A Critical Evaluation of the Rights, Status and Capacity of Distinct Categories of Individuals in Underdeveloped and Emerging Areas of Law

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I confirm that the published work submitted has not been submitted for another award.

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Lesley-Anne Barnes Macfarlane

Citations and references have been drafted with reference to the University's Research Degree Reference Guide

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VOLUME II

Abstract: PhD By Published Works

The aim of this thesis is to demonstrate how my research promotes knowledge exchange about my overarching research theme: the rights, status and capacity of distinct categories of individuals in underdeveloped and emerging areas of law. These categories include disempowered individuals (namely young people and transsexuals) and persons of reduced or questionable legal capacity (to date, children and disabled people).

The thesis is in two parts. Part 1 (Volume I) is a reflective commentary and Part 2 (Volume II) comprises the published work submitted. In the reflective commentary, my published work is critically appraised and placed within a wider legal and thematic framework. My overarching research theme is summarised and evaluated with reference to the legal premises, methodology and the research outcomes of my published work.

In particular, I present a critical reflection of eight of my publications, each of which is concerned with the impact of the law, and issues surrounding legal reform, upon the young and certain disempowered adults. I demonstrate that this body of work forms a contribution to interdisciplinary sharing of novel and meaningful research outputs both (i) within the academic arena and (ii) throughout the wider professional community.

I argue that my published work is original, because it is concerned with important, but largely neglected, areas of Scottish (and often wider UK) law. Furthermore, I argue that my publications are independent and significant in that they provide a distinct and critical evaluation of existing law and seek to promote the growth of individual status and capacity. This, in turn, often generates greater provision for individual rights, and the imposition in law of private law and state remedies.

Lesley-Anne Barnes Macfarlane: PhD by Published Works

List of Evidence in Support of Thesis

List of Sole Author Publications (from 2006 to date) included:

1. '"A child is, after all, a child": ascertaining the ability of children to express views in family proceedings', *Scots Law Times*, 2008, 18, 121-127

2. '"Moral actors in their own right": consideration of the views of children in family proceedings', *Scots Law Times*, 2008, 21, 139 -142

3. '"Dear Judge, I am writing to you because I think it's pathetic": Re A-H (Children)', *Edinburgh Law Review*, 2009, 13(3), 528-533

4. 'The Child's Right to Education', chapter in *Children's Rights in Scotland* (3rd ed., A Cleland and E.E. Sutherland), W Green (2009)

5. 'Trips, Slips and Bangs: Pupil Injury Claims and the Teacher's Duty of Care', *Juridical Review*, 2009, 3, 189 – 207

6. 'Contributory Negligence and the Child', *Juridical Review*, 2010, 3, 195 – 215

7. 'Gender Identity and Scottish Law: the Legal Response to Transsexuality', *Edinburgh Law Review*, 2007, 11(2), 162 – 186

8. 'Transsexuality and "Kidulthood": treatment and recognition', *Scots Law Times*, 2006, 25, 169 – 172 (supporting article)

Thesis Introduction

(I) An Era of Change in the Individual's Rights, Status and Capacity in Scots Law

In the course of the last three decades there has been tremendous momentum for legal change in Scotland. In particular, the general approach of Scots (and wider-UK[1]) law towards a range of previously disadvantaged groups of individual has been radically reformed.

Nowhere is this reform more evident than in the personal lives and interactions of individuals. The creation, or growth, of personal rights, status and capacity for particular groups in society has been a significant Scottish reform theme: in a 30-year period, legislation has, for example, afforded children with capacity a "right" to have their views taken and considered in various circumstances, provided recognition and remedies for cohabitants, improved the status of unmarried fathers, created broad parity between civil partners and spouses, reformed adoption law and increased available civil and criminal remedies for victims of domestic abuse.[2] This extensive, if at times precipitous, process of reform is set to continue. In 2014, the UN Convention on the Rights of the Child (also referred to in this thesis as "the UNCRC", or "the Convention") is likely to assume greater significance in Scots Law.[3] The Marriage and Civil Partnership (Scotland) Bill (2014), recently passed, also makes provision for same-sex marriage.[4]

However, while some areas of our law (such as Child and Family Law) have been substantially re-written and harmonised[5] in recent years, in other fields (such as

[1] Arguably, in Scots Child and Family Law, much of this reform began in the areas of my research with the Scottish Law Commission reports on (i) *Report on the Legal Capacity and Responsibility of Pupils*
[2] Key pieces of legislation relating to the reform areas mentioned include: Age of Legal Capacity (Scotland) Act 1991; Children (Scotland) Act 1995; Family Law (Scotland) Act 2006; Civil Partnership Act 2004 (UK-wide legislation); Adoption and Children (Scotland) Act 2007; Domestic Abuse (Scotland) Act 2011. For an overview of the work of the Scottish Parliament in this area, see Sutherland, E.E. (2011), 'Child and Family Law: Progress and Pusillanimity', chapter in Elaine E. Sutherland *et al*, *Law Making and the Scottish Parliament: The Early Years*, Edinburgh University Press, at pp 58-83.
[3] The Children and Young People (Scotland) Bill was passed on 19 Feb 2014, bill and supporting information available at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62233.aspx
[4] Marriage and Civil Partnership Bill (published 12 December 2012 and passed on 4 February 2014) and supporting documentation available at: http://www.scotland.gov.uk/Publications/2012/12/9433.
[5] The aim of, for example, the Scottish Law Commission in its *Report on Family Law* (see note 1 above), when the Commission called for a unified and "comprehensive code" on Scots Private Family Law has been achieved (certainly, since the Family Law (Scotland) Act 2006 came into force).

Delict and Education Law) legal provision remains outdated, inconsistent or uncertain.

My overarching research theme concerns the emergence, recognition and development in law of rights, status and capacity for certain groups, or categories of individual, in contemporary society. These groups, whether comprising young people, disabled people or disempowered adults, are united by a common theme: the creation, or cultivation, of contemporary rights, legal status and capacity. These three concepts, which are interconnected in theory and practice, and in law and society, are discussed below.

(II) Conceptual Framework of Critical Analysis: Rights, Status and Capacity

In subsections (a), (b) and (c) below, the three, interconnected, concepts of "rights", "status" and "capacity" are explored and developed. My work is contextualised within the relevant literature concerning each of the concepts.

(a) Rights

Defining rights

> "Lawyers lean heavily on the connected concepts of legal right and legal obligation… [which] we take… as a sound basis for making claims and demands… But our understanding of these concepts is remarkably fragile".[6]

When lawyers speak of rights, we generally mean legal rights, although, as both Hohfeld and Dworkin observe, we "fall into trouble when" when attempting to unravel what we mean by "rights", or "legal rights", any further than this.[7] Consequently, while laws provide mechanisms across a broad range of fields (including Child and Family law) through which personal legal rights are recognised and enforced, there is little discussion amongst practitioners about the origin and meaning of these rights.

[6] Dworkin R, (1977), *Taking Rights Seriously*, London: Duckworth, p 14; Hohfeld, WH, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law School Faculty Scholarship Series*, Paper 4378 (available: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5383&context=fss_papers), at p 724.
[7] *Ibid*.

Notwithstanding this, there is a significant literature concerning rights, spanning generations, continents – and disciplines. The notion that individual rights exist can be dated in the UK from as early as the *Magna Carta* (1215) and, later, the Bill of Rights (1689).[8] Rights have borne a variety of definitions over time. Such definitions range from the sensational ("nonsense upon stilts"; "an inconvenience") to the prosaic ("claims or entitlements").[9] Scholars disagree on a number of issues, including, for example: (i) can rights can ever be fully defined and, if so, with reference to which constant(s)?; (ii) do rights only exist in terms of an unconditional, corresponding (and enforceable) duty?; (iii) are wider philosophical issues concerning "permission, power and immunity" core to understanding rights?; (iv) what is the nature of the difference between a moral and a legal right?[10] The reader emerges from a broad review of the literature with an overwhelming sense of having journeyed over margins of time, place, perspective and semantics.

Pre-20th century literature that we would today recognise as concerning rights belonged principally to philosophers and renowned theorists.[11] They wrote as lovers of personal freedoms, believing that their essays about the "struggle between Liberty and Authority" might one day contribute to change.[12] Throughout the 20th century, rights-driven discussion and debate rapidly gathered momentum. It did so through a range of contemporary movements (e.g. the civil rights' movement, feminism, children's rights[13]) fuelled by activists, writers and scholars. Accordingly, in place of

[8] See (i) 'The Great Charter' at: http://www.bl.uk/treasures/magnacarta/document/index.html#, and (i) the Bill of Rights at: http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction. See also Kant I, (1793 / 2013), *Groundwork of the Metaphysics of Morals*, Print on Demand: ReadaClassic.com.

[9] Quotes taken, respectively, from (i) Bentham (see note 11 below), (ii) Freeman M, (2007), 'Why it remains important to take Children's Rights seriously *International Journal of Children's Rights* 15, at p 8 and (iii) Cameron E, (2012),'What you can do with rights', *European Human Rights Law* Review, 2, 147-159, at 147.

[10] See, e.g., Spector H, (2009),'Value Pluralism and the Two Concepts of Rights', chapter in Baurmann M and Lahno B, *Perspectives in Moral Science*, 355 – 371; MacCormick N, (1976 / reprinted 1982), 'Children's Rights: A Test-Case for Theories of Rights', *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Clarendon Press, 154-166; Campbell, K, "Legal Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed.): http://plato.stanford.edu/archives/fall2013/entries/legal-rights/; Dworkin (1977), *Taking Rights Seriously*, London: Duckworth.

[11] See Bentham J, (1843), 'Anarchial Fallacies' in J. Bowring (ed.), *The Works of Jeremy Bentham*, 2:489–534, London: Murray, as cited in Bentham, J (1782 / 1970), *Of Laws in General* (along with many of his other discussions of rights) in Hart HLA (ed.), London: Athlone Press.

[12] Quotes taken from chapter 1 (p 2) *On Liberty,* (1859 / 1998, Longman), the work of Bentham's student, John Stuart Mill. Both Mill and Bentham focused their writings upon adults.

[13] See, e.g., Federle KH (1994), 'Rights flow downhill', *International Journal of Children's Rights*, 2 343-368; Eekelaar J, (1986), 'The Emergence of Children's Rights', *Oxford Journal of Legal* Studies, 6(2), 161–182; Cassidy C, (2007), *Thinking Children*, Continuum International; Grigolo M, (2003), 'Sexualities and the ECHR: introducing the universal sexual legal subject', *European Journal of*

the more historic rights-discourse of ideas and ideals, the modern rights-discourse was concerned with emerging realities – and at times radical reform. Rights were transformed into something demanding immediate attention, whether in support of,[14] or opposition to,[15] one group or another. Likewise, questions about the political, social and legal recognition of rights became more focused.[16]

Since the middle of the 20th century, rights also became a matter of growing international importance, commonality in State approach and (significantly) governmental accountability. Many States ratified the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"), a treaty concerned with all mankind, regardless of "sex, race… religion… national[ity]… or other status".[17] Our human rights are recognised as forming part of our "inherent dignity"; they are "equal and inalienable rights [for] all members of the human family".[18] State parties to the ECHR are expected to safeguard and uphold the ECHR rights in their jurisdiction, thus ensuring that "human rights" are also recognised as being "legal rights".

Accordingly, in the UK, the language of rights has featured increasingly in legislative provisions relating to specific statutory rights and corresponding legal duties. The Human Rights Act 1998, which came into force over a decade ago,[19] incorporated the rights outlined in the ECHR into UK law. This enabled citizens to directly access their rights in domestic courts. The 1998 Act cemented the broad, contemporary view that rights should be a readily accessible – and legally enforceable – reality. Some scholars have, however, taken the view that growing "adult" human rights observance does not necessarily facilitate children's rights observance.[20]

International Law, 14(5), 1023-1044; O'Flaherty and Fisher J, (2008), 'Sexual orientation, gender identity and international Human Rights law: contextualizing the Yogyakarta principles', *Human Rights Law Review*, 8(2), 207-248.

[14] For a helpful overview of what we can learn in wider society "each time we let in an excluded group" in terms of the expansion of our "[ways] of knowing and… our current way of seeing", see Menkel-Meadow C, (1987), Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 *Miami Law Review* 29 -53 at p 52.

[15] See, e.g., Tushnet M, (1984), 'An Essay on Rights' 62 *Texas Law Review* 1384, and, O'Neill O, (1998), 'Children's Rights and Children's Lives', *Ethics,* 98, 445-46; Guggenheim M, (2005), *What's wrong with children's rights?* Harvard University Press.

[16] For contemporary rights-based discussions concerning children, see Chapter 1, Section 1.3. below.

[17] Words taken from Article 14 of the ECHR. There are currently 47 Member States (and 6 observer States, including the United States and Canada): http://hub.coe.int/.

[18] Quote taken from the preamble of the Universal Declaration of Human Rights, available at: http://www.un.org/en/documents/udhr/.

[19] Also referred to as 'the 1998 Act', which came into force on 2 October 2000.

[20] See, e.g. Fortin J, (2006), 'Accommodating Children's Rights in a Post Human Rights Act Era', *The Modern Law Review*, (69(3)) 299-326.

The UN Convention on the Rights of the Child (the "UNCRC" or "the Convention") represented a further, and significant, landmark where the rights of the young are concerned. The Convention is widely ratified, and it "codifies a recognisable cannon of thought about the rights of children."[21] This is particularly significant, for:

> "the rights given to children in the UNCRC are the rights that we – at least the 'we' of Western liberal democratic post-Enlightenment societies – now think it is important to give children" [22]

Thus, the significance of the UNCRC lies in its representation of the child himself or herself as a valid subject (or bearer) of rights, including "having agency and… having a voice that must be listened to."[23] As Sutherland observes:

> "It is one thing to be acknowledged by the legal system as an object of protection. It is quite another to be recognised as a person with rights."[24]

The UNCRC aims to do just this: to distinguish, or characterise, the child as a individual to whom specific, personal rights belong. In possessing these Convention rights, and in having these rights acknowledged in the legal systems of States Parties, children acquire a recognised legal status.[25] Thus, in contemporary UK law, both adults and children possess a range of legal rights and are owed corresponding legal obligations.

Yet, for all this, "rights" themselves remain abstract as a concept, and their meaning, impact and proper context is an enduring source of debate. It is hardly surprising, then, that one of the dominant themes found in the literature is a lack of consensus about the basics: what rights are and exactly "what you can do with rights".[26] In more

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[21] Archard D, (2004), *Children, Rights and Childhood* (2nd ed), London Routledge, at p 58. All States, save the USA and Somalia have ratified the UNCRC. See also, Fortin J, (2003), *Children's Rights and the Developing Law,* (2nd ed.), LexisNexis/Butterworths, chapter 2.
[22] Archard D, (2004), *Children, Rights and Childhood*, *ibid*, at p 58.
[23] *Ibid*, at chapter 9, p 125. Article 12 of the Convention is discussed more fully in chapter 1 below.
[24] Sutherland, E.E, Child and Family Law, 2nd ed., Thomson / W Green, p 145.
[25] Certainly, the contemporary view concerning children is that they may hold the status of "independent social actors within the social moral, political and economic constraints of society", James and James (2012), at p 5. See also Archard (2004), *supra*. For a historic overview of the child's considered (and greatly reduced) status, see Locke J, *Thoughts*, at 81, available in the following volume: Axtell JL (editor), (1960), *The Educational Writings of John Locke*, Cambridge University Press. Legal status is discussed more fully in the main text below.
[26] Cameron E, (2012),'What you can do with rights', *European Human Rights Law Review*, 2, 147-159; Sreenivasan G, (2005), 'A Hybrid Theory of Claim-Rights', *Oxford Journal of Legal Studies*, 25, 257–274.

recent decades, a positive scholarly view of this "conceptual fuzziness"[27] has emerged. Legal theorists have suggested that the "woolliness" surrounding rights is something that reflects, rather accurately, the "incommensurabilities with which life abounds".[28] In other words, perhaps we should embrace the impossibility that rights can precisely be defined or measured with reference to any agreed benchmark. They simply reflect truths at the core of who we are and what we are driven to champion. Rights therefore endure as flexible and necessary things, capable of empowering "rights-bearers"[29] in any era or civilization to be:

> "Agents… decision-makers… people who can negotiate with others, who are capable of altering relationships or decisions, who can shift social assumptions and constraints."[30]

Contemporary writers broadly agree that the concept of "a right" is "common to law and morality".[31] However, some believe that society should be wary of entrusting the ongoing recognition, evolution (and, at times, restriction) of rights to lawyers and judges. Accordingly, what might be termed the increasing legalisation of rights discourse remains controversial – even for the judiciary themselves who, according to Sumption, do not wish to be perceived as social policy creators or political decision-makers.[32] Most agree that rights should be enshrined in treaties, charters and legislation, since at least the legislature is "accountable to the electorate for their decisions".[33] Yet, even where treaties and legislation are concerned, questions persist[34] about the enforceability of rights. Such instruments do not always provide

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[27] Cameron E, 'What you can do with rights', *ibid,* at 149.
[28] Quotes taken from Raz J, (1988), *The Morality of Freedom*, Oxford University Press, at p.409. See also, Pieterse M, (2007), 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited', *Human Rights Quarterly* 29: 796-822; Griffin J, (2008), *On Human Rights*, Oxford University Press.
[29] Being the "bearer" of rights (or, indeed, any corresponding duties) is common terminology in rights-based discussions. See, e.g., Wenar, Leif, 'Rights', *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.): http://plato.stanford.edu/archives/fall2011/entries/rights/. Exactly *who* (or what) becomes a recognised bearer of rights and in *which* circumstances is one of the enduring debates in law and philosophy – and policy. Discussions about whether instinctive rather than rather than rational beings (such as animals and babies) can be rights-bearers is outwith the scope of this thesis.
[30] Freeman M, (2007), 'Why it remains important to take Children's Rights seriously *International Journal of Children's Rights* 15, at p 8.
[31] This is a dominant theme in the work of Raz and Wellman. See: Raz J,(1984), 'Legal Rights', *Oxford Journal of Legal Studies*, 4: 1–21; Wellman C, (1995), *Real Rights*, New York, Oxford University Press.
[32] Sumption (Jonathan) QC (now UK Supreme court judge), 'Judicial and Political Decision-Making, The Uncertain Boundary', F.A. Mann Lecture (Nov 9, 2011), *Guardian.co.uk*, http://www.guardian.co.uk/law/interactive/2011/nov/09/jonathan-sumption-speech-politicisation-judges.
[33] Sumption, 'Judicial and Political Decision-Making, The Uncertain Boundary'*,ibid*, p 3.
[34] See, e.g., Harel A and Kahana T, (2010), 'The easy core case for judicial review', *Journal of Legal Analysis*, (2)1, 227-256, *c.f.* Finnis J, (2013), 'A Response to Harel, Hope and Schwartz', *Jerusalem Review of Legal Studies*, (Aug) 1-20 (at p 7).

for effective rights' realisation in reality. In particular, where any instrument is too "highly general, indeterminate, lofty, aspirational and abstract… nebulous, turbid and cloudy", then this is likely to prevent it from providing "the objectively determinable criteria" required to guarantee entitlement to specific rights.[35]

My publications: the rights of distinct categories of individual in Scots Law

It is the entitlement to (or recognition of) specific rights in law that is the focus of my published work. In particular, my research is concerned with the development of certain rights through statute and judicial decision-making in Scotland. Consequently, I have not sought to conceptualise, or reconceptualise, the nature of rights themselves. My contribution is practical rather than "abstract", or theoretical. I focus on two distinct categories of individuals in underdeveloped and emerging areas of law: the young, and certain disempowered adults. I have written about: (i) the extent to which our legal system has recognised (and may yet recognise) particular rights relating to personal capacity and legal status (see below); (ii) how the practical detail of those rights has been framed in legislation and interpreted by the judiciary when individual remedies are sought; (iii) the conclusions that might be drawn in law and in legal practice about particular issues concerning individual rights, status and capacity.

Accordingly, as will be seen in the following Chapters, (i) the right of the child to express a view, and his or her capacity to participate in Family Law proceedings, (ii) the child's rights in education and (iii) the child's rights, status and capacity within the wider community are themes in my publications. Similarly, where disempowered adults are concerned, developments concerning sexuality and gender have been a focus of my research and published work, and so (iv) the rights, status and capacity of transsexuals before and after the Gender Recognition Act 2004 came into force are discussed. How these relatively new voices are accommodated in Scots law and legal practice is a significant theme in my work.

Much of my source material is primary: statute and court judgments. Also, while in my research I identify principally with the work of other Family, Child and Private

[35] Quote taken from the judgment /comments of Heydon JJ, at para 429, in the (in)famous Australian High Court case, *Momcilovic v The Queen* [2011] HCA 34 (8 Sept 2011). Similar observations have been made about rights-based legislation in the UK (e.g. see the terms of s1 of the Standards in Scotland Schools (Scotland) Act 2000, canvassed in Publication 4 at pp 212-213).

Scots Lawyers,[36] I also draw on relevant legal literature produced by academic lawyers, judges and practitioners in other jurisdictions.[37] Law and policy materials and social research are considered, with Scottish and UK Government publications in particular being referred to.[38] Some broader socio-legal literature is also drawn from,[39] and this is discussed more fully with reference to children's rights and their involvement in Family Law proceedings in Chapter 1, Section 1.3 below. A general discussion and analysis of research methods can be found here in the Thesis Introduction in Section (III) below.

(b) Status

Defining status

Discussions concerning rights are inevitably tied to discussions about status, since the status, or "official classification given to a person... [determines] their rights and responsibilities."[40] Many theorists believe that individual status and rights can only be afforded due recognition in a liberal democracy in which equal citizenship is a cornerstone. Equal citizenship means that individuals belong to a society in which:

> "[t]hey see themselves as having certain basic rights and liberties, freedoms they can not only claim for themselves but freedoms they must

[36] See, e.g., Marshall K, (1997), *Children's Rights in the Balance: The Protection Participation Debate*, Stationary Office Books; Cleland A, Sutherland E (2009), *Children's Rights in Scotland* (3rd ed.), W Green; Barr A and Edwards L, (1992), 'Age of legal capacity: further pitfalls: Part 2: Litigation and damages', *Scots Law Times*, 11, 91-95; Norrie K McK, (2013), *The Law Relating to Parent and Child in Scotland* (a new 3rd edition has now been published), W Green (in particular, chapters 1, 5, 8, 9).

[37] Freeman and Eekelaar, for example, in respect of children's rights. See, e.g. Freeman M, (1983), *Rights and Wrongs of Children*, Pinter (London); Freeman, M (2007), 'Article 3. The Best Interests of the Child', in Alen A, Vande Lanotte J, Verhellen F, Ang E, Verheyde M (eds), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers; Eekelaar J, (1986), 'The Emergence of Children's Rights', *Oxford Journal of Legal Studies*, 6(2), 161–182. For authors writing about the rights of disadvantaged adult groups see, e.g: Grigolo M, (2003), 'Sexualities and the ECHR: introducing the universal sexual legal subject', *European Journal of International Law*, 14(5), 1023-1044.

[38] Recent studies, include, e.g. Scottish Government Study: Child Welfare Hearings: A Scoping Study of the Commissioning, Preparation and Use of Bar Reports, Whitecross RW (2011), available at: http://www.scotland.gov.uk/Publications/2011/01/07142042/0; Children's Rights Alliance for England, *The State of Children's Rights in England 2013,* Review of Government progress during 2013 in implementing the UNCRC in England, available: http://www.crae.org.uk/.

[39] E.g., (cited in Publication 6): Perrochet, L. & Colella, U. (1993), 'What a difference a day makes: age presumptions, child psychology, and the standard of care required of children', 24 *Pacific Law Journal* 1323. See also: Brighouse H, (2003), 'How should children be heard?', *Arizona Law Review*, Fall 45(3), 691-711; Archard D, (2004), *Children, Rights and Childhood* (2nd ed), London Routledge. See also James A and James A, (2012), *Key Concepts in Childhood Studies*, 2nd ed, Sage Publications.

[40] The Oxford dictionary, see: http://www.oxforddictionaries.com/definition/english/status.

> also respect in others. Doing this belongs to their conceptions of themselves as sharing the status of equal citizenship."[41]

Thus, within the possession of status, there are elements of social, political and legal recognition, respect – and belonging. These elements have been discussed in respect of issues surrounding the rights, status and capacity of a range of disadvantaged groups, including children, disabled people and LGBT groups.[42] There is an inherent relativity, or mutuality, to the concept of status, for it is understood with reference to how we perceive others and how others perceive us.

This mutuality, or mutual respect, for a range of personal statuses, is a theme in legal literature about status and rights.[43] Just as legal rights confer status upon the bearer of those rights, the possession of recognised status itself confers a compendium of rights upon the individual. Such rights may be conferred by development of the common law, by legislation, treaty or by judge-made law. H.L.A. Hart suggests that the acquisition of "legal status… owe[s] [that] status… to a deliberate law-creating act."[44]

Legal status, in particular, is a platform for accessing the right to make personal choices about relationships and personal life – and having these choices validated through the appropriate legal processes.

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[41] Rawls J, (2001), *Justice as Fairness: A Restatement*, Cambridge (MA), Harvard University Press, at p 146. See also *Politics*: 1252a16, as discussed by Barnes J in his chapter, 'Aristotle and Political Liberty' in Kraut R and Skultety S (eds), (2005), *Aristotle's Politics: Critical Essays*, Rowman & Littlefield, at p 192; Koppelman, A, (1996), *Antidiscrimination Law and Social Equality*, New Haven: Yale University Press at p 85. For a general overview of this argument, see: Rawls J, (2001), *Justice as Fairness: A Restatement*, Cambridge (MA), Harvard University Press.

[42] See, e.g., (i) Children: Arneil B, (2002), Becoming versus Being: A Critical Analysis of the Child in Liberal Theory, chapter in MacLeod C M and Archard D (eds), *The Moral and Political Status of Children,* OUP; Cassidy C, (2012), Children's Status, Children's Rights and 'dealing with' Children', *International Journal of Children's Rights* 20, 57- 71; (ii) Disabled people: Becker L, (2005), 'Reciprocity, Justice, and Disability', *Ethics*, 116, 9–39; (iii) LGBT (transgender) status and rights: O'Flaherty and Fisher J, (2008), 'Sexual orientation, gender identity and international Human Rights law: contextualizing the Yogyakarta principles', *Human Rights Law Review*, 8(2), 207-248; Sharpe A, (2012), 'Transgender marriage and the legal obligation to disclose gender history', *Modern Law Review*, 7591), 33-53.

[43] The Oxford dictionary online further defines "status" as an individual's "relative... position; standing": http://www.oxforddictionaries.com/definition/english/status; Norrie K McK, (2000), 'We are family (sometimes): Legal recognition of same-sex relationships after Fitzpatrick.' *Edinburgh Law Review*, 4 (3), 256-282; Grigolo M, (2003), 'Sexualities and the ECHR: introducing the universal sexual legal subject', *European Journal of International Law*, 14(5), 1023-1044.

[44] Hart HLA, 2nd ed., (1997), *The Concept of Law*, Clarendon Law, at p 44.

Where the young are concerned, it should also be observed that "age is regarded as a key definitional marker of the status of [the] 'child'".[45] This is the case notwithstanding widely expressed concerns about the restrictive nature that age benchmarks can have on children in terms of personal development, participation in various activities and perceived competence.[46] In contemporary society, the child's age is characteristically perceived a valid measure of maturity, irrespective of a prevailing view in Childhood Studies that:

> "challenges static accounts of the 'life cycle' as a fixed and repetitive sequence of ages and stages within human life and experience."[47]

This more flexible construct of ageing as a diverse biological and social process has certainly not made great inroads into the law. The legal imperative for certainty and regulation is deeply ingrained in statute, policy and practice.[48] Thus, for most lawyers, questions surrounding the child's status and capacity are inevitably (and instinctively) bound up with discussions about the "age and maturity."[49]

My publications: status

Insofar as my publications are concerned, personal status (as with rights and capacity) is an ongoing theme, but it is also a particular focus of my work concerning two categories of disadvantaged individual: (i) children in Education Law, and (ii) adult transsexuals in Private and Family Law.[50] In respect of both groups, it can be seen that without possessing legal status, certain significant rights and remedies are inaccessible.[51] In the case of school children, only parents are recognised as

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[45] James A and James A, (2012), *Key Concepts in Childhood Studies*, 2nd ed, Sage Publications, pp 1-3, although it should be noted that the authors observe that the tendency in modern society to "institutionalise" age is "now regarded as problematic" and unduly restrictive for children.

[46] See, e.g., Freeman M, (1983), *Rights and Wrongs of Children*, Pinter (London), chapters 1 and 7; Archard D, (2004), *Children, Rights and Childhood* (2nd ed), London Routledge, chapter 3 and 9; Punch P, Research with Children: The Same or Different from Research with Adults? *Childhood, 2002, 9(3) 321-341*.

[47] Hockey J and James A, (2003), *Social Identities Across the Life-Course*, Basingstoke/Palgrave, at p 5.

[48] This is observed by Marshall K, (1997), *Children's Rights in the Balance: The Protection Participation Debate*, Stationary Office Books at p 85, and chapter 9 of Freeman, *Rights and Wrongs of Children, ibid,* gives an excellent overview of 'Children under the Law'.

[49] Quote taken from Children (Scotland) Act 1995, s 6(1)(b). The constructs of age and maturity are discussed by James and James, *ibid* and also by Hockey and James (2003) in chapter 2 ("The Structuring of Age") of *Social Identities Across the Life-Course, ibid.*

[50] See, in particular, publications 4 and 7.

[51] The child's developing status in Education Law is addressed in Publication 4 (and discussed in Chapter 2), p 209, under the heading "The evolving focus of educational rights". In respect of transsexuality, the developments towards the acquisition of status across a range of fields have been charted in a 'Transsexuality Timeline', addressing medical, social and legal developments, in the Appendix to this thesis. Developing status is also a significant theme in Publication 7.

possessing the legal status to access certain personal rights and remedies on the child's behalf,[52] whereas in the case of transsexuals, no legal status[53] existed prior to the coming into force of the Gender Recognition Act 2004 ("2004 Act").

Scots law concerning both children in education and adults with gender dysphoria, is underdeveloped and (certainly at the time of researching publication 7) emerging. My chief research sources were primary law (statute and case law from Scotland and elsewhere [54]), government publications and statistics [55] and (in the case of transsexuality) medical, ethical and social publications spanning decades.[56]

First, in my published work concerning children within education, the (gradually) changing face of Scots Education law is considered with reference to the relevant articles [57] of the UNCRC. I consider the extent to which contemporary Scots Education Law recognises the changing status of children. The traditional approach of Education law towards school children is grounded in an ethos in which children (perceived as human "becomings"[58]) depend on parents to make decisions for them.

