.....	72, 135
Art 28.....	72
Art 29.....	230
Art 32.....	72
Art 41.....	135
Art 42.....	135
Art 44.....	135
Art 51.....	135
4, 12, 13, 14, 15, 16, 17-Participatory rights	
Optional Protocols to the CRC	
OPIC OP3-CRC.....	114, 134
OPSC OP2-CRC.....	114
OPAC OP1-CRC.....	114

## **European**

European Convention on Human Rights (1953 ETS No.5) .....	40, 103, 115
Art 8.....	105, 106, 107, 108, 263
Art 14.....	105, 106
 European Convention on the exercise of Children's Rights (1996 ETS No.160) .....	81, 109, 110, 254
European Social Charter (ESC) (revised) (1996 CETS No.163) .....	115, 271
 European Union Charter of Fundamental Rights 2000 (2012/C 326/02)	
Art 1.....	28
Art 24.....	272

## **PART 1**

### **INTRODUCTION**

**‘Whereas mankind owes to the child the best it has to give....’<sup>1</sup>**

This study is an examination of two linked subject areas. The first is non-judicial administrative decision making procedures, particularly the Local Integrated Assessment and Planning Process (hereinafter referred to as LIAP); the second being the support mechanisms employed therein, especially non-legal advocacy, where children and young people are arguably, participant stakeholders. The question then, is to what degree the procedures and the mechanisms critiqued enable the child or the young person’s participation, as an acknowledged stakeholder. The thesis layout has been designed so that the theoretical and conceptual discussion will be given in Part 1, whilst the realpolitik will be discussed in Part 2.

The idea of children and young people as entitled rights holders is appealing. the reality is that is purely an ideal without substance, unless it is realised by society and its institutions in their accommodation of this young group. The provision of apt decision making procedures enabling participation, with the addition of a supporting mechanism and practitioner/role holder (eg advocate) is, on the face of it, a positive step. That stated, decision making procedures and the format they are premised upon, will be directed by an identified ‘need’. That need is largely determined by regulatory, and arguably normative frameworks;

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<sup>1</sup> Declaration of the Rights of the Child, Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959.

constructs of societies making. Those constructs directed by statute, policy and/or practice. The mechanisms of support employed in decision making processes are thereby largely dictated by these same three, ie statute, policy or/and practice. In this study these normative frameworks will be identified and examined against the question of whether they enable meaningful participation of the child or young person, or conversely, exacerbate their marginalisation. As Byrne and Lundy stated, *'The extent to which government takes its obligations seriously can be compounded by the inherent complexities of policymaking. The transmutation of any policy from formulation stage with its signalled intentions, commitments and objectives, to its subsequent implementation, and from the latter to the achievement of concrete outcomes and their evaluation is fraught with difficulties.'*<sup>2</sup>

However, it is necessary to set the scene for the reader so that they become familiar with the jurisdiction under study. Moray is only one of Scotland's 32 local authority areas, which are devolved from central government, ie the Scottish Government. In turn, the Scottish Parliament and incumbent Scottish Government derive their powers and authority from the UK's Westminster Government and Parliament. The inclusion of the term 'devolved' so early in the study is necessary, as it is discussed in contextual detail throughout the body of the thesis, with the hierarchical descriptive setting out the political and legal parameters which influence the themes of the study, within the jurisdiction of Moray.

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<sup>2</sup> Bronagh Byrne and Laura Lundy, 'Reconciling Children's Policy and Children's Rights: Barriers to Effective Government Delivery' (2015) 29 (4) Child and Society 10.

Moray has a population of less than 100,000; estimated at 95,780 as of mid-2017 and classed as semi-rural.<sup>3</sup> It has a total of 53 primary and secondary State schools, with its health care comes under the National Health Service Trust Grampian (hereinafter referred to as NHS Trust). It is important because as much as it may be the 8<sup>th</sup> largest authority in Scotland in respect of the geographical area it takes in, ie 864 square miles, its population size puts it at the other end of the scale as one of the least populated, ie 25<sup>th</sup> out of 32.<sup>4</sup> That observation highlights the differences between geographical coverage, and population size (and succinctly, spread of population). This can make the implementation and review of policy and practice, challenging. This is not to say that earlier local administrative models within historic counties, comprising established burghs (inclusive of Elgin, Banff, Forres and Cullen burghs) now falling within the Moray authority were more efficient models. However, administrative fusing of distinct cultural and geographical burghs has presented its own challenges. With regards to the qualitative data gleaned for the purposes of this study, cultural and attitude (in respect of children's rights) differences were clearly played out at the micro level, especially so in the practice and interpretation of the LIAP procedure and 'other' models within individual schools and area localities in Moray. This was in stark contrast to the goals and desired implementation of the authority, but it is explored throughout the text, particularly in Chapters, 4, 5 and 6, in Part II.

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<sup>3</sup> National Records of Scotland, 'Moray Council Area Profile, Population Estimates Mid-2017' (published 19<sup>th</sup> November 2018) <<https://www.nrscotland.gov.uk/files//statistics/council-area-data-sheets/moray-council-profile.html>> accessed 8<sup>th</sup> December 2018.

<sup>4</sup> *ibid.*



The selection of a topic on which to conduct qualitative research can be prescribed or recommended, by peers and/or supervisors, but in this study, the topic was identified by the researcher. The reader may also come across the term 'independent' researcher throughout the body of this thesis, with reference to the writer of the thesis. The inclusion is solely to inform the reader that, except for monies provided from the overseeing institution to enable aspects of fieldwork during the empirical stage, the research project has been self-financed.

The concept itself was submitted to a much respected academic in the arena of children's rights for her cogitation and commentary. Whilst moderate alterations to the study have taken place since it was instigated, such instances are atypical of this type of research, ie combined field and desk research. That stated, the tenet of the proposition has remained firm. Of course, a degree of prior knowledge of one's subject will also be highly beneficial, though it not always necessary. In this study, that prior knowledge extended to reasonable acquaintance with some of the procedures, and the associated support mechanisms, ie the Local Integrated Assessment and Planning procedure (hereinafter referred to as LIAP) and non-legal advocacy. Being conversant with the subject matter, or themes, meant that fundamental practical and theoretical knowledge was by degrees in place, especially so in respect of underpinning frameworks; the policies and practices, both influencing and directing the procedures and the mechanisms under review.

Being acquainted with local 'not for profit' non-government organisations, whose main functions are directed to contractual provision of support services for children and young people in the jurisdiction, provided an opportunity to view

procedures and mechanisms in practice. Thereafter, having established, post literature review, that there was a lacuna of national and local data in regards advocacy, other support mechanisms and the procedure/s in question, the proposition presented itself; manifesting in the research study. The decision to adopt an interdisciplinary method, ie the socio-legal, took place in the early stages and was critical to the themes and hypotheses of the study. This was undertaken with reference to legal and non-legal schema, to establish whether those normative legal frameworks marginalise children and young people in non-judicial decision making processes, particularly the LIAP procedure. That procedure will be discussed in greater detail later in the thesis in Part II Chapter 5 and will include a critique of its premise as a Child Planning Meeting and its connection with the Getting it Right for Every Child policy/philosophy (hereinafter referred to as GIRFEC); with of course a discussion on their relativity to the pivotal treaty in this thesis: the United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC).<sup>5</sup> Where applicable, additional non-judicial administrative processes, such as the Children's Hearings Panels will also be examined in Part II. Importantly, the organisations working with, and providing social, educational and health services for children and young people within (and outwith) the jurisdiction will also be critiqued.; especially those organisations involved in the provisioning of advocacy, and other identified supporting mechanisms/roles. These will be discussed relative to their impact on children and young people's participation.

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<sup>5</sup> Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

The methodology comprises elements of desk and field-based research. It is primarily qualitative, with the adoption of the socio-legal model, an interdisciplinary method. This provided opportunity to examine what is on the face of it, a sociological topic, but under the lenses of both sociology and law. Consideration was given over to the format of presentation which resulted in the identification (and review) of primary, secondary and tertiary data; via the application of sociological and legal interpretation; in addition to other methods during the fieldwork and desk-based stages. The fieldwork element involved undertaking qualitative interviews with a wide selection of 'Service Users, Service Facilitators and Service Managers'; these individuals selected via cooperative bodies and agencies, with individual agreements; those bodies and agencies having connection to the themes of the study.

Typically, a social science study will consist of 'a' dedicated literature review chapter; a large informative component posited at the beginning of a research piece. This will almost always be followed by a realpolitik of the subject, or subjects under cogitation. That is not always the format with a legal research study. In such instances, reviews of treaty, law and policy; primary, secondary and tertiary data (*legal definition of*) and of seminal writers will be referenced throughout the body of a thesis - in context. It is the latter method which has been selected in this study because it complements the narrative adopted, as well as being a method with which the researcher is familiar. To assist the reader through the narrative of the study, the referencing tool utilised is footnotes. The literature reviewed is situated in law, the social sciences and often both, ie 'interdisciplinary'. Where the subjects of research are human beings; especially children and young people, one must remain objective and sensitive to the subjects needs and the data

elicited. The whole process must be ethically premised. For example, research which involves children and young people, indeed, human beings, requires the researcher to be cognisant of the individuals 'best interests'; to treat the subject with respect and consideration at all times. This has always been a pivotal aim of this research piece, particularly so in the context of the discussion around the sub-themes of what defines a child and what is childhood; what are the affecting normatives, and how can participation, or marginalisation be measured. Studies which tend to ask such questions usually fall under the ambit of 'childhood studies', more often than not within the scope of the social sciences.<sup>6</sup> However, this is a socio-legal study, and as such seminal and influential legal interdisciplinary authors were also included in the literature review.<sup>7</sup> Scholars, academics and practitioners, these individual authors will also have contributed to

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<sup>6</sup> The following is a small selection of seminal authors writing under the wider humanities; ranging researchers, sociologists and including psychologists:  
 William A Corsaro, *The sociology of childhood*, (3rd edn, Sage 2011) 437;  
 Jens Qvortrup, William A Corsaro and Michael-Sebastian Honig, *The Palgrave handbook of childhood studies* (Palgrave MacMillan 2009) 452;  
 Allison James, 'Understanding Childhood from an Interdisciplinary Perspective', in Peter P Pufall and Richard P Unsworth (eds), *Rethinking Childhood*, (New Brunswick 2004);  
 Alan Prout, and others, 'Reconnecting and Extending the Research Agenda on Children's Participation', in Kay Tisdall and others (eds), *Children, Young People and Social Inclusion* (Bristol 2006);  
 Gary B Melton 'and others', *The SAGE handbook of child research* (Sage 2014);  
 Berry Mayall, *Towards a sociology for childhood: thinking from children's lives* (Open University Press 2002).

<sup>7</sup> The following are just a small selection of seminal authors writing under the humanities; particularly so with a legal dimension in respect of this study's themes:  
 E Kay M Tisdall *Children, young people and social inclusion* (Bristol 2006) 256;  
 Laura Lundy, 'United Nations Convention on the Rights of the Child and Child Well-Being', in Asher Ben-Aryeh 'and others', *Handbook of child well-being: theories, methods and policies in global perspective* (Springer 2013);  
 Ursula Kilkelly, 'Using the Convention on the Rights of the Child in law and policy: two ways to improve compliance', in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children, From Visions to Implementation* (Ashgate Publishing Ltd 2011) 373.

wider social policy and practice related to the themes of this research study. To that end these works have greatly informed its narrative.

Chapter 1 concentrates on *Participatory Rights – the theoretical and conceptual components*, focusing on the ideas of the child, childhood and participation. Chapter 2 identifies and critiques *Treaty, Law and Policy* as they contextually apply to this study's themes. The same principle is applied to chapter 3 in which the concept of *Advocacy* and its general application will be discussed, relative to models and types. Chapter 4 moves the subject of *Advocacy* forward to include *other identified support mechanisms*, aligning it in the context of 'happening'. This is the beginning of Part II, the realpolitik and a discussion of practice on the ground; as informed by observations, interviewee statements and examination of identified secondary and tertiary data. Chapter 5 introduces the reader to the LIAP procedure in detail, but that is preceded (as the chapter title denotes) with a summary of expediting and adjunct advocacy (and other support) agencies and bodies connected with this study, eg 'Children 1<sup>st</sup> Moray'. The presence and positioning of agencies, as connected with the LIAP procedure and that in turn, firmly posited in educational institutions was compelling from a rights angle and the adjunct concept of dignity, as delivered within schools. This led to an extended discussion whereby the delivery of rights education within schools was critiqued; relative to the practice of subsidiarity and precedence, on the themes of 'rights and respect'. Chapter 6 is the final chapter (prior to the Conclusion) and provides an explanation of the research methodology and the methods selected. This also incorporates a detailed narrative of the empirical work undertaken in the fieldwork stage; referring to the interview stage and providing examples of first

hand testimonies, questions and themes. In so far as the conclusion is concerned, the writer would like to borrow these words from the late Douglas Adams,

*'I may not have gone where I intended to go, but I think I have ended up  
where I needed to be'*

## **PART 1 -**

### **CHAPTER 1 Participatory Rights (the child and childhood)- theoretical and conceptual components**

#### **1.1 Introduction**

This chapter is dedicated to the discussion of the important theories and concepts that are central to the themes of this study, the main one being participation of the child or young person. That is without any doubt, correlative to the theme of advocacy (and other support mechanisms) which may or may not bring the child to 'voice'; within non-judicial decision making processes. The discussion is considered and crucial because unlike children and young people, adults are more inclined to identify as capable and competent individuals. They are also a more powerful group and one which expects and demands, holding authority over their own children via normative frameworks which they have created. These normative frameworks can manifest in often familiar procedures, statutory and non-statutory premised; presented as befitting and benefitting the child, but arguably, for the convenience of the adult.

Real or perceived, absence of, or weakening autonomy in respect of children and young people's participation and voice within normative frameworks, gives rise to the discussion on our 'worth' as human beings. That connects to the concept of human dignity as is discussed relative to this study's themes. The philosophical concept of dignity is profound, and it is readily adopted throughout society, but none more so than in the arena of the ethical and the moral debate.

This is because it is an elemental concept, 'something' everyone desires; only some make claim to. This makes it integral to the discussion on autonomy and capacity, amongst other things.

Autonomy is also a relative concept and arguably, just 'being' makes us autonomous human creatures. The independent three year old selecting its clothes for the day (albeit haphazardly to an adult audience) is acting autonomously, in the same manner as an adult. Both adult and child are subject to external and internal forces, those forces determining our competence and capability, de jure and de facto. Autonomy of person then, within the themes of this study is mostly concerned with the idea of capacity; ie the capability, or lack thereof to make choices, and act upon them. These two concepts, ie autonomy and capacity are arguably, requirements for effective participation and coming to 'voice'.

Participation and coming to 'voice' in a procedure is attainable. It can be achieved in several ways. Whilst the LIAP procedure is discussed in empirical detail in Chapter 5, at this juncture the writer desires to convey and discuss the fundamentals which comprise a decision making process. The adjunct and pivotal theme of this study brings us to the mechanisms and roles employed (advocacy and advocates as primary) in supporting the child and the young person in a decision making process; that theme explored in detail in Chapters 3 and 4.

Whilst adults may have greater expectations, and demands in life, children and young people are also driven by need, or want, though to a lesser degree. Those expectations of need are usually set by the markets of the socio-**economic and welfare**, ie the basic elemental needs for 'living'. These include, but are not limited to food, play, protection and nurture; to be provided for by the relevant adults in their young lives; the societal institutions they engage with, such as education,



health and social care. This is where additional concepts and principles come into play. Utilised in treaty, law and policy, these are the principals of **'best interests'**, **'wellbeing'** and **'welfare'**. These are primarily, protective and preventative principles, though they are not always constrained within protective and preventative framework parameters. However, the child is also a competent political individual (by degrees), in the same manner as a competent and capable adult and this facet of their being is without doubt connected to and brought about by their autonomy and agency. This notion of the political child brings posits them as an actor within the realm of the civil and political.

## **1.2 Participation and Rights**

The proposition that every, man, woman and child is a holder of rights and equal participant with the other, has been widely debated and contended. In so far as the humanities is concerned, we must look to the philosophical concept and arguments which dismiss or propel the individual child as a holder of rights and equal participant. This requires an examination of the following schools of thought.

Legal positivism can be said to emanate from what is known as analytical jurisprudence and from this empiricism was developed; its 20<sup>th</sup> century seminal being H L A Hart.<sup>8</sup> In basic terms, legal positivism asserts that there is a distinct separation of the moral law and manmade law, that, *'Laws and legal systems are*

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<sup>8</sup> See: HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, Clarendon Law 2012).

*not matters of nature but artifice...social constructs*'.<sup>9</sup> An adherent of the antithesis, natural law theory, would counter argue that each of us is born with innate natural rights. Arguably, elements of both theories are present and discussed in this study, especially so with regards to children's participatory rights. These theories, these constructs have become established, ie normatives. Because of this they mould and influence the frameworks and models by which participatory rights are facilitated and enjoyed, or not as the case may be. That stated, marked advancements and accommodation of children and young people's participatory rights has taken place in the 20<sup>th</sup> and 21<sup>st</sup> century; that advancement propelled through the actions of fringe groups and lobbying by political advocates. However, there are still detractors; those opposed to the recognition and acknowledgment of the child in law and policy, where he or she is accepted as an autonomous and capable agent; indeed, guaranteed same.

For example, Hart stated that the term 'participation' can refer to a process of decision sharing; whether that process is personal to our own life or to the life of the community. Hart stressed its importance and its effect upon the idea, and the ideal of a democracy, in that it is also, '*.... the fundamental right of citizenship*'.<sup>10</sup> Harcourt and Keen also identified a corpus of literature concentrated on children's participation in the socio-political sphere.<sup>11</sup> Their research, though focused on children's engagement in early years education, is indicative of increased interest

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<sup>9</sup> Hart (n 8) xvii.

<sup>10</sup> Roger A Hart, 'Children's Participation: From Tokenism to Citizenship' (Unicef 1992) <[https://www.unicef-irc.org/publications/pdf/childrens\\_participation.pdf](https://www.unicef-irc.org/publications/pdf/childrens_participation.pdf)> accessed February 2017.

<sup>11</sup> Deborah Harcourt and Deborah Keen, 'Learner Engagement: Has the Child been Lost in Translation?' (2012) 37 *Australasian Journal of Early Childhood* 71.

from academics and practitioners and that makes it a burgeoning area for more research. This heightened enthusiasm could be read as an affirming opinion that children and young people are, being seen more and more as competent and capable participants.<sup>12</sup> That being the case, they are also autonomous beings.

Lansdown has often discussed children's participation in terms of a 'universal' concept, that it should not be compartmentalised to an event, to law, nor policy or culture.<sup>13</sup> In a decision making process, the child's participation is more than the sum of that 'one' event, and Lansdown illustrates the greater potential involved when she states that it is an, '*.....opportunity for developing a sense of autonomy, independence, heightened social competence and resilience.*'.<sup>14</sup> However, adults are still the key to wider realisation and embedding of participatory opportunity and practice within decision making processes. Adults are not just stakeholders, but the directors of such opportunities and practice. They can also embolden active participation from the child, as an equal stakeholder and possibly, even director. This equates to the fullest acknowledgement of the child's human dignity.<sup>15</sup>

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<sup>12</sup> Harcourt and Keen (n 11) 76.

<sup>13</sup> Gerison Lansdown, 'The Participation of Children', in Heather Montgomery, Rachel Burr and Martin Woodhead, (eds), *Changing Childhoods, local and global* (Open University Press 2002).

<sup>14</sup> Gerison Lansdown, *Can you hear me? The right of young children to participate in decisions affecting them*, No 36 (Bernard van Leer Foundation 2005) <<https://files.eric.ed.gov/fulltext/ED522740.pdf>> accessed 9th December 2017.

<sup>15</sup> Gerison Lansdown, 'Children's participation is a process of recognising human dignity' (Eurochild 2016) <[http://eurochild.org/no\\_cache/news/news-details/article/childrens-participation-is-a-process-of-recognising-human-dignity-gerison-lansdown/](http://eurochild.org/no_cache/news/news-details/article/childrens-participation-is-a-process-of-recognising-human-dignity-gerison-lansdown/)> accessed 1st November 2016.

### 1.2.2 The participation ladder - typologies for participation

Hart's ladder of children's participation is an adaptation of Arnstein's ladder of citizenship participation, both of which are political in their inception and intention. Originally conceived for use with regards collective participation, in wider public decision making processes and adjusted by Hart.<sup>16</sup> As a classification method it has its critics. For example, Thomas is not convinced as to the effectiveness of Hart's ladder, describing it as being, '*...too linear to encompass the multidimensional character of children's participation in decisions about their lives.*'<sup>17</sup> Thomas offers alternative solutions from others, which modify Hart's ladder. However, these are more suited to 'formal' procedures, due to their being informed and directed by statute. This includes Thorburn 'and others study' in 'Child Protection' case conference reviews, as well as Grimshaw and Sinclair's evaluative studies of children and parents.<sup>18</sup> Whilst the 'ladder' and the models which further modify it are proficient tools, they are limited to identification of the 'point' at which an individual may be participating in a process. They are not designed to enable a thorough assessment of meaningful and effective participation.<sup>19</sup>

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<sup>16</sup> Sherry R Arnstein, 'A ladder of citizen participation', JAIP (1969) vol 35 216; Hart (n 8).

<sup>17</sup> Nigel Thomas, *Children, Family and the State* (Policy press 2002) 66.

<sup>18</sup> June Thorburn and others, *Paternalism or Partnership? Family Involvement in the Child Protection Process* (HMSO 1995); Roger Grimshaw and Ruth Sinclair, *Planning to Care: Regulation, Procedure and Practice under the Children Act 1989* (NCB 1997).

<sup>19</sup> Thomas (n 17) 176.

Thomas's proposal is a holistically premised model and he suggests that the following key points should be considered:

- The *choice* which the child has over his or her participation
- The *information* which s/he has about the situation and her or his rights
- The *control* which s/he has over the decision-making process
- The *voice* which s/he has in any discussion
- The *support* which s/he has in speaking up
- The degree of *autonomy* which s/he has to make decisions independently <sup>20</sup>

Another interesting proposition concerning the 'venues' of formal decision making process, comes from Leggatt. He posits three tests to be used in consideration of whether a tribunal, or a court of law is the more suitable venue for cases coming under the statutory jurisdiction of family and child law. The first test involves 'preparation' of the 'user' - whereby an individual should be able to prepare and present his or her own case effectively. This could just as easily apply to a non-statutory decision making procedure for children and young people, such as the LIAP and its successor, because this first test could also be adopted as an affirming statement.

The second test involves the question of 'special expertise' on the subject matter or matters under dispute. Assembled panel members will be presumed to have a sufficiency of expertise amongst their body, negating the employment of an external expert. The third test applies to 'expert knowledge around the area of law concerned' whereby the user **will not** have to prove their knowledge of the law

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<sup>20</sup> Thomas (n 17) 175-176.

concerned to a sitting panel; it is not a pre-requisite in a tribunal setting.<sup>21</sup> This third test could be applied to a child, family member and supporter involved in a non-judicial decision making process. For example, an advocate or other supporter whilst being expected to have a reasonable understanding of the law or policy upon which a decision making process is premised, this does not make them an 'expert', or even a 'professional' and neither should it; not if the third test is applied and satisfied. Leggatt's 'test' may have immediate and tangible application in the formal quasi-judicial processes, such as the Additional Support Needs Tribunal Scotland, but it may also serve as a useful tool in the less formal non-judicial and non-statutory processes, ie Child's Planning Meeting, (formerly LIAP).

### **1.2.3 Participation and the principle of promotion- a brief narrative**

A procedure where children and young people are the focus should be effective and established in the public psyche, but if knowledge of its function and existence is limited, then it is nothing more than an ornamental abstract. Where ignorance abounds, marginalisation will prevail and cumulate. Such marginalisation was discussed by Davis and others when they identified the barriers they believed children and young people faced in accessing decision making processes, referring to,

*'local power-politics... between children, young people, their families and professionals, .....a lack of appropriate collaborative structures and relationships mean that children and young people find it difficult to access*

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<sup>21</sup> Andrew Leggatt, *Tribunals for Users: One System, One Service* (Stationary Office Books 2001) para 1.11.

*decision-making processes and, when they do manage to raise issues, the pace of response is slow.*<sup>22</sup>

Davis and others were rightly concerned with the micro politics of children and young people's engagement in decision making procedures and it highly probably that ancillary mechanisms, such as advocacy and other support roles are negatively affected. The topic of promotion, or the lack of, is just part of wider discussion on possible marginalisation of the child, however, for arguments sake, let us assume that there is a reasonable awareness amongst the wider population of a decision making procedure with the child as its focus. Irrespective of the wider awareness of this procedure, if supporting mechanisms are not in place, or in short supply, the child or a young persons' ability (irrespective of their capacity) to access and participate effectively will be markedly impeded. Support mechanisms (such as advocacy) are arguably bolstered by addendum supports and these can take several formats. The simplest and most effective being the provision of informative data; hard copy or electronic, readily available and accessible. The caveat is that support mechanisms, and addendum support (as detailed) comes with a price tag and costs are usually met by unitary authorities or central government. Monies may even be 'ring-fenced' by central government and then channelled down to a unitary authority, providing certainty.

Once a decision making process is satisfactorily promoted, it is essential that its advancement is continued, certainly for the duration of its operation. If this is not done, the risk is that it becomes a wasted utility; a token rights trophy of an

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<sup>22</sup> John Davis 'and others', 'Social Justice, The Common Weal and Children and Young People in Scotland' (The Reid Foundation 2014) <<http://reidfoundation.org/wp-content/uploads/2014/03/Childhood1.pdf>> accessed February 1<sup>st</sup> 2017.

authority. These are self-evident points, but too often ‘the obvious’ must be emphasised and re-emphasised some more.

The principle of promotion is associated with the arguably more dominant principles and concepts of ‘*participation, protectionism and prevention*’ rights; customarily referred to as the three p’s. However, with the addition of ‘promotion’ we have the four p’s.

- *Protection*
- *Prevention*
- *Participation*
- *Promotion*

Promotion of rights as the fourth ‘p’ has taken place ‘post hoc’ relatively late. The reasoning behind this delay is largely historical and rooted in past views of children and childhood. For example, children’s participation in decision making processes is a relatively recent practice, but that does not mean that as a society, in the past we did not care for children and childhood. Instead, societies concern had been and to degrees, is still welfare premised; directed by the concepts and practice of protectionism and of prevention. Society was founded upon family and parental autonomy over a child, with minimal State interference or intervention. What we accept now as the arguably embedded principle of participation, and the accompanying idea of promotion, would be alien to earlier society because the child was not considered a natural agent. The child did not have legal personality in his or her own right. The current acknowledgment of the child as a capable participating agent could be ascribed to the drafting and invoking of the CRC over the last four decades and its incremental influence over



that period. The combination of these four concepts, the 4 p's in domestic and international laws, policies and practices has arguably benefited children and young people. It could even be described as democratisation in action and given the extra vulnerable status of children and young people as a group, it is highly progressive and liberating.

Without doubt, academic research has contributed greatly to children's participatory rights, informing and being informed by a positive movement. This is particularly obvious in the field of sociology [of childhood] and law. As Driscoll stated, there is now, *'[a] greater recognition of children's ability to give informed consent to participate.'*<sup>23</sup> That stated, the CRC and its fundamental principles have also influenced, and feature prominently in the policies of central and local authority practices. There are concerns that such implementation and interpretation is too varied and too wide to be meaningful and effective; that rhetorical application has fewer positive consequences for children and young people's meaningful participation. Hill and others picked up on an implementation method utilised by successive governments and devolved authorities, which they titled the *'...leap-frogging approach'*.<sup>24</sup> Of course, a critique of meaningful participation, as well as a sound measurement thereof, is not isolated just to policy

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<sup>23</sup> Jenny Driscoll, 'Children's rights and participation in social research: Balancing young people's autonomy rights and their protection' (2012) 4 CFLQ  
<<http://www.heinonline.org/HOL/Index?index=journals/abaj&collection=journals>> accessed 15 December 2017.

<sup>24</sup> Malcom Hill and others, 'Moving the Participation Agenda Forward' (2004) 18 Children and Society [81] <<https://doi.org/10.1002/chi.819>> accessed 15<sup>th</sup> May 2018.

and practice in the realpolitik. It applies just as much to the realm of academia and academic research, a point which is re-enforced by Christensen.<sup>25</sup>

#### 1.2.4 Participation and equality

Lutig wrote that a greater understanding of children's rights would only take place when the discussion deigns to confront the inequalities between adult and child.<sup>26</sup> Society must then confront traditionally held 'normative' views on children's rights and childhood; asking how these manifest and what is the impact on this young group. One of Lutig's proposed actions is to bring children and young people into the heart of the 'rights' discussion and enabling them to do so; perhaps with a support mechanism such as advocacy, but duly acknowledging and respecting the child's place at the table, as an equal participant. The inclusion approach is arguably beneficial for all because, in theory at least, human rights and equality will become substantive normatives.<sup>27</sup> Lutig was also endorsing Archard's 1996 views on inclusion in respect of children and young people, those views held a decade later when Archard asked, *'How should a society think of its children, how should it care for them and what rights if any should it accord them?'*<sup>28</sup>

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<sup>25</sup> Pia Haudrup Christensen, 'Children's participation in ethnographic research: Issues of power and representation' (2004) 18 *Children and Society* < <https://doi.org/10.1002/chi.823> > accessed 15<sup>th</sup> May 2018.

<sup>26</sup> Sarah Lutig, 'A Review of David Archard's children's Rights & Childhood', (1996) 41, *McGill LJ* < <http://www.heinonline.org/HOL/Index?index=journals/abaj&collection=journals> > accessed 15<sup>th</sup> January 2017.

<sup>27</sup> *ibid* 906.

<sup>28</sup> David Archard, *Children, Rights and Childhood*, (3<sup>rd</sup> edn, Routledge 2015) 232.

Whilst empirical research on the themes of children and young people's wider participation in society and the representation of their peer groups has increased beyond the social sciences, there are still areas demanding further exploration and data revelation. A literature review from Reynaert and others concentrated on the wider parameters of children and young people's autonomy and participation with respect to the following areas:

- (1) autonomy and participation rights as the new norm in children's rights practice and policy,*
- (2) children's rights vs parental rights and*
- (3) the global children's rights industry.<sup>29</sup>*

Whilst a reasonable amount of scholarly output was highlighted, Reynaert and others commented that the scholars and the works critiqued demonstrated that children and young people's participation in the three areas was limited. They put this down to encountered, *'tokenism, unresolved power issues, being consulted about relatively trivial matters and the inclusion of some children leading to the exclusion of others...There is also little evidence of the impact of child participation on services.'*<sup>30</sup> This state of affairs is supported somewhat by reference to a study conducted by Hemmings and Madge, whose primary research parameters were premised on children's participation in their 'religious lives'.<sup>31</sup> The accentuated

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<sup>29</sup> Didier Reynaert, Maria Bouverne-de-Bie and Stijn Vandeveld, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16 *Childhood*.

<sup>30</sup> *ibid* 522.

<sup>31</sup> Peter J Hemming and Nicola Madge, 'Researching children, youth and religion: Identity, complexity and agency' (2011) 19 *Childhood*.

absence of primary and secondary material within that 'wide field' led the authors to re-evaluate their original parameters and substituting a 'catch all' method. This 'apparent' lacunae of data could lead us to believe that the problem is not so much that children and young people are societally and politically unengaged, so much as they are impeded and hindered by normative frameworks which are incapable of acknowledging and accommodating children's political participation and agency. If this is the case, then the political child is arguably marginalised.<sup>32</sup>

### **1.2.5 Participation and the political child**

The idea of the child as a politically engaging participant in 'micro' level decision making processes is compelling. This political participation also manifests at the macro level, involving for example, the representation of one's peer group, as well as being a represented party. Micro level engagement and participation of the individual in decision making processes could also still be enabled by advocacy or other support mechanisms. The correlation with both micro and macro political participation is that both levels of engagement are rooted in the civil and political realm and they invoke substantive human rights. For example, Weynes's study of youth councils within the UK, laid bare the micro and the macro politics for his reader.<sup>33</sup> Weynes made the association between the civil and political and the socio-economic, juxtaposing that the latter potentially influences the former. An

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<sup>32</sup> There are worthy and distinctive pockets of participative practices and institutional provision, such as regional representation of children and young people via election processes at central and local level; as well as arguably 'public' appointments; ie Scottish Youth Parliament, Local Authority Committees, Pupil councils.

<sup>33</sup> Michael Weynes, 'Children representing children, Childhood, Participation and the problem of diversity in UK youth councils' (2009) 16 *Childhood*.

example in kind is the tangible and emotive issue of child poverty, its contributory factors and its consequences. When 'negatively' combined, these are a catalyst for experiential poverty; poverty that will likely act as a barrier to civil and political engagement.<sup>34</sup> The factors Weynes observed included housing, health and education. When a negative issue or issues, related to one or more of these takes hold of a child or young person's life, their opportunity to become a political participant diminishes drastically as compared with a non-affected peer. If this is the case, we have a lack of diversity amongst peer elected and appointed individuals in our youth councils and our youth parliaments. That some young people are politically participative is meritorious, but they are not true representatives of their community, of their peer group. This lack of diversification and exacerbated marginalisation of the many is a tacit issue and perhaps there is a case for further research and action. An absence of interventionist and 'all' inclusive strategies for and with children in their formative years does little to expel any continued malaise in regards this groups political participation. This is because reticence arguably, takes hold of children and young people during their early 'childhood' phase. A disengagement with the status quo and an imperceptible wall goes up between the socially and economically marginalised child and their more engaged, better off counterpart. Then again, perhaps the problem, and the answer lies with and within the actual political procedures?

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<sup>34</sup> A child will rarely experience poverty in isolation. They experience, and suffer by association, ie in the family unit. That sufferance is influenced by factors such as income, neighbourhood and culture (though not exhaustive). The use of the term 'child poverty' has become synonymous with the political arm of government agencies and NGO's. There are research tools, methods by which to gauge the poverty of a given locale or group, within determined factors, ie Scottish Index of Multiple Deprivation (SIMD).

A lack of broad social spectrum representation in such political procedures and therefore ‘participation’ is unfortunately, not a revelation and neither are its future effects. In so far as a child’s future disassociation and disengagement may be dictated in childhood, we must try to understand the extent by which individual childhood experiences in respect of early political exposure (or lack of) have shaped and influenced a disconnect with the ‘system’. Weynes certainly believes that there is substance to the childhood experience, for it manifests in mainstream politics where the minority are politicised and the majority apolitical. In addition to that we have the experience and effect of marginalisation, whether that be externally imposed, self-imposed, or one a causation of the other, *‘...electoral forms of participation reinforce existing inequalities between groups of young people and are less likely to incorporate the voices of disadvantaged and socially excluded groups of young people.’*<sup>35</sup> The solution offered by Weynes is ‘citizenship education’, which would offer, *‘...opportunities for reshaping children’s school identities as citizens, rather than citizens in-the making.’*<sup>36</sup> Such a system would require wider consideration by society and incorporate a review of hierarchical structures which tend to favour the few, over the many. The ideal procedural model would be one that is effective in the provision of equality for its participants, with an emphasis on the child as the principal agent.

### **1.2.6 Participation and positive action**

The road to attainment of equality for all participating children and young people in decision making procedures (with or without an advocate or other supporter),

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<sup>35</sup> Weynes (n 33) 552.

<sup>36</sup> *ibid.*

may then require the implementation of 'positive actions'. Not uncontroversial, 'positive action' as practice, but if used fairly and with due diligence, it can aid greater inclusion from otherwise, traditionally marginalised groups and such groups can be sub-categorised in respect of socio-economic and cultural factors; the latter including religious and the ethnic profiles, as well as gender. With regards the category of 'gender', an imbalance between males and females is still present in societies; in many industries and cultural niches. That fact re-enforces the pursuance of policies and practices which could well be termed positive actions. Positive action may also be required to meet the needs of those who share protected characteristics as categorised under the Equality Act 2010 (hereinafter referred to as the EA 10).<sup>37</sup> However, in so far as the Moray jurisdiction is concerned, within school environs, a balance of equality and opportunity exists. The commentary is relevant at this juncture because at no other time in our documented history, have the rights and welfare of both genders been catered for so proportionately. That can be linked to the increasing aspirations of young females with that of their male peers. Such improvement and move towards equality within the Scottish realm are given by way of current government policies and local practices in education, whereby young females and women are being targeted and directed towards science and engineering careers (STEM Science Technology, Engineering and Maths). This and other such proactive efforts to boost female representation impacts at secondary level and is carried into tertiary education, and optimistically, into careers and jobs. Whilst the EA 10 example is drafted to quash discriminatory attitudes and practices, and provide a shield for

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<sup>37</sup> Equality Act 2010 c2, Part 2 Chapter 1.

designated protected characteristics, its application is mainly concentrated in the work place. That stated, Scottish unitary authorities, and schools (state and independent) are also institutions, as defined by the EA 10. The term 'positive action' could then be utilised for the benefit of marginalised children and young people, reducing or removing their marginalisation and ensuring inclusion in the main stream. The proposition is sound and often, the end justifies the means. However, there is always a caveat with that statement. Once equality targets have been reached in say, gender equality for females in STEM subjects (and employment of), it should be discontinued. The reasoning is that it will have served its purpose and the continuation of policies and practices favouring a priori marginalised 'group' (and the individuals sharing the attributes of that identified group) has the propensity to lead to the detrimental treatment of all other 'non-group' members. They in turn, become the marginalised. This gives rise to the perception, or reality of 'positive discrimination' practices, which could lead to legal challenges. However, equality and equity are enablers for 'all'; for every child and young person to participate in their decision making processes and in civic life, if they choose to do so. Confidence and inclusion fostered from an early age will arguably be carried through into adulthood and the dignity which comes from that gifted to the next generation.

### **1.3 Human Dignity – Autonomy**

Dignity is a word which has multiple and universal application. It is widely used in the common vernacular, sometimes naively, but often with the best of intent. As a concept it is associated with the human experience, but more recently



appropriated by groups in furtherance of animal rights. In formal articulation it features in treaties, laws and policies. This makes 'pinning' the concept down 'tricky', but the implications of its universal application make that a necessary task. Its universal application can be demonstrated by reference to its inclusion in both international and regional treaties.<sup>38 39</sup> The Universal Declaration of Human Rights (hereinafter referred to as UDHR) for example, states that we are all '*born free and equal in dignity and rights*'.<sup>40</sup> The European Union Charter of Fundamental Rights, a more recent regional treaty goes further, when it provides that our dignity as human beings is 'inviolable' and it 'must be respected and protected'.<sup>41</sup> Kant took 'human dignity' and broke it down, into two component parts. Firstly, he stated that dignity is 'beyond price' and for human beings, it is an 'inviolable characteristic'; sacrosanct.<sup>42</sup> Humanity on the other hand, is premised on one's ability to make a moral decision, in accordance with a universal law of morality, ie to follow one's conscience, either way. However, humanity must be earned, and this requires positive action or actions on the part of an individual. That stated, an action should never be the means to an end; nor should it be of a singular nature. It should be measured against an objective end and according to Kant, achieved

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<sup>38</sup> UN General Assembly. "Universal Declaration of Human Rights." United Nations, 217 (III) A, 1948, Paris, art 1 < <http://www.un.org/en/universal-declaration-human-rights/>> accessed 7th January 2017.

<sup>39</sup> Article 1 of the European Union Charter of Fundamental Rights 2000, (2012/C 326/02).

<sup>40</sup> UN General Assembly. "Universal Declaration of Human Rights." United Nations, 217 (III) A, 1948, Paris, art 1 < <http://www.un.org/en/universal-declaration-human-rights/>> accessed 7th January 2017  
The **preamble** of article 1 UDHR also speaks of '*inherent dignity*' and *of the equal and inalienable rights of all members of the human family*', even though article 1 cites 'brotherhood'. This is indicative of the period in which it was written.

<sup>41</sup> Article 1 of the European Union Charter of Fundamental Rights 2000, (2012/C 326/02).

<sup>42</sup> Immanuel Kant, *Groundwork of the metaphysics of morals* (Mary J Gregor ed, tr, Cambridge University Press 1996) [4:392].

through the exercise of moral 'good will'. *'Humanity in his person is the object of the respect which he can demand from every other human being.'*<sup>43</sup> Therefore, the rational self-regulating human is regarded as autonomous and, *'Autonomy is...the ground of the dignity of human nature and of every rational nature'*.<sup>44</sup> The hitch with Kant's views is that they disqualify many classes of individuals, many of whom cannot conform to, nor meet his hypothetical 'capacity for rational self-government'. They fail to meet his criteria as acknowledged holders of 'humanity'. Because of this failure to demonstrate objective self-regulation and rational they are not 'autonomous agents'. Such a hypothesis dismisses the vulnerable, including children and young people. Kantian ethics have been called out on that dismissal; that they are an over-simplification of the hypothesis. Wood criticises Kant for ignoring the, *'...complex questions regarding borderline cases of rational agency, or what some like to call 'non-ideal conditions.'*<sup>45</sup> Kantian fundamental ethics also provide that dignity is acquired through self-determination, though arguably still qualified by the 'end'. Dworkin likewise hypothesised that our 'worth' as a human being is undoubtedly inherent, but our dignity, and the dignity of those around us is morally premised; achieved through our self-responsibilities.<sup>46</sup> These views and theorems are concerning because they go beyond the confines of academic debate. The concept of dignity and its moot qualifications in the 'real world', especially in

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<sup>43</sup> Kant (n 41) [6:434].

<sup>44</sup> *ibid*;

See: Doris Schroeder and Abol-Hassan Bani-Sadr, *Dignity in the 21<sup>st</sup> Century Middle East and West* (Springer 2017) 21.

<sup>45</sup> Allen Wood, 'Human Dignity, Right and the Realm of Ends' (2008) 1 *Acta Juridica* 47, 54.

<sup>46</sup> Ronald Dworkin, *Justice for Hedgehogs* (Harvard 2013).

health, social and education settings can be fraught, emotive and often, political. However, at an elementary level Waldron stated that dignity is inherent in every human being; the foundation stone of human rights and without qualification.<sup>47</sup>

Dignity can also be employed as a metaphysical concept, giving rise to its legitimacy as an applicable substantive normative. Juxtaposed, the concept of human rights comes in for much less of an interrogation, as it is more widely accepted as a substantive normative.<sup>48</sup> Treating children and young people with imbued dignity is one thing, but what does that mean when society fails to acknowledge them as inherent holders of rights? If we apply Waldron's 'foundation stone' precept, then it follows that everyone, children and young people included, are possessors of humanity, dignity and natural rights. Wood also critiqued Kant when he speculated as to the qualities that Kant espoused as comprising dignity; in so much as dignity correlates with the capacity to morally legislate 'oneself', whilst personality is, '*.... properly speaking what has dignity or absolute worth.*'<sup>49</sup> Wood also brought in the idea of the 'basic ethical value' in our time, very much in the tradition of the enlightenment pioneers, and for him it means that human dignity is, '*.... –the fundamental worth of human beings, and of every individual human being.*'<sup>50</sup>

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<sup>47</sup> Jeremy Waldron, 'The Dignity of Groups' (2008) 1 Acta Juridica 66, 68.

<sup>48</sup> Schroeder (n 44).

<sup>49</sup> Allen Wood, 'Human Dignity, right and the realm of ends. Keynote Address to the Conference on Dignity and Law, Cape Town University Law School' (July 2007) 9-10  
<<http://www.stanford.edu/~allenw/webpapers/keynote2007.doc>> accessed 20<sup>th</sup> Feb 2018.

<sup>50</sup> Wood (n 49) 2.

Waldron introduced another definition whilst summarising Kant and Dworkin, in a placating fashion –

*‘The rank definition tells us about the ontological basis of dignity, the Kantian contribution tells us about the axiological status of the values involved, and the Dworkinian idea points us towards the capacities that are going to be privileged and treasured in this way. In this way, we turn the tables on the destructive analytic critic...’<sup>51</sup>*

This ranking of agitating views by Waldron promotes accord between the three positions and from the viewpoint of group rights and individual rights, dignity is fundamental to both.<sup>52</sup> However, the idea of equality between ‘individual’ fundamental rights and ‘group’ fundamental rights is problematic. This is because western political philosophy favours individual dignity over that of the group. That is evidenced by reference to our treaties and our laws which are generally premised on the individual’s wellbeing; of the individual’s enjoyment to his or her rights, with reciprocal protections from the State built into our concordats. The group’s dignity is then subordinate to the individual, but group dignity is more closely allied to individual dignity than is at first obvious. This is because the group’s dignity, its enjoyment of rights and protections from the state, has arguably come about as a result of the universal recognition of the individual.<sup>53</sup> The hypothesis can be applied to all groups, especially children and young people,

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<sup>51</sup> Waldron (n 47) 72-73.

<sup>52</sup> For example, the South African constitution states that, ‘Everyone has inherent dignity and the right to have their dignity respected and protected’, Constitution of the Republic of South Africa 1996, s 10 Human Dignity.

<sup>53</sup> Waldron (n 47) 76.

with sub-groups therein (eg disabled children). Interestingly, Ignatieff stated that, '*group rights are needed to protect individual rights*', but also explained that this is not the 'groups' definitive purpose, or its premise.<sup>54</sup>

This being the case, there is a symbiotic relationship between the group and the individual in the discussion and progression of human rights. This elevates the concept of dignity and benefits both individual and group. However, it would also suggest that 'a' purpose of human rights is to promote human dignity, perhaps to the detriment of say, the idea of 'agency'. Ignatieff is sceptical of the reference to individual agency when he derisively pronounces that, '*Dignity as agency is thus the most plural, the most open definition of the word I can think of*'<sup>55</sup> Pinker on the other hand, described dignity as, '*...a phenomenon of human perception*' **and as such, 'morally significant'**.<sup>56</sup> As a theoretical concept and application, it is divisive, particularly so with regards to the debate between individual and group rights.

### **1.3.1 Autonomy - A brief consideration of Reductionism and Additive Methodological Applications**

Reductionism is an early 20th century philosophical term and its application involves reducing a complicated or complex subject down to its lowest denominator. The methodology is limited though, because it can only explain one facet of a given subject. In the example of a combined biological and social topic,

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<sup>54</sup> Michael Ignatieff, *Human Rights as Politics and idolatry* (Amy Gutman ed, 2001 Princeton) 67.

<sup>55</sup> *ibid* 164.

<sup>56</sup> Steven Pinker, 'The Stupidity of Dignity' (2008) 28<sup>th</sup> May, The New Republic <<https://newrepublic.com/article/64674/the-stupidity-dignity>> accessed 17<sup>th</sup> January 2018.

only one or the other could be studied at a given time, in situ, but not both. Additive methodology on the other hand, whilst still maintaining that unavoidable separation found with the 'reductionist' method, has extra appeal. This is because it can sustain the appreciation of one facet of a study as contributory, whilst undertaking a primary study of the other; ie the social aspect as the dominant concept to say... a biological aspect, or conversely so. The philosophical application of the reductionist method utilised by authority in the judgment of whether human dignity should or should not be bestowed on an individual or a group is, 'on the face of it' morally and ethically controversial. This is because it rejects the idea that dignity is inherently owned by 'all'. Neal rejected reductionism when she argued that human dignity should be accepted as a 'basic substantive norm'; that an individual's 'autonomy' is also an adjunct to dignity and is a substantive normative.<sup>57</sup>

Autonomy is arguably measured by reference to an individual's capacity and competence, in given contexts. Kant stated that the autonomy of an individual rests on whether he or she is 'that' competent and capable being.<sup>58</sup> They must be self-regulating and only then, deemed a possessor of dignity. If we accept Kant's postulation of 'self-regulation' and apply it to the case of very young children incapable of 'self-regulation', then they will not qualify. However, such a blanket stance fails to consider nuances, situations and context. Arguably, with the appropriate level of support to 'self-regulate', most individuals can achieve degrees of self-regulation; supported to reach their capacities as autonomous

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<sup>57</sup> See: Mary Neal, 'Human Dignity: Respect for human dignity as 'substantive basic norm'' (2014) 10 Inter JLC.

<sup>58</sup> Immanuel Kant, *Metaphysics of Morals* (Kant: 1797, 1990: 434f).

agents. Kant's rationale could be said to discriminate based on age, experience, biology and health. The abstract idea that autonomy and dignity are selectively 'awarded', based on subjective reasoning by a select few is moot. Philosophical debate of these concepts is healthy and meritable, but when subjective views on the ownership of 'autonomy' affect vulnerable groups negatively, in practice, society should be concerned.

The case to for acknowledging degrees of autonomy in individuals and groups is arguably dependent on capacity and ability. Kantian philosophy however, sees dignity as emanating directly from individual autonomy, but that autonomy is measured by reference to individual competence and capacity; to act morally and to self-legislate; though the idea of, '*...absolute inner worth*' is also problematic.<sup>59</sup> Schroeder has referred to this as the 'Kantian cul-de-sac' and proposes separation of human rights and human dignity accordingly.<sup>60</sup> Citing Nussbaum to bolster her proposal, Schroeder latches onto the term 'judged threshold'.<sup>61</sup> According to Schroeder, Nussbaum had judged individuals acutely medically incapable of central function as, '*...not really a human being at all, or any longer.*'<sup>62</sup> However, it is argued that Schroeder is selective in her narrative choice, because Nussbaum was writing in the context of medical ethics; she was far more interested in the 'higher threshold'; the point at which one's capability manifests

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<sup>59</sup> Kant (n 58).

<sup>60</sup> Doris Schroeder, 'Human Dignity and Human Rights: An Appeal to Separate the Conjoined Twins' (2012) 15 Ethical Theory and Moral Practice.

<sup>61</sup> This is a protectionist term mainly used in bioethics and one which Schroeder references to illustrate the cases of individuals deemed acutely medically incapable of central function.

<sup>62</sup> Schroeder (n 60).

and we become 'truly human', that, '*...it is profoundly wrong to subordinate the needs of some individuals to those of others*', because 'all' of us are bearers of value, of Kant's 'end'.<sup>63</sup>

Bontekoe (on Kant) stated that we are all, '*...subject to the forces of heteronomy*', dominated by power (divine or manmade) and only by acting through free will do we become an autonomous being, but a failure to self-initiate renders us nothing more than, '*a human animal*'.<sup>64</sup> However, Bontekoe appears to dismiss the most vulnerable individuals and groups in our society, especially children and young people. Except for the 'judged threshold' in bioethics, we know that very young children can 'self-initiate'; they can act autonomously. Granted, the initiation of that individual autonomy is contextual and individual, children and young people are undoubtedly autonomous agents and holders of rights.

### **1.3.2 Autonomy rights and protection rights –enabling meaningful participation**

Melton extends the discussion on autonomy and rights when he unequivocally states that children deserve respect, ie it is an unconditional precept and a topic which will be discussed later in chapter 5 of this thesis, relative to rights education in the school system in Moray and Scotland. A universally applied term, the idea of respect permeates all contexts and circumstances 'de facto', but even as an abstract, it is closely aligned with the concept of autonomy. This is an important

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<sup>63</sup> Martha Nussbaum, *Women and Human Development* (Cambridge 2000) 73.

<sup>64</sup> Ron Bontekoe, *The Nature of Dignity* (Lexington 2010) 6.



emphasis because children and young people desire respect, to be appreciated as worthy individual agents. They also desire to please and reciprocate that respect, especially when bestowed upon them by an adult. This bolsters their individual confidence and re-enforces the value of 'all'. However, when discussing the lives of children and other vulnerable agents and groups, safeguards must be factored in to the conversation, ie protectionist considerations and applications. Those safeguards dependent upon the level of an individual's capacity and maturity. This may entail adherence substantive protectionist rights of the individual via statutory edicts and local policies. At a fundamental level, in the public arena or the private sphere of the family, there is an expectation of 'duty of care' towards the child, be it legally or morally given. In this example, autonomy rights and protection rights are **not** so diametrically opposed, at least not in real time application where children and young people are arguably active and competent consenting political participants.<sup>65</sup>

### **1.3.3 Autonomous/competent child and consent**

Alderson stated that, '*Children's strengths are often seen more clearly during adversity...*'<sup>66</sup> Many social and care practitioners would readily agree with that statement and Alderson, who is adroit in the lives of looked after and care experienced children, emphasises that even when subjected to extremes of

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<sup>65</sup> Gary B Melton, 'Beyond Balancing: Toward an Integrated Approach to Children's Rights' (2008) 64 Journal of Social Issues.

<sup>66</sup> Priscilla Alderson, *Young children's Rights, Exploring Beliefs, Principles and Practice* (Jessica Kingsley 2000) 131.

adversity, ‘all’ children and young people are still able to manifest extraordinary resilience and displays of intelligence beyond their physical years. Perhaps these demonstrative abilities suggest that competence should be measured by reference to experience, followed by physical age and ability. As Alderson also observed, ‘... *very young children can have profound understanding*.’<sup>67</sup> Such a proposition should not give rise to contentious debate if it is viewed against existing family and child legislation.<sup>68</sup> Neither should it cause dilemmas in current unitary authority policies, with an emphasis on direct and indirect service provision in the education, social and health care sector; and of course, non-judicial decision making procedures.

#### **1.3.4 Autonomy- procedures- child, family and the State**

Without alerting the reader to the details of the ‘real politik’ (part 2 of the thesis) in respect of decision making procedures, these will be examined here relative to the concept of autonomy. Not every decision making process with the child and young person as the focus, or at the centre, accommodates and acknowledges their autonomy. Each decision making procedure will have a framework on which it is premised and from which it operates, be that founded on law, policy or practice (or a combination of). Whilst the drafting journey of a decision making procedure will have been tested for its compliance and legality against its normative frameworks, those ‘tests’ do not provide satisfactory answers in respect of the

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<sup>67</sup> Alderson (n 66).

<sup>68</sup> Age of Legal Capacity (S) Act 1991.

child's experience of autonomy. However, it would be disingenuous to suggest that decision making processes which contemplate the wellbeing and best interests of the child and the young person are designed according to the principles of 'in loco parentis' and 'parens patriae'.<sup>69</sup> Nonetheless, in regards judicial and statutory procedures, especially in child protection cases, these principles will and do apply. That stated, whether a procedure is statutory or non-statutory premised, there is no immediate evidence to suggest that the frameworks (in this study), the decision making processes under review are deliberately machined to marginalise a young person's participation. We must also remind ourselves that frameworks and procedures are abstract concepts, created and applied to enable society to try, 'to do the right thing' for the wellbeing, welfare and best interests of the child.

The latter three concepts of wellbeing, welfare and best interests do not always appear to align with the notion of children's participation; to acknowledge them as autonomous agents. This takes us back to the arguable patriarchal facet of processes; the 'in loco parentis' and 'parens patriae' where the alienation of young stakeholders re-enforces dependence; the antithesis of encouraging autonomy. There has been a lot of criticism from academics and practitioners in that vein, particularly so in respect of the Children's Hearing System. That criticism being directed to language usage, physical environment and inconsiderate practices,

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<sup>69</sup> Both terms imply legal responsibilities and duties, which could extend to the appointment of a 'Guardian ad litem', an 'attorney ad litem', or both. Those mechanisms are statutory premised and employed in formal procedures where children and young people are generally the subject of a welfare concern by the state.

affecting children and their families.<sup>70 71</sup> Domestic statute and common law could also be said to be hierarchical. A broad example in practice is an adults' assumed authority over the child, via 'in loco parentis'.<sup>72</sup> Granted, the doctrine derives from common law and refers to an adult (other than the parent) having a temporary responsibility for the care, custody and protection of a child or children. However, we also have the authority of the state which can exercise power over a parent, for the purposes of protecting a child via the doctrine of 'parens patriae', as engaged through applicable statute. This can result in multiple discord between a child and its family who are set in opposition; between the family and the unitary authority/state; between the unitary authority or devolved administration pitted against the ruling States edicts. All of this can impact on one's perception of autonomy as a concept to be enjoyed or impinged? This makes autonomy subjective, contextual and oppositional. This antagonism exists not just within and between the traditional familial hierarchy and the independent child actor, but as illustrated, between family and authority; between the State and its unitary authorities. According to Thomson, family autonomy is the hallmark of a democratic society, but it is under threat.<sup>73</sup> Turning this on its head, if Thomson is

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<sup>70</sup> Indiya Kurlus and Gillian Henderson, 'National Survey of Children and Families 2015' (SCRA 2015) <<http://www.scra.gov.uk/wp-content/uploads/2016/03/Children-and-Families-Survey-2015-Final-Report-A.pdf>> accessed 10<sup>th</sup> January 2018.

<sup>71</sup> Robert Porter, Vicki Welch and Fiona Mitchell, 'The Role of the Solicitor in the Children's Hearings System, A study commissioned by the Scottish Legal Aid Board' (CELCIS 2016) <<https://www.celcis.org/knowledge-bank/search-bank/role-solicitors-childrens-hearings-system/>> accessed February 2017.

<sup>72</sup> Unitary authorities/local authority administrations can be granted legal rights over children and young people in their care, under statutory obligation and duties.

<sup>73</sup> Joe Thomson, *Family Law in Scotland* (7<sup>th</sup> edn, Bloomsbury 2014) 335; Evidencing his assertion by reference to European treaty and devolved domestic legislation, Children and Young Persons (Scotland) Act 2014, Children (Scotland) Act 1995.

correct as to autonomy being the ‘hallmark’ of a democratic society, then measuring the degree of family autonomy in a given state could provide us with a plausible indicator of its democratic health. However, the concerns Thomson raises align with an arguably overly paternalistic and protective reach of central and devolved government; their unitary authorities and agencies. This can result in unnecessary and unwarranted interference in the sphere of the private by the public, affecting the autonomy of the child. But that effect can be both positive and negative, from a child centric autonomous position. By that it is meant that the state may have to impose its authority to empower a child with autonomous agency, even when such an imposition could lead to allegations of state interference in an individual’s private life and freedoms, as guaranteed by the European Convention on Human Rights (hereinafter referred to as the ECHR). So, it does not always follow that state interference in the private ‘family’ life has negative connotations, not for children and young peoples increased autonomy. However, Thomson cautions us to think about the reach of state authority into our private realm; that its bodies and agencies could be afforded opportunity to act ‘outwith’ their powers, inviting increased opportunity for ‘on the face of it’ infringements into family life.<sup>74</sup>

An example of such ‘disquiet’ is given by reference to the Children and Young Persons (Scotland) Act 2014 (hereinafter referred to as CYP (S) A 14), with an emphasis on Part 4.<sup>75</sup> An emotive piece of legislation, which has seen a charged campaign and legal challenge by opponents to the ‘Named Person’ scheme. This

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<sup>74</sup> Thomson (n 73).

<sup>75</sup> Children and Young Persons (Scotland) Act 2014, Part 4 s 21 (1) and s 22 (2).

apparent dispute is/was primarily premised on an ‘on the face of it’ infringement of Article 8 of the Human Rights Act 1998 (hereinafter referred to as HRA 98).<sup>76</sup> A separate challenge could theoretically be launched against the devolved Scottish Government, that by infringing a substantive piece of human rights law; in creating subordinate legislation incompatible with Convention rights, it has acted outwith its legislative competence.<sup>77</sup>

Although the debate surrounding the ‘Named Person’ may appear somewhat remote in the narrative of this chapter, there are salient reasons for its inclusion. Under the CYP (S) A 14, a ‘Named Person’ is an individual who has undertaken to perform that service.<sup>78</sup> That person will, for the most part, be employed in public service via unitary authorities and agencies, in education, health or social care. For example, a Health Visitor may be appointed a ‘Named Person’ for a new born; a Head Teacher for a school pupil, or another, as appointed separately by Scottish Ministers.<sup>79</sup> The functions of the ‘Named Person’ when examined against the concept and practice of children and young people’s participation and autonomy are also interesting because it calls on the ‘Named Person’ to ‘promote, support or safeguard their wellbeing’. These actions, it could be argued, should include the provision and promotion of advice, information and support, in addition to the means necessary to help access support or a service. The Act, relative to the ‘Named Person’ service also refers to the child and the

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<sup>76</sup> Human Rights Act 1998 c42 Schedule 1 Part I Article 8.

<sup>77</sup> Scotland Act 1998 c46, Part II, Ministerial functions s 57 (2).

<sup>78</sup> Children and Young Persons (Scotland) Act 2014, Part 4 s 32 Interpretation of Part 4.

<sup>79</sup> Children and Young Persons (Scotland) Act 2014, Part 4 s 19 Named person service.

young person, before the parent, making it potentially 'child centred'.<sup>80</sup> On the other hand, it could be interpreted as an assault by the state and devolved authority agents on familial autonomy. Pivotaly, the 'Named Person' service is an example of early interventionism and preventative investment. However, investment requires resources, and success is premised upon guaranteed resourcing and commitment, top down, bottom up.

To briefly close this part of the discussion, in 2016 the Supreme Court published its ruling in, 'The Christian Institute and others (Appellants)' case where it was determined that there was no breach of Article 8.<sup>81</sup> This final appellate judgement upheld the previous Scottish Courts decision. The appellants did however, succeeded in convincing the Supreme Court judges that elements of the 'Named Person' service were 'outwith' the legislative power of the Scottish Parliament.<sup>82</sup> The reasoning? An arguable absence of diligence on the part of CYP (S) A 14 drafters with regards issues of guidance, personal data and general implementation.<sup>83</sup> These were sufficiently serious indictments, demanding remedying to comply with the Scotland Act 1998 (hereinafter referred to as the SA 98).<sup>84</sup> The possibility of infringement in respect of inappropriate and illegal data sharing of children, young people and their family's details demands further

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<sup>80</sup> Children and Young Persons (Scotland) Act 2014, Part 4 s 19 (5).

<sup>81</sup> *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)* (Scotland), [2016] UKSC 51, Judgement given on 28<sup>th</sup> July 2016, < <http://www.bailii.org/uk/cases/UKSC/2016/51.html>> accessed February 2017.

<sup>82</sup> Children and Young Persons (Scotland) Act 2014, Part 4 Personal Data Information sharing.

<sup>83</sup> *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)* (Scotland) [2016] UKSC 51.

<sup>84</sup> Scotland Act 1998, s 57 (1).

consideration, particularly so with respect to mechanisms and safeguards. By 2017, contingencies in respect of 'data sharing' were being made, via the Children and Young People (Information Sharing) (Scotland) Bill (hereinafter referred to as CYP (IS)(S) Bill).<sup>85</sup> The CYP (IS) (S) Bill will make specific changes to and remedy Part 4 of the CYP (S) A 14, so as to comply with the Supreme Court's findings in the case in question.<sup>86</sup> It will also remedy Part 5 of said Act, which makes provisions for Information sharing.

#### **1.4 Decision Making Process**

The term 'decision making process' is wide, interpretive and applies to any procedure in which a decision about an issue, or issues is discussed and decided upon. It will usually comprise an assemblage of people with a common purpose. The format of the assemblage may be casual or formal. If formal, it will be guided by a set of standards or rules which may be informed by reference to statute, regulation and policy. It may also include precedence and practice, particularly with regards to historical societies and bodies. An important element of the formal and informal, is the participation of individuals, gathered for a common purpose with everyone having a stake in the process. The exercise of that 'stake', ie the reality of 'voice' and participation being an important theme in this study. In a 'micro' localised procedure, the setting and the tenor is far more personal and

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<sup>85</sup> See the following link to guidance on the 'Children and Young People (Information Sharing) (Scotland) Bill'

<<http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/cyp-information-sharing-bill-2017> > accessed 1<sup>st</sup> December 2017.

<sup>86</sup> *The Christian Institute and others (Appellants) v The Lord Advocate* (Respondent) (Scotland), [2016] UKSC 51.



active than in the macro activity of say, voting. The individual is at the centre (in theory anyhow) and their interest should be absolute.<sup>87</sup>

This study is of course focused on children and young people and the mechanisms and roles which assert to support them in a non-statutory process, but that process is rarely initiated by a lay individual. It is more often invoked by a professional or professionals, acting in their capacity as appointed representatives. To a lesser extent a procedure may be commenced at the behest of parents or other legal guardians of an extra vulnerable individual, but again, it is highly unusual for a child or young person to initiate, especially so in respect of the more formal statutorily premised procedures. There has been no forthcoming evidence that this has taken place within the jurisdiction in question.

#### **1.4.1 The tiers of a process**

The premise that there are two types of processes, or tiers (the formal and the informal) is practical and intelligible. Academics and practitioners can work well within this simple categorisation. However, a conceptual and supplementary third tier has also been suggested. This is linked to the ‘informal process’ (the second tier) and has been called the ‘informal decision’. Marshall referred to it in her early work, stating that it should be acknowledged as an addition to the widely

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<sup>87</sup> This research project has concentrated largely on what could be termed a ‘micro’ procedure. This was deliberate because this researcher wanted to determine whether the LIAP, and the mechanisms employed led to the meaningful participation of children and young people, or, did not.

acknowledged informal and formal processes.<sup>88</sup> Together, they comprise the possible three levels of formality.<sup>89</sup>

The 'informal decision' is an arguable mode of participation for children and young people in a standard family setting; the 'lowest level' by which children and young people may be enabled to participate as autonomous agents in a decision making process. It is theoretically sound and unambiguous, but meaningful participation of the child or young person in the 'informal decision' is premised on one pivotal aspect; the accommodation of the young individual by the parent, legal guardian or other relevant adult/s. The practice then, unlike the concept may be more difficult to implement, but Marshall underscores the trump card of the State to intervene, by placing a legal obligation on parents, '*...to consult their children on matters affecting them.*'<sup>90</sup> State intervention into the private domain of family life is a subjective and moot topic and whilst that intervention, in the form of 'hard legislation' is tolerated by a populace in say, matters concerning child protectionism, it is only that...tolerated. The state, its devolved authorities and its public servants have wide reaching powers, and these can often be

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<sup>88</sup> Marshall's formal processes are clearly judicial, whereas this researcher's take on a 'formal process' extends to the quasi-judicial, eg the 'Children's Hearing', which is tribunal premised.

<sup>89</sup> Kathleen Marshall, *Children's rights in the balance: the participation - protection debate* (Stationery Office 1997) 34.