Much of Scottish education statute pre-dates both international developments (i.e. the UNCRC) and domestic reform concerning children's participation in decision-making (i.e. Age of Legal Capacity (Scotland) Act 1991; Children (Scotland) Act 1995). The foundations of Education Law[59] have not yet been entirely rebuilt. The ongoing process of reform is "somewhat fragmented":[60] it can be observed that Scottish statute

[52] This is true, even in respect of children who may be competent to instruct their own solicitor. See Publication 4.
[53] As observed in Publication 7, this left the transsexual in a "legal no [wo]man's land".
[54] E.g: (i) Education Law: Standards in Scotland's Schools etc. Act 2000; *Sim v Argyll and Bute Council* [2006] CSOH 144; (ii) Transsexuality: *Forbes-Sempill,* 29 Dec 1967, Court of Session Outer House, court process available National Archives of Scotland, CS258/1991/P892; *Goodwin v UK* (2002) 35 EHRR 18; Gender Recognition Act 2004.
[55] E.g: Scottish Executive Statistics for 2006-7: www.scotland.gov.uk/schoolstats; Scottish Executive Education Department Circulars 5/2003, 8/2003 and 1/2005; Scottish Public Services Ombudsman documentation and Scottish Government Publication: *Transforming Public Services: Complaints, Redress and Tribunals* (2004).
[56] E.g: Benjamin H, (1954), 'Transsexualism and transvestism as psychosomatic and somatopsychic syndrome', 8 *American Journal of Psychotherapy* 219-230; Smith D K, 'Transsexualism, sex reassignment surgery and the law', (1971) 56 Cornell L Rev 963-1009; Blasius M and Phelan S, *We are everywhere: a historical sourcebook in gay and lesbian politics,* Routledge (1997); J.N. Zhou J N *et al*, (1995),'A sex difference in the human brain and its relation to transsexuality', *Nature*, 378, 68-70.
[57] Notably, articles 12, 23, 28 and 29.
[58] See, e.g., Arneil B, (2002), Becoming versus Being: A Critical Analysis of the Child in Liberal Theory, chapter in MacLeod C M and Archard D (eds), *The Moral and Political Status of Children,* OUP; Freeman M, (2007), 'Why it remains important to take Children's Rights seriously *International Journal of Children's Rights* 15, 5-23.
[59] See Publication 4, and Chapter 2 of this thesis.
[60] Publication 4, at p 231.

does not yet fully reflect significant changes made to the child's legal status over the last two decades.

Secondly, my publication concerning the status of disempowered adults (to date, transsexuals) was produced when the Gender Recognition Act 2004 was recently in force. The 2004 Act was perceived as a mechanism for recognition of the transsexual's status in UK Law across various interconnected fields, ranging from family life, to sports and employment.[61] It had been noted that:

> "over time, 'sexual orientation' has assumed the meaning of a status and has been treated as a prohibited ground of discrimination."[62]

Yet, the same could not be said of gender identity prior to the coming into force of the 2004 Act. Arguably, transsexuals have still not fully achieved a status that ensures access to the full gamut of rights in Scots (or UK) Family Law.[63] Developments in the legal status of transsexuals continues to be a personal research interest.

The third, and final, concept developed here concerning my published work is "capacity". Whereas status is concerned with personal ownership of certain rights and responsibilities in social, political and legal life, capacity is concerned with personal facility to make legitimate decisions.

(c) Capacity

> "Capacity is a construct which enables law to recognise and validate the decisions that a person makes... denial of legal capacity can mean that a person is stripped of the legal authority to [decide]… Legal capacity therefore underpins the enjoyment of a range of fundamental rights."[64]

Criteria exist in many western jurisdictions whereby personal capacity to make certain decisions can be judged. These criteria are not always agreed between

[61] Most provisions of the 2004 Act came into force on 4 April 2005. See, e.g., 2004 Act, ss 9, 12, 15 20. The continuing impact of the 2004 Act is discussed in Chapters 3 and 4.
[62] Grigolo M, (2003), 'Sexualities and the ECHR: introducing the universal sexual legal subject', *European Journal of International Law*, 14(5), 1023-1044, at 1044.
[63] See: Sharpe A, (2012), 'Transgender marriage and the legal obligation to disclose gender history', *Modern Law Review*, 7591), 33-53, and representations made by the Scottish Transgender Alliance in respect of the (current) Marriage and Civil Partnership Bill, consultation documentation available at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx.
[64] Lewis O, (2011), 'Advancing legal capacity jurisprudence', *European Human Rights Law Review*, 6, 700-714, at p 700.

regulating bodies, and much of the guidance about capacity is focused on particular areas of practical and theoretical difficulty, such as mental health, disability and medical treatment (e.g., Adults with Incapacity (Scotland) Act 2000). Where children are concerned, capacity to consent to medical treatment has been the focus of much literature and guidance to date.[65] In other fields, however, mutualising clinical and legal understandings of capacity criteria is emerging as an issue deserving further consideration.[66] Accordingly, both the conceptualisation of capacity and practical issues surrounding the determination of capacity are highly interdisciplinary subjects.

A considerable body of literature exists concerning capacity (and the connected issues of autonomy,[67] personhood[68] and competence[69]). In consequence, the meaning of capacity and how it should be assessed is debated across a range of fields, in particular law, medicine and philosophy.[70]

Determinations of capacity

Insofar as individual capacity determinations are concerned, various components to capacity have been proposed. The components are diverse, and they are the product of considerable ethical, clinical and professional contributions – but they are neither fixed nor are they universally agreed. The first component that might be proposed is *decision-making competence*. It is however, unfortunate that the terms "competence"

[65] See, e.g., Donnelly M, (1995), 'Capacity of minors to consent to medical and contraceptive treatment', *Medico-Legal Journal of Ireland*, 1(1), 18-21; Buchanan A, (2004), 'Mental Capacity, Legal Competence and Consent', *Journal of the Royal Society of Medicine*, 920, 415–420; Gilmore S and Herring J (2011), '"No" is the hardest word: Consent and Children's Autonomy', *Child and Family Law Quarterly*, 23(1), 3-25.

[66] See: Tan JOA and McMillan JR, (2004), 'The discrepancy between the legal definition of capacity and the British Medical Association's guidelines', *Journal of Medical Ethics*, 30, 427-429; Elliot C, (2011), 'Criminal responsibility and children: a new defence required to acknowledge the absence of capacity and choice', *Journal of Criminal Law*, 75(4), 289-308.

[67] See, e.g., Dworkin G, (1988), *The Theory and Practice of Autonomy,* Cambridge University Press. See also Callan E (2002), Autonomy, Child Rearing and Good Lives, chapter in MacLeod C M and Archard D (eds), *The Moral and Political Status of Children,* OUP; Driscoll J, (2012), 'Children's rights and participation in social research: balancing young people's autonomy rights and their protection', *Child and Family Law Quarterly*, 24(4), 452-474.

[68] In *Finnie v Finnie,* 1984 SLT 439, for example, Lord Cameron indicated that pupils, in lacking capacity, were those "without legal personality".

[69] See, e.g., Pincoffs EL, (1991), 'Judgments of Incompetence and Their Moral Presuppositions', *Philosophy and Medicine*, 39, 79-89; Buchanan AE and Brock DW, (1989), *Deciding for Others: The Ethics of Surrogate Decision Making*, Cambridge: Cambridge University Press.

[70] For a broad overview of cross-discipline questions that might be asked about decision-making capacity, see Pincoffs EL, (1991), 'Judgments of Incompetence and Their Moral Presuppositions', *Philosophy and Medicine*, 39, 79-89. For a legal theorist view, see Dworkin G, (1988), *The Theory and Practice of Autonomy,* Cambridge University Press. Discussion about the conceptual differences and overlays between "autonomy", "competence" and "capacity" is beyond the scope of this thesis.

and "capacity" have become virtually indistinguishable in some areas of the law, particularly in respect of the young. Hence, the Age of Legal Capacity (Scotland) Act 1991 deals with (among other things) the capacity of the child to instruct a lawyer and consent to medical treatment, whereas medical issues have been addressed in England largely by courts on the basis of ascertaining "*Gillick*-competence". This has led to discussions about whether *Gillick*-competence can be extended to other fields.[71]

A second component of capacity is believed to be *rationality*. The theory of rationality admits, however, that those with capacity may still "make unpopular" or (what appear objectively to be) "highly irrational" decisions. A considerable body of medical (and medico-legal) literature exists about competence and "rationality".[72] *Informed awareness about the circumstances* in which the decision is being made is considered by many to be a third component in the possession of capacity. This might be described as possessing an "authentic" and reasonably accurate appreciation of reality. Roberts (a psychiatrist) observes that subjective factors (including life history, possible emotional distress and experiences of "power relationships")" should also be considered in respect of safeguarding the broad awareness, and voluntariness, of the subject.[73]

A fourth proposed component of capacity is *freedom from coercion* – although it should be noted that this is something that lawyers tend to presume "if no evidence exists that someone has unduly influenced or coerced the person deciding".[74] A final component of capacity often suggested (in the case of children) is attainment of *requisite age and / or maturity*. In Scots Law, age, in particular the age of 12, is often either a conclusive or a presumptive feature insofar as decision-making (and participating) capacity is concerned. This is notwithstanding that:

[71] See, e.g., Buchanan A, (2004), 'Mental Capacity, Legal Competence and Consent', *Journal of the Royal Society of Medicine*, 920, 415–420; Driscoll J, (2012), 'Children's rights and participation in social research: balancing young people's autonomy rights and their protection', *Child and Family Law Quarterly*, 24(4), 452-474.

[72] See, e.g., Buchanan A, (2004) 'Mental Capacity, Legal Competence and Consent'*, ibid,* and (in respect of children) Potter J, (2006), 'Rewriting the competency rules for children: full recognition of the young person as rights bearer', *Journal of Law and Medicine*, 14(1), 64-85.

[73] Roberts LW, (2000), 'Informed Consent and the Capacity for Voluntarism', *American Journal of Psychiatry*, 159(5), 705–712 (quotes from 705;707).

[74] Appelbaum PS, Lidz CW and Klitzman R, (2009), 'Voluntariness of Consent to Research A Conceptual Model', *Hastings Center Report*, 39(1): 30–39, at 32, available at: http://www.thehastingscenter.org/Publications/HCR/Detail.aspx?id=3126.

> "Article 12 [of the UNCRC] imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard." [75]

It has been observed that the law is "increasingly being called upon to respond" to a variety of developments of a clinical and ethical nature.[76] Certainly, for lawyers and other professionals acting under instruction, the lack of consensus about what capacity is and the lack of precise direction about how it should be measured is challenging. This is particularly true when, for example, a statutory test determining capacity in law does not accord with empirical research about what is believed to constitute actual, or clinically measurable, capacity.[77] Thus, for example, statute might deem legally capable the psychopath lacking *mens rea.*[78] Contemporary theorists have explored some interfaces between legal tests and clinical determinations.[79]

However, in other areas, such as family life, and Family Law, a veil is often drawn over legal determinations of capacity – and such determinations frequently concern children. Social research has provided valuable insights into how issues relating to capacity within the Family Law process are dealt with by lawyers and other professionals. Studies indicate, for example, that "capacity" can become a routinely used tool through which the views of children below the age of puberty (often perceived as "incapable" of expressing a view) have simply not been heard.[80] Here it must be acknowledged that the fact that "children's physical and mental capacities [often] increase with age and experience" is reflected "somewhat crudely"[81] in Scots law.

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[75] UN Committee General Comment 12, (2009), at para 20, discussed in Chapter 1 below. See, e.g., Age of Legal Capacity (Scotland) Act 1991; Children (Scotland) Act 1995.

[76] Charland, L, 'Decision-Making Capacity', *The Stanford Encyclopedia of Philosophy* (Summer 2011 Edition), Edward N. Zalta (ed.): http://plato.stanford.edu/archives/sum2011/entries/decision-capacity/.

[77] Discussed in Elliot C, (2011), 'Criminal responsibility and children: a new defence required to acknowledge the absence of capacity and choice', *Journal of Criminal Law*, 75(4), 289-308.

[78] See, e.g. Quek J, (2012), 'Our brain "Kant" tell us? A Kantian perspective of how neuroscience challenges our notions of moral responsibility and the legal implications', *UCL Journal of Law and Jurisprudence*, 1(10, 22-43.

[79] See, e.g., Richardson G, (2010), 'Mental Capacity at the Margin: The Interface Between Two Acts', *Medical Law Review*, 18, 56–77.

[80] See Tisdall K, Baker R, Marshall K, Cleland A, (2002), Giving due regard to children's views in all matters that affect them Voice of the Child Under the Children (Scotland) Act 1995: Feasibility Study, Scottish Government, available at: http://www.scotland.gov.uk/Publications/2002/09/14938/7710; (Australian study) Parkinson P and Cashmore J, (2008), *The voice of the Child in Family Law disputes*, OUP.

[81] Norrie K McK, (2013), *The Law Relating to Parent and Child in Scotland* (3rd edition), W Green, at p 137. For an early discussion on the voice of the child within a legal context, see Marshall K, (1997),

My publications: capacity generally

It is this rather "crude" approximation (or interpretation) of child capacity in Scots law with which my relevant child-related publications are concerned. As with rights, I have not theorised about the concept, or construct, of capacity itself. I have suggested, though, insofar as "capacity to neglect" is concerned, that capacity might (as an evolving legal concept relating to delictual liability) be broadly construed as meaning simply "ability" as per the broad child psychology approach adopted by Professor David Wood *et al.*[82] However, in adopting a traditional legal research approach (see Part (IV) below) my principal focus has been a critical analysis of various factors – found in statute or observed by courts – believed to shape legal perceptions of child capacity in Scottish civil law (see, in particular, Chapters 1 and 2 below).[83]

Little has been written about what child capacity means by Scots lawyers or academics,[84] and my principal sources were: (i) the report and consultation material of the Scottish Law Commission (the body responsible for our current statutory provisions about child capacity[85] found in the Age of Legal Capacity (Scotland) Act 1991); (ii) judicial observations about capacity (from Scottish courts, and persuasive observations from elsewhere[86]); (iii) relevant literature on child capacity and development from other disciplines.[87] Capacity in respect of each specific area addressed in my publications, including disempowered adults, is discussed below.

Children's Rights in the Balance: The Protection Participation Debate, Stationary Office Books at pp 94-100 and chapter 6. Other professions have addressed competency and consent issues better: see, e.g., Buchanan A, (2004), 'Mental Capacity, Legal Competence and Consent', *Journal of the Royal Society of Medicine*, 920, 415–420. However, it has begun to be recognised that child development should be better addressed in law. See, e.g., Elliot C, (2011), 'Criminal responsibility and children: a new defence required to acknowledge the absence of capacity and choice', *Journal of Criminal Law*, 75(4), 289-308.

[82] Publication 6 at p 204.

[83] See Publications 1, 2 and 3, discussed in Chapter 1.

[84] Examples of the limited legal literature available include: Barr A and Edwards L, (1992), 'Age of legal capacity: further pitfalls: Part 1: Succession and trusts', *Scots Law Times*, 10, 77-83; Barr A and Edwards L, (1992), 'Age of legal capacity: further pitfalls: Part 2: Litigation and damages', *Scots Law Times*, 11, 91-95; Nichols DI, (1991), 'Can they or can't they? Children and the Age of Legal Capacity (Scotland) Act 1991', Scots Law Times, 34, 395-40.

[85] Scot Law Com, (1987), *Report on the Legal Capacity and Responsibility of Pupils and Minors*, No 110.

[86] See, e.g., *Houston, Applicant* (1996 SCLR 943); *G v St Gregory's Catholic Science College Governors* [2011] EWHC 1452 (Admin).

[87] See, e.g., Punch P, (2002), 'Research with Children: The Same or Different from Research with Adults?', *Childhood,* 9(3) 321-341; Buchanan A, (2004), 'Mental Capacity, Legal Competence and Consent', *Journal of the Royal Society of Medicine*, 920, 415–420; Tan JOA and McMillan JR, (2004),

Certainly, the relevant sections of current legislation governing the child's capacity in civil law[88] are particularly vague. This is discussed in Publications 1, 2 and 8. "Capacity" (or "legal capacity" as it is termed in the Act) is not defined in the Age of Legal Capacity (Scotland) Act 1991 ("the 1991 Act").

In their report preceding the 1991 Act, the Scottish Law Commission stated that their proposals were "expressly limited to questions of capacity in the private law field" leaving untouched "statutory age limits and questions of delictual… responsibility. Neither did they intend the 1991 Act to "to affect the actual capacity of a young person" who "might still lack capacity for other reasons such as mental disorder, for example".[89] This seems to indicate their intention that "legal capacity" (albeit not defined) may well be a unique construct of its own, possessing a separate nature from factually determinable "capacity". Section 2 of the 1991 Act provides a range of scenarios[90] in which children may be found capable of making autonomous – and legally recognised – decisions.

In some cases, no age of capacity, or presumed capacity, is mentioned in the 1991 Act.[91] Where the child's capacity to instruct his or her own solicitor is concerned, section 2(4A) provides that a child with a "general understanding of what it means to do so" may instruct. No guidance is given as to how such "general understanding" should be ascertained,[92] but 12 is stated as the statutory age at which "sufficient age and maturity" to possess such an understanding is presumed. As Sutherland observes, it is somewhat "curious" that "the 1991 Act is silent on the question of who assesses

'The discrepancy between the legal definition of capacity and the British Medical Association's guidelines', *Journal of Medical Ethics*, 30, 427-429.

[88] Excluding delictual responsibility: 1991 Act, s 1(3)(c). This is discussed in Publication 6. *N.b*. the age of criminal prosecution is currently 12 years: Criminal Procedure (Scotland) Act 1995, s 41.

[89] Scot Law Com, (1987), *Report on the Legal Capacity and Responsibility of Pupils and Minors*, No 110, at para 3.136.

[90] These include, e.g., common transactions (s 2(1)); making a will (s 2(2)); consenting to adoption (s 2(3)); consenting medical/surgical/dental procedures (s 2(4)), including storage of gametes (s 2(4ZA)); instructing a solicitor (s 2(4A/B).

[91] E.g. common transactions (s2(1)) and consenting to medical treatment (s2(4)).

[92] Age of Legal Capacity (Scotland) Act 1991 ("the 1991 Act"), s 2(4A) and also s 2(4B), which provides that a child who has legal capacity in terms of s 2(4A) "shall also have legal capacity to to sue, or to defence, in any civil proceeding".

the child for this purpose" – thus, leaving the determination in the hands of family lawyers in practice.[93]

Further, that this vague capacity test mentions the age of 12 produces "noticeable circularity,"[94] since there is now a widely held view that children below this age will lack capacity to instruct. Norrie submits that:

> "[T]he phrase "age and maturity" must be take as a single unified concept the substantive content of which is mental capacity, so that a child aged 12 years or more is presumed to have the mental capacity."[95]

This interpretation seems eminently sensible, but exactly what constitutes "mental capacity" in law – and how it should be measured – remains unclear. Scottish courts do not habitually instruct experts in cases concerning young children or children who may or may not be capable of expressing a view on the point of "mental capacity", unless illness or distress is a highly visible factor.[96] Lawyers do not generally record the basis upon which they make individual assessments about whether a child possesses "capacity to instruct" them,[97] and challenges to assessments of child capacity are (perhaps as a consequence) rare.[98]

Further, the language of the 1991 Act was repeated in later legislation: 12 years is also stated in the Children (Scotland) Act 1995 as being the age at which the child is presumed to possess "sufficient age and maturity to form a view".[99] The commonality of language found in statute therefore creates the unfortunate impression that the capacity to instruct a solicitor and the capacity to form a view are one in the same thing.[100]

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[93] Sutherland, E.E, Child and Family Law, 2nd ed., Thomson / W Green, p 511.
[94] Norrie K McK, (2013), *The Law Relating to Parent and Child in Scotland* (3rd edition), W Green, at pp 341.
[95] Norrie K McK, (2013), *ibid*, at pp 341-42.
[96] See, e.g., *J v J* 2004 Fam LR 20 (discussed in Publication 2).
[97] The requirement that all professionals dealing with children and young people be appropriately trained facilitating effective participation of children is discussed at para 49 of the UN Committee's General Comment No.12 (2009), discussed further in Chapter 1.
[98] Perhaps, e.g., where a child is ill, disabled or sufficiently distressed to such an extent that medical/psychiatric reports are obtained – this can be done by order of court (*H v H (Contact Order: Views of Child),* 2000 FLR 73).
[99] Section 6(1)(b).
[100] This perhaps adds another dimension to the traditional perspective of children as "adults in-waiting" (see Arneil B, (2002), Becoming versus Being: A Critical Analysis of the Child in Liberal Theory, chapter in MacLeod C M and Archard D (eds), *The Moral and Political Status of Children,* OUP) Children may also, it seems, be perceived as "children in-waiting to be older children, who are in turn in-waiting to be adults"!

Capacity and younger children

Perhaps it is telling that there is no substantial body of case law in Scotland concerning the expression of views by children (whether to lawyers, reporters, social workers or other professionals) below the age of 12 years in the Family Law court process. Issues surrounding ascertaining the views of younger children are a focus of Publications 1 and 2 in particular.

However, within the reported judgments we have, there is reason to believe that some genuine attempts to facilitate participation of young children are being made. In *Shields v Shields*[101] (discussed in my publications), the Inner House set aside the decision of the lower court on account of judicial failure to ascertain whether a child, who was only 7 years old when protracted proceedings began, wished to express a view. The Inner House also went on to say that enabling children to express views on more than one occasion in ongoing litigation was part of the court's "continuing duty"[102] to children.

When considering who should take the child's views (and how and when), Lord Marnoch did not believe that this should always fall within the remit of lawyers – or, indeed, should always involve the completion of the legal F9 form.[103] Instead, he said:

> "… 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... In particular, where younger children are involved or where there is a risk of upsetting the child, other methods may well be preferable."[104]

In other words, the individual child's needs and personal characteristics should determine how his views are sought. Issues of "sufficient… age" or "legal capacity" were clearly not at the forefront of the court's rationale. The Inner House simply said that article 12 of the UNCRC, rather than the article 8 of the ECHR, was "the proper starting point"[105] and left the door open for wide-ranging methods.

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[101] 2002 SC 246. See also *City of Edinburgh Council v H (A Child)* 2000 SLT (Sh Ct) 51 for a decision in which the views of a child below the age of 12 years (10½) were adhered to.
[102] *Shields, ibid*, at para 11. In *Shields*, the case had been ongoing for almost 2 years.
[103] F9 forms are discussed in Publication 2.
[104] *Shields*, *ibid*, at para 11
[105] *Shields, ibid*, Lord Marnoch, para 6

Child Capacity and the alienated/manipulated child

Certain terms (i.e. the 'alienated/manipulated child', the 'anti-contact movement') are used in this thesis to refer to scenarios in which a separated parent seeks, for no well-founded reason, to frustrate any continuing bond or relationship between their child and the other parent.[106] Such parental behaviour negatively impacts on the young, whether the children affected are old enough to express a view or not.[107]

Where an 'alienated' child, does express a view, he or she is almost certain to be doing so in an environment that is "intimidating, hostile, insensitive or inappropriate for his or her age".[108] Such an environment impacts principally upon the child's right to express a view freely. Judges and lawyers have also focused on the impact alienation/manipulation can have on a child's capacity (or perceived capacity) to express a view and a growing body of UK-wide case law exists on this point.[109] This was discussed in Publications 1 and 3 in particular and considered further in Chapter 1 of this thesis.

Child capacity and consent to medical treatment

Possessing capacity to instruct a solicitor, or to express a view, in Family Law proceedings is one of the broad dynamics of the concept of capacity I have explored in my published work. A second dynamic concerns the capacity of those below the age of 16 years to consent to certain medical or surgical treatments. This is addressed in Publication 8.

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[106] It is worth observing that it can also be the 'contact parent' who seeks to undermine the relationship between a child and his or her residential parent (see: *B v R,* 2009 Fam LR 146).

[107] As discussed in Chapter 1, a range of writing, and a variety of views arising from a breadth of disciplines, exists on this topic. See, e.g., Bruch CS, (2001), 'Parental Alienation Syndrome: Junk Science in Child Custody Determinations', 3 *European JL Reform* 383; Baker AJL, (2008), 'Parental Alienation Syndrome – The Parent/Child Disconnect', 8 *Social Work Today* (6) 24; Massarella F, (2008), 'Polarised parents', *Fam LJ*, 73(Feb), 22; Lowenstein L, *JP*, 2008, 172(20), 322; Davies H, (2012), 'Affinities, seeing and feeling like family: Exploring why children value face-to-face contact', *Childhood,* 19(1), 8-23.

[108] UN Committee, *General Comment No. 12*, para 34. See, Sutherland, discussion *in Child and Family Law, ibid,* at p 511 around child instruction of solicitors.

[109] Recent cases include: *B v S (Contempt: Imprisonment of Mother)* [2009] EWCA Civ 548; *Re S, Children* [2010] EWCA Civ 447; *Re L-W (Children)(Enforcement and Committal: Contact)* 2010 EWCA Civ 1253; *G v B* 2011 S.L.T. 1253; *K (Children)(Suspension of Contact)* [2011] EWCA Civ 1064; *B v B* 2011 Fam LR 141; *M v S* 2011 S.L.T. 918; *Re H (A Child) (Contact: Adverse Findings of Fact),* [2011] EWCA Civ 585; *Re E (A Child)* [2011] EWHC 3521 (Fam). *N.b*. the criticisms made of lawyers' tendency to simply label a wide range of family disputes concerning the cessation of contact as being 'alienation' is discussed in Chapter 1, Section 1.5, below.

Child capacity in the field of medicine is a matter that is also governed by the Age of Legal Capacity (Scotland) Act 1991. The Scottish Law Commission consulted with the medical and nursing profession prior to making its recommendations and drafting the Age of Legal Capacity (Scotland) bill. The 1991 Act thereafter replaced the former common law position in which, as a matter of "accepted [clinical] practice,"[110] parental consent alone was necessary for the medical treatment of those below the age of 16 years. The aim of the 1991 Act was therefore to remove this "unrealistic and… rigid"[111] approach which effectively negated childhood capacity in respect of medical decision-making.

Much has been written from a medical-legal ethics perspective about ascertaining capacity to consent, and whether such capacity also includes the capacity to refuse consent, throughout childhood.[112] As far as the English legal system is concerned, there remains a degree of ambiguity as to whether an:

> "… ability to consent to treatment [carries with it] an ability to refuse treatment." [113]

In Scottish legislation, once the child is deemed "capable" of making a medical decision (arguably, whether this involves consenting or refusing treatment) in terms of the 1991 Act,[114] it seems that there is no requirement that the child's decision be in his best interests. Further, unlike capacity to express a view or to instruct a solicitor, there is no minimum age (or presumed age) at which children are deemed to possess

[110] Scot Law Com, (1987), *Report on the Legal Capacity and Responsibility of Pupils and Minors, ibid*, paras 2.6 – 2.9: the consent of parents (or guardians) was also routinely sought in respect of medical treatment for those between the ages of 16 and 18 years before the 1991 Act came into force – a widespread practice without any legal foundation (para 2.8).
[111] *Ibid,* at para 3.62.
[112] See, e.g., Donnelly M, (1995), 'Capacity of minors to consent to medical and contraceptive treatment', *Medico-Legal Journal of Ireland*, 1(1), 18-21; Appelbaum PS, Lidz CW and Klitzman R, (2009), 'Voluntariness of Consent to Research A Conceptual Model', *Hastings Center Report*, 39(1): 30–39, at 32, available at: http://www.thehastingscenter.org/Publications/HCR/Detail.aspx?id=3126; Gilmore S and Herring J (2011), '"No" is the hardest word: Consent and Children's Autonomy', *Child and Family Law Quarterly*, 23(1), 3-25; Cave E and Wallbank J, (2012), 'Minors' capacity to refuse treatment: a reply to Gilmore and Herring', *Medical Law Review*, 20(3), 423 – 449. Much of the more recent literature is concerned with child capacity to consent to medial trails and research and the GMC and Medical Research Council have drawn up guidelines concerning child capacity to consent: http://www.gmc-uk.org/guidance/ethical_guidance/6469.asp.
[113] Per Balcome LJ in *Re W(A Minor)(Medical Treatment)*[1992] 4 All ER 627 at 653. See also recent Nuffield Foundation project on children's informed consent in England by Cave, E, information available at: http://www.nuffieldfoundation.org/adolescents-and-informed-consent.
[114] Age of Legal capacity (Scotland) Act 1991, s 2(4).

capacity. Instead, capacity depends entirely upon the child's appreciation of "the nature and possible consequences of the [particular] procedure or treatment".[115]

"Rationality"[116] rather than reasonableness would appear to be the major component of this particular capacity determination. Thus, in Scotland, while there is yet little authority, the position certainly seems to be that "legal capacity" is equal to *prima facea* medical autonomy, for it is:

> "[P]atently illogical that [those under 16 years] should be granted a general power to decide on medical treatment only to have this power removed when uncomfortable situations arise."[117]

This is not so in other jurisdictions, such as England[118] and Australia, where the child's best interests (or, welfare) effectively 'trump' his or her capacity, as discussed in Chapter 3 with reference to publications concerning treatment for transsexuality.

Child "capacity to neglect": Delict

Delict falls outwith the scope of current Scottish statutory provision governing "legal capacity" [119] in childhood. The rationale of our lawmakers in excluding statutory regulation of capacity in respect of delictual liability was that establishing such liability is not a legal matter, but rather:

> "[a] question of fact, depending on the child's mental capacity and the nature of the act… there is little direct authority on the liability of younger children… guidance may be drawn from contributory negligence cases in which children have been held capable… from the age of about 5 onwards." [120]

[115] Section 2(4A).
[116] See main text at note 72 above.
[117] *Houston Applicant* 1996 SCRL 943, at 945.
[118] For a recent English judgment in which the "best interests" of two children, aged 11 and 15 years, were used to overrule their refusal to consent to the MMR vaccine, see: *F v F* [2013] EWHC 2683 (Fam).
[119] Being expressly excluded from the terms of the Age of Legal Capacity (Scotland) Act 1991, s 1(3)(c). The current, common law, position is that there is no minimum age below which a child will be found incapable of delictual liability: Walker, (1981), *The Law of Delict in Scotland*, (2nd ed), Greens, p 493, *c.f.* the law in other jurisdictions, particularly the majority of American States which favour a minimum age of liability (notably 5 or 7): see *Restatement (Third) of Torts: Liability for Physical Harm (Tentative Drafts),* Aug 2008, Chapter 3: The Negligence Doctrine and Negligence Liability, at p 1. Final version published in March 2011, reviewed at: http://wakeforestlawreview.com/a-restatement-third-of-torts-liability-for-intentional-harm-to-persons-reflections-on-professor-bublicks-thoughts.
[120] Delict (liability both of children and potentially their parents on their behalf) formed a separate review in the Scottish Law Commission's report (no 110). See chapter 5 of the report, quote in text taken from para 5.1, citing *McKinnell v White* 1971 SLT (Notes) 61.

My final publications (Publications 5 and 6) exploring the dynamics of childhood capacity are therefore concerned with legal issues arising from the child's interaction with the wider world.