<sup>90</sup> *ibid.*

Marshall cited the Norwegian example of s 33 of the Children Act 1981, as follows: '*Parents shall give the child increasingly greater rights to make his own decisions as he gets older and until he comes of age.*'. It has since been amended to read as follows: '*Parents shall steadily extend the child's right to make his or her own decisions as he or she gets older and until he or she reaches the age of 18*', The Children Act, Act of 8 April 1981 No. 7 relating to Children and Parents (the Children Act), Law | Date: 2017-04-06

<<https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>> accessed 9<sup>th</sup> December. Note the insertion of 'steadily extend' in place of 'increasingly greater' - Of 'he or she' over 'he' and - Of 'reaches the age of 18', in place of 'comes of age'.

interpreted as heavy and reactionary and often ‘after the fact’, without addressing root cause problems. The antithesis comprises less encroaching (or perceived) statutory powers and greater investment in early intervention and engagement strategies. Convincing a hesitant population that the meaningful participation of the child, as an active agent in ‘all’ decision making processes may be beneficial for everyone, and is arguably the right thing to do, though harder to achieve. Hart latched onto this issue in the early 1990’s, and whilst he would no doubt be delighted to convert many to his way of thinking, his primary goal was reach those who fed into to the idea that the child is an active citizen. The reasoning was simple; he wanted to induce those same individuals to reflect on their own practices, which were, and are critical. Hart wanted to reach, ‘... *those people who have it in their power to assist children in having a voice, but who, unwittingly or not, trivialize their involvement.*’<sup>91</sup> This brings us onto the idea of ‘face value’ or ‘true value’, in that a procedure may be described as meaningfully participative; claims made that it acknowledges the child and young person as an active agent, but without qualitative and quantitative data to back-up such claims, the process is nothing short of empty rhetoric. Evidence should also be robust and subjectable to wider scrutiny. If a procedure is touted as a participative and enabling model, then it should be evidenced accordingly. If it proves to be otherwise, then managers and facilitators should be given opportunity to address any shortcomings. Failing that, a cessation of the procedure should take place. Anything less is normalising the negative; an acceptance of bureaucratic tokenism from adult stakeholders. Identifying and interrogating such procedures should be mandatory practice,

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<sup>91</sup> Hart (n 10).

involving managers and facilitators accordingly. Succinctly, the child and the young person should also be consulted; their views given weight and their autonomy acknowledged. Alderson was conscious and aware of the problem with the 'system', not just in format, but with the 'attitude' of adult stakeholders and she attributed that problem to, '*...the beliefs which encourage adults to consult or stop them from doing so.*'<sup>92</sup>

## **1.5 Best Interests (and Wellbeing)**

As a concept the term 'best interests of the child' resonates positivity, even child centrism. However, it is a subjective and objective term because of its wide and interpretive context. In drafted legislation and some local policy, the concept is usually applied as follows: '*the best interests of the child are paramount- or – the/a primary consideration*'. It is usually posited alongside the concept of 'welfare' as in, '*the best interests and welfare of the child*' etc. In addition to domestic family and child law, international and regional conventions are an additional source of inspiration and precedent.

It is naturally aligned with 'protection and prevention' ideals in respect of children and young people. It could also be argued that it is a construct of the 'welfarism' principle, which is so closely associated with the ideal of 'protectionism'. While there are competing interests in respect of the foregoing (ie children's welfare vs autonomy vs parental rights vs state), we look to preeminent characters of philosophical enlightenment to assist us in our understanding of the

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<sup>92</sup> Alderson (n 66) 65.

concepts.<sup>93</sup> Though deeper analysis of these influencing individuals and their theories is limited in this study (by reason of parameters and feasibility), their works have led us to current societal understanding and normative frameworks of the child and of childhood. However, if we return to the protectionist angle, there is a problem; the arguably protectionist pinnacle risks children become objectified little beings. Their childhood becomes a time and place of danger and they are viewed as hapless beings, dependent upon adults. Villarán and Muñoz critiqued such problematic objectification of children as incapable and immature creatures when they stated,

*'Children, like every other member of Homo sapiens, are social beings, interdependent, and needed, and as such they are urged to be themselves, to develop their condition as unique beings, born from autonomy, and have responsible self-determination.'*<sup>94</sup>

In many ways though, our 21<sup>st</sup> century society is moving away from that 'protectionist' premise. It acknowledges children and young people's autonomy and affords them more respect than has at any other time in our history been recorded. In so far as this study is concerned, the discussion and realisation of children's autonomous agency in Scotland was considered and acted upon back in the 1960's.<sup>95</sup> The following case will hopefully also dispel the idea that the concept of best interests is somehow, a modern construct.

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<sup>93</sup> John Locke, Immanuel Kant, Cesare Beccaria, Rousseau, Voltaire.

<sup>94</sup> Alejandro Cusiianovich Villarán and Marta Martínez Muñoz, *Handbook of Children's Rights, 'Child Participation, constituent of community well-being'* (Springer 2014) 2504.

<sup>95</sup> The Kilbrandon Report 1964 <<http://www.gov.scot/Publications/2003/10/18259/26879>> accessed 31st January 2017; Social Work (S) Act 1968; The British Association of Social Workers <<https://www.basw.co.uk/>> accessed 20<sup>th</sup> January 2018.

### **1.5.1 Case of Gover vs Gover<sup>96</sup> - 'Best Interests' principle in law**

Back in 1969 Lord Thomson deliberated on a Scottish jurisdictional custodial contact case, which was not unusual or uncommon, even in the 1960's. Its significance lay in the application of the best interest's principle, whereby the testimony of a 14-year-old boy (one of two siblings) amounted to neither child desiring contact with their father. Having read the proof of the child in question, Lord Thomson concluded that he was satisfied that the wishes expressed by him were genuine and reasonable. The court determined that compliance with this wish would not create a welfare risk to the siblings. This case was seminal because it led to the examination by the authority [Lord Thomson] of the principles of a child's best interest' and of their welfare. The principle is a malleable and sufficiently sensitive to be used with children and young people, as a group and as an individual, many of whom will have been identified as victims and/or witnesses in criminal and civil cases; in courts, tribunals and panels. The principle of best interests is also associated with the young offender, especially since Kilbrandon, but that application is not always understood or accepted by a sceptical society. However, the welfarist approach as illustrated with the tenets of Kilbrandon, makes it clear that a child offender is also a victim; of their circumstances. This being the case, their best interests, implied or specified should also be considered in decision making processes.

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<sup>96</sup> *Gover v Gover* 1969 SLT (Notes) 78 (Lord Thomson).

We can reference several devolved acts which reflect Scotland's particularly historic determinations as to where childhood ends, and adulthood begins.

Amongst these are the civil and contractual protections provided by the ALC (S) A 91;<sup>97</sup> the Criminal Justice and Licensing (Scotland) Act 2010;<sup>98</sup> the Criminal Procedure (Scotland) Act 95;<sup>99</sup> and presently, before the Scottish Parliament, the Age of Criminal Responsibility (Scotland) Bill (hereinafter referred to as the ACR Bill). Within the geographic scope of this study, the age of majority is by and large determined by the ALC (S) A 91, but a reasonable marker is 16 years and over.<sup>100</sup>

In so far as the Children's Hearings Scotland is concerned, a young person can be placed under what is termed a 'Compulsory Supervision Order'.<sup>101</sup> This demonstrates the best interests and welfarist approach in action, in that it is utilised to provide a protective net to 16- and 17-year olds. That said, such an order, the 'Compulsory Supervision Order' includes wide ranging powers. These are both prohibitive and restrictive and include the facility of a 'secure

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<sup>97</sup> Age of Legal Capacity (S) Act 1991, c50,

*'An Act to make provision in the law of Scotland as to the legal capacity of persons under the age of 18 years to enter into transactions, as to the setting aside and ratification by the court of transactions entered into by such persons and as to guardians of persons under the age of 16 years to make provision in the law of Scotland relating to the time and date at which a person shall be taken to attain a particular age; and for connected purposes. [25th July 1991].'*

<sup>98</sup> Criminal Justice and Licensing (S) Act 2010 asp 13 Part 3 Children s 52,

*(1) A child under the age of 12 years may not be prosecuted for an offence.*

*(2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.*

<sup>99</sup> Criminal Procedure (Scotland) Act 1995 c. 46 Part V s 42, Prosecution of children

*(1) A child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instructions of the Lord Advocate, or at the instance of the Lord Advocate; and no court other than the High Court and the sheriff court shall have jurisdiction over such a child for an offence.*

<sup>100</sup> Age of Legal Capacity (Scotland) Act 1991, c50, s 1.

<sup>101</sup> Children's Hearings (Scotland) Act 2011, Part 9, s 83 (1).

accommodation' authorisation.<sup>102</sup> A 'Compulsory Supervision Order' will cease to have power at the end of the 'relevant period', or upon the young person attaining the age of 18, whichever comes first.<sup>103</sup> Todres once stated that benchmarks can limit children and young people; failing to recognise the maturity of the individual's decisions.<sup>104</sup> This is a fair point and as we can see from the normative legal benchmarks (and multifarious devolved legislation) consideration is given to safeguard not just childhood, but the difficult transitional period into adulthood. Arguably, so long as autonomous agency is acknowledged, and participatory needs met, then the principle of children and young people's best interests can be acknowledged, and (for the most part) addressed. *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law or administrative bodies, the **best interest** of the child shall be a primary consideration.'*<sup>105</sup>

Whilst researching the statement, 'best interests of the child', several scholarly works emerged. Amongst these were the publications of Goldstein, Freud and Solnit,<sup>106</sup> 'On the Best interests of the child' in bringing forth cases; arbitrating on same and coming to a determination. Coming from distinctive, but

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<sup>102</sup> Children's Hearings (Scotland) Act 2011, Part 9, s 83 (2) (a) to (i).

<sup>103</sup> Children's Hearings (Scotland) Act 2011, Part 9, s 83 (7) (a) and (b).

<sup>104</sup> Jonathan Todres, 'Independent Children and the Legal Construction of Childhood' (2014) 23 Southern California Interdisciplinary Law Journal 263, 264.

<sup>105</sup> United Nations Convention on the Rights of the Child 1989, Art 3, para 1  
See also: General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, (art 3, para 1). CRC/C/GC/14, 29 May 2013, Committee on the Rights of the Child.

<sup>106</sup> Joseph Goldstein, Anna Freud and Albert J Solnit, *Beyond the Best Interests of the Child* (Burnet Books 1986).



not disparate academic disciplines, the authors and combined their considerable knowledge, expertise and philosophy in an attempt to best serve children and young people in 'child placement' cases and procedures.<sup>107</sup> They contemplated the legal status and rights of children at various stages of their placements; seizing on the philosophy of the 'all' encompassing in the description of 'child placement'; with much of the raw data originating from Yale's Child Study Centre.<sup>108</sup> To this day their works are cited amongst academics, practitioners and court rulings. The latter example is qualified, as rulings on cases are contained to the US jurisdiction. However, Spinak (2007) has contended that insufficient attention is being paid to Goldstein and others by legal practitioners (worldwide) and legal advocates working with and for children and young people.<sup>109</sup>

Before the ground-breaking work of Goldstein and others on the 'Best Interests of the Child', 'physical welfare' was the dominant consideration in whether an authority removed that child from its domicile. Psychological wellbeing was a lower consideration in the scales of deliberation in such decision making processes. The primacy of 'physical welfare' dominated three identified parts to a

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<sup>107</sup> Goldstein, a multi-faceted Professor of law, science and social policy at Yale, was a political scientist; a legal practitioner and psychoanalyst. Freud, the founder of a Child Therapy Clinic, specialised in psychoanalysis and child development. Solnit on the other hand, was a professor of paediatrics and psychiatry at Yale school of medicine.

<sup>108</sup> Goldstein (n 106) 5; This bolsters the selection in this thesis of non-judicial processes, which includes a policy based administrative procedure and quasi-legal administrative process, ie the LIAP and the CHP, CHS. It also highlights the feasibility of collaborative practice between academic fields and the possibilities of interdisciplinary research.

<sup>109</sup> Jane Spinak, 'When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on the best interests and the Role of the Child Advocate' (2007) 41 Fam LQ (393); See: *The Child and the Nation-State: France, Sweden, and the US, 1900-2000*, Columbia University in New York City on May 26–28, 2006. Spinak presented her assertions to an international symposium in 2006. Spinak asked how far the now international concept of the Best Interests of the Child had filtered down through to legal practice and practitioners on the ground; how far into the mechanisms and procedures and rulings had it featured

decision making process, according to Goldstein and others, with these being equal and connected; this writer would argue that these are fixed points which feature in every decision making process, including the LIAP procedure.

- invocation,
- adjudication and;
- disposition

It could be argued that ‘Best Interests of the Child’ has influenced law, practice and policy, even advancing children’s welfare rights in the Scottish jurisdiction; especially so with the Kilbrandon tenets. Those tenets extending to the child’s welfare, irrespective of their being victim or offender, with the philosophy of ‘need not deed’ the primary consideration.<sup>110</sup> However, in respect of children’s welfare and best interests, there are still authorities and agencies which have been identified as in need of improvement.<sup>111</sup>

In 1998, a compendium of Goldstein ‘and others’ works was printed and titled, ‘the least detrimental alternative’.<sup>112</sup> It advances an ambient standard by professionals, which should apply in matters concerning child abuse, neglect and ultimately, placement in care. That standard is, ‘the least detrimental effect’. Again, this could just as readily be transposed and applied to ‘all’ decision making processes and not just archetypal ‘protection’ procedures; including the successor to the LIAP, the Child’s Planning Meeting.

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<sup>110</sup> The Kilbrandon Report 1964 <<http://www.gov.scot/Publications/2003/10/18259/26879>> accessed 31st January 2017; Children’s Hearings (Scotland) Act 2011; Children’s (Scotland) Act 1995; Children and Young Persons (Scotland) Act 2014.

<sup>111</sup> The Care Commission Scotland’s April 2017 Inspection Report of ‘child protection’ services in Moray was highly critical of the local council.

<sup>112</sup> Joseph Goldstein, *The best interests of the child: the least detrimental alternative* (The Free Press 1998) xii.

### 1.5.3 Wellbeing (and welfare)

Wellbeing and best interests are constructs originating in the social and philosophical realms; firmly positioned in the popular lexicon of society, comprising the public and private. As terms of reference, wellbeing and best interests have also made their way into the narrative of international treaty, domestic law and policy. However, closer inspection shows us that the functioning of any society is also premised on power dynamics. Acting in its capacity as guardian, via the principle of 'parens patriae', the state influences the manner and method by which a parent raises a child. It is nigh impossible to ignore this authority and its moot (paternalistic) positive and negative laws and regulations; enforced as they are via our public institutions and falling under the blanket descriptive of a normative framework. Such a presence and such a power could be perceived as ubiquitous within the area of private and family life. Then again, the argument for state involvement is that it protects the child when that child is failed by its family; the state taking measures to ensure and promote the wellbeing and the best interests of children. Reynaert and others observed that, '*...children's rights have – paradoxically – become the bearer of a new movement of protecting children by controlling parenting...*'<sup>113</sup> Sen on the other hand, concentrates on attainment and measure of wellbeing as, '*...an evaluation of the 'wellness' of the person's state of being... 'the constituent elements of the person's being seen from the*

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<sup>113</sup> Reynaert (n 29) 529.

*perspective of her own personal welfare'*<sup>114</sup> The priority given by Nussbaum and Sen to welfare within the context of wellbeing is interesting because welfare has for so long been posited as the overriding focus of law and policy. We are now more familiar with the moot supplanting of the term welfare with that of wellbeing. An empirical stage conversation with a child's rights officer (**CRO 1**) on that very topic highlighted a dissatisfaction that the concepts of welfare and of wellbeing were being synonymously utilised by central government and local authority, both in practice and policy. That they were substituting the welfare of the child with the concept of wellbeing, where welfare was once primary, having as it did, '*....a stronger impact in practice and in law*'. Wellbeing on the other hand, was too multifarious and cannot protect the most vulnerable in our society. That being the case, welfare is then an inadequate measure of Sen's posited '*...wellness... of being*...'<sup>115</sup> The welfare concept, associated as it is with state and parental protection of the child is atypically preventative and interventionist, 'parens patriae'. Its associated measures ensuring the child's physical, physiological and psychological health and wellbeing, of course. Though it may not feature in the generalist narrative of the political child and children's rights, the wellbeing concept does, and this is testament to its breadth of scope and application. Still, the assimilation of the term wellbeing in law and policy, though understandably attractive, is fraught with problems. These being directly attributable to that multifarious scope and equivocal interpretation. In the context of child and family law practice, this may give cause for concern, because these areas require more

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<sup>114</sup> Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford Scholarship on-line 2003) 36 <<http://www.oxfordscholarship.com.ezproxy.rgu.ac.uk/view/10.1093/0198287976.001.0001/acprof-9780198287971-chapter-3>> accessed 20<sup>th</sup> January 2018.

<sup>115</sup> *ibid.*

definitive interpretation, implementation and precedent. It is also worth noting that individuals expressing concerns in the application of the wellbeing concept, may not necessarily be adherents of the welfare principle either, even though welfare is a primary concept in treaty, law and policy. In so far as children's participatory rights is concerned, within the arena of domestic law and policy, there are pockets of concern that the substance and context of those rights may be negatively affected with the popularisation of and usage of wellbeing, as a normative.<sup>116</sup> Whether or not the concept of wellbeing has supplanted welfare as a tool for measuring children and young people's participation, welfare is still a critically important concept (and tool) particularly so in child protection practice. In so far as academic research is concerned, both researchers and research models must also assume some responsibility for the role they will continue to play in shaping normative frameworks which have either marginalised or propelled the child and young person as a participative agent.

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<sup>116</sup> Deborah Harcourt and Solveig Hägglund, 'Children's participatory research in action: challenges and dilemma, Turning the UNCRC upside down: a bottom-up perspective on children's rights' (2013) 21 *International Journal of Early Years Education* 286.

## 1.6 Concept of childhood- Homogeny of the group vs childhood

It could be argued that the consolidation of children and young people as a singular entity, a homogenised group is problematic, especially so in the attainment of substantive human rights. Some may argue that homogenisation has also fragmented the very idea of childhood.<sup>117</sup> The aggregation of 'all' children and young people under the banner of a 'minority group' is a vexing issue and whilst there are shared contexts and experiences, so too are there undisputable differences. That being the case, we need to take account of children's individualism at a local policy and practice level. When the antithesis of homogeneity is acknowledged and acted upon via empathetic law, policy and practice, then perhaps individual and group rights will be better understood and will be facilitated.

Within the distinct disciplines of sociology and law, the concept of childhood may be interpreted from different viewpoints, but that does not cancel out the commonalities affecting and influencing these distinct disciplines. This is exemplified by reference to the increasing prominence of interdisciplinary research, in this study, the socio-legal.<sup>118</sup> The idea of childhood invites wide

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<sup>117</sup> Allison James and Adrian L James, *Constructing Childhood: Theory, Policy and Social Practice* (Palgrave 2004) 148.

<sup>118</sup> See the following works by contemporary publications related to the sociology of law: Roger Cotterrell, *The sociology of law: an introduction* (2nd edn, Butterworths 1992); Roger Cotterrell, *Sociological perspectives on law, International library of essays in law and legal theory* (Ashgate 2001); Roger Cotterrell, 'Socio-Legal Studies, Law Schools, and Legal and Social Theory' (Queen Mary School of Law Legal Studies Research Paper No. 126/2012) (Queen Mary University of London, School of Law 2012); Roger Cotterrell, *Émile Durkheim: law in a moral domain* (Edinburgh University Press 1999) 276; Eugen Ehrlich, *Fundamental Principles of the Sociology of law* (Walter Lewis Moll tr, 4th edn, Transaction Publishers 2009) 538.

interpretations, from the complex to the elemental; a topic which naturally lends itself to debate, in tandem with that of the marginalised child. By way of illustration, Prout stated that, *'...while many socially marginal adults also lack such opportunities, it is not the case that adulthood in itself would be seen as an obstacle to participation.'*<sup>119</sup> If we go back to the mid-20<sup>th</sup> century, Aries was considered the main protagonist of the idea of 'childhood', by reference to his social construction theory, which is summarised as follows, *'Henceforth it was recognized that the child was not ready for life, and that he had to be subjected to a special treatment, a sort of quarantine, before he was allowed to join the adults.'*<sup>120</sup> Largely rebutted over the last couple of decades, the consensus nowadays amongst academia and practitioners, is that the theory is less than 'brilliant'. This is due to its arguably stifling effect upon what could be termed progressive policies and practices. As Classen posits,

*'One of the consequences of Aries's paradigm was that standard encyclopaedias or major reference works on the Middle Ages simply ignore or neglect the topic 'childhood,' and by the same token many aspects we now consider essential in our investigation of emotions in the premodern period.'*<sup>121</sup>

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<sup>119</sup> Alan Prout, 'and others', 'Reconnecting and Extending the Research Agenda on Children's Participation', in Kay Tisdall and others (eds), *Children, Young People and Social Inclusion* (Bristol 2006) 91.

<sup>120</sup> Aries, *Centuries of Childhood* (Pimlico 1996) 396.

<sup>121</sup> Albrecht Classen (ed), *Childhood in the Middle Ages and the Renaissance, The Results of a Paradigm Shift in the History of Mentality* (Walter de Gruyter 2005) 4.

Classen may be a historian, but the views he espouses could influence how we accommodate children and their childhood in law and policy. That could extend to societal attitudes and the lengths it will go to accommodate.<sup>122</sup> Of course, there is no one universal childhood; there is no universally accepted idea of what 'childhood' is and whilst it would be simpler to accept Aries 'cut and dried' social construct stance, the fact of the matter is that the subject is multifactorial; demanding a multi-faceted approach.

### **1.6.1 Childhood and social construction as a category (akin to Classen's 'adulthood')<sup>123</sup>**

To a child centrist, societies attitude to childhood and children's agency may appear discordant and its actions reticent, as it fails to acknowledge what Prout proclaims is the verity of, '*...children's active social participation; their agency in social life and their collective life.*'<sup>124</sup> However, this is a 'state of affairs' which has been decades in the making and it would be unwise and unfair to place responsibility for the sedate pace of change at the foot of authority, past and present. Academia and practitioners have also had a part to play in shaping the journey of children's participatory rights and the notion of what childhood has

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<sup>122</sup> See: Lloyd De Mause, *The history of childhood* (Harper and Row 1974); De Mause classified childhood as a 'construct' differently to Aries; he looked at it from the viewpoint of psychohistories, ie childrearing types, aligned psycho classes and their historical manifestations. According to the De Mause chart, we have just reached the final stage and that stage involves 'helping' the child; recognising individuality, agency and capacity, which we encourage. The children's rights movement is also encompassed in this posited final stage.

<sup>123</sup> Classen (n 121).

<sup>124</sup> Alan Prout, *The Future of Childhood, Towards the Interdisciplinary study of children* (Routledge 2005) 1.



meant at given times. In so far as social research is concerned, a marked change of attitude over the last couple of decades has taken place, particularly so in confronting Aries 'social construct' theory and its opposition to the idea of the child as an autonomous agent. That change is an acknowledgement of childhood as diverse, complex and ever emergent. Perhaps it is time to abandon Aries 'social construct' theory and frame childhood in terms of a holism, establishing a new normative. This would not be a simple undertaking, because such a universal mind shift would require the cooperation of all sectors of society, private and public entity alike. In so far as academic research is concerned it would demand an, '*...inter-disciplinary approach and open minded process of enquiry.*'<sup>125</sup> This involves thinking of childhood not just in terms of biological periods; not just in terms of its social period, but an amalgamation of both, because neither the biological nor the social can function or be sustained in isolation of each other. Childhood is also arguably more than a category as say, disability is. If we accept that it is a homogeneous concept, it makes the job of addressing the theoretical and practice no less difficult because it still means so many different things, to so many different cultures and individuals.

Appell for one, criticised the 'legal academy' for their lax accommodation of childhood and children as a considered category, ie a 'normative social group' and a holism.<sup>126</sup> Such neglect is arguably not apparent in other categories of 'normative social groupings', which include race, gender and disability (latterly, sexuality). However, childhood is obviously comprised of the biological and social, as

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<sup>125</sup> Prout (n 124) 2.

<sup>126</sup> Ruth Appell, 'Accommodating Childhood' (2013) 19 Cardozo JL & Gender 715, 718.

espoused by Prout.<sup>127</sup> Transposed, such considerations could result in childhood incorporating, and in turn, being incorporated by these other 'normative social groupings'. This would mean that such categories could be developed to address inequality and result in the vulnerable and marginalised child being accommodated; that childhood, with the addendum of protective characteristics would then qualify as a 'normative social grouping'.

The term 'power vacuum' has also been used to critique so-called 'unnatural normatives' in respect of childhood relationships with adults and Appell's cited 'legal academics' may well have been cautious in their efforts to progress the topic in 'academic studies'. Perhaps greater progress in the diminution of a 'power vacuum' is more obvious in interdisciplinary studies, for example, the 'socio-legal'. Adoption of the interdisciplinary could eventually facilitate a critique of the idea and validity of 'power vacuums'; ie the adult's held superiority over the child.<sup>128</sup> On that theme, Appell proposed a 'Children's Participation Amendment' (for the USA), which would take cognisance of the child's,

*'...developmental differences and vulnerabilities...promotes inclusion by removing barriers to, and providing assistance for, children's integration into civic life and their independence in their own lives...it is helpful to focus on children's liberty, rather than their equality.'*<sup>129</sup>

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<sup>127</sup> Alan Prout, *The Future of Childhood, Towards the Interdisciplinary study of children* (Routledge 2005).

<sup>128</sup> Appell (n 126).

<sup>129</sup> Appell (n 126) 722.

Arguably, the closest we have come to a universal accord on childhood is through the CRC and its application, via the diverse member states which have acknowledged that treaty. Part of the CRC preamble reaffirms the UDHR position on childhood (and motherhood) when it states that, '*motherhood and childhood are entitled to special care and assistance*'.<sup>130</sup> Whilst these two UN treaties acknowledge the existence of childhood and its special entitlements, too many childhoods are filled with inconsistency, chaos and an absence of the much touted, '*special care and assistance*'. Despite the preamble of the CRC and the UDHR stances on childhood (and motherhood), there are stark contrasts and manifestations in, and between State applications of these interpretive '*special care and assistance*' measures.

### **1.6.2 Childhood and the independent child**

The idea of the independent child within the legal construct of childhood is a moot point. This is because law and the legislature are by degrees, partly responsible for authoritative notions that prevail around childhood and children's dependency. Whilst these institutions may not be entirely responsible for societal views, they have arguably done little to rebut the notion of dependency, nor to challenge the conception of same. According to Todres, this attitude has trivialised the independent child's experiences and, '*...the capacity of children to make decisions associated with maturity (e.g., to vote or to enter into a contract)*'.<sup>131</sup> This

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<sup>130</sup> UDHR Article 25 'Right to an adequate standard of living'; United Nations Convention on the Rights of the Child, Preamble, [4] '*Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance*'.

<sup>131</sup> Todres (n 104) 262.

‘dependency’ also ignore children’s powers of resilience, so often displayed and executed in the most difficult of circumstances.

An example of a childhood experience is illustrated by way of an educational reference. *‘Education is as old as man, but schools are comparatively new.... Children learned by experience, by practice..... Young people learned through living.’*<sup>132</sup> Each of us has had a childhood, some more difficult and challenging than others, but it is our one common denominator as human beings. We will all have had periods of dependency in those childhoods. However, we will also have learned to exercise ‘independence’ through our experiences. Perhaps we are all too ready in our adulthoods, as parents, to ‘forget’ the challenges that we met head on in our formative years. The reference with regards to the difference between school and education from Lawrence rekindled memories of ‘New Lanark Mills’ in central Scotland; a positive legacy for the accommodation of the child and the concept of childhood. In its day, it was what could be described as a co-operative utopian experiment. It was led and directed by the compelling social reformer Robert Owen who viewed children as individuals, male and female alike.<sup>133</sup> Owen implemented many educationalist and protectionist policies and practices, including ‘co-education’ of girls and boys. He also instituted the care of infants for working parents and provided extracurricular opportunities for individual’s advancement. Owen was not training a future workforce per se, rather he was

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<sup>132</sup> Elizabeth Lawrence, *The origins and growth of modern education* (Penguin books 1970) 11-12.

<sup>133</sup> Robert Owen, 1771 –1858. New Lanark Mill, 1800. Owen was an influential figure, from his humanitarian and educational methods. He not only desired to protect his workforce and their families, but to promote, foster and nourish the child in all aspects of its life. See the following works; Robert Owen, *A New View of Society and Other Writings* (Gregory Claeys ed, Penguin Books 1991); Gregory Claeys (ed), *The Selected Works of Robert Owen, The Life of Robert Owen* (Routledge 1993).

addressing lacunae in the common man, woman and child's socio- economic circumstances. This had the correlative effect of providing opportunity of civil and political empowerment. Children were probably fortified by his practices, his ideals. This is interpreted as recognition and accommodation of childhood as both a state of dependence, and of independence. It is conjectured that Owen and his followers also acknowledged children as capable autonomous agents; that the concept of childhood was also understood as a lived experience, of each child. Owens was by no means a solitary figure of his period and the ideals he held were also shared amongst his contemporaries, such as Jeremy Bentham. Owen not only inspired those at New Lanark, he influenced other social reformers, including Eglantyne Jebb.<sup>134</sup>

### **1.6.3 Marginalisation**

Focus on the minutiae is an essential part of drafting any treaty, law or policy. The approach is both clinical and objective with the drafting process often years in the making. On the other hand, abstract and the hypothetical debate by philosophers and academics can often be charged and profound, but also challenged. There is no doubt that the theoretical informs (by degrees) a society's laws, policies and its practices, but there is a common denominator and that is the factor of 'time'. For the philosophers and the law makers, temporal considerations are calculated in years, often decades. A childhood on the other hand, is but brief and with every couple of decades that pass, another generation of children will remain marginalised; so, history repeats itself and perpetuates this failing. If society truly

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<sup>134</sup> Eglantyne Jebb, 1876-1928, founder of Save the Children.

desires to reduce and eventually eradicate the marginalisation of the child and young person in their public and private life, then perhaps a fundamental shift of tone and action is required from academia, legislatures and practitioners.

Most adults do not wake up to each day deliberating on how they can make a child's life more difficult than it already is or must be. They do not necessarily go out of their way to de-rail a philosophy or practice which promotes participation and equity, but there are many ways by which they can unwittingly impede the participatory rights of a child or young person. That stated, a lack of fundamental rights knowledge and an obtuse inclination to engage with the subject matter does not, and never will engender positivity and progress in this area of rights. During the empirical stage of the study, some adult participants, though candid with the researcher, appeared to struggle with the notion of the child as a holder of rights; an equal participant. Perhaps the views expressed, and the attitudes displayed were a manifestation of their own work and life experiences; their own frustrations and lack of voice; of being marginalised in their childhood and possibly, adulthood. One or more experiences, as aforementioned by such individuals are often enough to deny bequeathing future generations of children opportunities they never had. Marginalisation can manifest in many ways and in many contexts. It subsumes many forms of behaviour and attitude that are causal in diminishing an individual or some groups standing in society, negatively effecting equality of rights and welfare. It can be detrimental in both the socio-economic and the civil and political realm. Attitudes are often revealed through acts and vocalisation, which incorporates ostracism, prohibition, discrimination and even disinformation. However, marginalisation of an individual, or a group may not necessarily be pre-meditated on the part of others, even though they may

be viewed as agitators. That stated, an act or an omission (in the negative) by a dominant group, intentional or not, can result in the further alienation of the non-dominant group/s. Irrespective of motive or intention, once entrenched in the psyche of a society and its corresponding institutional framework, the dominant groups power is bolstered because the behaviours and the attitude become normalised. All societies have their normative frameworks and how these affect individual members and groups will very much depend on the premise and purpose of a given normative; ie it could be positively or negatively charged. It can elevate the group and the individual, or it can keep them down. The groups mostly associated with being marginalised usually have identifying characteristics, which may include race, gender and even belief systems.

It is also worth remembering that the constitution of a group and its position of dominance is not entirely dependent on 'quantity'. Often, those groups with the least power and minimum privilege can be greater in number, exceeding that of those in power. An example is given by reference to the apartheid system (regime) in South Africa, which ended in the early 90's. Another example is given by way of gender; the female of the species making up half of earth's human population, yet the idea of an equality with males of the species is in some States and cultures, still...an anathema. Such discriminatory and derisory frameworks can be based purely on historically biased doctrine, but frameworks can also be imposed from outwith a state, a culture. An example of secular marginalisation is given by reference to the state of Iraq where a minority Sunni government has held rule over a majority Shia Population.<sup>135</sup>

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<sup>135</sup> The Sykes-Picot Agreement of 1916- spheres of influence- dismantling of the Ottoman Empire.

## **1.7 The child –the socio-economic and the civil and political**

This study is by and large focused on children and young people's rights which includes their welfare rights and their political rights; arguably 1<sup>st</sup> and 2<sup>nd</sup> generation rights, both of which feature throughout the narrative of this study.

When critiqued under the ambit of the socio-political and the socio-legal, the discussion on children and young people's rights could be said to be empirically driven, theoretically premised or indeed, a composite of both. Therefore, it is necessary to explain the etymology of those 1<sup>st</sup> and 2<sup>nd</sup> generation rights, ie the 'civil and political rights and the 'socio-economic and cultural'. This will be illustrated by reference to what are termed 'basic rights' and 'aspirational rights', within the context of the main themes of the study.

The main procedure under discussion in this study is a non-judicial administrative decision making process, the LIAP, though there are references to the Children's Hearings Panel and the Additional Support Needs Tribunal Scotland, which are also non-judicial and administrative. The difference between the latter two and the former, (the LIAP) is that they are statutory premised and thus, arguably quasi-legal. However, all three still fall under the banner of the 'civil and the political'.<sup>136</sup> It may be tempting to critique these procedures solely within the parameters of 1<sup>st</sup> generation rights, but the reality is that we must also look to 2<sup>nd</sup> generation rights, particularly the 'socio-economic' elements.<sup>137</sup> This is almost

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<sup>136</sup> First generation rights are covered by articles 3 to 21 of the UDHR and were adopted in 1948. The ICCPR 1966 was adopted 1976 and forms part of the International Bill of Human Rights. The ECHR before that period, in 1953. All of which feature prominently in the CRC.

<sup>137</sup> Second generation rights are covered by articles 22 to 28 of UDHR. The ICESCR 1966 adopted in 1976 and forms part of the International Bill of Human Rights and also features in the CRC.



necessary with the adoption of an interdisciplinary study. It is speculated that the notion of 1st and 2<sup>nd</sup> generation rights, presented as natural formations is a clever contrivance because they are after all, artificial and hierarchical constructs. The civil and the political has been raised above the socio-economic, but only because of political negotiation and manipulation which commenced in initial drafting stages, then subsequent implementation.

### **1.7.1 Socio- economic rights**

Often when a child or young person is thrust into a spotlight, without due preparation and support in a non-judicial decision making process, they can experience inertia and scepticism. Even when the individual is abetted by an effective and trusted supporter (advocate or another supporting role), there are still instances when the individual will fail to attain active and autonomous political agency. This is where, and this is when a child's 'real' situation outweighs the procedure in question should be considered by stakeholders. The socio-economic 'back story' of any individual service user should be a pivotal element of an effective procedure, especially so when the service user is a child or young person. Antecedents are essential because they provide clarity, evidence and facility to deduce and adduce; to gain a fuller understanding of the event or events which have triggered a procedure. This is also where supporting roles come into play. It is usually assumed that a social worker or other appointed professional, ie safeguarder, children's rights officer, or educational psychologist will be the most apt and suitable individual/supporter to garner the 'back story' of the child or young person. However, this is not always a truism. These roles have very

different remits which have a propensity to conflict with the child's views, their wishes and their personal story. In an administrative procedure such as the LIAP, because of the lower threshold of 'trigger', it was not always the case that there was a designated social worker, ie the local authority had little or no previous involvement with that child, or its family. The social work mechanism and its role holder can, in those circumstances be discounted. The same tenet applies to the safeguarder and the children's rights officer mechanism and its role holders. The LIAP procedure, as has been stated, was not directed by statute, though it was arguably informed by same, but this did not make it any less a critical decision making process for the individual children and young people that were part of it. Their personal circumstances should always have been be a critical component of that process (and its successor the Child Planning Meeting Moray) and this is where the socio-economic analysis effectively kicks in.<sup>138</sup>

Interrogation of a child's everyday life will reveal the internal and external factors that impact upon them but would not otherwise come to the fore. These factors could, and have included poor health, poverty, family disputes and addictions; more commonly, a combination of any of these, and more. These comprise a collection of socio-economic issues that create and exacerbate vulnerability; in turn, they can rapidly increase a child's perceived and actual marginalisation. We could argue that these socio-economic factors exist and thrive as a direct result of civil and political actions and edicts. It is because of the correlation that we should not impose synthetic separation of both sets of rights.

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<sup>138</sup> See generally: Aoife Nolan, *Children's socio-economic rights, democracy and the courts* (Hart 2011).

At a micro level, in a decision making process such as the LIAP, stakeholders or decision makers can of course be hard pushed to resolve an issue of ‘poverty’ within the wider pervading and prevailing civil and political frameworks. However, those same decision makers can still manage to support that child to ‘voice’, through enabling its participation and engaging some degree of their civil and political enablement. But the decision makers can act in small, effective socio-economic ways. They can for example, function as a conduit between health, education and social services; that they may offer and provide practical assistance and, in some cases, relief and respite.<sup>139</sup> The following Ministerial quote from Angela Constance seems quite apt at this point of the study. She called on public bodies to take active measures in respect of ‘socio-economic inequality’, to adopt ‘moral obligations’, to, ‘...**understand** the key socioeconomic inequality gaps that exist **and** that they’ve **taken account** of them in the decisions they make.... think carefully about how they can reduce poverty and inequality whenever they make the big decisions that are important to all of us.’<sup>140</sup>

The quote is a proposed step up from the ‘Fairer Scotland Action Plan’ and the equity aspirations therein.<sup>141</sup> The Scottish Government also claims that once

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<sup>139</sup> Signposting to local services, such as ‘Food Banks’ and ‘Holiday Clubs’, but it also covers ‘Cooking skills’, ‘Money Management’ amongst so many other charitable and non-charitable services available in the jurisdiction of Moray. Correct as of August 2018.

<sup>140</sup> Scottish Government, ‘The Socio-Economic duty, A Consultation’ (2017) <<https://beta.gov.scot/publications/consultation-socio-economic-duty/>> accessed 31<sup>st</sup> July 2017.

<sup>141</sup> Scottish Government, ‘Fairer Scotland Action Plan’ (2016) <<https://beta.gov.scot/publications/fairer-scotland-action-plan/documents/00506841.pdf>> accessed 17<sup>th</sup> January 2018, ‘This Fairer Scotland Action Plan is a first government response to the Fairer Scotland conversation and a range of wider sources. It outlines 50 actions to help tackle poverty, reduce inequality and build a fairer and more inclusive Scotland.’; See also: Scottish Government, ‘Fairer Scotland Action Plan - First Annual Progress Report’ (2017) <<http://www.gov.scot/Publications/2017/11/7078>> accessed 17<sup>th</sup> January 2018.

the 'socio-economic duty' is introduced, Scotland will be the first nation in the UK to have done so in respect of what is described as the, '*missing part of the Equality Act 2010*'<sup>142</sup> This is demonstrative of central (Scottish) government's arguable efforts to establish a civil and equitable society and an acknowledgment, that for one set of rights to be addressed, the other, or others must also be considered.

### **1.7.2 Civil and Political Rights**

Human rights are usually considered as falling under the ambit of the 'civil and political', but compartmentalising stifles meaningful discussion on the subject and hinders fuller engagement of, and acknowledgement of the correlations and nuances between both sets of rights in the real world of children's everyday lives. Civil rights encompass 'protectionist rights', which in turn guard against discrimination of the individual or the group. Such discrimination can be referenced to ethnicity, race, religion and colour; gender, sexual orientation, disability and in this study, arguably – age. Civil rights also incorporate the individual's right to privacy, to freedom of expression and association; examples of such being religious adherence, speech, assembly and movement.

Political rights, for the purposes of this study, incorporate the right of participation and though these 1<sup>st</sup> generation rights were drafted with a view to enabling 'adults' in political and civil engagement they are now employed in the serving the attainment of children and young people's rights. An illustration from

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<sup>142</sup> Scottish Government, 'The Socio-Economic duty, A Consultation' (2017) <<https://beta.gov.scot/publications/consultation-socio-economic-duty/>> accessed 31<sup>st</sup> July 2017.

Scotland is given by way of the recent empowerment of young people 16 years old and above to vote in Scottish local elections.<sup>143</sup> One of the plaudits of the CRC and the topic of generational rights, is that it claims to be the first international human rights instrument to incorporate both 1<sup>st</sup> and 2<sup>nd</sup> generation sets; that it provides for civil and the political freedoms (to degrees), as well as accommodating the economic, social and cultural, as detailed in its substantive articles and general principles thereof.<sup>144</sup> However, the CRC is not as definitive in such inclusion, as observed by Hodgkin and Newell,

*‘Neither the Convention itself nor the Committee defines which of the articles include civil and political rights and which economic, social or cultural rights. It is clear that almost all articles include elements which amount to civil or political rights’*<sup>145</sup>

### **1.7.3 Waiving freedoms for a civil society: the ‘social contract’ and the child**

The idea of relinquishing select freedoms for the promise of wider protection is as old as time itself. However, it was not until the 17<sup>th</sup> and 18<sup>th</sup> century that the philosophical debate on the theory of ‘social contract’ was popularised. The eminent political theorists of that time were Hobbes, Locke and Rousseau,

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<sup>143</sup> Scottish Elections (Reduction of Voting Age) Act 2015 asp 7.

<sup>144</sup> United Nations Convention on the Rights of the Child, *The right to health*, art 24; *The right to social security*, art 25; *The right to an adequate standard of living*, art 27; *The right to education*, art 28; *The right to protection from economic exploitation*, art 32.

<sup>145</sup> Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007) 627.

amongst others,<sup>146</sup> and coming from a nuanced angle concerning ‘social contract’ theory, their combined philosophies explained the fundamental logic which lies behind individuals handing over power to a higher authority, political and organised. In Hobbes’ case, he desired the preservation of a divinely appointed ‘sovereign’.<sup>147</sup> That form of social contract, forsaking certain freedoms, was presented as beneficent for the individual and for society; the greater good. It is an effective system, provided the majority individual and group purpose are served. That purpose is usually personified as the individual and collective desire to live in peace and prosperity, in a civil society. It is however, a constructed and controlled environment, the antithesis of nature and its volatility. A social contract may be subtle or frank; fair or partisan; objective or subjective, but it will always be a highly debated construct. However, waiving one’s freedoms in abeyance to established normative frameworks, for the benefit of living in a civil society can only be predicated on entitlement; the ownership of rights and acknowledgment of one’s agency by society. But not ‘all’ individuals are entitled citizens, and this includes minority and/or vulnerable groups within our society, specifically children and young people for the purposes of this study. Whilst each child and young person will adopt and display different levels of agency, capacity and adroitness, societies have denied them ‘ownership’ of rights. As individuals and a group, they are still devoid of the opportunity to consent or dissent in the surrender of what freedoms they have been afforded; instead, the state and the family unit, the public and private entities assume guardianship over them within

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<sup>146</sup> Thomas Hobbes, *Leviathan*, (1651); John Locke, *Two Treatises of Government* (1689); Jean-Jacques Rousseau, *The Social Contract* (1762).

<sup>147</sup> Thomas Hobbes, *Leviathan*, 1651.

constructed normative frameworks. This denies the child his or her moot inherent 'natural rights', failing to acknowledge their capacity as autonomous agents; until such times as the constructed 'normative frameworks' adult acolytes acknowledge a child's maturation.

That 'normative frameworks' are conceived and implemented for the purposes of protecting our children and young people is palpable, but not all protectionist and preventative laws, policies and practices are effective in those aims and that is an on-going public issue. Such protectionist laws, policy and procedures are to be found within the historic service areas of health, welfare and education, but are not limited to same. Where children and young people, particularly Looked after and accommodated Children (hereinafter referred to as LAAC) and aligned services are concerned, the public is often confronted with a questionable journalistic narrative. By that, reference is made to popular media coverage often focussed on catastrophic protectionist failures by authorities. This is illustrated by reference to high profile cases, and the death of some of our most vulnerable children.<sup>148</sup>

Such incidents and the media reporting of same, are for the most part in the public interest. However, there definite line between informative narrative and sensationalist feature. Often, the ethical and moral considerations are disregarded, with the result that asinine reporting has the propensity to convince the public that current protectionist models (in social, health and education) are weak and

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<sup>148</sup> Baby Peter Connelly (2007 London); Victoria Climbié (2000 London); Holly Wells and Jessica Chapman (2002 Soham), Liam Fee (2014 Scotland).

ineffectual.<sup>149</sup> This provokes societal ‘knee jerk’ responses which can include politically questionable propositions, calling on the extended surrender of individual freedoms over to the state, our ‘*parens patriae*’. The notion that early intervention by state institutions (facilitated by state powers) will prevent cases of cruelty and death upon vulnerable children is also partisan and naïve. Institutional abuse in state sanctioned premises is sadly, not uncommon, no more so than instances of abuse within private family units. Reactionary models for ‘apparently’ greater protection of children and young people (diminishing or discounting the ‘prevention’ concept) often fail to take account of their autonomous agency and their capacity to participate. Within the sensitive and emotive landscape of child protection and welfarism, distressing and affective stories can drive populist opinion and policy and encourage policies which are both protectionist and punitive, ostensibly further marginalising this vulnerable group.

#### **1.7.4 State intervention too far into the private domain? -welfare - A case in point**

The private domain of the family and the extent to which the state, its authorities and its agents are lawfully entitled to reach into that domain can be a contentious issue. When does such intervention say, premised on the principles of protection, prevention and participation of our children and young people become an

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<sup>149</sup> Hobbes was dismissive of the ordinary man’s capacity to make rational decisions for himself. The ordinary man had to be governed, for his own preservation and that of an established civil society. This civil society would be governed by higher political authority and of course, God’s anointed sovereign. Locke, influenced by religious dogma also doubted the ordinary man’s ability to self-govern with ostensible goodness and rationale, but he clearly favoured organised government. Rousseau was markedly different because he had faith in his fellow common man, his capacity for good; that the individual could make a rational choice, given the opportunity.



unwarranted interference, an intrusion? The answer is of course dependent upon one's viewpoint and subjective take on the matter in question. However, examples of evidenced interference and intrusion by state agents continue to take place.<sup>150</sup>

If we accept for the time being that the welfare of the child is paramount, that the child should be protected via preventative edicts and measures, then we must also acknowledge the power of the state, and its edicts. The welfare principle is an arguably protective and powerful concept when applied in law. For example, if a parent or guardian commits an act/or omits to act in circumstances which place a child in danger, to the detriment of their welfare, the State will intervene on that child's behalf. It will do so by triggering its agents to act in the enforcement of protectionist legislation. A very interesting piece of child centred legislation drafted for the purposes of protecting the child's health is the 'Smoking prohibition in motor vehicles Act' 2016 (hereinafter the SPMV A 16).<sup>151</sup> This piece of devolved law aims to prevent children and young people from being subjected to preventable 'secondary smoke inhalation' in private vehicles.<sup>152</sup> It would be fair to state that there is no shortage of research and NGO lobbying which publicly

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<sup>150</sup> This is asides examples in law where public authorities have been found to have acted illegally, as say in the removal of children from their homes; given by reference to the overzealous actions of individual agents in the Orkney scandal of the 1980's. At other times, public authorities have failed to act, resulting in the arguable preventable deaths of children.

<sup>151</sup> Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016, asp 3, Royal Assent on 21st January 2016, '*An Act of the Scottish Parliament to prohibit smoking in private motor vehicles in the presence of children, subject to limited exceptions; and for connected purposes*'.

<sup>152</sup> The child is defined by reference to the Age of Legal Capacity (S) Act 1991 s 1, as '*being 16 years or under (qualified)*'; The legal interference with the use and ownership of a motor vehicle is obviously conditional upon the commission or omission of an act or acts which constitute an offence or a crime. These include, but are not limited to stop, search and seizure of property. For example:

- Road Traffic Act 1988, 1988 c52 s 163 *Power of police to stop vehicles*;
- Misuse of Drugs Act 1971 c38 Law enforcement and punishment of offences s 23 (2) (b) (c).

informs, confirms and hammers home the dangers of exposure to primary and secondary smoke inhalation.<sup>153</sup> However, this legislation could be interpreted as state encroachment into what is 'on the face of it', a life choice. If competent adults have chosen to smoke in their private motor vehicles, as they do in their private dwelling, then the state surely has no right to dictate, legislate or interfere with our choice. Or does it? The child's welfare and right to be protected from secondary smoke inhalation appears to have triumphed, amid concerns of state interference in the citizen's private life. Whilst this applies to motor vehicles, neither Westminster, or the UK's devolved governments have plans to encroach into the realm of habitual residences; not yet. However, the case for further inroads is strong, though volatile because a baby or a young child cannot object to secondary exposure to smoke in a private dwelling. That stated, the rights of the child to a safe and healthy environment, coming as it does under the welfare concept (and wellbeing), is clearly being upheld by the state. We could conjecture that the legislation, to some extent, also fulfils elements of Article 24 of the CRC.<sup>154</sup> It is argued that this may also fulfil the terms of Article 19 of the CRC, certainly in respect of secondary smoking inhalation in private vehicles.<sup>155</sup>

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<sup>153</sup> Action on Smoking and Health, Ash Scotland, *Taking action on smoking and health*, <<https://www.ashscotland.org.uk/>> accessed February 18<sup>th</sup> 2018.

<sup>154</sup> United Nations Convention on the Rights of the Child, 1989, Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health.

<sup>155</sup> United Nations Convention on the Rights of the Child, 1989, Article 19

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.* 2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

The health and welfare rights of children and young people who are limited in their ability to fully and effectively participate and consent (or dissent) has become a pressing concern for the legislature, as demonstrated by the interventionist SPMV A 16. Children and young people clearly have rights in respect of their health and welfare and they should be readily able to 'voice'; their views heard and respected and their rights acknowledged, with the aid of an advocate or other supporter. That of course, may require further moot interventionist rights legislation. Whilst the SPMV A 16 is a commendable piece of law, it still comes more than 10 years after another piece of related legislation, the 'Smoking, Health and Social Care (Scotland) Act 2005'. Another interventionist statute, driven by health and (arguably) economic concerns, it has effect and coverage over premises and places of work to protect the public. However, at no point does that piece of law make specific reference to children. It can only be inferred that children and other vulnerable groups are catered for by reference to premises, '*which are being used wholly or mainly for the provision of education or of health or care services*'<sup>156</sup> We have to continually remind ourselves that children are our most valuable assets, but they are also vulnerable members of society and they should not be an afterthought.<sup>157</sup>

The circumstances in which the State encroaches into the sacrosanct private life of individuals and families will continue to be hotly debated. We might even question whether a motor vehicle is more than just a personal conveyance,

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<sup>156</sup> Smoking, Health and Social Care (Scotland) Act 2005, Part 1, s 4 (d).

<sup>157</sup> Smoking, Health and Social Care (Scotland) Act 2005, Part 1, asp 13, *The Bill for this Act of the Scottish Parliament was passed by the Parliament on 30th June 2005 and received Royal Assent on 5th August 2005, 'An Act of the Scottish Parliament to prohibit smoking in certain wholly or substantially enclosed places;*'.

that it is in fact an extension of an individual's domicile; hypothesise that extended protection of the vulnerable and marginalised child from secondary smoke inhalation justifies controversial interventionist legislation and the control of adults in their homes. Yet, we must consider the very real circumstances for many children whose health is at risk due their being unprotected and arguably ignored by adults in their own homes. The very young and sick do not have the option of removing themselves from the physically damaging environment they are domiciled in, through no choice of their own.

## **1.8 Models –strategies and tools emphasising participation**

### **The example of joint protagonist or coprotagonism**

Cusiianovich and Muñoz's research into indigenous native children's participation in their communities is elucidating because the culture observed was obviously divergent with our own.<sup>158</sup> We are informed that the indigenous people in that study embraced their children as capable autonomous agents and that childhood was nourished and valued. Marginalisation was 'on the face of it' non-existent. We could say that this alternative attitude towards children and young people is a 'status quo' because the normatives of that indigenous society have remained largely unaffected by external cultures and the modern world (West and East). The indigenous child was exemplified as being 'in charge of itself' whilst living in a state of mutual co-operation with adult members the community. That would mean that they had equal stake in their community. An interesting term provided

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<sup>158</sup> Cusiianovich (n 94).

by the authors is coprotagonist, ie joint protagonist. As a philosophy, coprotagonism arguably results in the conscious 'self-worth' of all individuals, children and young people included and this benefits the whole community. Therefore, coprotagonism recognises and enables children's political participation.<sup>159</sup> Cusiianovich and Muñoz's indigenous group found coprotagonism effective, but that success is probably the result of some fundamental factors specific to that indigenous group. One of these factors is that group's isolation. Another is the length of time (decades or centuries) during which this group have had opportunity to nurture their philosophy. Analytically and practically, the philosophy may serve the whole group's survival because children in subsistence communities will be expected to contribute to the community much earlier on than would be expected nowadays in the Western world. Another possible pre-disposing factor concerns close familial bonds, so prevalent in small isolated communities, ie blood ties, loyalty and dependence. On the other hand, there are arguably indigenous communities throughout the world that do not appear to value children and young people as autonomous political agents. They neither practice, nor espouse coprotagonism as their universal philosophy. This was highlighted by Van Beers in his critique of Vietnamese cultural attitudes towards the child as a participant in recent history.<sup>160</sup>

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<sup>159</sup> Cusiianovich (n 94) 2504.

<sup>160</sup> Henk van Beers, 'Exploratory assessment of the current understanding and level of children's participation among Radda Barnen's partners and relevant agencies in Ha Noi and Ho Chi Minh City Viet Nam', April 2000;  
See also: Henk van Beers 'and others', 'Creating an enabling environment, Capacity building in children's participation, Save the Children Sweden, Viet Nam, 2000-2004'  
<[https://www.crin.org/en/docs/seap\\_vietnam\\_environ.pdf](https://www.crin.org/en/docs/seap_vietnam_environ.pdf)> accessed 18th March 2018.

The coprotagonist concept is compelling, but our society would have to be further convinced as to its merits. It is argued that it is currently, an unlikely model for transplantation, though the philosophy is sound and lends itself to incorporation into domestic policy and micro practices. As a holistic philosophy, it has multifarious possibilities, applied and melded with the welfare concept and children's rights. In decision making processes, coprotagonism is an attractive philosophy and increase a child's confidence as an active and equal participant. However, it will not completely mitigate the mechanism of an advocate (or other supporting role), not for some time to come.<sup>161</sup>

### **1.8.1 Politicising the child and young person**

It could be argued that participation in a procedure is a political act, but political participation is subtler and more nuanced than that statement suggests. We could say that the political child has emerged in our society (in part) as a direct result of welfare concerns and current societal efforts to set right the wrongs of the past. Whilst socio-economic circumstances may be a prompt for many to act; a catalyst for initial political participation, the 'act' of participating falls under the sphere of the civil and political. The CRC may refer to both sets of rights in its substantive article, but political rights in the European dimension are considered through the European Convention on the Exercise of Children's Rights and to some extent, the

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<sup>161</sup> We could argue that coprotagonism takes place at committee level, within local and central government, which includes young people's representation. This is the most obvious example of political participation of this young group.

European Social Charter.<sup>162</sup> Political participation can manifest directly and indirectly, actively and passively and the utilisation of the advocate or other supporter in a decision making process for a child invokes both. It also depends on the individual child, their confidence and their capacity, but irrespective of the direct or indirect manner, the child is still a participant within the wide ambit definition of the participation concept. At the state level, ie devolved Scottish Government, the politically participating child is afforded consideration via devolved statute (as is demonstrated throughout this study), in addition to representation by their peers. An example of such direct and active political participation can be illustrated by reference to youth representation in local and central committees, such as the Scottish Youth Parliament.<sup>163</sup> A more recent example of extended political agency of young people is their being afforded the facility to vote in Scottish local elections;<sup>164</sup> a political micro act in a macro political system. However, it is the law which dictates the parameters of the democratic act and sets the physical age of determination. Individual capacity and competency are not a part of the equation. Lindley, in respect of the autonomous child, stated that many 14 year olds would be deemed fitter individuals to exercise

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<sup>162</sup> Council of Europe, European Convention on the Exercise of Children's Rights, ETS No.160, adopted on 5<sup>th</sup> January 1996. Even though the UK has yet to become a signatory to and thereafter ratify the treaty. Correct as of June 2018;  
Council of Europe, European Social Charter, (revised), CETS No. 163, adopted on 3 May 1996. Again, the UK has yet to ratify this charter. Correct as of June 2018.

<sup>163</sup> Pupil Council representatives: There are two young person's representatives on Moray's 'Children and Young Person's Committee' – There are also two representatives from Moray in Scotland's 'Scottish Youth Parliament'. Elgin Youth Café, for example, also provides facilities for groups thereof, including the Moray 'Children and Young Person's Committee'. The Patients Participation group for NHS Grampian, Elgin, does not prohibit representatives from this young group, but as of January 2018 there were still no young representatives on that participation group.

<sup>164</sup> Scottish Elections (Reduction of Voting Age) Act 2015 asp 7.

a 'vote' over large swathes of the populations less than competent adults; with the effect that the latter could be left politically and socially powerless, or at the very least, weakened.<sup>165</sup> That stated, Lindley acknowledges that on occasion, compelling decisions will have to be taken by authority, on behalf of children and young people, but that this can be effected without necessarily restricting that young person's autonomy, or their inherent liberty.<sup>166</sup> Throughout this study, the reader will see examples of nuanced political activity and opportunity, whilst generalist active and passive participation is critiqued in respect of the theoretical and the empirical.

### **1.8.2 Political volunteerism**

Patrikios and Shephard's post experiential examination of the Scottish Youth Parliament model, found it to be a channel for positive engagement of young people in our political system.<sup>167</sup> An interesting concept brought out by the authors, which involved engagement and participation was 'political volunteerism'. The authors stated that it was essential for the sustainment of, '*...a healthy democratic regime.*'<sup>168</sup> Political volunteerism is a compelling concept because it appears to encapsulate the real meaning of engagement and participation in a process, in respect of both the individual and the collective

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<sup>165</sup> Richard Lindley, *Autonomy* (Springer 1986) 125.

<sup>166</sup> *ibid* 117-118.

<sup>167</sup> Stratos Patrikios and Mark Shephard, 'Representative and Useful? An Empirical Assessment of the Representative Nature and Impact of the Scottish Youth Parliament' (2013) 20 *Journal of Legislative Studies* 236.

<sup>168</sup> *ibid* 251.



experience. Though naturally premised at the macro political level, it also has meaning at the micro level, in the localised decision making procedures because it is also premised on democratic enablement and choice.<sup>169</sup>

### **1.8.3 The Capability Approach: A practical philosophy in children and young people's participation in decision making processes?**

The last paragraph referred to the enablement and choice in regards children and young people's political activism. This in turn led to consideration of the 'capability approach' and its emphasis on wellbeing. That correlates with the freedom to choose; the accommodation of individualism, as well as an acknowledgment of the complexity of welfare concepts.<sup>170</sup> Whilst the capability approach started out as an economic theory, it has developed beyond its original boundaries. It has influenced the advancement of universal policies and one of these is the UN's Human Development Index (hereinafter HDI).<sup>171</sup> The capability approaches theoretical underpinnings have also been applied to and developed within the humanities and

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<sup>169</sup> So far as the organisation TOGETHER is concerned, it has stated that children should have been involved in the formation of Scotland's National Action Plan, as possible participants; that Scotland's National Action Plan should be viewed as a, '*...conduit through which further actions relating to children's human rights can be taken forward*', State of Children's Rights by Together (Together SACR 2016) <<http://www.togetherscotland.org.uk/pdfs/TogetherReport2016.pdf>> accessed 2<sup>nd</sup> December 2018 (22);

Scotland's National Action Plan for Human Rights (SNAP 2017) <<http://www.snaprights.info/>> accessed 2<sup>nd</sup> December 2018.

<sup>170</sup> Nussbaum (n 114).

<sup>171</sup> United Nations Development Programme, Human Development Reports, '*The HDI was created to emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone. The Human Development Index (HDI) is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living. The HDI is the geometric mean of normalized indices for each of the three dimensions.*'

<<http://hdr.undp.org/en/content/human-development-index-hdi>> accessed 13<sup>th</sup> February 2018.

the social sciences; both for study and real-time application. That application could be described as a form of ‘social justice’ in action, but the following citation articulates the premise of the approach in a theoretical framework, in that it, *‘...entails two core normative claims: first, the claim that the freedom to achieve well-being is of primary moral importance, and second, that freedom to achieve well-being is to be understood in terms of people’s capabilities, that is, their real opportunities to do and be what they have reason to value’* <sup>172</sup>

Sen described the ‘agent’ as an actor, ie an individual who acts to alter their circumstances; their attainments measured against their own objectives and principles.<sup>173</sup> The former element of that certainly applies to children and young people. The latter part, regarding the measurement of their attainments, pitted against personal objectives and principles is more concerned with the individuals whose objectives and principles are set by their limited knowledge, experience and opportunity. Annas, critiquing the honesty of normatives between men and women’s experiences and quality of life, discussed ‘desires’ which had a convincing equation with goals, objectives and even principles. *‘For peoples desires can be in large part formed by the circumstances and options that they perceive as being open to them. (The point holds across different conceptions of what desire is). In societies in which the options open to them are fewer than those open to men, it has always been a common adaptive strategy for women to adjust their desires to what they can*

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<sup>172</sup> Ingrid Robeyns, Edward N. Zalta (ed), ‘The Capability Approach’ (Winter 2016) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/archives/win2016/entries/capability-approach/>> accessed 13<sup>th</sup> February 2018.

<sup>173</sup> Amartya Sen, *Development as freedom* (Oxford University Press 2001).

*realistically expect.*'<sup>174</sup> If women, in certain circumstances and cultures adapt their desires because of their diminished circumstances, then we can hypothesise that children and young people do the same and arguably, they are a less a privileged group.

#### **1.8.4 The CRC as a workable transplant**

Implementation of the CRC treaty tenets in the UK's four nation States has taken place, but to moot degrees. This is because of variances in its interpretation, adoption and application within the four nation states and those variances influenced by several constituent factors. The main factor which affects the manner of CRC tenet implementation in the UK is the lack of direct transplantation into Westminster legislation. An example of direct implementation is given by way of reference to the ECHR, via the HRA 98. However, the nation state which has (arguably) come closest to 'grafting' the substantive tenets of the CRC into its domestic law and regulation is Wales, via its devolved Welsh Assembly. The elected members of the Assembly are obliged to give due consideration to the CRC tenets in respect of any Welsh legislation to be passed by that assembly, in addition to any administrative matters relative to the function of their office. Whether this could be interpreted as a circumvention of centralised UK government by the devolved assemblies/parliaments, is a moot point. However, even in the absence of a robust examination of Welsh primary authority in this

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<sup>174</sup> Julia Annas, 'Women and the Quality of Life: Two Norms or One?', in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford Scholarship on-line 2003) 282.  
<<http://www.oxfordscholarship.com.ezproxy.rgu.ac.uk/view/10.1093/0198287976.001.0001/acprof-9780198287971-chapter-3>> accessed 20<sup>th</sup> January 2018.

study, it still makes for a compelling discussion from the point of view of legal precedence. That stated we can still discuss the cogency of the CRC as a treaty fit for direct transplant into domestic laws, albeit the Scottish experience could be described as emotive, even fractious. For example, Norrie stated that the CRC treaty is not an enforceable piece of law because of the manner and the method of its drafting, which was unlike the ECHR which, *'...has a whole judicial process behind it to tell us what it means, how to resolve its ambiguities and how to balance its conflicting principles.'*<sup>175</sup> Sutherland however, disagreed with Norrie's views. She is convinced that the CRC was crafted with care and resoluteness, over a ten-year period by committed experts, whose intention was that it should, *'...lead to substantive rights for children and young people around the world.'*<sup>176</sup> However, the caveat is that Sutherland did not go so far as to advocate 'direct transplantation'. Instead, she suggested that each state must make their own decisions on how it should implement the CRC's substantive rights.<sup>177</sup>

### **1.8.5 Ethical praxis as a worldwide enabler vs one universal treaty**

Stride-Damley made commentary on the CRC as a workable treaty, with laudable core values that can be employed in the navigation of complex cultural and

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<sup>175</sup> Scottish Government, 'Education and Culture Committee Children and Young People (Scotland) Bill' (Submission from Professor Kenneth Mc K Norrie, 69, 3 August 2013)  
<[http://www.parliament.scot/S4\\_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/NorrieProfKennethMcK.pdf](http://www.parliament.scot/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/NorrieProfKennethMcK.pdf)> accessed 18th January 2018.

<sup>176</sup> Scottish Government, 'Education and Culture Committee Children and Young People (Scotland) Bill' (Submission from Professor Elaine E Sutherland, 2, 28 October 2013)  
<[http://www.parliament.scot/S4\\_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/Elaine\\_E.\\_Sutherland.pdf](http://www.parliament.scot/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/Elaine_E._Sutherland.pdf)> accessed 1<sup>st</sup> December 2018..

<sup>177</sup> *ibid.*

political types and frameworks.<sup>178</sup> This may be the case, but Stride-Damley's opinion is not necessarily shared by all, not even by Hartas whose work he reviewed. Hartas has proposed an alternative to the universal deployment of the arguably limited CRC. This alternative is the 'Ethical Praxis'.<sup>179</sup> This hypothesis states that reliance on one specific children's rights treaty or child rights law, ie a '*universal code of conduct*' is insufficient. It cannot work as a 'stand-alone' method; not if we desire to see full and meaningful realisation of children's rights at a global level. The adoption of a universal code, the CRC or another universal code is too idealistic and for Hartas, rendering it unattainable. The proposition of an 'ethical praxis', ie the practice of morality as principle is Hartas's alternative and would enable children to become, '*moral and social agents who understand their shared world with its global and local dimensions. ...what is common and what is different...*'<sup>180</sup> This is an appealing proposition, given the somewhat serpentine reality of the crowded nation states on our planet; each with cultural, religious and political agendas. The ethical praxis appears to offer a solution to diverse issues and concerns. An example solution is the universal acknowledgment of each State and its individual normative frameworks; that each state will adopt the concept of ethical praxis in its own governance. Hartas' vision of children and young people becoming the moral and social agents is thus compelling. The idea that such a workable and universally employed philosophy could possibly lead to the eventual

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<sup>178</sup> Ben Stride-Damley, 'Book review: Hartas, Dimitra. (2008) *The Right to Childhoods: Critical Perspectives on Rights, Difference and Knowledge in a Transient World* (Continuum Studies in Education)' (2010) 17 *Childhood* 568.

<sup>179</sup> Dimitra Hartas, *The Right to Childhoods* (Continuum 2011).

<sup>180</sup> *ibid* 125-126.

acknowledgment of a universal code; whether that be the adoption of the CRC and its tenets or a code yet to be written, is persuasive.

#### **1.8.6 Charters for the meaningful participation of the child- Child**

##### **Centredness and Impact Assessments**

The idea of the child at the centre of a process conjures up images of welfarist (protectionist) premised practice, their wellbeing and best interests arguably following suit. However, the application of child centredness is not, and should not be associated with solely welfarist tenets and processes. It is an attractive and malleable philosophy which has the potential for wider application in the public and private arena. It is imbued with fairness, respect and dignity and should be emphasised, as a primary pivot in decision making processes where the child is the impetus for its triggering. To be fair, many procedures, judicial and quasi-judicial, usually in the arena of child and family law already consider the child 'a' central player and 'a' point of focus. Crucially though, the child is not 'the' central player or 'the' point of focus. This is the 'status quo' and whilst it is prevalent in preventative and protective procedures and policies directed by statute, it is common place in non-statutory premised practices such as the LIAP procedure and its successor the Child Planning Meeting. An archetype advancing child centredness in 'all' decision making procedures (statutory and non-statutory) would include in its format, the engagement and active participation of the child or young person, amongst other positive obligations concurrent with the philosophy. This brings us onto the function of the 'Child Rights Impact Assessment' and the 'Child Rights and Welfare Impact Assessment'.

The method by which a policy and or practice is appraised in respect of its ‘child rights’ compliance is often conducted via such assessments. More commonly titled Child Rights Impact Assessments, they are a tool which the CRC cites as essential for the continuous appraisal of all enacted law and policy; to gauge the efficacy and impact of current and future policy, practice and legislation.<sup>181</sup> An example of their employment is given by reference to the devolved Welsh assembly.<sup>182</sup> The measures taken and agreed by the devolved Welsh assembly since 2012 in respect of such considerations are both ambitious and impressive. However, the caveat is that deployment of their Impact Assessment only applies to ‘Welsh Ministers’,

*‘...to have **due regard** to the requirements of the Convention on the Rights of the Child when exercising any of their functions. They must have due regard to the CRC when making decisions on legislation, formulation of new policy and making changes to existing policy’<sup>183</sup>*

That stated, such is the progressiveness of the Welsh assembly in this area, that further devolved legislation, the Social Services and Well-being (Wales) Act 2014, has now taken duties beyond Welsh Ministers and extended it as follows, to:

*‘(a) require persons exercising functions under this Act to seek to promote the well-being of people who need care and support and carers who need*

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<sup>181</sup> An example resource on ‘Monitoring and Evaluating Children’s Participation’ (comprising 6 booklets in total) has been available, for free, from Save the Children since 2014; See: Gerison Lansdown and Claire O’Kane, ‘A Toolkit for Monitoring and Evaluating Children’s participation: Introduction. Booklet 1’, Save the Children, Resource Centre <<https://resourcecentre.savethechildren.net/library/>> accessed 18<sup>th</sup> February 2018.

<sup>182</sup> Rights of Children and Young Persons (Wales) Measure) 2011 s 1, which provides for (as a matter of routine) a systematic consideration of the CRC and its three OP’s in the advancement of all policy and legislation. It came fully into force on May 2014.

<sup>183</sup> Rights of Children and Young Persons (Wales) Measure 2011 s 1.

*support (section 5); (b) imposes overarching duties on persons exercising functions under this Act in relation to persons who need or may need care and support, carers who need or may need support, or persons in respect of whom functions are exercisable under Part 6, so as to give effect to certain key principles (section 6).'<sup>184</sup>*

In Scotland though, the CYP (S) A 14 is limited and limiting, because it only requires Scottish Ministers to cogitate; they need only,

*'a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and (b) if they consider it appropriate to do so, take any of the steps identified by that consideration.'<sup>185</sup>*

Whilst the Scottish Government has not made parallel progress compared to its Celtic counterpart, the Welsh Assembly, their record compared to the UK government is positive. That stated, as far back as 2006 the office of the Scottish Commissioner for Children and Young People (hereinafter SCCYP) and its first commissioner, Kathleen Marshall advocated the value and necessity of adopting such assessments via regulatory frameworks.

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<sup>184</sup> Social Services and Well-being (Wales) Act 2014, anaw 4 Part 1 Overview of this Act s 1 (a) (b); See also: Part 2 General Functions Overarching duties, para 11 '*The SSWWA provides that a person exercising functions under the Act in relation to children with needs for care and support, child carers with needs for support or looked after and accommodated children, must have due regard to the CRC.*'; Also, para 12, '*The direct reference to the Wales Measure and the extension of the duty to other public officials shows the practical impact that the original Measure has had in terms of influencing the development of legislation which has the potential to directly affect the rights of children in practice.*'.

<sup>185</sup> Children and Young People (Scotland) Act 2014 asp 8 Part 1 s 1 (a) (b) '*Duties of Scottish Ministers in relation to the rights of children*'.



*‘Child impact assessments are a tool for looking at decisions, practice, policy or legislation and identifying and measuring their effect on children and young people. They permit impacts to be predicted, monitored and, if necessary, avoided or mitigated.’<sup>186</sup>*

This was at a time when mandatory requirement was not called on by any devolved authority. The current elected devolved Scottish Government will argue that it does promote a Child Rights and Wellbeing Impact Assessment, but there is nothing binding in the CYP (S) A 14 to that effect.<sup>187</sup> The Scottish Government only state that it is,

*‘...a policy development and improvement approach used by Scottish Government officials from June 2015. It has been designed to help support Ministers in meeting their duties under Part 1 of the Children and Young People (Scotland) Act 2014, the ‘2014 Act’, and in relation to the Articles of the United Nations Convention of the Rights of the Child (UNCRC)....The CRWIA policy development and improvement approach has been made available for public authorities and children’s services to adapt for their own uses, if they wish.’<sup>188</sup>*

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<sup>186</sup> Laura Paton and Gillian Munro, *Children’s Rights Impact Assessment: The SCCYP Model* (CYPCS 2006) <[https://www.cypcs.org.uk/uploaded\\_docs/children%27s%20rights%20impact%20assessment.pdf](https://www.cypcs.org.uk/uploaded_docs/children%27s%20rights%20impact%20assessment.pdf)> accessed 9<sup>th</sup> February 2015; See p 39- 42 of the report for the ‘Child Rights Impact Assessment’ template.

<sup>187</sup> Children and Young Persons (Scotland) Act 2014 Rights of Children, *S.1 Duties of Scottish Ministers in relation to the rights of children, (a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and (b) if they consider it appropriate to do so, take any of the steps identified by that consideration.*

<sup>188</sup> Scottish Government, Child Rights and Wellbeing Impact Assessment (CRWIA), (2017) <<http://www.gov.scot/Topics/People/Young-People/families/rights/child-rights-wellbeing-impact-assessment>> accessed 18 August 2018.

If it has not been made sufficiently clear already, there is no legal obligation in Scots law for anyone, or any 'body' to implement a Child Rights and Wellbeing Impact Assessment, except for 'Scottish Government officials'; these officials being civil servants of the Scottish Government. With regards public bodies and those individuals employed directly by such bodies, the use of the phrase, '*if they wish*', denotes 'choice'; the absence of a mandatory obligation could not be any clearer.

#### **1.8.7 Monitoring the State's commitment to children and young people's participation**

The undisputed treaty, in so far as children's rights is concerned is the CRC. Having discussed the moot points of its suitability for 'direct transplantation' as a universal code and suggested alternative models which incorporates substantive articles of the CRC, ie ethical praxis, politicising and coprotagonism, we now look to committal by states. A State parties' ratification of the treaty is an obligation to abide by, and implement its tenets, usually within a generous margin of appreciation and liberal interpretation (excepting the substantive and explicit tenets). However, state parties to the CRC (as with all treaties) cannot always be relied upon to be precise or even timeous in their reporting to the CRC committee in respect of the measures they have implemented or pledged to undertake in fulfilment of their obligations. This is a significant issue and one which is all too familiar for the CRC Committee, which has bestowed a not unreasonable amount of faith and trust in state parties to comply. However, the CRC Committee have a trump card; they invite and welcome alternative submissions, ie alternative reports from within each state party. In Scotland's case, such submissions are

carried out by the umbrella NGO, Together, a body which will be discussed later in this study.<sup>189</sup>

The subsequent monitoring and evaluation of compliance, or the lack of, is overseen by a CRC appointed Special Rapporteur. On receipt of the Rapporteur's submissions in respect of a member state, the CRC Committee will cogitate and publish their Concluding Observations and recommendations. It must be stressed that the whole process is largely premised on diplomacy (perhaps even peer pressure?) and this makes the job of the CRC committee an unenviable one. They must employ statecraft in their supervision of a variety of cultural and political membership states. Whilst these member states are expected to produce reports timeously (many do not), castigation for late submission is rare. The reasoning for this may well be come down to the colossal task of administration, where UN instruments and their administering committees are under stress. The Council of Europe fares little better as it too is under administrative overload. This is a real problem, and if these bodies are struggling to monitor and evaluate the implementation of children's rights in individual states, then it leaves the system open to being taken advantage of. Part of the solution is to self-review and evaluate; robustly and successfully via the use of the rights and wellbeing impact assessments.

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<sup>189</sup> Scottish Alliance for Children's Rights, (Together) <<http://www.togetherscotland.org.uk/>> accessed 18<sup>th</sup> January 2018.

## **1.9 Conclusion**

The administrative issues that affect and are affected by state submissions will not be solved without a systematic re-evaluation of the submission and monitoring process. A substantial amount of funds would no doubt be needed to ensure that timeous and effective responses from state parties and committees become the norm. However, we could also question whether the hierarchical model of assessing state compliance is even reliable, ie the submission of a single report by a state every few years; granted, the adjunct wealth of alternative state reports provides a largely veritable source of positive and negative examples of CRC and Optional Protocol (hereinafter OP) implementations. The single submission and hierarchical model conveniently excuse top down bottom up ownership of rights responsibility and that responsibility includes implementation and review by all concerned parties. Those parties comprising not only the higher state bodies and their unitary authorities, but all stake holder agencies in the public and the private sphere. What we should also be asking is how, as a society, we take ownership of this issue; how do we implement and measure protective, preventative and participative tenets top down bottom up? What methodologies can we utilise in everyday business and in children's services? In the absence of 'black letter instruction' or as an addendum to same, we need to be able to monitor and evaluate children and the young person's participation and in doing so, expose marginalisation where it exists. One suggested tool which all authorities and agencies could employ (and many bodies have already done so, as it lends itself to adaptation), has already been mentioned and explained ie 'Impact Assessments'. These can be customised for adducing compliance with regards to children and young people's rights and adjunct concepts, in practice, at their core.

## **CHAPTER 2 Treaty, law and policy**

### **2.1 Introduction to ‘The United Nations Convention on the Rights of the Child’ (CRC)**

The drafting and eventual ratification of the CRC provides us with an opportunity to look back to the development and progression of what is commonly referred to as ‘children’s rights’ and the concept of childhood, over the last 100 or so years.

The arguably modern origins could be said to have commenced upon the formation of the International Labour Organisation (ILO) in 1919.<sup>190</sup> The adoption of the ‘Declaration of the Rights of the Child’ in 1924’ (also known as the Geneva Declaration of the Rights of the Child) was an arguably pivotal moment for children’s rights in the 20<sup>th</sup> century.<sup>191</sup> A welfarist charter, it was envisioned and drafted in part by Eglantyne Jebb in 1922, then fully drafted by Janusz Korczak and arrogated by the League of Nations.<sup>192</sup> The Declaration was concerned with children’s economic and social protections, but less so their autonomy and self-expression. This is unsurprising given the historical context of the time, with its prevailing protective and limiting attitudes towards children, childhood and rights. The distress and suffering experienced and endured by children who were a

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<sup>190</sup> The ILO was formed in 1919 as an edict of the Treaty of Versailles and the League of Nations, following the cessation of hostilities after WW1 with the defeat of the German Empire and its allies. One of the ILO’s earliest labour conventions was the provision of a minimum age in the employment of young people; as well as rules on working nights; See the following website: <<https://www.ilo.org/global/lang-en/index.htm>> accessed 17<sup>th</sup> June 2018.

<sup>191</sup> Geneva Declaration of the Rights of the Child, Adopted 26 September 1924, League of Nations, OR UN Documents, ‘Geneva Declaration of the Rights of the Child’ <<http://www.un-documents.net/gdrc1924.htm>> accessed 17th March 2018.

<sup>192</sup> Eglantyne Jebb, 1876-1928, founder of Save the Children.

silenced group, irrespective of the atrocities inflicted upon them because of war, was a catalyst for the drafting of the 1924 charter. Its tenets have been described as ‘special safeguards’ and appear to have had wide support.

1. *The child must be given the means requisite for its normal development, both materially and spiritually.*
2. *The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.*
3. *The child must be the first to receive relief in times of distress.*
4. *The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.*
5. *The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.*<sup>193</sup>

In his critique of the 1919 Moscow Declaration on the Rights of the Child, Liebel described the 1924 statements as having, ‘... *laid the groundwork for continued efforts towards children’s (political) participation and the recognition of children as citizens with comprehensive rights of their own.*’<sup>194</sup>

That declaration may have had brief tenure, but it was an emancipatory document. Liebel brings it out of the shadows of an earlier Soviet Russia era,

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<sup>193</sup> Geneva Declaration of the Rights of the Child, Adopted 26 September 1924, League of Nations, OR UN Documents, ‘Geneva Declaration of the Rights of the Child’ <<http://www.un-documents.net/gdrc1924.htm>> accessed 17th March 2018.

<sup>194</sup> Manfred Liebel, ‘The Moscow Declaration on the Rights of the Child (1918), A Contribution from the Hidden History of Children’s Rights’ IJCR, 24 (2016) 3.

enlightening and informing his reader. In so doing, he acknowledges a lost declaration, which was a definitive example of political and social emancipation of children and childhood; where they [children] were recognised by the state as autonomous and participative agents, at least in theory. In comparison with the protectionist/welfarist Geneva declaration (as adopted by the League of Nations), the Moscow Declaration must have seemed incendiary in some circles. A short example of one of its 17 principles would confirm this:

*‘The child is equal to the adult, of-age person in freedoms and rights at all ages. If some rights are not realised by the child, this must be solely due to the lack of the necessary physical and mental abilities. If these are not lacking, age may not be an obstacle to the use of these rights.’<sup>195</sup>*

Abhorrence of war has never abated, but despite the horrors we are a species still drawn to conflict, and trepidation of further savagery after the ‘Great War’ failed to halt future national and international conflicts. This culminated in another ‘world war’ not 21 years after cessation of WW1 hostilities. However, even in the throes of those hostilities, some allied States sought to promote and re-affirm the need to protect and attend to the welfare of vulnerable children; perhaps in preparation for a ‘new’ world to come? An example of such a measure was the 1943 ‘Children’s Charter for the Post-War World’, as detailed by Van Bueren.<sup>196</sup>

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<sup>195</sup> Liebel (n 194) 4:

Liebel does not advocate for an absolutist re-enactment and transplantation of the Moscow Declaration into domestic law, but he does encourage the reader to open their minds to the concept of children as rights holders; that they can positively contribute to and influence society, as ‘active subjects’.

<sup>196</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1998) 9.

The once optimistically charged but broken 'League of Nations' fell to pieces in the last years of WW2 and was ultimately succeeded by the newly formed United Nations in 1946. In direct response to the repugnance of yet another world war and the detritus of its aftermath, the United Nations set up what we now know as the United Nations International Children's Emergency Fund (hereinafter referred to as Unicef). As the title states, the goal was simple; to address the immediate welfare needs of millions of European children, specifically their health, welfare and then education. Not 13 years later, the welfarist tenets of the 1924 Declaration were recognised in the UDHR; thereafter adopted and expanded upon in 1959 with the 'Declaration of the Rights of the Child' and its 10 guiding principles.<sup>197</sup> It is in this 1959 document that the more modern idea of the child as a holder of rights was mooted, though it was still predominantly welfarist and thus protectionist, *'Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,...'*<sup>198</sup> It was still just declaratory though, and as such States could not be compelled or bound by it. However, the intent was clear, because it called upon,

*'... parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these*

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<sup>197</sup> Declaration of the Rights of the Child, [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959; *'Whereas the need for such special safeguards has been stated in the Geneva Declaration of the Rights of the Child of 1924 and recognized in the Universal Declaration of Human Rights and in the statutes of specialized agencies and international organizations concerned with the welfare of children, .... Whereas mankind owes to the child the best it has to give, ....'*

<sup>198</sup> Declaration of the Rights of the Child, [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959.



*rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles.’*<sup>199</sup>

It was the 1959 ‘Declaration on the Rights of the Child’ which can confidently be stated as the inspiration for the CRC, though we must also acknowledge that its protectionist tenets came from an earlier era. In that regard, Van Bueren has pointed out that the 1959 Declaration was still, ‘...*silent about the civil and political rights of children.*’<sup>200</sup> Twenty years after the 1959 Declaration’s introduction, the Polish government made proposals to the ‘United Nations Human Rights Council’, that the aspirational and inspiring tenets of the 1959 Declaration be recognised in the form of a binding treaty.<sup>201</sup> However, as has been pointed out by Grant and Sutherland, ‘*The drafting of the Convention did not get off to a good start.*’<sup>202</sup> One of the main issues with which the ‘working group’ had to navigate, was the highly debated issue of childhood and how that should be defined. The concept of childhood, and its application is discussed in this thesis, but at the time of drafting the CRC, many state parties were very concerned about the practicalities and the effect a ‘standard definition’ would have on their individual cultures and societies. The definition that was mooted, concentrated on

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<sup>199</sup> Declaration of the Rights of the Child, [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959.

<sup>200</sup> Van Bueren (n 196) 13.

<sup>201</sup> The United Nations Commission on Human Rights was established in 1946. Its function, the creation of what it still, ‘... *the international legal fabric that protects our fundamental rights and freedoms.*’, amongst other things, including a ‘forum’ where States, NGO’s and other bodies may come to voice <<https://www.ohchr.org/en/hrbodies/chr/pages/commissiononhumanrights.aspx> > accessed 28<sup>th</sup> June 2018; The bodies title was altered to, ‘The United Nations Human Rights Council’ in 2006.

<sup>202</sup> John P Grant and Elaine E Sutherland, ‘International Standards and Scots Law’, in Alison Cleland and Elaine E Sutherland, *Children’s Rights in Scotland* (3<sup>rd</sup> edn, Green 2009) 49.

what constituted the beginning of, and the end of childhood, ie the ‘age of majority’. Whilst most states were satisfied with proposals that the beginning of childhood would only commence upon a ‘live birth’, others were not so supportive, and they resisted. This was, and still is a contentious and emotive topic and there was a degree of acquiescence, on both sides.<sup>203</sup> For example, Senegal proposed the following text as a possible Article 1 for the CRC:

*‘According to the present Convention a child is every human being, **from his conception** until at least, the age of 18 years unless, under the law of his State, he has attained the age of majority earlier.’*<sup>204</sup> The Senegalese proposal was considered by the 1989 Working Group, but was dismissed, albeit it had been seconded by the State of Malta whilst being supported by the then observer of the Holy See.<sup>205</sup>

### 2.1.1 The format of the CRC

The CRC comprises 54 articles, four of which are considered crucial to the realisation of children’s rights, because of how these are utilised in the

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<sup>203</sup> Article 14 (Freedom of thought, conscience and religion) provides that, ‘s 1 *States Parties shall respect the right of the child to freedom of thought, conscience and religion.* However, it could be argued that this qualified by, ‘s 2 *States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*’;

Even the drafting of s 3 would seem to favour ‘the parent’s religious rights’, ‘s 3 *Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.*’;

See: Sylvie Langlaude, ‘Children and Religion under Article 14 UNCRC: A Critical Analysis’ (2008) 16 IJCR.

<sup>204</sup> Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child, A Guide to the “Travaux Préparatoires”* (Martinus Nijhoff 1992) 118;

Article 1 (“CHILD”-AGE) – ARTICLE 1. Official Text as adopted by the General Assembly, General Assembly resolution 44/25.

<sup>205</sup> The Holy See is a ‘non-member’ of the UN but was granted ‘permanent observer status’ in 1964.

interpretation of other articles of the CRC. These are Articles 2, 3, 6 and 12 which pertain to the following four fundamental areas:

*The right not to be discriminated against- Article 2*

*The Best interest of the child- Article 3*

*The Right to life survival and development- Article 6*

*The Right to be heard- Article 12*

We can see that Articles 3 and Article 12 are considered fundamental in regards the CRC. The 'Best Interests' principle contained in Article 3, s 1, discussed in detail in chapter 1 of this study and referred to in part II. Article 12 is also crucial, because it articulates the idea of 'voice'; the expression of oneself in a myriad of forms and through a variety of mechanisms. Those mechanisms include non-legal advocates and other supporters. So, there are clearly two elements to coming to voice, both of which are essential for children and young people's active participation in decision making processes, statutory and the non-statutory. Article 12 may personify the idea of participation, but it is not a 'standalone' article. It is an enabling article in that it aids the interpretation and application of other CRC articles and is most often discussed relative to Article 3 and OP-3.<sup>206</sup> Importantly, it is also one of the CRC's 7 'Participatory Rights' articles which are given as follows:

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<sup>206</sup> OP 3- On a Communications Procedure- referred to as a 'complaints procedure' available to children who have exhausted legal avenues in their own States or are dissatisfied with the lack of a solution when their rights are believed to have been violated. By virtue of the Children and Young People (Scotland) Act 2014, Part 4, amending the 'Commissioner for Children and Young People (Scotland) Act 2003' (hereinafter referred to as the CCYP (S) A 03; to enable the Children and Young People's Commissioner for Scotland (hereinafter referred to as CYPSCS) to receive individual complaints from children and young people.

*The Protection of Rights*-Article 4

*The respect for the views of the child*-Article 12

*The freedom of Expression*-Article 13

*Freedom of thought, conscience and religion*-Article 14

*The freedom of association and peaceful assembly*-Article 15

*The Right to privacy, family, home or correspondence*- Article 16

*The access to information and mass media*-Article 17

Cleland has also stated that the international acknowledgement of children as, ‘*active citizens in their own right*’ is important for the wider development of children’s rights.<sup>207</sup>

## **2.2 European Convention on Human Rights<sup>208</sup>**

In contrast to the CRC, the ECHR is deeply embedded into UK domestic law and it has been so for nigh on two decades now. This ‘entrenchment’ in law, policy and judicial precedent has been achieved via the HRA 98. The SA 98 also provides a means by which prospective and meritorious cases, citing contraventions of the ECHR articles lie to a Court of law. The highest appellate court in the UK being the Supreme Court, with appeals thereafter lying outwith to the European Court of Human Rights.<sup>209</sup> The same rules in respect to challenging an absence of, or a

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<sup>207</sup> Alison Cleland, ‘Children’s Voices in Legal Proceedings’, in Alison Cleland and Elaine E Sutherland, *Children’s Rights in Scotland* (W Green 2009) 161, para 9-04; Malcolm Hill ‘and others’, ‘Moving the participation agenda forward’ *Children & Society* 18 (2006).

<sup>208</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entry into force on 3<sup>rd</sup> September 1953.

<sup>209</sup> Constitutional Reform Act 2005 c4.

contravention of a CRC tenet clearly do not apply. This is because it is not entrenched into UK domestic law with anything close to the same formality and legal structure as that of the ECHR. That stated, the principles of the CRC and substantive tenets, have been adopted via various modes and methods in devolved laws and policies of successive Scottish Government's (previously titled Scottish Executive); as well as that of the other three nation States making up the UK. The statement by Grant and Sutherland that the ECHR and the CRC are, '*the principal international standards against which children's rights under Scots law are to be judged...*', is then, a fair one.<sup>210</sup>

Where the CRC is the culmination of 100 years of effort towards the recognition of the child's wider welfare rights, the ECHR is a response by European states to the horrors of conflict, affecting millions of people; being drafted not four years post cessation of WW2 hostilities. However, another factor influenced the ECHR creation. This was Western European (and arguably North American) concerns of encroaching economic and political threats from the then USSR.<sup>211</sup> This resulted in the formation of the Council of Europe (founded in 1949), with fewer than 11-member States. Economic concerns aside, there was a strong desire to establish, maintain and further realise human rights and fundamental freedoms;

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<sup>210</sup> Grant (n 202) 40.

<sup>211</sup> Statute of the Council of Europe, April 5, 1949, ETS No.1; It could also be argued that there was a real and quantified concern from the then Western nations, particularly in respect of economic stability. This no doubt influenced the establishment of: The 'Treaty of Paris establishing the European Coal and Steel Community, (ECSC ) in 1951 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0022>> accessed 25 June 2018; The Treaty establishing the European Atomic Energy Community (EAEC now Euratom) in 1959 <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI%282017%29608665](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282017%29608665)> accessed 25 June 2018.

these being seen as under threat from an impending ‘cold war’ with Soviet bloc States.<sup>212</sup> To that end we must also remember that the Council of Europe took its inspiration from the declaration of the UDHR from 1948, which provides that, ‘*All human beings are born free and equal in dignity and rights*’<sup>213</sup>

However, the ECHR and its current 16 Protocols are devoid of ‘direct’ reference to children and young people as rights holders, either as a group or as individuals.<sup>214</sup> This does not mean children and childhood have been omitted from its tenets. They are instead recognised through the deferred reference to the CRC by the European Court of Human Rights and its judgements. This is particularly prevalent in cases invoking Articles 8 and 14 of the ECHR.<sup>215</sup> An illustration is given by reference to *Sahin v Germany*, when the Grand Chamber of the European Court of Human Rights stated that, ‘*The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child...*’<sup>216</sup> It could also be stated that whilst there is no direct reference to our young group, the ECHR has been drafted without ‘biases’. It is arguably, ‘all inclusive’. This inclusivity is apparent in its substantive articles and protocols which open with the following examples,

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<sup>212</sup> Statute of the Council of Europe, April 5, 1949, ETS No.1, art 1 (b).

<sup>213</sup> UN General Assembly, Universal Declaration of Human Rights, United Nations, 217 (III) A, 1948, Paris, art 1.

<sup>214</sup> See: Human Rights (Convention and Protocols only) Status as of 25/09/2018, <<https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3>> accessed 24<sup>th</sup> June 2018.

<sup>215</sup> Article 8 and Article 14, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entry into force on 3<sup>rd</sup> September 1953.

<sup>216</sup> *Sahin v Germany* (Application no. 30943/96), D. The United Nations Convention on the Rights of the Child para 39-41.

*'Everyone has...or...Everyone's right...'* **and the Protocols**, *'...all persons are equal before the law'*. In so far as children and young people are concerned, and utilising the ECHR, we could contrive to afford them special protections, via 'discrimination' bias, as set out in article 14 of the ECHR, which provides that,

*'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*<sup>217</sup>

The HRA 98 also replicates article 14 of the ECHR, except for the following insert, *'...set forth in the European Convention on Human Rights and the Human Rights Act shall be secured....'*<sup>218</sup>

However, the absence of reference to 'age' as a discriminatory and protected characteristic could presents us with a problem. As regards 'age', that characteristic is more commonly referenced in respect of 'Equality Opportunities'.<sup>219</sup> Additionally, the UK is not bound by Protocol 12, which provides that State parties ratifying same shall, *'...resolve to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and*

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<sup>217</sup> Article 14, Prohibition of Discrimination, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entry into force on 3<sup>rd</sup> September 1953; Article 14 cannot be considered without also coming within the ambit of a substantive right, such as Article 8; See: *Belgian Linguistics* (1968) 1 EHRR 252.

<sup>218</sup> Human Rights Act 1998 c42 Schedule 1 Part Art 14.

<sup>219</sup> Scotland Act 1998, Chapter 46, Schedule 5 Reserved Matters, Part 1 General Reservations, Head L – Miscellaneous, L2 Equal Opportunities, Interpretation.

*Fundamental Freedoms...*<sup>220</sup> The cause for delay of ratification of protocol 12 could be aligned with concerns that the protocol is too wide in its ambit. Theoretically, it could seriously effect or make void s 6 of the HRA 98, which provides that, *'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'*

It would be remiss not to discuss Article 8 of the ECHR, which has possibly been invoked on more occasions than any other article in that convention. It is one article through which children and young people are often presented as collateral agents, not principal petitioners. This is not surprising when we consider that article 8 is one of the most open-ended, interpretive and interpreted provisions of the ECHR. It provides that, *'Everyone has the right to respect for his private and family life, his home and his correspondence.'*<sup>221</sup> This makes it a fundamental right. That in turn effectively upholds, for the purposes of this study, children's rights;

*'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*<sup>222</sup>

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<sup>220</sup> ETS 177, Convention for the Protection of Human Rights (Protocol No. 12) 4.XI.2000.

<sup>221</sup> Article 8 (1), Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entry into force on 3<sup>rd</sup> September 1953.

<sup>222</sup> Article 8 (2), Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entry into force on 3<sup>rd</sup> September 1953.



This arguably equates to both ‘positive and negative obligations’; the duties upon a state ‘to act’ or ‘not to act’. If a state can substantiate its actions, or its omissions, in respect of an alleged breach of a substantive convention right or rights, then the European Court of Human Rights will dispense with the initiating complaint; as occurred in *Rasmussen*.<sup>223</sup> There is a principle at play here, and one which is fundamental to the relationship between a member state of the ECHR and its judicial arm, the European Court of Human Rights. For the state, we have the doctrine of ‘margin of appreciation’, which involves degrees of discretionary supervision by the COE. States and national authorities, like the parents of children are ‘generally’ best placed to make, and to take decisions in the interests of the people.<sup>224</sup>

### 2.2.1 European Convention on the Exercise of Children’s Rights<sup>225</sup>

Cleland and Sutherland described the Council of Europe as having, ‘...*made limited forays into the area of children’s rights...*’<sup>226</sup> This is an honest observation and it is made in respect of the European Convention on the exercise of Children’s Rights,

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<sup>223</sup> *Rasmussen v Denmark* (1984) 7 EHRR 372.

<sup>224</sup> See: *Handyside v United Kingdom* 7<sup>th</sup> December 1976, 1 EHRR 737; where the principle was developed and interpreted, eg, ‘*The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (23 the "Belgian Linguistic" case, July 1968, para.10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.*’; *James & Others v United Kingdom* (1986) 8 EHRR 123 at [46].

<sup>225</sup> ETS No 160, European Convention on the Exercise of Children’s Rights, Strasbourg 25 1 1996, entering into force in July 2000.

<sup>226</sup> Grant (n 202) 43.

which, as of September 2018, the UK (and thus its devolved authorities) has still not ratified. It may appear a bland document, premised as it is on ‘procedural matters’, but in regards the main themes of this study, it is a powerful convention and one worth discussing. The preamble cites Article 4 of the CRC, *‘which requires States Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the said Convention,’*<sup>227</sup>

In deference to children’s rights and best interests, the opportunity to exercise procedural rights is limited to, *‘... family proceedings affecting them;’*<sup>228</sup> Whilst there is no requirement in the European Convention on the Exercise of Children’s Rights for ratifying states to extend a ‘proceedings’ provision to non-judicial processes, it does oblige the states to ‘consider’ doing just that, especially with reference to children’s procedural rights and representation.<sup>229</sup> However, this lack of definitive obligation in respect of non-judicial processes is ‘on the face of it’ unsatisfactory. This is because of the uncertainty as to how a State will determine what ‘procedures’ will then qualify. This impacts upon children and young people’s exercise of procedural rights and associated representation. A theoretical, ‘what if’ pertaining to Scotland can be given by reference to the Children’s Hearings Scotland; the Additional Support Needs Tribunal Scotland; and the Mental Health Tribunals Scotland. All these procedures whilst deriving their power and function

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<sup>227</sup> ETS No 160, European Convention on the Exercise of Children’s Rights, Strasbourg 25 1 1996, entering into force in July 2000, Preamble.

<sup>228</sup> ETS No 160, European Convention on the Exercise of Children’s Rights, Strasbourg 25 1 1996, entering into force in July 2000, Preamble.

<sup>229</sup> ETS No 160, European Convention on the Exercise of Children’s Rights, Strasbourg 25 1 1996, entering into force in July 2000, D. Extension of certain provisions, Article 11- *‘Parties shall consider extending the provisions of Articles 3, 4 and 9 to proceedings affecting children before other bodies and to matters affecting children which are not the subject of proceedings’*

from statute, are not judicial processes. They are at best, quasi-judicial. But, if we applied the European Convention on the Exercise of Children's Rights tenets (in theory at least), children and young people's exercise of procedural rights and representation would be negatively affected, perhaps even void. The CRC, which espouses rights of audience and participation in non-judicial processes appears to have the greater clarity and moral strength as regards non-judicial procedures.

Another concern is the emphasis placed on the desire of the European Convention on the Exercise of Children's Rights that states should resolve family issues or disputes prior to petitioning a judicial authority. These resolutions, it is advised, are to be conducted via mediation or other processes and provisioned for as determined by an individual state, but this is another moot point. Mediation, or other processes for the purposes of resolution have little formal recognition, nor statutory backbone. They are at best policy and practice driven, ie non-judicial. The European Convention on the Exercise of Children's Rights cannot and does not guarantee the accommodation of children and young people's procedural rights and representation under such circumstances. If anything, it arguably disempowers and disenfranchises them as a group.<sup>230</sup>

Such concerns and critique have been raised for over 20 years, not least by Marshall.<sup>231</sup> As regards the issue of representation of children and young people,

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<sup>230</sup> ETS No 160, European Convention on the Exercise of Children's Rights, Strasbourg 25 1 1996, entering into force in July 2000F. Other matters, Article 13 – *Mediation or other processes to resolve disputes in order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties.*

<sup>231</sup> Marshall (n 89) 54-63.

Van Bueren has also ‘dressed down’ the European Convention on the Exercise of the Children’s Rights for being too narrow in its scope; offering little or no opportunity for the mechanism of the ‘advocate’. That stated Van Bueren also conceded (in 1996) that the fault of this ‘narrow scope’ may actually have lain with the CRC and the failure of its drafters to, ‘...*incorporate an individual petitioning mechanism*’<sup>232</sup> Perhaps one of the Committee of Ministers parliamentary recommendations paid off, with an appeal to member States, ‘*to envisage, if they have not yet done so, the appointment of a special ombudsman for children, who could inform them on their rights, counsel them, intervene and, possibly, take legal action on their behalf*’.<sup>233</sup> Looking at the UK, until the enactment of the HRA 98 into domestic law, the ECHR had no internal force nor legal effect (though arguably, it was persuasive). That was until ratification of the HRA 98 into UK domestic and devolved laws, which did give power and effect to ECHR substantive rights (and the associated protocols which the UK has ratified).<sup>234</sup> However, staying with the topic of a recommended ‘special ombudsman’ for children and young people, the concept and practical implementation throughout many States has no doubt influenced Scotland’s interpretation, when the Office of SCCYP (or CYPCS now) was created via the mechanism of the CCYP (S) A 03.<sup>235</sup> However, it was not until 2016 when an amendment was made to the CYP (S) A 14, that the office of

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<sup>232</sup> Geraldine Van Bueren, ‘Protecting children’s rights in Europe - a test case strategy’ (1996) EHRLR 180.

<sup>233</sup> Parliamentary Assembly Recommendation, 1121 (1990), Rights of Children, 13  
<<http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15155&lang=en>> accessed 25<sup>th</sup> June 2018.

<sup>234</sup> Reference to the Scotland Act 1998.

<sup>235</sup> Commissioner for Children and Young People (Scotland) Act 2003; SCCYP was the colloquial abbreviation and the published title of the commissioner up until 2017. It then reverted to CYPCS, in keeping with the title of the 2003 statute.

commissioner was empowered to undertake investigation into individual complaints.<sup>236</sup> This action may well have been propelled by the OP 3 to the CRC on a communications procedure, which the UK government has yet to sign, ratify, or accede to.<sup>237</sup> It could also be argued that a devolved Scottish Government has taken pro-active steps towards implementing progressive children's rights of audience and communication, whilst still acting within its legislative powers. However, in so far as procedure and enforcement of the ECHR is concerned, the introduction of legislation via the mechanism of the UK Westminster legislature is very different compared to that of the devolved Scottish Parliament. Legislation (at Bill stage, prior to second reading) introduced for consideration at Westminster need only be declared incompatible with Convention rights, ie the ECHR.<sup>238</sup> Even when a declaration of incompatibility has been made by a court of law, the legislation in question may still stand.<sup>239</sup>

*'A declaration under this section ("a declaration of incompatibility")—*  
*(a) does not affect the validity, continuing operation or enforcement of the*  
*provision in respect of which it is given; and*  
*(b) is not binding on the parties to the proceedings in which it is made.'*<sup>240</sup>

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<sup>236</sup> Children and Young People (Scotland) Act 2014, asp 8, PART 2, s 5, 'investigations by the Commissioner'.

<sup>237</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011; see: Article 5 Individual Communications.

<sup>238</sup> Human Rights Act 1998 s 19, Statements of Incompatibility.

<sup>239</sup> Human Rights Act 1998 s 4, Declarations of Incompatibility.

<sup>240</sup> Human Rights Act 1998 s 4 (6) (a) (b) Declarations of Incompatibility.

In comparison, the devolving legislature (Westminster) has ensured that the devolved legislature of Scotland has had to play by 'different' rules when it introduces primary and subordinate legislation. The Scottish Government could be said to be 'tied' by the very Act which gave it breath.<sup>241</sup> In so far as legislative competence is concerned, a Bill or law can still be declared 'unlawful'.<sup>242</sup>

*29 Legislative competence.*

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

*(2) A provision is outside that competence so far as any of the following paragraphs apply—*

*(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,*

*(b) it relates to reserved matters,*

*(c) it is in breach of the restrictions in Schedule 4,*

*(d) it is incompatible with any of the Convention rights or with [F2EU] law,*

## **2.3 Introduction to Scottish law and policy**

The CRC is one of those treaties which has had an obvious and indisputable impact on people's lives around the world. In regards its effect on Scotland and the

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<sup>241</sup> Scotland Act 1998, Part 1, Legislation.

<sup>242</sup> Scotland Act 1998, Part 1, Legislation, s 29 (d) it is incompatible with any of the Convention rights or with European Union law, (words in s29 (2) (d) substituted (22.4.2011) by The Treaty of Lisbon (Changes in Terminology) Order 2011 (S.I. 2011/1043), arts. 3, 6;  
See: s 35, Power to intervene in certain cases (by the Secretary of State for Scotland).

jurisdiction under critique [Moray], this study attempts to identify and examine the manner and mechanisms by which the CRC has been 'brought out'; this being relative to this study's main themes. A more detailed commentary on the empirical realities and experiences are critiqued in the latter part of this study. The most important point to make at this juncture, is that there is an absence of recognisable 'direct' importation of the CRC into UK law; ie 'unadulterated transplant'. This has impacted upon and determined the manner and method by which devolved states within the UK can, and do give effect to the CRC and its OP's (OPIC-CRC, OPSC and OPAC).<sup>243</sup> This has arguably, left the UK and its four nation States with a disparate structure in respect of interpretation, implementation. Perhaps it verges on a 'rank system' of provision and progression of children's rights within the United Kingdom. By that it is meant that there are degrees of higher authority and precedence; the legal implications of a devolved government arguably acting outwith (and within) its devolved powers have made this employed treaty highly debated, and debateable. This has in turn given rise to more questions than answers provided, garnering the need for greater critique. A discussion of children's political and welfare rights will also involve acknowledgement of salient and pivotal regional conventions;<sup>244</sup> in addition to details of the UK legal mechanisms which arguably enable and promote the optional protocol on the sale of children, child prostitution and child pornography.

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<sup>243</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, OPIC-CRC A/RES/54/263 of 25 May 2000 entry into force 12 February 2002; Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, OPSC-CRC A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002; Optional Protocol to the Convention on the Rights of the Child on a communications procedure, OPAC-CRC A/RES/66/138 of 27 January 2012 entry into force.

<sup>244</sup> The ECHR and the European Social Charter (ESC).

### 2.3.1 The Scotland Act 1998 (SA 98) and the Human Rights Act 1998 (HRA 98)<sup>245</sup> Manner and Mechanisms

The HRA 98 received Royal Assent in November of 1998, coming into effect in October 2000. The SA 98<sup>246</sup> also received Royal Assent in November 1998, but for operational purposes pertaining to the creation of the function and administration of the 'Scottish Executive' (re-branded the 'Scottish Government' in 2007) and a sitting lawful Parliament, it came into effect earlier than the HRA 98; as provided for by its schedules.<sup>247</sup> The SA 98 to be clear, is a devolved piece of legislation, but Scotland still retains control over 'reserved' areas in which its regions and authorities have historically held power. The SA 98 made also made clear what powers the early Scottish Executive did not hold; over and above the powers it did. It details the areas of government that are 'reserved' to the UK parliament.<sup>248</sup> For example, the Scottish Government cannot make provision for any subordinate

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<sup>245</sup> Scotland Act 1998 c46; Human Rights Act 1998 c42, *'An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.'*

<sup>246</sup> Scotland Act 1998 c 46, s 44; see also, Scotland Act 2012 c 11, which contains unambiguous title and reference to 'The Scottish Parliament'.

<sup>247</sup> See: The Scotland Act 1998 (Commencement) Order 1998, No. 3178 (C.79) (s 193), Schedule Provisions being enacted between the 25<sup>th</sup> January to 1<sup>st</sup> April 2000  
<<http://www.legislation.gov.uk/ukSI/1998/3178/contents/made>> accessed 8<sup>th</sup> September 2018.

<sup>248</sup> Scotland Act 1998, c 46, SCHEDULE 5 Reserved matters Part I General Reservations The Constitution; the Acts of Union in 1701 and 1707 provided that Scotland retained autonomy over its Court of Session and the Scottish legal system. It also guaranteed that the established Church of Scotland would remain so. Economically it brought with it a monetary and customs union with England and its trading partners.



piece of legislation, nor exercise same; neither can it approve any subordinate legislation containing a provision which is outside that legislative competence.<sup>249</sup>

In so far as compliance with the ECHR is concerned, the HRA 98 is the instrument of incorporation into UK domestic law, but it is less definitive in respect of interpretation of primary and subordinate legislation emanating from Westminster, *'so far as it is possible to do so...must be read and given effect in a way which is compatible with the Convention rights.'*<sup>250</sup>

The inclusion of *'so far as it is possible'*, is arguably interpretive and that provides valides provides a wide margin for Westminster primary and subordinate legislation, even where there are incompatibilities with Convention rights; namely, they can still be enacted and enforced.<sup>251</sup> However, this does not put the brakes on such a piece of primary or subordinate legislation being challenged in the courts, the Supreme Court being the UK's highest appellate court.

If we compare this with the SA 98, we already know that a sitting Scottish Government and its Ministers cannot make provision for primary or subordinate legislation outwith their competence, ie *'act outwith'* their powers. In respect of ECHR rights, the SA 98 also provides that, *'A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...'*<sup>252</sup> The

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<sup>249</sup> Scotland Act 1998, c46 s 54 (1) (2) (a) (b) and (3).

<sup>250</sup> Human Rights Act 1998 c42 s 3 (1).

<sup>251</sup> Human Rights Act 1998 c42 s 3 (1) (a) (b) (c); see s 19 Statements of compatibility which explains the parliamentary procedure involved in making statements of compatibility or non-compatibility.

<sup>252</sup> Scotland Act 1998 c46 s 57 (2).

procedures are arguably less stringent for the higher UK parliament than that demanded of its devolved authorities.

However, the HRA 98 still belongs to all four nations of the United Kingdom, and its subjects (or citizens). For example, the HRA 98 makes it '*unlawful for a public authority to act in a way which is incompatible with a Convention right*,' but only if primary legislation cannot be interpreted in any other way.<sup>253</sup> Within the context of this study, the definition of a public authority also includes a tribunal, ie '*a court or tribunal, and ... any person certain of whose functions are functions of a public nature*,'<sup>254</sup> Anyone who considers themselves a victim (including a competent and capable child) of a public authority, alleged to have acted in a manner incompatible with their Convention rights, may take that grievance before an appropriate court, or tribunal.<sup>255</sup> A couple of statutory tribunals in which children and young people are complainers, are the Mental Health Tribunals Scotland and the Additional Support Needs Tribunal Scotland. This part of the HRA 98 places a positive obligation upon 'public authorities', because 'an act', extends to '*... a failure to act...*'<sup>256</sup>

It may also be applicable at this juncture to inform the reader that the devolved Government of Scotland is prohibited by devolution edict from becoming involved in, '*International relations, including relations with territories outside the United Kingdom, the [F6European Union] (and their institutions) and other*

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<sup>253</sup> Human Rights Act 1998 c42 (6).

<sup>254</sup> Human Rights Act 1998 c42 s 6 ss 3 (a) (b).

<sup>255</sup> Human Rights Act 1998 c42 s 7 s 1 (a) (b).

<sup>256</sup> Human Rights Act 1998 c42 s 6 (6).

*international organisations, regulation of international trade, and international development assistance and co-operation...'*, because these are areas reserved to the Westminster Government.<sup>257</sup> However, whilst this restricts the wider international activities of the Scottish parliament, it does not impede them from observing and implementing international obligations, '*...under the Human Rights Convention...'*, and that extends to, and it includes the CRC.<sup>258</sup> Tisdall and Davis have commented that this re-enforces the domestic and international legal responsibilities incumbent upon the Scottish Government to implement the CRC, but because of the legal bind of devolution, CRC, '*...policy influence in the UK generally, and in Scotland in particular, is currently more moral than legal.*'<sup>259</sup>

### **2.3.2 The Children (Scotland) Act 1995 (hereinafter referred to as C (S) A 95) A brief chronology**

In 1993 the Scottish Office, the official administrator for Scottish affairs under a sitting Westminster Government, presented a 'White Paper' outlining the then Conservative Government's proposals for 'child care policy and law' in Scotland. That document came just two years after the UK government became a signatory to the CRC treaty (1991). It outlined eight principles which would, '*incorporate the philosophy of the United Nations Convention on the Rights of the Child*'<sup>260</sup> This was

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<sup>257</sup> Scotland Act 1998 c46, schedule 5, s 7 (1).

<sup>258</sup> Scotland Act 1998 c46, schedule 5, s 7 (2) (a).

<sup>259</sup> Kay M Tisdall, John M Davis, 'Children's Rights and Well-Being: Tensions within the Children and Young People (Scotland) Act 2014', in Anne B Smith (ed), *Enhancing Children's Rights, Connective Research, Policy and Practice* (Palgrave MacMillan 2015) 215.

<sup>260</sup> Scottish Office, 'Scotland's Children: Proposals for Child Care Policy and Law' (HMSO 1993) 6.

intended to give effect to the Children (Scotland) Bill but was instead preceded by another piece of arguably progressive legislation in the form of the Law Reform (Parent and Child) (Scotland) Act 1986.<sup>261</sup> That 1986 Act was by degrees a welfarist and reforming piece of legislation which improved the civil and legal standing and rights of illegitimate children, albeit largely focussed on parental rights. Being premised on 'private law', the gap in application of the welfarist principle in public law was wide and obvious. This no doubt also influenced the discussions which followed with the 'White Paper' in 1993. The White Papers publication also came at a historical time for Scottish politics and British politics, because just four years later (in 1997), a referendum on devolution was held in Scotland. This was a referendum which saw clear support for a Scottish parliament which came into being the following year, by virtue of the SA 98.

However, if we go back to a statement in this 1993 'White Paper', it only refers to the incorporation into domestic law and policy of CRC philosophy, omitting incorporation of the CRC's fundamental articles. Since the UK had yet to ratify the CRC treaty, this should have come as no surprise to interested parties. The reasoning behind this, as posited by Marshall and others in a 2002 'Scoping Exercise', was that in contrast to correspondingly analogous English and Northern Irish children's legislation that promoted the '*key legal principles of the UNCRC*', the UK Government opted for a less prescriptive approach to devolved Scottish

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<sup>261</sup> Law Reform (Parent and Child) (Scotland) Act 1986, c9, '*An Act to make fresh provision in the law of Scotland with respect to the consequences of birth out of wedlock, the rights and duties of parents, the determination of parentage and the taking of blood samples in relation to the determination of parentage; to amend the law as to guardianship; and for connected purposes.*'

<<https://www.legislation.gov.uk/ukpga/1986/9/contents>> accessed 4<sup>th</sup> June 2017.

legislation.<sup>262</sup> The reasoning given was that, ‘... a statement of overarching principles would add to the length of the Bill ... without any very clear benefit in terms of substance’ (Lord James Douglas Hamilton, House of Commons Hansard 1.5.95, Col. 93’’.<sup>263</sup> Tisdall, one of the authors of the aforementioned 2002 paper had raised her concerns six years earlier, which centred on the lack of fundamental incorporation in the C (S)A 95; a critique of domestic law and policy in respect of children’s rights and welfare.<sup>264</sup>

Arguably building on Kilbrandon’s welfarist tenets and desiring to up-date the Social Work (Scotland) Act 1968 (hereinafter referred to as SW (S) A 68), the incorporation of CRC philosophy was still, an acknowledgment of the civil, political and participatory rights of the children; that they are capable agents, with a right to express views on any issue, in decisions affecting or worrying them.<sup>265</sup> Marshall, having consulted on the C (S) A 95, also referred to it as, ‘....a first attempt to translate into Scottish legislation the principles of the UN Convention.....a conceptual framework more sympathetic to the UN Convention.’<sup>266</sup> We could say that this was a demonstration of the then UK Government’s confidence in Scotland’s ‘Children’s

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<sup>262</sup> The Children Act 1989 and the Children (Northern Ireland) Order 1995.

<sup>263</sup> Kathleen Marshall, E Kay M Tisdall and Alison Cleland, ‘Voice of the Child’ Under the Children (Scotland) Act 1995, Giving Due Regard to Children’s Views In All Matters That Affect Them’, Volume 1- Mapping Paper, (2002 HMSO CHECK) <<https://www.gov.scot/Publications/2002/09/14905/6740>> accessed 4<sup>th</sup> February 2018.

<sup>264</sup> Kay M Tisdall, ‘From the Social Work (Scotland) Act 1968 to the Children (Scotland) Act 1995: Pressures for change’, in Malcolm Hill and Jane Aldgate (eds), *Child Welfare Services: Developments in Law, Policy, Practice and Research* (Jessica Kingsley 1996) 36; This chapter provides a succinct explanation of domestic law and policy relating to children’s welfare services in Scotland, since the enactment of the SW (S) A 1968.

<sup>265</sup> Scottish Office, ‘Scotland’s Children: Proposals for Child Care Policy and Law’ (HMSO 1993) 6-7.

<sup>266</sup> Marshall (n 89) 46.

Hearings System'. It was also an opportunity for the implementation of, 'some reforms, particularly in relation to emergency protection of children.'<sup>267</sup> Those protectionist and interventionist reforms, referenced by 6 of the 8 principles in the White Paper, also emphasised greater parental responsibilities, rights and the need for more inter-agency working. The Children (S) Bill was introduced in 1994, and after lengthy consultation with many bodies and agencies, it received royal assent in 1995; coming into effect in 1997. An interesting element pertaining to Part 1 was the drafting of what has been termed the 'private law' aspect of the C (S) A 95. It provided that parents must fulfil their parental responsibilities, but that a failure to fulfil those responsibilities would see them deprived of those parental rights.

Part of the premise of this research study has involved the identification of the normatives which make possible the articulation of the child's views and the child's participation and extends to a critique of the formulation of legislation and treaty within the stated parameters, which makes this chapter necessary and succinct. When we discuss the notion of participation and the expression of the child's views, the concept of best interests is often present in related narratives, especially so in treaty and legislation. The C (S) A 95, though concerned primarily with family and child law, also references the appointment of individuals to represent the child and these individuals will act in the child's best interests.<sup>268</sup> However, representing a child or young person's interests (even best interests) is

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<sup>267</sup> The Children's Hearing System in Scotland, Training Resource Manual, 1st Rev. Edition, c7, The Children (Scotland) Act 1995 <<https://www.gov.scot/Publications/2003/01/16151/16388>> accessed 2 July 2018.

<sup>268</sup> Children (Scotland) Act 1995, Schedule 4, Para 53 (3) which provides for solicitors taking instruction from children and young people in proceedings.

not necessarily the same as representing their views. The representation role can also be 'misrepresented'. The latter usually occurs in the less formalised, non-statutory processes, but it is not necessarily isolated to them.<sup>269</sup> Even with the appointment as far back as 1985 of court appointed safeguarders, Marshall had reservations when in 1997 she stated that the role of Safeguarder had, '*... not been as developed nor as well used as the 'guardian ad litem' in England and Wales*'<sup>270</sup>

In determining the capacity of a child to form a view, the C (S) A 95 stipulates that the court should be concerned with the welfare of the child. This should be the paramount consideration in whether a 'Court Order' in Family Court proceedings should be made.<sup>271</sup> To assist the court in a determination, a 'practicability test' is applied as follows:

*'b) taking account of the child's age and maturity, shall so far as practicable—*  
*(i) give him an opportunity to indicate whether he wishes to express his views;*  
*(ii) if he does so wish, give him an opportunity to express them; and*  
*(iii) have regard to such views as he may express.'*<sup>272</sup>

The presumption as to the sufficiency of age and maturity is given at twelve years or more.<sup>273</sup> Again, for the purposes of this study and the procedures (primarily the LIAP procedure) that are discussed herein, the rigid reliance on a pre-determined

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<sup>269</sup> An example being Safeguarders; See: Children's Hearings (Scotland) Act 2011, Part 4 Safeguarders.

<sup>270</sup> Marshall (n 89) 49; The role has since been evaluated and reformed, especially so in relation to the Children's Hearings (S) Act 2011. Training being mandatory, it is now centralised and currently provided by a third party, namely Children 1<sup>st</sup> Scotland.

<sup>271</sup> Children (Scotland) Act 1995, s 11 (7) (a).

<sup>272</sup> Children (Scotland) Act 1995, s 11 (7) (b).

<sup>273</sup> Children (Scotland) Act 1995, s 11 (10).

physical age is, unrealistic. Cleland also commented on this very point, with reference to *Shields v Shields*.<sup>274</sup> She stated that the, ‘...court was at pains to emphasise that the test of practicability, which it said was the only proper and relevant test for affording a child the opportunity to make views known...was not a high enough test.’<sup>275</sup> The following quote from *Shields* also serves to emphasise the moot point about the rigid formality which can prevail in statutory edict and proceedings involving families and their children, ‘But, if by one method or another, it is ‘practicable’ to give a child the opportunity of expressing his views then, in our view, the only safe course is to employ that method.’<sup>276</sup> Perhaps we should consider other mechanisms more suited to accommodating and supporting a child in both the statutory and non-statutory procedures.

### **2.3.3 Children and young people (S) Act 2014** <sup>277</sup>

When this study was in its infancy, the CYP (S) A 14 had not yet progressed beyond draft law; a Bill at stage 2 in respect of Scottish parliamentary procedure.<sup>278</sup> A promising piece of legislation promoting the child and young person as a more ‘active participant’ with an emphasis on Part 5: the ‘Child’s Plan’. The child and the young person were to be more empowered and enabled by the incorporation of CRC philosophy and its guiding principles, especially so as regards provisions

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<sup>274</sup> *Shields v Shields* 2002 SLT 579.

<sup>275</sup> Alison Cleland, *Children’s Rights in Scotland* (W Green 2009) 162.

<sup>276</sup> *Shields v Shields* 2002 SLT 579, at 582 [F].

<sup>277</sup> Children and Young People (Scotland) Act 2014, asp 8, received Royal Assent on 27<sup>th</sup> March 2014.

<sup>278</sup> See the following up-dated version: Scottish Parliament Standing Orders, Chapter 9 Public Bill Procedures 5th Edition, 6th Revision, 9<sup>th</sup> May 2018.



concerning the powers of the CYPCS; in more general terms, ‘...*services and support for or in relation to children and young people*’<sup>279</sup> Presented to the Scottish Parliament in April of 2013 by the then Cabinet Secretary for Health and Wellbeing, Alex Neill MSP; it was considered by the sitting Education and Culture Committee, comprised of cross-party representatives with amendments tabled by those sitting Committee members. In practice, the Act places a duty on Scottish Ministers to **consider** the right of children under that treaty as follows:

*‘(1) ‘The Scottish Ministers must—*

*(a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and (b) if they consider it appropriate to do so, take any of the steps identified by that consideration.’*<sup>280</sup>

Section 1, places further duties on Ministers to, ‘...*take such account as they consider appropriate of any relevant views of children of which the Scottish Ministers are aware.*’, as it affects s 1 (a) duties (and to some extent adhering to Article 3 and Article 12 of the CRC).<sup>281</sup> Section 1 also acknowledges the need for Ministers to consider wider strategic promotion, public awareness and thus understanding of children’s rights.<sup>282</sup> As a Bill, and now Act, the CYP (S) A 14 is by and large a

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<sup>279</sup> Children and Young People (Scotland) Act 2014, asp 8, received Royal Assent on 27<sup>th</sup> March 2014, ‘*An Act of the Scottish Parliament to make provision about the rights of children and young people; to make provision about investigations by the Commissioner for Children and Young People in Scotland; to make provision for and about the provision of services and support for or in relation to children and young people; to make provision for an adoption register; to make provision about children’s hearings, detention in secure accommodation and consultation on certain proposals in relation to schools; and for connected purposes.*’.

<sup>280</sup> Children and Young People (Scotland) Act 2014, asp 8, Part 1, s 1 (1) (a) (b).

<sup>281</sup> Children and Young People (Scotland) Act 2014, asp 8, Part 1, s 1 (2).

<sup>282</sup> Children and Young People (Scotland) Act 2014, asp 8, Part 1, s 1 (3).

composite of the much earlier Children's Rights Charter and the abandoned Children's Services Scotland Bill, dating from 2007.<sup>283</sup>

*'There was originally to have been two bills. A consultation on a children's rights bill was issued in September 2011 (Scottish Government, 2011). A consultation on a single bill, incorporating the children's rights provisions as well as wider policy issues ran from July to September 2012 (Scottish Government, 2012a).'*<sup>284</sup>

#### **2.3.4 Independent Advocacy (and wellbeing) in the Bill: A chronology**

The reference to the Education and Culture Committee, and its cross-party composite representatives is calculated, because independent advocacy and wellbeing were also contemplated and debated by the Committee members in the very early stages of the Children (Scotland) Bill. The concept of wellbeing, its inclusion and what shape it would take, was also a topic of debate that featured in all three Stages of the Bill process. It is a concept which underpins GIRFEC principles and the provision of those principles, through the incumbent Scottish

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<sup>283</sup> 'Protecting Children and Young People - The Charter'

<<https://www.gov.scot/Publications/2004/04/19082/34410>> accessed 8<sup>th</sup> June 2018; Children's Services (Scotland) Bill. The Bill never proceeded beyond the Consultation stage in 2007. Please also see the following associated Scottish Government (then Executive) document which proposed changes to the Children (S) Act 1995 and was titled: 'Children's Services (SCOTLAND) Bill: Collected Proposed Amendments to Legislation'

<<https://www.gov.scot/Publications/2007/02/19133010/0>> accessed 8<sup>th</sup> June 2018; That the Children's Charter and Children's Services Bill were shelved, could in part be explained by the coming to power of a minority nationalist government that same year. Prior to this, the Labour party in Scotland were the party in devolved Government at Holyrood.

<sup>284</sup> Camilla Kidner, 'SPICe Briefing, Children and Young People (Scotland) Bill' (13/38, 4, Scottish Parliament 19 June 2013) <[http://www.parliament.scot/ResearchBriefingsAndFactsheets/SB\\_13-38.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/SB_13-38.pdf)> accessed 7<sup>th</sup> June 2018.

Governments policies. Reference to wellbeing can also be found within Part 18 of the CYP (S) A 14, in respect of, '*Assessment and Consideration of the child's wellbeing*'<sup>285</sup> That stated, interpretation of the concept in practice is arguably, variable and further discussed in Chapter 5 of this study.

Throughout the latter part of 2013 and early 2014, upon introduction of the Bill proposal by Alex Neill, MSP, several public bodies, private bodies and individuals made written submissions to the Education and Culture Committee; a response to the publicised Consultation process. At least twelve responders made specific reference to the subject of advocacy, and independent advocacy for children and young people. Most of those recommendations related to support for the provision of advocacy services for this young group. That stated, the responses of such support were sometimes confined to LAAC as well as those individuals who fall within the sphere of need under mental health care and protection; statutory services as required, for example under the Mental Health (Care & Treatment) (Scotland) Act 2003 (hereinafter referred to as MH (C&T) (S) A 03.<sup>286</sup> The organisations fighting for those corners included, Who Cares? Scotland (hereinafter referred to as WC? S), Fostering Network, Clan Childlaw and NHS Lothian Trust.<sup>287</sup> As regards the debate concerning the Child's Plan in Part 5 of the Bill, not all bodies and agencies were convinced of the need for a statutory

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<sup>285</sup> Children and Young People (Scotland) Act 2014 asp 8, part 18 s 96 Assessment of wellbeing.

<sup>286</sup> Related legislation: Children (Scotland) Act 1995; Mental Health (Care & Treatment) (Scotland) Act 2003 s 122.

<sup>287</sup> See the following document for access to select 'written submissions', Passage of the Children and Young People (Scotland) Bill 2013 SP Bill 2 7 (Session 4), subsequently 2014 asp 8 SPPB 199, (Scottish Parliamentary Corporate Body 2014) <<http://www.parliament.scot/LargePDFfiles/SPPB199.pdf>> accessed 6<sup>th</sup> June 2018.

provision of independent advocacy, as a service and mechanism. Even the idea of independent resolution facilities as an available support for children, young people and parents in the event of disagreements in decision making processes was unfavourable with other bodies.

These bodies included the Scottish Children's Services Coalition and Scottish Directors of Public Health.<sup>288</sup> Unsurprisingly, the Scottish Independent Advocacy Alliance (SIAA) and 'Your Voice' were wholeheartedly in favour of wider provision, perhaps even beyond the parameters of the Child's Planning Meeting, as determined per Part 5 of the Bill.<sup>289</sup> In 2013, Liam McArthur (MSP and then Education and Culture Committee member) proposed the following about Independent Advocacy services in relation to the Child's Plan, as it **could have read** in Part 5 of the Bill:

*'1) Where there is a dispute between the responsible authority or relevant authority and the child and child's parents in relation to the—*

*(a) requirement for a child's plan under section 31,*

*(b) content of a child's plan under section 32,*

*(c) preparation of a child's plan under section 33,*

*(d) delivery of a child's plan under section 36,*

*(e) management of a child's plan under section 37,*

*the responsible authority or relevant authority must advise the child and the*

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<sup>288</sup> Passage of the Children and Young People (Scotland) Bill 2013 SP Bill 2 7 (Session 4), subsequently 2014 asp 8 SPPB 199, (Scottish Parliamentary Corporate Body 2014), 934 and 945 (in that order) <<http://www.parliament.scot/LargePDFfiles/SPPB199.pdf> > accessed 6<sup>th</sup> June 2018.

<sup>289</sup> Passage of the Children and Young People (Scotland) Bill 2013 SP Bill 2 7 (Session 4), subsequently 2014 asp 8 SPPB 199, (Scottish Parliamentary Corporate Body 2014), 101 and 1119 <<http://www.parliament.scot/LargePDFfiles/SPPB199.pdf> > accessed 6<sup>th</sup> June 2018.

*child's parents of any independent advocacy services which are available to assist them and take appropriate steps to ensure that the child and child's parents have the opportunity of making use of those services.*

*(2) The Scottish Ministers may by order make provision for the regulation, operation and administration of independent advocacy services for children in relation to this Part. (3) In this section –independent advocacy services// has the meaning given by section 259 of the Mental Health (Care and Treatment) (Scotland) Act 2003.*<sup>290</sup>

It was also stated in November 2013's Stage1 report, that there should be some form of 'dispute resolution' in the event of disagreements arising in regards a 'Child's Plan'; that in a similar format as suggested by Liam MacArthur. However, such a provision, or provisions was deemed bureaucratically unnecessary by most of the Committee. Existing statutory provisions it was argued, could be incorporated easily enough into existing frameworks, without recourse to additional legislation.<sup>291</sup> Discussing the matter at Stage 2 in January 2014, the Education and Culture Committee stated that whilst independent advocacy services would not be included as a provision in the Bill, they [the Committee] were not against such services, merely their format; ie the statutory provision of

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<sup>290</sup> Passage of the Children and Young People (Scotland) Bill 2013 SP Bill 2 7 (Session 4), subsequently 2014 asp 8 SPPB 199, (Scottish Parliamentary Corporate Body 2014), 1668  
<<http://www.parliament.scot/LargePDFfiles/SPPB199.pdf>> accessed 6<sup>th</sup> June 2018.

<sup>291</sup> The Scottish Parliament, *Education and Culture Committee 11th Report, 2013 (Session 4) Stage 1 Report on the Children and Young People (Scotland) Bill* (SP Paper 421 Session 4 (2013), [141-144], 14 November  
<[https://www.parliament.scot/S4\\_EducationandCultureCommittee/Reports/edR-13-11w.pdf](https://www.parliament.scot/S4_EducationandCultureCommittee/Reports/edR-13-11w.pdf)> accessed 10<sup>th</sup> September 2018.

same, as recommended by Liam McArthur MSP. They did however state that they were committed to,

*‘...developing guidance to support all those who are involved in the provision of advocacy support to children and young people. That guidance will build on a set of principles and standards for independent advocacy that were published by the Scottish ministers in December. Although best practice should always be to inform children and families of where they might seek support in the event of a dispute about a child’s plan, a statutory obligation to signpost a child and his or her parents to independent advocacy in all cases when there is a dispute relating to a child’s plan is not proportionate.’<sup>292</sup>*

Whilst the Education and Culture Committee were discussing the merits, or otherwise of independent advocacy in relation to the Bill before them, there was another consultation on-going. That consultation was directed to public bodies and their service commissioners; authorities responsible for the direct commissioning of independent advocacy as directed by statute.<sup>293</sup> It was a reflective exercise designed to up-date a previous 2010 Guide.<sup>294</sup> Amongst the responders to that consultation were SIAA, WC? S, Children 1<sup>st</sup> Scotland and

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<sup>292</sup> The Scottish Parliament, ‘Education and Culture Committee 07 January 2014, Children and Young People (Scotland) Bill’ (Stage 2, Tuesday 7 January 2014) <<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9363&mode=pdf>> accessed 10<sup>th</sup> September 2018.