Considerable multi-disciplinary literature[121] exists on children's developing capacity to engage with the world around them. However, Scottish courts have rarely engaged with such literature or research when reaching decisions about childhood capacity to neglect in contributory negligence proceedings. This is the case notwithstanding the court's responsibility to consider the extent of the child's capacity to understand "cause and effect relationships" and to exercise "self-regulation"[122] when determining questions of both liability and apportionment of damages. Unusually, in *Morton v Glasgow City Council,* Sheriff Kearney referred to the evidence of an expert chartered psychologist to address questions about:

> "the ready propensity of children to indulge in risky activities without applying their mind to the degree of risk involved and the lack of expertise of such children [particularly teenagers] in assessing risk". [123]

Such an approach is uncommon. Most courts simply use 'native intelligence' (i.e. judicial assumption) to determine the capacity of children to neglect.[124]

Delict became an area of research interest because (unlike criminal law, for example[125]) it is an area of Scots law in which the child and his capacity to act, or assume responsibility, is under-researched by lawyers.[126] Thus, childhood "capacity

[121] See, e.g., Wood, D. (1998), *How Children Think and Learn* (2nd ed), Blackwell; Kennedy D, (1998), Reconstructing Childhood', *Thinking: the Journal of Philosophy for Children* 14(1), 29-37; Buchanan A, (2004), 'Mental Capacity, Legal Competence and Consent', *Journal of the Royal Society of Medicine*, 920, 415–420; Archard D, (2004), *Children, Rights and Childhood* (2nd ed), London Routledge; Garon, N. & Moore, C. (2004), 'Complex decision-making in early childhood, Brain and Cognition' 55, *PLoS ONE* 158–170; Gofin, R., Donchin, M. and Schulrof, B. (2004), 'Motor ability: protective or risk for school injuries?' *Accident Analysis and Prevention* 36, 43–48; Lindon, J. (2005), *Understanding Child Development: Linking Theory and Practice*, Hodder Education.

[122] Quotes taken from Perrochet, L. & Colella, U. (1993), 'What a difference a day makes: age presumptions, child psychology, and the standard of care required of children', 24 *Pacific Law Journal* 1323 at 1339.

[123] 2007 S.L.T. (Sh Ct) 81, at para 1.

[124] See, e.g., *N (A child) v Newham LBC* [2007] CLY 2931, per Lantham J at 2931. *C.f.* Morrongiello, A. (2006), 'Finding the daredevils: Development of a Sensation Seeking Scale for children that is relevant to physical risk taking, *Accident Analysis and Prevention*, 38,1101–1106.

[125] Criminal Law is similarly excluded from the terms of the Age of Legal Capacity (Scotland) Act 1991 by s 1(3)(c).

[126] See, English text: Freeman M, (1983), *Rights and Wrongs of Children*, Pinter (London), and American article: Much of the discussion, however, is historic – see, e.g., Bohlen, F.H. (1924), Liability in Tort of Infants and Insane Persons, 23 *Michigan.Law.Review*.

to neglect"[127] when "slips, trips and bangs"[128] arise (in the school and wider community environs) is therefore a focus of two publications discussed in Chapter 2.

Capacity and disempowered adults

Whereas the exercise of capacity in childhood has long been a subject of contention in law,[129] the cognitive capacity of adults to make decisions of a legally valid nature is assumed (unless steps are taken to question it[130]). Where adults are concerned, the language of capacity can also "underpin the enjoyment of a range of fundamental rights."[131] Accordingly, capacity can pertain to possessing the ability to access these basic rights by making the same sorts of personal decisions as other adults in society – and to have those decisions given legal effect.

The realisation of the "right to marry and to found a family"[132] goes to very heart of personal and family life: it is, however, a right that is qualified. The individual's capacity to marry and found a family is dependent upon "the national laws governing the exercise of this right."[133] Much has been written, and much continues to be written, about this particular right by scholars across a breadth of disciplines.[134] It is also worth observing that, notwithstanding the diminution in the importance of marriage as a social, sexual, reproductive and economic status, possessing the capacity to decide to marry (or not) remains a "vital"[135] right for most human beings.

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[127] A term coined in Scotland in *Campbell v Ord and Maddison* (1873) 1 R 149, at 149, per Lord Justice Clark Moncrieff.
[128] This is discussed in publications 5 (education) and 6 (wider community).
[129] See, e.g., *Erskine* at I, vii, 14, in observing "a pupil [i.e. a boy under 14 and a girl under 12] has no person in the legal sense of the word. He is incapable of acting, or even of consenting"; *Report on the Legal Capacity and Responsibility of Pupils and Minors*, Report 110, 1987, chapter 1.
[130] There is, however, a growing body of disability rights/capacity literature See, e.g: Becker L, (2005), 'Reciprocity, Justice, and Disability', *Ethics*, 116, 9–39.
[131] Lewis O, (2011), 'Advancing legal capacity jurisprudence', *supra,* st p 700.
[132] Quote from this taken from article 12 of the ECHR, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm. It should be noted that the right to found a family is not (nor has it been considered to be for more than 30 years) dependent upon first exercising the right to marry: *Marckx v Belgium* (1979-80) 2 EHRR 330.
[133] *Ibid*.
[134] See, e.g. (i) anthropologists: Weston K, (1998, 2nd ed), *Families We Choose: Lesbians, Gays, Kinship,* Columbia University Press; (ii) philosophers: Corvino J and Gallagher M, (2012), *Debating Same-Sex Marriage,* Open University Press (USA): (iii) sociologists: Heaphy B, Smart C and Eiarsdottir A, (2013), *Same Sex Marriages: New Generations, New Relationships*, Palgrave Macmillan.
[135] Heaphy B, Smart C and Eiarsdottir A, (2013), *Same Sex Marriages: New Generations, New Relationships*, *ibid*, at p 8.

Until relatively recently, transsexuals were unable to marry in their "acquired gender"[136] in the UK, for they lacked the requisite capacity, in terms of UK law governing the sex and gender of spouses, to do so.[137] While same-sex couples have, since December 2005,[138] been permitted to enter into a legally recognised civil partnership, they cannot, as yet, marry – although this is soon set to change.[139]

I have, to date, written about the capacity of transsexuals in Scots (and wider UK) law, notably in respect of the right to marry and to obtain full legal recognition of a desired gender status. My main sources for Publication 7, which considered the broad approaches of medicine, the law and society over a century, were: (i) primary legal materials: case law and statute; (ii) medical, ethical and social research and publications.[140] This was an area in which few, if any, lawyers were researching in the UK.[141]

Publication 7, which is discussed in Chapter 3, is set within a wider research interest concerning adults disempowered in Scots law by reason of gender identity and/or sexual orientation. My current research focus in this area is the capacity of certain groups within the LGBT community to marry (having regard to the recently passed bill in the Scottish Parliament and the parallel English legislation[142]).

Conceptual Framework: Conclusions

Here, in Section (II), the conceptual framework for the critical analysis of my published work has been developed through discussion, and definition, of "rights", "status" and "capacity". The broad construction and use of the each of these three,

[136] Insofar as UK citizens are concerned, "acquired gender" is defined in s 1(2)(a) of the Gender Recognition Act 2004 as "the gender in which the person is living".
[137] See, e.g., historic judgments: *Rees v UK* (1987) 9 EHRR 56; *Cossey v UK* (1991) 13 EHRR 622; *X, Y & Z v UK* (1997) 24 EHRR 143.
[138] The Civil Partnership Act 2004 came into force, for the most part, on 5 December 2005.
[139] The current Marriage and Civil Partnership Bill passed Stage 3 on 4 February and the Act is expected to come into force later this year.
[140] See, e.g., Zhou J.N. (1995), 'A sex difference in the human brain and its relation to transsexuality', *Nature,* 378, 68-70; Karaian L, (2013), 'Pregnant men: repronormativity, critical trans theory and the re(conceive)ing of sex and pregnancy in law', *Social and Legal Studies*, 22(2), 211-230.
[141] As observed later in this thesis, the prominent transsexual campaigner and Professor of Equalities Law at Manchester Metropolitan University, Stephen Whittle OBE, has published to promote reform, rather than providing a critical academic analysis of the legal response (see, e.g., S Whittle, 'Standpoint' (2003) 12 *Journal of Gender Studies* 137).
[142] Including transsexuals, notably the issues arising in respect of the (now passed) Marriage and Civil Partnership (Scotland) bill and the sections/Schedule to the bill concerning the provisions that will allow transpeople to acquire a gender recognition certificate without first having to be divorced. The parallel English legislation (Marriage (Same Sex Couples) Act 2013) received Royal Assent on 17 July 2013.

interconnected concepts within the context of my work has been set out. My publications are concerned with legal entitlement to rights, the possession of status and the exercise of capacity insofar as these relate to areas of the individuals' personal and family life.

My research has also been placed within the relevant legal (and, where appropriate, wider) literature concerning rights, status and capacity. My publications accordingly form a contribution, from the perspective of an academic Scots lawyer, to the steadily growing body of work concerning rights, status and capacity for certain categories of individual in underdeveloped and emerging areas of Scots law.

Next, in Section (III), traditional legal research is discussed.

(III) My Research Method: traditional legal research (benefits and disadvantages)

My published work forms a systematic, coherent study aimed at addressing lacunae or uncertainties in related fields of law, and my work has been disseminated in a range of journals and textbooks. I adhere to traditional legal research methodology. Accordingly, the method, or approach, used is that of conventional legal research, principally involving the review and analysis of primary and secondary sources of law, legal policy documentation and other materials arising from the practice of law. My research is directed towards aiding the interpretation and application of existing law and, where believed appropriate, discussing legal development and reform. The research outcomes of my published work fall within the Edinburgh Napier University definition of applied research.[143]

[143] "Applied research," as outlined in the University Strategy (2009-15), with particular reference to directing that research towards having an international significance and which makes a "measurable impact" on the economic, social and cultural needs of Scotland and other relevant countries. Recognition, development and enforcement of educational, personal and professional status and remedies for individual citizens form a legally enforceable agenda throughout the international community.

Traditional Legal Research Methods

More than two decades ago, Richard Posner, the leading American jurist and legal theorist, observed that law was:

> "not a field with a distinct methodology, but amalgam of applied logic, rhetoric… and familiarity with a specialized vocabulary and a particular body of texts, practices and institutions."[144]

It is likely that many contemporary legal scholars would disagree with Posner's view. Yet, clarification of exactly what is meant by traditional legal research methods is no easy task; this is largely due to the organic evolution of legal rules and discourse over centuries.[145]

In particular, lawyers are educated and encouraged to reach conclusions that are client-centric, rather than framing hypotheses acknowledging contrasting positions. Esptein and King (2002) compared the respective approaches of legal and scientific PhD candidates and found that the typical research methodology of each discipline is to some extent reflective of the overall purpose and aim of the profession itself. They observe the broad paradox that exists: "a [lawyer] who treats a client like a hypothesis would be disbarred", whereas, in science, a PhD candidate "who advocates a hypothesis like a client would be ignored". [146] Traditional legal research is a method that has intuitively developed in an environment in which legal academics had no cause to reflect on research processes or, indeed, "to justify or classify" their research methods within a "broader research framework".[147] There is, in consequence, no great (or particularly coherent) history of discussion by lawyers about legal research methods.

Insofar as my publications are concerned, the term "traditional legal research" can be understood principally to refer to "doctrinal legal research",[148] being conventional

[144] Posner R, (1988), 'Conventionalism: The Key to Law as an Autonomous Discipline', *University of Toronto Law Journal*, 38: 333 at 345.
[145] See, Kelly JM, (1992), *A Short History of Western Legal Theory*, Clarendon Press, chapters 3, 4, 9 and 10.
[146] Epstein L and King G, (2002), 'Empirical research and the goals of legal scholarship: the rules of inference', *University of Chicago Law Review*, 69:1, at p 9.
[147] Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review*, 17: 84 – 118, at 84. See also, Bartie S, (2010), 'The Lingering Core of Legal Scholarship', *Legal Studies*, 30(3), 345-352.
[148] McConville M and Chui WH, (2007), *Research Methods for Law*, Edinburgh University Press, p 19.

legal research in which the main aim is to examine an area of law and to critically analyse how it applies.[149] This can be distinguished from what has been termed "non-doctrinal" legal research. Non-doctrinal legal research is an umbrella term for a wider grouping (variously labelled and defined) of research that is specifically directed towards one or more of the following: identifying problems, discussing law and social policy, and promoting reform.[150] However, as Chynowth (2008) observes, "some element of doctrinal analysis will be found in all but the most radical forms of legal research".[151] Thus, while it is recognised by most commentators that doctrinal and non-doctrinal legal research are not mutually exclusive categories (research projects may contain elements of both[152]), most research tends more towards one or the other. Although there are certainly non-doctrinal elements in all of my published work,[153] it is, for the most part, most accurately described as doctrinal legal research.

Last year, two Law professors, observed that, in an increasingly interdisciplinary and competitive research climate:

> "academic lawyers are beginning to realise that the doctrinal research methodology needs clarification for those outside the legal profession".[154]

This presents as a challenge for a discipline in which the ability to conduct legal research is considered to be a latent skill that all lawyers possess in some degree. Even among contemporary academic lawyers and legal research students, adherence to traditional legal research methods is neither routinely explained nor justified. In 2010, Deanne and Hutchinson examined a range of traditional legal theses from eight leading Australian Universities, focusing on those described as being based on a

[149] It should be said that, while this is a mainstream view, there is not universal agreement. Glanville Williams, for example, in the seminal text *Learning the Law*, (12th ed; 2002), at pp 206-7, makes further distinctions in doctrinal legal research.
[150] See chapters 1 and 2 of McConville M and Chui WH, *Research Methods for Law*, *supra.* See also Martha Minow, (2006), Dean of Harvard Law School, 'Archetypal Legal Scholarship – A Field Guide', *Workshop for Law Teachers*, in which Minow suggests that there are in fact 9 legal research groupings, or methodologies, materials posted online at: https://www.swlaw.edu/pdfs/jle/jle631minow.pdf. See also, e.g., "reform-oriented research"; "theoretical research"; "fundamental" research, per Hutchison T, (2010), *Researching and Writing in Law*, (3rd ed.), Lawbook Co.
[151] Chynoweth P, (2008), 'Legal Research', in Knight A and Ruddock L (eds), *Advanced Research Methods in the Build Environment*, Wiley-Blackwell, at pp 30, 31.
[152] D Manderson and Mhor R, (2002), 'From Oxymoron to Intersection: an Epiemiology of Legal Research', 6 Law, Texts, Culture, 169, as discussed in chapter 1 of McConville M and Chui WH, (2007), *Research Methods for Law, supra.*
[153] For example, in Publication 5, I critically analysed medical, social and statistical sources and discussed legal reform. However, this was carried out with the overall research aim of examining a developing body of law and its application.
[154] Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do…', *supra,* at p 84-5.

"doctrinal legal methodology". They found that only 27% of those contained a methodologies chapter, a further 33% contained only a brief methodology statement, and 40% of the Law theses examined did not discuss methodology at all in the body of the thesis.[155]However, notwithstanding the ingrained and widespread dearth of methodological discussion, doctrinal legal research remains "the most accepted methodology in the discipline of law."[156]

As a process, doctrinal legal research involves first asking forms of research questions that are concerned with what the law is (and often *why* the law is as it is) in a particular area or legal context. Thereafter, primary sources of legal doctrine (such as statute and case law) and secondary sources (such as any existing commentary on the law) are located, ingathered and a research database is created and documented. Sources are examined and placed in a hierarchy according to legal rule, and the boundaries of the research project are clearly established. A critical evaluation of source material is then conducted with reference to established legal norms. Thus, as with other methods of research, the doctrinal legal researcher should:

> "review literature… consider any resource implications involved… define and justify the [primary beneficiaries]; collect valid data; use appropriate analytic methods; and base interpretations on the data… having collect[ed] as much data as is feasible… in a manner that avoids bias." [157]

Traditional legal research is termed within the wider academic community to be desktop research that is a study of "core law" data (i.e. documents): it is sometimes called 'black letter' research.[158]

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[155] Deanne F and Hutchison T, study of 60 higher degree traditional law theses from leading Australian Universities published in 2010 on the Australasian Digital Thesis Program website (now archived with findings available by searching the discontinued website pages of the National Library of Australia's Trove Service: http://trove.nla.gov.au/). The study is discussed in Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do…', *supra* at p 99.

[156] Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do…', *supra* , at p 102. Chynoweth P, (2008), takes this statement one step further in 'Legal Research', in Knight A and Ruddock L *supra*, states, at p 37, that "the normative process of doctrinal analysis is the defining characteristic of *most* legal scholarship", whether traditional or not (*italics* added).

[157] McConville M and Chui WH, (2007), *Research Methods for Law*, Edinburgh University Press, p 41.

[158] This term derives from the gothic black type traditional used in law statutes of formal legal documents. Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do…', *supra,* at p 94. See also Doherty M and Leighton P, (2004), 'Research in Law: who funds it and what is funded? A preliminary investigation', 38(2), *Law Teacher*, 182, at 182. An overview/analysis of how different forms of research in law might be considered to rank within (and outwith) the legal community: Campbell K, Goodacre A and Little G, (2006), 'Ranking of UK Law Journals: An analysis of the Research Assessment Exercise 2001 Submissions and Results', 33 *Journal of Law and Society*, 335.

Analysis: benefits and disadvantages

Doctrinal legal research has also been described as a research method involving "interpretive, qualitative analysis".[159] However, it has been argued that such a definition is not "sufficiently delineated for the current [interdisciplinary] research environment."[160] For those not cognisant of legal paradigms and norms, it presents as a discrete research method that is, simply, inadequately rationalised.[161] A further issue that can frustrate colleagues in other disciplines is that legal researchers do borrow – sometimes with little or no explanation – aspects of research methodologies used in other disciplines, including logical, normative, empirical, hermeneutic and argumentative practices.[162] Equally, legal scholars can be overwhelmed by a broader research community that is fluent in research methodology discourse and that has long perceived legal researchers as "not really academic… arcane… narrow and arrogant."[163]

This perception of legal scholarship is understandable, because natural scientific and social scientific research is reliant upon the ingathering of empirical data:

> "either as a basis for its theories, or as a means of testing them… [so that] the validity of the research findings is determined by a process of empirical investigation."[164]

However, where the science of law is concerned, the starting point is to consider a set of legal rules that are normative in nature (i.e. dictating how individuals should, rather than actually do, behave).[165] There is, accordingly, no attempt in traditional

[159] Chynoweth P, (2008), 'Legal Research', in Knight A and Ruddock L (eds), *supra*, at pp 30; 37.
[160] Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do…', *Ibid* , at p 118.
[161] See, Campbell K, Goodacre A and Little G, (2006), 'Ranking of UK Law Journals: An analysis…'. *Ibid*. See also, Bartie S, *supra*, for a general discussion of traditional black-letter law research (i.e. research that looks at the letter of the law – on a page, rather than research approaches of data collection etc.). This traditional legal research approach represents a stark contrast to, e.g., the systematic and replicable manner (and method) underpinning content analysis, as discussed in Bryman A, (2012), *Social Research Methods*, (4th ed.), Oxford University Press.
[162] This is reflected in the somewhat erratic range of categories into which law has been placed by research and funding bodies: e.g. the UK REF, law has been categorised with Social Sciences, whereas in other jurisdictions (e.g. the USA) law is grouped with Arts and Humanities: http://bcs.bedfordstmartins.com/resdoc5e/.
[163] Becher T, (1981), 'Towards a definition of disciplinary cultures, *Studies in Higher Education,* 109-122, at p 111. Becher goes on to describe, at p 111, legal research itself as being "unexciting, uncreative… a series of intellectual puzzles among large areas of description".
[164] Chynoweth P, (2008), 'Legal Research', in Knight A and Ruddock L, *supra*, a p 30.
[165] Kelsen H, (1967), chapter in Knight M (ed./translator), The Pure Theory of Law, University of California Press: California, as discussed by Marmor A, 'The Pure Theory of Law', *The Stanford*

legal research to comprehend, explain or predict human behaviour. It has (perhaps rather unhelpfully) been observed that, instead:

> "legal science is the systematic and ordered exposition of legal doctrine in the works of juristic commentators [which] can be understood only by reference to its own self-conception."[166]

Doctrinal legal research, adopts an "internal, participant-orientated epistemological approach to its object of study".[167] In other words, it is research that is *in*, rather than *about*, law. Traditional legal scholarship has, for centuries, explored and defined what the law actually is, or is believed to be: as such, it forms is an important contribution. Various benefits[168] and disadvantages[169] of the doctrinal research method can be observed. Three of what appear to be the more challenging disadvantages of the method are discussed below.

First, what might be termed the 'narrow' nature of doctrinal legal research can be seen both as a benefit, and also as a disadvantage. The focus and direction of such legal research is primarily inward-looking, rather than directed to a range of other disciplines. Many research findings provide invaluable, and highly specific, guidance for those deciding upon challenging legal issues, including judges and legal practitioners.[170] Yet, by seeking to debate, or develop a consensus within the legal community, doctrinal research does not immediately relate to any exterior reality. Some commentators, accordingly, argue that doctrinal legal research is of debatable

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Encyclopedia of Philosophy (Fall 2010 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2010/entries/lawphil-theory/.

[166] Simmonds NE, (1984*), The decline of Judicial Reason: Doctrine and Theory in the Legal Order*, Manchester University Press, at p 1.

[167] Chynoweth P, (2008), 'Legal Research', in Knight A and Ruddock L, *supra*, a p 30.a t p 30. See Hart HLA, 2nd ed., (1997), *The Concept of Law*, Clarendon Law, chapter I and IV for an in-depth discussion of these concepts.

[168] For a succinct apologetic of the benefits, purpose and value of traditional legal research, see: Pendleton M, (2007),'Non Empirical Discovery in Legal Scholarship – choosing, researching and writing a traditional scholarly article', chapter in McConville M and Chui WH, *Research Methods for Law*, *supra*. See also, Garner BA, (1995), *The Elements of Legal Style*, (2nd ed), New York: Oxford University Press, chapter 1.

[169] For a fascinating, albeit dated, generalised overview of criticisms that might be made of traditional legal research in comparison with a range of research methodologies employed by colleagues in other disciplines see Becher T, (1981), 'Towards a definition of disciplinary cultures', *Studies in Higher Education,* 109-122.

[170] See, e.g. the work of Elaine E Sutherland (a leader in the field of Child and Family Law in Scotland, and a doctrinal legal researcher) is routinely cited by law and policymakers, including Scottish (and Supreme UK) courts in reaching decisions on novel and difficult legal judgments. In *Brixey v Lynas* (No. 1) 1997 SC(HL)1, a landmark case on parental rights, the House of Lords cited Sutherland's doctrinal legal research, a p 5.

value, for it risks severing the law from its context and seeks to solve problems without properly considering anything that is not 'law'.[171]

The global research climate is one in which competition for research funding is high, and great value is justifiably placed on interdisciplinary knowledge sharing. Many contemporary legal doctrine scholars would, nevertheless, argue in their defence that in "establishing the nature and parameters of the law",[172] they frequently do take into consideration materials and perspectives that are non-legal. This might include, for example, reference to social research, medical reports or to historical publications contextualising a particular legal issue or judgment. [173] However, the characterisation of doctrinal legal scholarship as being inward-looking must, it is submitted, be accepted. This does not mean that doctrinal legal research is valueless or (in itself) incomplete – it simply means that such research requires to be considered as a contribution, from one particular perspective, to broader interdisciplinary discourse.

Lack of objectivity is a second criticism, and certainly a potential disadvantage, of doctrinal legal research. Such a research method can be viewed as a largely subjective process whereby both statute and the deductive, or inductive, [174] decisions of judges are critically analysed by a researcher. Experimental data is not collected or tested, which means that "the validity of doctrinal research findings is unaffected by the empirical world".[175] When a legal researcher analyses legal principle in a manner consistent with legal scholarship as a whole, the research findings are usually reliant on the expertise and experience (i.e. the 'voice') of that particular individual.

Various safeguards exist within legal scholarship, which include the expectation that critical analysis of law should be carried out by a trained expert in that particular area of legal specialism, is peer-reviewed and is often considered as a call for reasoned responses from other experts. In that sense, doctrinal legal research findings can be seen as an attempt to generate or enrich wider legal debate in which a number of

[171] Hoecke MV, (2011), *Methodologies of Legal Research: Which kind of research for what kind of discipline?,* Hart Publishing, preface vii.
[172] Hutchison T, (2010), *Researching and Writing in Law*, (3rd ed.), Lawbook Co. at p 37.
[173] An example of this is Publication 4, which forms part of a textbook on Children's Rights in Scotland. My doctrinal legal research involved consideration of, e.g., governmental policy and statistics.
[174] McConville M and Chui WH, (2007), *Research Methods for Law*, *supra*, at p 22. On legal reasoning, generally see Wilson AW, (1984), *Introductory Essays on Scots Law*, (2nd ed.), W Green and Son Ltd.
[175] Chynoweth P, (2008), 'Legal Research', in Knight A and Ruddock L.. *supra*, a p 30.a t p 30.

perspectives might emerge. The same might, of course, be said of (considerably less subjective) scholarly research in other disciplines.

The criticism about the lack of objectively is sometimes linked to a third criticism about the merit of the doctrinal research process, since it is a process in which often only tentative conclusions about law are reached. In response, legal scholars argue that – notwithstanding the rather cautious conclusions of much doctrinal legal research – the method remains valuable because it:

> "requires a specific language, extensive knowledge and a specific set of skills involving precise judgment, detailed description, depth of thought and accuracy… according to accepted discipline standards and rules."[176]

Within law it is recognised, that conclusions sometimes require to be tentative because, unlike some other sciences, "ultimately law may be knowable but it is not necessary predictable."[177]

There are different ways in which the law can be known and understood. Research on, in and about law can take many approaches: traditional legal research is one research approach. Other, non-traditional, forms of legal research include, for example, the use of empirical legal research. This type of research is gathering momentum, largely because it adopts the more interdisciplinary "scientific model of discovery through empirical research".[178] Since this is concerned with the operation and impact of the law in context, (i.e. "law in the real world"[179]), it is more immediately accessible to a wider audience.

Empirical legal research will certainly be the preferred method of research in some circumstances. This might include, for example, complex legal or socio-legal issues already identified that require to be addressed effectively by lawyers and a range of

[176] Hutchinson T and Duncan N, (2012), 'Defining and Describing What We Do…', *Ibid* , at p 116.
[177] McConville M and Chui WH, (2007), *Research Methods for Law*, *supra*, at p 21.
[178] Pendleton M, (2007),'Non Empirical Discovery in Legal Scholarship – choosing, researching and writing a traditional scholarly article', chapter in McConville M and Chui WH, *Research Methods for Law*, *supra*, at p 160.
[179] See, e.g., Nuffield Inquiry on Empirical Legal Research (The Nuffield Foundation, 2006) publication: Genn H, Partington M and Wheeler S, 'Law in the Real World: Improving our Understanding of How Law Works', full report and summary available at: http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_summary.pdf. The report noted, with concern, the general dearth of empirical legal research and legal research training.

other professionals, who more fully comprehend the issue than lawyers.[180] Doctrinal legal research, on the other hand, provides a "systematic exposition of [legal] rules, intensively evaluates the adequacy of existing rules, explains areas of difficulty… and recommends any changes found wanting."[181] This generates a more complete understanding of legal construct and principle for those who must make, interpret and implement Scots, or wider UK, law.

Many of the disadvantages, or perceived disadvantages, of traditional doctrinal legal research can also be seen as disadvantages of traditional non-doctrinal legal research. Thus, all such research might to some extent be considered narrowly focused, lacking in objectivity and likely to yield tentative outcomes. It is certainly true that legal scholars can learn much from the explicit manner in which other disciplines have constructed and defended a range of research methodologies.[182] However, while traditional legal research cannot, and certainly should not, form the sole basis upon which legal, political, economic and social issues are debated, such research nonetheless remains a valid, and valuable, contribution.

Traditional legal research: my publications

As stated above, my work is largely doctrinal legal research. However, my publications also contain elements of non-doctrinal legal research (i.e. research that is one or more of the following: problem-based; policy-based; law reform-based[183]).

[180] A good example of this is Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences', chapter **in** Freeman M (ed), *Law and Childhood Studies*, Open University Press. The research that underpinned this chapter involved both (i) a review of the relevant statute and case law, and also (ii) the findings of a study of the experience (involving separate in-depth interviews) of various children and residential mothers in respect of child participation in contested Family Law proceedings (contact cases) in which there is a history of domestic abuse. Here, the doctrinal and empirical research had been undertaken because the issues concerned had been highlighted in previous empirical studies undertaken in Scotland, and elsewhere. The research was undertaken by the CRFR, University of Edinburgh, in collaboration with Scottish Women's Aid.

[181] Pendleton M, (2007),'Non Empirical Discovery in Legal Scholarship – choosing, researching and writing a traditional scholarly article', *supra*, at p 159.

[182] As Paul Chynoweth, (2008), observes, in 'Legal Research', in Knight A and Ruddock L, *supra*, at p 37, given the "failure of the legal research community to adequately explain itself to its peers in other disciplines… it can hardly complain if those peers then judge it by standards other than its own".

[183] It should be noted that a range of terms exist in the sub-categorisation of "non-doctrinal" research – essentially, all terms are referring to legal research that is not strictly "doctrinal" and so arguably involves more considered and detailed planning of methodological screening criteria and result synthesis. The terminology I have adhered to is from McConville M and Chui WH, *Research Methods for Law*, *supra*. Other legal scholars, e.g., have termed "doctrinal legal research" as "pure" or "applied" legal research that involves a consideration of legal theory or black letter law, and "non doctrinal research" are including "applied" legal research that considers law in context, discusses, e.g., the policy

This is because, in ascertaining what the law is and why it is as it is, particular problems have been identified and further, particular research questions (i.e. problem-based research) formed about particular issues observed to arise. For example, in Publications 1 and 2, I set out to examine what the law was, generally, in respect of the expression of views (and the instruction of solicitors) by children in Scottish private family law proceedings. Throughout the process of collating data, particular questions about the expression of views began to form and research findings about how courts had approached these matters were built into the structure of the publications [184]

Similarly, existing policy, medical and social research have formed part of the source material analysed where this best contextualises the law. For example, in Publication 7, concerning legally disempowered transsexuals, reference was made to general terminology used in legal, policy, medical discourse in section C; the influence of medical progress in section D; the effect of social developments in section E and general reference throughout to submissions made to the UK Parliamentary forum on Transsexualism. Finally, where my critical analysis of the law has, in turn, begun to generate particular considerations of law reform (i.e. reform-based research) this has become a focus of my legal research and critical analysis. For example, in Publications 4 and 6, when the extent to which Scots law fails to measure up to its international obligations are discussed, particular and general reforms are either discussed or proposed.

Thus, my publications concerning the child in the family disputes (which are the focus of Chapter 1) are primarily doctrinal research about the ascertaining, recording and use of the child's view in the Scots Family Law court process. However, in these publications I also explore specific issues and questions of difficulty that arise for legal academics and practitioners. My publications concerned with the child in his or her wider community (the focus of Chapter 2), contain reform-based, critical analysis of aspects of both the law of Delict and Education law. The reform-based discussion was included because, further to undertaking doctrinal analysis of the law, the law was considered to be inadequate or outdated in some respects. My publications about the disadvantaged adult, and young, transsexual (discussed in Chapters 3 and 4)

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of law reform and is moving towards "interdisciplinary" research: see Chynoweth P, (2008), 'Legal Research', in Knight A and Ruddock L (eds), *Advanced Research Methods*, *supra,* at p 29.