See also: Passage of the Children and Young People (Scotland) Bill 2013 SP Bill 2 7 (Session 4), subsequently 2014 asp 8 SPPB 199 PUBLISHED BY SCOTTISH PARLIAMENTARY CORPORATE BODY, 1711 (3628) <<http://www.parliament.scot/LargePDFfiles/SPPB199.pdf>> accessed 10<sup>th</sup> September 2018.

<sup>293</sup> Mental Health (Care & Treatment) (Scotland) Act 2003 s 259.

<sup>294</sup> The Scottish Government, ‘Consultation on Independent Advocacy – Guide for Commissioners’ (2013) <<https://www.gov.scot/publications/consultation-independent-advocacy-guide-commissioners/>> accessed 7<sup>th</sup> August 2018.

Together; the final Guide being published in December 2013.<sup>295</sup> The foreword from Alex Neill MSP and Cabinet Secretary for Health and Wellbeing waxed lyrical,

*‘The Scottish Government recognises the important role advocacy plays in helping to safeguard people who may be at risk of being treated unfairly as a result of individual, social, and environmental circumstances that make them vulnerable. Advocacy helps ensure people’s rights are not infringed and makes it easier for them to exercise those rights.’<sup>296</sup>*

The Scottish Government was not prepared to include the mechanism as part of a statutory process in respect of the Child’s Plan in Part 5 of the CYP (S) A 14 and this bring us to the vote on Liam MacArthur’s suggested amendments on independent advocacy provision at such a Child’s Planning Meeting. Though it failed, it was only by a margin of one vote. Besides the spouted reasons for this not making the final cut, it is highly probable that the bureaucratic practicalities and cost of administering additional statutory independent advocacy for this young group (particularly so in non-statutory decision making processes) played a part in the final decision/vote. Though some divergent interest groups were satisfied at that outcome and the overall final draft of the Act, others were not so convinced.<sup>297</sup> In the 2014 SPICe briefing from Kidner, that sentiment of disappointment and of setback was illustrated by reference to responses from some children’s

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<sup>295</sup> The Scottish Government, *Independent advocacy: guide for commissioners* (2013) <<https://www.gov.scot/publications/independent-advocacy-guide-commissioners/>> accessed 7<sup>th</sup> August 2018.

<sup>296</sup> *ibid.*

<sup>297</sup> See: ‘Putting Baby in the Bathwater: Give priority to prevention and the first 1,001 days’ <<https://www.wavetrust.org/sites/default/files/reports/Putting-the-Baby-In-the-Bath-Water-1-1-1.pdf>> accessed 9<sup>th</sup> June 2018.

organisations who did not believe that the Bill had gone far enough in its acknowledgement of the fundamental principles of the CRC; that only providing for CRC tenets to be kept '*under consideration*' by Ministers was unsatisfactory.<sup>298</sup> The critics included powerful bodies such as the Together and Unicef UK, who are still pushing for full incorporation of the CRC into Scots law. On its Royal Assent in March 2014, disappointment was again expressed by Davis and others at the 'lack' of clear frameworks which would, arguably, have ensured children and young people's participation in decision making processes as being, '*... meaningful, effective and sustainable.*'<sup>299</sup>

It is tempting to draw a direct comparison with the Welsh Assembly measures, because that devolved assembly has arguably incorporated and considered the CRC to a greater extent.<sup>300</sup> However, this is not a comparative study and it can only be conjectured that the Scottish Government, having observed the progressiveness of their Celtic counterparts in this area of law and policy felt pressured into prematurely pushing the Bill forwards?

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<sup>298</sup> Camilla Kidner, 'SPICe Briefing, 'Children and Young People (Scotland) Bill as amended at Stage 2' (14/13, 5, Scottish Parliament 5 February 2014) <[http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB\\_14-13.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_14-13.pdf)> accessed 7<sup>th</sup> June 2018;  
See: SPICe, The Scottish Parliament Information Centre  
<<https://scottishparliamentinformationcentre.org/>> accessed 10<sup>th</sup> September 2018.

<sup>299</sup> Davis (n 22).

<sup>300</sup> Rights of Children and Young Persons (Wales) Measure 2011;  
The Children and Young Persons (Scotland) Act 2014 does not go into the detail of; nor does it provide for unambiguous reference to the articles of the CRC, whereas the Welsh Measure does.



## 2.4 The Universal Periodical Review and CRC Concluding Observations<sup>301</sup>

This element of the discussion concerns the issue of evaluation and assessment of state parties by the OHCHR, which was discussed in brief in chapter 1. The two instruments utilised are the Universal Periodical Review and a Concluding Observation. The Universal Periodical Review takes place every 4 years, with the assessment conducted by 'Special Rapporteurs'.<sup>302</sup> The UK government submits its own assessment in respect of the efforts it believes it has made in implementing and realising the tenets of CRC; and its OP's (where applicable). The State reports contain distinct jurisdictional assessments from each of the UK's 4 nations which, of course, includes a devolved Scotland. This 'self-assessment' is counterbalanced by the submission of an 'alternative' report and the 'alternative' report emanates from NGO's. In Scotland, the function is currently undertaken by the umbrella body Together.<sup>303</sup> The OHCHR, the authoritative body for external examination, points out that it is reliant on signatory states to, 'do the right thing' and report back on their efforts at implementation and realisation of CRC tenets. Some bodies have been critical in that there is no 'list of indicators' from the OHCHR by which a state's

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<sup>301</sup> The periodic report is a reporting method by which the UK (as a requirement of it being a signatory to the convention) is duty bound to present to the 'Office of the United Nations High Commissioner for Human Rights'. This has been completed every five years. It provides the UK Government and the devolved parliaments/assemblies the opportunity to give account of the efforts taken to eradicate, or reduce issues of concern, such as poverty and violence; as well as actions taken to improve issues such as health and welfare. Once submitted the reports are considered by the committee. The committee's concluding observations are then made public and are titled 'General Comments'.

<sup>302</sup> The UK submitted their fifth Universal Periodical Review to the OHCHR in 2014; See: CRC/C/GBR/5. Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention. Fifth periodic reports of States parties due in 2014 United Kingdom [Date received: 27 May 2014]; Many signatory states are often late in the submission of their reports, with the OHCHR conceding that it has struggled to administer the system. That highlighted, the OHCHR has failed to place sanctions upon any state for late submission of their report.

<sup>303</sup> See: Together (SACR) <<http://www.togetherscotland.org.uk/>> accessed 20th August 2017.

progress may be measured.<sup>304</sup> However, the OHCHR would argue that in the absence of indicators, it has set forth 'General Measures' of implementation which,

*'outline[s] a number of measures such as legislative, policy, institutional, budgetary and statistical actions which countries must undertake for the effective implementation of the CRC. This is based on the foundation that ratification of the Convention creates accountabilities to children to protect, respect and fulfil their rights.'*<sup>305</sup>

Since its launch in 1989, the OHCHR has had the difficult and ambitious task of appealing to a plethora of culturally diverse member states. Of course, recognition by a member state through signature, ratification or accession (in that order) was, and is still dependent on it being a member of the UN club. In so far as the bodies (OHCHR) commitment to children and young people's increased participation is concerned, it has made concerted efforts to appeal to state parties to implement 'participative' strategies. These are strategies which encourage the active agency of individuals in their 'whole' lives. This is commendable, but when the fundamental articles of the CRC and OP3 on a Communications Procedure have already been drafted with the participation of the child and young person as their focus, the 'appeal' to state parties' smacks of weakness and concession. However, as much as the OHCHR entreats States, Hartas confirms that a lack of progress, or satisfactory progress on such strategies undoubtedly lies with adult's ambivalence, *'...whether adults are genuinely attentive and responsive to young people's*

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<sup>304</sup> 'State of Children's Rights' (Together SACR 2016) (6)  
<<http://www.togetherscotland.org.uk/pdfs/TogetherReport2016.pdf>> accessed 20<sup>th</sup> August 2017.

<sup>305</sup> UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General Measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5.

*perspectives, and aware of the plurality and polyphony of their voices.*'<sup>306</sup>

Participation is an on-going activity which needs to be endorsed and actively supported by states and their devolved powers, as provided for in the CRC, if ambivalence and tokenism are to be met head on.<sup>307</sup>

A related issue worthy of brief inclusion is the debatable 'reservations mechanism'. This can operate as a facilitating mechanism for the benefit of state parties, inclusive of current and future members.<sup>308</sup> The CRC provides the following in regards this mechanism in that, '*A reservation incompatible with the object and purpose of the present Convention shall not be permitted*'<sup>309</sup> States that are facilitated in respect of 'opt outs' will, or should have been subject to rigorous examination and evaluation by the directing Council. Whilst 'opt outs' could come across as derisory in respect of the OHCHR and a given state, these are concessions and a necessary part of any treaty mechanism. The following is an example of a 'written in' concession, that it, '*...shall [not] affect any provisions which are more*

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<sup>306</sup> Hartas (n 179) 98.

<sup>307</sup> 'Working methods for the participation of children in the reporting process of the Committee on the Rights of the Child', Adopted by the Committee at its sixty-sixth session (26 May–13 June 2014)', para 4, Committee on the Rights of the Child, CRC/C/66/2. <[www.ohchr.org/Documents/HRBodies/CRC/CRC-C-66-2.doc](http://www.ohchr.org/Documents/HRBodies/CRC/CRC-C-66-2.doc)> accessed 15<sup>th</sup> January 2017.

<sup>308</sup> United Nations Convention on the rights of the Child, Art 42; Vienna Convention on the law of treaties, Signed: 23 May 1969, Entry into force: 27 January 1980; Art 2 (1) '*For the purposes of the present Convention, d) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*'; Art 27 also provides that, '*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*'.

<sup>309</sup> United Nations Convention on the rights of the Child, Art 51, para 2.

*conducive to the realization of the rights of the child and which may be contained in:*

*(a) The law of a State Party; or (b) International law in force for that State.’<sup>310</sup>*

## **2.5 The Nordic (or Scandic) examples**

*‘If the laws of a country provide better protection of children’s rights than the articles in this Convention, those laws should apply’<sup>311</sup>*

The most cited examples of what have been called progressive states in the children’s rights arena include the ‘Nordic States’. These comprise, Norway, Sweden, Finland, Denmark and Iceland. However, looking closer at these ‘Nordic’ (or Scandic) states, it becomes obvious that the construction of such a collective of Nordic nations is too simplistic, albeit these five enclaves ‘Nordic’ nations are held up as exemplars of progressive children’s rights laws, practice and policy by other states and non-state bodies. Whilst all five Nordic states certainly have more precise ‘written’ constitutions compared with the UK, they are still a mixture of republics; of parliamentary democracies, and in the case of Norway, a Kingdom. Arguably, Norway is the most progressed child centrist state of the five. Its ‘Storting’, its constitution and its domestic legislation evidenced paragons for

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<sup>310</sup> Convention on the Rights of the Child, *Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, Art 41;*

It could be argued that the ‘elastic’ design of Article 41 enables progressive child policies in regards welfare and legal rights by State Parties’ and legislators; those who ‘know’ their people and their society. This is evocative of the notion of the ‘ethical praxis’.

<sup>311</sup> Article 41 (Respect for superior national standards), of the UNCRC, FACT SHEET: A summary of the rights under the Convention on the Rights of the Child

<[https://www.unicef.org/crc/files/Rights\\_overview.pdf](https://www.unicef.org/crc/files/Rights_overview.pdf)> accessed 15th June 2018.

progressive children's rights, having invoked Article 41 of the CRC.<sup>312</sup> In 2014 for example, Norway underwent a large constitutional amendments process to strengthen its human rights.<sup>313</sup> One of the constitutions amending provisions stated that, '... *the best interests of the child shall be a fundamental consideration in actions and decisions that affect children.*'<sup>314</sup> This is a powerful provision and one that should take precedence over all other legislation which conflicts with its principles. Amendments to existing legislation, as adopted by the 'Storting', include not only fixing the concept of 'the best interests of the child' into domestic law by reference to 'The Children's Act'; that children under the age of 7 years, who are deemed capable of forming an opinion, must be afforded the opportunity to do so; to express themselves in decision making processes concerning their personal situation and, '*When the child has reached the age of 12, the child's opinion shall carry significant weight.*'<sup>315</sup>

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<sup>312</sup> The Storting is the Parliament of the Kingdom of Norway; See the website at: <https://www.stortinget.no/en/In-English/About-the-Storting/> accessed 18<sup>th</sup> July 2018.

<sup>313</sup> The Constitution of the Kingdom of Norway, the Constitution, as laid down on 17 May 1814 by the Constituent, Assembly at Eidsvoll and subsequently amended, most recently in May 2018 <https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf> accessed 18<sup>th</sup> July 2018.

<sup>314</sup> Article 104, The Constitution of the Kingdom of Norway, the Constitution, as laid down on 17 May 1814 by the Constituent, Assembly at Eidsvoll and subsequently amended, most recently in May 2018, '*Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development. For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration. Children have the right to protection of their personal integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.*' <<https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf>> accessed 18<sup>th</sup> July 2018.

<sup>315</sup> Section 31, The child's right of co-determination, The Children Act, Act of 8 April 1981 No. 7 relating to Children and Parents (the Children Act), Law | Date: 2017-04-06 <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/> accessed 18<sup>th</sup> July 2018.

## 2.6 Conclusion

In acknowledging young children's capacity and providing enough and effective opportunity for them to form an opinion and to express themselves in decision making procedures, Norway's legislature has both accepted and accommodated this young group more than any other state.<sup>316</sup> The procedures encompassed by 'The Children Act' include those where the mediation and advocacy mechanism is utilised. The LIAP, and its successor, the Childs Planning Meeting would certainly qualify as decision making processes under the Norwegian legislative example, which appears to embrace child centredness and agency as a philosophy and this makes it a statute worthy of consideration.

The CRC has been a century in the making, almost three decades of active use and this makes it a fundamental international treaty. However, it is also an aspirational treaty; one which attempts to shore up its weaker proclamations by reference to its OP's, and its General Comments, eg General Comment 14 on the application of the 'Best Interests' principle. While countless thousands of children and young people's situations have improved because of the CRC, they are still marginalised as individuals, and as a group. Their best interests open to wide interpretation from the many cultures and societies comprising state membership of the CRC and their participation in decision making processes premised on the normative frameworks of each member state and by dint, acknowledgment and accommodation of individual autonomy, agency and capacity. Diplomacy and supplication are necessary elements for any reasonable dialogue and negotiation,

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<sup>316</sup> Section 31, The child's right of co-determination, The Children Act, Act of 8 April 1981 No. 7 relating to Children and Parents (the Children Act), Law | Date: 2017-04-06  
<<https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>> accessed 18<sup>th</sup> July 2018.

but as with most treaties (international and regional), conciliatory and capitulating instruments come into action. This facilitates states and enables them to make reservations on elements of articles (though not substantive articles) of a treaty; entertaining opt-out of others. However, it could be stated that a concession is not just about 'giving something up' because it also has positive connotations that include the 'idea', and the act of 'enablement'. Another weapon, or instrument in the OHCHR's armoury, is the Universal Periodical Review and the Concluding Observation. The Universal Periodical Review as discussed, is a state's self-assessment, but is tempered by the submission to the OHCHR of the 'alternative' report, which bolsters the reported observations of the OHCHR appointed Special Rapporteur to each state.

The CYP (S) 14 is partly a fusion of a failed Children's Services Bill and an abandoned Children's Charter, and this denotes that it is not an exemplar child centric or child rights statute. It has not succeeded in abating children and young people's marginalisation in decision making procedures, as illustrated by the failure in its Bill stage to include advocacy in all statutory proceedings and independent advocacy provision at a Child's Planning Meeting. However, it is not a 'toothless tiger' and by extension of its powers, it has had a mainly positive effect on children, young people and family life. Additionally, with the extended powers of the CYPSC, the agency and participatory rights of this young group will hopefully be further accommodated.<sup>317</sup>

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<sup>317</sup> The office of the Children and Young Persons Commissioner for Scotland (CYPSC). Previously known and titled as the Scottish Commissioner for Children and Young People (SCCYP); deriving power of office from the following legislation: 'Commissioner for Children and Young People (Scotland) Act 2003'. Those powers were extended in 2017 by Part 2, s 5 and s 6 of the Children and Young Person's (Scotland) Act 2014. These have empowered the commissioner to investigate individual complaints; to report/recommend on given events from concerned bodies.

The HRA 98 gives effect to the ECHR in UK law and applies to Scotland, as it does the other three nations comprising the United Kingdom. Whilst it does not make specific reference to children as individuals, or as a group, any child deemed competent and capable should be afforded like opportunity to bring forth a case alleging a convention wrong by a public authority; more common in respect of an education authority's failure to provide for a child's additional support and educational needs. Concerns in respect of legal precedence, ie the moot subordination of ECHR law in preference to CRC treaty tenets in domestic devolved law are unestablished. This is because the ECHR (the EU) promotes the application of the CRC. This is largely positive because it provides a ratifying state with options, and if the UK were to also ratify the European Convention on the exercise of Children's Rights, the benefit for this young group would be great. Regrettably, with the current political climate in the UK and the Scottish parliament a mere devolved body, it is an unlikely scenario.



## **CHAPTER 3 ADVOCACY**

### **3.1 Introduction**

This chapter commences with an explanation of advocacy and the model types most commonly practised, with an emphasis on instructed Advocacy (1-1) and collective advocacy. This will be followed by a discussion on the principles of advocacy and a brief historical chronology of the advocacy movement within the context of its origins and impact in the UK. Thereafter, the idea of the independent and professional advocate will be critiqued. Where relevant, reference to applicable law, policy and practice will be highlighted.

The term ‘mechanism’ has been chosen as it conveys the importance of advocacy (and other support mechanisms) in that it is an essential part; has an essential function in the operation of a decision making process. Its inclusion, arguably essential when the focus of a decision making process is a child or young person. The mechanisms referred to in this study are carried out by individuals and they are termed role holders. For example, advocacy is the mechanism and the advocate, the holder of that role. There are additional and varied non-advocacy support mechanisms (and adjunct role holders) that feature in this study and these will also be critiqued, relative to their supporting context.

It is important that the reader understands the difference between the non-legal advocate and the ‘legal’ advocate and this requires a succinct explanation of the latter. In plain terms, a legal advocate is a specially qualified individual who can advise, represent and plead on behalf of their client. Critically, they have rights of audience before a state court or a tribunal. However, the researcher would also draw the attention of the reader to the following international body, ‘The

Children's Rights Information Network' (also referred to as CRIN). This agencies foundation is premised on the CRC and their membership includes Together (SACR) and other Scottish agencies. This international body, whose work is focused on 'legal and quasi legal' advocacy provide an interpretation of legal advocacy as follows:

*'Legal advocacy is a pathway for challenging abuses of rights that are based on absent or weak laws, or on laws that represent an abuse of rights in and of themselves...Legal advocacy is an important, sometimes neglected, tool for rights defenders and is one that can be used both in isolation and alongside more traditional political and social advocacy techniques to advance children's rights.'*<sup>318</sup>

The inclusion of the phrase, '*alongside more traditional political and social advocacy*' is inspiring. It highlights possibilities and exudes positivity; that there is more meaningful theoretical premise to advocacy in its simplest form; it is a powerful supporting tool.

Related to the idea of the political and social, we also have what is termed 'public and cause' advocacy, these being concepts which permeate the narrative of this study. In plain terms, 'public and cause advocacy' is concerned with the supporting and perhaps even lobbying of a group, or for a cause. They are associated with the macro political, but not always so. Salamon and others best summarise these two clear cut types of advocacy, ie the public advocate and the

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<sup>318</sup> CRIN-Children's Rights Information Network, 'Legal Advocacy, We want a world where all children can enjoy all their human rights so they can enjoy their lives with equality, dignity and respect' <<https://www.crin.org/en/home/law/legal-advocacy>> accessed 4th October 2016.

cause advocate, when they define them as aspects of a 'singular origin'.<sup>319</sup> Salamon and others, also set out the hypothetical positives and arguable benefits of employing the 'not for profit' sector in the thematic role of the advocacy and the advocate when they state the following:

*'Because they are not beholden to the market, and are not part of the governmental apparatus, nonprofit organizations can be expected not only to innovate, but also to push for changes in government policy or in societal conditions...This role is also consistent with the voluntary character of nonprofit organizations and the availability of these organizations as mechanisms to rally people who share a particular concern. In this sense, these organizations may be in a position to serve as a link between individuals and the broader political process...nonprofit organizations will be particularly instrumental in producing major policy innovations in the fields where they operate, and that they will be actively involved in such advocacy and societal change activity.'*<sup>320</sup>

### **3.2 Advocacy model/type**

The Equality and Human Rights Commission provide us with a veritable and practical interpretation of the concept of advocacy and the advocate in that it

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<sup>319</sup> Lester M Salamon, Leslie C Hems, and Kathryn Chinnock, *The Non-Profit Sector: For What and for Whom?* (Issue 37 of Working Papers of the Johns Hopkins Comparative Non-profit Sector Project) (Johns Hopkins University 2000) 6.

<sup>320</sup> *ibid.*

comprises, *‘Taking action to help people say what they want, secures their rights, represent their interests and obtain services they need.’*<sup>321</sup>

There are unsurprisingly, several non-legal advocacy models and whilst the following are not exhaustive, they are more representative of the common types to be found. These include, non-instructed, peer, self and collective. However, in this study, as already stated, the dominant model/type is instructed advocacy (1-1). The organisations involved and critiqued in this study have, for the most part adopted the 1-1 method.<sup>322</sup> However, it would be prudent to provide a brief description and explanation of the aforementioned models and in doing so confirm the selection of the 1-1, instructed model as the primary type under critique.

### **3.2.1 1-1 Instructed Advocacy**

As stated, instructed Advocacy, or 1-1 advocacy is the primary model identified and critiqued in this research project. From its title, we can deduce that only two individuals are involved in this model and we can adduce that a service user will instruct his or her advocate. Instructed advocacy does not promote silence on the part of the service; nor does foster the absence of service use in a decision making

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<sup>321</sup> Equality and Human Rights Commission, ‘Research report 67: Advocacy in social care for groups protected under equality legislation’ (EHRC 2011)  
<<https://www.equalityhumanrights.com/en/publication-download/research-report-67-advocacy-social-care-groups-protected-under-equality>> accessed 17<sup>th</sup> January 2018;  
See also: Ursula Kilkelly, ‘Using the Convention on the Rights of the Child in law and policy: two ways to improve compliance’ in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children, From Visions to Implementation* (Ashgate Publishing Ltd 2011).

<sup>322</sup> These organisations are not for profit NGO’s and consist of Who Cares? Scotland (WC? S) and Children 1<sup>st</sup> Moray (part of Children 1<sup>st</sup> Scotland). WC? S also practices ‘collective advocacy’, as did Advocacy North East (or NEA) and its successor, ‘Circles Network Advocacy Scotland’.

process irrespective of its premise in law and policy (statutory or non-statutory). The 1-1 advocate should in fact promote the 'voice' of the service user and enable them to come to power.

Brandon and others provide an inclusive explanation of advocacy that refers to purpose and end-result, when they state that,

*'Advocacy involves a person(s), either a vulnerable individual or group or their agreed representative, effectively pressing their case with influential others, about situations which either affect them directly or, and more usually, trying to prevent proposed changes which will leave them worse off. Both the intent and outcome of such advocacy should be to increase the individual's sense of power; help them to feel more confident, to become more assertive and gain increased choices.'*<sup>323</sup>

Where feasible, their attendance at a decision making process is encouraged, though there are many reasons why a child or young person cannot or will attend a procedure in person; even occasions when the 'team around the child' will have decided that it is not in the child's best interests or wellbeing to attend, irrespective of the edict recommending this. Such a situation as that is acceptable, so long as every effort has been made to elicit the child's views with regards their attendance, or not. Where a child or young person is in attendance, but is unwilling to 'speak up', the team, or the assembled stakeholders will hear from that child's advocate; in many ways, the child's proxy voice in the conveyance of their written word (or other communicated method, ie pictorial, or recorded). The

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<sup>323</sup> David Brandon 'and others', *Power to People with Disabilities* (Venture Press 1995) 1; David Brandon was a highly influential figure in not only bringing the plight of the homeless to mainstream attention, he also advocated on their behalf, especially so in respect of correlative mental health issues which many homeless individuals suffered from.

assembled stakeholders should then accept the views of the child or young person, as delivered by the advocate supporter, acting on their behalf and with their consent. In doing so, the stakeholders are acknowledging the mechanism and the role holder as competent and capable in taking instruction from their young client and conveying their wishes and desires. Goldstein and others principal of the 'least detrimental alternative' (briefly discussed in chapter 1) has application here.<sup>324</sup>

For example, the non-attendance of a child or young person at a meeting/procedure is on occasion acceptable, because to otherwise compel their attendance would cause them unnecessary stress, impacting negatively, their wellbeing and possibly their welfare. It would not be in their best interests. On such an occasion the 1-1 advocate would then represent that child's views, gathered at some point prior to the meeting via an acceptable method.

Anecdotally, during the empirical stage of this study, one service facilitator stated that children and young people, not otherwise familiar with statutory processes, such as Child Protection Reviews and CHP's, often view procedural meetings with varying degrees of apprehension and fear. These children clearly concerned that they would be met with hostility and their views dismissed. In such circumstances, the least detrimental alternative, ie non-attendance should be acceptable because the child or young person is no less empowered. On the contrary, they have learned to assert themselves because they have been given a choice, not a command. This makes instructed advocacy a valuable mechanism, especially so with children, young people and other vulnerable individuals.

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<sup>324</sup> Goldstein (n 112).

### 3.2.2 Non-Instructed advocacy

This type of advocacy is mostly utilised in situations where individuals are deemed incapable of communicating their views, instead, the non-instructed advocate will represent them. Arguably, this will not always be looked upon as being in the service user's best interests. However, society has a duty to ensure that the rights of such individuals are met by many means; that they are given a 'voice'. In such circumstances, the non-instructed advocate must not only be seen to be competent and independent, but that competence and that independence must be beyond reproach. Whilst this type of non-legal advocacy was not evidenced during the empirical stage of this study, it is nonetheless a valid insertion because the children's advocate is very often confronted with the very young; the traumatised and the disabled child. A salient document pertaining to non-instructed advocacy, containing principles for further consideration, is the code of practice from the English and Welsh Office of the Public Guardian.<sup>325</sup>

#### ***'The key principles of non-instructed advocacy***

- *The client does not instruct the advocate.*
- *The advocacy is independent and objective.*
- *People who experience difficulties in communication have a right to be represented in decisions that affect their lives.*

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<sup>325</sup> The Office of the Public Guardian is an executive agency of the English and Welsh Ministry of Justice.

- *The advocate protects the principles underpinning ordinary living which assumes that every person has a right to a quality of life.*<sup>326</sup>

A role specific to English and Welsh procedure and practice, the Independent Mental Capacity Advocate is not that dissimilar from the Scottish safeguarder role. The Independent Mental Capacity Advocate is primarily for service users who lack capacity to make important decisions in their life, usually in respect of medical issues, but not exclusively so. It was introduced via the Mental Capacity Act 2005 which only applies to England and Wales. However, this non-instructed model involves a degree of expectation concerning the concept of best interests, certainly on the part of the individual advocate. This is where contentions can arise. For example, the Court of Protection (an adjunct body to the Mental Health Act 2005) is often cited as the UK's most secretive court, due in part to its wide ambit powers over an individual's property and their other financial affairs; effectively assuming overall control and welfare of those deemed to lack the mental capacity to act for themselves in decision making processes.<sup>327</sup>

Henderson has defined the non-instructed advocate, or advocacy organisation as endeavouring to take, *'affirmative action with or on behalf of a person who is unable to give clear indication of their views or wishes in a specific situation.'*<sup>328</sup> Given the foregoing, it is in many ways, a model of 'best intention' and exercised in very

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<sup>326</sup> Sue Lee, 'Making decisions, The Independent Mental Capacity Advocate (IMCA) service' (Office of the Public Guardian 2007)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/365629/making-decisions-opg606-1207.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365629/making-decisions-opg606-1207.pdf)> accessed 9<sup>th</sup> February 2018.

<sup>327</sup> Lee (n 326).

<sup>328</sup> Rick Henderson, 'Defining non-instructed advocacy' (2006) 18 Planet Advocacy  
<[https://www.actionforadvocacy.org.uk/articleServlet\\_action=list&articletype=22](https://www.actionforadvocacy.org.uk/articleServlet_action=list&articletype=22)> accessed 9<sup>th</sup> December 2016.



difficult circumstances. The use of the term, Service User, to describe the vulnerable individual could also be debated, given that the individual cannot consent, or has been deemed unfit to do so. However, as the Child's Rights Information Network have pointed out, this is why we have legal advocates and legal representatives, *'Legal advocacy is a pathway for challenging abuses of rights that are based on absent or weak laws, or on laws that represent an abuse of rights in and of themselves.'*<sup>329</sup>

### 3.2.3 Self-Advocacy

Self-advocacy is probably one of the most diverse and interpretive models in concept and practice. It can be applied for the benefit of an individual, as well as a collective. By that, it is meant that an individual and a group (with a common cause and purpose) act autonomously, towards their own ends; their common goal.<sup>330</sup>

Self-advocacy is utilised by many organisations such as Circles Network Advocacy Scotland (in Moray), WC? S and many others. The aim being to create less dependency upon the individual advocate (1-1) and the initiating collective advocate through fostering independence and confidence within the individual who will take ever increasing steps towards self-advocacy and self-support. In the case of maturing children and young people, they will come to 'voice'.

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<sup>329</sup> CRIN-Children's Rights Information Network, 'Legal Advocacy, We want a world where all children can enjoy all their human rights so they can enjoy their lives with equality, dignity and respect' <<https://www.crin.org/en/home/law/legal-advocacy>> accessed 4th October 2016.

<sup>330</sup> David Hodgson, 'Advocating Self-Advocacy - Partnership To Promote The Rights of Young People with Learning Disabilities', in Jane Dalrymple and Jan Hough (eds), *Having a Voice: An Exploration of Children's Rights and Advocacy* (Venture Press, 1995) 123-134.

While self-advocacy is in many ways holistically supported, it is a model that is utilised in prescriptive processes. It is 'something' most adults with capacity already do! Pithouse and others have referenced the less than obvious cross-overs between the various models, when they state,

*'Whilst advocacy is generally agreed to be a process of ensuring another's voice is heard, enabling another to speak up or speaking for another, there are various and sometimes over-lapping forms of advocacy in existence. These forms include individual self-advocacy, collective advocacy, citizen advocacy, peer advocacy and professional advocacy.'*<sup>331</sup>

Elsley, influenced by the work of Pithouse and Parry incorporated three additional and often nuanced types/models in her 2009 commissioned research piece into the availability of advocacy services; where they were located and under what circumstances they may be accessed. In respect of this research study all the following types were observed:

- *case and systemic or cause advocacy (where knowledge from individual cases aids collective advocacy for more systemic change)*
- *passive and active models (speaking for someone [citizen advocacy] at one end of a continuum to self-advocacy at the other end)*
- *service model (where advocacy systems are purchased or set up by providers of services who retain some control over the process as opposed to completely*

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<sup>331</sup> Andrew Pithouse 'and others', 'A Study of Advocacy Services for Children and Young People in Wales' (Welsh Assembly Government 2005) 5-6 <<http://clouk.uclan.ac.uk/3704/1/advocacy-services-children-e.pdf>> accessed 2<sup>nd</sup> December 2018.

*independent services). Such service systems typically provide case-based professional advocacy but may also promote peer and collective advocacy.*<sup>332</sup>

Employing these additional and nuanced types, Elsley conducted her own follow up in identifying groups of children and young people that utilised or required such services; this being inclusive of LAAC, those with Additional Support Needs (hereinafter referred to as ASN) and those with Mental Health needs.<sup>333</sup>

### **3.3 Chronology - Principles – Independence**

#### **Chronology**

The growth and development of what is now recognised as the practice of non-legal advocacy, as well as the provision of non-legal advocates in the 20<sup>th</sup> century can be traced back to the 1960's 'civil rights' movements in North America; culminating in (then) progressive and hard fought for equality victories in respect of race and sex. Less high-profile groups included people with mental and physical disabilities, but often, these were intrinsically linked to the dominating issues of inequality of race and sex; of black people and females.

Within the realm of Scotland's mental health care and treatment, progressive legislation was arguably incentivised by this burgeoning 'civil rights' movement, though in the 1960's, the patients' admissions system in mental health institutions was very much custodial; at a stretch, Dickensian, albeit gradually

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<sup>332</sup> Pithouse (n 331) 8.

<sup>333</sup> Susan Elsley, 'Advocacy makes you feel brave': Advocacy support for children and young people in Scotland (Scottish Government 2010) <<http://www.gov.scot/Publications/2010/01/07144331/0>> accessed 18<sup>th</sup> November 2017; See p10 which borrows from, Pithouse 'and others', 'types'.

improved upon and replaced.<sup>334</sup> Such centres took on a more humane tenor, with residents being provided holistic treatments. Those treatments included the practical training of patients, as an ancillary preparation for their life outside the residential institutional setting. This was a period when children and young people were being afforded greater consideration by State institutions. Young patients, children and young people received improved treatment and their welfare rights were by degrees, accommodated. Arguably weak by today's standards of welfare, these young people were still afforded levels of autonomy. In its publication 'Towards the Future',<sup>335</sup> the SIAA also provide the reader with an insight into the more recent history of the 1970's advocacy movement in Scotland; citing patients and their supporters as responsible for wider public acceptance of what is termed 'citizen and collective' advocacy and the advancement of human rights for 'marginalised groups'; those rights extending to policy and programmes and effectively, 'normative frameworks'. Some policies and programmes played a huge role in the provision of rehabilitative treatments. An example of ancillary vocational training opportunities is given by reference to a Lothian example which commenced in the early 1970's when 'Therapy Units' and 'Children's units' were established.<sup>336</sup> However, by the 1980's and part of the 1990's, legislation was still

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<sup>334</sup> See: Mental Health (Scotland) Act 1960.

<sup>335</sup> SIAA, *Towards the Future*, (SIAA 2013) < <https://www.siaa.org.uk/publications/towards-future/>> accessed 2<sup>nd</sup> December 2018.

<sup>336</sup> Lothian Health Services Archive, Gogarburn Hospital, '*In 1969 the Gogarburn Board of Management was disbanded and the hospital's management was transferred to the Board of Management of Royal Edinburgh and Associated Hospitals. In 1971 two units for adolescents and the Industrial Therapy Unit were opened, followed in 1972 by the Children's Unit.*', Lothian Health Services Histories, 'Lothian Hospital Histories, Gogarburn Hospital' <[http://www.lhsa.lib.ed.ac.uk/exhibits/hosp\\_hist/gogarburn.htm](http://www.lhsa.lib.ed.ac.uk/exhibits/hosp_hist/gogarburn.htm)> accessed 25<sup>th</sup> January 2016.

largely seen as protectionist premised and arguably punitive.<sup>337</sup> This led to the convening of the 'Millan Committee', so named after the Rt. Hon. Bruce Millan its chair. The report which followed, provided a fundamental review of Scottish mental health law. Ward, a legal pioneer in Mental Health law, wrote an article in 1999, commending the then review of mental health services and reaffirming why that review was so drastically required at that time, because mental health user's voices had, '*... become increasingly powerful; they were survivors of the 'psychiatric system'*'<sup>338</sup> That particular system is a product of statutory and regulatory requirement; obligations and duties, overseen by unitary trusts (such as NHS Grampian and Moray Local Authority) and even though Ward did not make specific reference to children and young people, he did not exclude them as a group, not in their own right. Whilst there are still in-roads to be made in respect of children and young people's agency in decision making procedures (statutory and non-statutory) the development and increased use of advocacy and the advocate over the last few decades have greatly aided the advance and defence of children and young people's individual and group rights; that from modest beginnings the seeds have been sown for even wider acknowledgment and utilisation of the 'independent' advocate in civil society. This recognition already extending to enacted law.<sup>339</sup>

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<sup>337</sup> Mental Health (Scotland) Act 1984; s 58 and s 59 of the Criminal Procedure (Scotland) Act 1995; Mental Health (Detention) (Scotland) Act 1991; Mental Health (Patients in the Community) Act 1995.

<sup>338</sup> Adrian Ward, 'A review of mental health law - at last' (1999) 1 Feb, JLSS.

<sup>339</sup> See: Mental Health (Care & Treatment) (Scotland) Act 2003 s 259.

### 3.3.1 Principles

Undoubtedly, the Scottish Independent Advocacy Alliance (SIAA) is a lead organisation and proponent of 'independent' advocacy within Scotland, hence its inclusion in this section of the thesis.<sup>340</sup> Part of the 'independent' advocacy movement in Scotland, it was set up in 2002 and its Principles and Standards have since become the mantra of many advocacy organisations; its member organisations, irrespective of group dynamics, demographics and model type, obliged to put them into practice.<sup>341</sup> This means that all distinct groups should benefit, inclusive of Children and Young People. In so far as the SIAA definition of a child is concerned, it refers to '*..... those under 16, whether they live in the community, are detained or are "looked after"*.'<sup>342</sup> This is in deference to Scots law and not the CRC.<sup>343</sup> It could be said that the adopted SIAA definition of the adult, as

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<sup>340</sup> SIAA-Scottish Independent Advocacy Alliance, 'About us' <<https://www.siaa.org.uk/us/>> accessed 18 January 2017, '*...a membership organisation that has the overall aim of ensuring that Independent Advocacy is available to any vulnerable person in Scotland. Independent Advocacy safeguards people who are vulnerable and discriminated against or whom services find difficult to serve, empowering people who need a stronger voice by enabling them to express their own needs and make their own decisions.*'

<sup>341</sup> Membership includes WC? S, Circles Network Advocacy Scotland and Partners in Advocacy; amongst others critiqued in this study. It does not, and never has included Children 1<sup>st</sup> Scotland (or its Moray branch office) among its membership.

<sup>342</sup> SIAA, *Principles and Standards for Independent Advocacy*, (SIAA 2008) 9 <[https://www.siaa.org.uk/wp-content/uploads/2013/11/siaa\\_principles\\_and\\_standards\\_2010.pdf](https://www.siaa.org.uk/wp-content/uploads/2013/11/siaa_principles_and_standards_2010.pdf)> accessed 18<sup>th</sup> January 2018.

<sup>343</sup> United Nations Convention on the Rights of the Child, 1989, article 1 recognises the child as '*every human being before the age of eighteen years*'; Age of Legal Capacity (Scotland) Act 1991 c50 s 1, '*An Act to make provision in the law of Scotland as to the legal capacity of persons under the age of 18 years to enter into transactions, as to the setting aside and ratification by the court of transactions entered into by such persons and as to guardians of persons under the age of 16 years...*'; Amended in 1995 to give children under 16 the capacity to instruct a solicitor in connection with any civil matter etc. This move was very important, just as it was over two decades ago; that children under the age of 16 were, in civil law, recognised as legally capable of instructing a solicitor (s 2 (4) (4a)); Children's Hearings (S) Act 2011, Part 9, s 83 (1), which acknowledge and accommodate the 16 and 17 years old as child and not an adult, for the purposes and duration of the Compulsory Supervision Order. It ceases to have effect upon the individual's 18<sup>th</sup> birthday.

being 16 years of age and above has limited the young person, maybe even disadvantaged them when compared with their English peers. paradoxically, on becoming an adult in Scotland on their 16<sup>th</sup> birthday, the young person is more likely to benefit from the provision of statutory advocacy services from unitary authorities.

### **3.3.2 Independence**

The term independence is closely allied to the autonomy concept; free from the control and direction of another, whether that be an individual, a group or an authority; to act with self-driven capacity. The Scottish Independent Advocacy Alliance (SIAA) arguably, acknowledges many advocates, advocacy models and groups in Scotland today, albeit SIAA members are bound to incorporate independence as a premise of that membership. This should denote that the independent advocate and/or organisation will not be influenced or directed by another individual or agency; except for the client/ service user, of course.

However, as this researcher has referred to throughout the body of this study, advocacy organisations are by and large funded by unitary bodies. This enables them to provide statutory and non-statutory advocacy services to vulnerable individuals. Those bodies are in the main, local authorities, NHS trusts and the Scottish Government. The question to be asked is, how independent are these agencies and their advocates? This is not a trivial matter, because this study is concerned with the efficacy of advocacy (and other mechanisms) to support a child or young person in a decision making procedure (statutory or non-statutory); to

support them in coming to ‘voice’; to abate their marginalisation and increase their participation. It was deemed sufficiently important to put the question to interviewees during the fieldwork stage of this research. The discussions which took place about independence with service facilitators and managers of NGO’s and the local authority was interesting. This was because almost every interviewee claimed to be independent in their supporting role; that they were able to support a young service user, independently and without conflict. This was despite their being employed directly by unitary authorities, central government or indirectly by a 3<sup>rd</sup> party NGO (salaried or voluntary).<sup>344</sup> For the stakeholders, especially the child or young person, as service user (and his or her family), independence is immensely important. One **CYP** service user even stated that she valued the volunteer advocate more than the salaried advocate. The reason given was that the volunteer was there out of a desire to support them.<sup>345</sup> It is tempting to adopt an overly pedantic position, but the fact of the matter is that the practice and the interpretation of independence is subjective and often led by context. Looking at a devolved statutory example, it provides that, ‘... *information, advice and advocacy*

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<sup>344</sup> In this study the Local Government authority is Moray Council and the unitary trust, NHS Trust Grampian. The Scottish Parliament is in turn, termed the central government. There is currently an absence of legal structure and authority from central government, whereby Advocates would be directly employed. That stated, there are duties incumbent upon Scottish Ministers in respect of independent advocacy provision, but only in certain tribunals and appeals accordingly. One example of the latter can be found in the Education (Additional support for Learning) (Scotland) Act 2009, s 10 (1) and (2). Unitary authorities may also receive funding (occasionally ring-fenced) to carry out their statutory duties in respect of Independent advocacy provision. This is demonstrated by reference to the Mental Health (Care and Treatment) (Scotland) Act 2003, Chapter 2 Advocacy etc. s 259 (1) and (1) (b). A very recent addition to the provision of ‘*independent information and advice and independent advocacy*’, comes in the form the Social Security (Scotland) Act 2018 s 6 (1) (a) and (b), which recognises the importance of the foregoing. These are still early days in respect of the latter statute, with the machinations of supporting frameworks yet to be made clear.

<sup>345</sup> Further details of the realpolitik of independence will be furnished and critiqued in Chapter 4, which follows on from this, chapter 3.



*are independent if they are provided by a person other than the Scottish Ministers.*<sup>346</sup> That is an indefinite take on the independent advocate and their role. Such a diffuse statement makes it incredibly difficult to identify and document possible ‘conflicts of interest’. In other words, the conflict or conflicts would have to be very conspicuous and that makes judgement of alleged, or apparent conflict issues incredibly difficult to monitor and tackle. Conflicts of interest are generally foreseeable and can usually be mitigated for, but conflict is also a fixture of our daily lives; as is our efforts to resolve same. Adjunct to conflict of interests we also have competing demands which, it is argued, can detrimentally affect the performance of service facilitators (and service managers) in decision making processes. These are demands which should not affect the purpose and function of decision making processes, but unfortunately, they can do. These concerns extend to factors such as security of tenure (short term and low pay contracts), increased workloads and management pressures. These are also nuanced factors which can, and do inhibit conflict free working environments, casting doubt on the veritable independence of the supporter to a child or young person in a decision making process.

### **3.4 The Professional supporter**

Often conflated with the efficacy of advocacy and other supporting mechanisms is the concept of the ‘professional’ supporter and the reader will now be aware that there are several models of non-legal advocacy, just as there many types of non-

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<sup>346</sup> Social Security (Scotland) Act 2018, s 6 (4).

legal advocate; not forgetting macro 'public and cause' advocacy examples. As the role has developed over the last few decades, we have reached a stage whereby, certain types of advocate (usually qualified by the inclusion of 'independent' in the title) are now acknowledged by central government in law and policy; practice and policy in devolved unitary authorities. In more generalist terms, there is a prevailing opinion that a 'professional' supporter (qualified and salaried) is superior to an unqualified and/or lay supporter. As with the idea of independence, the notion of the professional was identified as a topic worthy of further exploration in this study, forming as it did part of the main themes in the empirical field work stage, ie interviewee stage. However, in keeping with the tenet of this chapter, Oliver and Dalrymple conjectured that the role of children and young people's advocacy has become increasingly subjected to procedural edict and practice, while also driving through positive, '*changes for children*'.<sup>347</sup> In other words, the correlative popularity in the use of the advocate in children's statutory processes has led to a proliferation of the professional advocate; of advocacy agencies, who are responsible for the development of the role (and the mechanism) to the level of the professional. Whilst such proliferation is less evident in Moray, by reason of its population and geographic spread (except for statutory processes), it is certainly more developed and prevalent in jurisdictions with greater concentrations of population and advocacy activity. That stated, organisations such as WC? S and Circles Network Advocacy Moray may take the antithetical view; that they are indeed professionals, akin to say teachers or social workers and if not, they are at the very least to be considered specialists. The idea

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<sup>347</sup> Christine M Oliver and Jane Dalrymple (eds), *Developing Advocacy for Children and Young people, Current Issues in Research, Policy and Practice* (Jessica Kingsley Publishers 2008) 13.

of 'professionalising' what has been understood to be a 'lay' supporting role is not without issue, but so long as the philosophy of advocacy is maintained; so long as the advocate can lay claim to their independence, free of conflict and bias, then there is a place for the professional. Some agencies and bodies also provide nationally recognised accreditation to individuals upon completion of advocacy training. Other agencies and bodies offer little, or no training and accreditation. This does not mean that the accredited advocate is more effective and competent than the non-accredited advocate. Having observed practice with both types of advocates in procedures and having listened to their testimonies, this researcher can avow that there is often little to separate the two types. However, if the Scottish Government were ever to implement a centrally funded independent advocacy service, there would surely have to follow a dedicated programme of training and accreditation. At that point, the role and the mechanism would arguably become professional and procedural. Dalrymple referred to this as 'creeping professionalisation', in respect of certain processes. Those processes being Child Protection Procedures and Family Group Conferences.<sup>348</sup> The language Dalrymple uses, ie 'creeping' indicates her unease and concern with the manner and type of changes impacting the advocacy role. Dalrymple's hesitance may stem from a widely held attitude by many in authority, that only the professional, ie the trained and the accredited (perhaps even the salaried) can support vulnerable people and groups in decision making processes. This dismisses every other

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<sup>348</sup> Jane Dalrymple's PhD thesis was titled: *Constructions of Advocacy: An analysis of professional advocacy in work with children and young people*, (Manchester Metropolitan University 2003); Jane Boylan's 2004 PhD thesis was titled: *'Reviewing your review: a critical analysis of looked after children's participation in their statutory reviews and the role of advocacy'*, (Staffordshire University 2004); Dalrymple and Boylan's latest joint work is titled as follows: *Effective Advocacy in Social Work* (Sage 2013).

advocate type and supporter, irrespective of ability and vocation and labels them merely amateurs; a form of denigration.

Boylan makes another connection regarding professionalisation and the increased popularity of advocacy and advocates in England, when she states that the CRC and the ECHR's embedment into national law, has had the effect of creating, or giving rise to, '*....a proliferation of advocacy services for children and young people*'<sup>349</sup> This should 'on the face of it' be viewed positively, but like Dalrymple, Boylan is cautious, perhaps rightly so. There may well be an increase in individuals referring to themselves as advocates (non-legal) and a parallel expansion of agencies providing advocacy services for children and young people, but these must be met with robust review, monitoring and regulation. Checks and balances are always necessary before any child or young person should be 'exposed' to any individual or agency. As already stated, Boylan's expansive proliferation has not yet affected this corner of North East Scotland, with the exception of recent statutory obligations in respect of advocacy provision, and an emphasis on LAAC and ASN.<sup>350</sup> That stated, if and when the role of the advocate and advocacy agencies advances beyond what it is documented in this study, then national frameworks must surely be put in place; meeting the challenge of those robust checks and balances. That 'all' non-legal advocates and advocacy provision should fall under an ambit umbrella of professionalism (or quasi-professionalism)

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<sup>349</sup> Oliver and Dalrymple (n 347) 45.

<sup>350</sup> See: Children's Hearings (Scotland) Act 2011 s 122; Education (Additional support for Learning) (Scotland) Act 2009 s 10.

is again, a moot point. It is certainly a topic which demands greater discussion and further research.<sup>351</sup>

### 3.5 Conclusion

The children's rights movement has advocated progressive policies and actions by state governments for many years via 'public and cause' advocacy; appealing to state governments whose normative frameworks are premised upon the ideals protectionism and prevention, and less so on the participating child and young person. Such movements desire an increased parity of children and young people's participative rights (and promotion of said rights) in mainstream policies, practice and domestic statute. However, not everyone, or every state is convinced that parity is meritable. Reynaert and others have argued that this could be a type of 'mainstreaming' which has inadvertently led to greater, though unwelcome involvement of the state in our private lives; that via the increased application of the three principles of protectionism, prevention and participation via law and policy, the state has subsumed anomalous control of the parent. A situation whereby the state servant (the professional advocate) becomes, '*...the advocate for the best interests of the child... [via]...the creation of new social services.*'<sup>352</sup> The

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<sup>351</sup> Jane Dalrymple, 'Constructions of child and youth advocacy: emerging issues in advocacy practice' (2005) 19 Children & Society 13.

<sup>352</sup> Reynaert (n 29) 529;

In so far as the Scottish experience is concerned, this 'new social service' is epitomised by the created post of a certified 'Social Worker' in the 1960's. The social work positions were in the main, melded from existing health and social care service personnel of that time. The role of the Social Worker was arguably attractive to individuals who were keen to be part of a 'new era' of welfarism for all children, irrespective of need or deed;

See: The Kilbrandon Report 1964 <<http://www.gov.scot/Publications/2003/10/18259/26879>> accessed 31st January 2017; Social Work (Scotland) Act 1968; The British Association of Social Workers <<https://www.basw.co.uk/>> accessed 20<sup>th</sup> January 2018.

authority and autonomy of the parent usurped by the state. It is a strange hypothesis, especially so if it has (debatably) been aided by the children's rights movement; the very movement which seeks to empower children as competent participants in their daily lives, through its successful advocacy has disempowered the parent. However, if society is to progress towards a greater parity of rights for all, it will need to re-evaluate its relationship between children and young people and the adults in their lives; private and public domain alike, and where necessary embed new normative frameworks. The institution of the family, the private domain may well be concerned with this arguable encroachment of the state, made possible by the parallel empowerment of children and young people as active and participative agents. Suffice to state at this point, that the debate will rage and no doubt lead to struggles within the micro, the private domain and the macro, the public domain.

The provision of advocacy models/types and advocates will of course be dependent upon determined need, context and availability. The main external and affecting factor determining advocacy provision is whether it is demanded by black letter law, statutory duty. Over and above provision, as mandated by statute and regulation, there are only pockets of non-statutory practice in Scotland, and indeed in Moray. The situation in that respect is made even more precarious, in times of devolved authority austerity cutbacks. In the absence of compelling legal obligations, ie duty upon public bodies to provide support services, it is 'luck of the draw' as to where and how 'proactive' advocacy policies are implemented in a framework, especially so in the provision of children and young people's services.

The types of advocacy available are generally influenced by the lead provisioning advocacy bodies and that suggests that the advocacy support provided is only as worthy as the advocate and the agency. As it is a largely un-regulated support role, training, review and accreditation (where applicable) is lacking uniformity and thus, rather disparate. The only membership group in Scotland with anything close to defined principles and standard and guidance is the SIAA, funded as it is by the Scottish Government. This groups purpose is to 'ensure that independent advocacy is available to any vulnerable person in Scotland'. However, individual advocates and agencies providing advocacy are not compelled to become signatories, albeit the take-up with those agencies and individuals incorporating 'independent' into their title will of course, be more inclined to become members. However, as the researcher pointed out earlier in this chapter (three), the advocates (and other supporters and managers) interviewed in this study also claimed to be independent in their roles, despite the absence of that term in their title, nor membership of the SIAA. Can an advocate, or an advocacy organisation truly be independent by the mere insertion of the term in their title and voluntary membership of a government funded body? Or is it enough that their actions are proof of that independence and autonomy? There is no doubt that claims to independence require further dedicated research because the welfare of our vulnerable children and young people is paramount. While we concern ourselves with 'checking' and 'validating' individuals who may have an encounter with our children and young people, there is a strong case to be made for a considered and balanced response to some types of lay advocate, whereby they should not be subjected to the same levels of protectionist and preventative scrutiny. There will always be a place for grass roots advocacy; advocacy for and by the common man,

woman and child which is faithful to the original fundamentals of the concept. All types of advocacy will prevail, even in this small enclave of Scotland and this is a certainty, until such times as marginalisation of the vulnerable, especially the child and young person will no longer be tolerated. However, whilst there is a place for grass roots support, we also must acknowledge the fact that procedures are becoming increasingly complex, particularly statutory processes and this demands that the individuals providing support must be endowed with the applicable qualities and knowledge if they are to successfully aid vulnerable and marginalised individuals. Chapter 3 has for the main part concentrated on the concept of advocacy and what this means from a generalist point of view, but this being an inter-disciplinary study, it is now necessary to introduce the reader to advocacy, the advocate and other support mechanisms in real terms; the 'realpolitik' in Chapter 4.



## **PART II      REALPOLITIK**

### **CHAPTER 4**

#### **ADVOCACY AND OTHER SUPPORT MECHANISMS/ROLES and ORGANISATIONS**

##### **4.1      Introduction**

Many of the bodies and agencies critiqued in this study have incorporated procedures and adjunct mechanisms into their daily functions and duties as demanded by statutory and regulatory edict. There are also distinctive practices between unitary authorities and 3<sup>rd</sup> party agencies (especially the charity sector) where the procedures, policies and mechanisms employed are more reflective of historic practices and principles. Having just discussed the concept and general context of advocacy, this chapter will focus on advocacy and other support mechanisms, as they are utilised in the Moray jurisdiction, for the main part. This will commence with a critique of advocacy and other support mechanisms in Moray and where applicable, neighboring authorities. A detailed descriptive of identified mechanisms and support roles within the jurisdiction will follow, in so far as they relate to children and young people's advocacy in decision making procedures. Thereafter, a brief discussion on the burgeoning practice of collaboration between bodies and agencies in the jurisdiction will follow; as they impact children and young people's support. The conceptual analysis of independence and the advocate (and other support roles) discussed in the previous chapter will be explored, with the emphasis on interpretation and

application by bodies, agencies and individuals. It was also deemed necessary to include a section on the numerous 'factors' affecting agencies, mechanisms and support role holders which have not already been discussed in the foregoing. These identified factors were partly observed by the researcher and partly highlighted by participants during the empirical stages of this research and they include topics relating to the professional vs the lay supporter; the dilution of core support roles within 3<sup>rd</sup> sector agencies and unitary authorities; the significance of complaints procedures, and consultation with the public. Advocacy and the advocate are arguably essential in non-statutory procedure, promoted as an equal platform for all involved stake holders; children and young people included. The chapter will close with an appraisal of the Family Group Conference, because of its increasing prevalence as a decision making procedure and its incorporation of many aspects of an atypical mechanism.

## **4.2 Moray**

The wellspring of advocacy services for Moray arguably originated during the tenure of what was known as Grampian regional council and Grampian Health Board.<sup>353</sup> Services were developed in the very early 90's, when '*....it was recognised that there was a need for some form of Independent Advocacy service for users of health and social work services*'<sup>354</sup> The growth in popularity and transition

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<sup>353</sup> There were 9 regional areas, from 1975 to 1996. Grampian region has altered since 1996. It now comprises 3 separate unitary council areas/authorities inclusive of Moray, Aberdeenshire and the City of Aberdeen; NHS Grampian is now one of 14 regional health boards in Scotland. It still covers the 3 unitary authority council areas of Moray, Aberdeenshire and the City of Aberdeen.

<sup>354</sup> Allan J Sim, Rob Mackay and Lynne Batik, 'The Evaluation of Advocacy Projects in Grampian: A Report prepared for the Joint Committee on Community Care' (School of Applied Social Studies, The Robert Gordon University 1996) 1; Referenced within the University Library 361.809412 EVA.

from a periphery, to a mainstream mechanism did not happen overnight though. Its position in societal frameworks and its status were largely down to the efforts of earlier public and social advocates lobbying for change. Individuals, bodies and practitioners all saw the value of the mechanism, encouraging its use in the field of health and social care. What was happening in the then Grampian Health Board and Grampian Region (*which would have included the then district of Moray*) was mirrored throughout Scotland and the UK. As referenced in a 1996 study, *‘Thus, in that year Grampian Health Board’s Charter for Health was published, stating that all patients had a right ‘...’ ‘to have someone help you to express your views to the staff who work with you and speak on your behalf if you wish’* <sup>355</sup> The researchers in that commissioned study were highly positive in respect of their collaborating projects and individuals’, particularly with responses to their requests for interviewees, and the return of questionnaires which was, *‘extremely high for such a method of approach.’* <sup>356</sup> The participating advocacy projects involved in the 1996 Grampian study received their funding from one, or both unitary bodies operational at that time (Grampian Regional Council and Grampian Health Board) who in turn commissioned the study. The stratagem adopted during that period included a ‘micro-policy’ agreement in respect of joint working in community care. Joint working between authorities may well be standard nowadays, per the incumbent legislative duties demanded of health and social care bodies to integrate health and social services via the Public Bodies (Joint Working) (Scotland) Act 2014

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<sup>355</sup> Sim (n 354).

<sup>356</sup> *ibid* 11.

(hereinafter referred to as PB (JW (S) A 14);<sup>357</sup> back in 1996 however, such moratoriums were unusual and progressive and that is arguably demonstrative of pro-active leadership and management of that time. The Grampian study contains pertinent critique, particularly so about policy, as well as propositions for (then) future research in the arena of advocacy as a support mechanism. It would be fascinating to know what the authors of that study would make of today's status quo.<sup>358</sup>

To further illustrate the importance with which advocacy as a support mechanism in decision making processes has been held in Moray's recent past, reference is made to a recording of a 2004 'minute' from the local authority. This details the need for investment in, and of advocacy services, *'To seek the support of the Committee to explore future alternative options for the provision of Advocacy services to people in Moray, both in the immediate & longer term.'*<sup>359</sup> The 2004 document also evidences Moray Council's previous collaborative relationship with Scotland's umbrella advocacy body, the SIAA.<sup>360</sup> Perhaps the relationship between Moray Council and the SIAA could be revisited, given that WC? S and Circles Network Advocacy Moray, two of the three advocacy providers in Moray (up to

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<sup>357</sup> Public Bodies (Joint Working) (Scotland) Act 2014, asp 9 2014, Part 1, 'Functions of local authorities and Health Boards'; Also see: Public Services Reform (Scotland) Act 2010, asp 8, Part 5 'Social care and social work: scrutiny and improvement' Chapter 1 'Social Care and Social Work Improvement Scotland'; Care Services and Social Services have come under greater scrutiny and this reforming 2014 statute, 'inter alia' hopes to improve services function and delivery.

<sup>358</sup> Sim (n 354) 27-31.

<sup>359</sup> Moray Council, Item: 31, Report to: Community Services Committee 24<sup>th</sup> November 2004, About: Moray Advocacy, By: Head of Community Care  
<<http://www.moray.gov.uk/minutes/archive/CM20041124/morayadvocacy.PDF>> accessed 18<sup>th</sup> January 2018.

<sup>360</sup> *ibid.*

2018) are members of the SIAA.<sup>361</sup> It is not unusual and nor is it uncommon for the SIAA to count unitary authorities amongst its membership alongside 3<sup>rd</sup> party NGO's and individual practitioners.

Mention has already been made of three advocacy providers in Moray; that two out of three are members of the SIAA. The one provider without membership is Children 1<sup>st</sup> Moray, despite their being the main provider of advocacy to children and young people in Moray, up until four years ago that is.<sup>362</sup> The emphasis is on the past tense, because up until about 2014, Children 1<sup>st</sup> Moray provided advocacy to both LAAC, and non-LAAC in statutory and non-statutory decision making processes. However, returning to the 2004 minute, another recorded detail concerned future funding and future planning, whereby reference is made to a 'community fund' to recruit 'specialist advocates'.<sup>363</sup> This is interesting, because historically (and procedurally) funding has come from central government and then shared amongst qualifying local authorities and applicable NHS trusts. It must also be stated that such nuanced funds are often 'ring fenced' and this denotes that the money must be spent on a specified project or purpose. Some of these funds have also come directly from European Union bodies; designated for specific

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<sup>361</sup> WC? S provides 'one to one' and 'collective advocacy', for children and young people up to the age of 26, by dint of the Children and Young Persons (Scotland) Act 2014 s 57; see their website at <<https://www.whocarescotland.org/>> accessed 19<sup>th</sup> January 2018; Circles Network Advocacy Moray, CNAM also provides both types/models of advocacy, for vulnerable adults; see their website at <<http://www.circlesnetwork.org.uk/>> accessed 19<sup>th</sup> January 2018.

<sup>362</sup> Children 1<sup>st</sup> Moray is the working title for a regional office of the Scotland wide 'Children 1<sup>st</sup>' organisation whose main offices are in Edinburgh; see their website at <<https://www.children1st.org.uk/>> accessed 19<sup>th</sup> January 2018; The Children 1<sup>st</sup> site appears to have been altered (dated 2018). Where previously a search of the Moray service would detail 'Rights and Advocacy' work, this no longer calibrates. A search of services now only displays the Moray office when the option, 'Recovery from abuse and trauma' is selected, as follows: <<https://www.children1st.org.uk/what-we-do/how-we-help/our-services/>> accessed 19<sup>th</sup> January 2018.

<sup>363</sup> Moray Council (n 359) 2.

causes and groups, which qualify under conditions that require specific elements be present, ie rural community and outdoor education. Those EU awards have also incorporated and benefited children and young people in respect of that group's welfare and political rights. Moray authority was very active, perhaps pro-active in championing advocacy as a support mechanism in children and young people's decision making processes, but it was also keenly aware of impending statutory duties in respect of the provisioning of mental health advocacy, as detailed in the 2004 documents caveat, ie MH (C&T) (S) A 2003.<sup>364</sup>

Arguably in 2010 there was a greater sense of enthusiasm for advocacy at a Scottish political level, as illustrated by Elsley who was commissioned to undertake a Scotland wide study to gauge availability and use of the mechanism as, *'.... informed by guidance and policy on children and young people's entitlement to advocacy and the range of semi- judicial, legal and administrative processes where children and young people may have access to advocacy support.'*<sup>365</sup>

The citation is important at this juncture because its parameters were deliberately wide, incorporaing judicial, legal and administrative processes. Elsley did not restrict the range of systems because her primary object of interest was the mechanism, ie advocacy.

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<sup>364</sup> Moray Council (n 359) 2.

<sup>365</sup> Elsley (n 333) 8.

However, by 2015 the SIAA reported that advocacy and advocate provision for children and young people in Scotland was poor, compared with the experiences of adult service users.<sup>366</sup>

It must be borne in mind that the data provided by the SIAA was collated in respect of groups with statutory rights of access to independent advocacy. It did not include non-statutory procedures (such as the LIAP and its predecessor, the LAP) and service users therein.<sup>367</sup> A couple of years prior to that SIAA publication, the Equality and Human Rights Commission published an appraisal of wider advocacy provision in Scotland, with specific reference to the ‘social care agenda’ and ‘self-directed’ support, though critical of the scant information available at that time.<sup>368</sup> The Commission had positive words for the official consultation on Self-Directed Support and the Scottish governments National Strategy response, that, *‘In Scotland, personalisation is central to the public service reform agenda: service users being centrally involved in the way services are designed,’*<sup>369</sup>

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<sup>366</sup> SIAA, ‘A Map of Advocacy across Scotland 2015–2016 edition’ (SIAA 2016) 11 <[https://www.siaa.org.uk/wp-content/uploads/2017/09/SIAA\\_Advocacy\\_Map\\_2015-16-1.pdf](https://www.siaa.org.uk/wp-content/uploads/2017/09/SIAA_Advocacy_Map_2015-16-1.pdf)> accessed 14<sup>th</sup> January 2018; *‘Children and young people with a mental illness still do not have easy access to independent advocacy. In some areas there is no provision at all.... This significant gap is concerning us because with increasing numbers of children and young people experiencing mental health issues we haven’t seen any evidence of NHS and LA taking steps to address the lack of advocacy provision.’*

<sup>367</sup> *ibid.*

<sup>368</sup> Equality and Human Rights Commission, Research report 67, ‘Advocacy in social care for groups protected under equality legislation’ (Equality and Human Rights Commission 2010); Social Care (Self-directed Support) (Scotland) Act 2013, asp 1, *‘An Act of the Scottish Parliament to enable local authorities to provide support to certain carers; to make provision about the way in which certain social care services are provided by local authorities; and for connected purposes.’*

<sup>369</sup> Equality and Human Rights Commission, Research report 67, ‘Advocacy in social care for groups protected under equality legislation’ (Equality and Human Rights Commission 2010) 1.

Commissioning advocacy and/or rights provision for children and young people over a considerable period, the authority has arguably demonstrated a commitment to children and young people's increased participatory rights as part of their wider normative framework. As mentioned, the 3<sup>rd</sup> party organisation procured to provide 'amongst other things', 'Advocacy and Rights' services for the authority since 2004 was Children 1<sup>st</sup> Moray. However, early procurement took place prior to EU regulations informing national law and many agencies (including Children 1<sup>st</sup> Moray) provided public services via 'grants awards' from unitary authorities.<sup>370</sup> The grant awards process was positive and negative in application. For example, intermittent reviews and an absence of challengers may have resulted in stable service provision over longer periods of time; a benefit to everyone, especially the service users, the children and young people. The antithesis inference though, is that an absence of challengers, coupled with lengthy gaps between service reviews can lead to questionable patronage; preferential treatment and bias (particularly in smaller authorities). It is important to stress this is conjecture, that neither Moray authority, nor any of its collaborating agencies (past and present) have been accused of any acts of impropriety in the awarding and procuring process. However, the critique is still necessary because it highlights positive and negative aspects which could have arisen from older practices. It is also a cautionary note to unitary authorities and the increased 'outsourcing' of what was 'in house' social and care services. From a practical point of view, without effective and robust review, it can be nigh impossible to measure

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<sup>370</sup> Procurement Reform (Scotland) Act 2014, asp 12, *The Bill for this Act of the Scottish Parliament was passed by the Parliament on 13th May 2014 and received Royal Assent on 17th June 2014.*



the success or failings of any project or service. Whilst this is not an 'out and out' denouncement of what was the grants award system, it is an acknowledgement that arrangements may not always have been the best models; not for out-sourcing public services. Instead of creating stable periods of guaranteed service provision, these models could have fostered stagnancy and enabled ineffectual practices.

Many 3<sup>rd</sup> party service providers have origins within a locale and for a specific purpose, ie historical and geographical origins; serving a niche identified need via a bespoke model. Advocacy North East (or NEA) is one such provider, but it is argued that they are becoming the exception and not the rule. This tangible change of tack in practice is reflective of many organisations' struggle to survive in a market driven economy. From the adoption of business models and modern marketing techniques, the appearance of some charitable agencies in social, health and educational provision has greatly altered in the last few years. The procurement process in the UK (affecting the devolved nations) has also directed this change.<sup>371</sup> For some charitable agencies, the markets may have presented new opportunities enabling their expansion, adaptation and survival. For others, it has resulted in a contraction of services, with many unwilling to abandon long held principles intrinsic to their founding philosophies. These 3<sup>rd</sup> party agencies are not affected in isolation though, because unitary authorities have had to adopt similar strategies and implement practices in the face of ever decreasing budgets and streamlining. This is illustrated by reference to Moray authority splitting its

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<sup>371</sup> See: CYP (S) A 14; MH (C&T) (S) A 03, s 259; E (ASL) (S) A 03, s 14A; EA 10; See also: Procurement Reform (Scotland) Act 2014, asp 12.

‘Advocacy and Rights’ service provision for children and young people in 2013. It separated said provision according to LAAC and non-LAAC service users in both statutory and non-statutory decision making processes. Up until that point, Children 1<sup>st</sup> Moray (as previously stated) had the contract to provide advocacy and rights for types of service users; in statutory and non-statutory processes. As much as finance and business models may have influenced this decision, it was arguably driven in response to impending statutory duties upon local authorities in respect of LAAC.<sup>372</sup> Whilst those statutory duties and obligations have been hugely positive for LAAC, there may well have been a negative impact upon non-LAAC. The focus on, and statutory obligations afforded the LAAC, could adversely result in less attention and resources being invested in non-LAAC; their decision making processes and access to advocacy and other support mechanisms. Though not overtly stipulated in the public contract ‘award notice’ that followed, it was still inferred that different agencies should be employed for the two service types advertised. WC? S was subsequently awarded the contract for the LAAC element, with Children 1<sup>st</sup> Moray awarded (or retaining) the contract for the non-LAAC element; in addition to their being awarded contracts for associated services, such as ‘Stronger, Safer Families’.<sup>373</sup>

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<sup>372</sup> Funding will be provided to authorities and bodies from central government, ‘specifically’ for the preparation and delivery of parts of forthcoming statutes. In this example, the Children’s Hearings (Scotland) Act 2011, s 122 (advocacy provision) for LAAC.

<sup>373</sup> See: Public Contracts Scotland, ‘View Notice, Award of 13/0014 Rights, Advocacy and Mediation Services for Children and Young People’  
<[http://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=FEB167227](http://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=FEB167227)> accessed 19th January 2018.

### 4.3 Mechanisms and Support Roles

There was a time in unitary authorities where the practice of outsourcing core and ancillary roles in children and young people's services was virtually unknown, particularly so in respect of education, social and health care provision. What we have now is very much an even split in respect of 'in-house' provision, with core and ancillary staff vs 3<sup>rd</sup> party ancillary; core staff employed through procured service agencies (usually not for profit NGO's). Leaving aside the legal, political and economic machinations that have brought us to this point, we are interested in how these 'new' norms affect children and young people in a decision making process. The core and ancillary roles utilised in the Moray jurisdiction are listed below. Some of these roles afforded greater consideration than others; a decision which has been led by the researcher's observations.

#### 4.3.1 Operational within the jurisdiction: *\* indicates the titles and roles of interview participants:*

- Advocate\*
- Advocate and Rights Worker\*
- Independent Advocate\*
- Mediator
- Children's Rights Officer\*
- Family Support Worker\*
- Young Persons Worker [LAAC]\*
- Residential Care Officer\*
- Children's Panel Member\*
- Social Worker (SW)\*
- Mental Health Officer
- Educational Psychologist

Some of the roles listed are prescriptive, whilst others are flexible, but by degrees they are involved with and support children and young people's social, educational and health needs; welfare rights and political rights. The more prescriptive roles and associated mechanisms that derive their power and function via statutory edict or regulation, arguably incur greater demands of the individual role holder, ie qualifications and tenure. Other roles and mechanisms, no less valuable to the individual service user, though less prescriptive are in some cases, no less specialised; advocates being one of those roles.

#### **4.3.2 Alternative or complementary support**

There are a couple of types of advocacy provision and practice within the Moray jurisdiction, but this is largely representative of the situation throughout the whole of Scotland. These are detailed in Part 1, chapter 3 of this study and include 1-1 Instructed Advocacy. However, as stated at the outset of this study and reiterated throughout the piece, there are many other additional supporting mechanisms and associated roles. These include: Home School Link Worker/Youth Worker/ Social Worker/ Children's Services Worker. There is also a great deal of assumption made about advocacy, advocates and other support mechanisms, as is evidenced by the opinions and views expressed by interview participants taking part in this study. For example, one Manager, **SM 4**, stated,

*'A Child Rights Worker will put across the views of the child and help them understand what is being fed back; but sometimes they get drawn into and do more than 'support' the child, help that child to 'voice'. I have had to clarify a*

*couple of situations and roles...They can be crossing, going beyond their role (official remit) take away from the solution; can create antagonism.'*

#### **4.3.3 Mediators and Mediation - Moray**

Since this study began, there have been many changes in national and local law and policy, as well as developments within the agencies and services critiqued. Albeit mediators were not involved in the empirical stages of this research, the mechanism is still worth detailing, given its status and use within the Moray jurisdiction (certainly up until June 2017). This date is specific because it relates to a Freedom of Information (Scotland) request which was made to the Moray authority in respect of 'Mediation in Education'.<sup>374</sup> The requesting party desired to know the details of local authority 'independent mediation' arrangements, as well as related statistics for the years 2005 to 2017. Those statistical requests concerned the numbers of referrals and the successful resolutions (prior to being elevated to Additional Support Needs Tribunal Scotland case status) which had been made during that period. It went on to request how many applications had and had not been elevated in status, ie as a case lying to the Additional Support Needs Tribunal Scotland. This is of interest because that FOIS not only asks about mediation, it asks after 'independent' mediation; covering a period over 12 years and pivoting on a critical support mechanism for children, young people and their families in a statutory process. The reply from the authority was... brief,

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<sup>374</sup> Moray Council, FOIS Request Mediation in Education Request 101001513940 02/06/07, 3-7 Comment from Inclusion Manager for Education and Social Care: (Moray Council 2017) <[http://www.moray.gov.uk/moray\\_standard/page\\_113316.html](http://www.moray.gov.uk/moray_standard/page_113316.html)> accessed 28<sup>th</sup> January 2018.

*'We do not routinely record information about mediation. However, after asking Moray Head Teachers about this within their tenure, there has been one request for mediation during 2016-17 which is currently on-going. I am unable to identify other information. There have been none going to Tribunal that I can identify.'*<sup>375</sup>

Once again, we are presented with 'information deficit'. This somewhat supports the notion that there is an absence of a universal robust system to collate and manage what pivotal (though sensitive) data. This is not dissimilar to the issues and the outcomes which this researcher argues, affected the administration and management of the LIAP procedure.

#### **4.3.4 Mentors and Mentoring - Moray**

Mentoring, like non-legal personal advocacy is a popular support mechanism. Both advocacy and mentoring offer support for different purposes, in different contexts. Where a practitioner of advocacy 'should' have a reasonable working knowledge of a procedure (including statute and policy upon which a procedure is premised) to enable them to perform their role, mentoring requires another skill set altogether. It is a more personalised role; the mentor emotionally and practically involved. At a national level there is political support for the mechanism and the role, but only in respect of LAAC. That support is demonstrated by reference to a report, commissioned by the Scottish Government. It was conducted by Elsley in 2013, in conjunction with the Centre of Excellence

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<sup>375</sup> Moray Council, FOIS Request Mediation in Education Request 101001513940 02/06/07, 3-7  
Comment from Inclusion Manager for Education and Social Care: (Moray Council 2017)  
<[http://www.moray.gov.uk/moray\\_standard/page\\_113316.html](http://www.moray.gov.uk/moray_standard/page_113316.html)> accessed 28<sup>th</sup> January 2018.

for Looked after Children.<sup>376</sup> This led, in part, to the establishment of a 'National Mentoring Scheme for Looked after Children and Young People'. Launched in 2016, it is managed by the charitable body 'Inspire Scotland' and goes by the working title, 'intandem'.<sup>377</sup> Funding applications were expected to be in place by December of 2016, with charities called to make application for same, by September 2016. It is anticipated that successful projects will be reviewed by December 2018 in order that efficacy and value are appraised. Even though the Moray area has not been included in this initial stage, Children 1<sup>st</sup> Scotland are part of 13 co-operative organisations, as well as having operations in another Scottish jurisdiction.<sup>378</sup>

As much as 'Inspire Scotland' desire to see all groups of children and young people benefit from a mentor, as and when the need arises, the moratorium in regards the 'intandem' service only referred to LAAC between the ages of 8-14; granted this was in its initial stages. Like 'Inspire Scotland', Elsley envisaged that at a later period non-LAAC children and young people should also benefit from mentoring. It was a recommendation which was accepted by the then Minister for Children and Young People, Aileen Campbell.<sup>379</sup> However, from the following

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<sup>376</sup> Susan Elsley, 'Developing a National Mentoring Scheme for Looked after Children and Young People', (CELCIS 2013) 201 < [https://www.celcis.org/files/2714/4050/9227/LACSIG\\_Mentoring\\_Report-2014-09-02](https://www.celcis.org/files/2714/4050/9227/LACSIG_Mentoring_Report-2014-09-02).> accessed 16th January 2017.

<sup>377</sup> Inspiring Scotland, 'Vulnerable young people offered chance of unique supportive relationship' (Inspiring Scotland 2017) <<http://www.inspiringscotland.org.uk/news/latest-news/deputy-first-minister-launches-intandem-mentoring-scheme>> accessed 19th January 2018.

<sup>378</sup> Correct as of January 2018.

<sup>379</sup> The post was re-titled Minister for Childcare and Early Years and was held by Mark McDonald MSP, up till November 2017 (resigned), thereafter Maree Todd MSP (current as of December 2018).

quote, it could be argued that we are far from a committal to any extension beyond LAAC:

*'A national audit has identified the presence of local and regional mentoring and befriending projects across Scotland, although existing services are not specifically focussed on looked after children and young people. The intention is to expand the scheme in stages so that, over time, mentoring relationships will be available to all looked after children and young people across Scotland.'*<sup>380</sup>

That stated, mentoring's worth in respect of the GIRFEC philosophy and SHANNARI indicators is also highlighted for, *'...demonstrating its effectiveness in improving outcomes across a wide range of educational, health and wellbeing, and 'positive destination' indicators, including positive community engagement.'*<sup>381</sup> In so far as the Moray jurisdiction is concerned, there is not a dedicated, or readily identifiable mentoring service, though there are 'ad hoc' pockets of practice. These are usually carried out by other support type roles, such as youth workers; extensions of their primary roles and function.

#### **4.3.5 Befrienders and Befriending - Moray**

Highlighted in the foregoing document alongside mentoring we also have befriending as a support mechanism. Befriending is perhaps best described as a

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<sup>380</sup> Scottish Government, 'Scotland's National Mentoring Scheme for looked after children and young people, Development of the Scheme' < <http://www.gov.scot/Topics/People/Young-people/protecting/lac/mentoring> > accessed 16th March 2017.

<sup>381</sup> *ibid.*



less specialised mechanism; the befriending role holistically encompassing. This makes it economically attractive and provides greater opportunities in the recruitment of 'lay' individuals who are mostly volunteers. An empirical example of befriending in Moray is given by reference to one of the NGO's already featured in this study, ie Children 1<sup>st</sup> Moray. This body incorporated volunteer befriending and volunteer advocacy as part of its localised ancillary support service in late 2012. Inductions and training programmes were delivered according to each role. Though the programmes for these ancillary support services fell 'off the radar' within a couple of years of initial implementation, there is no doubt that the befriender's service was valued. Many young people benefited, and it was sorely missed. The discontinuation of the befrienders service was disappointing and its demise an unfortunate combination of circumstances. One of the reasons was a lack of volunteer management which affected on-going training. This impacted on the wider promotion of the role and the retention of existing volunteers. The voluntary advocacy was likewise affected, for much the same reasons. Arguably, with enough funds to enable the recruitment of a dedicated manager for the volunteer befrienders and advocates, the services could have prevailed. The issue of funding was possibly affected by the larger nationwide review of Children 1<sup>st</sup> Scotland services. That review led to major policy and procedural changes in the organisation affecting the Moray office; further compounded by failed bids with Moray Council for other service contracts, particularly so in respect of LAAC. Pivotaly, whilst Children 1<sup>st</sup> Moray have provided advocacy and rights services in the jurisdiction, Children 1<sup>st</sup> Scotland have not universally invested in the mechanism. There may well have been 'ad hoc' service support over the years, but never a central commitment. Again, to re-state an earlier observation from **SM 2**

about advocacy provision in Moray, *'In my experience, at my time of working, we were driven by Moray Council requirements not Children 1<sup>st</sup>.'*

#### **4.3.6 Buddy Service - a case in point**

The use of befriending by Moray Council as a support mechanism has wider relevance for this study, albeit the main users are vulnerable adults. However, a search of FOIS requests via the authority's 'Information Management' site has revealed the following. In 2016 an FOIS request for data on a buddy service was submitted. The response dated 30<sup>th</sup> November 2016, came that they (Moray Council) did not offer, nor provide a 'Befriending' service.<sup>382</sup> Moray Council's 'Volunteer Opportunities in Community Care' web page also referred to the insufficiency of volunteers, hence their appeal. This was directed to certain roles, one of which was the 'buddy'. The official position in respect of the buddy role is emphasised in the authority's volunteer policy. It makes no reference to children and young people, only to 'vulnerable adults',

*'Where the opportunity states a PVG or Standard Disclosure is required, as part of the Volunteering Policy, these checks are paid for by Moray Council, after a potential volunteer is matched to an opportunity and Character References have been received. Read more about the **Protection of Vulnerable Adults** [emphasis added] (PVG) Scheme and Disclosure on the Disclosure Scotland website.'*<sup>383</sup>

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<sup>382</sup> FOIS-Request, to Moray Council, 'Befriending Services-Request' 101001362450  
<[http://www.moray.gov.uk/moray\\_standard/page\\_108911.html](http://www.moray.gov.uk/moray_standard/page_108911.html)> accessed 9<sup>th</sup> March 2018.

<sup>383</sup> Moray Council, 'Volunteer Opportunities in Community Care'  
< [http://www.moray.gov.uk/moray\\_standard/page\\_80805.html](http://www.moray.gov.uk/moray_standard/page_80805.html) > accessed 17th January 2018.

The volunteer posts advertised on the site were mostly directed to ‘vulnerable adults’ services; individuals diagnosed with conditions such as autism and onset dementia. That facility coming under the direction of ‘Community Care’, in partnership with health and social care; under the banner of Moray Community Health and Social Care Partnership. The identification and referral of service users in need of a buddy would no doubt come from health and social service staff. Third party agencies such as Circles Network Moray (and their predecessors Advocacy North East [or NEA] would effectively ‘signpost’ identified individuals to the administering service.

Why then the inclusion in this part of the thesis? The reasoning is that if 3<sup>rd</sup> party agencies can and do facilitate befriending and mentoring services for children and young people; if they do so with or without service level agreements in place, why then have Moray Community Health and Social Care Partnership not extended their buddy programme to include this young group? The authority disinclination to extend this volunteer support service to include children and young people may stem from concerns that they (Moray Community Health and Social Care Partnership -the unitary authorities) may be held vicariously liable for the negative acts of omissions of individual volunteers. But, we must remind ourselves that the buddy service supports vulnerable adults; these adults are also an ‘at risk’ group and some of them no less vulnerable than children and young people. Of course, the official position may well be that there are sufficient and satisfactory support mechanisms already in place that cater for children and young people in Moray.

#### **4.3.7 Children's Rights Officer and the Scottish Children's Rights Officers Network**

Children's rights officers are employed by Scottish local authorities, though not all of Scotland's 32 local authorities employ children's rights officers. There are now fewer than 20 salaried children's rights officers employed in fewer than 20 local authorities. The remaining local authorities instead, engage 3<sup>rd</sup> party agencies such as WC? S, Children 1<sup>st</sup> Moray and Partners in Advocacy to provide advocacy and rights services. However, 'all' of the local authorities will supplement to a greater, or lesser extent, children's rights, advocacy and support services through 3<sup>rd</sup> party agencies; via contractual processes (procurement/Service Level Agreement).

The Scottish Children's Rights Officer Network (SCRON) is mostly funded by the Scottish Government to enable it to carry out its functions, its membership encompassing unitary authorities. These include local authorities and NHS Trusts, but also extend to NGOs such as Children 1<sup>st</sup> Scotland (Children 1<sup>st</sup> Moray) and Barnardos Scotland. Membership has brought several benefits, including the right to attend meetings and being made aware of committee business. However, the main benefit is the link to a wider network of practitioners, public body, NGO or other involved 3<sup>rd</sup> party agency. That stated, around 2016 the SCRON membership was reduced by the then standing committee. This affected the wider notification of its activities; only reflecting those bodies that took an 'active role' in membership. As has been stated, SCRON are partly funded by the Scottish Government and part of their remit extends to networking and the promotion of children and young people's rights. Unlike children's rights officers, who will have access to greater resources (including staffing and administration facilities), many

NGO's are not so well placed. As **CRO 1** confirmed, *'I have a Children's Rights Officer that I line manage and supervise and I also have a half time admin. support in the team, without which we wouldn't be able to do half the things that we do.'* Not for Profit NGO's on the other hand generally rely on volunteers, in a variety of capacities, to undertake activities on request. This researcher has previously attended SCRON meetings in a voluntary capacity on behalf of a Moray NGO, so it was disappointing to learn that SCRON had later amended their constitution to exclude non-salaried' 3<sup>rd</sup> party representatives of NGO's. This will obviously affect and include WC? S, Children 1<sup>st</sup> and any other NGO member provisioning children's rights and advocacy services. There are occasions when 'sensitive' and/or 'confidential' matters require to be discussed within any body and its committees; even one composed of salaried and internally elected public employees engaged in children's rights activities; those activities being publicly funded. However, the adoption of an absolutist 'closed door' policy risks alienating 3<sup>rd</sup> party NGO's; fostering an atmosphere of ignorance and division, it does Scottish children and young people a disservice at a time when 'all' bodies and agencies should be working together in the child's best interests.

So far as the role of the children's rights officers is concerned, it is not too dissimilar throughout the local authorities employing same. Much of their time and remit can be taken up supporting LAAC, though this is becoming less common, especially where 3<sup>rd</sup> party agencies such as WC? S are contracted to provide services in respect of the LAAC group. The role of the children's rights officer has also extended to the furnishing of advice; on advocacy and advocacy provision for children and young people in their jurisdictions; in statutory and non-statutory processes. However, there are pockets of local authority practice where advocacy

provision from a children's rights officer is not forthcoming. The following example from 2015 relates to a children's rights officer (full title in that instance being 'Children's Rights and Information Officer') for Inverclyde local authority. The holder of that title made it patently clear that the role did not incorporate advocacy, '*...but not, it should be noted, acting as an advocate or representative in individual cases*'<sup>384</sup> Anecdotally, several children's rights officers have also emphasised (and empathised) with that particular stance. This is very much the antithesis of many 3<sup>rd</sup> party service roles, including those provided locally by Children 1<sup>st</sup> Moray and WC? S, wherein children's advocacy and children's rights are considered two halves of the same coin. Even if NGO practices and policies in respect of advocacy provision are dismissed by local authority children's rights officers, it is difficult to understand why there is a general reluctance to incorporate 'advocacy' into their function and remit. The point is highlighted here because the issue has been raised via the Scottish government, Scottish Children's Rights Implementation Monitoring Group (SCRIMG).<sup>385</sup> At one of the 2014 meetings, the former CYPSC (SCCYP) Tam Baillie commented on the subject and suggested,

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<sup>384</sup> Inverclyde Council's Children's Rights & Information Officer  
 <<http://www.inverclydechildprotection.org/news/2008/aug/inverclyde-council-children-rights-amp-information>> accessed 16<sup>th</sup> March 2018.

<sup>385</sup> Scottish Children's Rights Implementation Monitoring Group (SCRIMG)  
 <<http://www.togetherscotland.org.uk/resources-and-networks/scrimg/>> accessed 1<sup>st</sup> October 2017;  
*'In partnership with the Scottish Government and Scotland's Commissioner for Children and Young People, we have established the Scottish Children's Rights Implementation Monitoring Group (SCRIMG). The group, which meets quarterly, has been tasked with developing a common understanding on progress to implement the UNCRC in Scotland as well as discussing emerging issues and, where possible, agreeing approaches and actions to address them.'*  
 The link above has not functioned since late 2017; however reference to SCRIMG can be viewed via the following Scottish Government policy page: <<https://www.gov.scot/policies/human-rights/childrens-rights/>> accessed 2<sup>nd</sup> December 2018.

*'... that the provision of advocacy by Child Rights Officers should be explored further and should be discussed with the Child Rights Officers Network.*

*Action: Conversations should be had with the Child Rights Officers Network to decide how SCRIMG and the network could work more closely. SW will speak with a representative of CRON at the cl@n childlaw event.*<sup>386</sup>

This was a position the ex-commissioner Tam Baillie continued to hold, up until his tenure ended in early 2017. Mr Baillie was convinced that local authority children's rights officers were the individuals best placed to provide advocacy in respect of children and young people at Children's Hearings; as provided for in statute by reference to s 122 of the CH (S) A 11, which had at that time not been enacted (currently only LAAC will benefit from this part of the Act). At least one **CRO 1** may have been on side... to a point,

*'I would like to see every Local Authority have a Children's Rights Officer (CRO) that's in-house. I think that keeps services honest. That's not what I mean, child centred, child focussed, children's rights focussed. I think there's a place, there has to be a place for all different kinds of advocacy, but I think that those kinds of advocacy do need to be regulated...'*

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<sup>386</sup> Scottish Children's Rights Implementation Monitoring Group (SCRIMG), Tuesday 11<sup>th</sup> March 2014 Scottish Government, Victoria Quay, Edinburgh  
<<http://www.togetherscotland.org.uk/resources-and-networks/scrimg/>> accessed 1<sup>st</sup> October 2017; The link above has not functioned since late 2017; however reference to SCRIMG can be viewed via the following Scottish Government policy page: <<https://www.gov.scot/policies/human-rights/childrens-rights/>> accessed 2<sup>nd</sup> December 2018.

## 4.4 Collaborations

With many existing charitable providers of public services struggling to survive the practice of collaboration, expansion and change of direction is appealing. Even unitary authorities are finding the current economic climate difficult and have in many instances, collaborated with neighbouring authorities; so much so that their 'public contracts' incorporate greater geographic areas and population, as illustrated by reference to the '*Highlands and Islands and Aberdeen & North-East*' in respect of 'Rights, Advocacy and Mediation' services for children and young people.<sup>387</sup>

Another example of collaboration is given by reference to joint provision of advocacy services, via Community Planning Partnerships (CPP),<sup>388</sup> where there is a greater opportunity for children and young people's active participation in decision making processes affecting them. Firstly, the CPP incorporates the ideals and the practice of community planning and is a descriptive and prescriptive expression of services which combine to give effect to a community plan. A policy of the Scottish Government, it is provided for in statute, via the Community Empowerment (Scotland) Act 2015 (hereinafter referred to as CE(S) A 15).<sup>389</sup> Each local authority has a CPP and the idea is that resources are pooled for the optimum result in social and/or health care services, often with neighbouring jurisdictions.

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<sup>387</sup> See: Public Contracts Scotland, 'View Notice, Award of 13/0014 Rights, Advocacy and Mediation Services for Children and Young People' <[http://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=FEB167227](http://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=FEB167227)> accessed 19th January 2018.

<sup>388</sup> Improving public services, Community Planning, <<https://beta.gov.scot/policies/improving-public-services/community-planning/>> accessed 20th September 2018.

<sup>389</sup> Community Empowerment (Scotland) Act 2015, asp 6.



The CE(S) A 15 is arguably more associated with community empowerment initiatives and the land reform movement.<sup>390</sup> That stated, the statute makes it patently clear as to what and who are ‘Community Partners’ by virtue of Schedule 1; a Community Planning Partnership, ‘...*must act with a view to reducing inequalities of outcome which result from a socio-economic disadvantage...*’<sup>391</sup> In so doing, there is an argument that the civil and political opportunities of the marginalised and the disadvantaged are being met. Perhaps it has merit and wider application possibilities in empowering and enfranchising children and young people, as a group. In practice, collaborative arrangements tend to include one or two neighbouring local authorities, but they also include bodies such as Highlands and Islands Enterprise and NHS trusts (ie Grampian), in so far as schedule 1 of the CE(S) A 15 is concerned. Another fundamental devolved statute in respect collaborations and partnerships is the PB (JW) (S) A 14; a framework which directs local authorities and health boards to more effective integration in the delivery and provision of adult health and social care services, but as the reader will have observed, this is ‘adult’ premised.<sup>392</sup> The only reference to children and young people’s services is by way of an amendment to the CYP (S) A 14, defining ‘integration joint board’ as ‘other service provider’, as per that Act.<sup>393</sup>

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<sup>390</sup> Land Reform (Scotland) Act 2003, asp 2.

<sup>391</sup> Community Empowerment (Scotland) Act 2015, asp 6, s 5 socio-economic inequalities.

<sup>392</sup> Public Bodies (Joint Working) (Scotland) Act 2014, asp 9, ‘The Bill for this Act of the Scottish Parliament was passed by the Parliament on 25th February 2014 and received Royal Assent on 1st April 2014’.

<sup>393</sup> Public Bodies (Joint Working) (Scotland) Act 2014, asp 9, s 58 ‘Children’s Services Planning’.

An NGO example of moot encroachment by one body over another is given by reference to WC? S, an experienced advocacy body for LAAC. Prior to 2014, WC? S had little history or impact in the Moray jurisdiction; the exception being ‘ad hoc’ arrangements with Children 1<sup>st</sup> Moray as regards the occasional support of a LAAC child in a statutory premised meeting. That stated, WC? S was reasonably well established in the neighbouring Highland authority (as well as other proximate authorities). The organisation is also highly active and successful in the arena of ‘public and cause’ advocacy, as demonstrated by their political lobbying. This no doubt played a significant part in the decision to award to them the contract for LAAC.<sup>394</sup> Even Quarriers Carers Support Service (Moray) have expanded upon their operations in the last few years; in service models and jurisdictional extension; the antithesis of say Advocacy North East (or NEA) who have remained, for all intent and purposes, purists. These organisations, their remit and functions will be discussed in greater detail in Chapter 5.

#### **4.5 Independence and advocacy**

In 2014 the SIAA published a summary research piece from 2014, the premise of which was an exploration of the value of ‘independent advocacy’.<sup>395</sup> Whilst this was a Scottish study, some of its analysis as regards 3<sup>rd</sup> party agencies was not dissimilar to the empirical observations and the testimonies heard first hand in

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<sup>394</sup> There is a geographic cross-over of advocates with WC? S in that the organisation operates between jurisdictions, ie in Moray and in Highland; correct as of October 2018.

<sup>395</sup> SIAA, “‘Without advocacy - I don’t want to think about that’ A summary of research exploring the value of Independent Advocacy and examining current advocacy provision in Scotland’ (Scottish Independent Advocacy Alliance 2014) <<https://www.siaa.org.uk/wp-content/uploads/2014/12/Barbaras-report-FINAL.pdf>> accessed 1<sup>st</sup> December 2018.

this study. The SIAA agencies and their services may have adopted different forms providing services under distinct frameworks, but the commonality are their claims to independence. The SIAA 2014 report highlights wider national concerns in regards a dearth of public awareness of advocacy which is exacerbated by the difficulty facing advocacy organisations' in raising their awareness; a result of limited resources. Antithetically, there is an increase in demand for services for which there is little comparable funding. This has led to the prioritisation of cases.<sup>396</sup> *'This has meant that, in some areas, access to advocacy for people who are not subject to compulsory measures, but who do have a legal right to **independent advocacy is more limited.**'*<sup>397</sup>

The idea of independence, certainly in respect of advocacy provision, is not as straightforward as would first appear though. Not all 3<sup>rd</sup> party agencies are members of the leading umbrella advocacy organisation in Scotland, namely SIAA, as already noted with Children 1<sup>st</sup> and Children 1<sup>st</sup> Moray. Not all of them provide advocacy by way of a service level agreement with a unitary authority; those same authorities mandated by statute to fulfil certain duties. Even the term, independent advocacy is a moot one, because there is no one definition of what it means. In so far as the lead organisation in Scotland is concerned, it implies that independent advocacy organisations, *'...are separate from organisations that provide other types of services.'*<sup>398</sup> Effectively, that is all they will do, very much like

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<sup>396</sup> SIAA, "Without advocacy - I don't want to think about that" A summary of research exploring the value of Independent Advocacy and examining current advocacy provision in Scotland' (Scottish Independent Advocacy Alliance 2014) 22 <<https://www.siaa.org.uk/wp-content/uploads/2014/12/Barbaras-report-FINAL.pdf>> accessed 1<sup>st</sup> December 2018.

<sup>397</sup> *ibid.*

<sup>398</sup> Scottish Independent Advocacy Alliance, SIAA <<https://www.siaa.org.uk/us/independent-advocacy/>> accessed 30<sup>th</sup> October 2018.

Advocacy North East (or NEA) and Circles Network Advocacy Moray. NHS Grampian Trust which covers Moray (as well as Aberdeen and Aberdeenshire) follow this guidance in respect of the agencies they contract with.

*‘Independent advocacy is structurally, financially and psychologically separate service providers and other services. Such independence helps to ensure that there is no possibility of any conflict of interest arising in relation to any other services accessed by the individual or group.’*<sup>399</sup>

Interestingly, NHS Grampian confirm that they will accept volunteers, as well as paid employees in respect of the advocacy role holder.<sup>400</sup>

A comparative in respect of the absence of the term independent is illustrated by reference to the Carers (Scotland) Act 2016 (hereinafter referred to as C(S) A 16) in which advocacy has a brief mention under Part 6, though critically, without reference to the ‘independence’ of the role.<sup>401</sup> The same section, under Part 6 also provides that local authorities ‘must’ ensure services are fit for the purpose of information and advice provision to those with one or more protected characteristics, as per the EA 10.<sup>402</sup> This could well include young carers

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<sup>399</sup> NHS, ‘Grampian Independent Advocacy Plan 2016-2018’ (NHS Grampian 2016) 5 <[https://foi.nhsgrampian.org/globalassets/foidocument/dispublicdocuments---all-documents/Grampian\\_Independent\\_Advocacy\\_Plan-Consultation-2016-18.pdf](https://foi.nhsgrampian.org/globalassets/foidocument/dispublicdocuments---all-documents/Grampian_Independent_Advocacy_Plan-Consultation-2016-18.pdf)> accessed 2<sup>nd</sup> December 2018.

<sup>400</sup> *ibid* 4.

<sup>401</sup> Carers (Scotland) Act 2016, Part 6, ‘Information and advice service for carers’, s 34 (1) (2) (d); See also: Scottish Government, *Guidance for Unpaid Carer Advocacy in Scotland* (Scottish Government 2016) <<https://www.gov.scot/publications/guidance-unpaid-carer-advocacy-scotland/>> accessed 1<sup>st</sup> December 2018.

<sup>402</sup> Equality Act 2010, s 149 (7).

by reason of their 'age' and is a point already highlighted in this study.<sup>403</sup> The inclusion at this juncture is applicable because in Moray, young carers are currently supported by Quarriers Young Carers Support Workers. These support workers are 'not' advocates, but they do support young carers (amongst other things) in decision making processes; *'We can also attend, where appropriate, meetings and appointments with you.'*<sup>404</sup>

The children and young people participating in decision making procedures in this study had mixed views on what the term independent meant to them, within the context of the advocate, or other support roles. One young service user, **CYP 5**, on being asked their opinion on the issue of independence, epitomised his peer group when he replied, *'I never thought of anything like that. I would have known to be honest!'* Most service facilitators and service managers had little more to offer about independence; as one **SF (10)** stated, *'To be honest I don't think it matters who the advocate is working for as long as they represent the child fairly.'*

If we return to Children 1<sup>st</sup> Moray, this agency has maintained that their advocates, indeed, all their support roles are independent. WC? S have also insisted on the independence of their supporters, but unlike Children 1<sup>st</sup> Moray they are members of SIAA. Children 1<sup>st</sup> (and Children 1<sup>st</sup> Moray) have never committed to SIAA membership, nor adopted SIAA guiding principles and codes of conduct on independent advocates. This has not deterred Moray local authority from making historical grant awards and procuring 'rights and advocacy' services from the agency, despite Moray authority referencing independent advocacy in its

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<sup>403</sup> Carers (Scotland) Act 2016, Part 6, 'Information and advice service for carers', s 34 (4).

<sup>404</sup> Quarriers, 'Young Carers Support Service Moray' < <https://quarriers.org.uk/services/young-carers-support-service-moray/>> accessed 15th November 2018.

documents when contracting with WC? S and Circles Network Advocacy, both of whom are SIAA members.

Perhaps the less defined and holistic ideal and approach is workable, but it is a moot point. For service users of advocacy, the independence of a supporter, proven or firmly stated can be critical. For many agencies it is an intrinsic part of their operations; that they present as an autonomous body, beyond the influence of another authority. Therefore, further discussion on this alone is needed is required and it would be ideal for any future debate to include academics, practitioners and service users. For Brandon and others however, when it comes to advocacy and advocates in decision making procedures, the authors are more concerned with, '*intent and outcome*'<sup>405</sup> though this researcher believes that they would welcome a wider discussion on the idea of independence as it correlates to 'intent and outcome'.

#### **4.6 The factors affecting agencies, mechanisms and core roles**

The mechanisms and core roles employed by a unitary authority in the provision of children and young people's services is for the most part directed by statutes, regulations and policies; as has already been stated, these are mainly prescriptive, whilst others are flexible. Some mechanisms fall somewhere between the highly prescriptive (such as social worker) and the 'lay' supporter. The independent advocate could come under this mid-banner, where the role holder undertakes an industry recognised program, leading to accredited certification for the recipient

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<sup>405</sup> Brandon (n 323) 1.

facilitator. This would also satisfy the conditions and demands of bodies like the Scottish Social Services Council, membership of which is compulsory for many support role holders and their employing organisations under critique in this study. Whilst stringent requirements (or as near as) are demanded of unitary authorities/public bodies in their direct employment of core roles with vulnerable groups, there is a higher probability that this may not always be the case with 3<sup>rd</sup> party contractors. There is arguably a greater facility and success for the assessment and judged suitability of prospective employees when conducted 'in house'; by a unitary authority and its presumed rigorous checks and balances. However, in fairness to 3<sup>rd</sup> party agents providing public services, a carefully drafted tender award 'notice', positing very specific conditions and reciprocal duties on the part of that 3<sup>rd</sup> party and their employee/s should allay concerns. As **CRO 1** stated, *'...there does need to be that level of scrutiny for services, for service providers to provide that for their advocates...they need to provide some sort of quality assurance. That needs to be looked at.'* That stated, no system is full proof, irrespective of the direct or indirect source of an individual's employment, ie local authority, not for profit NGO or for profit NGO. We must also factor in Protection of Vulnerable Groups provisions, as well as Scottish Social Services Council regulations and requirements. These are for the most part effective, if only for a brief period. They are only as full proof and testament to a person's character on the date on which they were conducted; when the individual was appraised. They are not predictive, but they are tools in a wider arsenal for the purposes of protecting the vulnerable. That arsenal should also include (and demand) robust internal policies of each involved body and agency.

#### **4.6.1 Dilution**

Dilution of core role functions is problematic and was observed as having taken place with a couple of mechanisms during the empirical stage of this study. The reasons for these occurrences were adduced to be down to three identified factors. The first factor related to the increased workloads of experienced individual facilitators; arguably just within the remit of the core role, the facilitators capacity to carry out their role effectively was impeded. The quality of the experience for facilitator and service user diluted; negatively affecting the outcome.

The second factor related to an extension of a role holder's duties, beyond their original remit. It differs from the first factor, because it concerns additive ancillary duties, over and above the advocate's primary remit; peripheral 'add ons'. The third factor concerned auxiliary mechanisms and the adjunct role holders, ie the lay roles, such as youth worker and even home school link worker; being utilised beyond their supplementary remit, in place of core roles (advocate, social worker) for children and young people in decision making processes. There were examples of all three factors occurring within the jurisdiction of Moray. This researcher would hazard that this is not unusual or uncommon practice (albeit poor practice) throughout the UK. Even though such practices may not always be sanctioned as official policy, they are a result of economic and staffing constraints which affects all unitary authorities and 3<sup>rd</sup> party agencies. That stated, they are not a valid excuse for increasing and sustaining the marginalisation of children and young people. The increasing practice of out-sourcing key education, health and social care services to external agencies, coupled with a competitively driven 3<sup>rd</sup> sector market, has also resulted in 'not for profit' NGO's pitted against one another



in tendering processes, further denigrating the quality of children and young people's services and rights.

The comparable grades and salaries of employees in 3<sup>rd</sup> party 'non-profit' sector and 'for profit' agencies often fall below that of a unitary authority equivalent. It is not unsurprising then that services (and adjunct mechanisms/role holders), at one time delivered directly by public authorities are now increasingly outsourced. How this affects the type and quality of support offered a child or young person in a decision making process is an important question. The observations taken by this researcher during the empirical phase of the study led to the conclusion that 3<sup>rd</sup> sector support workers (arguably independent of the unitary authorities) were often more successful than say, a senior social worker, in advocating for a child or young person in a decision making process. One example concerned an emergency child protection review during which another 3<sup>rd</sup> sector advocate was obliged to rebuke the chairperson on two points. The first point concerned a disregard of statutory procedure; the second, for not upholding the merit and value of the young person's communicated written views. However, another couple of observations, taken in non-statutory and quasi-legal procedures, only served to highlight the procedural ignorance and incompetence of two advocacy role holders. Both of whom were employed by notable 3<sup>rd</sup> party agencies that pride themselves in their training and accreditation of advocates. None of the adult interviewees in the empirical stage had much to say about comparable posts in terms of salaries, but there were complaints. Those complaints emanated from service facilitators and concerned (conjectured) superior attitudes by unitary authority employees towards 3<sup>rd</sup> sector role holders. Such perceptions, or proven realities will only feed into the wider debate as to the merits of 'in house' and 'out

sourcing' of public services, mechanisms and roles directed to and accommodating vulnerable individuals. It is already an issue in the private sector where contract workers are being paid substantially less than salaried company employee's carrying out the same, or comparable roles.

#### **4.6.2 3<sup>rd</sup> sector and public authority**

In so far as not for profit NGO's are concerned, many of their employees (paid or volunteer) are by and large motivated by altruism; enthused and driven by a given vocation. In this study, such individuals included advocates and other supporters, working with and for children and young people in their decision making processes. Driven by a social conscience and humanitarian spirit, the not for profit 3rd sector offers individuals opportunities, unavailable elsewhere. It is a gateway for people to gain experiences, life skills and even qualifications. Brutally though, the economic climate is such that the job market is weighted in favour of employers, irrespective of the model, be that founded on avarice or benevolence. There are also fewer employment opportunities, particularly in smaller rural and semi-rural jurisdictions, Moray being an example of same. An interesting observation made by the researcher correlating to the foregoing, was that a high percentage of the not for profit workforce were over-qualified for their roles; in possession of impressive tertiary qualifications, backed up with equally impressive life and work experiences. Perhaps the nuanced population mix of Moray has facilitated such a set of circumstances, in that the jurisdiction has benefited from a regular influx of educated individuals seeking lifestyle over career and pay. This skill base has no doubt benefited the public and the private sector. A couple of

interviewees (service facilitators) in this study and coming under the category of being over qualified for the roles they held (supporters in 3<sup>rd</sup> sector NGO's) made the researcher aware of their experiences with public body professionals in decision making processes. Those professionals included social workers, teachers and educational psychologists; though not confined to that select group. The interviewees confided that next to these public body 'professionals', they were treated as subordinates; viewed as 2<sup>nd</sup> class citizens by said unitary body staff. If these instances are indeed isolated subjective perceptions of a small numbers of individuals, it is an issue that still requires to be understood and further investigated. However, if the observations taken by the researcher, coupled with anecdotal 'off-tape' commentaries by many service facilitators are anything to go by, such perceptions were indeed common place; a malady suffered by several 3<sup>rd</sup> sector supporters and their lesser qualified authority counterparts? Perhaps a wider and honest discussion requires to be had by management, from all sectors, coupled with an equally honest input from all service facilitators. It is a concern, because this will undoubtedly affect the efficacy of support provision to children and young people in applicable decision making procedures.

A couple of supporters had discussed their lack of confidence, which it had to be conjectured would have affected their ability to support a child or young person. When questioned further on the matter as to the contributing factor leading to their lack of confidence was organisation pressure; newly defined roles and associative tasks which had been pressed upon them. An example is given by reference to an individual who had previously supported a young person in a decision making process. Their employer, a 3<sup>rd</sup> party 'not for profit' NGO agreed to a revised contract with the public body in question, the revision an addendum to

an existing service level agreement which required the supporter to not only support to the child or young person, but the wider 'family group', if required to do so. This gave rise to a situation where staff could well be required to support an adult family member and a child or young person of that family group in decision making processes.

**SF 4** stated, *'I work with families through 'kinship care'. I am doing that with one family at the moment, BUT I also advocate for a child in that family.'*

**SM 1** however, stated that this does not occur, *'...we do have a number of cases where we do therapeutic work with the young people, but they're also in the LIAP system ...one worker does the therapeutic and another does the advocacy. So, the roles don't get confused. And they may both attend the LIAP...'*

Even if the skill set of the practitioner is enough to cope with multiple service and role demands; even if we acknowledge the possibilities of an all-inclusive model, this does not engender confidence from the aspect of independence of role and service; nor does it appear to be free from the risk of conflicting interests. It could be argued that the all-inclusive model has some place and purpose, just so long as the organisation provisioning this all-inclusive model does not misrepresent itself; that it will continue to view the child as its primary focus above the needs or desires of the wider family unit. Additionally, there should no crossover of roles, of mechanisms. It could be asserted that best interests, wellbeing and the rights of the child cannot be fully met where indecision and uncertainty prevail in such circumstances. The concepts of best interests and wellbeing, as discussed in Part 1, may well be interpretive widely applicable, but the illustration provided above is unsettling, because it must be

incredibly difficult for an advocate to act with credence when they must support two or more family members; even if that is at different times and in different processes. One procedure which may 'just about' host such duplications of role is the Family Group Conference or Family Group Decision Making process, which is discussed later in the study. This may qualify as an all-inclusive model (and these are meritorious procedures when applied in context), but even then, it is argued that a child or young person's participation should be facilitated by an autonomous supporter. However, increased role demands, and moral dilemmas are common place throughout public services and the provision of those services by individual role holders; affecting 3<sup>rd</sup> party employees and unitary authority employees in parallel. These role holders (and mechanisms) include, home school link workers, family support workers and youth workers. This researcher is under no illusion that participating interviewees may well have gilded their subjective oratory; taking advantage of an opportunity to 'vent' irritations and grievances. That is the reality of this empirical mode of research, but even when subjective bias is factored in, there will always be an element of authenticity in a conversation. This is especially the case when narratives are analysed and commonalities found, providing validity. Such an instance, evidenced by corroborating testimony, touched on questionable practices (arguably by isolated 'pockets' of management) within departments in the local authority. These practices detrimentally affecting subordinates, children and young people and by extension, their families. For example, **SF 12** stated, *'But when the child is not included in the decisions ie they haven't come to the meetings because they HAVEN'T BEEN INVITED. Sometimes they don't want to come, which [is] NOT RIGHT, but yes, they get a 'HAVE YOUR SAY FORM' which I do with them. I even do it for the adults too.'*

This became a familiar response with many service facilitators and service users; all claiming to have experienced varying indifference from pockets of middle and upper management, as illustrated by reference to communication, or the lack thereof; service users, their families and supporters often, 'left out of the loop'. From a procedural point of view, where compelling instruction and considered guidance provide that all parties (all stakeholders) should be kept informed; kept updated in respect of decisions taken and forthcoming meetings in a procedure and they are not, then there is a problem. Such incidences occurred in LIAP procedures, as well as Children's Hearings Scotland Moray panels, despite their statutory or non-statutory frameworks. The remedies available any complainant will obviously pivot on the type of procedure, with the statutory procedure having an arguably stronger platform for redress. However, a local authority's non-statutory procedure, irrespective of its informing tenets, should still incorporate equitable remedies (and associated guidance) that can be diligently exercised by a complainant. If not, the authority is surely vicariously liable for the actions, or inactions of its employee stakeholders. Lack of action will only foster animosity between stakeholders. Worse still, the wellbeing, best interests and meaningful participation of the child and young person will be lost in the resultant discordant milieu.

#### **4.6.3 Complaints (complacency)**

Pithouse and Crowley published research in which they critiqued children, advocacy and complaints to social services. The authors determined that the complaints system was adult-dominated. They illustrated this by reference to

procedures in which a supporting advocate's intercession was not only 'last minute', but in a fractious and emotive end stage of a procedure; limiting the support that role holder could give.<sup>406</sup> It so happened that primary and secondary data collection and analysis throughout the period of this research study failed to find any evidence of formal complaints having been made against the individual advocates, 3<sup>rd</sup> party provisioning agencies or the unitary authorities herein mentioned. The absence of complaints, indeed any negative commentary from children, young people and their families in respect of decision making processes was, uncommon. This was peculiar because people do complain, if they know how to and are enabled to do so. In so far as Moray was concerned, publication and promotion of age appropriate material was, mixed. To be fair, there was an instance in a neighbouring authority whereby its children's rights supporters had not drafted and made available departmental procedures in respect of a complaint's mechanisms for the children and young people they supported; a situation they stated would be remedied on it being highlighted. Back in Moray, a few participating service facilitators and service managers were also unclear as to the procedure for dealing with complaints. Such common ambiguity disadvantages children, young people and their families. It is further proof that the engagement of an advocate or other supporter is beneficial, but that supporter should be fully conversant with the procedural frameworks they are confronted with, when acting on behalf of a child or young person. The supporter's organisation should also draft its own guidelines on a complaint's procedure, which the supporter should be fully conversant with. Lastly, age appropriate and concise information on how

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<sup>406</sup> Andrew Pithouse and Anne Crowley, 'Adults Rule? Children, Advocacy and Complaints to Social Services' (2006) 21 Children and Society 201.

to make a complaint should be readily available and furnished a child or young person (and their family) engaged in a decision making process. It would simple to conclude that authorities and agencies if not remiss, can be complacent in respect of their complaint's procedures, though they make laudable efforts to consult with the public generally.

#### **4.6.4 Evidence of Consultation**

In so far as instances of consultation are concerned, it was deemed apt to restrict observation and analysis to the subject of advocacy and advocacy services, as provided by the authority (via 3<sup>rd</sup> party bodies). The following is an example.

In February of 2016 Moray's Education & Social Care department invited members of the public to comment on a review of its advocacy services. This public consultation document was titled, 'Planning for future advocacy services'. Whilst the electronic thread is no longer available to read, it provided evidence that Moray authority actively sought the views of the wider public. The consultation took the form of a questionnaire and was made available in paper and electronic form; the latter via 'Surveymonkey'. Even though the period, 'open window' for public response was arguably short and the document focused solely on 'adult services' (in deference to children and young people), the effort was laudable. More to the point, Moray authority enlisted the local media to publicise and promote details of the consultation, which included the methods by which to do so. Arguably, had children and young people been included as part of the authorities 'planning for future advocacy services', the authority would have been



praised for its proactive efforts; satisfying the fundamental tenets of the CRC, in so far as promotion and inclusion of this young group is concerned.

#### **4.6.5 A tool to aid participation and the representation of views <sup>407</sup>**

In a 2013 Moray Councils 'Children and Young People's Services Committee' report, reference was made to an on-line tool to be developed through the authorities Child Protection co-ordination as part of a wider 'Communication and Consultation strategy'. The tool was Viewpoint, '*... an interactive web based tool that will enable the service to gather the views of children and families...*'<sup>408</sup>

Viewpoint has been utilised for several years by other local authorities in Scotland and dismissed by others. Practitioners and service facilitators in Moray had mixed feelings with regards this tool. For example, **SF 2** was unimpressed, '*we just bash through it, the answers to the questions, well you get something pouring out the other end, well I don't see it as particularly useful.*' The main premise of Viewpoint, as with similar interactive tools, is the reduction in the number of questions the user will be confronted with; for vulnerable individuals, it also reduces or eliminates the stressful and irritable exercise of having to answer the same questions time and again. In that respect, such tools could be very useful

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<sup>407</sup> Viewpoint, 'About Us' < <https://www.vpthub.com/about-us> > accessed 1<sup>st</sup> December 2018, '*The Viewpoint methodology combines the use of Audio Computer Assisted Self Interviewing and reflective casework to help children and young people gain a better understanding of their experiences and aspirations and be more able to contribute their views to individual plans and programmes of work*'

<sup>408</sup> Moray Council, "item: 11' Moray Child Protection Committee, 'Annual Report on Protecting Children and Young People in Moray CPC 2013' 16  
<<http://www.moray.gov.uk/minutes/data/CP20140625/Item%2011-Moray%20Child%20Protection%20Committee%20Annual%20Report%202013.pdf>> accessed 2<sup>nd</sup> December 2018.

because they will reduce the gamut of paperwork and questionnaires so pervasive in statutory services falling under the ambit of child protection. It may also be useful beyond the narrow demographic of LAAC. Developed accordingly, it could be utilised to include non-LAAC in statutory and non-statutory decision making procedures. That stated, Viewpoint and the many other model types available children and young people's supporters are just tools. They are not miraculous panaceas, but aids in 1-1 human interfacing and interaction. They are not a replacement for human interplay, but there is a concern that they may become relied upon to the extent that they become the main support, not a conduit to 1-1 human interaction via an advocate or other supporter. It can be tempting in times of fiscal constraint for bodies and agencies to turn to such tools, especially when technologically premised, but they should guard against such inclinations. There is also a question mark as to when Viewpoint became operational in Moray and with which groups it was utilised. It is believed by this researcher that it was only made available to LAAC within Moray authority halfway through 2015; not earlier. To date, there is still an absence of any evidence that it has been offered or utilised by non-LAAC. Anecdotally, Moray Council may not renew its licence with the operating company for Viewpoint upon its expiration in 2019.

#### **4.7 Family Group Conference and Family Group Decision Meeting**

This is an interesting sub-topic which it was felt must be critiqued here in Chapter 4. The reasoning for its insertion betwixt 'mechanisms' and the commencement of 'facilitating agencies and procedures' in Chapter 5 is defended by reference to the tenet of the Family Group Conference. Also known as Family Group Decision

Making, the Family Group Conference is a 'catch all' mechanism and a procedure; Gaining in popularity, it has been advanced by Children 1<sup>st</sup> Scotland and practiced by many of their Scotland wide services, including those offered by Children 1<sup>st</sup> Moray. It is a rather democratic procedure, in that stakeholders have an apparently equal place at the 'table' of discussion. However, the researcher is cautious about the reality of the espoused equality between 'all' stakeholders. Without the application of equity, in the form of a supporting mechanism such as advocacy for a child or young person, the procedure does not appear to guarantee truly equal participation; not of the child and young person juxtaposed with other capable adults around that table of discussion. That stated, the following critique should throw more light on the subject. Children 1<sup>st</sup> Scotland state that they are the largest 3<sup>rd</sup> sector provider of Family Group Decision Making and are responsible for having brought, '*...Family Group Meeting (sometimes known as a Family Group Conference) to Scotland in 1998.*'<sup>409</sup> In early 2016, the Scottish Child Law Centre held a roundtable discussion titled '*Family Group Conferencing - The Child at the Centre*'<sup>410</sup> Although Moray Council were not directly involved in the discussions which followed, many other unitary authorities were. Children 1<sup>st</sup> were participants in those discussions, through their assistant director for National Services. It was a demonstration of inter-agency collaboration and co-operation, the whole discussion process being illustrative of the wider interest shown by Scottish unitary authorities in expanding the use of the Family Group

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<sup>409</sup> Children 1<sup>st</sup>, Family Group Decision Making, (FGDM) <<https://www.children1st.org.uk/help-for-families/ways-we-work/family-group-decision-making/>> accessed 30<sup>th</sup> September 2018.

<sup>410</sup> SCLC-Scottish Child Law Centre, 6<sup>th</sup> Annual Round Table Discussion, 'Family Group Conferencing -The Child At The Centre', (Tuesday 22nd March 2016, Fairfax *Somerville Room*, Scottish Parliament, Edinburgh) <<http://www.sclc.org.uk/events-home.html>> accessed 19<sup>th</sup> January 2017.

Conference. In that same year (2016) Children 1<sup>st</sup> and the Centre for Research on Families and Relationships at Edinburgh University further collaborated on a research project, culminating in a briefing which was titled, *'Learning from Family Group Conferencing: Reimagining approaches and outcomes to child care and protection.'*<sup>411</sup> This details the principles of Family Group Conference (or Family Group Decision Making) in that it purports to help families 'develop their own solutions'; encouraging family members to 'support each other' and 'take back responsibility for themselves'. The critical aspect for the purposes of this study, is that they should be aided by an independent co-ordinator working to bring the family together, 'to explore issues affecting the child and support those members and to find their own resolutions to keep the child safe, healthy and happy'.<sup>412</sup> Admittedly, much of this is directed towards those children (and their families), who are at risk of being accommodated by social services and becoming LAAC; Scottish government guidance making clear reference to Family Group Decision Making as a relevant service, *'which is designed to facilitate decision-making by a child's family in relation to the services and support required for the child'*<sup>413</sup> This guidance enforces the processes statutory posit within the CYP (S) A 14.<sup>414</sup>

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<sup>411</sup> Mary Mitchell and others, 'Learning from Family Group Conferencing: Reimagining approaches and outcomes to child care and protection' <<https://www.children1st.org.uk/media/6738/fgcbriefingpaper.pdf>> accessed 30<sup>th</sup> September 2018.

<sup>412</sup> *ibid* 4.

<sup>413</sup> Children and Young People (Scotland) Act 2014: National Guidance on Part 12: Services in Relation to Children at Risk of Becoming Looked After, etc., (Scottish Government 2016) 8 <<http://www.gov.scot/Publications/2016/12/6827>> accessed 30<sup>th</sup> September 2018.

<sup>414</sup> Children and Young Persons (Scotland) Act 2014, Part 12 Services in relation to children at risk of becoming looked after, etc, s 68 (2).

As a 'standalone' mechanism, it is still difficult to envision a parity and equity between the child on one hand, and the adult on the other, certainly in the absence of an intervening supporter for that child, ie an advocate (independent). Mitchell's 'stages' and 'key concepts' of the Family Group Conference denote that the first stage is referral and then preparation; thereafter, the Family Group Conference meeting and finally, the monitoring and review stage.<sup>415</sup> For the purposes of this study, we are interested in the preparation stage, which provides for:

- Identification of family members and significant others to participate
- Decisions to use advocates or other supporters<sup>416</sup>

To date (December 2018), the recorded use of advocacy is still unknown for the Moray jurisdiction and there is an insufficiency of recorded data clarifying the roles (and individuals) that have been deemed fit to be considered 'other supporter'. This is important, because the role of an advocate and the purpose of advocacy differs from a generalist 'other supporter'; it is neither defined, nor is it clarified. If an appointed 'independent co-ordinator' to the process fails to grasp the differences or sees the 'other supporter' as the cheaper option, then the child or young person could well be further marginalised. To gauge the reality on the ground about Family Group Conferences use, all unitary authorities employing this process/mechanism, should be obliged to retain records detailing non-sensitive data, inclusive of supporters used (or not). That would enable thorough analysis and review of local and national practice and procedures.

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<sup>415</sup> Mitchell (n 411) 4.

<sup>416</sup> *ibid.*

Dalrymple, likewise dubious, stated that the Family Group Conference is an ‘adult decision-making process’; the child marginalised from the outset in such a framework.<sup>417</sup> The incorporation of applicable support mechanisms for the child at ‘planning, private and decision making stages’ of the Family Group Conference would however, go some way to mitigate the negative concerns raised. As Dalrymple further commented, in relation to the study of a given project, *‘it could be argued that in order to preserve equity, if the young person chooses, the advocate should be part of family time.’*<sup>418</sup>

Ideally then, a supporter would be independent of the family unit and the unitary authority holding the Family Group Conference or Family Group Decision Making procedure. It [Family Group Conference] has merit, but in the context of this study’s themes, the right of the child to express his or her views should incorporate an absolute right to be supported by an independent advocate, if he or she so chooses.

## **4.8 Conclusion**

As the reader will now be aware, Moray authority were actively supportive of non-statutory advocacy provision for children and young people, certainly up till around 2014/2015. Whilst it still sustains advocacy as a mechanism, via service level agreements with Children 1<sup>st</sup> Moray and latterly, WC? S (mainly in respect of LAAC in statutory procedures), its commitment has waned. And whilst all the

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<sup>417</sup> Jane Dalrymple ‘Family Group Conferences and youth advocacy: The participation of children and young people in family decision making’ (2002) 5 European Journal of Social Work 288.

<sup>418</sup> *ibid* 296.

mechanisms and the adjunct supporting roles critiqued have been affected by external factors outwith the control of the authority, agency or body, independent advocacy could still be utilised more often and in more procedures.

Whilst children and young people's advocacy still has a presence in the authority via WC? S and arguably, Children 1<sup>st</sup> it is not as developed, nor manifest a support mechanism as adult advocacy services, such as provided by Circles Network Advocacy Moray (previously Advocacy North East and NEA). There is a prevalence of generalist roles within 3<sup>rd</sup> sector agencies and the unitary authorities, as with the 'ad hoc' use of support workers and though these non-specific support roles have value, that value is limited and does not, nor should it extend to advocating for an individual in 'any' decision making procedure. That is unless there are mitigating circumstances to the contrary. In so far as the Family Group Conferences are concerned, it should be made clear what 'other supporter' constitutes and in the absence of clarification, the appointment of an independent advocate should always be the primary option.

## **CHAPTER 5 Facilitating agencies -the LIAP Procedure and the affecting principles**

### **5.1 Introduction**

This is the most comprehensive chapter of Part II, whereby bodies and agencies that make use of and make possible the use of advocacy and other support mechanisms have been identified and critiqued. This includes bodies and agencies that support children and young people and where relevant, vulnerable adults. Most of these agencies are in the jurisdiction of Moray, but reference is also made to external agencies and practice where significant and meaningful connection to the premise of the study has been established. This thorough critique is made against the backdrop of applicable procedures, with the LIAP process being the primary example. The discussion on the LIAP procedure will take the form of a chronological narrative, commencing with its inception and informing frameworks, thus charting key moments.

### **5.2 Children 1<sup>st</sup> Moray**

This is a branch of Children 1<sup>st</sup>, which up until 1995 was more commonly known as the Royal Scottish Society for Prevention of Cruelty to Children.<sup>419</sup> This organisation's national services are multiple, but include, 'Supporting children and families' and 'Recovery from abuse and trauma'. The organisation also manages Scotland's 'National Safeguarder Panel', as well as 'Safeguarding in Sport'

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<sup>419</sup> See the Children 1st website at: < <https://www.children1st.org.uk/who-we-are/about-children-1st/>> accessed 8<sup>th</sup> October 2018.



(including training of Safeguarders). This is a wide-ranging set of services and an operational premise, certainly when compared with other 3<sup>rd</sup> party providers of children and young people's services in Scotland, ie WC? S. So far as the Moray branch is concerned, they are listed on the organisation's national web site as providing a 'rights and advocacy service'. The type of advocacy they provide is 1-1-1 (or individual advocacy). That particular service is offered in respect of support provision for 'children and families' and 'recovery from abuse and trauma'. Children 1<sup>st</sup> Moray have only recently been contracted to provide an additional trauma service, titled 'trauma informed military support' (due in no small part to the military presence in the locale).<sup>420</sup> These projects are for the most part, financed through service level agreements with Moray Council, NHS Grampian Trust and latterly, Military of Defence trust funding.

Quite often, when more than one type of support mechanism is offered by an agency in a smaller jurisdiction via its various projects, there are overlaps with other bodies and agencies providing services to children and young people; statutory or non-statutory premised. These intersectional instances impact service users, agencies and even service facilitators. This may benefit an individual service user, but it can also have negative connotations and influences if the many agencies and individuals involved in a child's life do not collaborate, correspond and cooperate with one another.

During the early stages of this study and in respect of Children 1<sup>st</sup> Moray, the mechanism of advocacy was exercised through a Children and Young People's Rights Worker, a Children's Rights Advocacy Worker and later, a Child Protection

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<sup>420</sup> Correct as of December 2018.

Advocate. The latter role, the child protection advocate, was required by the contracting authority (Moray Council) to be a registered social worker, but only because of discussions between the contracting body and agency; prompted by an earlier review of wider 'Child Protection Services' in the authority by the Care Commission, around 2015. Up until that point there had been no requirement for any Children 1<sup>st</sup> Moray advocate in Child Protection Reviews (and adjunct meetings) to hold a social worker qualification. As one manager (not a qualified social worker) **SM 2** stated,

*'I've been to Children's Hearings, I've been to Be Looked After Reviews, Initial Child Protection Case Conferences, and core groups...Individualised Education Plans for children and young people with additional support needs.... Co-ordinated Support Plan meetings with young people... Local Integrated Assessment Planning procedures and ....at appeals against exclusion for young people....-I've been as the Rights Worker for LIAPs, CSPs, IEPs, and the Children's Hearing and as an Advocacy Worker, Children's Child Protection Advocacy Worker at Initial Child Protections Case Conferences.'*

Children 1<sup>st</sup> Moray may promote a 'rights and advocacy service', very much as they have done since the early 2000's, but it not a mechanism (or model) readily promoted by its national body, Children 1<sup>st</sup> Scotland. That prompted a question from the researcher to a service manager, **SM 2**; 'who' or 'what' drove the advocacy service in the first instance, if not the national body. The answer, *'In my experience, at my time of working, we were driven by Moray Council requirements not Children 1<sup>st</sup>.'* It was through Children 1<sup>st</sup> Moray, facilitated by their advocates,

that interview subjects were identified and subsequently agreed to take part in this study.

### **5.2.1 Who Cares? Scotland (WC? S) <sup>421</sup>**

The main provider of advocacy services for children and young people in Scotland is WC? S. However, this is qualified because WC? S only acts as a service provider of advocacy (and other support mechanisms) for those who are in care, through-care and care experienced, ie LAAC. According to one of their service managers, the organisation employs more than sixty advocates, or as they are termed, 'Young Person's Support Workers'. WC? S has expanded since its inception in the late 1970's, operating in 25 out of 32 Scottish local authorities and providing advocacy services to LAAC through negotiated service level agreements with those authorities.<sup>422</sup> To the organisation's credit, and in deference to their expertise in the use of the mechanism, they are regularly consulted by central and local government. Along with charitable bodies such as Barnardos, WC? S have also been influential in the drafting of devolved legislation such as the CYP (S) A 14 and the CH (S) A 11.<sup>423</sup> Kathleen Marshall, the first CYPCS has even consulted with care

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<sup>421</sup> WC? S provides 'one to one' and 'collective advocacy' for children and young people under the age of 26 (in circumstances); See their website at: <<https://www.whocaresScotland.org/>> accessed 5th January 2018;  
See: Children and Young Persons (Scotland) Act 2014, s 57 (1) and (2).

<sup>422</sup> Data correct as of 26<sup>th</sup> September 2017.

<sup>423</sup> Children and Young Persons (Scotland) Act 2014, Part 9-Corporate parent, Part 10-Aftercare, Part 11-Continuing care. Particularly where the duties incumbent upon a 'corporate parent' can extend to an individual up until under 26 years old, s 66 (2) (c) (i);  
Children's Hearings (Scotland) Act 2011 asp 1, Part 12-Children's Hearings General, s 122 'Children's advocacy services'.

experienced youngsters from the organisation WC? S in the past, incorporating their experiences in her oft cited book.<sup>424</sup> WC? S began their operations in Moray providing advocacy support to LAAC, arguably at the expense of Children 1<sup>st</sup> Moray. Up until 2015 the latter agency had a wide ambit service level agreement with Moray Council to provide advocacy and rights services for LAAC and non-LAAC in statutory and non-statutory procedures. However, as discussed earlier in this study, WC? S and Children 1<sup>st</sup> Moray had also collaborated over the years, albeit in an ‘ad hoc’ manner. It was through WC? S, facilitated by their advocates, that interview subjects were identified and subsequently agreed to take part in this study.

### **5.2.2 Partners in Advocacy<sup>425</sup>**

This organisation has a much wider clientele which includes vulnerable adults, children and young people, claiming to be the ‘oldest established advocacy project in Scotland’. Whilst breaking its legal tie with ‘Barnardos Scotland’ in 1998, it has historical ties to that organisation, with its origins going as far back as the early 1980’s.<sup>426</sup> Whilst Partners in Advocacy are not currently active within the

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<sup>424</sup> Marshall (n 89) 65.

<sup>425</sup> See: PiA-Partners in Advocacy < <http://www.partnersinadvocacy.org.uk/>> accessed 2<sup>nd</sup> December 2018.