[184] Concerning, e.g., the child's age; state of wellbeing etc, Publication 1, pp 123-127.

required to address a volume of material about relevant social, legal and medical developments – both in Scotland and elsewhere.

The criticisms, and limitations, of my work are symptomatic of traditional legal research itself. I have not to date explored or evaluated the impact of the law in society (or upon certain groups in society). Other colleagues have undertaken such research.[185] Publications 1 – 8, forming the body of evidence in support of this thesis, are intended, primarily, to inform the legal profession and a wider readership wishing to become better acquainted with certain complex and problematic areas in contemporary Scottish law.

(IV) Reflective Commentary of my Overarching Research Theme and Research Strands

I demonstrate in the following five chapters that my published work is independent, significant and original and has made a "distinctive contribution to knowledge".[186] Publications submitted in support of this thesis are considered in a single chapter where this synthesises my connected research outputs. Research falling within my overarching theme has been subdivided into two, at times interconnected, research strands:

Research Strand 1: *Critical Analysis of the Legal Status and Capacity of 'the Young'*

In Scots law, and in other jurisdictions, it has long been recognised that *the young* are, on account of physical and mental immaturity, deserving of "special safeguards and care, including appropriate legal protection" and provision.[187] Being *'young'* is a rather imprecise status, arguably a category comprising both children and older young people. In accordance with modern authorities on the Law of Persons in Scotland, my research adopts "as its starting point" the approach of contemporary statute and policy, which

[185] Examples of research, and wider materials, cited include, e.g: (i) statistical data: Publication 4 (school attendance figures in the current statutory regime); (ii) wider interdisciplinary discourse: Publication 6, Section E; (iii) empirical research (medical): Publication 7, section D(3); and (iv) public consultation/debate involving law and policy-makers: throughout Publication 7, e.g., the debate UK Parliamentary forum on Transsexualism and legal reform is discussed.
[186] Edinburgh Napier University Research Degree Regulations, Section D15.9(e).
[187] UN Convention on the Rights of the Child 1989 (the 'UNCRC'), ratified by the UK Government on 16 December 1991, coming into force in the UK on 15 January 1992 (words taken from the Preamble).

generally "applies the term 'child' to everyone under the age of 16".[188] However, in some contexts, notably the UN Convention on the Rights of the Child and certain protective domestic provisions, the term 'child' extends to persons up to the age of 18 years and beyond.[189]

Insofar as my published work is concerned, the term 'child' is applied to individuals below 16 years of age, while the term 'young person' refers to those between the ages of 16 and 18 years.[190] The generic phrase, *the young*, is used in this thesis in a wider sense to refer to all individuals below 18 years of age.

In contemporary Scots law, humans possess passive legal capacity from birth.[191] Active legal capacity (i.e. the ability to enforce personal rights and seek remedies in law[192]) gradually develops during childhood until, at the age of 16 years, full capacity is attained for most legal purposes.[193] It is this incremental assumption of capacity throughout childhood, and in some respects beyond the age of 16 years, that generates particular uncertainties in respect of the legal status of the young.

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[188] Wilkinson, AB, and Norrie, K McK, *Parent and Child*, W Green, 1999, Chapter 1, page 1 (para 1.01). The term "child", in Scots common law, suffered for want of a precise definition. Historically, the young were divided into "pupils" (girls from 0-12 years; boys from 0-14 years) and "minors" (girls from 12 – 18 years; boys from 14 – 18 years). In the Scottish Law Commission's 1987 *Report on the Capacity and Responsibility of Minors and Pupils* (Report No 110), the Commission had its their remit for consideration persons below the age of 18 years, however (save for "prejudicial transactions", which were addressed in ss 3-4 of the Age of Legal Capacity (Scotland) Act 1991) for almost all purposes, it restricted its consideration to those below 16 years. It is, accordingly, generally understood that a person below the age of 16 years is, for most contemporary "private law" purposes, a "child".

[189] The Preamble of the UNCRC (full text of Convention available at: http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf). Insofar as domestic statute is concerned, the Children (Scotland) Act 1995 refers to those below the age of 18 years as being "children" for certain purposes. The term "child", occasionally, also applies to those beyond the age of 18 years: see, e.g, the definition of "child" in the Family Law (Scotland) Act 1985, s 1(5), for the purpose of the parental duty of aliment; Section 15(1) of the Children (Scotland) Act 1995, extending the definition otherwise to those "under the age of eighteen years"). Those below the age of 18 years are also considered to be "children" for the purposes of adoption: Adoption and Children (Scotland) Act 2007, s 28(4). Certainly, it can be assumed that, until a person reaches the age of 16 years (Age of Legal Capacity (Scotland) Act 1991, s 1) he or she will generally be considered in Scots law to be a "child". It is harder to be precise about the elusory period between 16 and 18 years of age (i.e."kidulthood") and this issue is addressed in Chapter 4, which canvases Publication 8*, 'Transsexuality and "kidulthood"'*.

[190] See, e.g. the definition of "young person" found in s 135 of the Education (Scotland) Act 1985, as "a person over school aged [i.e.16] who has not yet attainted the age of eighteen years". Chapters 1 and 2 of this thesis are concerned with children, whereas in Chapter 4, the focus is largely young people (i.e. those between the ages of 16 and 18 years of age).

[191] Professor Thomson describes this, at p 207 of his latest edition of *Family Law in Scotland* (6th ed, Bloomsbury, 2011) as the passive enjoyment, from birth, of a "plethora of legal rights" which, on account of a lack of active legal capacity, cannot directly "be enforced throughout childhood".

[192] Discussions about the capacity and status of childhood in other disciplines (e.g. see excellent article by Cassidy, C, (2012), 'Children's Status, Children's Rights and Dealing with Children', 20 Int'l J Child Rts. 57) were not the focus of my published work. See discussion in thesis Introduction at "Section (II)(c) Capacity" above.

[193] Sixteen is age at which, e.g., a person may marry or enter into a civil partnership: (Marriage (Scotland) Act 1977, s 1; Civil Partnership Act 2004, Part III.

It is certainly true that children and young people have benefitted from the legal recognition of certain of their rights, and from being afforded greater status and capacity through domestic legislation[194] in Child and Family Law in recent years. However, the contemporary status and capacity of the young in other fields of law, such as Delict is unclear. Consideration of inconsistencies in the legal perception, and treatment, of the young in different fields of law is one of my enduring research interests.

Chapters 1 and 2 of this thesis provide a commentary of my published work concerning *the young*. First, in Chapter 1, the operation of the law in respect of the exercise by the child of her right to express a view within the context of family life is considered. Thereafter, in Chapter 2, I discuss the rights and capacity of the young in the sphere of education, and within the wider community.

Research Strand 2: *Critical Analysis of Legal Status and Capacity of Disempowered Adults*

I have also considered inconsistencies in legal provision, and in some cases the perceived need for reform, in respect of certain disempowered categories of adult. Emerging, if rather piecemeal, provisions affording greater status and rights to the Lesbian Gay Bisexual and Transsexual ('LGBT') community is a growing research interest. Debate and discussion surrounding the Gender Recognition Act 2004, and the ongoing difficulties generated for transgendered people (particularly those living in Scotland) by the terms of the 2004 Act, has been a particular research focus.

Chapters 3 and 4, provide a commentary of published work principally concerning *disempowered adults*. Chapter 3 examines one comprehensive publication about the rights, status and capacity of transsexuals. In Chapter 4, one publication demonstrating an intersection between my research about disempowered adults and *the young* is critically appraised.

[194] The Age of Legal Capacity (Scotland) Act 1991 came into force in September 1991 and began a steady flow of statutory reform, largely concerned with protective and participative rights, in respect of the rights of the young in the course of private family disputes and state intervention in family life (see, e.g., the Children (Scotland) Act 1995, Part I and II, as amended, and (most recently) the recent Children's Hearing (Scotland) Act 2011).

The significance, originality and impact of my published work (i.e. my overall contribution) is discussed in Chapter 5.

Part 1:

Critical Appraisal of Cited Published Works

CHAPTER 1: Publications 1, 2 and 3

1.1. General Introduction to Publications 1, 2 and 3

The following publications are discussed in the present chapter:

(i) **Publication 1**: *'"A child is, after all, a child": ascertaining the ability of children to express views in family proceedings',* SLT, 2008, 18, 121-127 (hereinafter referred to as '*A child is, after all, a child')*,

(ii) **Publication 2**: *'"Moral actors in their own right": consideration of the views of children in family proceedings',* SLT, 2008, 21, 139 -142 (hereinafter referred to as '*Moral actors in their own right*'),

(iii) **Publication 3**: *'"Dear Judge, I am writing to you because I think it's pathetic": Re A-H (Children)',* EdinLR, 13(3), 2009, 528 – 533 (hereinafter referred to as *'Re A-H (Children)'*).

Each of the above publications has as its primary focus the legal status and capacity of *the young* in the context of underdeveloped and emerging areas of Child and Family Law. In other words, the outputs considered in this chapter pertain to the first strand of my overarching research theme. In particular, Publications 1, 2 and 3 critically analyse the operation of the law in respect of various contemporary challenges arising when the child[195] exercises the right to express a view in litigation about her private family life.

First, in *'A child is, after all, a child'*, various factors observed in recent years by the judiciary throughout the UK as being capable of affecting the ability of children to

[195] The term "child", for the purpose of 'private' family law, takes its meaning from Part I of the Children (Scotland) Act 1995, and broadly means a person "under the age of sixteen years": ss 1(2)(a); 2(7); 11(2) (see also ss 1(2)(b); 15(1) of the Children (Scotland) Act 1995, extending the definition otherwise to those "under the age of eighteen years"). It should be noted that Scottish courts have, to date, only made 'section 11' orders in respect of those under the age of 16 years. It is possible in theory, albeit unlikely in practice, that a court might make an award in terms of s 1(2)(b) of the 1995 Act relating to the exercise of parental responsibility of guidance, such a responsibility continuing until the child reaches the age of 18 years.

properly participate in family proceedings[196] were identified, categorised and their overall significance in Scots law evaluated. Thereafter, in '*Moral actors in their own right',* practical considerations governing the occasions on which, and means by which, a child's views may be taken during proceedings were discussed with reference to judicial rationale and the operation of the relevant legislation.

Publications 1 and 2 ('*A child is, after all, a child'* and '*Moral actors in their own right'*) were connected articles, published in *Scots Law Times*, Scotland's best-known practitioner Law journal.[197] Both articles arose from a paper I delivered at a 2008 'Central Law Training' event and were written with legal practitioners, court-appointed Child Welfare Reporters and social workers in mind. The publications addressed increasingly problematic practical issues arising in UK family proceedings that had not before been comprehensively critiqued in a Scottish legal journal publication.[198] I also used the feedback from practitioners at the training event regarding the (then) current issues of concern in child-related law practice.

Secondly, in Publication 3, *'Re A-H (Children)'*, consideration was given to the "proactive case-management role"[199] of the judiciary in contemporary, "intractable", contact disputes in which "the child, rather than the parent, is (ostensibly at least) the non-compliant individual."[200] '*Re A-H (Children)*' was written in 2009 and submitted to the *Edinburgh Law Review,* a peer-reviewed legal journal with a primary readership of University teachers and students.[201] The journal was considered appropriate because the issues raised in Publication 3 were comparative (*Re A-H* is an English judgment[202]) and,

[196] The term "proceedings", for the purpose of the present chapter, refers to private family proceedings, i.e. proceedings between parents (private individuals) concerning their children. In Scotland, such proceedings are raised, as a matter of course, under Part I of the Children (Scotland) Act 1995. Public law proceedings about family life, involving the State, are not the focus of Publications 1, 2 and 3 and so are not discussed in the present chapter.

[197] *Scots Law Times*, comprising "case reports, articles, book reviews… news and case commentaries": Quotes in this and information about journal taken from the *W Green/Sweet & Maxwell* webpages: http://www.sweetandmaxwell.co.uk/wgreen/scots-law-times.htm.

[198] Central Law Training is "the UK's leading provider of post qualification training and accreditation for professionals working in the legal sector": http://www.clt.co.uk/About-CLT.

[199] Publication 3 at p 528 citing *In Re M (A Minor) (Contempt of Court: Committal of Court's Own Motion)* [1999] Fam 263 at para 31 per Ward LJ.

[200] Quotes taken from Publication 3 at p 530.

[201] The Edinburgh Law Review is an academic journal directed towards setting "the law of Scotland in an international and comparative context" by providing comprehensive "analysis of developments in legislation and of court decisions". Quote taken from the EUP Publishing webpages: http://www.euppublishing.com/journal/elr. The *Edinburgh Law Review* is published in three volumes per annum: Publication 3 was accepted for publication and forms a critical case commentary in the *Analysis* section in the September 2009 volume of the journal.

[202] Reported at: [2008] EWCA Civ 630, [2008] 2 FLR 1188.

due to the emerging nature of debate on its subject-matter, the discussion, and research outcomes, were more tentative.[203]

The following sections provide a critical overview of each area outlined in the chapter structure on page 3 above. In section 2, research rationale and independence will be summarised. In section 3, the subject-matter of, *'A child is, after all, a child'*, '*Moral actors in their own right'* and *'Re A-H (Children)*' will be contextualised and overall research premise and aims will be examined. Thereafter, in sections 4 and 5, the approach adopted, and research outcomes of Publications 1, 2 and 3 will be critically evaluated. Concluding chapter observations about the contribution of each publication to literature concerning rights, status and capacity will be made in section 6.

1.2. Rationale and Independence of Publications

My programme of applied legal research is directed towards promoting knowledge exchange of both (i) practical utility and (ii) academic merit. Insofar as the first strand of my research theme (*analysis of the capacity and status of the young*) is concerned, the publications selected as the focus of the present chapter help to illustrate these two motivations.

First, as a former practitioner, I research and write, observationally, about aspects of legal life in which I specialised in practice for a number of years. I have, accordingly, written about cases in which my own recommendations as court appointed Child Welfare Reporter, or *Curator Ad Litem,* have been a determinative factor in the court's decision-making process. I have also academically critiqued significant judgments that have either changed, or advanced, the Law in Scotland in which I personally represented the individuals involved.[204] In so doing, I have been able to give a reasoned, and I hope

[203] E.g: Issue raised in Publication 3, as follows: "is it impracticable that weight be given to the views expressed by children in [tortuous] family proceedings" in which the child's views "seem rooted in manipulation and fallacy"? Answer: "It would be sad, and somewhat perverse, if… recent Scottish provisions allowed obstinate residential parents to frustrate contact arrangements merely by being more disobliging… It certainly seems, in *Re-A-H (Children),* a case in which Wall LJ described the parents as "warring parties" that C herself was her mother's strongest weapon and surest protection against coercive judicial orders."

[204] E.g: *Fourman v Fourman* 1998 Fam LR 98 (I represented child party minuter, the only case of its kind reported in Scotland: discussed in all major Scottish Family Law textbooks, and in my own Publications 1 and 2); *Guild v City of Edinburgh Council*, 2002 SCLR 92 (I represented the parents of a child with "special educational needs" in the first case of its sort – Judicial Review – raised in Scotland: see Publication 4); *City of Edinburgh Council v W* 2002 Fam LR 67 (I represented grandparents seeking parental responsibilities and rights in a highly complex and contested adoption process in which Article 6 arguments advanced prevented

useful, insight into the mechanics of the practice of law that I would not have been able otherwise to provide.

Secondly, as an academic, I seek to contribute to, and where appropriate generate, debate and discussion in my areas of research. In particular, I write about emerging and expanding areas of uncertainty and difficulty with which lawyers (whether Advocates, solicitors, court reporters and, indeed, sheriffs and judges) "wrestle… in family disputes".[205] This is a particularly important part of my research, since I teach Child and Family Law to undergraduate and postgraduate students, provide ongoing training to the profession and comment whenever I can on relevant legal developments.

The rationale behind Publications 1 and 2 (*'A child is, after all, a child'* and '*Moral actors in their own right')* was practitioner-orientated: to resolve, through an academically reasoned analysis of case law and statute, general child-related problems arising, on an increasing basis, in the practice of law. Publication 3, submitted to a peer-reviewed journal, was written with a more academic audience in mind. The intention of *'Re A-H (Children)'* was to raise the profile of a single (and as yet unresolved) area of growing concern in Child and Family Law, perhaps generating academic discussion and debate.

In section 3 and 4, below, a critical analysis of the premise and aims of Publications 1, 2 and 3 will be given with reference to the legal framework (and the general legal uncertainty) existing in Scots, and UK, law at the time of publication insofar as the child's views and her status in family proceedings was concerned. A discussion of the broader socio-legal literature and debates concerning children's rights generally, and the right to be heard by children in Family Law proceedings, has also been included in section 3 below. My contribution is then linked to these debates.

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the granting of orders in respect of adoption. The judgment was, again, the first of its kind reported in Scotland and is discussed in most Family Law textbooks in Scotland).

[205] Publication 1, at p 121.

1.3. Publications 1, 2 and 3 – Contextualising the Premise and Aim(s)

(i) Families and Family Law in contemporary Scotland

'Family' is a wide and, it seems, constantly evolving genetic, biological and social construct to which every human being belongs. Family Law is an important field of law because it is concerned with regulating personal relations between family members. The boundaries of Family Law change over time because what society perceives (and accepts) as a family unit changes. Family Law in Scotland has undergone a period of extensive statutory reform throughout the last three decades – and more is set to come.[206] Accordingly, contemporary personal relationships, and the means by which these relationships are regulated in law, are wide-ranging.[207] The changing nature of families and Family Law impacts upon the regulation of relations between parents and each other and between parents and their children.[208]

Personal relationships today are also more likely to be impermanent than was historically the case. In Scotland, for example, around 10,000 spouses divorce per annum: there has been little change in these statistics since 2008.[209] Throughout the UK as a whole, almost half of all marriages end in divorce – and almost half of those divorcing have children

[206] This reform process began in Scotland with Scottish Law Commission report 135 ('*Report on Family Law'*) in 1992, and continued through the coming to force of several significant pieces of legislation including: Children (Scotland) Act 2007; Gender Recognition Act 2004 and Civil Partnership Act 2004 (both of these Acts are UK-wide); Family Law (Scotland) Act 2006; Adoption and Children (Scotland) Act 2007, Human Fertilisation and Embryology Act 2008 (UK-wide Act). The programme of reform in contemporary family life is set to continue following the introduction of the Marriage and Civil Partnership (Scotland) Bill in December 2012.

[207] There is also a steady increase in recorded same-sex relationships and civil partnerships in the UK: see, e.g "Civil partnerships are 5 times more popular than expected, figures show", The Guardian, 31 Jul 2012: http://www.guardian.co.uk/lifeandstyle/2012/jul/31/civil-partnerships-popular-expected-figures. The Marriage and Civil Partnership (Scotland) Bill, which will provide for same-sex marriage, passed Stage 3 on 4 February 2013.

[208] In particular, who is perceived to be a "parent" in law – this depends on the statutory purpose concerned, but insofar as private family proceedings are concerned, the principal definition was, and still is, found in s 15 of the Children (Scotland) Act 1995. The changing nature of families and Family Law is a theme common to most jurisdictions, see: Sutherland, E.E., (2012), 'Imperatives and challenges in child and family law: commonalities and disparities', chapter in *The Future of Child and Family Law: International Predictions*, Cambridge University Press, at pp1-48.

[209] A slight downward trend has taken place in the last few years (circa 2% on average). According to National Statistics, between 40 and 50% of marriages in the UK end in divorce (current figure is around 42% for Scotland). The most recent figures from the Scottish Government (late 2010) can be found at: http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/DivDiss/; http://www.bbc.co.uk/news/uk-20794505. There are a number of organisations, such as the Family Law Association ('the "FLA"'), which are committed to providing a service that is collaborative, insofar as possible, avoiding confrontation and seeking to minimize conflict for adults and children in the midst of family breakdown: http://www.familylawassociation.org/.

under the age of 16.[210] More children are now born to unmarried parents[211] than to married parents in Scotland,[212] although comprehensive contemporary Scottish statistics about the number of cohabitants or "about the rate of cohabitation breakdown is not yet available."[213] Certainly, children are more likely than ever before to experience the breakdown of a parental relationship.[214] Thus, research about the rights of children, and how best to support and listen to children involved in litigation between separating parents generates wide-ranging legal, and social, benefits.

(ii) Linking my contribution about children in Family proceedings to broader socio-legal literature and debates

The notion that children should have the right to be actively involved in Family Law proceedings (or in any other process affecting them for that matter) is "a very modern one… fraught with controversy."[215]

There is certainly widespread support throughout socio-legal literature for the realisation of children's rights – in particular, the child's right to participate.[216] However, certain commentators remain vociferously opposed to "tak[ing] children's rights seriously",

[210] The divorce rate in the UK is highest for the 40-44 age range, an age at which adults are very likely to have children under the age of 16 years: see http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20612080. Statistic also indicate that almost half (49%) of those divorcing in the UK have children under the age of 16 years old.

[211] Statistics available (from 2009) at One Parent Families Scotland at: http://www.opfs.org.uk/files/one-parent-families_a-profile_2009.pdf

[212] The first official returns from the Scottish 2011 Census have indicated this, as reported by The Times on 18 Dec 2012: http://www.thetimes.co.uk/tto/news/uk/scotland/article3634439.ece. Census information available (as results are released) at: http://www.scotlandscensus.gov.uk/en/.

[213] Most recent "Gender Audit of Statistics…", available on the Scottish Government website: http://www.scotland.gov.uk/Publications/2007/03/27104103/5. Recent (Nov 2012) UK-wide data from the Office for National Statistics indicates that around 2.9 million people cohabit in the UK: http://www.bbc.co.uk/news/uk-20174078.

[214] Much has been written on this recently. See, e.g., 'Census 2011: the typical family is not what it used to be', The Observer, (England and Wales returns), 27 Mar 2011: http://www.guardian.co.uk/uk/2011/mar/27/census-family-housing-ageing-population.

[215] MacLeod CM and Archard D (eds), (2002), *The Moral and Political Status of Children,* OUP, pp 3; 5. A range of theories to underpin the recognition of rights (whether moral, legal or political) that children may be found to possess (Brighouse H, (2002), 'What Rights (if any) do Children have? chapter in MacLeod C M and Archard D (eds), *The Moral and Political Status of Children,* OUP).

[216] See, e.g., Hill M, Davis J, Prout A and Tisdall EKM (2004) 'Moving the Participation Agenda Forward', *Children and Society*, 18(2), 77-96; Taylor N, Tapp P and Henaghan M, (2007), 'Respecting Children's Participation in Family Law Proceedings', *International Journal of Children's Rights* 15, 61-82; Parkinson P and Cashmore J, (2008), *The voice of the Child in Family Law disputes*, OUP ; Quennerstedt A, (2010), 'Children, But Not Really Humans? Critical Reflections on the Hampering Effects of the "3 p's"', *International Journal of Children's Rights* 18, 619-635; Reynaert D, Bouverne-De Bie M, Vandevelde S (2012), 'Between 'believers' and 'opponents': Critical discussions on children's rights', *International Journal of Children's Rights*, (20), 155-168.

while others do not accept that children can (or should) themselves be rights-bearers.[217] Freeman observes that the debate about whether, and to what extent, children have rights at all is tied to deeper issues concerning power and marginalisation, since:

> "For the powerful, and as far as children are concerned adults are always powerful, rights are an inconvenience. The powerful would find it easier if those below them lacked rights. It would be easier to rule, decision-making would be swifter, cheaper, more efficient, more certain."[218]

In 1989,[219] the UN Convention on the Rights of the Child became an international turning point in the global recognition of children's rights.[220] The Convention remains the primary point of reference in most contemporary children's rights discourse. A number of themes and debates have emerged throughout the last two decades in rights-based children's literature. Reynaert *et al* (2009) carried out a review of children's literature to date and grouped the themes/debates into three categories, discussed below.[221] The broad categories identified by Reynaert *et al* have also been identified (albeit not always defined using exactly the same language[222]) by others writing on children and their rights.

[217] Quote taken from Freeman M, (2007), 'Why it remains important to take Children's Rights seriously *International Journal of Children's Rights* 15, 5, at p 5. See, e.g., Griffin's (who, e.g., believes that infants do not have 'human rights') discussion in his chapter (2002), 'Do Children Have Rights?' in *The Moral and Political Status of Children: New Essays*, Archard D and Macleod C (eds), Oxford: Oxford University Press: 19–30; Guggenheim M, (2005), *What's wrong with children's rights?*, Harvard University Press.

[218] Freeman M, (2007), 'Why it remains important to take Children's Rights seriously, *ibid,* at p 8. See also: Federle KH (1994), 'Rights flow downhill'*, International Journal of Children's Rights*, 2 343-368 (c.f. O'Neil, who advocates that children's "main remedy" to being without rights "is to grow up", O'Neill O, (1998), 'Children's Rights and Children's Lives', *Ethics,* 98, 445-463.

[219] The UK signed the Convention on 19 April 1990 and ratified it on 16 December 1991 – the Convention came into force throughout the UK on 15 January 1992: http://www.unicef.org.uk/UNICEFs-Work/Our-mission/UN-Convention/.

[220] See, e.g: Marshall K, (1997), *Children's Rights in the Balance: The Protection Participation Debate*, Stationary Office Books; Fortin J, (2003), *Children's Rights and the Developing Law,* (2nd ed.), LexisNexis/ Butterworths; Archard D and Skivenes M, (2009), 'Balancing a Child's Best Interests and a Child's Views', *International Journal of Children's Rights* 17, 1-21.

[221] Reynaert D, Bouverne-De Bie M and Vandevelde S, (2009), 'A review of children's rights literature since the adoption of the United Nations Convention on the Rights of the Child', *Childhood* 16(4), 518-534. 107 scholarly articles were reviewed, dating from 1989 – 2007, so the review is a little outdated.

[222] See, e.g., Freeman M, (1983), *Rights and Wrongs of Children*, Pinter (London), who divides his text into chapters, which include those addressing (i) the evolution, framework and 'enforcement' of children's rights (chapters 1, 2, 5); (ii) best interests versus child's views (Chapters 6 & 7); (iii) child autonomy is an ongoing theme throughout the text and in particular in chapters 1, 3 & 7. See also Archard's grouping of children's rights-based themes in his text, Archard D, (2004), *Children, Rights and Childhood* (2nd ed), London Routledge.

Socio-legal literature about realising children's rights: linking my contribution to the debate

The first category identified by Reynaert *et al* is concerned with what has been termed the "global children's rights industry". The principal discussions here are about the "standard-setting, implementation and monitoring" of children's rights. An "enormous amount of literature", [223] spanning a range of disciplines, was observed to exist. Much of this literature is concerned with the interpretation of the terms of the UNCRC and activity of the Committee on the Rights of the Child.

Certainly, for Scotland, and Scots law, recognition, implementation and monitoring of Convention rights is a particularly topical debate. No doubt influenced to some degree by the impending UNCRC progress report, the Scottish Government recently affirmed the need to take steps to "[make] children's rights real" through the imposition of a new statutory regime regulating child-related public policy and practice.[224] A government bill concerning these matters (the Children and Young People (Scotland) Bill 2013) has just been passed in the Scottish Parliament.[225] This means that questions surrounding the implementation of UNCRC rights in law and policy will be a prominent children's rights debate in Scotland for many months to come. My contribution to this ongoing debate is in doctrinal analysis of areas of domestic law and policy affecting children.[226]

In particular, my contribution to literature about the implementation of children's rights (in particular, Article 12 of the UNCRC) can most clearly be seen in Publications 1, 2 and 4. Publications 1 and 2, discussed in the present Chapter, focus on the domestic statutory

[223] Quotes from this and previous sentence taken from Reynaert D *et al*, (2009), *supra*, pp 518; 526. For helpful literature on this broad theme, see, e.g., Veerman P and Levine H, (2000), 'Implementing Children's Rights on a Local Level: Narrowing the Gap between Geneva and the Grassroots', *International Journal of Children's Rights*, 8(4): 373-384; Beeckman K, (2004), 'Measuring the Implementation of the Right to Education: Education versus Human Rights indicators', *International Journal of Children's Rights*, 12(1), 71-84; Reynolds P, Nieuwenhuys O and Hanson K, (2006), 'Refractions on Children's Rights in development Practice: A View from Anthropology – Introduction', *Childhood*, 13(3), 291-302.
[224] Quote take from the UNCRC report in 2012, "Do the Right Thing" Progress on the Scottish Government's progress in terms of respecting the rights of children and young people in Scotland, available at: http://www.scotland.gov.uk/Resource/0039/00392997.pdf. See also the Scottish Government Response to 'A Scotland for Children' Consultation, at p 2 available at: http://www.scotland.gov.uk/Resource/0041/00416972.pdf, pending the next examination by the UN Committee on the Rights of the Child of the UK, scheduled to take place in 2014. For details on the reporting process, see: http://www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/.
[225] See the Children and Young People (Scotland) bill, passed on 19 Feb 2014, available at: http://www.scotland.gov.uk/Publications/2012/07/7181. Consultation and research material supporting the bill is also available via the previous Scottish Parliament link.
[226] See, e.g., Publication 4, which is concerned with implementation of the child's Convention rights in the field of Education Law.

framework implementing the child's right to express a view in the context of Family Law proceedings. Here, I contributed to existing legal scholarship in the field.[227] Publication 4, which is discussed in Chapter 2, is an evaluation of "the extent to which the terms, and spirit, of the [UNCRC] are honoured in Scots Education Law".[228] My publications, based upon traditional legal research methods, are therefore intended to provide a critical analysis, with reference to judicial precedent, of how particular rights are (or are not) incorporated in contemporary Scottish statute.

Socio-legal literature about autonomy and participation: linking my contribution to the debate

The second category of literature suggested by Reynaert *et al* pertains to the child's "autonomy and participation rights".[229] Here, policy-based discussion centres on the realisation of child competency (or, capacity) across one or more contemporary processes affecting him or her. Policy-making (in a range of government and community-based exercises) and research involving children are examples of two such areas.[230] Where more theoretical discourse is concerned, contemporary scholars challenge traditional perceptions of children as mere "adults in waiting."[231] Suggested remedies to commonly occurring autonomy/participation problems (such as "tokenism, unresolved power issues… and [a lack of] inclusion" of "disabled children, ethnic minority groups and younger children") are also debated under this broad category heading.[232] A focus of much of the literature is how adults can learn to engage meaningfully with children

[227] See, e.g., Sutherland, E.E. (1996), 'A Voice for the Child', *Journal of the Law Society of Scotland,* 41910), 391-393.
[228] Quote taken from Publication 4, p 210.
[229] Reynaert D, Bouverne-De Bie M and Vandevelde S, (2009), *supra,* at 518. For a philosophical discussion on this theme, see: Callan E, (2002), 'Autonomy, Child-Rearing, and Good Lives', in *The Moral and Political Status of Children: New Essays*, Archard D and Macleod C, *supra.*
[230] See, e.g., Melton GB, (2005), 'Building Humane Communities Respectful of Children; the Significance of the Convention on the Rights of the Child', *American Psychologist*, 60(8), 918-26; Hill M, Davis J, Prout A and Tisdall EKM (2004) 'Moving the Participation Agenda Forward', *Children and Society*, 18(2), 77-96.
[231] Matthews H, Limb M and Taylor M, (1998), 'The Right to Say: the Development of Youth Councils/Forums within the UK', *Area,* 30(1), 66-78 at 67. For wider literature see, e.g., Arneil B, (2002), Becoming versus Being: A Critical Analysis of the Child in Liberal Theory, chapter in MacLeod C M and Archard D (eds), *The Moral and Political Status of Children, supra*.
[232] Reynaert D, Bouverne-De Bie M and Vandevelde S, (2009), *supra*, at 521. For helpful literature on this theme see, e.g., Potter J, (2006), 'Rewriting the competency rules for children: full recognition of the young person as rights bearer', *Journal of Law and Medicine*, 14(1), 64-85; Brighouse H, (2003), 'How should children be heard?', *Arizona Law Review*, Fall 45(3), 691-711; Cashmore J and Parkinson P, (2007), 'What Responsibility do courts have to hear children?' *International Journal of Children's Rights* 15, 43-60.

across a range of processes in a manner that is respectful of the child and his or her evolving capacities.[233]

Where Family Law processes are concerned, the body of empirical research that exists concerning the participation of children within Family litigation (from Scotland and elsewhere) is insightful.[234] Some research findings are so widely accepted that they seem to have passed into the realm of common-sense.[235] We have long known, for example, that continued parental conflict (before and after separation) is "most harmful" to most children.[236] With other research findings this is not yet the case: it is only in more recent years that pre-adolescent children have generally been perceived as having capacity to make reasoned choices within the litigation process.[237] A critical analysis of judges' and sheriffs' written judgments also indicates that a range of factors are considered by our judiciary to impact upon a child's capacity (or perceived capacity) to express a view in Family proceedings.

My Publications 1, 2 and 3, which are the focus of this Chapter, are concerned with these judicial determinations of child capacity to participate (whether by expressing a view or instructing a solicitor) in Family litigation. From a traditional legal scholarly perspective, I have identified the factors that affect judicial decision-making concerning the ascertaining, expression and impact of children's views. These factors have then been analysed with reference to the statutory framework governing the substantive and procedural decisions of courts. My publications can be contextualised within the wider

[233] Article 5 and 14 of the UNCRC. For literature, see, e.g., Punch P, Research with Children: The Same or Different from Research with Adults? *Childhood, 2002, 9(3) 321-341.*

[234] See, e.g., Laing K and Wilson G, (2010), *Understanding Child Contact Cases in the Sheriff Court*, Scottish Government report: http://www.scotland.gov.uk/Publications/2010/12/08145916/0; Scottish Government Study: Child Welfare Hearings: A Scoping Study of the Commissioning, Preparation and Use of Bar Reports, Whitecross RW (2011); Cashmore J and Parkinson P, (2009), 'Children's participation in family law disputes: the views of children, parents, lawyers and counsellors', research findings available at: http://www.mentalhealthacademy.net/journal_archive/aifs099.pdf., (2007), *Child and Family Law Quarterly*, 19(3), 283.

[235] Tisdall K, Baker R, Marshall K, Cleland A, (2002), Giving due regard to children's views in all matters that affect them, Voice of the Child Under the Children (Scotland) Act 1995: Feasibility Study, Scottish Government, available at: http://www.scotland.gov.uk/Publications/2002/09/14938/7710; Some of the research about the legal profession is quite dated: Marshall K, (1997), *Children's Rights in the Balance: The Protection Participation Debate*, Stationary Office Books; Smart C and Neale B, '(2000), 'It's my life too: children's perspectives on post-divorce parenting', *Family Law*, 30, 163-169.

[236] See, e.g., Crosby-Currie CA, (1996),'Children's involvement in contested custody cases: practices and experiences of legal and mental health professionals', *Law and Human Behaviour*, 20, 289-311; James A and Prout A (eds.), (1997), *Constructing and reconstructing childhood: Contemporary issues in the Sociological Study of Childhood*, (2nd ed.), London: Falmer Press.

[237] Thomas, N, (2007), 'Towards a Theory of Children's Participation', *International Journal of Children's Rights* 15, 199-218; Trinder L, Jenks C and Firth A, (2010), 'Talking Children into being in Abstentia?' *Child and Family Law Quarterly* 234. See also: Cleland A 'Children's Voices in Legal Proceedings', in Cleland A and Sutherland E (2009), *Children's Rights in Scotland* (3rd ed.), W Green.

debates concerning autonomy and participation as follows: they critically appraise how contemporary law governing the expression of views by children in Scottish Family proceedings has been, and might be, interpreted and applied.

Socio-legal literature about children's versus adults' rights: linking my contribution to the debate

A third, broad, category of children's rights' literature identified by Reynaert *et al* is that concerning the long-standing debates surrounding 'children's rights versus parents' (or adults') rights, and 'views versus best interests'.[238] Here, the emergence both of the self-determined child and a "shift in parenting" practices have been "important concern[s]" for contemporary children's rights' scholars.[239] It has been observed that focusing too intently on the competing rights of parent and child generates negative outcomes. In particular, "antagonistic power relations between children and parents" creates "legitimacy for the State to take over parental responsibilities for the sake of the child".[240] And, where individuals submit to the decision-making processes of the State (e.g. the judicial process), they are each expected to adhere to the decision made – with which they may be profoundly unhappy.[241]

The experiences of children and adults within Family Law are also, it seems, very different. Adults involved in litigation have the outcome(s) of litigation formally intimated to them. This is done through the court issuing either an interlocutor intimating the decision or a full legal judgment being issued. In the case of represented adults, this will be sent to their solicitors, whereas a party litigant will be sent court papers direct. [242] Adults also have a range of mechanisms accessible to voice their dissatisfaction with any

[238] As highlighted in the landmark case, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. See Archard D and Skivenes M, (2009), 'Balancing a Child's Best Interests and a Child's Views', *International Journal of Children's Rights* 17, 1-21.
[239] Reynaert D, Bouverne-De Bie M and Vandevelde S, (2009), *supra*, at 524. See also: Howe RB, (2001), 'Do Parents have Fundamental Rights?', *Journal of Canadian Studies*, 36(3), 61-78 (quoted in Reynaert); Some commentators argue that a rights-based approach only "generates adversarial interests in decision-making": Benporath SR, (2003), 'Autonomy and Vulnerability: On Just Relations between Adults and Children', *Journal of Philosophy of Education*, 37(1), 127-45. See also Brennan S, (2002), 'Children's Choices or Children's Interests: Which do their Rights Protect?' in *The Moral and Political Status of Children: New Essays*, Archard D and Macleod C (eds.), Oxford: Oxford University Press: 53–69.
[240] Vandenbroeck M and Bouverne-De Bie M, (2006), 'Children's Agency and Educational Norms: A Tense Negotiation', *Childhood*, 13(1), 127-143 at 132.
[241] The perception of one child, who certainly felt let down by the Family Law process is discussed in: Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences', chapter in Freeman M (ed), *Law and Childhood Studies*, Open University Press (pp156-173).
[242] Current Court rules and practice (and guidance for party litigants): http://www.scotcourts.gov.uk/home.

legal process or its outcome, ranging from judicial and extra judicial steps connected to the proceedings themselves to making a formal complaint to an external body such as the Scottish Legal Complaints Commission.

However, where children are concerned, the experience is rather different. The law imposes no requirement that courts explain why particular decisions are being reached or what these decisions mean – even where children participate in the process. Tisdall *et al* (2002; 2012) found that children involved in litigation were generally were given too little information on the court process and were often not kept informed about the ongoing process. As a consequence, children routinely did not understand why delays took place or why certain decisions were made (and in some cases what the decisions actually were).[243] Serious issues were observed to remain where the "quality of children's experiences" of the Scottish Family Law court process were concerned.[244]

Further, traditional Family Law places a high degree of reliance on "autonomy, 'voice', and rationality",[245] and there is a danger that some (particularly younger) children's views are routinely sidelined. Tisdall and Morrison (2012) observe that a failure to fully engage with children or to provide feedback to them also creates a "vacuum [that] can be filled by the child's own ideas and interpretations or by the perspectives of others".[246] The practice of giving children no explanation for the outcome of litigation which is, in fact, about them is also indicative of a process in which the child's rights can consistently be 'trumped' by adult rights – or certainly by what adults determine serves the child's best interests. Accordingly, while:

> "Scotland can be considered a success story, in its legislation and the evolution of its reported case law", and "children's participation is… testing traditional attitudes towards children, childhood and family law", the success

[243] Tisdall K, Baker R, Marshall K, Cleland A, (2002), Giving due regard to children's views in all matters that affect them Voice of the Child Under the Children (Scotland) Act 1995: Feasibility Study Scottish Government, available at: http://www.scotland.gov.uk/Publications/2002/09/14938/7710.
[244] Tisdall, E.K.M. and Morrison, F (see (2012), 'Children's Participation in Court Proceedings…', *supra* (quotes from p 170).
[245] Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings…'*supra,* at 170. See also literature from elsewhere, e.g., James A and McNamee S, (2004), 'Turn Down the Volume? Not Hearing Children in Family Proceedings', *Child and Family Law Quarterly*, 189; Potter M, (2008), 'The Voice of the Child: Children's Rights in Family Proceedings', *International Family Law Journal*, 3(Sept), 140.
[246] Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings…'*supra,* at 167.

> remains "qualified by certain trends that may undermine or sideline some or many children's views". [247]

My contribution to the wider discussion about children's rights versus adults' rights, and the child's view versus the child's best interest, is a doctrinal legal one, which can be seen in Publications 1, 2, 3 and 8.[248] The focus of each publication is critical analysis of what the contemporary law actually is and how the child's right to be heard is represented through statute and case law. Thus, in Publications 1 and 2, I explored the child's right to express a view within the context of a Scottish statutory framework in which the child's best interest (or "welfare" as it is termed in statute) is the court's "paramount consideration".[249]

In Publication 3, I considered a scenario described by the court as an "intractable contact dispute"[250]. Here, the court was seeking (and, by its own admission, failing) to resolve a family dispute in which children and their parents were "effectively at stalemate"[251] over the question of paternal contact. The child involved ("C") had been misinformed by her mother about both the "intentions of her father", who was seeking contact with his daughter, and "the nature of family proceedings".[252] C, caught between two parents described by the court as "warring parties,"[253] had become alienated from her father. The court's proactive case-management role in such Family Law litigation is a focus of my contribution.

In this subsection, the broader socio-legal literature and debates have been discussed, and my own contribution has been linked to those debates. My work can be seen as having its primary focus upon the interpretation and application of the child's right to be heard in substantive and procedural Scots Family Law. In the following subsection, guidance provided by the United Nations Committee on the Rights of the Child concerning how the child's right to be heard can best be translated into domestic law, policy and practice is discussed.

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[247] *Ibid*, quotes taken from pages 158 and172-3 respectively. See also the findings of Scottish Government Study: Child Welfare Hearings: A Scoping Study of the Commissioning, Preparation and Use of Bar Reports, Whitecross RW (2011), in particular Chapter 5 (paras 5.18-5.40) of the report, available at: http://www.scotland.gov.uk/Publications/2011/01/07142042/0.

[248] In Publication 8, which is the focus of Chapter 4, considered the child's views and best interest in the context of complex medical decision-making.

[249] Children (Scotland) Act 1995, s 11(7)(a).

[250] *Re A-H (Children)* [2008] EWCA Civ 630, para 5 of judgment, quoted in Publication 3 at p 529.

[251] *Ibid,* quoted in Publication 3 at p 530.

[252] Publication 3, at p 530.

[253] *Re A-H (Children)* [2008] EWCA Civ 630, para 21 of judgment, quoted in Publication 3 at p 532.

(iii) Article 12 and Family Law: the framework governing the participation of the child

The child's right to express a view – and to have that view heard – is found in article 12 of the UNCRC. The right to be heard has been described by the UN Committee on the Rights of the Child ("the Committee") as "one of the fundamental values of the Convention".[254] The right is particularly significant, because it recognises the child as an independent being with an inherent and valuable contribution to make. Thus, in addition to possessing a range of quiescent rights that derive from being vulnerable or dependent on adults, the child is empowered through article 12 to exercise a positive "influence on his or her life".[255]

In its *General Comment on the right of the child to be heard, No. 12*,[256] the Committee also highlighted the dual function of article 12. First, it provides the child with a free-standing right to express a view (should the child wish to do so) in all matters affecting him or her. Secondly, article 12 establishes an overarching principle to inform the "interpretation and implementation"[257] of all other Convention rights. In other words, article 12 is in itself a lens through which every other article should be read, understood and effected.[258]

The progress made to date by State parties towards ensuing the permeation of article 12 across a range of processes affecting children has been "broadly conceptualized" with reference to the term "participation".[259] While "participation" is not mentioned in the Convention itself in respect of the child being heard, it has been aptly described as a:

[254] UN Committee on the Rights of the Child (hereinafter referred to as "the Committee", General Comment No. 12 on Article 12, CRC/C/GC/12, 20 July 2009, hereinafter referred to as "General Comment, No. 12". Quote taken from para 2, and text available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11.

[255] General Comment, No. 12, para 18. The Convention rights are commonly referred to with reference to the three "ps": Provision, Protection and Participation (see note 4 of General Comment, No. 12).

[256] General Comment, No. 12, *supra*.

[257] Para 17 of General Statement No. 12: article 12 is "one of the *four* general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests" (italics added).

[258] This reiterates the view expressed by the Committee in its earlier General Comment No. 5 (2003) on general measures of implementation for the Convention on the Rights of the Child (CRC/GC/2003/5), para 57 of which refers to "Article 12 of the Convention… [requiring] due weight to be given to children's views in all matters affecting them, which plainly includes implementation of "their" Convention." It is worth observing that the four overarching principles of the Convention are not explicitly stated in domestic legislation.

[259] Para 3 of General Statement No. 12. The extent to which children's rights are respected throughout these processes is subject to ongoing scrutiny. See, e.g., Tisdall EKM, (2012), 'Taking Forward Children and Young People's Participation', in Hill *et al* (eds), Children's Services: working together, Harlow: Pearson (pp151-162).

> "very good term for that what results from expressing views, listening and giving due weight to the views, interests and goals of the child." [260]

It has, however, been observed by the Committee that a number of widespread barriers to participation exist, and that State parties generally require a "better understanding of what article 12 entails, and of how the article should be implemented" fully in legislation, policy and practice.[261] In *General Comment, No. 12*, the Committee also stressed that professionals providing services to, and working with, children and young people[262] should be better trained "on article 12, and its application in practice".[263] This opinion is shared by many commentators on children's rights.[264] While most agree that discussing "children's rights is almost inconceivable without considering the Convention", debate continues about the extent to which "'old' childrearing paradigms" of controlling adults and "protected" (rather than participating) children have persisted in practice.[265]

The Committee envisaged that certain "literal" measures for participation would be put in place by State parties. These measures include establishing valid processes to assess child capacity [266] to express a view freely in all matters affecting the child (recognising that not all children will wish to verbalise their views). Such processes should enable the child, or the group of children,[267] concerned to express a view directly, or through a representative person or body (e.g. a parent, teacher or lawyer), in a "manner consistent" with national law.[268] Further, States were explicitly "discourage[ed]… from introducing age limits

[260] Krappmann L [writing at the time as a member of the *UN Committee on Rights of Child*], (2010), 'The Weight of the child's view (Article 12 of the Convention on the Rights of the child)', *International Journal of Children's Rights* 18, 501-513, at p 502 (the term "participation" is used in articles 23 and 40).
[261] Paras 4; 8 of General Comment, No. 12. Barriers are observed by the Committee include "long-standing practices and attitudes… political and economic barriers" and further barriers relating to the characteristics of "certain groups of children, including younger boys and girls…" (para 4)
[262] These people include, e.g., "lawyers, judges, police, social workers… psychologists, caregivers, residential and prison officers, teachers…medical doctors...civil servants…"(para 49).
[263] Para 49.
[264] See, e.g., Marshall K, (1997), *Children's Rights in the Balance: supra*. For a more recent discussion, see: Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences', chapter **in** Freeman M (ed), *Law and Childhood Studies*, Open University Press (pp156-173)**.**
[265] Reynaert D *et al, ibid,* at p 529. See also Freeman M, (2007), 'Why it remains important to take Children's Rights seriously', *International Journal of Children's Rights* 15, 5-23.
[266] In *General Comment, No. 12* the Committee also noted the practical "distinction" between the individual child's right to be heard and "the right to be heard as applied to a group of children" (paras 9; 10).
[267] The challenges in implementing the right to be heard in respect both of the individual child and groups of children is the focus of Part III of General Comment No. 12.
[268] *Ibid,* Paras 34-39. "The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation" (para 36).

either in law or in practice that would restrict the child's right to be heard in all matters affecting him or her."[269]

Insofar as Scots Law processes are concerned, certain established perceptions have shaped the "consistent manner" in which our legal system approaches the expression of views by children. Two of these perceptions are briefly considered here with reference to the Committee's *General Comment No. 12*: (i) the impact of the child's age upon his or her perceived ability to express a view, and (ii) the apparent tension between the child's best interests (or welfare) and what might be his or her views.

Where (i) the impact of the child's age is concerned, the requirement that the child's view is given due weight "in accordance with age and maturity"[270] does not mean that younger, perhaps less articulate, children should be ignored. The Committee has, in particular, been keen to stress that article 12:

> "imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him." [271]

A significant focus of *General Comment No. 12* is hearing the child in the context of "judicial proceedings" concerning "key issues" affecting the child. Paragraphs 50 – 64 list the "main issues" in which the requirement to hear the child in legal proceedings is a "specific [State] obligation".[272] As might be expected, child contact and residence disputes (i.e. private Family Law litigation following parental relationship breakdown) appear at the top of the "main issues" list. However, the processes governing legal proceedings in Scotland (and elsewhere) have been constructed over centuries by adults – with adult actors in mind. The notion that children might be distinct, and autonomous,

[269] *Ibid,* Para 20. See also references to "play, body language" and other forms of childhood communication, discussed at para 21 and in the the UN Committee's General Comment No 7 on Implementing Child Rights in Early Childhood (2005), available: http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf.

[270] Paras 28-31. A broad definition of "all matters" is adopted by the Committee, who observed (at para 27) that the Open-ended Working Group established by the Commission on Human Rights "rejected a proposal to define these matters by a list" which might have the effect of limiting the definition.

[271] Para 21.

[272] These include proceedings about divorce and separation cases in which "custody and access are determined by the judge either at trial or through court-directed mediation" (para 51); public care proceedings and adoption (paras 53- 55); cases in which the child is an offender (paras 58 – 61) or a witness (62 – 64).

actors (even in Family Law proceedings) is a very modern one.[273] Within the litigation process, the age of 12 was imposed by Scottish statute almost 20 years ago as being the age at which children are "presumed" capable of possessing the maturity to form "a view".[274] Twelve is also the childhood age most commonly referred to in contemporary statute as a benchmark for maturity within the legal process.[275]

The initial, and continued, imposition of an age presumption in Scottish statute for expressing a view in Family proceedings is controversial. It is perhaps not surprising that lawyers (being required to make one-to-one decisions about children's participation within the judicial process) broadly support the degree of certainty provided by statutory reference to a particular age.[276] Non-lawyers, in contrast, tend to favour there being no age benchmark. Commentators from various disciplines have cautioned against the "institutionalisation of chronological age" as the key factor for determinations of childhood status and capacity.[277] James and James (2012) note that age is:

> "a less useful concept" than many others in defining and marking the stages and status of childhood "for a number of reasons" and that the "mapping of an age- and stage-based categorisation schema onto children's social intellectual and psychological development, irrespective of social context, is now regarded as problematic."[278]

A reliance on age alone may accordingly "diminish [the] validity [of younger children's views and]… confuses validity with accuracy."[279]

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[273] "Recognis[ing] children as a distinct client group" has been one of the challenges for the legal profession: Cleland A, Sutherland E (1996), *Children's Rights in Scotland* (1st ed.), W Green, chapter 4; (3rd ed.), (2009).

[274] Exactly what constitutes "a view" is not defined in the Children (Scotland) Act 1995 (see s 6(1)(b); s 11(7)). A general consensus seems to be that expressing a "view" is much the same thing as expressing an "opinion": see UNICEF Fact Sheet on the Right to Participate: http://www.unicef.org/crc/files/Right-to-Participation.pdf.

[275] It is, e.g. the current age of criminal prosecution (Criminal Procedure (Scotland) Act 1995, s 41) and the age at which a child can refuse to consent to his or her adoption, instruct a solicitor or draft a will (Age of Legal Capacity (Scotland) Act 1991, ss 2(2); 2(4A); 2(3)).

[276] See, e.g., Marshall K, (1997), *Children's Rights in the Balance: supra*, at p 85. The Appendix to this book contains a copy of a survey sent out in the early years following ratification of the Convention about children's participation in the legal process in Scotland. For a more recent study, see: Scottish Government Study: Child Welfare Hearings: A Scoping Study of the Commissioning, Preparation and Use of Bar Reports, Whitecross RW (2011), *ibid.*

[277] See (e.g. sociologists) and Hockey J and James A, (2003), in their text *Social Identities Across the Life-Course*, Basingstoke/Palgrave, chapters 1 -3. The authors observe, at p 64, that "what is means to be a child… has become highly contextualized (sic) in relation to… age".

[278] James A and James A, (2012), *Key Concepts in Childhood Studies*, 2nd ed, Sage Publications, age is noted, at p 1.

[279] Quotes taken from Marshall K, (1997), *Children's Rights in the Balance: supra*, at p 85. Children's Rights Alliance for England, *The State of Children's Rights in England 2013,* Review of Government progress during 2013 in implementing the UNCRC in England, at p 27, e.g., the report makes reference to

It is true that while the presumed age of capacity to express a view in Family Law is currently set at 12 years, this is specifically stated in section 6(1)(b) of the Children (Scotland) Act 1995 to be "without prejudice"[280] to the right of 'mature' younger children to express a view. However, the onus (arguably a difficult one to rebut[281]) remains on children below the age of 12 years to demonstrate that they possess the maturity, notwithstanding their young age, to express a view. Further, it is not entirely clear what section 6(1)(b) means. Family lawyers are not generally trained in child development or in how to measure such 'premature maturity'. Family Law is a legal field beset by high-running family emotions, acrimony and client complaints.[282] It is not unreasonable to speculate that reaching the age of 12 has become the general requirement before any kind of meaningful child participation in Family litigation is guaranteed by lawyers intent on avoiding a whole new category of age-related client complaints.

Some would, of course, dispute that children below the age of 12 are routinely excluded from the Family Law process, since younger children often have contact and residence proceedings intimated upon them by way of an F9 form. The validity of such intimation is, however, a matter of ongoing debate: concerns about tokenism and possible parental influence have been expressed about the F9 process.[283] Others observe that the Scottish Family court system is flawed – perhaps to the extent that meaningful participation is not guaranteed for any child or any age.[284] The reality is that, for the legal profession, throughout which systemisation is endemic, the more open-textured approach towards the expression by children of views envisaged by the UN Committee has arguably been frustrated.

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the "lack of involvement" of younger children and "tokenistic" taking of their views, report available: http://www.crae.org.uk/ .

[280] Children (Scotland) Act 1991, s 6(1)(b). It should be noted, however, that it is common practice of court reporters to take the views of children between the ages of 5 and 12 years old (the weight given to these views is of course a separate matter): see Scottish Government Study: Child Welfare Hearings: A Scoping Study of the Commissioning, Preparation and Use of Bar Reports, Whitecross RW (2011*), ibid.*

[281] This has long been recognised to be the case (whether in respect of expressing a view, instructing a solicitor or becoming a party) in England and in Scotland. See, e.g., *Re A (A Minor)(Independent Representation)* [1993] 2 FCR 437 (per Booth J, at p 440); *Shields v Shields, supra* (child age 7 too young to express a view at the start of proceedings).

[282] The Scottish Legal Complaints Commission most recent Annual Reports show (as is the norm) that Family lawyers attract the greatest volume of complaints of any other named business category: http://www.scottishlegalcomplaints.com/media/47185/slcc_review_201213__-_final_proof.pdf.

[283] See, e.g., Scottish Government report, Laing K and Wilson G, (2010), *Understanding Child Contact Cases in the Sheriff Court*, paras 7.7 - 7.8, available: http://www.scotland.gov.uk/Publications/2010/12/08145916/0.

[284] For a discussion of the system and process, see e.g., Tisdall K, Bray R, Marshall K, and Cleland A, (2004) 'Children's Participation in Family Law Proceedings: A step too far or a step too small?' *Journal of Social Welfare and Family Law*, 26(1): 17-33.

Insofar as (ii) the 'child's best interests versus the child's view' debate[285] is concerned, in Scotland (as with other jurisdictions[286]), the best interests of the child[287] is stated to be the primary focus of Family Law disputes concerning the child. Article 3 of the Convention is concerned with the best interests of the child, requiring States parties to ensure protection for the child, always "taking into account the rights and duties of his or her parents".[288] It is, of course, possible that this broad, welfarist requirement (i.e. respect for parental rights and parental views) might conflict with respect for the child's own views. However, the Committee stressed in *General Comment No. 12* that:

> "There is no tension between articles 3 and 12, only a complementary role… one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing… the child … there can be no correct application of article 3 if the components of article 12 are not respected."[289]

The extent to which State parties recognise, and appropriately balance, what the Committee considers are the essentially complementary roles of articles 3 and 12 in legal and other fora has been a point of ongoing discussion in Scotland, and elsewhere, since the Convention came into being. The relationship between the two articles has been observed by one of the leading Children's Rights lawyers in the UK as "puzzling" on account of how the potential conflict between the child's wishes, and what adults think is best for him, or her, can be effectively managed in law.[290] Some commentators have suggested that the 'best interests of the child versus the views of the child' debate is, in reality, a part of a wider debate about 'children's rights' versus adults (essentially, 'parents') rights' and that, in law:

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[285] A sound overview of this debate is given in Part III of David Archer's foundation text: Archard D, (2004), *Children, Rights and Childhood* (2nd ed), London Routledge.

[286] See, e.g., section 28(2) of the South African Constitution, which provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

[287] Article 3 of the UN Convention on the Rights of the Child: "in all actions concerning children… the best interests of the child shall be a primary consideration" (Article 3(1)). The Children (Scotland) Act 1995, s 11(7)(a) goes further than the Convention, stating that the court "shall regard the welfare of the child concerned as its paramount consideration".

[288] Article 3(2).

[289] Para 74.

[290] Freeman, M (2007), 'Article 3. The Best Interests of the Child', in Alen A, Vande Lanotte J, Verhellen F, Ang E, Verheyde M (eds), A Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, at p 6. See also: Freeman M (1996), Children's Rights: A Comparative Perspective (Issues in Law and Society), Dartmouth, an early comparative text addressing emerging issues concerning the implementation of the Convention by a range of State parties, including the UK, Canada, Denmark, Japan, Holland, New Zealand and Russia; Lansdown G (2006), 'International developments in children's participation: lessons and challenges', in Tisdall EKM, Davis JM, Hill M, Prout A (eds), (2006), Children Young People and Social Inclusion, Policy Press, a text containing chapters spanning "participation in many forms" (at p139).

> "The parent-child dichotomy debate is characterized by the search both for the best judicial procedure and for a legal compromise that protects the rights of both the children and the parents and defines the role of the state." [291]

It has been persuasively argued that the Convention itself addressed the problems generated by the parent-child dichotomy debate with reference to the construct of the "evolving capacity of the child."[292] The Committee was clear that age should not be the only determinant of this evolving capacity and, in *General Comment No. 12*, made reference to a range of factors that can impact upon capacity:

> "Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination."[293]

Thus, each child should be considered as an individual, rather than merely a human being of a particular age. Generally speaking, as the child develops towards adulthood, legal (and other) processes should recognise that he or she becomes gradually more autonomous and parental rights recede. However, it is clear from the terms of *General Comment No. 12* that, regardless of age or perceived capacity, children deserve no less respect as service-users than adults (including their own parents) involved in the litigation process.[294] This ought to be the case regardless of whether the child expresses views that accord with what adults consider serve his or her "best interests". It is, however, arguable that, since the child's best interests (or, "welfare", as it is termed in Scots Family Law) are the court's "paramount consideration", every other consideration is secondary.[295] The Scottish approach has much in common with England: the 'best interests of the child versus the child's views' is an ongoing theme of children's rights literature in the UK (and elsewhere).[296]

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[291] Reynaert D *et al, ibid,* at p 525. It is worth noting that the authors cite various scholars who criticise the "dichotomization of children's rights *v*s parents' rights" as being a "myopic focus" on rights to the detriment of other more collaborative (and less legally focused) approaches to adults and children.
[292] Hammarberg T (1990), 'The UN Convention on the Rights of the Child – and How to Make it Work', *Human Rights Quarterly,* 12(1), 97-105.
[293] Para 29.
[294] The overall treatment of children as service users is part of the UNCRC Committee reporting/report card process of State parties. See: "Do the Right Thing" Progress on the Scottish Government's progress in terms of respecting the rights of children and young people in Scotland, available at: http://www.scotland.gov.uk/Resource/0039/00392997.pdf.
[295] Quotes from Children (Scotland) Act 1995, s 11(7)(a).
[296] See, e.g., Eekelaar J, (1986), 'The Emergence of Children's Rights', *Oxford Journal of Legal* Studies, 6(2), 161–182, at 166-171; Archard D and Skivenes M, (2009), 'Balancing a Child's Best Interests and a Child's Views', *International Journal of Children's Rights* 17, 1-21; Zermatten J [*then Chair of UN*

In the closing paragraphs of *General Comment No. 12*, the Committee provided a detailed, practical overview of the characteristics required by article 12 of all processes "in which children are heard and participate."[297] A key characteristic noted was training of adults to listen, and to work "jointly with children… engaging children effectively in accordance with their evolving capacities."[298] Among the other characteristics stated were: (i) an "inclusive" process which is "transparent" (involving, e.g., full access to (appropriately prepared) and "relevant" information about the purpose of participation and the process itself); (ii) a "child-friendly" mechanisms for ascertaining, recording and feeding back on views expressed in an "accountable" manner.[299] This means, in particular, informing children:

> "as to how their views [however expressed] have been interpreted and used and, where necessary, with the opportunity to challenge and influence the analysis of the findings." [300]

The lack of any routine practice whereby feedback is given to the children is not the only criticism that can be made of Scottish Family Law processes. Certain steps have been taken over the last two decades (e.g., the Law Society of Scotland introduced a Child Law Specialist Accreditation for Family Lawyers in the early 1990s), but there remains inadequately formalised training for practitioners' Child Law specialism in Scotland. While it has been observed that Scotland appears to state the child's participation more positively in legislation than elsewhere in the UK, and overtly acknowledge the child's view in case law,[301] Tisdall and Morrison (2012) observe that this apparent:

> "success story… must be qualified by certain trends that may undermine or sideline some or many children's views: a fixation on 'voice' and a façade of fixed, rational, autonomous views."[302]

In the following subsection, the focus of my discussion shifts to issues surrounding the expression of views by children within the current Scottish statutory framework.

Committee on Rights of Child)], (2010), 'The Best Interests of the Child Principle: Literal Analysis and Function', *International Journal of Children's Rights* 18, 483-499; Cassidy C, (2012), Children's Status, Children's Rights and 'dealing with' Children', *International Journal of Children's Rights* 20, 57- 71.