<sup>426</sup> See: Barnardos Scotland  
<[http://www.barnardos.org.uk/what\\_we\\_do/corporate\\_strategy/scotland.htm](http://www.barnardos.org.uk/what_we_do/corporate_strategy/scotland.htm)> accessed 17<sup>th</sup> December 2017;  
Barnardos Scotland collaborated with the Scottish Child Law Centre to provide a central government subsidised advocacy service to children and young people involved with the Additional Support Needs Tribunal Scotland. Titled, ‘Hear 4 U’, it was terminated early 2014. A new contract awarded to Govan Law Centre and Kindred Advocacy; launched on the 1<sup>st</sup> April 2014, titled ‘Let’s Talk ASN’; See Kindred-Scotland <<http://www.kindred-scotland.org/lets-talk-asn/>> accessed 17<sup>th</sup> December 2017; This data is no longer available via the former site. Please access the following link for up-to-date data on Additional Support Needs from Govan Law Centre, <<https://additionalneeds.co.uk/>> accessed 31<sup>st</sup> January 2018.

jurisdiction of Moray, they are still worthy of mention because of their strong presence in Scotland; especially so in the provision of statutory support services (including advocacy) to individual children and young adults suffering from mental health issues. Interestingly, Partners in advocacy will facilitate individuals with advocacy support in statutory decision making processes, up to the age of nineteen years. This age range is more in keeping with the CRC definition of the child and an acknowledgment of the vulnerabilities of young adulthood, where on occasion, special measures of assistance and support are required; particularly independent advocacy support in statutory decision making procedures.

WC? S and Partners in Advocacy have commonalities in that the advocacy support, provision and the procurement of same, is solely premised upon statute, whereby unitary authorities are compelled to provide same, directly or indirectly. There are two pieces of law, both of which are devolved pieces of legislation of the Scottish Government. Firstly, we have the Mental Health Scotland Act 2003 (MHSA) and secondly, the Education (Additional Support for Learning) (Scotland) Act 2009.<sup>427</sup> It is worth stressing that whilst WC? S and the Partners in Advocacy's services are procured and subsidised by public bodies, both NGO's stress that they are independent and that they are free from conflicts of interest. For many service users, independence is a vital component.

However, the concept of independence is a nuanced one, as has been discussed. In respect of the MHSA and the E (ASL) (S) A 09, the application of the term 'independent' is different, but not entirely oppositional with regards to its

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<sup>427</sup> Mental Health (Care and Treatment) (Scotland) Act 2003 Chapter 2 Advocacy etc s 259 (1); Education (Additional support for Learning) (Scotland) Act 2009, Advocacy services, s 10.

meaning, which alters according to context and application. For example, the MHSA incorporates independence as a requirement to the provision of a service, but it does not define what it means by the term.<sup>428</sup> The E (ASL) (S) A 09 on the other hand, does not make mention of independence as a prerequisite to the provision of advocacy.<sup>429</sup> The reasoning for these differences can be explained by reference to the aim and function of the two statutes. The MHSA and the powers contained therein, extend to control over individual liberties and freedoms, in given circumstances where criteria must be met. Therefore, the advocate must not only be independent, but must be impartial in the Mental Health tribunal process (and any associative pre-tribunal procedures). Comparatively, there is no power to deprive an individual of his or her liberty in an Additional Support Needs tribunal, because no requirement for such a stark provision has been made in statute and is not necessary. That stated, the importance and the gravity of additional support needs proceedings for any child and its parents are still a serious issue and are treated as such. With that in mind, the E (ASL) (S) A 09 is drafted to enable Additional Support Needs Tribunal ‘appeals’ to lie directly to a Sheriff.

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<sup>428</sup> Mental Health (Care and Treatment) (Scotland) Act 2003 Chapter 2 Advocacy etc s 259 (1), ‘Every person with a mental disorder shall have a right of access to independent advocacy a)each local authority, in collaboration with the (or each) relevant Health Board; and (b)each Health Board, in collaboration with the (or each) relevant local authority, to secure the availability, to persons in its area who have a mental disorder, of independent advocacy services and to take appropriate steps to ensure that those persons have the opportunity of making use of those services.’

<sup>429</sup> Education (Additional support for Learning) (Scotland) Act 2009, Advocacy services, s 10 Provision of advocacy service: Tribunal, After section 14 of the 2004 Act (supporters and advocacy), insert— “14A Provision of advocacy service: Tribunal (1) The Scottish Ministers must, in respect of Tribunal proceedings, secure the provision of an advocacy service to be available on request and free of charge to the persons mentioned in subsection (2). (2) The persons are— (a)in the case of a child, the child's parent, (b)in the case of a young person— (i)the young person, or (ii)where the young person lacks capacity to participate in discussions or make representations of the type referred to in subsection (3), the young person's parent.

### 5.2.3 Children in Scotland

‘Children in Scotland’ is a Scottish government funded agency which is contracted directly to provide mediation services and dispute resolution. Children in Scotland state that they will achieve this by offering, *‘.... special services and partner with organisations that provide practical support, advice and representation for children, young people, parents and families throughout Scotland.’*<sup>430</sup>

The organisation provides advice and guidance to parents, young people and public bodies, especially education authorities, *‘...Services - Enquire and Resolve are our national services, offering advice, information and mediation on additional support for learning for children and young people, parents, carers and practitioners.’*<sup>431</sup> Moray Council also refer to ENQUIRE in their electronic information pages on Additional Support Needs, in that the authority, *‘...offers independent, confidential advice and information on additional support for learning. They also provide a range of clear and easy to read guides for both parents and children.’*<sup>432</sup>

Whilst these are well received support services, their role is limited, or, confined. ‘Enquire’ make it clear from the outset that their helpline advisers are unable to provide advocacy services; interpreting advocacy as speaking to *‘(..... other*

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<sup>430</sup> Children in Scotland, ‘Our services and partner organisations’ <<https://childreninscotland.org.uk/our-work/services/>> accessed 17<sup>th</sup> April 2017.

<sup>431</sup> ‘We are the Scottish advice service for additional support for learning. We are managed by Children in Scotland and funded by the Scottish Government. We offer independent and impartial advice and information to parents, carers, practitioners, children and young people about how pupils should be helped to get the right support to be successful learners ...’ ENQUIRE, ‘What do we do?’ <<http://enquire.org.uk/about>> accessed 17<sup>th</sup> April 2018.

<sup>432</sup> Moray Council, Additional Support Needs (ASN), (Moray Council 2018) <[http://www.moray.gov.uk/moray\\_standard/page\\_43857.html](http://www.moray.gov.uk/moray_standard/page_43857.html)> accessed 6<sup>th</sup> October 2017.

*professionals on your behalf) but we can give you details of organisations that do*<sup>433</sup>

The latter part regarding the provision of ‘details of organisations that do’ is imprecise, because the enquirer is referred to an agency called ‘Resolve’ who are providers of mediation and not advocacy. In turn, ‘Resolve’ state that their, *‘Additional Support for Learning independent mediation service is the largest mediation provider in Scotland.’*<sup>434</sup>

#### **5.2.4 Let’s Talk ASN (Additional Support Needs) – Kindred Scotland and Govan Law Centre’s Education Law Unit**

##### ***Moray Council and promotion of Additional Support Needs advocacy***

Moray Council provides information on its public services utilising a selection of media and mediums.; the most popular and most readily accessible (provided an individual can access same) is the internet. In amongst the plethora of data on public services, there is an informative section on Additional Support Needs which includes a link to the body ENQUIRE (Children in Scotland) in respect of ‘Independent Advice and Information’.<sup>435</sup> However, advocacy or independent advocacy provision and information is not included in the authority site. It does not include any reference to local availability, or availability outwith the

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<sup>433</sup> See the ‘Enquire’ website at: < <http://enquire.org.uk/advice> > accessed 17<sup>th</sup> April 2017.

<sup>434</sup> See the ‘Resolve’ website at: < <https://childreninscotland.org.uk/our-work/services/resolve/> > accessed 2<sup>nd</sup> December 2018.

<sup>435</sup> Moray Council, ‘Additional Support Needs (ASN)’ (Moray Council 2018) <[http://www.moray.gov.uk/moray\\_standard/page\\_43857.html](http://www.moray.gov.uk/moray_standard/page_43857.html)> accessed 18<sup>th</sup> January 2018  
Note that as of late 2017 a ‘link’ was attached as follows:  
Moray Council, ‘Moray Additional Support Needs, Strategy for Schools 2017/27’ (Moray Council 2018) <<http://www.moray.gov.uk/downloads/file116628.pdf>> accessed 19<sup>th</sup> January 2018.



jurisdiction of Moray, despite the existence of a national, funded service for children, young people and their families via 'Let's Talk ASN'. In the section on, *'How we can Help'*, the enquirer is only informed that, *'When appropriate, multi-agency working with a range of partners, including NHS and third sector, will take place'*<sup>436</sup> The local authority may not be compelled to advertise a service such as 'Let's Talk ASN' (administered by Kindred-Scotland and Govan Law Centre's Education Law Unit), but the adoption of a proactive practice making such information widely known via their internet site would benefit Moray children, their families and the authority.<sup>437</sup> The absence of wider promotion by public authorities has been noted by 'Let's Talk ASN', when in February 2016, the Education Law Unit contacted local authorities and other linked agencies (including Moray Council and local NGO's) by email. An informative piece, the communication was also an appeal by the Education Law Unit, that after two years of running 'Let's Talk ASN' there was a lack of referrals from several Scottish local authorities. This is concerning, and it can only be conjectured that Moray was one of those local authorities, hence the communication. It is apt, at this juncture to narrate the experience of one facilitator, **SF 2** as it concerns an Educational Placing Request Appeal within Moray authority in 2016. **SF 2** was advocating on behalf of three siblings (and arguably, the parents of those children) and recounted the following,

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<sup>436</sup> Moray Council, 'Additional Support Needs (ASN)', (Moray Council 2018) <[http://www.moray.gov.uk/moray\\_standard/page\\_43857.html](http://www.moray.gov.uk/moray_standard/page_43857.html)> accessed 18<sup>th</sup> January 2018  
Note that as of late 2017 a 'link' was attached as follows:  
Moray Council, 'Moray Additional Support Needs, Strategy for Schools 2017/27' (Moray Council 2018) <<http://www.moray.gov.uk/downloads/file116628.pdf>> accessed 19<sup>th</sup> January 2018.

<sup>437</sup> See Kindred-Scotland < <http://www.kindred-scotland.org/lets-talk-asn> > accessed 17th December 2017. The service was launched on the 1<sup>st</sup> April 2014.

*'In total, there were four families present that day and all lost. The set up was horrendous. Held in the Council Chambers, there was not one, but three solicitors present, representing the council. It was power led. It was financially led. Four families lost, but four families competing against one another also. Terrible. After that I now advise families to get a solicitor.'*

That some local authorities and agencies are passive in making use of a centrally funded service is bemusing. Many children and young people's best interests, wellbeing and welfare are not being met when they and their families are unnecessarily ignorant of the existence of funded and specialised support mechanisms.

### **5.2.5 Advocacy North East (NEA) and Circles Network Advocacy in Moray**

Grampian NHS Trust covers the jurisdictions of Moray, Aberdeenshire and Aberdeen, replicating its predecessor Grampian Health Trust. In 2015/16 NHS Grampians 'Engagement and Participation Committee' drafted an 'Independent Advocacy Plan'; directed towards the provision of independent advocacy for adults with learning disabilities, mental health disorders, as well as patients' rights; all relative to their care and treatment.<sup>438</sup> The inclusion in this study is purposeful so that the reader may better understand the wider frameworks that inform advocacy provision in the jurisdiction under study.<sup>439</sup> As of April 2017, two

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<sup>438</sup> NHS, 'Grampian Independent Advocacy Plan 2016-2018' <[http://foi.nhsgrampian.org/globalassets/foidocument/dispublicdocuments---all-documents/Grampian\\_Independent\\_Advocacy\\_Plan-Consultation-2016-18.pdf](http://foi.nhsgrampian.org/globalassets/foidocument/dispublicdocuments---all-documents/Grampian_Independent_Advocacy_Plan-Consultation-2016-18.pdf)> accessed 2<sup>nd</sup> December 2018.

<sup>439</sup> This falls under the ambit of the 'Mental Health (Care & Treatment) (Scotland) Act 2003 and the duties incumbent upon Unitary Authorities therein.

agencies were identified as providing advocacy services within this cumulative NHS Grampian area. These were Advocacy Service Aberdeen and Advocacy North East (or NEA).<sup>440</sup> Both of these organisations being registered charitable NGO's in Scotland and members of the SIAA.<sup>441</sup> Whilst Advocacy North East (or NEA) still operates within the jurisdiction of Aberdeenshire, it no longer has the contract for services in the Moray locale.<sup>442</sup> The award for that service went to Circles Network Advocacy Moray, on April 1<sup>st</sup> 2017; a UK wide organisation, which up until April 2017 had no prior history or presence in the Moray area.<sup>443</sup> Many of the independent advocacy services catering for adults are premised upon the joint working statutory requirements of Scottish unitary authorities. In this study that

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<sup>440</sup> ASA-Advocacy Service Aberdeen, *'We work with people using health and social work services. Everyone in Scotland who has a mental disorder (including learning disability) has a legal right to an independent advocate.'* <<http://www.advocacy.org.uk/>> accessed 20th September 2017; ANE (NEA)-Advocacy North East, *'... provides independent advocacy throughout Aberdeenshire to adult users of health and social care services with a Learning Disability or Mental Illness/Disorder, who find it hard to speak up for what they want and need. We work with people over the age of 16.'* **AND** *'Independent Advocacy for Carers'* <<http://www.advocacyne.org.uk/about.html>> accessed 20<sup>th</sup> September 2017.

<sup>441</sup> However, only Advocacy Services Aberdeen provided 'independent advocacy' to children with 'additional support needs', and only within the locale of Aberdeen City; ASA-Advocacy Service Aberdeen state that they can provide 'independent advocacy' in their jurisdiction because of funding from external bodies. In their case, that external body being 'Children in Need' <<http://www.advocacy.org.uk/about-advocacy-service-aberdeen/children-and-young-people-with-additional-support-needs/>> accessed 20th September 2017.

<sup>442</sup> In 2016 the Moray Council, acting as a conduit for 'volunteer recruitment' (for internal positions such as 'keyholder', as well as external organisations, ie 3<sup>rd</sup> sector agencies) made it known that Advocacy North East (NEA) had been struggling to recruit volunteer advocates. This was an issue which had apparently been affecting Advocacy North East for some time. Whilst the Moray authority link/thread relating to this example has since been deleted, it is clearly still relevant, albeit anecdotally so.

<sup>443</sup> Circles Network Advocacy, *'In Scotland, our advocacy projects continue to thrive. The extensive range of advocacy work we have undertaken has helped us to develop a unique Person Centred approach to advocacy and includes.... Advocacy in Fife... Advocacy in Glasgow.... Advocacy in Inverclyde... Advocacy in Moray.... Advocacy in South Ayrshire.'* <<http://www.circlesnetwork.org.uk/>> accessed 19<sup>th</sup> January 2018; See also: Public Contracts Scotland, 'View Notice, Award of 16/0003 Independent Advocacy Services' <[http://www.publiccontractsscotland.gov.uk/search/show/search\\_view.aspx?ID=JAN268810](http://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=JAN268810)> accessed 2<sup>nd</sup> December 2018.

includes Moray Council and NHS Grampian. The more recent incarnation of such a joint strategy titled, 'Health and Social Care Moray', via the Moray Integration Joint Board.<sup>444</sup>

Advocacy North East (or NEA) had provided independent advocacy for adults in mainly statutory processes in the Moray jurisdiction for several years, via a joint service level agreement between NHS Grampian and Moray Council. In 2015 however, an interesting development took place. Advocacy North East (or NEA) was approached by NHS Grampian with a view to conducting a 'short term', real time study on the efficacy of providing independent advocacy to young people (18 and under) on their admission to Moray's Dr Gray's mental health ward. Manager **SM 5** described it as, *'Our pilot project which was from April 15<sup>th</sup> to December 15<sup>th</sup> for children and young people over the age of 12 years and subject to hospital admissions. Because there was nobody else with experience in Mental Health.'* Advocacy North East (or NEA) already provided independent advocacy to adult patients in an adjacent ward/facility, so not only was the organisation in situ, they also had specialised advocates available for this niche and extra sensitive study. The projects short-term duration was undertaken with a view to longer-term future service provision for this especially vulnerable young group. However, obstacles were apparently encountered at the outset of this 'pilot project'. The main obstacle concerned timeous communication, or the lack thereof from some

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<sup>444</sup> *'The Moray Council and NHS Grampian have come together to form a new partnership which is governed by the Integrated Joint Board which has budget and decision making responsibility.'*

<<https://hscmoray.co.uk/index.html>> accessed 25<sup>th</sup> November 2018;

See also the following document which provides an example of Guidance which was issued in respect of Carers Advocacy in Scotland, and which preceded the Carers (Scotland) Act 2016: Scottish Government, 'Guidance for Unpaid Carer Advocacy in Scotland' (Scottish Government 2016)

<<https://www.gov.scot/publications/guidance-unpaid-carer-advocacy-scotland/>> accessed 1<sup>st</sup> December 2018.

NHS staff 'on duty' in the ward to Advocacy North East (or NEA). The apparent failure to notify Advocacy North East (or NEA) facilitators as to when a child or young person had been admitted was disappointing. Not only did this detrimentally affect the 'short term' study, but it denied vulnerable children and young people the opportunity of an advocate as a supporter. However, the positive that could be taken from that experience, as related by the Advocacy North East (or NEA), is that the moral and legal rights of young people, at the extremes of Mental Health services are being acknowledged, if slowly.

NHS Grampian Trust insist on independent advocacy as a remit for any provisioning third party organisation. They also make it clear that they recognise the salaried employee and the volunteer as equally capable independent advocates. The bodies insistence on 'independence' is premised upon there being, *'...no possibility of any conflict of interest arising in relation to any other services accessed by the individual or group'*<sup>445</sup>

### 5.2.6 Action for Children Scotland

Another service agency (and mechanism) discussed by **CYP 3** concerned her time 'in care' a few years prior, in Moray. The agency was known to **CYP 3** as the National Children's Home, but its working title is Action for Children and its

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<sup>445</sup> NHS, 'Grampian Independent Advocacy Plan 2016-2018' (NHS Grampian 2016) 5  
<[http://foi.nhsgrampian.org/globalassets/foidocument/dispublicdocuments---all-documents/Grampian\\_Independent\\_Advocacy\\_Plan-Consultation-2016-18.pdf](http://foi.nhsgrampian.org/globalassets/foidocument/dispublicdocuments---all-documents/Grampian_Independent_Advocacy_Plan-Consultation-2016-18.pdf)> accessed 2<sup>nd</sup> December 2018.

Scottish operations coming under, Action for Children (Scotland).<sup>446</sup> Whilst **CYP 3** did not go into detail ‘on tape’, she stated that experiences during her time ‘in care’ with Action for Children were very positive. The staff were akin to ‘surrogate’ parents because they had given her much needed emotional support. Unfortunately, upon leaving the care home such support ended abruptly. This had a negative impact upon her. From the point of view of the staff in residence in such care homes, they are not at fault. These individual facilitators, in relinquishing their ‘duty of care’ in respect of **CYP 3** only did so as she was no longer their statutory responsibility; their duty of care lying with another child or young person. However, it was the local authority, acting under their statutory duty as a corporate parent to LAAC which relinquished parental responsibility on **CYP3** attaining the age of 18 years. Such situations are now rare, due to the amended enactment of Parts 9, 10 and 11 of the CYP (S) A 14.<sup>447</sup>

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<sup>446</sup> Action for Children, ‘Our Work in Scotland, Taking Action’

<<https://www.actionforchildren.org.uk/what-we-do/our-work-in-scotland/>> accessed 1st March 2017; *‘Many children and young people in Scotland are suffering because they don’t get help early enough. This is why we are working with MSP’s and Scottish Government Ministers to take action to tackle problems before families reach crisis point’;*

Action for Children Scotland also operates an additional project in the Moray jurisdiction which is titled, ‘Supporting Moray Families’. It provides, amongst other things, *‘.... programmes of intensive, structured support to the most vulnerable families within the Moray area on behalf of the local authority. Supporting Moray Families works with families within the Moray area over a defined period to provide packages of support tailored to meet their individual needs.’* See their website at:

<<https://www.actionforchildren.org.uk/in-your-area/services/early-years-and-family-support/family-support/supporting-moray-families-service/>> accessed 1st October 2017.

<sup>447</sup> Children and Young Persons (Scotland) Act 2014, Part 9-Corporate parent, Part 10-Aftercare, Part 11-Continuing care. Particularly where the duties incumbent upon a ‘corporate parent’ can extend to an individual up until under 26 years old, s 66 (2) (c) (i); Children’s Hearings (Scotland) Act 2011 asp 1, Part 12-Children’s Hearings General, s 122 ‘Children’s advocacy services’.

### 5.3 A personal experience of through-care and after care- LAAC

Field and desk research throw up many different pieces of data and whilst the inclusion of the following service user 'personal experience' is perhaps unexpected, its position in this part of the thesis is meaningful.<sup>448</sup> The reason for this is because **CYP 3**, refers to some interesting agencies, mechanisms and role holders.<sup>449</sup> A care experienced LAAC service user, **CYP 3** shared her personal history of her time in what she referred to as '*the system*', with an emphasis on 'through care' and 'post care'. She identified individual role holders that supported her in several situations. It became obvious when she recounted her experiences, that her supporters were not advocates, not within the terms of reference and definition as that required by say, the SIAA. For clarification, during her time in the care system, in the jurisdiction under critique, WC? S was not operative. Additionally, the pertinent legislation, the CYP (S)A 14 which gave rise to additional rights for LAAC in Scotland, had not at that time been enacted. WC? S were however latterly successful in being awarded a service level agreement by the local authority in Moray, and as has been stated, their service facilitators though titled Young Person's Worker, are advocates.

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<sup>448</sup> See: Sandy Fraser, *Doing research with children and young people* (SAGE 2004) 294; Alison McLeod, *Listening to children* (Jessica Kingsley 2008) 224; Both Fraser and McLeod have conducted theoretical and empirical research focussed on children and young people.

<sup>449</sup> Scottish Association for the Care and Resettlement of Offenders, SACRO, 'Sacro is a Scottish community justice organisation which works to create safer and more cohesive communities across Scotland. Sacro provides a wide range of services spanning all aspects of the community justice continuum. These range from conflict resolution to prevent disputes escalating, to supporting prisoners on release.' <<http://www.sacro.org.uk/organisation/about-sacro>> accessed 1<sup>st</sup> December 2018.

**CYP 3** stated that she valued the advice and services of the local authority 'Housing Team' (Moray Council) with whom she was put in contact by her Young Person's Worker. The plaudits from **CYP 3** were in the main reserved for that Housing Team and a mediator from the 'Moray Community Mediation Service'. The aforementioned 'community mediation' is operated by the Scottish Association for the Care and Resettlement of Offenders (SACRO). The housing accommodation provided for **CYP 3** and many other such young people is called 'Elgin (Moray) Young Person's Accommodation'. Again, this is predominantly a SACRO service, but it is run in collaboration with Moray Council's Housing Department. The local authority employed housing officers are just one of many groups that can make referrals on behalf of relevant young people. These agencies, bodies and individuals will not necessarily feature in every young person's life, but they are without doubt, supporting agencies, in a variety of capacities and contexts and this merits their inclusion.

**CYP 3** espoused gratitude for the Young Person's Workers from WC? S, as they supported her in gaining a place at a University. This support comprised information, advice and contact with the institution in question. This does not go beyond the role of the advocate (which is the primary role of the Young Person's Worker), not if we accept the wide ambit interpretation of advocacy, rights and support. Besides, it is fitting and just that a 'care experienced' LAAC young person benefit from the support of a corporate parent, via a third party, ie WC? S, just as they would (or should) from traditional parents.

Trust and confidence in supporters were a common theme throughout the narratives of service users and even facilitators; **CYP 3** candid in her interview that



she built up a bond of trust with her Young Person's Worker, which fostered her own sense of confidence. This was quite a common sentiment amongst the young interviewees, both LAAC and Non-LAAC group alike; trust and confidence in their supporter was critical to them. One of the questions put to this group of young participants during the empirical stage asked, 'who' they would approach, if they sought (or had sought) advice on a rights issue. The roles given varied, but included a parent, foster-parent and supporter (general and non-specialised); a friend and guidance teacher. Albeit the sample size (six) was small, none of the young participants mentioned the advocate, despite the question relating directly to accessing rights information. It could be deduced that the association between 'advocacy and rights' was not sufficiently clear, despite these young participants having utilised advocacy services in statutory and non-statutory procedures. That stated it appears to be the case that in the absence of an advocate or other supporting role/mechanism enlisted in decision making procedures, children and young people will usually approach a parent (or another guardian) for advice and information on rights; and whilst parents and guardians should be a safe port of call for a child or young person in such instances, the reality is often bleak in that many adults are disinterested, or disaffected by the topic of children's rights. Gallagher hypothesised that a child's decision on who to approach was based on their current knowledge of what and who is available, but that is also affected by wider 'information deficit'.<sup>450</sup> Notwithstanding the issue of who to approach on rights issues, the young participants in this study were more experienced and informed than their peers. It was also interesting for the researcher to hear that

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<sup>450</sup> Rosemary Gallagher, *Children and young people's voices on the law, legal services & systems in Scotland* (Stationary Office Books 1999) 18.

not only did they value knowledge, they wanted and appreciated knowledgeable and honest supporters; desiring 'do-er's' to act on their behalf. About advocates, **CYP 2**, stated '*...like I said. They matched someone to my personality. Well, in fact I had two, both different, but they're not fake, like I've seen with some social workers.*'

### **5.3.1 Emotional Needs and Information Needs**

The young participants also stated that they wanted someone they could 'emotionally' connect with. This emotional connection between the young person and their supporter is not always realised, nor is it attainable, given time and supporter constraints in the real world. However, the emotional needs of the child or young person should be taken account of and where possible, acceded to, irrespective of the mechanism utilised. This is because children and young people have without doubt, greater emotional needs than the average adult. This is not just rhetoric from the researcher either, because the emotional needs of the child and young person are acknowledged in statute and policy, through the application of the wellbeing and best interest concepts. The bodies, agencies and facilitators providing supporting mechanisms and roles in respect of children and young people's services should be ready and able to respond to their emotional needs and that should be incorporated into the wider agenda of participatory rights and coming to voice. While such needs are more readily ascribed those young people falling under the ambit of the LAAC group, authorities and agencies should attempt to respond to and address all children's emotional needs on a comparable level.

It may come across as somewhat of a generalisation, but very few adults desire to remain ignorant of the world around them and of issues that affect them

directly. Children and young people are no different from adults in that respect and the researcher's observation and discussions with this group indicates that they are even more acquisitive. The difference is that the adult is acknowledged in law as a more autonomous and entitled agent. It is critical that not only are the emotional needs of children and young people met in decision making procedures, they must also be kept informed; not kept in the dark. As Gallagher attests, '*All children and young people have information needs*'<sup>451</sup> These needs can be met by an advocate or other able supporting role. An individual who also has a thorough understanding of the child's rights within specific contexts; the ability to convey information to the child or young person on their rights and address their emotional needs.

#### **5.4 The Local Integrated Assessment and Planning Procedure (superseded by the Child's Planning Meeting)**

*'Creating the opportunity for children's right to be heard within education requires a significant cultural change at all levels of the system. It necessitates not only organisational or procedural adaptation but differences in the fundamental relationships between adults and children.'*<sup>452</sup>

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<sup>451</sup> Gallagher (n 450) 12;

See also: United Nations Convention on the Rights of the Child, Article 17 Access to information, Article 13 Freedom of expression, Article 14 Freedom of thought, conscience and religion, and Article 29 Preparation for active life as an adult.

<sup>452</sup> Gerison Lansdown 'and others', 'Children's rights and school psychology: Children's right to participation' (2014) 52 Journal of the School of Psychology 8.

The LIAP procedure was specific to Moray and is the main procedure under critique in this study. The retirement of the procedure during the empirical stage of this study necessitated that it be examined in greater detail, to discern the factor, or factors contributing to its demise; to consider its ‘fitness of purpose’ when active. On commencement of the research, the procedure had been in operation for just over a period of three years, up to the latter part of 2016. At that point it was supplanted with the Child’s Planning Meeting.

A non-statutory mechanism the LIAP was premised on Scottish Government policy and informed by statute.<sup>453</sup> Its drafters proclaimed to have taken inspiration from the tenets of the CRC.<sup>454</sup> It incorporates the following key themes and practices:

- Child centred (and Family)
- Viewpoint of the child (and Family)
- Participation of the child (and Family)
- Use of external and internal supporters i.e. Advocates/ Educational Psychologist / Family Support Worker
- Use of mechanisms: Advocacy/Mediation

The LIAP procedure was based on the then Scottish Executive’s GIRFEC policy, which arguably influenced (and still influences) local policy; fostering the promotion of ‘Integrated Assessment and Multi-Agency’ practice in deference to what ‘single agency working’. These have now been diluted by reference to the

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<sup>453</sup> For example, Education (Additional Support for learning) (Scotland) Act 2004; Children and Young Persons (Scotland) Act 2014 s 21 (1) and s 22 (2).

<sup>454</sup> United Nations Convention on the Rights of the Child, Article 12 and Article 3.

joint working practices required of Scottish public bodies by devolved legislation.<sup>455</sup>

An early interventionist model utilising ‘solution-oriented methods’, the primary purpose of the LIAP procedure was that it should serve as a resolution process for children and young people, their families and involved agencies. The issue or issues leading to the instigation of a process premised on that which had adversely affected a child’s life or had the potential to do so. That denotes a degree of early interventionism on the part of those individuals effectively activating the procedure. That in turn is clearly associated with the idea of meeting the individual’s best interests and their wellbeing. Some of the children, young people and families involved in the LIAP procedures were also involved in or had prior experience of the more formalised statutory mechanisms, ie the Children’s Hearings Scotland, or the Sheriff Courts. For many service users and their families, it was a successful ‘one-stop’ process, as was envisaged by its drafters, but that success was tempered by several issues, as will be explained.

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<sup>455</sup> Public Bodies (Joint Working) (Scotland) Act 2014.

#### **5.4.1 The GIRFEC policy, Children's Services Bill and the influence on the LIAP process.**

The GIRFEC policy whilst still active, influencing and persuasive is also linked to the Draft Children's Services Bill. That bill was a political, legal and societal acknowledgement that children's services required reform and transition.<sup>456</sup> GIRFEC, and the Children's Services Bill were hugely influential and possibly, interdependent. However, whilst the GIRFEC philosophy and programme survived, the Children's Services Bill did not. It failed to reach Stage 3 in the Scottish Parliamentary bill procedures. Had it succeeded there is no doubt that advocacy access and wider provision for children and young people in administrative decision making processes would have been a reality today. Additionally, GIRFEC would also have had a greater statutory footing. Without a legislative backbone, the GIRFEC programme was, and it could be argued, is still at the mercy of 'ad hoc' interpretations. It is also debatable as to the level GIRFEC has been realised or has been provided for in the CYP (S) A 14. This is highlighted because the notion that GIRFEC has a statutory footing in the CYP (S) A 14 is pervasive in some sectors, as testimony from interviewees in this study has demonstrated; that many a professional (in education and social care) proclaimed to the researcher that the CYP (S) A 14 put GIRFEC on a statutory footing. It is argued that this is a misnomer because the CYP (S) A 14 cannot fully support the GIRFEC policy. Besides, drafting a philosophy into black letter law is a nigh impossible undertaking.

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<sup>456</sup> Scottish Executive, *Getting it right for every child: Draft Children's Services (Scotland) Bill Consultation* (Scottish Executive 2006) <<https://www2.gov.scot/Publications/2006/12/18140606/4>> accessed 1<sup>st</sup> December 2018.

The LIAP procedure evolved from, and was in turn influenced by external and preceding procedures, such as Pathways and Health for All.<sup>457</sup> The origins of Health for all can be traced back to 1988 and the establishment of a multi-disciplinary working group from the Royal College of Paediatrics and Child Health (RCPCH), *'to review routine health checks for young children'*<sup>458</sup> Its purpose, relative to this study can be summed up by reference its 'framework' which is, *'... firmly rooted in the need for an integrated approach to the delivery of services and support for children and families.'*<sup>459</sup> These external stratagems and the LIAP procedures successor, the Child's Planning Meeting are still effectively non-statutory mechanisms, though official parlance often cites them as, *'underpinned by statute'*<sup>460</sup>

Prior to the launch of LIAP, a procedure titled the Local Assessment Procedure was in operation (from 2004). At first glance it could be argued that any change from the Local Assessment Procedure to the LIAP was inconsequential, but for a re-badge and insertion of the phrase, 'integrated planning'. However, in 2008 it was decided that the Local Assessment Procedure was to be replaced.

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<sup>457</sup> HALL 4, See: David M B Hall and David Elliman (eds), *Health for All Children*, (Oxford University Press 2003); Scottish Executive, *health for all children 4: Guidance on Implementation in Scotland* (Scottish Executive 2005) <<https://www2.gov.scot/Publications/2005/04/15161325/13269>> accessed 1<sup>st</sup> December 2018; Scottish Government, *A NEW LOOK AT HALL 4 The Early Years Good Health for Every Child* (Scottish Government 2011) <<https://www2.gov.scot/Publications/2011/01/11133654/0>> accessed 1<sup>st</sup> December 2018.

<sup>458</sup> *ibid.*

<sup>459</sup> Scottish Executive, *health for all children 4: Guidance on Implementation in Scotland* 9 (Scottish Executive 2005) 9 <<https://www2.gov.scot/Publications/2005/04/15161325/13269>> accessed 1<sup>st</sup> December 2018.

<sup>460</sup> The Child Planning Meeting-effective as of late 2016 and apparently premised on the Solution Oriented method, or approach.

The reasoning given was that the LIAP was to be, ‘...an overarching framework for Moray’s GIRFEC Pathway’<sup>461</sup> The local authority also referring to the earlier, but highly successful Highland Pathfinders Project.<sup>462</sup> Having conducted trials of the LIAP procedure during 2009 (adjusting, amending and revising where it was deemed necessary) the procedure became firmly rooted in local authority policy by June of 2010. Its utilisation was required by Moray Chief Officers and Heads of Service of ‘all’ integrated assessment and planning procedures and ‘all’ subordinates; that the LIAP was, ‘...the overarching framework for assessment and planning to meet the needs of children and young people on a multi-agency basis in Moray.’<sup>463</sup> However, an interview participant, **SM 4** stated that, ‘Implementation by school’s areas was not mandatory, is not, but some schools were fantastic, others not.’ Rooted in GIRFEC ideology, the LIAP procedure’s pivotal aim was to provide every child or young person with an ‘individual plan’ (not to be confused with the statutory Child’s Plan). The main tenets, or ‘Key Principles’ of the LIAP procedure as follows:

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<sup>461</sup> Jeremy Akehurst, Safer and Stronger Strategic Group, GETTING IT RIGHT FOR EVERY CHILD (GIRFEC) (Moray Council 2009) <[www.morayperforms.org.uk/downloads/file77606.pdf](http://www.morayperforms.org.uk/downloads/file77606.pdf)> accessed 24th January 2018.

<sup>462</sup> See the following links related to Pathfinder: Bob Stradling and Morag MacNeil, ‘GIRFEC Evaluation Themed Briefing: Briefing 3Record Keeping and Assessment of Children's Needs’ <<http://www.gov.scot/resource/doc/1141/0117448.pdf>> accessed 22<sup>nd</sup> January 2018; Bob Stradling, Morag MacNeil and Helen Berry, *Changing Professional Practice and Culture to Get it right for every child: An Evaluation Overview of the Development and Early Implementation Phases of Getting it right for every child in Highland: 2006-2009*, (2009a) (Scottish Government 2009) <[www.gov.scot/Publications/2010/07/19145422/](http://www.gov.scot/Publications/2010/07/19145422/)> accessed 19<sup>th</sup> January 2018; Bob Stradling, Morag MacNeil and Helen Berry, *Changing Professional Practice and Culture to Get it right for every child - Executive Summary-An Evaluation Overview of the Development and Early implementation Phases of Getting it right for every child in Highland: 2006-2009*, Scottish Government 2010) (2009b) <[www.gov.scot/Publications/2009/11/20094407/0](http://www.gov.scot/Publications/2009/11/20094407/0)> accessed 19<sup>th</sup> January 2018.

<sup>463</sup> ‘SMARTER Theme Co-ordinating Group’, getting it right for every child in Moray, Implementation of Local Integrated Assessment and Planning Procedures (LIAP) (HB788969) (Moray Council 2010) <<http://www.moray.gov.uk/downloads/file65435.pdf>> accessed 1<sup>st</sup> December 2018.



- ‘1. Meaningful involvement of children, young people and their families at every stage of assessment, planning, service delivery and review;*
- 2. Adherence to the principles of the Pan Grampian Information Sharing Protocol and its Memorandum of Understanding;*
- 3. Professional accountability for high standards of collaborative practice;*
- 4. Solution oriented approaches and a commitment to achieving the best outcome for children and young people in Moray;*
- 5. Each child/young person with additional support needs has a single, integrated plan which sets out its objectives and the various activities undertaken to achieve those objectives (the Child’s Plan)’<sup>464</sup>*

The prominence, and the promotion of the procedure was also re-enforced by the then GIRFEC Coordinating group, when they stated that it was vital that every worker understood that the LIAP was, *‘...the ‘trunk’ from which only specific routes such as child protection, or those for Looked After Children (LAC) diverge before re-connecting with the main LIAP route when issues return to child in need of support.’*<sup>465</sup> This Group comprised a team which was supported by development officers and two sub-groups (one for wider training on the procedure; the other specifically for practitioners) and it was involved in the wider roll-out; a furtherance of the then Scottish Executive’s GIRFEC programme. Aspects of this rollout included the following:

- Guidance, information and instruction for local authority staff, partner organisations (Children 1<sup>st</sup>, Aberlour Child Care Trust), parents and young

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<sup>464</sup> Moray Council, ‘Getting it right for every child in Moray, Moray’s Local Integrated Assessment and Planning (LIAP) Procedures, Procedures Pack’ 7 (Moray Council 2010) <[www.moray.gov.uk/downloads/file64661.pdf](http://www.moray.gov.uk/downloads/file64661.pdf)> accessed 5<sup>th</sup> November 2018.

<sup>465</sup> Moray Council, ‘GIRFEC Group Meeting: 29 June 2010, 3.GIRFEC Practitioners Sub-Group’ (Moray Council 2010) <<http://www.moray.gov.uk/downloads/file66961.pdf>> accessed 2<sup>nd</sup> December 2018.

people. Facilitated by a dedicated web-site accessed via the Local Authority internal intranet.

- Staff training incorporated ‘twilight’ sessions; an intense programme of education and embedment across all agencies, which was estimated to include 515 in 2009 and 73 (*twilight sessions- after school hours/early evenings to accommodate mainly education staff*)<sup>466</sup>

On the second bullet point, **SM 4** had stated, *‘We used to hold training sessions, even twilight sessions on LIAP’s on GIRFEC, but it was a matter of choice as to whether people came. It was usually the same people. The big change was when the Head of schools and curriculum took over the chairing of the strategy group where before it was Social work.’* The Moray Smarter Theme Co-ordinating Group also had the task of reviewing and revising the procedure throughout the early period, and it was then validated by the then Chief Officers’ Group for Children’s Services. The documentation confirming this undertaking refers to ‘Integrated children’s services’ and reaffirms the LIAP procedure as being grounded in the Scottish Government’s wider vision for its children and young people. This they did by referencing the strong foundations of its premise, in that it was,

*‘... underpinned by both legislative requirements and areas of good practice, including the Education (Additional Support for Learning) (Scotland) Act 2004, the national Getting it right for every child programme, Health for All Children (HALL 4) and by relevant supporting protocols such as the Pan Grampian Information Sharing Protocol’*<sup>467</sup>

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<sup>466</sup> Moray Council (n 465).

<sup>467</sup> Moray Council, ‘Getting it right for every child in Moray, Moray’s Local Integrated Assessment and Planning (LIAP) Procedures, Procedures Pack’ 3-4 (Moray Council 2010)  
<[www.moray.gov.uk/downloads/file64661.pdf](http://www.moray.gov.uk/downloads/file64661.pdf)> accessed 5<sup>th</sup> November 2018.

It was also largely informed by the then Scottish Executive's Supporting Paper (1) on, *'The process and content of an Integrated Framework and the implications for implementation'*<sup>468</sup>

#### 5.4.2 2009

By 2009 the LIAP procedure was officially launched and an appraisal/up-date report from the Performance and Strategy Manager was delivered to the 'Safer and Stronger Strategic Group' at the Local Authority.<sup>469</sup> A few caveats were applied throughout the report, but the following are probably the most applicable here. In the 'Summary of Implications', an official cited the civil-political and socio-economic positives and potential of the GIRFEC programme for vulnerable children and young people.<sup>470</sup> The same report also referred to the need for *'quarterly evaluation of all identified local LIAP processes'*, and the necessity of on-going awareness and training *'across all services'*<sup>471</sup> The reference to 'Summary of Implications' and on-going checks and balances is important because it demonstrates a couple of points. One of these being the child focused positivity which the 'Safer and Stronger Strategic Group' placed on the LIAP as a creditable 'early interventionist' procedure. Secondly, the necessity for continued vigilance

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<sup>468</sup> Scottish Executive, *Supporting Paper 1: The process and content of an Integrated Framework and the implications* (Scottish Executive 2005) <<https://www2.gov.scot/Publications/2005/07/25112327/23294>> accessed 1<sup>st</sup> December 2018.

<sup>469</sup> Jeremy Akehurst, 'Safer and Stronger Strategic Group, GETTING IT RIGHT FOR EVERY CHILD (GIRFEC)' (Moray Council 2009) <[www.morayperforms.org.uk/downloads/file77606.pdf](http://www.morayperforms.org.uk/downloads/file77606.pdf)> accessed 24<sup>th</sup> January 2018.

<sup>470</sup> *ibid* 8.

<sup>471</sup> Akehurst (n 469) 4.

and support of same, if it was to remain successful in serving children and young people in decision making procedures. In the six or so years since that report, positive practice and progress had arguably stalled. There was an absence of seamless commitment to the LIAP procedure, though not necessarily the GIRFEC programme. The local authority procedural pack on the LIAP procedure from 2010 was circulated to 'all' concerned bodies and individuals (internal and external), so it is not for a lack of wider knowledge and guidance that the procedure forestalled.<sup>472</sup>

### 5.4.3 2012

That stated, reference is made to a local authority department 'internal paper', published in February 2013 which details research which had been undertaken the previous year (2012). The department in question was the Educational Psychology Service; the report, a critique of LIAP implementation throughout the Moray jurisdiction in primary and secondary schools in that year. The report was highly critical of its implementation and the following is an excerpt sample of the wider 'Implications and Suggestions' as furnished by the authors of the report.

- *'Consulting with children and young people should be an integral part of preparing for a LIAP meeting and the time requirements for this should be accounted for as part of the planning process.'*

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<sup>472</sup> Moray Council, 'Getting it right for every child in Moray, Moray's Local Integrated Assessment and Planning (LIAP) Procedures, Procedures Pack' 3-4 (Moray Council 2010)  
<[www.moray.gov.uk/downloads/file64661.pdf](http://www.moray.gov.uk/downloads/file64661.pdf)> accessed 5<sup>th</sup> November 2018.

- *Further research could investigate how the content of LIAP meetings is fed back to children and young people, for those who attend their meetings and those who do not.*
- *Age has been cited as a barrier to gathering information from pupils and to including them in LIAP meetings. There is a key distinction to be made between including pupils in their meetings and consulting with them to allow their views to be considered in their meeting –while age and other factors may be a barrier to physically including them in their meeting, this should not present a barrier to gaining and representing their views.’<sup>473</sup>*

Coincidentally, in February 2012 a Moray GIRFEC Officer published a brief three page report which was intended to clarify the role of ‘Multi-Agency Meetings’ in respect of the LIAP procedure. An unambiguous report, it re-iterated the laudable aims of ‘Education and Social Care’. It re-stated the importance of engaging with and involving children and young people; further promoting a culture of value and respect for ‘all’ human dignity.<sup>474</sup> However, there have been ‘on the face of it’ positive counterpoints, one example being the inclusion of children and young people by the local authority in seeking their views in a consultation; notifying the public of the consultation via the use of a local media

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<sup>473</sup> Moray Council, ‘Educational Psychology Service, Research paper February 2013, Local Integrated Assessment and Planning (LIAP) Processes, How schools involve children and young people in LIAP meetings’ 6 (Moray Council 2013) <[www.moray.gov.uk/downloads/file84742.pdf](http://www.moray.gov.uk/downloads/file84742.pdf)> accessed 3<sup>rd</sup> December 2018.

<sup>474</sup> Kathy Ross, ‘The Role of Multi-Agency Meetings’ (GIRFEC Development Officer 2012, Moray Council 2012) <[www.moray.gov.uk/downloads/file84273.pdf](http://www.moray.gov.uk/downloads/file84273.pdf)> accessed 2<sup>nd</sup> December 2018.

article.<sup>475</sup> The consultation was part of the authority's preparations in respect of the 'Moray Children and Young People's Services Plan' (a generic term for the 'Integrated Children Services Plan') for the period 2013-2016.<sup>476</sup> On the flip side, an analysis of the survey questions published, showed a preference for structure over substance. For example, one of the questions asked respondents about the 'layout' of the strategy document but failed to ask or encourage respondents as to their opinions in respect of current and future services; ie what really mattered to them.<sup>477</sup> That stated, one must always be mindful that some consultations take the form of elementary surveys. They have 'narrow' precepts and a comparatively short shelf life. The 2009 survey had a brief period of impact because it was only 'live' for responses over a two week period; Monday 28th October 2013 to Monday 11th November 2013. Whether the responding public included a reasonable youth demographic is unknown and cannot be ascertained. This is unfortunate, considering it was a consultation in respect of 'Children and Young People's [future] Services'. The Plan which followed opened with a confident foreword from the then Chair of the Children and Young People's Partnership, as follows: *'This plan will ensure that children, young people and families feel confident in the services they are receiving. They will understand the need for those services, having been*

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<sup>475</sup> 'Have a say on vision for Moray's youth' *The Northern Scot* (Elgin, 25<sup>th</sup> October 2013) <<http://www.northern-scot.co.uk/News/Have-a-say-on-vision-for-Morays-youth-25102013.html>> accessed 23rd December 2017.

<sup>476</sup> Moray Council, 'Moray Children and Young People's Services Plan Consultation, What is the Moray Children and Young People's Services Plan?' (Moray Council 2013) <<http://www.moray.gov.uk/downloads/file106120.pdf>> accessed 2<sup>nd</sup> December 2018.

<sup>477</sup> Moray Children and Young People's Services Plan Consultation, 'What is the Moray Children and Young People's Services Plan?' (Moray Council 2013) <<http://www.moray.gov.uk/downloads/file106120.pdf>> accessed 2<sup>nd</sup> December 2018.

*involved in decision making and know that they have been listened to and understood.*<sup>478</sup> Perhaps future consultations in respect of 'all' Moray service provision could include proactive and concerted efforts to engage more conspicuously with children and young people. This would acknowledge this group's capacity as politically engaged and engaging participative agents.

#### 5.4.4 2015

By 2015 interviews were underway in the empirical stage of this research project. Interview participants at that time included service users, managers and facilitators. It became obvious that there was a problem, or problems with the functioning of the LIAP procedure. That was made obvious from the statements made by participants, in addition to the researcher's observations. Several points were highlighted, and it is conjectured that these were partly responsible for the demise of the LIAP procedure and its replacement with the Child's Planning Meeting. Those points include the following indicative bullet-points, but they are not exhaustive:

- a **culture** of imperious autonomous school management in respect of the LIAP procedure;
- paucity of uniform adherence to procedure throughout associated school group areas (now locality management groups)
- **strained** relationships between education and social care, even prior to the re-structuring and arguable integration of these large authority departments

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<sup>478</sup> Moray Council, 'Moray Children and Young People's Services Plan, 2013 to 2016' (Foreword, Chair of the then Moray Children and Young People's Partnership, Councillor Anne Skene) 5 (Moray Council 2013) <<http://www.moray.gov.uk/downloads/file106120.pdf>> accessed 2<sup>nd</sup> December 2018.

- an **absence of** compelling and regular instruction in respect LIAP procedure principles and purpose

Full Breakdown figures for all of Moray LIAP's (raw data) had not been provided by late 2015, or early 2016 when requested by the researcher. It became clear that the authority (and individual officers on the ground) were having difficulty obtaining said data. In response to the failure of repeated efforts to obtain data sets, and not having been furnished with a reasonable answer for the delay and absence, the researcher submitted an FOIS; a last resort.<sup>479</sup> It was made obvious through subsequent negotiation that the absence of robust statistical data was a multifactorial issue. However, based on observations and statements from participant interviewees, it is argued that 'ad hoc' and unchallenged practices in many schools and locality management groups were the major reason for the failure; ie the absence of efficient and uniform recording and storage methods. The data which was eventually furnished to the researcher during the period of June/July 2016 was deemed uninformative and unreliable. This is because the quantitative statistics furnished provided a mere 'snap shot' of a few schools over periods of disjointed yearly quarters. Publishing the graphs that were provided would only have served to 'throw' up 'numbers' without any basis for real analysis and comparative. For example, sixty three (63) LIAP's in one quarterly period in one Associated School Group.

- Spreadsheets do not detail the number, nor types of meetings completed and took the form of quarterly reports/audits. They only indicate that a process was commenced at a school by a Lead Professional or Named Person.

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<sup>479</sup> See Appendices K.



- These ‘commencement’ details include the following pieces of data, but only relative to a select number of schools in an Associated School Group area:
  - Number of new LIAP processes
  - Number that have concluded
  - Breakdown of schools and numbers held per quarterly audit.
  - The Lead Professionals generic titles and generic reference to the school

What is provided is a document termed, ‘**Mini-Review**’ for the ‘East area’ of Moray. This is titled the ‘**LIAP Process**’ and covers the period from October to December 2015. This brief A4 report was made available to the researcher via the RGU institutional email on the 2<sup>nd</sup> March 2015, for information and use in this research project. There were 16 issues/concerns raised by community learning and development and social care; the departments (and staff), who oversaw LIAP’s. Of course, the procedures were driven (in the main) by educationalists, in the role of Lead Professional and conducted within primary and secondary schools; ie educational establishments (with staff coming under the ambit of the Education department).

#### **Issues/Concerns:**

- *Requests for initial LIAP without info re what’s been tried with outcome*
- *Requests for LIAP within days’ notice – not 3-4 weeks*
- *Not enough info re who’s to be invited, venue, date, time*
- *Specific info required – ‘a SW to be present’ (Social Worker)*
- *Requests not always appropriate for LIAP, i.e. issues can be dealt with via HSLW support (Home School Link Worker)*
- *Inconsistencies of minutes template*
- *Unclear who Lead Professional/Named Persons are*
- *Inconsistencies within East and West, e.g. West unable to take minutes*
- *No ‘edunet’ e-mail contacts*
- *RFA doesn’t ask questions for info required, e.g. who to be involved – does this constitute the invite to meetings/support*
- *Volume of work*

- *Parents unclear on process*
- *SOA minute form doesn't show 'outcome' of previous action*
- *People in attendance/apologies not stating role, e.g. '\* \*\*\*\*'* but role not stated
- *Lack of info from previous LIAPs – sometimes child/YP has previously been in process but this has ended; therefore, Lead Prof need to be aware that initial LIAP to be convened as initiating process again*
- *Secondary school staff not finding relevant info re children involved in LIAP at Primary School before moving to secondary – issue: Primary have done all own admin re LIAP, Secondary staff going straight to LIAP before trying other measures, e.g. professions discussion/parental carer discussions*

### **Actions:**

- *Full review of LIAP process – to involve GIRFEC Officers, [REDACTED] – re changing current system and adding early meetings (e.g. monthly update meetings)*
- *Meeting to review process with [REDACTED]*
- *E-mail to partners re what is required (who, where, etc plus timescales)*  
[REDACTED] *to attend ASGs and discuss, remind, gain views re process (dates in place)*

Without even having to refer to the empirical data garnered from observation and testimony in this study or pay attention to primary and secondary local authority literature, it could be concluded, just by reference to the above points that the procedure was not a failure and nor was it inadequate. It should have been a success. The administration and management of the LIAP at a micro and macro level was certainly causal in its demise.

That same year, the authority prepared a draft of their 'Early Years Strategy' which was focused on children 0-8 years old, and their families. This involved 'amongst other things', an Early Years Conference. During that conference attendees were asked to respond to several evaluation questions and offer suggestions in respect of the target demographic.<sup>480</sup> This was an important

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<sup>480</sup> Moray Community Planning Partnership, 'Draft, Moray Early Years Strategy 2023' 24 (Moray Council 2015) <<http://www.moray.gov.uk/minutes/data/CP20160302/Item%206-Early%20Years-Appendix%201.pdf>> accessed 20<sup>th</sup> January 2018;

This Draft varies from the final print in that much of the detailed critique from 'delegates' of the 2015 conference is omitted. That critique included statements on the need for, 'a better understanding of GIRFEC and LIAP'. The final document can be viewed at: <<http://www.moray.gov.uk/downloads/file109795.pdf>> accessed 20<sup>th</sup> January 2018.

strategy and the responses from delegates were refreshingly honest. However, the delegates/audience members were limited to professionals; eighty (80) unitary body professionals in total.<sup>481</sup> Perhaps the consultation could have been more inclusive of middle and lower rank and file staff; inclusive of 3<sup>rd</sup> party agency representatives engaged in and with 'Children's Services'. After all, the themed questions turned on a logically simple premise, as follows: *'What do we do we do well in Moray for children aged 0-8 and their families: What do you think we should be doing in Moray for children aged 0-8 and their families?'*<sup>482</sup> Importantly for this study, one of the 'condensed responses' included a critique of GIRFEC and LIAP,

*'Review processes to reduce bureaucratic systems which can prevent/slow up access to actual workers; co-located teams; joint 'virtual family centres'; better understanding of GIRFEC and LIAP; professionals, agencies, children/YP, parent carers; wellbeing groups for parents; nurture groups for parents; target dads to develop groups; etc etc.'*<sup>483</sup>

Even by 2015, a combined delegation of professionals and practitioners from education, social and health care, had commented that GIRFEC and the LIAP process were not 'understood' and that it could be 'better'. At that point and almost a decade of the LIAP and GIRFEC policy being in place, such statements

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<sup>481</sup> Moray Community Planning Partnership, 'Draft, Moray Early Years Strategy 2023' 24 (Moray Council 2015) <<http://www.moray.gov.uk/minutes/data/CP20160302/Item%206-Early%20Years-Appendix%201.pdf>> accessed 20<sup>th</sup> January 2018.

<sup>482</sup> Moray Community Planning Partnership, 'Moray Early Years Strategy, Moray Community Planning Partnership 2016-2023' 18 (Moray Council 2015) <<http://www.moray.gov.uk/downloads/file109795.pdf>> accessed January 20<sup>th</sup> 2018.

<sup>483</sup> *ibid.*

should have rung alarm bells. Interestingly, though rather late in the day, it was also stated that the whole community would have to be on board if the LIAP process and GIRFEC were to be successful.<sup>484</sup> That 'whole community' it is hoped, also included advocates and other support roles/mechanisms and not just middle and upper authority management.

#### 5.4.5 2016

##### **Farewell to LIAP procedure and welcome to the 'Child's Planning Process' (CPP)**

As of mid-2016, the authority elected to dispose of the LIAP procedure and adopt the 'CPP', apart from a couple of local secondary schools that is. The CPP is not to be confused with the Child's Plan, the tenets of which are to be found within Part 5 of the CYP (S) A 14, the fundamentals of which were detailed back in 2007 in GIRFEC guidance, *'The child's plan is the core of the approach to meeting the needs of children as set out in GIRFEC'*.<sup>485</sup> Interestingly, in 2016 **SM 4** stated, *'I don't think the title, LIAP is helpful. People see it as a meeting, but it is more than that. These processes, each one about the child, should be inclusive and restorative. They should be called 'Child Planning Meetings'*. Whilst there are generic similarities between the LIAP procedure and the Child's Planning Process, including multi-agency

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<sup>484</sup> Moray Community Planning Partnership, 'Moray Early Years Strategy, Moray Community Planning Partnership 2016-2023' 18 (Moray Council 2015)  
<<http://www.moray.gov.uk/downloads/file109795.pdf>> accessed 20<sup>th</sup> January 2018.

<sup>485</sup> Scottish Government, *Getting it right for every child: Guidance on the Child's or Young Person's Plan* (2007) 4.

working and integrated practices, the flow and administration has since materially altered.

Leading up to the transition from the LIAP procedure to the Child's Planning Meeting, there was a period of internal training delivery, premised primarily on the thematic of child protection and child safety and directed by the authorities Moray Learning & Development Group, *'The ML&DG are responsible for developing and delivering a multi-agency Child Protection (CP), GIRFEC, Early Years, and Corporate Parenting training calendar for ALL staff working with children, young people and adults across Moray.'*<sup>486</sup> The three local authorities, Moray, Aberdeen and Aberdeenshire still 'work together', albeit on a slightly different footing. The partnership still maintains a, *'.... responsibility for the Child Protection Register, Significant Case Reviews and Joint Training Provision'*<sup>487</sup>

In addition to this, there was a seemingly committed delivery of the 'Solution Oriented' approach and 'Solution Oriented Meetings'. Training sessions were led by representatives from the Educational Psychology Service of the local authority. This was the same internal agency that identified issues of concern within the

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<sup>486</sup> Moray Learning & Development Group, <[http://www.moray.gov.uk/moray\\_standard/page\\_88800.html](http://www.moray.gov.uk/moray_standard/page_88800.html)> accessed 22<sup>nd</sup> August 2018; The group come under the 'Moray's Child Protection Committee' and up until a few years ago, training was delivered centrally by what was known as the 'North East Scotland Child Protection Committee'. That umbrella agency incorporated Moray, Aberdeenshire and Aberdeen Councils. Its primary purpose was the promotion of common standards for interagency work.

<sup>487</sup> 'Child Protection in Moray' (Moray Council) <[http://www.moray.gov.uk/moray\\_standard/page\\_55497.html](http://www.moray.gov.uk/moray_standard/page_55497.html)> accessed October 2017; See also: Elinor Smith, 'Review of North East of Scotland Child Protection Committee' (Board meeting 02 06 09 Open Session Item 5.2.1, NHS Grampian 2009) <[www.nhsgrampian.org/grampianfoi/files/item5.2.1nescpcreport.doc](http://www.nhsgrampian.org/grampianfoi/files/item5.2.1nescpcreport.doc)> accessed 22<sup>nd</sup> January 2018; See also: Moray Child Protection Committee, 'North East Child Protection Committee Update' (Moray Council 2013) <<http://www.moray.gov.uk/downloads/file88228.pdf>> accessed 2<sup>nd</sup> December 2018.

wider practice of the LIAP procedure (or lack thereof) back in 2012/2013.<sup>488</sup>

Attending one of the training sessions in 2017, as an observer, the researcher deemed that the delivery on the methodology of the solution oriented method and its application in a meeting (singularly or part of a decision making process) was sound. However, the researcher was disappointed that the input during the session in respect of the 'Child's Voice', was too brief; that the topic of supporting roles, such as the advocate in decision making procedures was not discussed. That stated, two very important questions were addressed as follows:

a) *What happens when children and young people are not listened to... ..,*

- *Children are less safe*
- *Children's happiness and wellbeing are affected*
- *Children become less visible; adult needs can dominate*
- *Assumptions are made about children's lives*
- *Knowledge about children is limited to their relationships with adults*

b) *So, how do we ensure children's voices are heard?*

- *Preparation for participation.*
- *Bring prompts from preparatory discussion.*
- *Always have views represented as collected directly from child, using their words.*

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<sup>488</sup> Educational Psychology Service, 'Research paper February 2013, Local Integrated Assessment and Planning (LIAP) Processes, How schools involve children and young people in LIAP meetings' (Moray Council 2013) <[www.moray.gov.uk/downloads/file84742.pdf](http://www.moray.gov.uk/downloads/file84742.pdf)> accessed 3<sup>rd</sup> December 2018.

- *Be creative in your methods of gathering information from the child meeting their learning and developmental needs and preferences'* <sup>489</sup>

Interestingly and a few months prior to the delivery of that session, the authority had seconded a senior member of education to deliver 'Named Person' training to staff and institutions; to be carried out over a period of about a year. A preparation for full enactment of part 5 of the CYP (S) A 14, it would not have been unusual amongst all 32 Scottish local authorities, but it merits inclusion here as it directly affected, and affects the Child's Planning Process.

The LIAP procedure framework was arguably not a perfect process, but questionable practices and procedural follow through from individual practitioners, individual schools and other authority agencies was admittedly the crux of its failure. As **SF 1** stated,

*'it's quite different between the primary and the secondary, when it's older children and they're at high school and they've got a little bit more to say, and I think you're received more as a part of... you know, like a valued part of the LIAP, but sometimes the primary school ones, ....when the teachers, when like social work, they think they've got quite a good relationship with the young person anyway and could represent their views without you being there... It doesn't always feel like you're needed from my point of view.'*

***'Do you still think you're needed though?' 'Absolutely.'***

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<sup>489</sup> Educational Psychology Service, 'Solution Oriented Meetings HGIOSOM1 (How Good Is Our Solution Oriented Meeting 1) (Moray Council, Education and Social Care, January 2015) <<http://www.moray.gov.uk/downloads/file98673.pdf>> accessed 17<sup>th</sup> June 2018.

That stated, when LIAP procedures were conducted, as originally envisaged, the child or young person was generally supported to 'voice' and afforded the facility to participate, with the aid of an (independent) advocate or another supporting role. The methodology behind the solution oriented approach has merit when incorporated into a decision making process, such as the child's planning meeting, but the extent to which the child (and its family) are centre stage is debatable. It can be argued that without a methodical training programme; without a review and evaluation of the solution oriented approach as applied in meetings and decision making processes, the child or young person could become further marginalised. Further to that, the popular adoption of equality law and associated measures by unitary bodies as their pivotal human rights tenet, could set back children and young people's participative rights in non-judicial administrative processes.

However, some degree of assurance (in line with GIRFEC guidance) to the contrary may come from a dedicated and universal recording system for the Child's Plan. Such a system is still being developed by SEEMiS, an Education Management Information System.<sup>490</sup> The downside is that this is still to be rolled out fully by local authorities. This includes Moray and until the issue is fully resolved, unsatisfactory recording methods in many local authority schools will

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<sup>490</sup> SEEMiS Group is an Education Management Information System provider. As the standard MIS within Scottish Education, all local student data is processed and managed by SEEMiS software, offering interfaces with external agencies such as ScotXEd and SQA. The next Rollout (411) is according to the site, scheduled for 22nd February 2018 <<https://www.seemis.gov.scot/site3/>> accessed 23rd January 2018.



persist.<sup>491</sup> Concerns over data sharing, storage and security (already mooted) are not going to disappear anytime soon.<sup>492</sup>

#### **5.4.6 2017 - Moray Children's Services Plan 2017-2020**

The Moray children's services plan- 2017 to 2020 may make a brief reference to an 'interventionist model and assessment', but it does not detail how that assessment is to be carried out. Nor does it make mention of the various mechanisms of support and adjunct supporting roles (advocates or any other support types) which enable children and young people to come to voice in decision making processes; those same processes falling under the ambit of an 'interventionist model and assessment'.<sup>493</sup> Even though third party agencies such as Children 1<sup>st</sup> Moray and WC? S, specialising in advocacy' support 'amongst other things', are listed in the report, this is only with regards to universal services and generic service level agreement reviews and provision.<sup>494</sup> The absence of reference to independent advocacy, advocacy or other support could be construed as a disregard for the mechanisms; sounding their demise, except where statutory

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<sup>491</sup> In October 2016 an FOIS Request was made to Moray Council requesting, amongst other things, details of whether the authority utilises a 'tracking and monitoring' system, such as SEEMis. The authority replied as follows, '*Most of our secondary schools use SEEMis for producing tracking and monitoring reports, usually twice a year*', 'FOI Request - Internet Connection in Schools, Request 101001310705' (Moray Council 2016) <[http://www.moray.gov.uk/moray\\_standard/page\\_107524.html](http://www.moray.gov.uk/moray_standard/page_107524.html)> accessed 23<sup>rd</sup> January 2018.

<sup>492</sup> Moray Council, 'Minute of the Children and Young People's Partnership, Tuesday 1<sup>st</sup> March, (Draft)' <<http://www.yourmoray.org.uk/minutes/files/CYP-Minutes-20160301.pdf>> accessed 13th September 2016.

<sup>493</sup> Moray Council, 'Moray Children's Services Plan, 2017-2020' (Moray Community Planning Partnership, 57, 2017) <<http://www.moray.gov.uk/downloads/file112627.pdf>> accessed 2<sup>nd</sup> December 2018.

<sup>494</sup> *ibid.*

edict enforces their provision for specific groups, such as LAAC. Universal services and targeted interventions encompassing decision making procedures should have actively referred to such supporting mechanisms and role holders because they enable effective and real participation. The impression one gets is that service providers and the adjunct support mechanisms are increasingly being viewed as invalid and inconsequential by upper tier management in unitary authorities. That critique may read as a pessimistic analysis of one three year Plan, but there is no published evidence from the same source to allay concerns to the contrary, ie support mechanisms for 'all' children and young people.

In ascertaining the views of a child in a decision making process, a local authority has a degree of latitude as to the manner and method by which those views are obtained, expressed and heard. The authority is only directed to 'take account of the child's age and maturity'.<sup>495</sup> An absence of reference to the child's planning meeting as an 'administrative process', is also unfortunate, but it is moot as to how powerful and compelling its inclusion would be for the purposes of support provision through an advocate or other role. This is because not even the CRC definitively states what is and what is not an 'administrative procedure', albeit that is exactly what a decision making process is; the LIAP an exemplar. The CRC provides that, *'In all actions concerning children, ...administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*; that a state party is bound to commit itself to the furtherance of a child's protection and care as is necessary for his or her well-being and to that end it,

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<sup>495</sup> Children and Young Persons (Scotland) Act 2014, the 'Child's Plan', part 5, s 33 (7) and s 35 (6).

*'shall take all appropriate legislative and administrative measures.'*<sup>496</sup> However, the latter is qualified because the standards by which a state party, its institutions, services and facilities must conform is weighted in their favour. This is because of the phrase *'competent authorities'*, which are the very creations of the state party.<sup>497</sup> Even article 12 is tempered by reference to *'administrative proceedings'* which are defined by individual state parties (and devolved legislatures) as, *'procedural rules of national law'*.<sup>498</sup> The European Convention on the exercise of Children's Rights is likewise, of limited use because whilst its object may be the, *'best interests of children, to promote their rights, to grant them procedural rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them.'*<sup>499</sup> it only applies to *'judicial authorities'*. Besides which, the UK has yet to ratify that convention.