[297] Paras 134-136.

[298] Para 134(g).

[299] Quotes taken from para 134, paras (a) to (i).

[300] Para 134(i).

[301] Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences', chapter in Freeman M (ed), *Law and Childhood Studies*, Open University Press (pp156-173), at pp 158; 170.

[302] *Ibid*, p 172-173.

(iv) Expressing a view in the context of Scottish Family Law proceedings

As long as children are old enough to be aware of legal proceedings concerning their own care and upbringing, the prevailing thinking in Scotland in 2008/9 (and currently) is that children can, and should, have any views they wish to express considered in those proceedings.[303] As observed in Publication 3, "so far as Scotland is concerned, the need to have regard to the views of children in family disputes is a relatively recent and much applauded legal development."[304] This development followed the coming into force in September 1991 of the Age of Legal Capacity (Scotland) Act 1991, and the subsequent requirement placed upon the court by the Children (Scotland) Act 1995 to have regard to the views of the child capable of expressing views (and desirous of doing that) in family proceedings.[305]

These statutes seek to reinforce the "right" to express a view enshrined in the UN Convention on the Rights of the Child. Standard judicial practice since 1995 has been to ascertain whether the capable child wishes to express a view and to have regard (to whatever extent thought appropriate in the situation concerned[306]) to any views expressed. This is considered preferable to the former law in which "children's views… were not routinely sought and court orders regulating the care and upbringing of children were often granted [in opposition to] the child's wishes".[307]

However, it is one thing to pass an Act giving a child the "right" to have his or her view given due regard if and when expressed. It is quite another thing to put in place practical, and effective, machinery[308] to govern *when* a child's views should be taken (for example, the Court of Session required to rule on whether a child below 3 years of age was too

[303] Article 12 of the United Nations Convention on the Rights of the Child ('the UNCRC'), as translated into domestic legislation through a number of statutory provisions, including ss 6; 11(7)(b) of the Children (Scotland) Act 1995, s 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 etc.
[304] Publication 3, at p 531.
[305] Part I of the Children (Scotland) Act 1995 came into force in November 1995.
[306] Here, the term used in the legislation to equate to "appropriate" is "practicable" (see s 11(7) of the Children (Scotland) Act 1995), as discussed in the main text below.
[307] Publication 3, at p 531, in particular referencing *Blance v Blance* 1978 SLT 74; *Brannigan v Brannigan* 1979 SLT (Notes) 73. Cf *Porchetta v Porchetta* 1986 SLT 105; *Russell v Russell* 1991 SCLR 429.
[308] While this has been the subject of, it seems quite extensive, discussion in other disciplines it has been relatively little discussed by lawyers. See, e.g, Tisdall EKM, (2012), 'Taking Forward Children and Young People's Participation', in Hill *et al* (eds), Children's Services: working together, Harlow: Pearson (pp151-162); Cassidy, C, (2012), 'Children's Status, Children's Rights and Dealing with Children', 20 Int'l J Child Rts. 57; Tisdall EKM and Morrison F, (2012), 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences', chapter in Freeman M (ed), Law and Childhood Studies, OUP (pp156-173).

young to express a view[309]). Further, where a court accepts that a child's views are to be taken, other considerations come into play, such as the *manner* in which that view should be sought, and recorded.[310] Is it, for example, acceptable that a court reporter attempts to obtain the "independent view" of a child at the home of a residential parent who strongly opposes that child seeing the other parent in a contact dispute?[311]

Finally, what should we *do* with the views expressed by children? What weight should they carry – particularly in cases where the views of the child do not accord with what is generally perceived to be in her best interests? Can such views be decisive, or at they merely one factor to which the court gives a nod in its overall decision-making process?[312] Also, does Article 6[313] mean that the parent's right (as a party to proceedings) to be made aware of anything relevant to the judge or sheriff's decision-making in a family case trumps the child's wish that his or her views remain confidential?[314] These questions seemed to me to be both pressing and significant at the time *'A child is, after all, a child'*, '*Moral actors in their own right'* and *'Re A-H (Children)'* were published. Some of these questions have yet to be addressed comprehensively by our legislature or judiciary.

Accordingly, the overarching premise of Publications 1, 2 and 3 was that it was becoming increasingly clear that contemporary Scots Family Law lacked: (i) a clear diagnosis of the range of practical difficulties that were arising in respect of recognising the right of the

[309] *Stewart v Stewart,* 2007 SC451, per Lord Wheatley in the Inner House, who giving the court's opinion, observed: "At the time of the proof, the child was under three years old, and it was clearly within the sheriff's discretion to take the view that to seek the views of a child of that age would be wholly impractical …" This case is discussed in Publication 1,*'A child is after all a child'*.

[310] Steps have certainly been taken with the legal profession over the last decade in Scotland to better train members of the judiciary interacting with children but whether this is enough has been questioned by leading academics: Raitt F (2007), Hearing Children in Family Law Proceedings: Can Judges Make a Difference?, Child and Family Law Quarterly 204-224. Also, the general dearth of training given to Court Welfare Reporters (i.e. those producing "bar reports" in family proceedings, during which children regularly express views) was highlighted in a recent Scottish Government Study: Child Welfare Hearings: A Scoping Study of the Commissioning, Preparation and Use of Bar Reports, Whitecross RW (2011), available at: http://www.scotland.gov.uk/Publications/2011/01/07142042/0. It should be noted that various organisations, such as the "FLA" (Scottish Family Law Association") provide training, but that this training is not compulsory.

[311] See, e.g., In *F v F,* 2004 Fam LR 20, an expert reporter was heavily criticised by the Inner House for submitting, among other things, a report based on conversations with the children which took place in their mother's home when she was in the environs. The court described the report as "inevitably one-sided and partly biased". This case is discussed in Publication 2, '*Moral actors in their own right'*.

[312] This is discussed in Publication 2 at p 141 onwards.

[313] Of the European Convention on Human Rights, text available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf. The Right to a fair hearing is found, within the civil court context, in Article 6.1.

[314] Discussed in Publication 2 at p 142, with particular reference to *Dosoo v Dosoo (No 1),* 1999 SLT (Sh Ct) 86; and *McGrath v McGrath,* 1999 SLT (Sh Ct) 9.

young to express a view in family proceedings; (ii) proper classification, or contextualisation, of these difficulties within the existing theoretical framework of the law; (iii) a possible, practical, way forward in terms of the application of broad legal principle and precedent to these difficulties. The overarching aim of these publications was, therefore, to promote knowledge exchange in order to generate "identifiable benefits"[315] to relevant professionals, the academic community and perhaps even Scottish and UK society as a whole.

Next, in section 4 of this chapter, consideration is given to the approach adopted, using traditional legal research methods, toward these publications.

1.4. Observations on Approach Adopted in Publications

In this section, my general approach to researching and writing up *'A child is, after all, a child'*, '*Moral actors in their own right'* and *'Re A-H (Children)'* is outlined and critiqued.

(i) General Approach of Publications 1 and 2

The focus of Publications 1 and 2 (*'A child is, after all, a child'* and '*Moral actors in their own right')* were the difficulties increasingly facing practitioners coming into contact with children in complex and often high conflict family proceedings.[316] In particular, Publications 1 and 2 addressed the uncertainty surrounding the exercise by the child of her "right to express" a view in respect of "all matters affecting" her.[317] Questions to which no satisfying answer had been suggested in Scots law were posed and conclusions drawn with the intention of providing guidance to family practitioners.

In Publication 1 *('A child is, after all, a child')*, the statutory framework (and international source of our domestic statutes) was outlined and a critical commentary

[315] Edinburgh Napier University, "*Research, Knowledge Transfer and Commercialisation Strategy 2009-15*" (Amended 01 March 2012) – *"Vision, Mission and Values*", at p 5, available: http://www.napier.ac.uk/randkt/documents/rktc_strategy.pdf.
[316] Publication 1 at p 123.
[317] Quotes taken from the United Nations Convention on the Rights of the Child ('the UNCRC'), Article 12. The Domestic provisions which currently give effect to the Convention right were outlined in detail in Publication 1 and are discussed in the main text below.

provided.[318] Thereafter, various "problem" children were grouped and the particular "practical, ethical and academic difficulties surrounding the expression of [their] views"[319] addressed. Thus, using the practical difficulties that had come to my attention through examining existing judicial rationale and using feedback provided by practitioners, four main "problem" categories were identified. Corresponding publication sub-headings given: (1) "the manipulated or unduly influenced child"; (2) "the disturbed child"; (3) "the child affected by disability"; (4) "the underage child". In respect of each category, issues surrounding assessing competence, obtaining views and evaluating the level of credence that should properly be given to any views expressed was analysed.[320]

In Publication 2, '*Moral actors in their own right'*, the occasions on which it might be either "practicable"[321] or impracticable to take a child's views were canvased and the "problematic issue of ensuring that proper regard"[322] be given to any views expressed was explored. The "wide range of means by which a Scottish child's views may legitimately be ascertained and managed in different circumstances"[323] were outlined and evaluated. These means were observed to be wide-ranging, although their use was cautioned in certain cases (e.g. the pitfalls of a child minuting into process[324] where his or her views merely repeat those of an adult party). The publication also addressed questions surrounding the "weight attributed to the child's views", and the difficult issue of whether or not "confidentiality" could, or should, be afforded for such views.[325]

'A child is, after all, a child' and '*Moral actors in their own right'* were highly structured publications in which headings were used in an effort to target particular areas of difficulty and provide intellectually satisfying and practical answers. In hindsight, I think that this approach was effective. I would not change the method by which I managed the

[318] Publication 1, at p 121 onwards.
[319] Publication 1, at p 123 - 126.
[320] Publication 1. p 123-126.
[321] The term "practicable" is taken from s 11(7)(b) of the Children (Scotland) Act 1995, and also from the judgment of Lord Marnoch in *Shields v Shields*, 2002 SC 246, at para 11: "… 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."
[322] The statutory term "regard", taken from s 11(7)(b)(iii) of the Children (Scotland) Act 1995, is discussed in Publications 1 and 2 insofar as the views of the child are concerned, see Publication 1 at p 122-3 and Publication 2 at p 139 onwards.
[323] Publication 1, p 139.
[324] Meaning that the child becomes a party, or litigant, to the case in her own right.
[325] Publication 1, at 142.

research material, nor the manner in which I approached, and set out, my research findings.[326]

(ii) General Approach of Publication 3

The aim of Publication 3, *'Re A-H (Children)'* was to further develop one emerging theme identified in Publications 1 and 2: "uncooperative litigant behaviour" in family proceedings, with particular emphasis upon "recalcitrant" children.[327]

Re A-H (Children) struck me as a curious, and potentially significant, decision: a likely forerunner of similar cases to come in the UK. My reasoning was that the Court of Appeal, in 2009, faced a very modern dilemma: a "teenager [who] simply would not obtemper any contact award granted".[328] The teenager (who was a 13 year old "child"[329] at the time of the judgment) had also written the court a letter entitled "Dear judge, I am writing to you because I think it's pathetic…" Wall LJ, who delivered the court's opinion, took the highly unusual step of reproducing the child's letter in his judgment. The opening words of the letter formed the longer title of Publication 3.[330] The court's dilemma in *Re A-H (Children)* was compounded by two matters: (i) the teenager's letter revealed her "complete misapprehension"[331] about both the intentions of her parents and the nature of family proceedings and (ii) since her views had been formed, and behaviour strongly encouraged, by one parent the teenager's whole position was entirely "rooted in manipulation and fallacy".[332] The case was perhaps an example of one of the worst manifestations of the (apparent) operation of the child's right to express a view.

The judgment in *Re A-H (Children)* was set within a wider legal framework in the last section of the publication. In particular, the new English statutory compliance framework

[326] These publications are relatively recent. It is certainly relieving to see an improvement in my research approach, presentation and structure over the course of the three years between Publications 1 and 2 and my first academic publication: *'Transsexuality and "kidulthood"*, discussed in depth in Chapter 4.
[327] Quotes taken from Publication 3, at p 529.
[328] Quotes taken from Publication 3, at p 532. "Obtemper" means adhere to (i.e. the order was granted by the court and the party to whom it referred did not obey its terms). This is the subject of further discussion in the text below.
[329] The teenager, 'C', fell within the parallel English legislation (ss 9(6); 9(7); 105 of the Children Act 1989) which provided that, as she was below the age of 18 years, she was a child and that, generally, contact/residence orders could be made in respect of her while she was below the age of 16 years (s 9(7)). Similar Scottish provisions are found in the Children (Scotland) Act 1995 (ss 1 and 2).
[330] '"Dear Judge, I am writing to you because I think it's pathetic": *Re A-H (Children)(Contact Order)', Edinburgh Law Review,* Vol 13, 2009, 528.
[331] *Ibid*, judgment at para 19.
[332] Quotes taken from Publication 3, at p 529.

and the (then) recent amendments to the Children (Scotland) Act 1995 were observed[333] to require that the court consider whether it is appropriate to grant a contact order when parties are unable to "co-operate … as respects matters affecting the child".[334] Consideration was give to the possible impact of these statutory provisions on 'recalcitrant child' scenarios and conclusions suggested.

'Re A-H (Children)' was split into three sections: "(A) The (contemporary) intractable contact dispute; (B) "'Just' or 'Right' means nothing but what is in the interest of the stronger party; (C) "So the question returns and abides: what, if anything, can we do?" As with Publications 1 and 2, a very tightly structured approach was adopted in the publication.

The overall approach adopted in *'Re A-H (Children)'* was, to a large extent, dictated to by word-count restraints. In order to meet the requirements of the *Edinburgh Law Review's Analysis* section, the publication, inclusive of footnotes, could not exceed 2,000 words.[335] This was the first time I had written an analytical case commentary, and such a succinct output. However, restraint is sometimes beneficial: in revisiting the publication I cannot see that there was anything significant lacking in content. Also, any further content would have been directed to a wider purpose than a critical case commentary alone.

In section 5 below, the research outcomes of these publications will be critically evaluated.

1.5. Reflections on Publication Research Outcomes

It is not possible in this thesis, or desirable, to revisit the gamut of research outcomes in *'A child is, after all, a child'*", '*Moral actors in their own right'* and *'Re A-H (Children)'* concerning complex family proceedings and the young. Many of the areas addressed in

[333] These provisions are found in English and Scottish legislation, respectively, as follows: Children Act 1989, s 11J onwards; Children (Scotland) Act 1995, s 11(7A)-(7E). Domestic abuse, or violence, was not a feature of *Re A-H (Children)*.
[334] Publication 3, at p 532, referring to the Children (Scotland) Act 1995 s 11(7D)(b). (n.b. the Justice 1 Committee decided against inserting compliance orders of the sort found in English legislation in Scottish legislation when the provisions of the recent Family Law (Scotland) Bill (now the 2006 Act) were debated).
[335] This remains the case. See, *Edinburgh law Review,* submissions notes: http://www.euppublishing.com/page/elr/submissions.

these publications have, in any event, remained static in Scots law over the last four years.[336]

The Manipulated Child and the 'Anti-Contact Movement': discussion leading on from Publications 1 and 3

Courts "impose solutions and stifle constructive dialogues".[337] Family proceedings are, as with all litigation, adversarial and often lengthy in nature. The Family court process itself can, accordingly, contribute to increasing parental polarisation and hostility – which in turn can place the child under increasing pressure.[338] A paradox (predicable, but troubling nonetheless) has been observed concerning the participation of children in Family Law proceedings:

> "The more weight that is given to the children's views, the greater the danger that they will be exposed to pressure from parents and manipulation, and the more likely they are to experience damaging loyalty conflicts."[339]

In this section, the publication outcomes of *Re A-H (Children)'*, '*A child is, after all, a child',* '*Moral actors in their own right'* pertaining to the manipulated child will be developed further. In Publications 1 and 3 in particular, ascertaining what should be done with the view expressed by a child believed to be "manipulated or unduly influenced" was presented as a difficulty perceived as commonly encountered in the context of Family Law proceedings. Cashmore and Parkinson (2009) observed in their Australian family court-based research that "about half" of the parents they spoke to believed (whether rightly or wrongly) that the other parent was a "potential manipulator" of the

[336] This is true, for example, insofar as confidentiality issues surrounding the expression by children of views in private family proceedings: *Dosoo v Dosoo* (No. 1) 1999 Fam LR 80; (No.2) 1999 Fam LR 130 and the other cases discussed in Publication 2 remain the leading authorities since there have been no further judgments of note on this issue. There have also been no further significant judgments on the views expressed by very young children in Scotland (i.e. the *Stewart v Stewart,* 2007 SC451 debate).

[337] 'Children as victims of the Divorce Process', chapter in Freeman M, (1983), *Rights and Wrongs of Children*, Pinter (London), at p 227.

[338] See, e.g., Smart C, Wade A, and Neale B, (1999), 'Objects of Concern? – Children and Divorce', *Child and Family Law Quarterly*, 11(4): 365-376; Smith AB, Taylor N and Tapp P, (2003), 'Rethinking children's involvement in decision-making after parental separation', *Childhood*, 10(2), 201–216; Cashmore J and Parkinson P, (2009), 'Children's participation in family law disputes: the views of children, parents, lawyers and counsellors', research findings available at: http://www.mentalhealthacademy.net/journal_archive/aifs099.pdf. See also, Hunter R, (2007), 'Close Encounters of a Judicial Kind: "Hearing" Children's "Voices" in Family Law Proceedings', (2007), *Child and Family Law Quarterly*, 19(3), 283.

[339] Cashmore J and Parkinson P, (2009), 'Children's participation in family law.., *ibid*, at p 5. See also: Bradford K, Burns-Vaughn L and Barber B, (2008), When there is conflict: Interparental conflict, parent-child conflict, and youth problem behaviours', *Journal of Family Issues*, 29, 780-805.

child.[340] As observed in Publication 1, a parent can be responsible for influencing a child against the other parent.[341] It was also observed in Publication 1 that, in more extreme cases, courts have found that parental influence can be so intense that it amounts to "indoctrinat[ion]"[342] of the child concerned.

Such cases are usually characterised by recurrent court hearings about the child's living arrangements, over many months or years, during which a number of measures are attempted, including, e.g., instructing welfare reports, the involvement of child psychologists, repeated orders of court (sometimes including coercive orders). Sections 8 – 14 of the Children Act 1989, as amended, contain a raft of provisions to address non-compliance with court orders and other recalcitrant parental behaviours. In Scotland, there are no statutory mechanisms specifically created to address such parental conduct: common law remedies, such as admonishment, motions for finding a party in contempt are the remedies most commonly used. The child himself, or herself, can easily become lost in such judicial processes.[343] However, the intractable nature of such high conflict litigation can be manifested by the manipulating parent's use of the child's expressed 'view' both as a "weapon" against the other parent and as "protection against coercive judicial orders".[344] As might be expected, research has long-shown that ongoing parental conflict manifesting in a number of ways (from parents "using their children to carry hostile messages" to parents who "prohibit discussion of the other parent, or express verbal and physical aggression… toward the other parent in the presence of the children"[345]) is detrimental to children.

[340] Publication 1, at p 123. Cashmore J and Parkinson P, (2009), 'Children's participation in family law disputes…' *ibid.* at p 21.
[341] Publication 1, at p 123, referring to *W (Contact: Joining Child as a Party)* 2003 Fam Law 225. In Publication 2, at p 140 onwards, general discussions about the communication, recording and weight given to children's views is discussed.
[342] This was noted in Publication 1, quoting from *K (Children)* [2005] EWCA Civ 1691 at para 7.
[343] Cashmore J and Parkinson P, ((2009), 'Children's participation in family law.., *ibid*) observe, at p 16, that parents and other adults "can often play a gatekeeping role" which might significant restrict the child's realistic participation in what the adults consider to be cases that are, perhaps, too difficult or stressful for them. This is also a criticism that has long been made (generally) in Scottish Family proceedings, see: Tisdall K, Baker R, Marshall K, Cleland A, (2002), Giving due regard to children's views in all matters that affect them, *supra*.
[344] Publication 3, at p 532. Here, the studies have long-shown that implicit or explicit parental conflict involving the child and his or her views or perceived views, is linked to a range of negative consequences for children and young people: 'The use of Children's Wishes'; Bradford K, Burns-Vaughn L and Barber B, (2008), When there is conflict: Inter-parental conflict, parent-child conflict, and youth problem behaviours', *Journal of Family Issues*, 29, 780-805.
[345] See, e.g., Kelly, JB, (2003), Changing Perspectives on Children's Adjustment Following Divorce: A View from the United States, *Childhood*, 10(2), 237 - 254 at 242.

Managing such disputes is problematic for all professionals concerned.[346] This is particularly true for Judges and Sheriffs who must oversee the process – with an increasingly watchful eye on the public purse. Following Lord Reed's criticism of the Scottish court system in *B v G* (2012), discussions about drastically improving case management, avoiding protracted Family cases, are high on the judicial and Government agenda.[347] Seeking to bring a resolution that both respects the child's right to be heard and retains his or her best interests as the paramount consideration is the court's aim. Such complex, seemingly intractable, disputes were the focus of Publication 3.

Here in Section 1.5, consideration of this area of particular and growing concern to the legal profession in Scotland, and elsewhere, is developed further.[348] I seek, in the subsection below, to acknowledge that there are a range of perspectives about such cases and that, as some have argued, we still understand relatively little about them. This lack of knowledge generates problems of a theoretical and practical nature.[349] Thereafter, I will seek to identify and critically analyse a range of judicial attitudes observable in UK court judgments towards these extreme cases involving children believed to be alienated from one parent as a result of deliberate, prolonged and intense manipulation. This discussion directly leads on from the observations made in Publications 1 and 3.

Counter-arguments to the ideas of the 'Anti-Contact Movement' and the 'Manipulated Child' in academic literature

The intractable cases outlined in the above subsection concern children who are believed to have been systematically alienated from one parent by the other. Here, it must be acknowledged that courts deal with family cases in a manner that provides only a snapshot of family life at a given (and very difficult) time. Courts, and lawyers, are sometimes criticised for failing to take on board important factors before simply classifying wide-ranging and complex family disputes as 'systematic alienation'. There are other factors (e.g. a residential parent seeking to protect the child from latent, but

[346] In *Re A-H*, for example, the involvement of a range of professionals (including, e.g., CAFCASS) to support the child, C, her mother and her father, had done little to resolve the dispute or to reduce the tension and conflict: judgment at par 21, discussed in Publication 3 at p 532.
[347] [2012] UKSC 21.
[348] See, e.g., D Smith, (2011), 'Fought all the way', *Journal of the Law Society of Scotland* ('JLSS'), 56(2), 44 - 46; Morris G, (2009), 'Family: Children's Voices', 159 NLJ 1721; Shaw M and Bazley J, (2011), 'Effective strategies in high conflict contact disputes', Fam. Law, 41(10), 1129-1137.
[349] Bruch CS, (2002), 'Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases', *Child and Family Law Quarterly*, 14(4), 381, at p 381-2. There is no universal definition of the syndrome (if indeed such a syndrome exists). See thesis discussion in main text below.

destructive, behaviour of the other parent) that should be explored first. Further, Johnston (2003) argues that the notion that children who are 'alienated' from their parents at the time of litigation is not necessary one that reflects any permanent reality: in the cases she studied, contact was often re-established at a later point in time.[350]

Such cases typically involve a dispute over contact arrangements: they have often been categorised within legal process as "(parental) alienation", [351] or "implacable hostility,"[352] cases. The phrases 'anti-contact movement' and 'manipulated child', used in this thesis, are not therefore intended to refer to (or to undermine) children who are "realistically estranged" [353] from one parent and are supported in that choice by the other parent. One example of a realistic/healthy estrangement might include a child who is the victim of domestic abuse or violence carried out by the non-residential parent.

Nor are the phrases 'anti-contact'/ 'parental alienation' intended to refer to, or to undermine, the child involved in family proceedings who, for personal reasons (whether explained or not), does not wish contact with a parent.[354] The UN Committee made it clear in its *General Comment No. 12*, first, that it is the child's view (rather than any explanation for that view) that is being heard[355] and, secondly, that the child has no

[350] Johnston JR, (2003), 'Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce,' *Journal of American Academy of Psychiatry and the Law*, 158-170.
[351] 'Alienation' is, e.g., the term used by Henaghan (2012) in his chapter based on empirical research of these cases in the Family Court process in New Zealand: 'Why judges need to know and understand Childhood Studies', in Freeman M (ed), *Law and Childhood Studies*, Open University Press (pp156-173). Others have used the term 'parental alientation' (although it is worth noting that this term and also discussions surrounding a "syndrome" are controversial): Gardner R, (2001),The Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases, 35 *Family Law Quarterly* 527; Warshak R, (2003), 'Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence', *Family Law Quarterly*, 37(2), 273-301. Gardner has a great many critics, see, e.g., Bruch CS, (2002), 'Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases', *Child and Family Law Quarterly*, 14(4), 381, at 399, "PAS as developed and purveyed by Richard Gardner has neither a logical nor a scientific basis."
[352] This is a term used to refer to such cases (sometimes featuring in the Law Report headnote). Notable recent reported UK cases include: *Re L-W (Children)(Enforcement and Committal: Contact)* 2010 EWCA Civ 1253; *G v B* 2011 S.L.T. 1253; *K (Children)(Suspension of Contact)* [2011] EWCA Civ 1064; *B v B* 2011 Fam LR 141; *M v S* 2011 S.L.T. 918; *Re E (A Child)* [2011] EWHC 3521 (Fam).
[353] Johnston JB and Johnston J, (2001), 'The Alienated Child: A Reformulation of Parental Alienation Syndrome', *Family Courts Review*, 39: 249 at 263. See also: Morrison F, Tisdall EKM, Jones F, Reid A, (2013), 'Child Contact Proceedings for Children Affected by Domestic Abuse', A report to Scotland's Commissioner for Children and Young People, (CRFR, University of Edinburgh, CL@N Childlaw), available at: http://clanchildlaw.org/wp/wp-content/uploads/2013/04/Child-contact-proceedings-SCCYP-report.pdf.
[354] See, e.g., chapter by Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings when Parents Divorce or Separate, *supra*. In the chapter, the experiences of "Claire", from p 166 onwards, indicate that children may havedeeply held views about not seeing a parent at a particular time but be unable to articulate those views in a way that is acceptable to the court.
[355] *General Comment No. 12*, para 19 onwards ("Literal Analysis of article 12).

responsibility to prove his or her view to be 'reasonable' by any adult standard.[356] Thirdly, the Committee observed that the child can only effectively be heard in a "child friendly"[357] environment – i.e. in the case of Family proceedings, not one that is constructed on adult litigation paradigms of 'averment' and 'evidence'. Judges and lawyers should, then, be criticised when they focus on a perceived necessity that the child rationalise, or defend, his or her views rather than simply listening to the child and taking any views expressed into consideration. There is a danger that the child's views are simply ignored on account of the "disjuncture between what [the child] and the court [perceive] to be valid reasons for contact to stop". [358]

However, in the case of an alienated child, the court considers that the views expressed do not represent what the child might feel if her or she were able, with true freedom, to express a view.[359] Consequently, the court seeks to determine whether the views expressed by an alienated/manipulated child "should be put to one side".[360] Setting aside the views of the child altogether, for any reason, is extremely controversial.[361] Doing so, arguably, represents the imposition on the child of what adults think that the child *should* be thinking in these circumstances – citing the 'best interests' as the rationale. Undermining the views of children in this manner, whatever the situation and however uncomfortable or unpleasant these views may be for adults to accept, is treading on dangerous territory.[362] Accordingly, the categorisation of the views of a child perceived as manipulated or alienated as being views that are immediately of suspect value is the first, broad, 'counter argument' that might be made against the existence of any such categorisation.

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[356] *Ibid,* para 20.
[357] *Ibid,* para 34, 134(c), 134(h). Para 34 states that a child "cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate…"
[358] See, Tisdall, E.K.M. and Morrison, F. (2012*), ibid,* p 167.
[359] Johnston JR and Roseby V, (2009), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, (2nd ed.), Springer: New York, discuss what systematic alienation comprises in Chapter 13 – they, in fact, reformulate the "phenomenon" of 'parental alienation syndrome' as the 'alienated child', thus ensuring the child is at the centre of the issue.
[360] UNCRC, Article 12 (1). Henaghan M, (2012), 'Why judges need to know and understand Childhood Studies', *ibid*, at p 43.
[361] See, e.g., Johnston JR, (2003), 'Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce,' *Journal of American Academy of Psychiatry and the Law*, 158-170, *c.f.* Gardner R, (2001), The Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases, 35 *Family Law Quarterly* 527.
[362] For general guidance about how to respect the child' view across a range of scenarios, see: *General Comment No. 12*, para 20. See Krappmann L [*then of UN Committee on Rights of Child*], (2010), 'The Weight of the child's view (Article 12 of the Convention on the Rights of the child)', *International Journal of Children's Rights* 18, 501-513.

A number of other counter arguments to the idea of 'anti-contact' and the manipulated child might be made. These arguments generally arise from concerns that the 'anti-contact' or 'alienated/manipulated child' labels are applied – in ignorance – within the legal process to children involved in a wide range of high-conflict family disputes.[363] As Johnston and Roseby (2009) observe:

> "Too often in divorce situations, all youngsters resisting visits with a parent are improperly [branded] "alienated", and too frequently parents who question the value of visitation in these situations are labelled "alienating parents"."[364]

Two of the main counter arguments to the ideas, or categorisation, of the alienated/manipulated child and the 'anti-contact' parent will be discussed below, namely: (i) that the motivations of children refusing contact with one parent following separation and divorce are not always properly explored before the term 'alienated child' is applied to them, and (ii) that the concept of alienation itself, from a developmental perspective, is not properly understood in law. In other words, what judges and family lawyers (across a range of jurisdictions) assume constitutes alienation does not measure up to the "scientific probity"[365] of any such condition. The broad lack of knowledge about alienation can be linked to a lack of understanding about how this might best be addressed when it does arise within the context of Family proceedings. As Bruch (2002) observed, following her research across a range of apparent 'parental alienation' family cases:

> "the vast majority of cases mentioning [parental alienation syndrome ('PAS')] reveal that one or more of the experts evaluated the case in the light of PAS, and there is nothing to suggest that anyone – expert, attorney, judge – thought to question whether the theory is well-founded or leads to sound recommendations or orders."[366]

Insofar as counter argument (i) is concerned, carefully distinguishing alienated children from children who are, instead, resisting contact because they are in the midst of a difficult life transition is critically important. This is an exercise at which lawyers are not

[363] Bruch argues in her article that a lack of 'rigorous analysis" about what 'alienation' is across the board by professionals dealing with children in complex Family Law cases is "endangering" children: (2002), 'Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases', *Child and Family Law Quarterly*, 14(4), 381, at p 381-2.
[364] Johnston JR and Roseby V, (2009), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, (2nd ed.), Springer: New York, p 364.
[365] *Ibid*, at 389.
[366] See, e.g., Bruch, *ibid*, who argues, at p 389-390.

particularly skilled.[367] "Multiple reasons" can be given as to why children resist contact and "only in very specific circumstances does this behaviour qualify as alienation".[368] Even if it does qualify as 'alienation', not all scholars take the view that the alienated child's views should be undermined.[369] Kelly, Johnston (1997; 2003; 2004) and other leading researchers in the field suggest a range of reasons for resisting contact exist, some of which are:

> "resistance [that is] rooted in the normal developmental process… high-conflict transition… resistance in response to the parent's parenting style… the child's concern about an emotionally fragile custodial parent…[resistance relating to] remarriage of a parent."[370]

Johnston (2004) concludes by reminding the reader of the inherent complexity of human beings; she writes "that most children who resist contact with one parent in favour of the other do so as a result of a mixture of many and varied factors". [371] Like adults, children at times express preferences, and experience alignments to and estrangements from, people they love. In contrast to this organic process, the alienated child has been indoctrinated to persistently express:

> "negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."[372]

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[367] Although it must be observed here that mental health professionals, upon whom judges and lawyers might rely, have not always projected a uniform or properly "evaluative" discussing the approach of lawyers and other professionals. Bruch, *ibid*, at p392, criticises some of the peer-reviewed medical and psychological literature for "seriously misstat[ing]" the position, referring to, e.g., Conway Rand D, (1997), The Spectrum of Parental Alienation, *American Journal of Forensic Psychology*, 15(3) 23.