#### **5.4.7 Participants experience and views of the LIAP Procedure**

From the statements of interview participants in this study it would appear that *'ad hoc'* and often inappropriate methods were applied in individual LIAP procedures. Another issue concerned the apparent misappropriation of the LIAP process by some school managements, in place of the more appropriate

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<sup>496</sup> United Nations Convention on the Rights of the Child, Article 3 (1) and (2).

<sup>497</sup> United Nations Convention on the Rights of the Child, Article 3 (3).

<sup>498</sup> United Nations Convention on the Rights of the Child, Article 12 (1) and (2).

<sup>499</sup> Council of Europe, European Convention on the Exercise of Children's Rights, ETS No.160, adopted on 5<sup>th</sup> January 1996. Article 1 (2);  
See also Chapter II – Procedural measures to promote the exercise of children's rights;

‘Educational Meeting’ (sometimes referred to as an Educational Review). As **SF 12** stated,

*‘A case of non-attendance at school, the school would resort to a LIAP or an Education Review, know what I mean? It is being addressed, but the fact is that it's easier to get, to arrange a LIAP. It can be arranged the next day, BUT an Education Review takes longer to organise. Then again, it is possible to sort it out without using either sometimes.’*

**SF 2** stated, *‘Well I've attended quite a lot of meetings (15 +). Some are called LIAP's but they're not really. For example, there's been meetings where it was just me, the guidance and the parent. That's not a LIAP. That's an Educational Meeting. Some are quite small. They are definitely not LIAP's. There is also a pattern in the schools and which schools.’*

On the other hand, **SM 2** stated, *‘I would always say that there has been a clear way to do things. People maybe have interpreted them differently.’* In other words, there was nothing wrong with the system, or systems; and while there was an acknowledgement that a LIAP was mistakenly chosen over say, an Education Review, there was an absence of evidence to explain, or to justify such occurrences. To be clear, the Educational Meeting, or Education Review is an internal mechanism. Its purpose is to manage educational issues pertaining to and contained within a given school and is accordingly, not the concern of other universal agencies. The crux of the issue is that it took much longer to set up and so, was in that sense more bureaucratic than organising a LIAP. In fairness though, there may have been genuine incidences of ‘misunderstanding’ on the part of some school managements as to the applicable process to adopt. However, the bottom

line is that the LIAP procedure was certainly speedier to implement, as **SF 12** and **SF 2** avow. Further operational issues discussed by participants included the topic of communication and the problems therein with the LIAP. There were concerns with regards to notifications of meetings to 'all' stake holders and a lack of awareness amongst stake holders of the existence and availability of supporting mechanisms to the procedure in question. Firstly, the timeous and appropriate communication of meetings to 'all' stake holders was not uncommon; commencing with the Lead Professional (LP) in the LIAP process, children and parents were often omitted from notifications. Sometimes this was honest human error, but often a calculated judgement call made by a Lead Professional, or another professional; that the child and the family could be dispensed with, even though such actions ran counter to LIAP practice guidance. **SF 2** stated, *'Oh, on the 'Have your Say Forms' and advocating, some schools, quite a few, have their own; they deal with the LIAP's etc IN HOUSE! With the Guidance staff. That's a problem, I think.'*

When **SF 1** was asked how important it was that a child or young person participate meaningfully in decisions that are taken in their [the child's] name, they answered as follows, *'It's vitally important. It's really important. It's about them.'* **'Regardless of age?'** *'Regardless of age!'*

**SF 4** went further, *'Some schools don't want us there! I've seen them by-pass the child and I've pulled them up. I stand up for the child. Social Workers are good at Chairing the meetings, but the staff from the schools? Not so much.'*

The second issue concerned the supporting mechanisms to the LIAP procedure. These were provided by Children 1<sup>st</sup> Moray via a service level agreement with the local authority. It involved supporting children and young

people through their advocacy and rights service in LIAP's and other decision making processes in the jurisdiction, statutory and non-statutory. The provision of such services by Children 1<sup>st</sup> Moray should have been more widely known amongst unitary sector staff, not least because those services had been contracted for. As **SF 2** stated, *it's not that they don't know we exist. As a team we visited [EACH] High School last year, so it's not like they don't know about us.*' Ignorance of the service was minimal, which implied that the service was viewed with indifference, or outright dismissed. Irrespective of the reasons, each family and each child who could have benefited from 'independent' support mechanisms, should have been informed accordingly. The child and family would then have had the opportunity to enlist the services of the supporting advocate, or not as the case may have been. They would have had a choice.

#### **5.4.8 Observations and Data analysis of the LIAP procedure**

That such issues occurred at all was unsatisfactory, especially when there was an 'on the face of it' adequate administrative set-up to support the procedure and its stake holders. The construction of this administration comprised two teams which, between them, covered the jurisdiction of Moray. They were split according to Associated School Groups which effectively took in all the primary and secondary schools in Moray.<sup>500</sup> On being notified that a LIAP procedure was to commence and

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<sup>500</sup> Associated School Groups (ASGs) are now termed Locality Management Group (LMGs), of which there are eight. They replicate the older Associated School Groups and their geographical coverage. 'LMGs focus specifically on the provision of services for children and young people; this includes both universal and targeted services. LMGs are based on the principles and values of GIRFEC, in that the aim is to simplify pathways of support, reduce bureaucracy and enable effective information sharing.', Moray Council, 'Moray Children's Services Plan, 2017-2020' (Moray Community Planning Partnership, 5 2017) <<http://www.moray.gov.uk/downloads/file112627.pdf>> accessed 2<sup>nd</sup> December 2018.

a meeting would take place, the administrators would notify stake holders, ie correspond with them. With regards to initial or primary LIAP procedure meetings, the literature accompanying the correspondence would also have included Children 1<sup>st</sup> Moray literature in respect of their advocacy and rights service. That hard copy information would have been provided to the administration teams by Children 1<sup>st</sup> Moray directly. During the empirical stage of this study, the researcher observed an administrator enclosing such literature with invite letters to stakeholders, inclusive of children and young people's families. An example of positive and effective communication. It is worth reminding the reader that whilst the main administration of the procedure was conducted outwith school premises by non-education staff (during its live phase), the procedure was conducted in primary and secondary schools, within the authority area. During the empirical stage, the researcher also observed what could be called flawed practices in respect of the recording, collation and storage of LIAP procedure data. As with any procedure (statutory or non-statutory) focused on individuals, especially children and young people, the methods for gathering, disseminating and storing 'sensitive' data should be robust and comply with legal edict and practice (where applicable). In so far as the recording methods utilised in LIAP processes was concerned, these varied and were largely dependent on the individual school the Associated School Group it fell under. This included scribing onto paper or A3 parchment boards. The A3 board was popular because it was thought to enable and include 'all' present at a meeting; facilitating and encouraging contributions in 'real time'. The scribe, or 'minute taker' was often nominated from the assembled public body personnel (never the advocate or other 3<sup>rd</sup> party supporter). Given that 'all' present were stakeholders, it is arguable

as to how effective and contributory a nominated scribe was at meetings. It is after all difficult enough to participate fully in any meeting, without being saddled with the additional role of minute taker, or scribe. Even if a stakeholder is a competent scribe, they are not necessarily a competent contributor. Another method was to record directly onto notepads or laptops, but as stated, this would be undertaken by a nominated scribe from the stakeholder's present.

In so far as 'data protection' and 'confidentiality' of personal information' is concerned, the manner and practice of storage was disquieting. For example, it was not unusual for individual schools to store hard data, usually taking the form of hand-written notes (occasionally typed up) 'on site'. This was prevalent within schools whose managements, for whatever reason or reasons, decided 'not' to relay information onwards to the designated administrators for the LIAP procedure. This was a common practice according to participant service facilitators in this study, but one they did not wish to be recorded as highlighting. In two separate primary schools where the researcher made general enquiries as to the storage of LIAP data, office staff pointed to cardboard boxes in their main offices. These boxes contained paper files on individual subjects which would include sensitive and personal data on said subjects. The conclusion drawn by the researcher was that these practices were more commonplace than were isolated instances.

What should have taken place, besides regular inspections of each institution to gauge their compliance with LIAP procedure guidance (and additional training), is that 'data' should have been forwarded onto one of two dedicated LIAP process administrators (up until 2016 anyway). These administrators would then record



details of meetings onto a dedicated electronic site. However, to compound the problems encountered in storage upload and retention of data, the LIAP administrators made use of software which was specific to their department (then social care) at a time when the education department (and by dint, schools) employed a different software. The systems were incompatible and neither side had access to the other's software. Even if they had, the data sets were not comparable. That aside, the guidance was clear in that data (irrespective of format) should have been sent to the LIAP administrators for recording and managing. It was also observed that where hand noted minutes were typed up prior to being sent off to one of the two administrators, an additional delay took place, further increasing the likelihood of missing vital details and nuances from a meeting. This impacted on those minutes not being circulated in time for the next LIAP meeting. In many instances, these minutes would be presented only on the day of the meeting to the child (their family) and their advocate, or other supporter. Not for the first time have advocates and other supporters found themselves chasing down public officials to be notified of meetings being scheduled and to be furnished with relevant documentation and the reasons are not solely down to poor administration. More concerning, someone in a position of power will have decided that the child's supporter did not need to be invited, nor kept up to date.

Having observed procedures 'first hand' and witnessed the 'screeds' of seemingly incomprehensible sheets landing on the desk of an administrator, (not having attended any LIAP meetings) it was difficult to comprehend how they were expected to decipher the scribbled recordings of a minute taker, or scribe; how they supposed to translate and record onto individual computer records. The

question as to why in-house school administrators were not utilised as scribes in these procedures was asked by the researcher. The answer, *'it is not in their [administrators] grade scale.'* To put the reader in the picture, a minute taker in Moray local authority is a grade above school administrators in the same authority. That is unless the latter has undertaken additional training in minute taking. No evidence, empirical or anecdotal could be found to prove that school administrators had acted as minute takers in any LIAP procedures.

A uniform data base in respect of LIAP procedures did not exist, not for the purposes of robust examination and review and as has already been mentioned, social care and education employed two incompatible recording systems at the time. However, there are other directly attributable factors which are best summarised by reference to the explanation for missing LIAP data; as furnished by the authority:

*'Explanation for missing LIAP Data*

- 1 Several schools did their "own thing" and did not use services of admin – therefore stats were not made available*
- 2 Some schools, notably the smaller schools did not use the LIAP process*
- 3 No one was in post in west from January 2014 until early Summer 2014 – LIAPs were administered by east admin – due to work load it was agreed that data collection could be postponed temporarily until someone came into post*
- 4 Collection methods varied between east and west. The east used the data collection spreadsheet and diary to produce stats. The west surveyed schools requesting the number of LIAPS held etc.*
- 5 Returns in the west were stopped earlier as there was confusion over how the data was collected and analysed – Team Manager*
- 6 Data collection and then analysis ceased with the introduction of the Named Person Service – unsure whether schools will use the framework of*

*LIAP for children and young people outwith the remit of universal services with support'*

It would be unjust not to bring to the reader's attention the contemporaneous re-structuring of 'Education and Social services' which took place during the earlier part of this study; a re-structuring process which would have affected all departments and all staff. There is also no doubt that 'Children and Young People's Services' were particularly affected during that period.

#### **5.4.9 Public services and service level agreements with third parties**

The provision of social, educational and health services by a public body is often demanded of them by a legal duty, but it does not necessarily require the public body to perform its legal obligations directly, in-house. The practice of outsourcing generalist infrastructure work has, over the last three or four decades, encroached into social, education and health sector provision. The practice is almost mainstream now, but that does not mean that it should not go unchallenged, especially when these services involve the nurturing and protection of our most vulnerable groups. An additional incursion from the private 'for profit' sector and the emergence of the 'social enterprise' model, only amplifies and compounds the issue of keeping tabs on these burgeoning frameworks. It is especially interesting from a probable future 'public law' point that third party agencies could eventually be deemed 'public authorities'. Back in 2002 Baillie and Strachan proposed, in respect of confidentiality, data protection and general structure, that advocacy organisations could be considered public authorities

insofar as Article 8 of the ECHR is concerned.<sup>501</sup> If this supposition transpires, then third party agencies could well fall under the ambit of FOIS legislation, in addition to Data Protection legislation.<sup>502</sup> It is essential then that data be recorded in a uniform manner that protects the integrity of the information held; is in compliance with compelling legislation, legal obligations and general good practice. If any of these elements are not fulfilled then the same issues, commissions and omissions will recur and once again this will make it nigh impossible to gauge the provision, practice and effectiveness of the system which supersedes the LIAP, ie the child's planning meeting. It could also expose many third party agencies and this ties in with child protection. As with all Scottish local authorities (through its Child Protection Committee), Moray Council is obliged to report annually to the Scottish Government on the steps it has taken each year to complete its duties and obligations around 'Child Protection' in its jurisdiction, as well as reporting on its action plans for the year to follow.<sup>503</sup>

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<sup>501</sup> Deborah Baillie and Veronica M Strachan, 'The Legal Context of the Advocate Service', in Barry Gray and Robin Jackson (eds), *Advocacy & Learning Disability* (Jessica Kingsley 2002) 99.

<sup>502</sup> Freedom of Information (Scotland) Act 2002; The European Union 'General Data Protection Regulations' were implemented by the UK via the Data Protection Act 2018; thus, replacing the Data Protection Act 1998.

<sup>503</sup> Scottish Government, *The National Guidance for Child Protection in Scotland 2014* (2014) <<http://scotgov.publishingthefuture.info/publication/the-national-guidance-for-child-protection-in-scotland-2014>> accessed 24<sup>th</sup> January 2018; This e-book was an up-date of the following document: Scottish Government, *National Guidance for Child Protection in Scotland 2010* (2010) <<https://www2.gov.scot/Publications/2010/12/09134441/0>> accessed 1<sup>st</sup> December 2018; Both documents provide, amongst other things, the duties incumbent upon Child Protection Committee's. This includes financial accounting and liaison with partner agencies.

## 5.5 Rights education in schools – meeting promotion and provision needs?

### *Rights Respecting Schools Award (hereinafter referred to as RRSA)*

The following quote is interesting because it applies to all ‘Educational’ establishments, which includes nurseries, primary and secondary schools and tertiary institutions.

*‘The Committee recommends that the State party further strengthen its efforts, to ensure that all of the provisions of the Convention are widely known and understood by adults and children alike, inter alia by including the Convention in the statutory national curriculum, and that it ensure that its principles and values are integrated into the structures and practice of all schools.’<sup>504</sup>*

The recommendation was made to the UK in 2008, but it still has relevance for Scotland and Moray. In 2011 a report was published on the issue and was co-authored by Ewart and Tisdall who were commissioned by the Centre for Research on Families and Relationships.<sup>505</sup> This report highlighted the need for a wider dissemination of provision knowledge, but also for an implementation of children’s ‘information rights’ across the four nations comprising the UK.<sup>506</sup> Whilst

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<sup>504</sup> Concluding Observations of the UN Committee on the Rights of the Child, Para 21, CRC/C/GBR/CO/4, 20 October 2008.

<sup>505</sup> Carole Ewart and Kay Tisdall, ‘Embedding information rights in the primary and secondary education systems of the United Kingdom’, (Information Commissioners Office 2011) <<https://ico.org.uk/media/about-the-ico/documents/1042370/embedding-information-rights-report.pdf>> accessed 22<sup>nd</sup> January 2018.

<sup>506</sup> The CRC contains several articles in respect of ‘information’ rights. These are part of the 7 articles pertaining to ‘participatory rights’: Articles 4, 12, 13, 14, 15, 16, 17.

the report is confined to the data which may be held on individual children and young people, it also addresses the extent to which their rights are, or may be realised within three specific areas. Those areas being 'freedom of information requests'; 'right to access personal files' and the 'right to privacy.'<sup>507</sup> The commissioning of the document is demonstrative of the level of interest and concern that prevails with regards information rights. The report also took place at a time when there was an absence of empirical studies relative to the topic and importantly, it refers to Moray local authority.

#### **5.5.1 Moray's education authority<sup>508</sup>**

That reference is given by way of a critique on Information Technology and Information Rights,

*'Scottish education is experiencing change nationally and locally. Local and school-specific practices present difficulties for crafting a national model. For example, Moray Council has closed the computing departments in schools and moved the subject into the more generic business department. The information rights agenda may have a different focus. In Stirling Council, the IT department will teach technical computing skills but not information rights. On the other hand, the Curriculum for Excellence has only recently been introduced. It gives increased flexibility to schools and teachers. Resources thus may be welcomed, should they fit within the new*

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<sup>507</sup> Ewart (n 505).

<sup>508</sup> Ewart (n 505).

*requirements. Qualifications are currently being developed, which could incorporate attention to information rights.*<sup>509</sup>

The point in question, was not that the education department, nor indeed Moray Council acted in a pre-meditated manner to deny children and young people real access to Information Technology and to Information Rights. It was their inability to see beyond a myopic periphery and seek a broader solution which would have benefited the most vulnerable and less vocal members of Moray society. Given the timeline, there are similarities to be drawn between Ewart and Tisdall's report and the empirical data obtained for this study, with an emphasis on the LIAP process. However, the authors looked positively towards the then newly introduced 'Curriculum for Excellence' and published a follow-up report the following year on the same topic.<sup>510</sup>

### **5.5.2 Moray Council 'service level agreement' and RRSA**

In 2015 an accord was reached between Moray Council and Unicef UK's RRSA. A service level agreement was put in place so that the primary and secondary schools within its jurisdiction would benefit from RRSA programmes, irrespective of an individual institution's arrangement with the Unicef body. It included existent recipients of awards; members aspiring award status; current 'expressions of interest' and those coming fresh to the process. Far from being the

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<sup>509</sup> Ewart (n 505) 12-13.

<sup>510</sup> Carole Ewart and Kay Tisdall, Phase 2 Report. 'Embedding Information rights in the primary and secondary education systems of the United Kingdom' (Information Commissioners Office 2012) <<https://ico.org.uk/media/about-the-ico/documents/1042368/embedding-information-rights-phase-2-report.pdf>> accessed 22<sup>nd</sup> January 2018.

only public authority (education authority) to take advantage of this RRSA offer, the resulting service level agreement should, in theory, enable all of Moray's 53 schools to take advantage of the Unicef programme, if individual 'Heads' choose to take up the offer. This is because they are not compelled by the education authority to do so.<sup>511</sup> It equates to 11, 941 children and young people (in addition to 'all' staff) having equal and fair opportunity to take advantage of a very well received and internationally valued programme.<sup>512</sup>

Of course, it must be emphasised that this Moray wide programme is part of a larger service level agreement between RRSA Unicef UK and Scottish local authorities. The Scottish Government has enabled this roll-out through the contribution of monies; effectively subsidising the core costs. For example, since 2014, the Scottish Government has provided year on year increased grants to Unicef UK. The figure for that year being £114,000.<sup>513</sup> This in turn has reduced the amount to be met by individual local authorities, including Moray. Previous arrangements were such that each individual school, and Heads of staff were fiscally responsible for choosing whether to take part in the RRSA programme.

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<sup>511</sup> Moray Council, 'Find a School' <[http://www.moray.gov.uk/moray\\_standard/page\\_55590.html](http://www.moray.gov.uk/moray_standard/page_55590.html)> accessed 23<sup>rd</sup> January 2018.

<sup>512</sup> Moray Council, School Roll, (Annual School Census, Pupil Roll Statistics, -As at 10<sup>th</sup> December 2017) <[http://www.moray.gov.uk/moray\\_standard/page\\_58530.html](http://www.moray.gov.uk/moray_standard/page_58530.html)> accessed 2<sup>nd</sup> December 2018.

<sup>513</sup> Unicef UK, 'United Kingdom Committee for Unicef Trustees Reported and Consolidated Financial statements for the year ended 31 December 2014' (50 2015) <<https://www.unicef.org.uk/publications/2014-annual-report/>> accessed 1<sup>st</sup> December 2018; In 2015 and 2016 the figures were £123,000 and £190,000, respectively. See: Unicef UK, 'United Kingdom Committee for Unicef Trustee's Reported and Consolidated Financial statements for the year ended 31 December 2016' (63 2017) <<https://downloads.unicef.org.uk/wp-content/uploads/2017/07/unicef-uk-trustees-annual-report-2016.pdf>> accessed 19<sup>th</sup> January; These monies have for the most part been utilised for the RRSA, in addition to supporting smaller initiatives. See: Unicef UK, 'Child's Rights Launchpad' <<https://launchpad.unicef.org.uk/>> accessed 19<sup>th</sup> January 2018.



Many declined, either through budget concerns, a lack of value in the programme, or a combination of the two. The prior lack of up-take was particularly prevalent in schools falling within areas of high economic and social deprivation, so the current rollout should result in a level playing field for all fifty-three schools, their pupils and the staff. Such parity and equity between establishments, children and adults is positive.

Figures from the Unicef RRSA official site provide details on which schools have been accredited Silver and Gold respectively, as of January 2018. Moray has five schools with a Silver award. This comprises four primary's and one secondary. None has achieved Gold Level, whereas both the neighbouring authorities of Aberdeenshire and Highland have more schools, at both levels. However, this is subjective because only 21 out of 32 Scottish local authority educational institutions have reached either Silver or Gold award level.<sup>514</sup>

### **5.5.3 Rights and Respect – the nuances**

As much as RRSA is premised upon the 'Rights' of the child, it precisely positions the concept and practice of respect with that of rights. Following the syllabi of the RRSA, children and young people are schooled in rights and respect accordingly. It could be argued that young global citizens in the making are being drilled; that rights become formulaic and conditional, ie 'rights = respect = rights'. Will children and young people in turn deem themselves undeserving of the enjoyment of one

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<sup>514</sup> Unicef UK, 'Awarded Schools across the UK' <<https://www.unicef.org.uk/rights-respecting-schools/the-rrsa/awarded-schools/>> accessed 1<sup>st</sup> December 2018.

without a reciprocation of the other and mirror this in their expectations of others? The foregoing is speculative and provoking, but deliberately so. It highlights the possibility that there is a fundamental misunderstanding of, or more concerningly, a misrepresentation of the programme's philosophy. The point is accentuated here because of what was observed within some school cultures and what was divulged by interview participants in this study. On several occasions, both in class room environments and whole school assemblies, it was not uncommon to hear and to observe children being told that they must 'respect' their teachers. The researcher has no issue with this practice, but the instruction to 'respect' was immediately followed with a qualification; to receive rights the child must respect the teacher. One young interviewee was quite candid during the study when she brought up the subject of teachers always stressing respect over rights. Additional commentary from participants on rights-respect.

**CRO 1** *'I think there is a danger that people say, 'oh if you're not responsible you can't have rights' and that's not the way round to do it.'*

**CYP 3** *Like, I've got a right to say something and the rights to do what I want to do and the rights to live and have a happy life.*

**CYP 1** *Emm, I think that to have rights you have, like, the right to be heard, the right to, like, right to be yourself, you have the right to, like, make up your own mind and, like, you have the right to do, like, what you want to do, that's what I think*

**CYP 2** *That I can complain if something is wrong. I would feel confident doing that. That I have rights and responsibilities. I have the right to food, shelter and things like that.*

**CYP 5** *'...they've told me before at meetings; you've got rights, so don't be afraid to use them and all that, things like that.'*

**CYP 6** *'Well, I'm not sure, but it's like, I'd probably say I have a right to speak... You have a right to say what's on your mind and how you feel, cause feelings make you human really.'*

Whilst the young people interviewed for this study were [unsurprisingly] more knowledgeable and assertive than their non-experienced peers, who may not have been involved in statutory decision making procedures, there is still a risk that individual adults could distort RRSA teaching guidance; that the formulaic and conditional 'rights = respect = rights' interpretation could be pushed by 'pockets' of adult resistance. If that occurs and does so with regularity, then another generation of children and young people will accept that what they have been taught is indeed the status quo; an institutional normative in the wider framework. Correlatively, their participatory rights in decision making processes will become dependent on a contortion of the idea and practice of respect. It would be preferable if such negative experiences were an exception and **not** the 'norm'; that we could have faith in the delivery of programmes like the RRSA. The desired proviso of course, is that such programmes are routinely reviewed for their effectiveness in practice, but that review should be conducted by an independent source.<sup>515</sup>

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<sup>515</sup> The following is premised on observation and hypothesis. Secondary research revealed that the individual seconded to deliver the 'Named Person' training to Moray schools, was a senior Teacher with said local authority. The individual had an additional position with Unicef UK's RRSA programme. The remit of the RRSA position extended to the delivery and review of the RRSA programme within Moray. It is not uncommon for RRSA UK staff to hold, or have held local authority positions, mainly in education. However, the conflation of the two posts could arguably render the agencies (and the individuals employed therein) to criticism in respect of 'conflicts of interest'.

## 5.6 Rights Education and the effect of subsidiarity and precedence

In its efforts to incorporate CRC philosophy via its showcase GIRFEC policy and in its arguable attempts to underpin CRC principles and guidelines in the CYP (S) A 14, the Scottish government could be accused of acting 'outwith' its powers with a back-door incorporation of the CRC.<sup>516</sup> However, even if there was an attempt at 'full transplant' of the CRC into Scots law by a devolved Scottish government, the case for acting outwith its powers is a tenuous one. This is because the ECHR and the European Convention on the exercise Children's Rights (particularly the latter), make it clear that as regards the CRC, state parties should, '*... undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the said Convention.*'<sup>517</sup> This being the case, the CRC's implementation into our domestic laws does not appear to circumvent nor take precedence over European law or treaty; to the contrary, its implementation is encouraged and directed. It could be conjectured that the Unicef RRSA programme is indeed an exemplar of rights education practice in Scottish schools; Moray being the authority of focus in this study. But, perhaps a degree of caution is required, because the delivery of rights education, within the parameters of the CRC is too narrow. Whilst it is laudable, there is a case for the deliverance of children's rights to be conducted under the wider ambit of 'human rights', as laid down in the ECHR, the European Social Charter and its associated Directives and Regulations. Even though the ECHR does not make direct reference to children and young

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<sup>516</sup> Scotland Act 1998, s 57 (2), '*A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...*'

<sup>517</sup> ETS No 160, European Convention on the Exercise of Children's Rights, Strasbourg 25 1 1996, entering into force in July 2000, Preamble.

people, it does refer to 'everyone', and it has been successfully invoked to remedy breaches of the convention in many areas affecting children and young people, directly and indirectly. These areas often include education, disability, family life and religious life. Everyone, in the common parlance of the ECHR means just that, including children and young people. However, if we look to the Charter of Fundamental Rights of the European Union, this goes some way to explaining the reasoning behind the CRC's 'apparent' infiltration of Council of Europe charters and treaties. The Charter of Fundamental Rights of the European Union is split into six specific areas; the succinct following article (24), unsurprisingly comes under...'Title III- Equality' as follows,

*'Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his and her parents, unless that is contrary to his or her interests.'*<sup>518</sup>

Whilst the European Commission has emphasised the importance of the child's views, as provided for in Article 12 of the CRC (and GC No 12 (2009)), the Council of Europe goes further, with the incorporation of the CRC (amongst other European and international documents) in its 2012 'Recommendation on the

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<sup>518</sup> The Charter of Fundamental Rights of the European Union, 2012/C 326/02, Title III Equality, Article 24.

participation of children and young people under the age of 18'.<sup>519</sup> This should provide an additional layer of protection for the child, and the status of childhood. The edicts and pronouncements from the European Union and the Council of Europe sympathise with the family unit and family life (as well as the duties of a parent, including a corporate parent), but they also acknowledge the right of the child to be heard in decision making processes. However, with the prospect of a post Brexit Britain, much of this discussion will become null, void and arguably, academic. That stated and to re-emphasise a previous point, a UK government would have to launch a separate divorce process to break from the Council of Europe and this would no doubt end up just as drawn out and divisive as the Brexit debacle with the European Union.

### **5.6.1 Children's rights and the effect of the Equality Act 2010<sup>520</sup>**

It may seem a little odd to launch into a discussion on the Equality Act 2010 but given that the neighbouring jurisdiction of Highland have adopted EA policy and implemented its tenets throughout its departments (including its schools), the topic demands cursory attention. In so far as Moray is concerned, the researcher makes reference is made to two memoranda from the Child Protection Committees 2014 annual report; containing closing sections titled, 'Summary of Implications'

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<sup>519</sup> Council of Europe, 'Participation of children and young people under the age of 18' (2012) <<https://rm.coe.int/168046c478>> accessed 20<sup>th</sup> January 2018; This document refers to Recommendation CM/Rec (2012) 2 of the Committee of Ministers to member States on the participation of children and young people under the age of 18. It was adopted by the Committee of Ministers on 28 March 2012, at the 1138th meeting of the Ministers' Deputies.

<sup>520</sup> Equality Act 2010 c15.

making reference to fiscal, policy and legal considerations.<sup>521</sup> These are drafted in predictable local government parlance, but there is an added emphasis on 'Equalities' and the implications of consolidating EA 10 with local policy and practice; something which all unitary authorities will have to start paying attention to.<sup>522</sup>

The first Memorandum concerned a campaign for 'Young Carers' at a local and national level and was reasonably informative in respect of s 149 of the EA 10; the campaign designed to, *'Foster good relations between groups who share a characteristic protected under the Equality Act 2010 and those who have not.'*<sup>523</sup> The second memorandum was more general in that it stated, *'In relation to specific elements of the Improvement Plan, managers consider equalities issues for staff and service users when addressing current service delivery arrangements and future requirements.'*<sup>524</sup> The positioning of equalities alongside policy and fiscal in local government documentation may be more standardised nowadays, but if the EA 10

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<sup>521</sup> Moray Council, 'Moray Child Protection Annual Report 2013' (Item: 11, Children and Young People's Services Committee on 25 June 2014, 2014)  
<<http://www.moray.gov.uk/minutes/data/CP20140625/Item%2011-Moray%20Child%20Protection%20Committee%20Annual%20Report%202013.pdf>> accessed 2<sup>nd</sup> December 2018.

<sup>522</sup> Equality Act 2010; See: c15 Schedule 19 — 'Public authorities Part 3 — Public authorities: relevant Scottish authorities': The EA 10 is the synthesising statute for the UK's collective, and repealed or superseded discrimination legislation, which is enforced throughout England, Wales and Scotland (except for Northern Ireland) and includes the Race Relations Act 1976 (repealed) and the Sex Discrimination Act 1975 (repealed).

<sup>523</sup> Moray Council, 'Care.Fair.Share SCOTTISH YOUTH PARLIAMENT CAMPAIGN' (Item: 22, Children and Young People's Services Committee 25<sup>th</sup> June 2014, 2014)  
<<http://www.moray.gov.uk/minutes/data/CP20140625/Item%2022-Care%20Fair%20Share%20SYP%20Campaign.pdf>> accessed 2<sup>nd</sup> December 2018.

<sup>524</sup> Moray Council, 'Moray Child Protection Annual Report 2013' (Item: 11, Children and Young People's Services Committee on 25 June 2014, 3, 2014)  
<<http://www.moray.gov.uk/minutes/data/CP20140625/Item%2011-Moray%20Child%20Protection%20Committee%20Annual%20Report%202013.pdf>> accessed 2<sup>nd</sup> December 2018.

is to become the overarching legislation by which ‘all’ service provision is measured throughout an authority (including children and young people’s services), then a wider and considered discussion on its applicability and efficacy needs to take place within all sectors of society.

This is necessary as under the EA 10, Moray council has a ‘public sector equality duty’, and in the exercise of its functions this means that it must have ‘due regard’ to the following areas:

*‘(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

*(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it’<sup>525</sup>*

The seven relevant protected characteristics prominent throughout the act illustrate the synthesis of earlier discrimination law, incorporating and up-dating: *‘age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.’<sup>526</sup>* Whether the EA 10 will or will not be used successfully in the furtherance of children and young people’s rights is a moot point. It requires acceptance of children and young people as a distinct group with shared characteristics, in need of protective and welfare measures by the state. Success will be qualified, especially if we accept that children and young people

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<sup>525</sup> Equality Act 2010 c15 Part 11 — Advancement of equality chapter 1 — Public sector equality duty, s 149 (1) (a) (b) (c).

<sup>526</sup> Equality Act 2010 c15 Part 11 — Advancement of equality Chapter 1 — Public sector equality duty, s 149 (7).



are also holders of rights for the purposes of participating in decision making processes affecting them, and the EA 10 does not offer clear assurances in that respect. However, within the 'collective' group of children and young people, there are sub-groups that could benefit from the EA 10; one of those groups being 'young carers'. Moray's local authority has acknowledged this vulnerable and often hidden sub-group via the procurement of 3<sup>rd</sup> party agency support. That supporting service is provided (in the last few years) by Quarriers (Young Carers) Support Service. The role of this support service is interesting as despite the mechanism of advocacy not included in the agency's literature, it is stated that,

*'We can also attend, where appropriate, meetings and appointments with you.*

*More specifically, this might be:*

- *Provision of "condition-specific", age appropriate information and advice.*
- *Age appropriate support or training to cope with household responsibilities, where needed.*
- *Introduction/accompaniment, where needed, to attend your mainstream young people's activities or agencies.*
- *Facilitating or attending meetings with or on your behalf with schools, colleges, employers or any other organisations that need to take into consideration your young person's Carer status and its impact on your well-being.*

*We also have a Young Carers Advisory Group which all Young Carers are welcome to attend. This group is instrumental in having your voice heard and in shaping the future of services in the Moray area and Nationally.*<sup>527</sup>

Figures from Moray Council's 2017-2020 service plan provide that as of 31<sup>st</sup> December 2016, there were a total of 162 young carers receiving support from Quarriers. This comprised 56 males and 106 females; not an insignificant number.<sup>528</sup> The 'young carer supporter' is an interesting role, in that it appears to cover many facets, arguably crossing over into 'quasi' advocacy support in administrative procedures. This could make the mechanism and the agency worthy of future study.

Significantly, the EA 10 was not drafted with the individual child and the young person in mind and not as collective and distinctive group. Despite 'age' being one of the seven protected characteristics, which can give rise to grievance procedures on allegations of discrimination, it is insufficient as a standalone characteristic. Arguably, the majority of grievances raised by children, young people and their families will be taken against educational institutions (by dint, education authorities) on an education matter, but education is an exempted area under the EA 10.<sup>529</sup> In practice then, and insofar as the child, young person and their family is concerned, alleged breaches of discrimination have been limited to

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<sup>527</sup> Quarriers, 'Young Carers Support Service Moray' <<https://quarriers.org.uk/services/young-carers-support-service-moray/>> accessed 15th November 2018.

<sup>528</sup> Moray Council, 'Moray Children's Services Plan, 2017-2020' (Moray Community Planning Partnership, 30, 2017) <<http://www.moray.gov.uk/downloads/file112627.pdf>> accessed 13<sup>th</sup> December 2017.

<sup>529</sup> See: Equality Act 2010 c15 Part 6-Education Chapter 1-Schools, s 84 (a) the second exempted characteristic being 'marriage and civil partnership'.

the following areas; enjoyment of education and the ancillary support services to make that enjoyment a reality.<sup>530</sup> There is still an unacceptable level of knowledge in many authority areas as regards satisfactory understanding of the EA 10 as it should be applied in our schools; so much so that the Equality and Human Rights Commission produced a dedicated manual on the EA 10 for schools in Scotland, which was last up-dated in 2014.<sup>531</sup> Similarly, the office of CYPCS (when it was known as SCCYP) and the body ‘Enquire’, formed part of a ‘working group on the administration of medicines in schools’.<sup>532</sup> In that same year, 2014, the CYPCS office conducted its own research on the matter and concluded that, ‘...almost a quarter of schools who took part were unaware of guidance produced in 2001’.<sup>533</sup>

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<sup>530</sup> See: *Wyper v NLC* [2013] ASNTS –DDC- 1 July 2013, Wyper is an interesting case that exemplifies the application of the EA 10 protections. It concerns a 7 year old diabetic child requiring daily assistance in the management of his condition and the failure of the local authority to make reasonable adjustments in the provision of auxiliary aids and services in respect of that management. These were omissions that the authority could not justify in light of previous legislation, ie the Disability Discrimination Act 1995 and the Equality Act 2010;

See also: Equality and Human Rights Commission, *Julie Wyper v North Lanarkshire Council* (Legal Work in Scotland, Scottish Legal Articles, 2016) <<https://www.equalityhumanrights.com/en/legal-work-scotland/>> accessed 10<sup>th</sup> January 2018.

<sup>531</sup> Equality and Human Rights Commission, *Technical Guidance for Schools in Scotland* (2014) <<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-scotland>> accessed 22nd January 2018.

<sup>532</sup> CYPCS, ‘Scottish Government Update of the 2001 Guidance on the Administration of Medicines in Schools’ (Scotland’s Commissioner for Children and Young People’s Administration of Medicines Working Group February, 2014) <<https://www.cypcs.org.uk/ufiles/Administration-of-Medicines-SCCYP-Working-Group-27-02-14.pdf>> accessed 14<sup>th</sup> November 2017.

<sup>533</sup> ‘*The Administration of Medicines in Schools*’, Scottish executive guidance 2001’ was replaced late 2017 following a public consultation titled ‘Guidance on Healthcare Needs in Schools’.

The new guidance published in December 2017 as follows;

Scottish Government, ‘Supporting children and young people with healthcare needs in schools, Guidance for NHS boards, education authorities and schools’ (2017)

<<https://www2.gov.scot/Resource/0052/00529511.pdf>> accessed 1<sup>st</sup> December 2018;

See: PB (JW) (S) Act 14, whereby a number of the Health and Social Care Partnerships across Scotland have integrated children’s health and/or social care services, in respect of the ‘Human Medicines (Amendment) (No.2) Regulations 2014.

**and almost 8% were unaware of local authority guidance relating to the administration of medicines in schools.**<sup>534</sup>

All public authorities in Scotland should now have Equality Officers in their employ and this should enable them to test their current (and draft) policies and practices; Moray having had an equalities officer in place since before the EA 10. These authorities can also utilise existing Equality Law Impact Assessments (in tandem with Children's Rights and Wellbeing Impact Assessments), should they choose to do so.

### **5.6.2 A comparative authority**

The document titled '*My Child's Plan*', by Highland Children's Forum for Highland Council in 2014 is a qualitative piece of work, premised as it is on interviews from children, parents and staff; ie service users and service facilitators, much in the manner of the field work undertaken in this study.<sup>535</sup> The commentary highlighted in the sections on, 'opinion and recommendation' is interesting because the child participants stated that they wanted, amongst other things, equal treatment with others. That included the desire to be heard by someone who was 'fit' to listen to

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<sup>534</sup> Sarah Doyle and Kelly Stone, "No barriers to medication at school", The Administration of Medicines and Health Care Procedures in Schools: The views of parents and carers' (SCCYP 2013) <<https://www.cypcs.org.uk/ufiles/No-Barriers-to-Medication-at-School.pdf>> accessed 10<sup>th</sup> January 2018.

<sup>535</sup> Tracy Anderson, 'A Highland Children's Forum consultation on behalf of the Highland Council' (Highland Council 2014) <[http://www.highland.gov.uk/download/meetings/id/68143/item\\_10\\_booklet\\_a](http://www.highland.gov.uk/download/meetings/id/68143/item_10_booklet_a)> accessed 21<sup>st</sup> January 2018; Highland Children's Forum, 'Welcome, What we do' <<http://www.highlandchildrensforum.org/what-we-do>> accessed 4th January 2018.

them and not always say, a teacher; child participants asking for comparable representation as that enjoyed by adults. However, the EA 10 does not compel local authorities to provide such equitable consideration. Another point is that whilst Highland Children's Forum provide several services which includes advocacy, their primary focus is the family unit. This ethos and practice may not reach the tenets of 'child centric' policy, but the fact that the child is included as a participant is a positive. To what degree the child's inclusion is afforded cannot be ascertained within the remit of this study, but the type of advocacy Highland employ, ie 'collective advocacy' is meritable. This is because it involves the advocate obtaining the views of 'all' stakeholders including the children and young people and presenting those views on the behalf of those who are not physically present or represented in a decision making process.<sup>536</sup> The Highland Children's Forum also makes it clear that one of its purposes is the development of the child's voice (via its collective advocacy), as well as its political advocacy; influencing policy, locally and nationally. The body is not only engaged in political advocacy, it is also consulted by statutory bodies which seek to ascertain Highland children's special needs, amongst other things. In so far as 1-1 (individual advocacy) for children and young people is concerned Highland Children's Forum will signpost forward. However, that signposting does not cover general advocacy provision, not for 'all' and not in equal measure. For example, 'Advocacy Highland' will only support people 'over the age of 16 years', which excludes those 16 and under.<sup>537</sup>

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<sup>536</sup> The Project manager of Highland Children's Forum also happened to be the Chief Executive Officer of 'Advocacy Highland'. Correct as of December 2018.

<sup>537</sup> Advocacy Highland, 'Welcome to Advocacy Highland' < <http://www.advocacy-highland.org.uk/> > accessed January 2018.

WC? S, through a service level agreement with Highland Council takes up the slack as regards LAAC, up to and including 26 years of age (26 is qualified). This is in cognisance of the recent change in law as provided by the CYP (S) A 14.

## 5.7 Conclusions

Inserting the words 'Advocacy- Children- Young People' into the Scottish Government search engine and the reader will more than likely be taken to a site detailing, in brief, the concept of advocacy as a support mechanism,

*'Advocacy is about supporting a child to express their own needs and views and to make informed decisions on matters which influence their lives. Advocates do not make choices for children. Instead, they support children and young people to make their own choices. Advocacy will most often be required where a child is engaging with a service (e.g. health, education, police, social work etc.)'*<sup>538</sup>

The explanation provided, and the interpretation of the advocate is so wide that 'anyone, including a parent' could be capable of taking up the role and advocating for a child or young person, *'Anyone can act as an advocate for a child or young person. However, they should only take on the role if they properly understand what advocacy does and does not involve.'*<sup>539</sup> When we consider the relationships, the Scottish Government has fostered with external bodies and agencies such as

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<sup>538</sup> Scottish Government, 'Children's Advocacy, What is Advocacy' (2017) <<http://www.gov.scot/Topics/People/Young-People/families/advocacy>> accessed 1<sup>st</sup> December 2018.

<sup>539</sup> Scottish Government, 'Introduction to children's advocacy, 'Who can advocate for a child or young person?'' <<https://www2.gov.scot/Topics/People/Young-People/families/advocacy/introduction>> accessed 1<sup>st</sup> December 2018.

SIAA, Together and Govan Law Centre, it is a non-committal and indifferent narrative. That stated, we also have a convoluted status quo in respect of existing statutory advocacy practice, as illustrated by the 'Let's Talk' service.<sup>540</sup> A couple of examples of early stage effort, and support for the inclusion and retention of advocacy in the now Act, CYP (S) A 14, is given by reference to submissions made by members of the 'working group' to the Scottish government; ie the 'Education and Culture Committee'. For example, SIAA and YOUR VOICE have raised concerns at the decision to 'drop' advocacy provision from the then CYP (S) Bill (at Stage 1), in respect of all decision making processes involving a child or young person, *'We believe that the inclusion of a right of access to independent advocacy (as defined within the Mental Health (Care & Treatment) (Scotland) Act 2003) will be vital to ensure the underpinning principles of GIRFEC, the UNCRC and the Bill are achieved.'*<sup>541</sup> Only time will tell if the absence of statutory inclusion transpires to be a false economy as regards children's participation in 'all' decision making processes in which they are involved.

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<sup>540</sup> The researcher refers to the Scottish Government collaboration with 'Kindred Advocacy' and its funded service titled 'Let's Talk' advocacy. The 'Let's Talk' service specific to Additional Support Needs and the Additional Support Needs Tribunal Scotland, as prescribed for in the Education (Additional support for learning) (Scotland) Act 2004, as amended. Prior to the current collaboration with 'Kindred Advocacy' and up until March 2014, an identical service was operated by the Scottish Children's Law Centre and Barnardos, which was known as 'Hear 4 U'. Interestingly, 'Kindred Advocacy' originated from advocacy initiatives with Barnardos Scotland.

<sup>541</sup> Scottish Government, 'Education and Culture Committee Children and Young People (Scotland) Bill' (Submission by SIAA, 101, [8-9] 19 July 2013) <[http://www.parliament.scot/S4\\_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/ScottishIndependentAdvocacyAlliance.pdf](http://www.parliament.scot/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/ScottishIndependentAdvocacyAlliance.pdf)> accessed 25<sup>th</sup> January 2018; Scottish Government, 'Education and Culture Committee Children and Young People (Scotland) Bill' (Submission by Your Voice, 120, [4] 26 July 2013) <[http://www.parliament.scot/S4\\_EducationandCultureCommittee/Children%20and%20Young%20People%20\(Scotland\)%20Bill/YourVoice.pdf](http://www.parliament.scot/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/YourVoice.pdf)> accessed 25<sup>th</sup> January 2018.

When the empirical stage of this study was underway it became apparent that individual service facilitators often lacked confidence and/or understanding of the idea of the child as a rights holder; extending to practice on the ground.<sup>542</sup> A significant number of service facilitators (and some managers) struggled with the pragmatic of the concept of child as holder of rights, as asserted by Melton.<sup>543</sup> In so far as 'priori natural rights for 'all persons', inclusive of children and young people was concerned, there was a distinct dearth of committed adherents. That stated, counter proponents following empiricist legal positivism were few and far between. It is a concern that many individuals who have and will appear as stakeholders in a child or young person's decision making procedure/meetings are uncommitted to the ethos of that process and perhaps, dismissive. As **SM 5** stated, *'I think we can be seen as a thorn in the side of institutions, especially Professionals. Commissioners (Upper Management) can see the value of our services, but not the workers.'*

Many participants were candid and declaratory, but others were more cautious. When engaging with human beings involved in empirical research, it is worth paying attention to a respondent's method of response, which is often immediate or delayed and cautious. These responses are arguably natural but should be considered and factored into the analysis process. They can aide the researcher and for the purposes of this study, that fed into the analysis on an individual respondents' wider ability to engage meaningfully with children and

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<sup>542</sup> Nussbaum (n 114).

<sup>543</sup> Melton (n 65).



young people in decision making procedures in which they have or will become involved in.

Supporting roles for children and young people are generally to be found in unitary authority departments. These will for the most part comprise education, social care and health departments; welfarist premised and directed. Welfarism is itself arguably grounded in the idea of protectionism and rights thereof; fundamentally embedded into our normative frameworks. However, the idea of political rights and agency for the child is gaining in momentum, despite the prevalence of welfarist models and practices; whilst some children and young people are considered capable and active agents in their decision making processes, they would still benefit greatly from the aid of an apt supporter.

Returning to the professed grown up dismissal of the idea of children's rights as centric, it is not an uncommon stance, nor occurrence. Many adults struggle with the idea of the child as an autonomous and entitled agent. This is especially prevalent in the domestic setting, where the authority of the parent over the child is under constant flux and test. It exists in traditional institutional settings, such as schools, where the authority is wielded by adults who are granted temporary care and custody over our children. Judging when and how the degree of autonomous agency a child is afforded is incredibly difficult for any parent and is no doubt informed by internal and external influences and drivers. Irrespective of the family model, it is vital that the child is heard and thus, respected. It is equally important for institutions and their agents on the ground to acknowledge this young groups right to such respect. This does not mean that a parent or an employee in an institution must agree with every child centric concept or practice;

that they must liberally dispense agency to all young and vulnerable individuals, but it does require them to have regard to the child as a human being as being entitled to respect. An example of disrespect by authority figures is given by way of the following example from **SF 2**, which concerns a young person, their family and who were in the throes of a child protective procedure under statutory measures, *'These are tick box exercises. We are not involved from the outset of the case. We are only brought in by social work for the last one, when taking them (the Young Person) off the register.'*

Such recited examples from participants were not uncommon and this is unfortunate, because such failings could be interpreted as measured contempt from authority agents towards children, their family and their supporters. This tends to support the view that children's agency and autonomy in decision making procedures are concepts that are dismissed by many and embraced by a few; a replication in the micro of macro societal viewpoints. Even amongst managers and facilitators employed directly in children and young people's services, contrary views are held in respect of those concepts and their application in children's participative rights in those processes. Oswell was less forgiving of the moot standard position, as was encountered by this researcher when he derisorily states that children's agency and childhood has been reduced to, *'...a reflexive subjectivity of the unitary child.....a normative model of social science which endlessly returns to the dichotomy or duality of structure and agency.'*<sup>544</sup> On a more optimistic note, that 'dichotomy and duality' is challengeable and indeed, challenged; the moot

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<sup>544</sup> David Oswell, *The Agency of Children, From Family to Global Human Right* (Cambridge University Press 2012) <<http://ebooks.cambridge.org/ebook.jsf?bid=CBO9781139033312>>, accessed 24<sup>th</sup> March 2015 6.

standard parameters are just constructs, like any other. They can be reviewed and altered, without threatening the fabric of the family unit or societal authority. It only requires a study of childhood from a holistic viewpoint. One that enables us to see children as, '*...social actors [and] not beings in the process of becoming such*'<sup>545</sup>

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<sup>545</sup> Allison James and Alan Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (6<sup>th</sup> edn, Psychology Press 1997) ix.

## CHAPTER 6

### METHODOLOGY and INTERVIEW STAGE

#### 6.1 Introduction

Research will usually involve a subject matter in a discipline with which a researcher will have a base knowledge. That knowledge is often accrued empirically in the select topic and its themes. As with all research undertakings, be they desk and/or field research, the aim is to expand on our knowledge; resolve and illuminate. In this study the theoretical component and methodology was afforded a high level of consideration, due to its fundamental importance in this study. The process, intensive as it was, enabled the researcher to view simultaneously, concept and practice with a 'fresh' pair of eyes. The facility to ruminate in the early phases of this study was thus, valuable and expedited the digestion and analysis of data and the cogitation of constructive feedback from a supervisory team. It was important to the researcher that every effort was made to be fair and objective throughout the entirety of the study, particularly so in respect of the empirical stage, ie the practical element involving participants. In the case of the research undertaken with children, and mindful of the limited number of young research participants, Greig and Taylor stated that, *'Practice should be evidence based, but the evidence does not need to be derived from personal research, but from a wider knowledge of research which is being undertaken within and out with a profession which can inform practice.'*<sup>546</sup> Of course, that statement could be applied to any type of study, but Greig and Taylor re-enforce another important

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<sup>546</sup> Anne D Greig and Jayne Taylor, *Doing Research with Children* (2<sup>nd</sup> edn, Sage 2001) 7.

point, that to inform and be informed, the researcher does not always have to undertake first hand personal research.

## 6.2 The adoption of the socio-legal

This socio-legal study comprises aspects of the sociological and legal in what is a popular interdisciplinary method and valuable research tool. It is for the most part, qualitatively premised, with brief inclusions of quantitative data and it would be fair to state that the latter type pertains largely to the LIAP procedure. As the study progressed, so too the realisation that the quantitative data obtained in that respect contributed little the substantive narrative of the study.

Relative to the sociological aspect of this thesis, Silverman references the methods of sociological ethnographers in that they, '*... identify an activity, an institution or a subculture and just 'hang out'. ....to grasp 'reality' in its daily accomplishment. .... that somehow meaning would 'emerge' by itself from such 'in-depth' exposure to the field.*'<sup>547</sup> To some extent, this is premised on Glaser and Strauss's 'grounded theory' who stated, '*...it works- provides us with relevant predictions, explanations, interpretations and applications.*'<sup>548</sup> This study may not be fully committed to 'grounded theory', but Silverman's exposure descriptive of the 'inductive' method still had bearing, especially in influencing the early planning approach in respect of the empirical and the 1-1 research stage. However, in as much as grounded theory and inductive methods have been utilised, so too has the

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<sup>547</sup> David Silverman, *Doing qualitative research* (3<sup>rd</sup> edn, Sage 2009) 84.

<sup>548</sup> Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative*, (Routledge 2017) (first published in 1967).

reductive method; perhaps more so because the conclusions drawn by the researcher were influenced by the data drawn from applied inductive and reductive methods.

Children's rights can be said to fall naturally under the discipline of law, but this group of rights is also considered in other fields, such as sociology and the combination of the sociological and the legal create further opportunities in research and academia. The topics in this study which include the child's voice, participation, decision making processes and supporting mechanisms can readily be studied in both fields and disciplines. In turn, those disciplines have informed and enriched the discussions in this study. This factorial give and take was recognised by Freeman when he stated, '*...those who work within, and to propagate children's rights can find much in sociological literature and research about children to assist them....*'<sup>549</sup> Freeman made a causal observation, that the children's rights movement, predominantly driven by law, and then politics, '*...also has important things to say to sociologists of childhood about ways in which we can enhance our understanding of children's lives...*'<sup>550</sup>

Whilst this study is primarily a socio-legal critique of normative frameworks which may or may not marginalise children and young people in decision making processes, it was essential that the concept of childhood was critiqued in detail, with a brief reference to child development theories, where applicable. The child development theories discussed for the most part, premised

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<sup>549</sup> Michael Freeman (ed), '*Law and Childhood Studies, Towards A Sociology of Children's Rights*' (Oxford University Press 2012) [3] at 22.

<sup>550</sup> *ibid* 36.

on positive methodologies related to the field of psychology. That stated, Greig and Taylor emphasised the adoption of a holistic method of research study which would incorporate the eclectic and the heuristic.<sup>551</sup> To some extent, that eclectic and heuristic methodology made sense in this study, most likely because of the adoption of an interdisciplinary method and some fundamental decisions taken at the very outset. Mindful of the differences in meaning and application of the term ‘positivism’ within academia’s field of specialisms, the adoption of social sciences interpretation as a dominant methodology was dismissed by the researcher as it was not deemed capable of explaining human behaviour and response within normative legal frameworks.<sup>552</sup>

### **6.3 Negotiations, dilemmas and renegotiation encountered**

Blaxter and others presented an ideal of the importance of identifying the ‘right’ gatekeepers and the influence they will have in the negotiating process for research access.<sup>553</sup> As has been explained already, this researcher had a reasonable level of knowledge with regards to ‘whom’ could be approached within the identified bodies and organisations. However, irrespective of this pre-existing knowledge, negotiations and access were on occasion, problematic. For example, people ‘move on’ from organisations and gatekeepers are no exception. During the

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<sup>551</sup> Grieg (n 546) 46.

<sup>552</sup> Positivism is a concept with several applications and descriptions. It can be used with reference to quantitative approaches in the social sciences, but the term is also familiar in regards legal jurisprudence, as it is with concepts of philosophical positivism; See: David R Buchanan, ‘Reflections on the relationship between theory and practice’ (1994) 9 Health Education Research 273.

<sup>553</sup> Loraine Blaxter, Christina Hughes and Malcolm Tight, *How to Research* (4<sup>th</sup> edn, McGraw-Hill 2010) 159.

early stages of this study a well-placed service manager and gatekeeper for one of the not for profit organisations featured had, unbeknownst to the researcher left post a couple months prior. It took another few months to identify a collaborative service manager and start the process of identifying and negotiating access to suitable staff facilitators and service users for interview purposes. Even within a unitary authority, with a definitive hierarchical structure, one cannot assume or expect a sole gatekeeper to facilitate across the board access. Greig and Taylor discuss access with a focus on children and young people, as a 'special group'.<sup>554</sup> Meanwhile, Hek and others state that gatekeepers are, '*... people who are attempting to safeguard the interests of others.*'<sup>555</sup> The assertion that gatekeepers are somehow the guardians of children and young people's best interests, welfare and wellbeing is, for this researcher, a moot point. Greig and Taylor's research subjects were by and large young patients and in that instance the gatekeepers comprised a 'health trust ethical committee' and professionals on the ground; altogether more realistic, compared with say, Hek and others simplistic and convenient interpretation. The reality is more complex and so to negotiations. In so far as this research project is concerned, there were several gatekeepers involved, within several departments. Each gatekeeper had to be negotiated with individually and that took time. That stated, the outcome, ie the identification and interview of suitable candidates was eventually achieved. Munro and others also discussed fieldwork experience, post the tentative early stages and how individual gatekeepers can influence aspects of research. That influence extends not only

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<sup>554</sup> Greig (n 546) 151.

<sup>555</sup> See the up-dated edition of Hek and others: Pam Moule and Gill Hek, *Making Sense of Research, An Introduction for Health and Social Care Professional* (3rd edn, Sage 2011) 167.



possible candidate or contacts, but in the distribution of surveys; even the determination of 'interview settings'.<sup>556</sup> It is conjectured that an employee (or associate) of an organisation undertaking fieldwork study within said organisation would have a less jagged experience. But, to what extent that (internal) researcher is free of bias, is less certain. Correlatingly, the verity and honesty of research participants in such a study may be questionable; compared that is with an external researcher. On that very point, Bell and Waters wrote,

*'There is nothing new about practitioners operating as researcher, but as in all 'insider' investigations, difficulties can arise if clearly held views and practices of some participants are challenged, as can happen if the research evidence appears to indicate that radical changes are needed if progress is to be made.'*<sup>557</sup>

The research journey can reveal much about an organisation, local authority or not for profit entity. As Munro and others highlighted, the researcher gains, '*...insights into the structures...departmental autonomy and lines of communication*'<sup>558</sup> Whilst those authors may have been referring to larger organisations, we can learn just as much the medium and micro sized body. This correlates with the discussion on size of a research project, ie large scale or small scale. This research project would no doubt be categorised in the latter, ie small

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<sup>556</sup> Anne Munro 'and others', 'Power at work: reflections on the research process' (2004) 7 International Journal of Social Research Methodology, 290 <<https://doi-org.ezproxy.rgu.ac.uk/10.1080/1364557021000024758>> accessed 20<sup>th</sup> January 2018.

<sup>557</sup> Judith Bell and Stephen Waters, *Doing Your Research Project, A Guide for first time Researchers* (6<sup>th</sup> edn, McGraw Hill 2004).

<sup>558</sup> Munro (n 556).

scale, but its size does not make it any less a valuable piece. Greig and Taylor make a valid point about the importance of communicating small scale research to associated and interested professions, because it is both relevant and informative; that wider knowledge of same may also halt pointless duplication in future research.<sup>559</sup> Therefore, the perimeter of this study should not detract from its merits as a valid and informative piece. It is a study that should appeal to practitioners and theorists alike, in addition to benefitting future studies.

### **6.3.1 The LIAP procedure consideration and negotiation**

As previously stated, the LIAP was a procedure which was held on school premises which fall within the administration of the education department in the local authority. However, it was not administered by that department and this set-up had a no insignificant impact on this study. An atypical set-up of a LIAP (asides supporting roles and a lead professional) would generally comprise a youth worker, a home school link worker and (possibly) an assigned social worker. That asides, practice and involved stakeholders varied across the associated school groups and the individual schools under these groups. In respect of a couple secondary schools associated with LIAP's, social care staff members were afforded a dedicated space within some educational institutions, ie 'hubs'. The idea of the hubs was that they would facilitate in tandem working practice between social, care and education staff, with the former 'on hand'; enabling and supporting pupils

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<sup>559</sup> Greig (n 546) 7.

and their wider families. However, as social care employees, they came under the ambit of ‘integrated children’s services’ and not ‘education services’.

What should have been a straightforward process of negotiation in respect of LIAP access (and observation) turned out to be rather convoluted. A hierarchical model pertaining to integrated children’s services should have facilitated access and observation via a central point of contact within the authority which would minimise the amount of negotiation and communication, irrespective of individual school managements. However, despite the much lauded rhetoric of integrated practices and inter-departmental set-ups, it became clear in the primary stages of this study that access and observation was likely to be an issue. It was concluded that this was in the main, attributable to organisation structure and distinct departmental entities therein.<sup>560</sup> It was only by late 2016 that both departments (technically) came under one corporate directorship which comprised ‘education and social care’, though the hierarchical structure of these departments did not alter significantly. The then Head of Integrated Children’s Services, the researcher’s main point of contact (and keen supporter of the research study) was not in a position of authority to compel or direct those falling under the employ of the education authority. Similarly, the Head of Education (the department now titled Schools and Curriculum Development) could neither compel or direct those falling under the employ of social and care services. This will not come as a revelation for those familiar with devolved authorities and the often historically premised divisive structures, but it presented its own challenges

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<sup>560</sup> Education and Integrated Children’s Services; the latter incorporating Corporate Parenting and Commissioning Services. Correct as of January 2016.

during the initial planning phase. An interesting dynamic as of late 2017, is that the former Head of Education now occupies the Corporate Director post. This could be a positive step for any future research collaborations which employ fieldwork as a method.

Early in 2015 this researcher received information, that if it was desired, access to LIAP's for observation purposes would have to be arbitrated by the researcher on a 'school by school' basis; via individual school managements. This would have been quite a feat, considering there are 53 schools in the Moray jurisdiction and each Head Teacher or Acting/Depute Head would have to be contacted personally. The decision to allow or to deny access would be left entirely in the hands of those individuals. However, this is just an example of a challenge that many researchers (and their affiliated institutions) experience on a 'day by day' basis. It still serves as a reminder that research is fraught with issues which are best identified and tackled early on. However, turning that experience into a positive enabled considered amendment to be made, with the agreement of the original supervisor to the research study.

The Head of Integrated Children's Services, probably aware of the issues already mentioned, requested that where possible, that social care staff should negotiate this researcher's attendance where those members of staff were involved in a LIAP procedure at a school. If any enquiries were made by individual facilitators, then it can only be conjectured that those requests were unsuccessful; hence the 'individual approach' posited. The seamless experiences of Greig and others as regards negotiation did not quite match this researchers' experiences, when the authors state that educational institutions, ie schools and nurseries were

more, '*...willing than health care practitioners to act as indirect rather than direct gatekeepers.*'<sup>561</sup> As much as empirical observations of LIAP's may possibly have benefited the study as an observed model procedure, after consultation with the initial supervisor it was decided that there was more than enough qualitative data from the 'fieldwork interviews' to forego same. Of course, prior personal and professional experience by the researcher of local procedures and support mechanisms under critique was in this instance, beneficial.<sup>562</sup>

Interviewing individual service facilitators with practical and up-to-date experience in the Children's Hearings Panel and the LIAP procedure provided opportunity to critique the procedures and importantly, mechanisms such as advocacy. The data accumulated these service facilitators being employed in various roles to support children and young people provided opportunity to critique the various mechanisms. A picture of the LIAP's and to an extent, the Children's Hearing Panel Moray was thus developed.

### **6.3.2 SCRA- Children's Hearings Scotland- consideration and negotiation**

The LIAP procedure was always the primary decision making process under consideration for this research study, as it utilised non-legal advocacy and other support mechanisms and associated roles. The idea of negotiating access to the

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<sup>561</sup> Greig (n 546) 177.

<sup>562</sup> This position was held for just over 2 years and included additional procedures such as 'Child Protection Meetings'. This researcher was also requested to attend events related to the role of the advocate, the advocacy mechanism and children's rights in general and highlight the role of the advocate, the wider work of the NGO's involved; particularly so with groups of children and young people, with an emphasis on 'rights' and the CRC.

Children's Hearing Panel, Moray was also contemplated in 2015 and to that end a process of communication commenced. However, the 'Scottish Children's Reporter Administration' Reporter (Moray) made it clear to the researcher that negotiation would have to be conducted with the 'Lead Chair' of the local panel, who would grant or deny access. In hindsight, the proposal was impractical and unrealistic, given the existing logistics and demands involved in administering existing field work, which included interviews. However, as the reader will have ascertained by now, the lead panel member did assist in respect of a couple of interview participants, which along with the study of secondary and tertiary data, resulted in a reasonable overview of the Children's Hearings panel and Scottish Children's Reporter Administration in the Moray jurisdiction. It was fortuitous that several of the participant service users (including facilitators and managers with the LIAP procedure) were also experienced in respect of Children's Panels. This also validated the decision to include supplementary interviewees involved in that Panel procedure. That stated, the issue of gatekeepers to the Children's Hearings System, its regional panels and the 'Scottish Children's Reporter Administration' (SCRA) was uncertain, until that is, the publication of a Scottish Children's Reporter Administration information piece for 'researchers and students'; a step by step guide if you will. Whilst it came too late for this researcher, it explained the protocol and requirements involved for future enquiring students and researchers; an arguably overdue improvement.<sup>563</sup> Major developments took place between 2014 and 2016 within Children's Hearings Scotland and the Scottish

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<sup>563</sup> Scottish Children's Reporter Administration, 'Information for Researchers and Students' (SCRA 2018) <<http://www.scra.gov.uk/contact-us/information-researchers-students>> accessed 2<sup>nd</sup> December 2018.

Children's Reporter Administration. Those developments arguably created a barrier in the accommodation of independent researchers. Admittedly, these bodies were going through a period of statutory change and local re-organisation. These included revised training programmes and an adjunct delivery of same to panel members, but it came at a time of peak crisis. The retirement of then, current panel members resulted in a large recruitment drive to fill the void left behind. During that period 'other' research was underway with both the Scottish Children's Reporter Administration and the Children's Hearings Scotland. These were conducted by institutions such as CELCIS, based at Strathclyde University and the Centre for Research on Families and Relationships at Edinburgh University. These centres/bodies were commissioned by the Scottish Children's Reporter Administration and the Children's Hearing System, with the addition of the Children's Hearings Improvement Partnership and the Scottish Legal Aid Board. It also involved not for profit agencies such as Children 1<sup>st</sup> Scotland and WC? S (amongst others),

*'...efforts to recruit young people and parents to the study. Brian Houston and colleagues at Who Cares? Scotland for support in networking with advocates working across Scotland and their willingness to offer opportunities to young people to participate in the study. The Scottish Children's Reporter Administration, Children's Hearings Scotland, Social Work Scotland and various local authorities and bodies for facilitating access to their members, and responding quickly and flexibly within the tight timescales the research presented.'*<sup>564</sup>

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<sup>564</sup> Porter (n 71).

In October 2016, the Children's Hearings Improvement Partnership published a review based upon research which it had undertaken the previous year (2015) titled, '*Children's Hearings Improvement Partnership, The Next Steps towards Better Hearings*'<sup>565</sup> The Children's Hearings Improvement Partnership Review and the research material feeding into it, took place at the same time as the Scottish Legal Aid Board commissioned research was underway. Perhaps this influenced the lack of desire for these bodies to engage with additional small scale research requests.

#### **6.4 Ethics and Confidentiality**

Any involvement with children and young people demands a degree of sensitivity and this includes empirical research on this distinctive young group. That being the case, additional exigencies should be considered by researchers and applied as they pertain to the individual's wellbeing and best interests. These are pre-requisites and they need to be addressed; they must be satisfied before any encroachment into a young person's life. Despite the paradoxical promotion of all-inclusive participation, such intrusions must be justified. From a research aspect, the ethical and the moral argument for 'intrusion' must be met; the proposal must be sound; its methodology and method adhering to ethical principles.<sup>566</sup> Finch made an interesting statement in respect of 'highbrow' discussions and debate on ethics and ethical practice in research, in that it is, '*sanitised.... fairly irrelevant...I*

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<sup>565</sup> Indiya Kurlus, Gillian Henderson and Gordon Brechin, 'The Next Steps Towards Better Hearings' (CHIP 2016) <<https://www.chip-partnership.co.uk/wp-content/uploads/2016/10/Better-Hearings-Research-Report-2016.pdf>> accessed 20<sup>th</sup> January 2018.