[368] Acklin MW, 'Concepts, Assessment and Treatment of Children Who Refuse Visitation', *Paper given to the Hawaii State Bar Association*, 24 July 2008, available at: http://dracklin.com/index.php?option=com_content&view=article&id=41:concepts-assessment-a-treatment-of-children-who-refuse-visitation&catid=20:journal-articles

[369] Johnston JR and Roseby V, (1997), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, New York. Here the writers argue, at p 218, that to ignore, or fail to adhere to the alienated child's wishes wherever possible, would only "compound" the child's "sense of powerlessness… rendering the children unseen and unheard in [family] disputes that are fought fraudulently 'in the name of a child'".

[370] Acklin MW, 'Concepts, Assessment and Treatment of Children Who Refuse Visitation', *ibid,* citing Johnston and Roseby, 1997, discussed above, Wallerstein JS and Kelly J B, (1980), *Surviving the breakup: How children and parents cope with divorce*, New York: Basic Book.

[371] Johnston's studies are observed by Garber to be "the only scientific and empirical data on the subject presently available" (Garber B, (2010), *Developmental Psychology for Family Law Professionals: Theory, Application and the Best Interests of the Child*, Springer Publishing, p 266).

[372] Acklin MW, 'Concepts, Assessment and Treatment of Children Who Refuse Visitation', *ibid,* citing Clawar SS & Rivlin BV, (1991), *Children held hostage: Dealing with programmed and brainwashed children*, Chicago: American Bar Association. It should be noted that the contemporary view seeks to address the issue with the alienated child as the "starting place" rather than the alienating parent (Johnston JR and Roseby V, (2009), at p 364.

Such beliefs originate from the alienating behaviours of the aligned parent,[373] rather than forming a part of the child's own perceptions or emotional journey. Whether or not the aligned parent is being deliberately spiteful and vindictive, his or her behaviour is emotionally abusive.[374] Lee and Oleson (2001) suggest that understanding whether a contact resistant child is in fact alienated "requires that a specially trained mental health professional or team of professionals conduct a child-centred systemic evaluation".[375] Johnston and Rosenby (2009) observe that it can be very hard to determine whether a child is estranged or is in fact alienated, since there is often a "considerable overlap between the two" as both can "present" in much the same way.[376]

A second 'counter-argument' to ideas of the 'anti-contact movement' and the 'alienated child' is observed above to be: (ii) an apparent lack of understanding of which high-conflict family disputes should be identified as cases involving alienation. Here, a tendency to use the term 'alienation' with both a lack of knowledge and "rigorous analysis" can lead to lawyers "dramatically overstat[ing]" its occurrence.[377] This is particularly problematic since, in a family litigation, highly conflicted families are already "disproportionately represented".[378] Bruch (2002) argues that "far greater interdisciplinary training and competence in scientific methodology [is] needed" for lawyers so that they can scrupulously address assertions of alienation in Family Law proceedings.[379]

Concern about how courts might correctly identify, and properly address issues in apparent anti-contact/manipulated child cases is not restricted to the UK. A consensus among many researchers is that trained family therapists or counsellors are integral to combatting alienation scenarios (Johnston and Roseby, 2009; Parkinson and Cashmore,

[373] Johnston JR and Roseby V, (2009), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, (2nd ed.), Springer: New York, discussed from p 366-380 (Chapter 13).
[374] Johnston JR and Roseby V, (2009), discuss complex manifestations of alienation in *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce, ibid,* chapter 13.
[375] Lee S and Oleson N, (2001), Assessing for alienation in child custody and access evaluations, *Family Court Review*, 39(3), 282-298, at p 282.
[376] Johnston JR and Roseby V, (2009), *In the Name of the Child, ibid,* discuss how best to address this Part III of their book "Interventions on Behalf of Children in High-Conflict and Violent Divorce".
[377] Bruch CS, (2002), 'Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases', *supra*, at 381; 382.
[378] Maccoby EE and Mnookin, RH, (1992), *Dividing the Child – Social and Legal Dilemmas of Custody*, *Harvard University Press*, at 132.
[379] *Ibid*. Bruch's critical analysis of case law extends principally to the USA and England.

(2008)).[380] In a recent study by Henaghan (2012), the practices used by the Family Court of New Zealand[381] in taking the views of children across a range of Family Law cases was observed. A sample of the cases involved what were termed "alienation cases"[382] (i.e. anti-contact/manipulated child). As with the UK, these cases were observed to create particular difficulties within the Family Court process because:

> "the child [had] normally internalized negative views of the so-called alienated parent. A choice [had] to be made as to whether these views should be given weight, or whether they should be put to one side…"[383]

The New Zealand study findings make interesting reading: weight was given to the child's view in only one third of the "alienation cases" (with age and maturity affecting weight).[384] However, it was found that the more vociferous the child's views, the less likely the court generally was to interfere with those views.[385] Childhood researchers are not in agreement as to whether this is the correct approach for children who are coping with such an "entangled web of parental conflict".[386] While professional child psychologists were routinely appointed in the New Zealand cases by the Family Court, not all psychologists "place[d] a strong emphasis on listening to children".[387] Inconsistent understanding and approach by professionals in the family court system have been observed in a number of jurisdictions.[388] It is suggested that contemporary empirical research in the UK, and in Scotland, is much needed.

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[380] See, e.g., Kelly J B and Johnston J R, (2001), 'The Alienated Child: A Reformulation of Parental Alienation Syndrome', *supra;* Warshak RA, (2003), 'Payoffs and pitfalls of listening to children', *supra*; Bradford K, Burns-Vaughn L and Barber B, (2008), When there is conflict: Interparental conflict, parent-child conflict, and youth problem behaviours', *supra*.

[381] The findings of the study, based on 120 Family Court cases between 2005 and 2010, are the focus of: Henaghan M, (2012), 'Why judges need to know and understand Childhood Studies', *ibid*. The assumed starting place in the study was that these cases had been correctly identified as "alienation" cases, rather than another kind of case in which alienation from the contact parent is a healthy step for the child.

[382] "Alienation cases" were stated, at p 43, to be those in which the court had observed that "the child has… internalized negative views of the so-called alienated parent".

[383] *Henaghan M, (2012*), 'Why judges need to know and understand Childhood Studies'*, ibid*, at p 43.

[384] *Ibid*, at p 48.

[385] *Ibid*, at p 44.

[386] Quote, *ibid,* at p 44. Gardner states that the "only way to break the deadlock of alienation is to remove the child from the alienating parent and place them with the alienated parent": Gardner R, The Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases, 35 *Family Law Quarterly* 527. However, see above for criticisms of Gardner. Johnston and Roseby take the view that any conduct which might seem "punitive and coercive" to the child will "[compound his or her] sense of powerlessness as [a person in his or her] own right", at p 149 in Johnston JR and Roseby V, (1997), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, New York.

[387] Henaghan M, (2012), 'Why judges need to know and understand Childhood Studies', s*upra*, at p 42-44.

[388] See discussions of, e.g., Bruch CS, (2002), 'Parental Alienation Syndrome and Alienated Children', *supra;* (USA and UK) and Cashmore J and Parkinson P, (2009), 'Children's participation in family law disputes: the views of children, parents, lawyers and counsellors', *supra*; Parkinson P and Cashmore J,

In the next subsection, my discussion about 'anti-contact' parents and the alienated/manipulated child is linked to the conceptual framework of this thesis.

The Anti-Contact Movement/Manipulated Child: Rights, Status and Capacity

The conceptual framework of this thesis, as it relates to the child's rights, status and capacity has been outlined and developed in the thesis Introduction ("(II) Conceptual Framework of Critical Analysis: Rights, Status and Capacity: *Child Capacity and the alienated/manipulated child"*). As was observed there, where 'alienated', or manipulated children express views, they are doing so in a broader environment that is likely to be "intimidating, hostile, insensitive or inappropriate for [their] age".[389] This affords no right to express a view freely. The child who has been alienated from one or more members of his or her family is also giving his or her view in an uninformed context since he or she lacks the proper information upon which to base an informed view. According to the UN Committee, the "right to information is essential, because it is the precondition of the child's clarified decisions".[390]

Where themes of status and capacity are concerned, children involved in high conflict parental disputes are "particularly vulnerable; [since] their internal models of family relationships distorted".[391] In such a context, researchers have long observed that alienation experiences can interfere with the child's capacity to reach decisions.[392] Family lawyers and judges also face difficult questions about determining a child's capacity to engage in the judicial process in such circumstances. In *Re H (A Minor)(Guardian ad Litem: requirement),* the court considered whether a child being alienated from one parent by another still possessed the capacity to express a view. Booth J said:

(2008), *The voice of the Child in Family Law disputes*, OUP (Australia); Henaghan M, (2012), 'Why judges need to know and understand Childhood Studies', *supra*, (New Zealand).

[389] UN Committee, *General Comment No. 12*, para 34.

[390] *Ibid,* para 25.

[391] Johnston JR and Roseby V, (2009), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce, ibid,* at p 324.

[392] Garber B (with reference to longstanding research (Ainsworth and Wittig, 1969), describes alienation as "a contamination of the child's internal working model": Garber B, (2010), *Developmental Psychology for Family Law Professionals: Theory, Application and the Best Interests of the Child*, Springer Publishing, p 266; Johnston JR, (2003), 'Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce,' *Journal of American Academy of Psychiatry and the Law*, 158-170.

> "I ask myself, has the [adult] influence been so intense… as to destroy capacity…?"[393]

Critically analysing judicial benchmarks for ascertaining the child's legal capacity to form his or her own views is a focus of my work, as is the extent to which courts balance the child's right to express a view against the child's best interests.[394] Accordingly, my discussion of the alienated/manipulated child is linked to the interconnected themes of rights, status and (in particular) capacity.

Here in this subsection, consideration of the child who is, or who may be, a victim of alienation has been placed within the conceptual framework of this thesis. In the following subsection, various judicial approaches of UK Family courts in respect of alienated/manipulated child scenarios are critically analysed.

(i) Alienated/Manipulated Children: the Anti-Contact Movement

In post-separation parental disputes about child-care and upbringing the position in contemporary law and practice (before 2008, and to date) seems dictated by common sense and basic social compassion. Accordingly, other than in circumstances where there is a clear justification for no contact,[395] it is considered important that children retain a positive relationship with both parents:[396] this is something that the law may be used to encourage (and where necessary enforce). Here, it is worth noting that my research has

[393] [1994} Fam 11, at para, discussed in Publication 1 at p 123.
[394] See, e.g., Publication 1, p 123 onwards. The child's view versus the child's best interest debate a particular focus in Section 1.5 below and has been considered above in the context of the broader socio-legal literature.
[395] See, e.g, *K (Children)(Suspension of Contact)* [2011] EWCA Civ 1064, in which a parent on the sex offenders' register was refused a contact award. Similarly, in *B v B*, [2011] CSOH 127, a mother's application for contact was refused on the grounds that she suffered from "a delusional disorder and had acted and held beliefs contrary to her child's best interests".
[396] The modern authorities for this in Scots law are the cases of *White v White* 2001 SC 689; *J v J* 2004 Fam LR 20, per Lord Abernethy (delivering the opinion of the Inner House): "the normal assumption that children would benefit from continued contact with their natural parents" at para 6. Generally speaking, contact with family and kin is believed to be a positive feature in children's lives: E.g., Davies explored the manner in which seeing family members enables children to "feel connected to and develop affinities with others", and noted "intra-family conflict" as something in which a number of children she observed found themselves to be "indirect participants", a consequence of which was the "diminished… ability to share contact with estranged kin". She reflected that "the child\s desire to see a family member can be quashed by a residential parent", resulting in the loss of an otherwise positive relationships between the child and the family member concerned (Davies H, (2012), Affinities, seeing and feeling like family: Exploring why children value face-to-face contact, Childhood, 19(1), 8-23), at pp 8; 19; 20.

not so far been concerned with contact proceedings in which domestic abuse is a factor.[397]

Children generally wish to maintain relations with both parents regardless of, even blatant, discord between separated parents. However, as was observed recently by the Family Court in England, "a child's views can be shaped by quite subtle behaviour by a parent".[398] It can, accordingly, be very difficult for courts to determine in high conflict family proceedings whether the child's ability to form an independent view has been undermined by a parent.

Manipulated child scenarios are an unpleasant, and it seems largely unexpected, by-product of affording children the right to express a view.[399] Such scenarios have typically arisen in litigation when a child old enough to express a view resides with a parent ('the residential parent') who, for whatever reason,[400] post-separation, is strongly opposed to the child spending time with the other parent ('the contact parent'). These undue influence cases are particularly sad, since children who have previously enjoyed a close and loving relationship with a parent then experience complete alienation from that parent.[401] Such cases can also be extremely complex: children can be "liable to be

[397] It is my intention to research the application of s 11(7A-E) of the 1995 Act in respect of cases in which allegations of domestic abuse are made in the future. There is, as yet, relatively little reported case law on these provisions. For a recent application of the provisions of s 11(7A-E) of the 1995 Act see, e.g., *JB v AG* 2013 G.W.D. 3-96, in which the allegations of "abuse" in that case did not involve physical abuse and did "not outweigh other positive factors favouring the continuation of contact". The 7 year old child involved in *JB v AG* wished contact with her father. It was held by Sheriff Thornton, notwithstanding some degree of abusive conduct on the father's part, that "it was conducive to her welfare that she should continue to have contact with him and that he should continue to have parental responsibilities and rights". The Centre for Research on Families and Relationships is in the process of producing a report on 'Contact Proceedings for Children Affected by Domestic Abuse' (based on a briefing paper produced, in January 2013, for Scotland's Commissioner for Children and Young People by the Centre's Fiona Morrison and E Kay M Tisdall), with the collaboration of Fiona Jones and Alison Reid of CL@N, briefing paper available at: http://www.sccyp.org.uk/downloads/Adult%20Reports/Child_contact_proceedings_March_2013.pdf.

[398] *Re N (a child) (religion: Jehovah's witness)* [2011] EWHC 3737 (Fam), per Bellamy J, at para 59.

[399] Certainly, the manipulated child scenario seems to have been an unexpected by-product by lawyers, whatever other professions might have anticipated. Neither Article 12 of the UN Convention, as translated into substantive domestic statute, nor our contemporary procedural rules provide for the rather awkward scenario of parental manipulation. Indeed, as more extreme cases have arisen in Scottish courts, our judiciary has required to resort to generic remedies such as the archaic (and, certainly, last resort) common law remedy of contempt of court: see, e.g, *G v B* 2011 S.L.T. 1253.

[400] In more recent years, courts have (particularly in Scotland) assumed, when such manipulative parental behaviour appears to be ongoing, that the very worst of intentions exist. See, e.g. the comments of Lord Gill at paras 47-49 in *G v B, supra*: an "attempt by a custodial parent to sever the bond between the other parent and child by means of delaying tactics and protracted defiance of a court order, constituted a grave contempt of court were… simply part of the manipulative stratagems by which she had frustrated the father's attempts for several years to have contact with his child."

[401] This is, of course, what happened in respect of 'C', the teenager in *Re A-H (Children*), the case that was the focus of Publication 2. While the term "parental alienation syndrome" has achieved some recognition, and notoriety, world-wide (and has made its way into European case law, most notably *Elsholz v Germany* [2000] 2

vulnerable and impressionable… lacking… insight",[402] particularly when experiencing acrimonious family breakdown. In addition, parental manipulation is often insidiously conducted and so can be difficult for lawyers and other professionals to identify – and even harder to resolve positively, certainly in the shorter term.[403] This was the case in 2008/9, and it seems that little has changed in contemporary law and society.[404]

It was concluded in *'A child is, after all, a child'* that it was "unlikely" that a Scottish court would "deem [an otherwise competent [405]] child incapable of expressing a view simply because of, even very strong, adult manipulation". However, the importance of recording the child's views in a location removed from an alleged manipulative parent was stressed in Publication 2.[406] It was thought that unhealthy adult influence would be "addressed [when the court decided] how much weight to attribute to the child's views".[407] It remains the case today that the wishes of clearly manipulated children capable of expressing a view are recorded by courts and given regard: the weight such views will carry depends entirely upon the judicial approach adopted. In the research outcomes of Publications 1, 2 and 3 it was observed that two, broad trends in respect of unduly influenced, competent, children were emerging in UK judicial rationale.

Where the child's rights, status and capacity are concerned, the broader literature indicates that 'sidelining' the child's views in high conflict Family Law proceedings can be detrimental to the child's wellbeing.[408] It is also undermining of the child's status as a

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FLR 486, and some English judgments) it is not a term that has been utilised by Scottish courts in family proceedings.

[402] *Re S (A Minor)(Independent Representation)* [1993] Fam 263, per Sir Thomas Bingham, as discussed in Publication 1, at p 121.

[403] Some radical solutions to "alienation" have been suggested, although these have not generally found favour in UK courts. *Lowenstein L, writing in "*Parental Alienation Due to a Shared Psychotic Disorder (Folie a Deux)" ((2006) 170 JPN 467) recommended "destroying the *folie a deux* pathological relationship of the child and the alienator by removing the child either to the alienated parent or an independent party while the child is being provided with therapy…"

[404] See, e.g, the difficulties observed by courts in the recent case that were similar in nature to those cases discussed in Publications 1, 2 and 3: *Re S (Children)* [2010] EWCA Civ 447, per Thorpe LJ, at para 12: "Plainly the children need respite, not just from litigation but from interrogation, so bringing in a fresh expert at this stage has its disadvantages which can only be matched by the greatest sensitivity on the part of the expert instructed." For a similar, recent Scottish judgment, see the judgment of the Inner House in *B v G* [2010] CSIH 83.

[405] The term "competent" here, unless otherwise defined, takes its normal meaning within the context of family law and means competent to express a view in family proceedings.

[406] Publication 2, p 140 – 141.

[407] Publication 2, at p 124.

[408] Cashmore J and Parkinson P, (2009), 'Children's participation in family law.., *ibid*, at p 5. See also: Bradford K, Burns-Vaughn L and Barber B, (2008), When there is conflict: Interparental conflict, parent-child conflict, and youth problem behaviours', *Journal of Family Issues*, 29, 780-805. See also chapter by Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings when Parents

rights-bearer and, more specifically, of his or her right to participate.[409] Any questions about the child's capacity to express a view in such scenarios can become rather circular questions concerning the 'best interests versus the child's views' debate.[410] Here, the concern is that the child who does not say what the legal profession wish to hear (and consider 'reasonable') in terms of judicious case management of a complex family dispute is deemed to be lacking capacity.

The trends observed below, through 'black letter law' doctrinal analysis, therefore form one contribution from a traditional legal research perspective, to the broader interdisciplinary discussions (as outlined in the relevant Sections above) concerning children's involvement in such Family law proceedings. The judicial trends can be outlined and reflected upon as follows:

(ii) Trend 1 – Best interests trump child's views: strive to fix what's broken

The first, and perhaps more satisfying, judicial trend identified in Publications 1, 2 and 3 was to refuse to reward obvious parental manipulation and, instead, intervene in an effort to resolve issues with some degree of ongoing judicial supervision. However, a significant issue is that this approach was (and remains), on the face of it, dependent upon courts granting orders in opposition to the, often strongly expressed, views of manipulated children.[411] Accordingly, some Scottish courts (and their English counterparts) have made contact orders notwithstanding that children have been entirely alienated from the contact parent. In *J v J,* for example, a 2004 judgment that remains a leading Inner House authority today, Lord Abernethy said:

> "The welfare of the children [is] paramount … their views [are] a factor to be taken into account … they were liable to be upset at the outset if contact were

Divorce or Separate: Legal Constructions and Lived Experiences', in Freeman M (ed), *Law and Childhood Studies*, Open University Press (pp156-173).

[409] Freeman M, (2007), 'Why it remains important to take Children's Rights seriously *International Journal of Children's Rights* 15.

[410] Warshak RA, (2003), 'Payoffs and pitfalls of listening to children', *Family Relations*, 52, 373-384; Taylor N, Tapp P and Henaghan M, (2007), 'Respecting Children's Participation in Family Law Proceedings', *International Journal of Children's Rights* 15, 61-82; Quennerstedt A, (2010), 'Children, But Not Really Humans? Critical Reflections on the Hampering Effects of the "3 p's"', *International Journal of Children's Rights* 18, 619-635.

[411] A recent study has cast doubt over whether courts, and other professionals, should rely too heavily upon the views expressed by children in the midst of high conflict parental litigation: Weir, K. (2011), 'High Conflict Contact Disputes: Evidence of the extreme unreliability of some children's ascertainable wishes and feelings', Family Court Review, 49: 788–800. doi: 10.1111/j.1744-1617.2011.01414.x This study is discussed further in the chapter main text below.

> resumed. Their temporary distress … should not stand in the way of what was in their long term best interests." [412]

The court in *J v J* went on to make a contact award in favour of an alienated father, with that award being made, explicitly, against the wishes of the children concerned. In other judgments, courts sought through continual involvement and monitoring [413] to mitigate the effect of parental manipulation. At times, courts have employed the services of other child-care professionals, such as psychiatrists, psychologists, specialist charities and mediators.[414] Often this prolonged judicial involvement in family life, having at its focus the children's longer-term best interests, [415] has been contrary to the wishes of manipulated children concerned.

The 'best interests' versus 'rights' of the young debate [416] is one that pervades much of Scots law, and it is often in evidence when courts balance a child's views in family proceedings. It is one thing to impose what is objectively considered best on a child of 8 or 9 years old, but quite another to seek to do that with a teenager holding strong views. This is the stage at which Trend 1 has, in practice, typically broken down. In Publication 3, it was noted that the children in *J v J*, at aged 7 and 10 years old respectively, were considerably younger than the teenager in *Re A-H (Children)* who, at 13 years old, was believed to possess more of an "independent mind".[417] It was also observed that family courts face an unenviable task in seeking to ensure "that [their] orders are upheld" in these cases involving older children, or those on the brink of adulthood. Unlike the adults involved, such children (or, young people) are, it seems, free to ignore without consequence family court orders concerning them.[418] It is perhaps a dangerous thing to endow any rational being with rights to which little accountability or responsibilities attach.

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[412] *J v J,* 2004 Fam LR 20, at para 11. The case is discussed at p 124 in Publication 1.
[413] Discussed in Publication 1. at p 123, with reference in particular to the case of: *W (Contact: Joining Child as Party),* 2003 Fam Law 225.
[414] This was done in the *Re W* case and suggested in *Re A-H*. In *Re S (A Minor)(Independent Representation*) [1993] Fam 263 the Court of Appeal refused to grant the petition of a 12 year old child to remove his court appointed guardian in highly contested proceedings.
[415] For example, the child in *Re A-H (Children)*, under the watchful eye of her mother, had frustrated attempts by a court appointed reporter, a formal guardian and by CAFCASS to reconcile her to her father and restore the formerly "perfectly happy" relationship they once enjoyed: discussed in Publication 3 at p 529 -530.
[416] The best interests/welfare versus child's views debate is considered, in respect of medical treatment concerning transsexuality and the young in Chapter 4, which is concerned with Publication 8 on *Kidulthood* and transsexuality.
[417] Publication 3, at p 532, referencing para 18 of the court's judgment.
[418] This is discussed at p 532 of Publication 3. It was, however, observed in Publication 3 at p 529, that "it is generally believed that punishing [any] family member counteracts the court's primary obligation to have regard to the child's welfare".

It seems, therefore, that 'Trend 1', whereby contact orders are granted for the greater good [419] against the wishes of manipulated (but competent) children, has its best chance of success before the child concerned becomes a teenager. It was concluded in Publication 3 that judicial mechanisms for dealing with "intractable" disputes involving manipulated, contact-averse teenagers in civil proceedings are very limited. In *Re A-H (Children),* Wall LJ observed that the irresolvable "question returns and abides: what, if anything, can we do?"[420]

The research outcome of Publication 3, was a suggestion that, if teenagers cannot be compelled to obtemper family court orders, perhaps the interests of older children (and the "substantial" interests of the court "in seeing that its orders are upheld") were best served by removing such disputes from the judiciary. The alternative presented, and continues to present, as pointless: "pursuing orders which, it seems, remain[ed] unenforceable both north and south of the border."[421]

(iii) Trend 2 – Accept the child's apparent views to reduce ongoing conflict: the contact parent loses out

Unlike the first judicial approach towards manipulated children, which seeks to facilitate, and even impose, reconciliation upon children and estranged parents, the second trend could be termed that of 'least resistance'. Or, it might simply be that the court has recognised that a point has been reached whereby the "whole family is fed to death with litigation".[422] It is often, of course, not merely the 'contact parent' who suffers, but ultimately the child himself, or herself, who loses a parent, indefinitely (and often a perfectly good parent at that[423]).

[419] See, e.g, *ML v IM*, decision of Sheriff McGowan at Falkirk Sheriff Court (unreported) on 30 November 2011 (available LexisLibrary), in which two children, aged 6 and 7, had previously expressed a desire to a court reporter to see their father but suspicions of anti-contact maternal influence had arisen (there were also religious issues in the case). There, the Sheriff took the rather interesting approach of deliberately *not* speaking with the children again with a view to ascertaining the their views. Being aware of their previously expressed views the Sheriff went on to make a contact award. (at para 111).
[420] Judgment at para 11, discussed in Publication 3.
[421] Publication 3, at p 533.
[422] *Re S, Children* [2010] EWCA Civ 447, Judgment at para 9.
[423] See, e.g, the observations noted in Publication 1 of the court in *W (Contact: Joining Child as Party)* 2003 Fam Law 225, concerning the father of a boy who, fuelled by his mother, put an end to a healthy and happy relationship with his father by refusing to see him. Dame E Butler-Sloss opined: "For my part, I would not think it right to close the door [on contact]," yet she expressed doubt that the court could "succeed" in restoring the relationship.

It was observed in the research outcomes of Publications 1, 2 and 3 that some courts opted to make no contact award in respect of "indoctrinated" children who had expressed strong views against spending time with an alienated parent over a sustained period of time. This was the court's approach in the 2005 English case of *K v K*, in which the Court of Appeal made no contact award in long-running, high conflict family proceedings, instead concluding:

> "whatever the cause of the children's hostility towards, and suspicion of, their father, it was apparent… that they derived little, if any positive benefit from… meetings with him."[424]

The children in the case were 8 and 11 years old respectively. It is worth noting that, even when courts follow the 'least resistance' trend, and make no formal orders, it is more likely than not that some attempt has been made to encourage reconciliation between estranged parents and children.[425] However, if no contact order is made and the family court process ends, the lack of ongoing judicial management of the case means that there is no accountability of former litigants for their actions (or, indeed, inactions).

We live in the era of Children's Rights:[426] this is a necessary and positive reality. There is also no doubt that what have been termed "implacable hostility"[427] cases present the judiciary both North and South of the Border with a wholly unenviable task. However, while Trend 2, as adopted by the court in *K v K* above might, superficially, appear to respect the views of the child it is open to criticism because of its failure to address underlying psychological issues. This begs the question today, as it did years before[428]

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[424] Publication 2. at p 123, reference made to *K (Children)* [2005] EWCA Civ 1691. It should be noted that both parents were criticised for their behaviour in the judgment, which concerned a complex factual scenario.

[425] The eventual outcome of *Re A-H (Contact)* after various failed attempts to resuscitate the parent-child relationship was a referral by Wall LJ to a children's advocacy charity. This is discussed at p 532 of Publication 3.

[426] Although, it should be said that children's rights have often not fared well under our present statutory regime in which the ECHRs has been incorporated into UK domestic law (Human Rights Act 1998) while the UNCRC has not. Parents' rights therefore often have greater significance with "presumptions that paramountcy of the child's welfare will adequately consider the child's position": Tisdall EKM *et al*, (2008), 'Reflecting on Children's and Young People's Participation in the UK, *International Journal of Children's Rights: Special Issue*, 16(3), 343-354. See also, Tisdall EKM *et al*, (2008), 'Is the honeymoon over? Children and Young People's participation in public decision-making', International Journal of Children's Rights (Special Issue), 16(3); 419-429. The 'trumping' of children's rights by parental rights can be seen, in particular, in the field of Education Law (discussed in Chapter 2).

[427] *K (Children)* [2005], citation above. Of course, in some cases, a desire on the part of a residential parent that there be no contact may be merited, and even desirable: see, e.g, *K (Children)(Suspension of Contact)* [2011] EWCA Civ 1064, in which a father "with a substantial criminal history including a number of sexual offences against children and was on the sex offenders register" was refused a contact award which was also opposed by the mother of his children.

[428] See, Young I and King P, (1988), 'Children – the child as client', LS Gaz, 14 Sep, 85 (20)), by a freelance social worker. The article, written before the UK ratified the UNCRC, observed that the psychological impact

2008: where courts adhere to views of the manipulated child, are they making decisions that are not based on the child's genuine sentiments at all and, further, ruling in a manner detrimental to the child's best interests?

(iv) Contemporary management of children's views in intractable disputes: 2008 to date

Since Publications 1, 2 and 3 were published, there have been few significant decisions in Scottish courts concerning the management of children and teenagers believed to have been unduly influenced by a parent. In *B v B,* 2011, a late application to minute into process (i.e. become an additional party to his parents' ongoing litigation[429]) made on behalf of a child who strongly opposed contact with his father was considered. In refusing the child's application, Sheriff Principal Bowen observed that:

> "There was no Scottish authority on the circumstances in which a child of [12 years old] should enter the process as a party… [t]he court should normally be able to have regard to the views of the child without the child entering the process… the possibility of harm caused by the additional pressures on him outweigh his right to be involved as a party."[430]

This rationale is interesting. It suggests that, although Scottish courts are quite willing to hear the views of competent children (whether manipulated or not) they will certainly not encourage any great degree of involvement of such children in high conflict family proceedings. The rather pragmatic approach of the court in *B v B* perhaps paid lip service to the 'rights' of the child, while being directed towards ensuring his best interest were served. It was also an approach designed to minimise distress likely to be experienced by the child who, had he entered proceedings as a party, would have become fully versant in unsavory allegations made by either parent against the other.[431]

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upon children who participated in adult-litigation was beyond the ordinary skills of a lawyer to address.