<sup>566</sup> Michelle O'Reilly, Pablo Ronzoni and Nisha Dogra, *Research with children: theory & practice* (Sage 2013) 51, 57.



*have preferred to call my dilemmas 'moral' ones, but in fact they are also, it seems to me, inherently political in character.*<sup>567</sup> Finch's statement is compelling, but when we are dealing with individuals, especially children and young people, there will always be degrees of vulnerability, thus safeguards must be in place for the benefit of the researcher and pivotally, the participant. There needs to be a balanced response though, one which will not overly politicise or paternalize. As Driscoll has stated, that response should not impede the ability of researchers conducting studies with children and young people.<sup>568</sup> Ethical and confidential considerations were satisfied in respect of RGU's requirements, via its ethics committee. This extended to the institution becoming 'an interested' party for the purposes of Protection of Vulnerable Groups (children and young people) and Disclosure Scotland; in interviewing children and young people as part of the study. Even though this researcher was in possession of a current Protection of Vulnerable Groups certificate, considered valid for work undertaken as a 'volunteer advocate' with one of the collaborating 3rd party NGO's, it was felt necessary to expand on this. It was essential that RGU, as the overseeing institution, become 'an interested party' for the purposes of the fieldwork research. This widened the scope of who could be involved, in so far as young people were concerned. It provided validity for the researcher and the institution.

Of course, the individual bodies and organisations involved in this study required to be satisfied in respect of their own ethics and confidentiality requirements. To that end, they were all furnished with the documentation of 'pro

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<sup>567</sup> Janet Finch, 'It's great to have someone to talk to': the ethics and politics of interviewing women', in Martin Hammersley (ed), *Social Research, Philosophy, Politics and Practice* (Sage 2004) 177.

<sup>568</sup> Driscoll (n 23).

formas' and evidence of institutional backing from Robert Gordon University. The children and young people (the service users) were approached on behalf of the researcher by intermediaries who had personal knowledge and existing relationships with the prospective interviewees and their parents/guardians. Having provided the intermediaries with the documentation necessary, they would then pass these onto the interviewee and the parent/guardian for consideration. Where permission was given, the signed document was forwarded to the researcher, in advance, or just prior to the interview taking place. It was important to ascertain if the interviewee had indeed received the documents and not rely solely on an assurance from intermediaries. The interviewees were always informed that they could leave the process at any time; that the interview could be halted.

This research piece involves the child as a participant, but it does not extend to their being co-researchers. That is an important point and one which requires an explanation. In their article on the child as the research subject Hood and others emphasised the importance of ensuring that, *'...the 'with' and the 'for' are linked in terms of goals and methods.'*<sup>569</sup> This was always foremost in the researcher's considerations and it was important that the 'all' participants understood that their participation was both valued, and of value. Lundy and McEvoy's article on the child as both participant and co-researcher is elucidating because it is reflective, and it provides advice on strategies that place the child at the centre. Even though participants in this study were not co-researchers, the point being made by the Lundy and McEvoy was still relevant; that for a procedure

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<sup>569</sup> Suzanne Hood, Peter Kelley and Berry Mayall, 'Children as research subjects, a risky enterprise' (1996) 10 *Children & Society* 119.

to satisfy the child centred approach, that approach must be long term and it requires strategies over tactics that will, ‘.... assist children in the formation of their views.’<sup>570</sup> According to the authors this is the formula for a truly enabling process of participatory research whereby the child should, where possible, be part of the process and not detached from it as has historically been the case.<sup>571</sup> Boylan expanded on the experiences of LAAC as participants in statutory reviews, with the mechanism of advocacy, stating, ‘*Evidence of children’s ability to provide data themselves has emerged, together with a growing recognition of the importance of asking children directly about their experiences, rather than via proxies.*’<sup>572</sup>

It is important to stress that the inclusion of the child in every research piece is not always warranted. Nor is it always feasible and this is a point that is acknowledged by Lundy and McEvoy.<sup>573</sup> That is not to say that the young service users in this research project were incapable of acting without a proxy or being directly involved in the rumination of the proposal and its contents. The latter, the child as a collaborating researcher is laudable in a given context, but not this study. James and others have stated that children are universally acknowledged as capable and competent vocalisers in matters affecting their lives; a point which Robson and McCartan agree on.<sup>574</sup> This is a sound premise, but arguably, young

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<sup>570</sup> Laura Lundy and Lesley McEvoy, ‘Children’s rights and research processes: Assisting children to (in)formed views’ (2011) 19 *Childhood* 129.

<sup>571</sup> See also: Priscilla Alderson, ‘Children as researchers: Participation rights and research methods’, in Pia Christensen Pia and Allison James (eds), *Research with Children: Perspectives and Practices*, (2nd edn, Falmer Press 2008) 276.

<sup>572</sup> Jane Boylan, *Reviewing your review: a critical analysis of looked after children's participation in their statutory reviews and the role of advocacy* (Staffordshire University 2004) 77.

<sup>573</sup> Lundy (n 570).

<sup>574</sup> Allison James, Chris Jenks and Alan Prout, *Theorizing childhood* (Polity Press 1998) 223.

people still need assistance and guidance to come to voice and participate in decision making procedures and life generally. It is also important that researchers make every effort to ensure that all participants, especially young individuals are suitably enabled and informed by furnishing them with appropriate and relevant information. In this study that involved creating 'age' appropriate 'pro formas' and re-assessing one's own spoken language, so that it was appropriate and befitting the interviewee. Informed consent is also fundamental and true consent should be evidenced by the researcher. Acceptance of consent via a proxy, or assumption of same from a signature on a document is also insufficient.

The interviewees in this study had also to be judged competent and unequivocally willing to participate.<sup>575</sup> To that end, all prospective interviewees were made aware of the 'voluntary' aspect of agreement. No-one was compelled, especially the young people. As much as the need for the researcher to satisfy herself/himself as to informed consent is essential, and not to rely solely on 3<sup>rd</sup> party proxies, there was never any indication that any of the participants in this study were under duress by service managers or service facilitators, even those acting as intermediaries. Robson and McCartan detailed several issues that they considered should also be addressed when the researcher is considering the direct involvement of children and young people in a social research study.<sup>576</sup> The authors also referred to an 'abridged form' checklist of considerations, based on 2006 National Children's Bureau guidelines and that organisation has since

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<sup>575</sup> Colin Robson and Kieran McCartan, *Real World Research, Ethical and Political Considerations* (4<sup>th</sup> edn, Wiley 2016) 223.

<sup>576</sup> Robson (n 575) 224.

produced an updated checklist (2011). This researcher found these sources to be both valuable and informative.<sup>577</sup> In that vein, the Economic Social Research Council's key principles for ethical research was also considered as part of the study.<sup>578</sup>

## 6.5 Interview Stage

### **The effects of normative frameworks on the research, the researched and the researcher**

Though a small selection of children and young people were interviewed for this research project, the experience was by and large a positive one. The majority of interviewees were of course, facilitators and managers. The protocols and procedures undertaken during the interview stage were not too dissimilar between the groups, ie facilitators, managers and children, albeit with the latter group (young people), extra conditions applied. In so far as those young people were concerned, the ethical requirements of all the institutional bodies involved were met, but importantly, those young people were content, capable and willing to take part in the study. The empirical preparations for interviews with the

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<sup>577</sup> Catherine Shaw, Louca-Mai Brady and Ciara Davey, 'Guidelines for Research with Children and Young People' (National Children's Bureau 2011) <[www.nfer.ac.uk/nfer/schools/developing-young-researchers/NCBguidelines.pdf](http://www.nfer.ac.uk/nfer/schools/developing-young-researchers/NCBguidelines.pdf)> accessed 20<sup>th</sup> January 2018;

'The NCB Research Centre are adherents of Ethical Guidelines as provided by the Social Research Association (SRA)'; the web address provided by the authors, Robson and McCartan, has an error- it should read: < [www.the-sra.org.uk](http://www.the-sra.org.uk)> This body has a Scottish arm, which can be viewed via <<http://the-sra.org.uk/home/sra-scotland/>> accessed 14<sup>th</sup> November 2017.

<sup>578</sup> The Economic Social Research Council, 'Our Core Principles' <<http://www.esrc.ac.uk/funding/guidance-for-applicants/research-ethics/our-core-principles/>> accessed 20<sup>th</sup> January 2018.

service users and facilitators was aided through personal and prior associations with the NGO's in question, Children 1<sup>st</sup> Moray, and latterly WC? S with their staff facilitating the identification and selection of appropriate service users. In so far as working with vulnerable groups was concerned and as already stated, the necessary paper work (Protection of Vulnerable Groups up-date) had been completed.

#### **6.5.1 A narrative on 'interview approach and technique'**

Training in interview techniques, coupled with an array of experience with groups and vulnerable individuals was advantageous, though the researcher would argue that experience is not always necessary; provided applicable training is undertaken in preparation for such an undertaking. That is an essential element for this mode of empirical research; a foundation from which to take forward what Greig and others have referred to as the 'special relationship' which occurs between the researcher and the participant.

*'We can only ensure that we do our best to question all our practices and strive, as far as possible, to base our practice on sound research and evidence. This involves two different, but related notions. First, all professionals have responsibility to ensure that they are aware of current research, can intelligently interpret it and incorporate sound research into practice.'*<sup>579</sup>

Greig and others also touched upon two types of 'personal or personalised' research, namely the therapeutic and the non-therapeutic. Whilst the connections

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<sup>579</sup> Greig (n 546) 6.

on the therapeutic were not obviously transmutable for this research study, the non-therapeutic certainly was. That stated, extra consideration was afforded the young interviewees so as to limit any potential risks to them.<sup>580</sup> Those extra considerations go beyond basic 'housekeeping' issues, tick box exercises and safeguarding concerns. It entails negotiating the burgeoning 'legal and policy' requirements made of all research undertaking. In respect of vulnerable groups, this extends to safeguarding. These added requirements place extra stress on social science researchers and even whilst this is to be expected when we are interacting with living subjects, it does not mitigate the researchers' concerns. Driscoll commented on the increased pressures faced by researchers, especially those working with young people. She stated that increasing and burgeoning protectionist premised regulations were creating a problem; disrupting the balance in, and between the, '*...need to ensure safe research practice against the importance of enhancing young people's capacity to make decisions and ensuring that their voice is heard...*'<sup>581</sup>

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<sup>580</sup> The empirical research is not premised on medical ethics and human experimentation; therefore, it does not require consideration of the regulations, nor the declarations which govern and guide medical practice;

See the: 'Declaration of Helsinki (latest version 2013)' and the 'Declaration of Taipei on Ethical Considerations regarding Health Databases and Biobanks'.

<sup>581</sup> Driscoll (n 23).

## 6.5.2 Preparation and reception- practicalities and encounters- CHILDREN AND YOUNG PEOPLE

**AGES:** The age parameters of this study were set early on, to preclude very young children. The youngest participant was 13 years of age (at the time of interview) and the oldest 17 years of age, again at the time of interview.

**NUMBERS:** 6 young people in total.

Roulston once wrote, '*there is no one-size-fits-all approach to preparing qualitative interviewers*'<sup>582</sup> Those words provided some succour during this researcher in the preparations stage and re-enforced the need for patience and adaptability when working with human subjects. But for a single interview, they were conducted on a 1-1 basis. The exception was **CYP 1** whose mother was present throughout. **CYP 1** was somewhat dependent upon his mother in the initial stages, but his confidence grew towards the end of the interview whereby he was more than capable of autonomous thought and espousing his opinion. Other than the emotional support proffered by her presence, **CYP 1** could have managed without her presence; though it is doubtful the mother would have agreed. Morrow and others remind the researcher that though a child may be regarded as vulnerable, she or he is not incompetent; nor are they powerless. However, the social researcher should always be vigilant; never overestimate or underestimate a child's capacity and autonomy.<sup>583</sup> Other than one young CYP, who was slightly distracted due to the

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<sup>582</sup> Kathryn Roulston, 'The Pedagogy of Interviewing', in Jaber F Gubrium 'and others' (eds), *The SAGE Handbook of Interview Research: The Complexity of the Craft* (2<sup>nd</sup> edn, Sage 2012) 72.

<sup>583</sup> Virginia Morrow and Martin Richards, 'The Ethics of Social Research with Children: An Overview' (1996) 10 *Children and Society*.  
See also: Priscilla Alderson and Virginia Morrow, *The ethics of research with children and young people: a practical handbook* (2nd edn, Sage 2011) 161;  
Rick Henderson and Mike Pochin, *A right result?: advocacy, justice and empowerment* (Policy 2001) 165.



school break near approaching (resulting in a shorter interview), all the young participants were keen, relaxed and confident. Perhaps that confidence may have been instilled in them from their exposure to statutory and non-statutory procedures; procedural interventions many of their peers will not have experienced. However, a great part of these young participants expressive agency was clearly influenced by the supporting role holders in their lives and paradoxically, the very procedural interventions having been initiated. Even **CYP 1** stated, in respect of advocacy as a mechanism, *'It makes me feel that someone actually wants to listen to me and I'm not like, I'm not like ignored, I'm not invisible, and I get to speak my true mind and ideas, how I think.'*

In so far as safeguards, for the benefit of interviewer and interviewee are concerned, there was always an intermediary nearby in an adjacent room of all the premises in question. Those intermediaries would comprise school staff, advocates or other support role holders; even a family member on one occasion. The arrangements for the interview discussed and agreed with the interviewer, the supporter and the child or young person. Where applicable, the wider family. Common sense and adherence to ethical guidelines should always apply when contemplating interviewing younger participants; the locus of the interview being one of those important considerations. The domicile of a young person was never a consideration. That stated, if it meant that the only way of including a child or young person who was confined to their domicile in the study, then of course steps would have been taken to make that happen. Reasonable adjustments would have

been made. Hood and others discussed the positives of pair and group interviews and outwith the home environment when they stated,

*'... we found that pair or group interviews outside the home resulted in freer discussion than did single interviews at home. Perhaps the children felt more confident about the presence of the adult interviewer, when in the supportive company of their peers.'*<sup>584</sup>

The premises, or loci in this research project included a central 'youth café', Moray schools, and the offices of a collaborating NGO (Children 1<sup>st</sup> Moray). These were suitable locations because they accommodated the interviewees in respect of their familiarity with the locations. They were relaxed in these facilities and had people they knew and trusted close by. All interviewees were furnished with the relevant documentation and informed of the purpose of the interview. That they were 'in control' was stressed. They were assured that their confidentiality would be maintained through anonymising their details via coding. They were further assured that recordings would be stored with the institution, as would transcripts of the recordings. The paperwork furnished included details of their rights to request copies of their interview transcription upon its completion, along with appended details on how to make a request.

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<sup>584</sup> Hood (n 569) 123.

### **6.5.3 Preparation and reception- practicalities and encounters- ADULTS – FACILITATORS AND MANAGERS**

#### **NUMBERS: 18 SF and 5 SM**

Suitable locations for the adult participants were arranged between the researcher and the interviewees. Meeting rooms were booked in advance, if taking place in the interviewee's workplace. On arrival at say... local authority headquarters, attendance was always recorded with front of desk. The interviewees would also have informed a line manager or colleague accordingly. On a couple of occasions, two service managers made it clear that they would be interviewed in a public space and not in Moray Council offices. One of these interviews was held in a coffee outlet frequented by Moray Council staff and the public; the other interview, in the open air, in plain sight of Moray Council offices. An additional encumbrance was that both interviewees declined to go 'on tape'. However, there was still a degree of privacy, of not being overheard and being free to talk. This was aided because of the seating arrangements at both loci and was aided by a relative lack of footfall at both locations. Ethical integrity was still upheld, albeit the interviews were slower in pace, compared with the 'hands free', 'on tape' facility. Statements made were recorded and then checked with the interviewees for accuracy, before moving on to the next topic. All interviewees were furnished with the relevant documentation and informed of the purpose of the interview. Their control was emphasised, and they were assured that confidentiality would be maintained through anonymising via codifying their details. The interviewees were further assured that recordings would be stored with the institution, as would transcripts of the recordings. The paperwork furnished included details of their rights to

request copies of their interview transcription upon its completion, along with appended details on how to make a request.

#### **6.5.4 Preparation prior to interviews**

*'... actions, thoughts, intentions and meanings cannot be conveyed in an analogous way with numbers, but need a more qualitative handling of data'.<sup>585</sup>*

The preparation stage incorporated prior 'negotiated' access to lists of employees. These employees/individuals were deemed by departmental managers to have requisite knowledge and/or experience of the LIAP procedures. Prospectively, some of the individuals would have experience of other procedures, but for the majority, this was limited to the LIAP procedure. The individuals selected comprised the following roles/supporting mechanisms: home school link worker/youth workers/ social workers/ children's services worker.

An e-mail from the officer heading integrated children's services was distributed to departmental heads, notifying them a study was to take place and that individuals may be contacted by this researcher. Whilst the communication did not compel staff to take part, it promoted the merits of the study and encouraged participation.<sup>586</sup>

A meeting with two managers took place on 2<sup>nd</sup> October 2014 where facilitation (on their part) would include identification of suitable staff and access

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<sup>585</sup> Greig (n 546) 37.

<sup>586</sup> See: Appendix I.

to LIAP's. Staff lists would be sorted, and sampling methods applied to negate 'research bias'. From the staff lists provided by departmental managers, a tabular system of selection was adopted. Commencing at the top of a list, random selections were made for every fifth count. These individuals were thereafter contacted by way of their work e-mails and where necessary, with follow up telephone calls. The individuals were invited to participate, but never compelled to. With each prospective interviewee the following details were logged; date, time and response of the contact. After a week or so, everyone would again be contacted. This was preceded by a check of the prospective interviewee's current position/role and locality. Care was taken not to identify individuals to managerial intermediaries. If an individual failed to respond after a few weeks, or declined to be involved in the study, then the count began again. The designation of individuals on the list and a desire to have a reasonable representation of each role in the study was another facet which the researcher factored in.

#### **6.5.5 Anonymising participants post interviews**

Participants, including service users, facilitators and managers have had their details coded to maintain the anonymity guaranteed at the outset of the field research and in documentation furnished (see pro-formas). This codification has extended to interview transcripts for all participants; and redaction of any other details which could easily identify them. A separate key document was created so that as this researcher could readily identify individuals from their assigned code. For service users the prefix **CYP** was used. For service facilitators **SF**, and for

Service Managers **SM**. The only addition to this list was for **CRO**, ie a Children's Right Officer.

This was important, because whilst Moray may be geographically large, it has a population of less than 100,000. The unitary authorities, especially the local authority is one of the largest employers in the area and it would not have been too difficult for a manager to ascertain which service facilitators had taken part (if they were of a mind to make such an enquiry). Interestingly, though anonymity was guaranteed, there was a general lack of concern on that issue by service facilitators, ie identification by colleagues or managers.

#### **6.5.6 Model selected and Preparation**

The big question to be answered; the hypothesis if you will, has never depended solely on the viewpoint of service users; though the information gleaned from the young people who participated has been critically informative. Instead, it was deemed more appropriate, having identified decision making procedures (primarily the LIAP procedure), advocacy and other supporting mechanisms, to focus in on those roles. Those roles, these individuals and their testimonies considered together, informed the wider study; not only with regards to the procedures everyone was involved with, but of their various roles, as supporters. This has informed the discussion on the procedures, mechanisms and importantly, the normative frameworks. This was and is not an unusual tack and is employed

with regularity in children's rights studies, especially where there is a 'rights' focus on children and young people's participation in decision making processes.<sup>587</sup>

Gallagher's study justified selection of the 12-18 age group (as per demographics and numbers) for the same reasons. Those reasons being time and available resources. This researcher also deferred to the CRC and devolved legislation on the matter of interviewee selection, as well as discussion on the topic with 3<sup>rd</sup> party collaborators, who were also in agreement.<sup>588</sup> In so far as considering and then dismissing the use of the 'questionnaire' as a primary, or additional information gathering tool, Gallagher's experiences were influential in not using that tool, when she stated,

*'The questionnaires were completed by children and young people in advance of meetings or, if this was not possible, prior to any discussion. This worked well in most cases with the exception of children and young people who stayed in residential units, none of whom completed questionnaires...these were rarely passed on to them.'*<sup>589</sup>

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<sup>587</sup> Elsley (n 333).

<sup>588</sup> United Nations Convention on the Rights of the Child, 1989, article 1 recognises the child as 'every human being before the age of eighteen years'; Age of Legal Capacity (Scotland) Act 1991 c 50 s 1 'An Act to make provision in the law of Scotland as to the legal capacity of persons under the age of 18 years to enter into transactions, as to the setting aside and ratification by the court of transactions entered into by such persons and as to guardians of persons under the age of 16 years...';

Amended in 1995 to give children under 16 capacities to instruct a solicitor in connection with any civil matter etc. This move was very important as it was just over two decades ago that children under the age of 16 were, in civil law, recognised as legally capable of instructing a solicitor (s 2 (4) (4A); Children's Hearings (S) Act 2011, Part 9, s 83 (1), which acknowledge and accommodate the 16 and 17-year-old as child and not an adult, for the purposes and duration of a Compulsory Supervision Order. The order ceases to have effect upon the individual's 18<sup>th</sup> birthday.

<sup>589</sup> Gallagher (n 450) 8;

To be denied parity of participation with one's peer group is serious enough, but to be left in ignorance, of the right to participate is fundamentally wrong and unjustifiable.

The reliance on others who are less invested than oneself in one's research is a constant concern and extends to the idea of the gatekeeper and the impact they can have. The effort and time that goes into initiating collaborations can be extensive. It involves continual and regular fostering or negotiation and re-negotiation. Even then, the researchers invested efforts do not always yield a successful outcome.

## **6.6 Questions and themes**

### **Question style and interview format -Adaptability and the 'ad hoc'**

The manner of the interviews meant that every interviewee was accommodated. By that it is meant that they were enabled the opportunity to respond as honestly and openly as they could or would and no two interviews were the same. Though planned and formally executed, the interviews were also relaxed. The adoption of a 'conversational' narrative relative to the 'key themes' was key to this. Within the first few minutes of each interview, the level of 'dramaturgy' and the degree of 'stagecraft' required was re-enforced. The 'performance' analogy being relevant and tangible in some of interview settings, it was interesting to note that Berg and Lune posited that, '*...there should be no fiction to the encounter*'<sup>590</sup> This researcher would qualify that by saying there should be as little fiction as is possible in such an encounter.

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<sup>590</sup> Bruce L Berg and Howard Lune, *Qualitative Methods for the Social Sciences* (8<sup>th</sup> edn, Pearson 2012) 106.



As the empirical stage progressed the idea of conversational analyses became more relevant.<sup>591</sup> Non-verbal behaviour in the interviews was mostly observed in the quieter settings when the interview was 'on tape'. This informed the analysis in 'real time' and reflectively in the post' interview phase. Though the concept and practice of conversational analysis was not utilised with the degree and formality as it would in other fields of research, it was still a valuable and applicable empirical data collection tool and method.

The questions on 'processes and mechanisms' were framed in such a way as to empower the interviewee and elicit the broadest range of their experiences. The tone, where feasible was conversational and informed by the key themes as detailed in processes and mechanisms. The adoption of key themes and open questions only deviated from when clarifications were required by the researcher; ie where an interviewee was less than forthcoming OR where a point of interest was raised and then, pursued.

#### **6.6.1 Explanations of interviews -furnished to interviewees and relevant 'adults' and 'young people'**

Interviewees were furnished with the following documentation prior to each interview:

**Explanation of the research**  
**Interview Schedule**  
**Consent form**<sup>592</sup>

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<sup>591</sup> See: Harvey Sacks (auth), Gail Jefferson and Emanuel A Schegloff (eds), *Lectures on Conversation* (Wiley-Blackwell 1995).

<sup>592</sup> See Appendices, C, F, H.

The interview explanation and the interview schedule were designed and tailored for both adults and young people.<sup>593</sup> With reference to the 'children and young people' being interviewed, the necessary consents were sought and obtained days or weeks in advance, where permission was given from the relevant authority and/or guardian; all interviews commencing with an explanation of the research. However, individual consents would again be sought just prior to the interview and a schedule of 'key themes' would be furnished prior to each interview. The three main groups of interviewee types were as follows:

**Children and Young People- SERVICE USERS - CYP**

**Adults - SERVICE FACILITATORS – SF**

**Adults - SERVICE MANAGERS – SM**

The data created from the interview stage was analysed according to participant's understanding and opinion of the following, which mirrored the themes selected from the outset.

#### **CHILDREN AND YOUNG PEOPLE - SERVICE USERS - CYP**

Views and Understanding of rights

Views and Understanding of participation

Views and Understanding of support mechanisms and procedures

Views and Understanding of complaints processes

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<sup>593</sup> See Appendices, A, B1, B2.

## **ADULTS - SERVICE FACILITATORS – S F**

Views and Understanding of CYP's rights

Views and Understanding of CYP's participation

Views and Understanding of CYP's support mechanisms and procedures

Views and Understanding of CYP's complaints processes

## **ADULTS - SERVICE MANAGERS – S M**

Views and Understanding of CYP's rights

Views and Understanding of CYP's participation

Views and Understanding of CYP's support mechanisms and procedures

Views and Understanding of CYP's complaints processes

### **6.6.2 Example of responses to 'rights' by children and young people**

This topic was broken down into manageable segments and this selection is just an example of responses which are to be found throughout Part 2 of the thesis as regards the 'real politick'.

**CYP 6** *'Well, I'm not sure, but it's like, I'd probably say I have a right to speak...You have a right to say what's on your mind and how you feel, cause feelings make you human really.'*

**CYP 5** *'That I'm my own person, that ...It depends what it is. I could speak freely about something, no matter what, even though, but if it's like....I don't know how to explain it like... I cannae think, but if it was something really bad, then.... It's just*

*something [its] said to be honest. You know you've got them; you'd know what they were. As long as you have them, you're not really bothered about what they are.'*

**INTERVIEWER:** *Okay, so if I said to you, what rights do you think you have?*

*Let's go for really basic stuff, what rights do you think you have?*

**CYP 5** *'That I can express myself freely without being judged and I can speak my mind if something's coming, if something is not right to me. I can speak it, and no-one will say no to me and things like that.'*

**CYP 2** *'That I can complain if something is wrong. I would feel confident doing that. That I have rights and responsibilities. I have the right to food, shelter and things like that.'*

This element of the interview themes highlighted that the children and young people interviewed were reasonably confident of their knowledge of 'rights' and what 'rights' means. That stated, on occasion they struggled to articulate this self-ascribed knowledge, but that did not detract from their general understanding of the topic. This was not a revelation, nor a concern because some of the adult respondents in this study also found it difficult to articulate on the same topic. The responses detailed by the children and young people, about their experiences of advocacy and other supporting roles and mechanisms was, for the most part, upbeat. When it came to an appraisal of the procedures in which they had been, or were still involved in, their responses were perhaps, less generous.

## 6.7 Personal experiences of the researcher the ‘sympathetic witness’

In Boylan’s earlier thesis, she discussed the ‘sympathetic witness’.<sup>594</sup> This in turn led the researcher to Finch’s writing and the emphasis on the female.<sup>595</sup> It resonated in this study and it struck a chord with this female researcher and the female interviewees.

*‘However effective a male interviewer might be at getting women interviewees to talk, there is still necessarily an additional dimension when the interviewer is also a woman, because both parties share a subordinate structural position by virtue of gender.’<sup>596</sup>*

Of all the females interviewed, only two participants appeared not to buy into the idea of the researcher as a ‘sympathetic witness’. These individuals were somewhat guarded and cautious. Coincidentally or incidentally, they both held senior positions, though not in management per se. There were exceptions to the idea those in a manager’s role will be cautious and guarded, when for all intent and purpose this researcher was received as the sympathetic witness. Those participants were relaxed and candid interviewees; quite unusual, given their status (premised on the researchers experience of management interviewees), but that could be explained by reference to their individual contexts. One participant had already considered resigning and leaving the jurisdiction. The second

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<sup>594</sup> See: Jane Boylan, ‘Reviewing your review’: a critical analysis of looked after children’s participation in their statutory reviews and the role of advocacy’ (DPhil thesis, Staffordshire University 2004).

<sup>595</sup> Finch (n 567) 160-180.

<sup>596</sup> Finch (n 567) 170.

participant had already considered retirement. This may have influenced their desire to 'open up', which indicates that there are many more factors at play beyond and above the shared 'feminine' when it comes to interviewing females (by females).

#### **6.7.1 Observations during the field work stage –understanding, awareness and bias**

Some adult participants (facilitators and managers) struggled to make immediate and real connections between their role and an understanding of children's rights, in practice and theory. **SF 9** stated,

*'...There is that kind of thing, there is the rights and there is the responsibilities and I think there needs to be a clear thing as well for children and young people but also for parents and carers, it's like these are the rights but these are the responsibilities and sometimes folk don't know that.'*

Some service facilitators could not make the association between the need for a reasonable working knowledge of rights and their ability to carry out their role. They could not understand the negative effect such a lacuna could have on the child or young person and their lives, irrespective of the statutory or non-statutory premise of the procedure they were involved in. For the most part however, many supporters did their utmost to apply their accrued base knowledge to enable the child or young person to exercise a basic right of participation in a decision making process. There were others, often employed in advocacy and other support roles/mechanisms that were more than capable of exercising rights on behalf of

the children and young people they worked with and for, despite their knowledge of legal formalities being 'mixed'. Other supporters enlightened and informed their peers, other service users and non-supporting facilitators.

## **6.8 Conclusion**

It would be disingenuous to the individuals, bodies and organisations featured in this study to state that there is an endemic lacuna of knowledge with regards children's rights and that that negatively effects the child or young person in a decision making process, statutory or non-statutory. There are however gaps in some fundamental rights basics, but this is not to say that the delivery and acquisition of knowledge around children's rights must be formalised within strict parameters. That is not what is being recommended in this study, because not everyone requires to be, nor desires to play the academic or the lawyer. It would however be a sagacious move if an authority (its departments and management) were to implement regular and targeted training relative to given posts and the role holders of those posts. This could be classed as a level of Continuing Professional Development (CPD) by an authority.

There were participants/facilitators in this study who were discernibly knowledgeable on their role and its function; cognisant of children's rights within their roles. These same facilitators had importantly, made efforts to disseminate appropriate rights information to their young charges. In many instances, where

these facilitators believed that there were gaps in their own knowledge, they did not hesitate to seek assistance from another colleague, or even another agency.<sup>597</sup>

Within the environments considered and critiqued in this study, knowledge of children's rights has often been accrued 'on the job' by driven and enthused facilitators and even managers. This is in deference to overt and formal provision by agencies and authorities; ie an insufficiency of regular and applicable training of supporting roles. That stated, it would be unfair to denigrate a whole organisation; unitary authority or 3<sup>rd</sup> party NGO, for not adopting a 'child centric' position, based on the tenets of the CRC. The exception to that criticism is directed to agencies and bodies which undoubtedly promote themselves as child centric and it is those that leave themselves open to greater scrutiny. That stated, not 'all' agree that child centrism and the CRC tenets are a panacea to the realisation of children's rights. Equally, not everyone is convinced that children and young people are deserving, or capable agents and that the case for wider acknowledgement of this groups rights is disproportionate and unnecessary; a sentiment which was applied to this young groups participation in their decision making processes. This makes the topic more emotive and divisive; highly debatable, but in urgent need of discussion.

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<sup>597</sup> Facilitators from two NGO's stated that they would utilise the facility of the Scottish Child Law Centre, or in the past, the Education Unit of the Govan Law Centre. However, the Scottish Child Law Centre was also criticised by facilitators for delays in responding to their enquiries and on a couple of occasions, failing to respond at all. The examples alluded to by participants covered the period beginning early 2013 and ending late 2016.



## Conclusions

The efficacy of a procedure or a mechanism which purportedly enables children and young people's participatory rights is a major theme of this study. It is a theme which is fed by, and in turn, feeds into other areas of focus, which includes the earlier discussion on equality law and rights education within the jurisdiction under critique. It is important to highlight these 'to and fro' connections because they have a tangible effect upon this young group. The case of Wyper was an apt illustration as regards equality law, serving as it did, to illustrate a local authority's lackadaisical and dismissive attitude towards a child's enjoyment of his education.<sup>598</sup> Succinctly, if at an earlier stage of that case there had been an accessible and available independent advocate (or other competent supporter) the issues could have been reconciled earlier on.

Concomitant re-structuring of Moray's 'Education and Social services' in 2015, or thereabouts placed a significant stress on those individual departments and their members of staff. This was passed onto and affected role holders involved in this research. That disruption no doubt also impacted upon provisioning 3<sup>rd</sup> part NGO's and their operations. It fed into the delivery of services, impacting the service users, the children, young people and their families.

The LIAP procedure was a theoretically sound process in respect of meeting children's participation and enabling their voices to be heard; promoting the wider merits of 'arguable' co-protagonism. It was designed and envisaged to

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<sup>598</sup> *Wyper v NLC* [2013] ASNTS –DDC- 1 July 2013.

enable meaningful participation. The regular provisioning and use of external advocates and rights workers in the procedures formative years ensured, as near as possible, that an apt supporter was made available to a service user; not via legislative edict, but as a locally adopted policy. The examination of the reality on the ground threw up a speculative and factual reasons for its apparent 'failure'. Its demise forming a key discussion within the main body of this study. It was concluded that the procedure did not fail, in so much as it was failed. The successor to the LIAP procedure, the Child's Planning Meeting (CPM) having a skeletal statutory framework provided for by the CYP (S) Act 14, Part 5.

Moray authority may have opted for what is termed a solution-oriented method (SOM) to be utilised in these child planning meetings, but the concern with the solution-oriented method is that it does not necessarily guarantee the child an 'equal' seat in a decision making process. The LIAP procedure, theoretically anyhow, would certainly have done so. It is arguable as to whether the child or its family will be entitled participants in the new procedure (child's planning meeting) and only time will reveal.

Another legislative element regarding the participation of the child and young person came from a discussion on the incorporation and utilisation of Equality law (EA 10); that children and young people's participation is dependent, or rather, measured on their being considered equals. The glaring obstacle with this is that children and young people require additional support, via the application of the equity principle and not the equality principle. Hypothetically then, the adoption of the EA 10 as the 'informing' piece of legislation for 'all' authority acts and services (including the child's planning meeting), could be

interpreted as a 'dismissal' of Article 12 and Article 3 of the CRC. From the point of view of the child in a decision making process, their marginalisation may be exacerbated. However, it could be argued that the child's best interests and their wellbeing are still being met, but we must remember that those concepts are highly interpretive and contextual. Their deployment in law or policy does not guarantee participatory rights and this brings us right back to the moot discussion of the marginalised child. However, article 12 of the CRC is also tempered by its reference to, '*administrative proceedings*', which are clearly determined and defined by a state Party (and devolved legislatures) as '*procedural rules of national law*'. Because of the increased adoption and popularity of say, equality law and its associated measures, there is a possibility of setting back the clock in regards embedded participative rights for children and young people in non-judicial administrative processes. This is an area in anyone, but especially practitioners and academics that have a vested interest in children and young people's rights in decision making processes should be watchful.

In so far as European edict is concerned we have the ECHR and the Human Rights Act. However, we also have the European Convention on the exercise of Children's Rights and it is conjectured that ratification of that European treaty by the UK parliament would go some way in the mitigation of the child's marginalisation, especially so in decision making procedures involving the child or young person; it being premised upon the, '*best interests of children, to promote their rights, to grant them procedural rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate*

*in proceedings affecting them..*<sup>599</sup> Until, and if ratification takes place, then the discussion will remain hypothetical, but it is no less tangible and empowering, especially so for non-judicial decision making procedures; even the child's planning meeting in Moray.

Throughout this study the concepts of rights and advocacy have been mooted and conflated and those discussions have incorporated the debate on the merits and benefits of advocates and other supporter roles, ie facilitators. The discussion extended to the wider debate on rights knowledge amongst facilitators and managers and the effect upon service users in their decision making processes. Knowledge of rights amongst the children and young people, the service users was examined, bringing us to the realm of rights education. Within Moray that rights education is, to arguable degrees being met by the Unicef RRSA programme; a syllabus of comparative rights education for 'all' children and young people which should reduce aspects of marginalisation for some sub-groups of children, such as LAAC. Whilst it is a positive programme and meets the tenets of general rights education, there were concerns in respect of its implementation and the idea of rights= respects=rights being entertained as an acceptable interpretation. Prior to the service level agreement between Moray authority and RRSA not all Moray schools bought into the initiative. As has been discussed, this was indicative of socio-economic factor within individual institutions or a lack of faith in the programme. Whilst Moray Council have proudly included their

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<sup>599</sup> Council of Europe, European Convention on the Exercise of Children's Rights, ETS No.160, adopted on 5<sup>th</sup> January 1996. Article 1 (2); See also Chapter II – Procedural measures to promote the exercise of children's rights; Even though the UK has yet to become a signatory to and thereafter ratify the treaty. Correct as of June 2018.

affiliation with the RRSA programme in their 'Children's Service Plan', it is only a statement; commitment and merit (as demonstrative by reference to the LIAP procedure) will be judged on evidence, not on rhetoric.

*'.... schools putting the UNCRC principles at the heart of their culture and ethos, will aim to improve wellbeing and enable children and young people to make informed decisions and to grow confident, active and empowered global citizens.'*<sup>600</sup>

As to Unicef UK's RRSA programme, premised as it is on 'rights and respect' from a CRC foundation, there are other 'rights' education programmes available and reference has been made to wider human rights education, such as the 'Investing in Children' programme. It would be interesting to see how far RRSA can go without central government funding and whether the alternative adoption of a holistic human rights method is a future possibility in Moray schools. Again, time will tell, and it is another associated topic worthy of future consideration.

## **Marginalisation and Power**

Oliver and Dalrymple re-enforce a point made by Brandon, that children and young people on the periphery of society are often a suppressed group; the very people whose need of, and whose use of advocacy is driven by extreme exigencies

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<sup>600</sup> Moray Council, 'Moray Children's Services Plan, 2017-2020' (Moray Community Planning Partnership, 13, 2017) <<http://www.moray.gov.uk/downloads/file112627.pdf>> accessed 2<sup>nd</sup> December 2018; the same Plan informs the reader that 5 secondary schools, and 33 primary schools have registered for accreditation from Unicef RRSA.

of their lives.<sup>601</sup> These people are also, ‘a *socially silenced group*’<sup>602</sup> and this researcher has emphasised that this young group are often met with silence, in its many forms. Such experiences often occur in decision making processes where adults hold the reins of power.<sup>603</sup> What is often not discussed, is a child’s perception of marginalisation as a witness and recipient during the exercise of power in the public and private sphere. In a decision making procedure, taking time to consider something as simple as the impact of the physical set up of a reception or meeting room can make a huge difference. It can empower the child and the young person, their family and every other stakeholder present. An example of the foregoing given by reference to the Scottish Children Reporters Administration and the Children’s Hearings System, when the physical environments of their offices were critiqued; recommendations made for their improvement, per Kurlus and Henderson and the Scottish Children Reporters Administration.<sup>604</sup> From austere reception areas to adversarial set-ups in meeting rooms, these impediments are simply and economically remedied.

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<sup>601</sup> Oliver (n 347) 12.

<sup>602</sup> Jane Dalrymple, ‘Professional Advocacy as a Force for Resistance in Child Welfare’ (2003) 33 *British Journal of Social Work* 1044.

<sup>603</sup> Dalrymple (n 602); Dalrymple states that in respect children and young people, resistance of ‘*...their exclusion through constraining adult discourses....is a complex process which goes beyond finding communication spaces within the institutions of government or promoting the participation of young people. It means that adults have to resist the positioning of young people within the dominant discourses. This draws on Foucault’s notion of resistance which suggests that ‘as soon as there is a power relation, there is a possibility of resistance.’*

<sup>604</sup> Kurlus (n 70); Sophie Murphy ‘and others’, ‘It’s all about change’ (SCRA 2013) < <http://www.scra.gov.uk/wp-content/uploads/2016/03/Its-All-About-Change.pdf> > accessed 1st December 2018.

As commented upon by facilitator **SF 5**, after Kurlus and Henderson's 'Scottish Children's Reporter Administration' survey was published,

*'The environment is Crap. The waiting room is child friendly, but the actual room is not! (Interviewer can vouch for this). Even the searing plan, the set-up, it's wrong. It's set up like a court. The children, the family must feel that they've done something wrong. INVEST IN IT!'*

Ignoring such indictments (and suggestions) will only further marginalise children, their families and perhaps, supporters. The participants in this study also referred to administrative issues and connected correspondence; wherein irregular, untimely and an absence of consultation from authority ostracised children, families and supporters further. This is evidenced in respect of the LIAP process and the researcher's personal observations and experiences. Where there is an issue and concern, which logistically and legally can be rectified, then it should be addressed, judiciously. A reluctance by authority to amend an ineffectual constructed framework which does not function according to its purpose only serves to re-enforce the perception of their ignorance and closed mindset. Whilst there will always be subjective and objective viewpoints on the limits of children and young people's human rights and their participatory rights, disenfranchisement by adults' verges on the naïve. As a service facilitator and manager stated, *'You give children rights and they will exercise them responsibly, because they know they'll be listened to, etc. You don't give children rights, you just disempower them, and you'll get the banging on the table.'*

## **Dignity and Autonomy**

As theoretical and applied concepts dignity and autonomy are largely subjective, and this is demonstrated throughout the body of this thesis, particularly so with regards to the idea of children having individual rights and/or group rights. It has been suggested and fortified by some elements, that ‘only’ as a group can children and young people be endowed with dignity.<sup>605</sup> This is because the dignity concept has been affixed to the autonomy concept; the autonomy concept commonly measured by reference to one’s judged capacity, or lack thereof. Anyone not deemed to have enough capacity, as determined by society, will be judged to have failed to meet the dignity threshold construct and with that, the enjoyment of rights and freedoms it brings. In this study, it has been argued that children, even the very young and disabled have capacity; they are capable agents. The caveat, and one which is difficult to dispute and to dismiss, is that everyone’s capabilities will vary; as will their autonomous actions which are so very dependent on personal circumstances, experience and age. Nevertheless, everyone exhibits levels of capacities, through their actions and/or words, both elementary and compound. But the point being made here is that we ‘all’ qualify and are deserving of dignity. Children and young people in decision making procedures, especially the less formal processes, should expect no less an acknowledgement of that from stakeholders. That acknowledgement should include equal and meaningful participative opportunities, with the aid of an apt supporter.

The ideas of conceptual models and tests for possible consideration within the ambit of the study’s themes was also discussed, particularly the LIAP (or now,

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<sup>605</sup> Waldron (n 47).



the child's planning meeting). For example, it was argued that Hart's ladder of children's participation is limited because (to repeat Thomas), it is, '*...too linear to encompass the multidimensional character of children's participation in decisions about their lives.*'<sup>606</sup> Whilst Thomas offers ideas for the modification of Hart's model, these have only been directed to the 'formal' procedures, directed by statute and predominantly protectionist and welfarist. Leggatt's 'test', as detailed in chapter 1 has possibilities, more so in the quasi-judicial processes, ie Children's Hearings Scotland Panels and Additional Support Needs Tribunal Scotland; there is possibly a place for an application of the test in non-judicial and non-statutory processes. That could include a child's planning meeting (formerly the LIAP procedure).<sup>607</sup>

### **Wellbeing, best interests and welfare**

The interpretations of the wellbeing and best interests' concepts are arguably premised on the principles of 'in loco parentis' and 'parens patriae'. This is especially obvious in decision making procedures, with an emphasis on the quasi-judicial and judicial. As discussed in Part 1, this occurs because these concepts are rooted in protectionist frameworks; normatives that struggle to accommodate the idea and practice of a participating and autonomous child in decisions affecting their life. This is founded on their being fundamentally welfarist with the wellbeing concept posited alongside, or even supplanting the welfare principle. In failing to acknowledge and accommodate the child as a participating political

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<sup>606</sup> Nigel Thomas, *Children, Family and the State* (Policy press 2002) 66.

<sup>607</sup> Leggatt (n 21).

stakeholder, marginalisation is further augmented; the child's dependence upon the adult and authority is re-enforced and society sheepishly acquiesces to a flawed status quo.

### **Models-tools suggested**

Could we just transplant the CRC into domestic (devolved) legislation? The argument against that proposition pivots on procedural issues as regards precedence. This has been discussed in respect of the ECHR and the ECECR in that those treaties already expound the incorporation of CRC substantive tenets into domestic law by their signatory. That is just one argument dismissing the notion of transplantation, but the crux of the issue is that the CRC is insufficiently determinative in its narrative to alter and improve the lived situation of many Scottish children and young people; certainly, in so far as their being accommodated as autonomous participative agents in decision making procedures (especially non-judicial administrative types). Neither does the CRC guarantee that authority will act to provide support mechanisms to children and young people in 'all' decision making procedures, irrespective of the legal foundations of those procedures. Considered application of CRC substantive tenets into state laws and regulations, certainly in respect of the 4'ps, the CRC Optional Protocol and the timely implementation of recommendations from its Committee's Concluding Observations should have been sufficient. After all, it is a treaty which was designed to navigate complex universal cultures and political frameworks, but it is not a strong enough treaty to be so exalted. It is not the 'universal code' espoused

by Stride-Damley.<sup>608</sup> On the other hand, Hartas discussed the ethical praxis, where we not only preach, but practise morality, irrespective of our cultural or political frameworks. He argues that this will empower children and through this they will become, *'moral and social agents who understand their shared world with its global and local dimensions. ...what is common and what is different...'*<sup>609</sup>

At a very practical level and one which is cost-effective and relatively simple to apply, we have different types/models of Impact Assessments against which we can test the efficacy of 'all' legislation; of policy and even local procedures. In so far as the child and young person are concerned, rights and welfare impact assessments already exist and can readily be applied. It would be a fortuitous act if all unitary authorities and all central government departments were compelled to apply impact assessments, which at present they are not. However, conducting an impact assessment should not be viewed or enabled a 'tick box' on the part of authorities.

A method by which we ensure meaningful participation of a child or young person, is through the services of a supporter. An independent advocate would be the ideal supporter in judicial and non-judicial administrative decision making procedures. Any argument premised against governmental fiscal support and funding of a central service is weak because the Scottish government already fully funds mediation services via 3<sup>rd</sup> party agencies. Those services include Resolve (part of Children in Scotland), despite that service being a response to statutorily premised duties with regards the Additional Support Needs Tribunals Scotland

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<sup>608</sup> Stride-Damley (n 178).

<sup>609</sup> Hartas (n 179).

(and associative legislation). The reader is also reminded that the Scottish Government has contributed vast sums of money to the delivery of programmes such as the RRSA UK in Scottish schools, in the absence of incumbent statutory duties. There is then, a feasible case to be made for central funding of independent advocacy outwith statutory edicts, in non-judicial procedures.

It is hoped that this thesis will appeal to a wide ambit of practitioners and academics having an interest in the study's key themes and findings. It is the intention of the researcher to present a copy of the finalised thesis to each of the collaborating bodies and agencies, without whom the study would not have been possible. These are Moray Council, Children 1<sup>st</sup> Moray and Who Cares? Scotland. The bodies and agencies that were not full collaborators, but nevertheless provided time and data will be informed of the study's completion; such as Advocacy North East (or NEA). The thesis will also appeal to other unitary authorities, including NHS Trusts. Lastly, it should be of some interest to the Scottish Government's Education and Skills Committee and the Equalities and Human Rights Committee.

## Appendix A



### INTERVIEW SCHEDULE

#### SERVICE USERS

*The interview will be 'conversational' in tone and informed by the 'Key themes' below.*

#### KEY THEMES

*Rights, Participation, Views, Support Mechanisms, Complaints processes and practices*

#### **SECTION A: Advocacy, Advocates and processes**

Making contact

Understanding

Outcome

#### **SECTION B: Rights and Laws**

Understanding and Knowledge of

Sources

Usefulness and Importance of

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## **Appendix B1**



### **INTERVIEW SCHEDULE**

#### **SERVICE USERS**

#### **SECTION A: Understanding of Advocacy**

- 1. What do you understand about Advocacy**
- 2. What do you think an advocate does?**
- 3. How did you find out about the advocacy service?**
- 4. How has your advocate helped you?**
- 5. How long have you had an advocate?**
- 6. How do you think children and young people could find out about the services of an advocacy organisation, or an advocate?**
- 7. How would you make that happen?**
- 8. This next question will concern your views about the service you have received and your participation in decisions that have affected you?**
- 9. If you were unhappy, or dissatisfied about an issue concerning the service, would you know how to make a complaint about that issue?**
- 10. Would you recommend the advocacy service to other children and young people?**

## **Appendix B2**

### **SECTION B: Rights**

- 1. What does the statement ‘You have rights’ that mean to you?**
- 2. What rights do you think you have?**
- 3. Where have you got your information from?**
- 4. Who do you think you would approach for advice, information and even representation on a ‘rights’ issue?**
- 5. What would be the best ways for children & young people to receive information?**
- 6. What do you think is the most convenient way of accessing information?**
- 7. Have you ever heard of the following?**
  - UNCRC**
  - ECHR**
  - C & YP (S) Act 2014**
  - SCCYP**
  - C (S) ACT 1995**
  - C H (S) ACT 2011**
  - SCLC**
- 8. What other ‘rights’ or ‘legal’ terms have you heard of/ what organisations?**
- 9. In all of the listed organisations, laws and conventions, the one common theme is that children and young people have a right to ‘participate’ in decisions affecting their lives and have their ‘views’ heard. Do you think you have been able to participate and have your views heard?**
- 10. In addition to being able to participate and be heard, do you feel that you have been able to complain about an issue you were unhappy with, or dissatisfied with? Did you know how to complain?**

## Appendix C



### INTERVIEW SCHEDULE

#### SERVICE FACILITATORS

*The interview will be 'conversational' in tone and informed by the 'Key themes' below.*

#### KEY THEMES

*Rights, Participation, Views, Support Mechanisms and processes*

#### **SECTION A: Processes and Mechanisms -**

Local Integrated Assessment and Planning (LIAP) Procedures

Children's Panel (*if applicable*)

Knowledge of and experience of processes and mechanisms

Relevance of the processes and mechanisms, rights and participation

#### **SECTION B: Advocacy and Representation -**

Understanding of Advocacy for Children and Young People

Knowledge and Experience of such Advocacy or other Representation

Relevance of Advocacy and Representation, Rights and Participation

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## Appendix D



### REQUEST FOR INTERVIEW PARTICIPANTS

Dear .....

I am a Moray based independent researcher, affiliated to Robert Gordon University and am conducting a socio-legal study on the following:

#### **“A Critical Analysis of Child Advocacy Services in Moray”**

Your name has been passed to me by the Manager of the ‘Children’s Wellbeing (Engagement) Team, as you may be currently involved in, or have previous experience of the **‘Local Integrated Assessment and Planning’ procedure, (LIAP).**

I am conducting interviews with a variety of individuals who have knowledge of the above procedure and of other processes and mechanisms relating to the subject under critique.

Interviews would take about ‘30’ to ‘40’ minutes, at a date, time and place suitable to yourself.

I hope that you will consider taking part in this study, as your knowledge and views are important and valuable.

Should you agree, then please reply to this email, as per the contact details provided. I will then send the following documentation out:

- Information Sheet
- Interview Schedule (topics)
- Consent Form

Please do not hesitate to contact me should you have queries or concerns.

#### **Researcher Contact Details :**

Linda Grieve, PhD student,  
The Law Department, Aberdeen Business School,  
The Robert Gordon University, Garthdee Road,,  
Aberdeen AB10 7GE  
[l.r.grieve@rgu.ac.uk](mailto:l.r.grieve@rgu.ac.uk)

c/o

*For your information and to appease any concerns you may have in your capacity as an employee of Moray Council, the Head of Integrated Children’s Services, Susan McLaren and the Corporate Parent and Commissioning Manager, Jennifer Gordon, have kindly agreed to accommodate this research, should you require any assurance as to authenticity and permissions.*

## **Appendix E**

██████████ **Manager**

██████████

### **PROCESSES AND MECHANISMS**

Q With regards to C & YP what processes, mechanisms have you been involved in? Let's go with a chronological description

Q Why was LISO developed from say the LCN officer?

Q Can you tell me about the LAP's?

Q How was LIAP implemented?

Q What things can and do affect LIAP's?

Q How do you evaluate this implementation of GIRFEC?

Q What about feedback from C YP on the LIAP?

Q Is there an alternative to the LIAP?

Q What about training on the LIAP from the education staff to well, all those who could and are involved in same?

### **ADVOCACY**

Q How would you describe Advocacy? Could you define it?

Q What about the CYP advocate. Is there anything else that should be an additional requirement? A particular skill set?

Q What is your opinion of the wider role remitted to and agreed with Moray Council of the review of the Service being provided by Children 1<sup>st</sup> recently?

Q What do you think of the commissioning of rights and advocacy workers; the tendering of contracts to outside agencies, in Moray's case, NGO's (Children 1<sup>st</sup> and Who Cares) In deference to In-house staff, Children's Rights Officers, as is done in neighbouring authorities?

Q What you know, from the current organisation providing Rights and Advocacy under contract, what do you know about the training provided to their staff to perform their role/s?

Q What do you think about professionalising the role of an advocate?

Q What about 'accreditation'; formalising and recognising the Advocate as a specific and warranted role?

Q Where's Moray taking, or where is it going with LIAP now?

**Appendix F**

**CONSENT FORM**



**PROJECT TITLE**

**"A Critical Analysis of Child Advocacy Services in Moray"**

*Please Initial*

**1** I confirm that I have read and understand the information sheet for the above study and have had the opportunity to ask questions.

-----

**2** I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason.

-----

**3** I agree to take part in the above study.

-----

**4** I agree to the interview being audio recorded

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Named of Participant

Date

Signature

-----

-----

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Name of Researcher

Date

Signature

-----

-----

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*If applicable*

Name of Parent/Guardian

Date

Signature

*'In loco parentis'/Title and position*

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**Contact Details:**

Linda Grieve

[l.r.grieve@rgu.ac.uk](mailto:l.r.grieve@rgu.ac.uk)



**The Law Department, Aberdeen Business School, The Robert Gordon University, Garthdee Road, Aberdeen, AB10 7GE**

## Appendix G

### Confidentiality Agreement

#### Transcriptionist

I, \_\_\_\_\_ transcriptionist, agree to maintain full confidentiality in regard to any and all audiotapes and documentations received from (researcher's name) related to his/her research study on the researcher study titled (name of research study). Furthermore, I agree:

1. To hold in strictest confidence the identification of any individual that may be inadvertently revealed during the transcription of audio-taped interviews, or in any associated documents.
2. To not make copies of any audiotapes or computerized titles of the transcribed interviews texts, unless specifically requested to do so by the researcher, (name of researcher).
3. To store all study-related audiotapes and materials in a safe, secure location as long as they are in my possession.
4. To return all audiotapes and study-related materials to (researcher's name) in a complete and timely manner.
5. To delete all electronic files containing study-related documents from my computer hard drive and any back-up devices.

I am aware that I can be held legally responsible for any breach of this confidentiality agreement, and for any harm incurred by individuals if I disclose identifiable information contained in the audiotapes and/or files to which I will have access.

Transcriber's name (printed) \_\_\_\_\_

Transcriber's signature \_\_\_\_\_

Date \_\_\_\_\_

## Appendix H



### INFORMATION SHEET

#### Participants Information Sheet

#### **"A Critical Analysis of Child Advocacy Services in Moray"**

#### **A sociolegal study**

You are invited to participate in a research study. To assist you in deciding whether you would like to participate, it is important that you understand its purpose; why it is being conducted and what that will mean for you if you agree to take part.

Please take the time to read the following information, as this assists you in making the decision to be involved or not. If you have any further questions on reading same, then I will do my utmost to provide an explanation where possible.

#### **BACKGROUND**

**The United Nations Convention on the Rights of the Child** celebrated 25 years in November 2014. One of the most often cited articles of this convention is 'Article 12', *Respect for the Views of the Child*. This is particularly relevant when we consider the overarching influence of adults when taking decisions that affect children. This article recognises the right of the child to have an opinion and have that opinion considered.

**Advocacy** is one of the oldest forms of support. For the purposes of this study the type of advocacy being studied is that which supports a child or young person and enables them to express their opinions in decisions which affect them.

A literature review has identified a large volume of both 'social' and 'legal' research in 'children's rights' and 'advocacy'. There is also a dearth of current and historical works on the subjects from notable academics and other experts in these disciplines. That stated, there is still a gap in 'sociolegal' research into these areas, as well as an identified lack of qualitative data pertaining to more rural and semi-rural areas; in this case, the jurisdiction of Moray.

#### **PURPOSE OF THE STUDY**

Having identified these issues as above, this study will attempt to fill in those gaps by addressing 'key themes' from a socio-legal viewpoint.

#### **WHY HAVE I BEEN SELECTED?**

You may have or have had the services of an 'advocate'. You may be an 'Advocate', or a facilitator. You may be involved in management and /or policy making, or part of a mechanism.

Your experiences are therefore potentially relevant to this study. This is also an opportunity for you to reflect your own experiences and discuss them in the context of this study.

#### **DO I HAVE TO TAKE PART?**

The choice is yours to make. You can decide whether you wish to be part of this study. You are also at liberty to withdraw at any time, without having to provide an explanation.

#### **WHAT WILL HAPPEN IF I TAKE PART?**

Your participation will take the form of an 'interview', where your experiences and your knowledge of the study topic will be sought. The interview should take around '30' to '40' minutes and will be conducted at a location and time to suit you. It may be that if an interview cannot take place in person, then consideration may be given to a telephone interview.

Interviews may be digitally recorded, provided you give your permission for this to take place. Transcripts of individual recordings will be made available upon request.

#### **WILL MY TAKING PART IN THE STUDY BE KEPT CONFIDENTIAL?**

All participants details will be kept confidential and none of the interview materials will be personally attributable to any named individuals. Generic role descriptors such as '*service user*' will be used to promote this anonymity.

The recordings obtained in the study will be stored securely; password protected and destroyed when no longer required.

#### **WHO HAS REVIEWED THIS STUDY?**

The research study has been reviewed by Robert Gordon University's Research Degrees Committee and registered accordingly. Ethical issues have been examined, found compliant and approved.

#### **WHAT HAPPENS TO THE RESULTS?**

All participants will receive a summary report of the findings if requested. It is anticipated that the findings will be disseminated through conferences and peer reviewed articles.

Thank you for taking the time to read this 'Information Sheet' and for your consideration in taking part in the study.

For further information and enquiries please contact:

Linda Grieve

[l.r.grieve@rgu.ac.uk](mailto:l.r.grieve@rgu.ac.uk)



**The Law Department, Aberdeen Business School, The Robert Gordon University, Garthdee Road, Aberdeen, AB10 7GE**

## Appendix I



### REQUEST FOR INTERVIEW PARTICIPANTS

Dear .....

I am a Moray based independent researcher, affiliated to Robert Gordon University and am conducting a socio-legal study on the following:

#### **“A Critical Analysis of Child Advocacy Services in Moray”**

I am conducting interviews with a variety of individuals from a variety of organisations with regards the above subject.

Interviews would take about ‘30’ to ‘40’ minutes, at a date, time and place suitable to yourself.

I hope that you will consider taking part in this study, as your knowledge and views are important and valuable.

Should you agree, then please reply to this letter, as per the contact details provided above and I will provide the following documentation:

- Information Sheet
- Interview Schedule (topics)
- Consent Form

Please do not hesitate to contact me should you have queries or concerns.

Linda Grieve

[l.r.grieve@rgu.ac.uk](mailto:l.r.grieve@rgu.ac.uk)

**The Law Department, Aberdeen Business School, The Robert Gordon University, Garthdee Road, Aberdeen, AB10 7GE**

## **Appendix J**

### **CONFIRMATION MEMORANDUM EMAIL FROM S MCLAREN TO STAFF 11<sup>TH</sup> SEPTEMBER 2014**

*'Over the course of the next year she would like to interview approx. 25 staff, and also observe some LIAPs. Can you identify staff across your teams (SSWs, SWs, CLDWs, Youth Workers, FSWs, HSLW's, CSW's) who are working with children & young people who are currently engaged in the LIAP process, or who are about to start working in the LIAP process who are willing to be interviewed by Linda and negotiate for her to observe a LIAP.*

*Albeit Linda is an independent researcher this will give us a valuable insight into the advocacy needs of the children & young people we work with and enable us to plan for the future.'*



## Appendix K

### FOIS Request for Data

#### Local Integrated Assessment Planning Procedure (LIAP)

In connection with my study I request the following:

Available statistics and data from the period beginning January 2013 to March 2016 relating to LIAP's that have taken place within Moray Primary and Secondary schools, as follows:

1. The Name and Number of Primary schools involved.
2. The Name and Number of Secondary schools involved.
3. Their Associated School Group designation.
4. Which LIAP Administration they fall under, i.e. East or West.
5. The number of LIAP's held for each school for the period stated.
6. A demographic breakdown in respect of- *Age, sex, ethnicity, disability, nationality, LAC and/ or any other demographic bands utilised by the authority.*
7. The recorded reason/s for the calling of the LIAP per school- *health, education, ASL and/ or any other bands utilised by the authority.*
8. The recorded 'outcomes' as collated by the authority.
9. The systems/s utilised to record LIAP data- *electronic (type), paper or other method.*
10. The number and details of any concerns and/or complaints raised by parents, children and other individuals regarding the LIAP process and the subsequent action taken by the authority, if applicable.
11. Does the authority consider there to be an alternative to 'advocacy' support in 'meetings concerning the child or young person' and if so, what is, or what are those alternatives?
12. In the event of the LIAP being replaced as an authority wide process, could you provide details of the proposed alternative/s and expand on how such a procedure will enable the following:
  - a) The voice of the child or young person to be heard.
  - b) Participation of the child or young person, via an advocate or other support.
  - c) The promotion of the service, to include that of advocate or other support.
13. A list of the organisations, (*inclusive of 'social enterprises', private bodies and non-governmental organisations*) with whom the authority has a contract/ service level agreement to provide 'support services' to children and young people (CYP) within the authority area, in addition to a descriptive of said service.

The term 'Support services' to include - support, advocacy, representation and/or advice.  
Children and young people' to include the following categories.

  - a) Looked After Children (LAAC)
  - b) Young Carers
  - c) CYP with Additional Support Needs (ASN) in terms of education
  - d) CYP under the ambit of 'child protection'.

- e) CYP with a disability
- f) CYP of ethnic minority
- g) CYP with English as an Additional Language

**REPLY**

**19/05/2016**

**LINDA GRIEVE (1314356)**

**Reference: 101001174598**

Dear Ms Grieve

**REQUEST FOR INFORMATION UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002**

Please accept my sincere apology, but we will be unable to respond to your request within the statutory timescale. We will have a response to you before June 15th, 2016. I am sorry for any inconvenience this may cause.

Yours sincerely

\*\*\*\*\* \*

\*\*\*\*\*

The Moray Council  
info@moray.gov.uk

## **Appendix L**

### **GETTING IT RIGHT FOR EVERY CHILD – MORAY**

#### **The Role of Multi-Agency Meeting**

Final Approved Version: February 2012

Document Owner: [REDACTED] GIRFEC Development Officer

This document will clarify the role of Multi-Agency Meetings in relation to Local Integrated Assessment & Planning (LIAP) Procedures.

#### **Multi-Agency Meetings**

Multi-Agency Meetings can be used to refer a new case or consider an old case that involves new issues. Multi-Agency Meetings should not be used to discuss cases already within the LIAP system and other avenues available in the LIAP procedures, to share concerns or access support, should be used as and when required and in particular to avoid any unnecessary delays.

#### **PRINCIPLES**

The approach to Multi-Agency Meetings should be based on the aims of Education and Social Care which are to:

- . Support, enable and encourage people to achieve positive outcomes
- . Ensure prevention and early intervention
- . Share and use information openly and fully
- . Create a culture of evidence based practice
- . Ensure accessible, consistent and equitable services
- . Use resources and target capacity appropriately and efficiently
- . Practise effective working with other organisations
- . Engage and involve people through effective communication
- . Encourage a culture which values and respects human dignity

At all times, any Multi-Agency Meeting must ensure compliance with all aspects of Data Protection law and interagency policies and procedures on data protection. In particular:

- . any information shared should be on a need to know basis
- . participants should share no more information than is essential
- . there should always be a legitimate aim for sharing any information
- . parents and/or young persons should know what information is being shared with whom and for what purpose and consent to this.

#### **INTERFACE WITH CHILD PROTECTION**

In any case in which the concern could include child protection (ie a child may be at risk of significant harm) it is possible, and on occasions, essential, to proceed without consent in commencing multiagency discussions in line with Child Protection Procedures, but with the reasons for doing this being clearly recorded in terms of a child's safety. For guidance on this refer to Moray's IRD Procedures.

In the unlikely event that child protection issues are brought to, or raised during a general multi-agency meeting, care must be taken that participants have a legitimate reason to participate in any discussion that may occur. The role of Multi-Agency Meetings LIAP 2012 Moray Council

#### GUIDELINES

The following guidelines are therefore offered to support the aims stated above and to protect participants by ensuring compliance with data protection.

1. Any case discussed at the Multi-Agency Meeting should refer to a new case or to an old case which involves a new issue i.e. Multi-Agency Meetings should not be used as a platform to discuss cases already existing within the LIAP system.
2. Disclosable information by the agency raising the concern should be restricted to:
  - . Name & address of child/ family
  - . How and when consent was obtained and by whom
  - . Nature of the concern – brief and disclosed with agreement of the family who also know to whom the information will be disclosed.
3. An explanation should be given as to why it has been reasonable to wait for this meeting rather than utilise other avenues within the LIAP procedures.
4. Other agencies present may at this point express an interest in the case.
5. Next steps should be agreed and recorded in Action Minute that goes only to agencies at (4) for their records.

The Action Minute 'pro forma' should contain:

- . Name & address of child/ family
  - . How consent has been obtained and by whom
  - . Nature of the concern
  - . Agencies to be involved
  - . Next steps
  - . Who will feedback to family
6. It will be the responsibility of the Chair to ensure that the Action Minute is distributed appropriately and followed through.

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