[429] *B v B* 2011 Fam LR 141: "minuting into process", or (as it is sometimes termed) "becoming a third party minuter" means entering into ongoing litigation as an addition party. It is an unusual step for solicitors to take on behalf of child clients. In *B v B,* the existing parties to the litigation were the child's mother and father in a contact dispute concerning him.

[430] Judgment at paras 7, 12, 21. It is interesting that Sheriff Principal Bowen observed, at para 12 of his judgment: "It was not relevant to take into account the fact that as a party to the action S would have access to information which *might* not be in his best interest to know. As a person with capacity to instruct solicitors, and the person most directly affected by the proceedings, he ought to be entitled to know what is said concerning him. But part of his discussion with his solicitors would involve discussion about the extent of his involvement in his proceedings." There were also other technical reasons, relating to the lateness of the application, that mitigated against the child's request to minute in being allowed.

[431] This is suggested throughout the court's judgment, in particular at para 16.

In England, there has been more judicial discussion concerning intractable family disputes involving competent children who, being influenced by one parent, are estranged from the other.[432] Some courts have tended towards Trend 1 (*'Best interests trump views: strive to fix what's broken'*) while others have tended towards endorsing Trend 2 ('*Accept the views to reduce ongoing conflict: the contact parent loses out'*).

Insofar as Trend 1 is concerned, an attempt was made to assert a degree of judicial authority (or paternalism?) over the exercise of the right of older children to express a view in *Re S (Contact),* in 2010.[433] Here, a contact award was made in favour of a father in direct opposition to the expressed views of his 12 and 13 year old children who had been the victims of "deliberate and willful" manipulation by their mother against contact. In granting a contact award in favour of the father the court firmly based its judgment, not just upon what it perceived to be the children's best interests, but upon some notion of justice, Thorpe LJ stating:

> "if wishes and feelings rule [the children] would be walking away from [their father]. But fortunately they do not and children of [this] age have to have their lives regulated by adult judgment."[434]

This approach would seem most likely to meet with success in respect of children who are not inclined to want contact with an estranged parent because they are confused, or distressed, as opposed to children who have been entirely brainwashed against that parent.[435]

In marked contrast to the above, rather dogmatic, attempt of Thorpe LJ in *Re S* to ensure that an older child and a teenager [436] obtempered an order of the family court, other courts have instead preferred Trend 2, seeking to *Accept the child's apparent views to reduce ongoing conflict'.* The rationale of this second trend can be seen in the judgment, in late

[432] Important English cases of note since 2008 include: *B v S (Contempt: Imprisonment of Mother)* [2009] EWCA Civ 548; *Re A (Suspension of Residence Order)* [2009] EWHC 1576 (Fam); *Re L-W (Children)(Enforcement and Committal: Contact)* [2010] EWCA Civ 1253; *Re S (Children)* [2010] EWCA Civ 447, in which a contact order was granted against the express wishes of 12 and 13 year old children who had been the subject of maternal obstruction to contact that was "deliberate and willful".
[433] *Re S, Children* [2010] EWCA Civ 447.
[434] *Ibid,* at para 7.
[435] For example, such orders would be likely to work in cases like *Re A (Suspended Residence Order) ibid*, in which, while the children "stated that they did not wish to have contact with their father some contact had taken place with "apparent success".
[436] It should be noted that the judgment of the court in *Re S* was compassionate and well-reasoned. Thorpe LJ went on to recommend that a "most senior consultant child and adolescent psychiatrist" instead become involved in the case to help and support the children.
Judgment at paras 9 – 11.

2010, of the court in *Re L-W (Children)(Enforcement and Committal: Contact).*[437] There, the Court of Appeal was considering appeals against five "enforcement orders"[438] following upon the failure of a 10 year old to attend for court ordered contact with his estranged mother in an intractable contact dispute with rather blatant elements of parental alienation. There had been "persistent failure to comply" with contact awards granted in the course of prolonged litigation. The court reasoned that, despite the "affront to [its] dignity" demonstrated by the failure of the child attending for court ordered contact, it was entirely pointless to place:

> "… an intelligent 10-year-old in a position in which he can either keep his father out of prison by grudgingly going to see his mother or acquire a burden of guilt by persisting in his refusal and letting his father go to gaol… punishing the father not only cannot solve [the intractable dispute] but will exacerbate it."[439]

The court observed that, "instead of seeking to restore relations" between mother and son by using "the blunt instrument of [judicial] coercion" it would be better leave it be and "to let time take its course". Munby LJ, who delivered the court's opinion, noted that it seemed "much more likely that [the child] will in his own time find his own way back to the affectionate relationship with his mother which both of them wish for. It may not happen, of course…" [440]

In the 2011 judgment, *Re E (A Child),*[441] the Family Division of the High Court in England took the opportunity to issue some practical guidance to lower courts determining what appear to be intractable contact disputes. The guidance included: (i) "[identifying] at an early stage those cases with the hallmarks of intractability"; (ii) the importance of "judicial continuity" and, where appropriate, the need for (iii) "a professional assessment of direct contact".[442] It remains to be seen whether Scottish courts will follow this persuasive precedent.

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[437] 2010 EWCA Civ 1253.

[438] Since 2008, specific statutory provisions has been made in England (unlike in Scotland) to empower courts to impose financial penalties in the event that parents fail to adhere to court orders made about their children in family proceedings. The Children Act 1989, as amended, s 11J, provides that where the court is "satisfied beyond reasonable doubt that a person has failed to comply with the contact order… it may make an enforcement order". The decision in *Re L-W* was followed in the later case *Re H (A Child) (Contact: Adverse Findings of Fact),* [2011] EWCA Civ 585.

[439] Judgment at para 105.

[440] Judgment at para 124.

[441] *Re E (A Child)* [2011] EWHC 3521 (Fam).

[442] Per Hedley J at paras 12 onwards in the judgment. The child involved in the case was 8 ½ years old at the time of proof.

Certainly, there have been noteworthy Scottish developments concerning the judicial management of other forms and expressions of psychologically abusive parenting since Publications 1, 2 and 3 appeared in the *Edinburgh Law Review* and the *Scots Law Times*. These are considered in the final sub-section of section 5 below.

(v) All About Eve (or Adam): a third emerging Trend in intractable family proceedings?

Both judicial approaches in respect of the manipulation/estrangement cases discussed above (*Trend 1, Best interests trump views: strive to fix what's broken*, and *Trend 2, Accept the views to reduce ongoing conflict: the contact parent loses out*) have as their primary focus either the child's best interests or her views - or, as is often the case, a combination of both. However, although there is not yet a large body of precedent, it seems that a third trend may now be emerging in UK courts. Trend 3, which has as a principal motivation typically residential (and patently contact-averse) *parents* rather than children, has manifested itself in two ways.

First, the parent unreasonably and relentlessly opposed to contact is likely to find that her, or indeed his, role as the residential parent is placed in jeopardy.[443] That courts are willing to consider a transfer of a child's residence from the contact-averse, manipulative parent to the estranged parent might be seen as a great (and, perhaps just?) step. As might be expected, there has been a degree of judicial reluctance to change a child's primary residence when the motivation is, at least in part, punishment of a recalcitrant parent. Courts have, accordingly, been keen to stress that such a step would be a last resort. In *Re L-W (Children)(Enforcement and Committal: Contact)* the Court of Appeal observed that, "short of an actual transfer of residence, the [lower] court had tried just about every other method to break the deadlock".[444]

Secondly, the entrenched, contact-averse parent is liable to be subject to severe criminal penalties[445] for failure to obtemper court contact awards. Increasingly, findings of "contempt" are being made. And, since 2009, these penalties in Scottish cases have

[443] In, e.g, *Re A (Suspended Residence Order)* [2009] EWHC 1576 (Fam), the court considered an application for the removal of children, aged 8 and 11 from the residential care of their mother, who "vehemently" and "unremittingly" opposed contact between the children and their father. It was held that the children "had suffered significant emotional harm as a result of M's conduct in demonising" their father and paternal grandparents. In *Re L-W (Children)(Enforcement and Committal: Contact), ibid,* the residential parent was the father.

[444] [2010] EWCA Civ 1253, judgment at para 69.

[445] There is now statutory provision for this in England : the new s 11J of the Children Act 1989. See, e.g. *Re H (A Child) (Contact: Adverse Findings of Fact),* [2011] EWCA Civ 585.

begun to include custodial sentences for parents,[446] regardless, it seems, of the age of the child concerned.[447] Scottish courts, in particular, have been highly critical of the parents seeking to alienate their children from the other parent. The Lord Justice Clerk (Gill) observed in *G v B* that the behaviour of the mother of a 6 year old child who had repeatedly refused to obtemper a contact award in favour of her child's father:

> "exemplifies yet another attempt by a custodial parent to sever the bond between the other parent and their child by means of delaying tactics and in due course by protracted defiance of an order of the court… Her defiance not only thwarted the respondent's rights but undermined the rule of law. Conduct of this kind constitutes a grave contempt of court."[448]

This new, hard-line, trend adopted by the Scottish judiciary in respect of such *parents* in prolonged, high conflict cases will doubtless be appreciated by beleaguered Scottish family practitioners representing parties in such high conflict disputes.

However, any approach that does not have regard to the status of the child as a vulnerable individual deserving to be a very visible part of the Family law process must be questioned.[449] Care must be taken to ensure that the child's right to be heard is not lost within an evolving judicial ethos in which punishing parents is a primary motivation. Such a parent-centric approach (while perhaps appealing to a sense of justice) risks reinforcing traditional notions of the child as an "object"[450] rather than a participant in disputes about him or her.

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[446] The common law "contempt of court" process is invoked in Scotland because, unlike England, there is no statutory enforcement process in respect of family court orders. In the recent Scottish judgment of *G v B* [2011] CSIH 56 a mother of a 6 year old child was jailed for 2 months for failure to obtemper a contact award. Her attempt to recall the imprisonment, using the nobile officium, was refused by the Inner House. In *M v S* 2011 S.L.T. 918 another attempt by a mother to recall a n order for 3 months' imprisonment following her failure to obtemper a contact award similarly was rejected by the Second Division. See also other parent-punishment arising from family proceedings: *B v R,* 2009 Fam LR 146, in which a recalcitrant contact father, who sought to estrange a 12 year old boy from his mother (the residential parent) was also found in "contempt".

[447] See *B v S (Contempt: Imprisonment of Mother)* [2009] EWCA Civ 548, where the child concerned was a baby. In *G v B (ibid*), the child concerned was 6 years old.

[448] Judgment, at para 47, per LJC Gill.

[449] See, e.g., studies by See Cashmore J and Parkinson P, (2009), Children's participation in family law disputes: the views of children, parents, lawyers and counsellors, research findings available at: http://www.mentalhealthacademy.net/journal_archive/aifs099.pdf. Here the researchers found that, while placing children under a spotlight was noted often to be detrimental to them, the findings of the report were that everyone was happier when children were asked what they thought and their input (and the outcome of the case) was clearly explained to them.

[450] Baroness Hale, (2006), 'Children's Participation in Family Law Decision-Making: Lessons from Abroad', *Australian Journal of Family Law*, 119 at 124.

In this section, some of the research outcomes of '*A child is, after all, a child'*, '*Moral actors in their own right'* and *'Re A-H (Children)'* were developed further. The analysis focused on emerging legal developments concerning the views and best interests of children and young people insofar as the 'anti-contact movement' is concerned.

1.6. Concluding Comments

Here, in Chapter 1, Publications 1, 2 and 3 (*'A child is, after all, a child'*, '*Moral actors in their own right'* and *'Re A-H (Children)*) have been critically appraised. These publications were concerned with the first strand of my overarching research theme: a critical evaluation of the rights, status and capacity of *the young* in underdeveloped and emerging areas within Child and Family Law. In particular, this chapter was concerned with legal issues impacting upon the young in their private family life, or home environment.

Conceptual Framework: Rights, Status and Capacity - Contribution of Publications 1, 2 and 3

In my Thesis Conceptual Framework ("Introduction (II)"), Publications 1, 2 and 3 were placed within the broader academic literature concerning the rights, status and capacity of *the young* and *disempowered adults* as categories of individuals in underdeveloped and emerging areas of law. Publications 1, 2 and 3 were introduced as contributions about children resulting from a traditional legal research perspective. The limitations of traditional legal research methods were discussed in Section (III) of the Introduction. Each Publication sought to identify and critically analyse areas of Scots Civil Law that are concerned with matters affecting the child's rights, status and capacity. Thus, systematically addressing Publications 1, 2 and 3 in turn, I believe their contribution can be outlined as follows:

Publications 1 and 2: consider the interpretation and application of relevant statutory provisions (i.e. core law data) concerning the child's *right* to express a view in Scots Family proceedings. A focus of both publications is the extent to which the child's *status* as a valid participant with *capacity* to make personal choices is endorsed in the interpretation of statute by our courts. The approaches adopted by courts, in particular, to scenarios in which the child's capacity to express a view is considered to be undermined

were systematically categorised and evaluated. Both publications contribute to the existing body of work outlined in the thesis Introduction. They do so by means of traditional doctrinal legal analysis. In other words, the contribution is one of clarifying the law itself and seeking to develop a consensus within the legal community about what the interconnected concepts of the child's rights, status and capacity actually mean within the context of 'black letter' Scottish Family law.

Publication 3: is concerned with intractable, high conflict Family law proceedings. The publication is non-doctrinal traditional legal research that is concerned with exploring a specific issue of difficulty arising in the context of Family cases. The principal focus of Publication 3 is the *status* and *capacity* of the contact-resistant child observed by the court to be misconceived due to parental manipulation. The judicial case management role was discussed and limitations in the statutory provisions governing such intractable disputes were highlighted. In particular, it was noted (i) that children do not normally hold the status of parties to litigation and so should not be found in contempt for failing to adhere to any contact order made, and (ii) there exist differences in approach to intractable family disputes North and South of the Border insofar as the weight given to the child's view is concerned. Publication 3 contributes to the existing literature by seeking to promote greater understanding about the status of children in high conflict cases for judges and lawyers who must make, interpret and implement Scots, or wider UK, law.

Next, in Chapter 2, a reflective commentary of my publications concerning children and young people in wider society is provided.

CHAPTER 2: Publications 4, 5 and 6

2.1. General Introduction to Publications 4, 5 and 6

In the present chapter, the following publications are critically appraised:

(i) **Publication 4**: '*The Child's Right to Education'*, chapter in *Children's Rights in Scotland* (3rd ed.), A Cleland and E. E. Sutherland, W Green (2009), pp 209 – 231 (hereinafter referred to as *'The Child's Right to Education'*).

(ii) **Publication 5**: *'Trips, Slips and Bangs: the Teacher's Duty of Care'*, Juridical Review, 2009, 3, 189 – 207 (hereinafter referred to as *'Trips, Slips and Bangs'*).

(iii) **Publication 6**: *'Contributory Negligence and the Child',* Juridical Review, 2010, 3, 195 – 215 (hereinafter referred to as *'Contributory Negligence and the Child'*).

The published work above is concerned with the interactions of children and young people at school and within the community. The publications are broad ranging in scope and nature. Insofar as scope is concerned, in Publication 4 ('*The Child's Right to Education'*), the extent to which Scots Education Law honours the terms and spirit of the UN Convention on the Rights of the Child [451] was considered with reference to "contemporary statute, policy and practice".[452] In particular, emerging rights and remedies provided by the state in public statute for the young within the state school environment were critically evaluated.

[451] According to the UK Government Dept. for Education website, the UNCRC is "presently the most widely ratified international human rights treaty" and "the only international human rights treaty to include civil, political, economic, social and cultural rights": http://www.education.gov.uk/b0074766/uncrc.
[452] Quotes taken from Publication 4, p 209.

In Publication 5 (‘*Trips, Slips and Bangs’*) further consideration was given to the young in the field of education: pupils’ rights and remedies in the event of personal injury were the focus of this publication. Decisions from a range of jurisdictions concerning “key aspects of the educator’s duty” and “what might be termed the ‘teacher’s duty of care’” in respect of school pupils were explored with a view to suggesting possible contemporary legal approaches in Scotland.[453]

Finally, in terms of scope, Publication 6 (*‘Contributory Negligence and the Child’*) was a comprehensive study of the young as they interact with wider society. More specifically, I considered “various complexities concerning child victims of Delictual wrong in” a wide range of scenarios in which “the defence of contributory negligence is, or might be, pled.”[454]

Insofar as the nature of Publications 4, 5 and 6 is concerned, ‘*The Child’s Right to Education’* (Publication 4) was a chapter in an academic/practitioner textbook, while Publications 5 and 6 were peer-reviewed articles. The style, themes, content, and word count, of ‘*The Child’s Right to Education’* were dictated by the general requirements of the well-established, 3rd edition, textbook of which it formed part.[455] A reflective overview of the rights of the young within a whole field of Scots law was, accordingly, provided in Publication 4 in 2008 (all within a 10,000-word limit, including footnotes).

In contrast, I was able to write in depth on certain, relatively narrow, issues concerning the young and civil law in *‘Trips, Slips and Bangs: the Teacher’s Duty of Care’* and *‘Contributory Negligence and the Child’*. Since the focus of Publications 5 and 6 were areas of growing interest both to litigators and academics, the articles were published in the *Juridical Review* in 2009 and 2010 respectively. The journal has a wide readership of law students, teachers and practitioners [456] and covers a diverse range of legal subjects and is published in four volumes per annum. I had considerable freedom in my overall approach towards Publications 5 and 6, since the editor was very flexible in respect of word count and article substance.

[453] Quotes taken from the Abstract of Publication 5.
[454] Quotes from Publication 6, Abstract.
[455] Each successive edition of *Children’s Rights in Scotland*, Alison Cleland and Elaine Sutherland eds (3rd ed, 2009) has been cited domestically and worldwide as a leading authority on its subject-matter.
[456] The journal is marketed as “Scotland's leading refereed law journal” and seeks to form “an authoritative and innovative perspective on recent case law” and “a valuable and respected source of reference for use in court “Sweet & Maxwell website, Juridical Review Catalogue / Product Details, available at: http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=7122&recordid=475.

Next, in section 2, research rationale and independence of '*The Child's Right to Education'*, *'Trips, Slips and Bangs'* and *'Contributory Negligence and the Child'* will be outlined. In section 3, each publication will be contextualised: research premises and (key) research aims will be examined. Thereafter, in sections 4 and 5, the approach adopted, and research outcomes of the publications will be evaluated. Concluding chapter observations about the contribution of each publication to literature concerning rights, status and capacity follow in section 6.

2.2. Rationale and Independence of Publications

Over a decade ago, while in practice, I observed in an article written for the *Journal of the Law Society of Scotland* that Education Law was:

> "[A]n underdeveloped area in our legal system. Rarely taught or practised in Scotland, it lacks the detail and precision found in more popular legal fields."[457]

It seems generally accepted that Education Law remains a "complex" legal field, governed by a "fragmented framework of regulation" with a general dearth of case law existing to provide guidance.[458] I continue to contribute to the limited body of legal writing concerning ongoing, and emerging, areas of difficulty within Education Law.[459] I also provide professional training[460] in the field to Scottish lawyers and educators, and

[457] , 'The Right to Education', L-A Barnes, Vol 46(7) June 2001, *Journal of the Law Society* (Scotland), footnotes not reproduced on the online version of the article, article available at: http://www.journalonline.co.uk/Magazine/46-7/1000971.aspx#.UOX36I7w6SI.

[458] Quotes taken from review, by Dr Jane Mair, of *Children's Rights in Scotland* Edin LR 2011, 15(1), 153 - 154, and with reference to my chapter, *The Child's Right to Education'*, Dr Mair comments: "It is clear from this whole collection that children's rights form a diverse and developing area of law. Some chapters, for example Lesley-Anne Barnes' discussion of a child's right to education, show a very complex and fragmented framework of regulation. One of the strengths of the book is that the contributors succeed in illuminating these areas even where, as in education, there is "a general dearth of case law".

[459] Some other Education Law publications not submitted in support of this thesis include, e.g., 'Ready to Learn but disliking being taught', March 2004, *ENQUIRE;* 'When Social inclusion becomes Social exclusion', September 2003, *SCOLAG*; 'Fighting the Bullies', Vol 51(16), August 2006, *Journal of the Law Society (Scotland);* 'Sticks, Stones and Broken Bones (and legal expenses too?)', January 2007, *SCOLAG* Journal 21. Most publications are listed on my University webpage, at: http://www.napier.ac.uk/business-school/OurStaff/BusinessSchoolStaff/Pages/LesleyAnneBarnesMacfarlane.aspx .

[460] In 1999, I became one of the first Scottish solicitors to provide advice to pupils and parents, and training to 'Not for Profit' bodies and local government on Education Law. I left practice in 2004 to teach at Edinburgh Napier University. My LLM (By Research) thesis (University of Strathclyde, 2008) was a comparison of the respective status, capacity and remedies available to (i) vulnerable employees (i.e. *disempowered adults*) in corporate environments and (ii) *the young* in the field of education.

develop knowledge sharing practice.[461] Publications 4, 5 and 6 (*'The Child's Right to Education'*, *'Trips, Slips and Bangs'* and *'Contributory Negligence and the Child')* accordingly are the product of an ongoing research interest spanning almost 15 years.

Publication 6 (*'Contributory Negligence and the Child'*) is also about the possible impact of the Law of Delict upon the child's interactions at school and in wider society: little has been written about this from a legal perspective in Scotland, or elsewhere. This is particularly true in respect of the child's apparent partial or, perhaps even complete, "immunity from liability"[462] (i.e. from the legal and financial consequences arising in civil law upon wrongdoing). It is often suggested that the young deserve more temperate consideration of their negligence, or contributory negligence, than adults.[463] However, the notion that any person, regardless of age, should be excused the consequences of his actions is at odds with the Law of Delict, which is "primarily concerned with the circumstances under which a person who suffers damage may recover compensation".[464] Thus, difficulties of legal theory, substance and practice linger: while most jurisdictions agree that "a person's childhood is a relevant circumstance in negligence determinations"[465] there is widespread disparity about the manner in which account is taken of childhood.

The focus of *'Contributory Negligence and the Child'* is the legal difficulties outlined above that surround childhood and youth and arise in the Law of Delict, most particularly within the field of negligence. These difficulties are also addressed (insofar as they relate to the educational environs) in *The Child's Right to Education'* and *'Trips, Slips and Bangs'*. A critical analysis of the premise and aims of Publications 4, 5 and 6 is given below.

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[461] See, e.g., previous training events listed on my Edinburgh Napier University page: 'Children with Special Needs', Scottish Education Law Conference, Sir Crispin Agnew of Lochnaw Bt QC, September 2004; 'School Exclusions: Social exclusions', Education Law Training, W.S. Society, July 2003; 'An overview of Scots Education Law', Law Conference, Law Society of Scotland, June 2002: http://www.napier.ac.uk/business-school/OurStaff/BusinessSchoolStaff/Pages/LesleyAnneBarnesMacfarlane.aspx.

[462] Quotation taken from the Abstract of Publication 6.

[463] This is true of many decisions prior to, and most after, ratification by the UK of the UNCRC: *Campbell v. Ord & Maddison*, (1873), 1 R. 149, *Creed v McGeoch Sons Ltd* [1955] 1 WLR 1005; *Galbraith's Curator ad litem v Stewart* (no 2) 1998 SLT 1305. See also, e.g., the Occupiers' Liability Act 1957, s 2(3), which states occupiers should be 'prepared for children to be less careful than adults'.

[464] *McHale v Watson* (1966) 115 CLR 199, per Menzies J (dissenting) at para 16.

[465] *Restatement (Third) of Torts: Liability for Physical Harm (Tentative Drafts),* Aug 2008, Chapter 3: The Negligence Doctrine and Negligence Liability, at p 1. Final version published in march 2011, reviewed at: http://wakeforestlawreview.com/a-restatement-third-of-torts-liability-for-intentional-harm-to-persons-reflections-on-professor-bublicks-thoughts.

2.3. Publications 4, 5 and 6 – Contextualising the Premise and Aim(s)

The overarching premise and aim of all three publications considered in the present chapter was to contribute to contemporary understanding of the present, uncertain state of Scots law concerning children and aspects of their day-to-day interactions beyond the family unit.

Publication 4, *'The Child's Right to Education,'* was a chapter forming part of a textbook, published in 2009, about the overall progress made in Scots Law towards "achieving complete respect for children's rights in Scotland".[466] The premise of the textbook was that the time had come to take an "opportunity to consolidate and advance the process of analysing" developments in Scots Law since the previous (2nd) edition of the textbook had been published in 2001.[467]

In Publication 4 it was observed that in an effort to "give full effect" to the UNCRC in Scotland, the recently "rebranded"[468] Scottish Government had committed itself to ensuring that "all children receive the help and support they need in order to learn effectively".[469] Other developments had taken place in Scottish law and policy since 2001,[470] and these had not yet been the subject of any comprehensive legal consideration from a children's rights perspective. The specific aim of *'The Child's Right to Education'* was, therefore, to provide a reflective:

> "overview of the extent to which rights provided in the UN Convention are visible in [Education Law] statute, policy and practice."[471]

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[466] All quotes in this paragraph taken from the Preface (at p *vii-viii*) to the Third Edition of *Children's Rights in Scotland.*

[467] Information about the 2nd edition of the textbook can be seen at: http://www.amazon.co.uk/Childrens-Rights-Scotland-Elaine-Sutherland/dp/0414013492. The UK Government had also recently submitted its "Consolidated 3rd and 4th Periodic Report to the UN Committee on the Rights of the Child", available at: http://media.education.gov.uk/assets/files/pdf/u/uk%20government%20periodic%20report%20to%20the%20uncrc%20-%20july%202007.pdf.

[468] The Scottish Executive rebranded itself the "Scottish Government" in September 2007, the same year as the SNP assumed power: http://news.bbc.co.uk/1/hi/scotland/6974798.stm.

[469] Quote taken from the Report on the Implementation of the UN Convention on the Rights of the Child in Scotland, at para 449 (Scottish Government Publication, Aug 2007), also cited at p 209 in Publication 4.

[470] These changes include, e.g, the School Education (Amendment)(Scotland) Act 2002 (discussed at p 214 in Publication 1); a complete overhaul of the "additional support needs" system in Scotland following the coming into force of the Education (Additional Support for Learning)(Scotland) Act 2004, and other subsequent legislation in this area of Education Law (see pp 215 – 218, 220 – 223 of Publication 1); the Scottish Schools (Parental Involvement) Act 2006, discussed at p 229 of Publication 4.

[471] Publication 4, at p 230.

The rights and remedies available to, or on behalf of, the young are also a feature of contemporary legal interest when they generate personal injury claims. The young are often slow to appreciate "often the most obvious danger",[472] and so are particularly prone to meet with accidents as they interact with those around them. Publication 5, *'Trips, Slips and Bangs',* focused on an issue of growing concern for educators:[473]

> "[a] burgeoning compensation culture in which educational funds [were] being diverted to settle claims."[474]

Educator liability for pupil injury was not a matter upon which significant reported case law within the UK exists – and this remains the case today.[475] This suggests that Education Authorities might simply be "[accepting] liability for injuries in the classroom, sports field or playground" and paying out to avoid litigation.[476] The premise of Publication 5 was that there was a need to address the nature the educator's duty of care in respect of pupils, particularly those injured on the "periphery"[477] of the educational environs. The aim of *'Trips, Slips and Bangs'* was to explore comparative judicial rationale and provide some guidance about the likely extent of educator liability.

There is an expectation in the Western world that law and policy-makers are "solicitous in protecting the interests of children" as they interact with those around them.[478] The premise of Publication 6, *'Contributory Negligence and the Child',* was that only

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[472] *Hardie v Sneddon*, 1917 SC 1, at p 6, per Lord Salvesen.

[473] The term "educator' refers to (i) "education authorities" responsible for state school education in terms of s 135 of the Education (Scotland Act 1980, and (ii) independent schools registered on the Independent Schools Register in Scotland, in terms of s 98 of the Education (Scotland) Act 1980.

[474] Publication 5, Abstract, at p 189. For example, *The Telegraph* reported, on 6 Oct 2008, that "Almost £2 million [had been] paid in playground accident claims":

[475] There is a general increase in the online presence of Compensation Claims Agencies offering to obtain large amounts in the event of accidents, or incidents, within the educational environs giving rise to injury. See Edinburgh case study involving a school child given by "*You Claim"* at: http://www.youclaim.co.uk/scottish-injury/edinburgh-school-personal-injury-case-study.htm.

[476] See, e.g., "Ten pupils a week winning injury payouts from school accidents", 26 Sept 2010, in which it is claimed that in 2009-10 UK councils paid out "£2.25 million" when they "accepted liability for injuries in the classroom, sports field or playground", Smith H, *The Metro*, available at: http://mtero.co.uk/201/09/26/ten-pupils-a-week-winning-payouts-from-school-accident. It is hard to ascertain a clear picture of pupil claims and costs involved (Education Authorities do not, necessarily, publish this information). However, insofar as education staff are concerned, Unions often maintain records of claims made and settled on behalf of their members. According to recent statistics cited, "Teachers' Injury Compensation Exceeded £25 million in 2011: http://bestinjuryclaims.co.uk/injury-claims-news/teachers-injury-compensation.

[477] *Ibid.*

[478] Quote taken from the judgment of Sir Thomas Bingham in *Re S (A Minor)(Independent Representation)* [1993] Fam 263, at 279, cited in Publication 6 at p 198. Also, all United Nations member states, except for the United States and Somalia, have ratified the UNCRC, which is intended to ensure that member states are committed to putting in place "special safeguards and care, including appropriate legal protection" for children (quotes from the preamble to the UNCRC, 1989).

"tentative and superficial observations" had been made about the law concerning "child victims of Delictual wrong", particularly where contributory negligence has been an issue.[479] It certainly seemed to be the case that a child found by a court to be "contributory negligent" in respect of injury sustained (i.e. responsible in part for the injuries he or she sustained) would most likely have financial compensation reduced by courts.[480] However, in 2009/10, no clear pattern had emerged concerning this – and none has emerged to date.

As with the young in the context of family life, it was thought that capacity[481] would (or should) have some bearing upon considerations of childhood liability in the Law of Delict. The aim of Publication 6 was, accordingly, to explore judicial approaches from a range of jurisdictions in respect of childhood injury in an effort to make observations about a likely Scottish approach.

In section 4, the approach adopted, using traditional legal research methods, in respect of each publication will be critically appraised.

2.4. Observations on Approach Adopted in Publications

(i) General Approach of Publication 4

The focus of '*The Child's Right to Education'* was the broad gamut of rights that the Scottish child may, in theory if not in practice, lay claim to within the field of education.

The earlier sections in Publication 4 were taken up with providing a critical overview of: (i) the overarching Rights to Education found in Article 2 of Protocol 1 of the

[479] Publication 6, Abstract at p 195.
[480] The provisions of the Law Reform (Contributory Negligence) Act 1945 enabled courts to apportion damages when both parties (i.e. the 'victim' and the 'wrongdoer') are found to be at fault. Section 1 of the 1945 Act provides that "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".
[481] The young in the context of family life were discussed with reference to Publications 1, 2 and 3 in Chapter 1. It is worth noting, however, that s 1(3) of the Age of Legal Capacity (Scotland) Act 1991 specifically excludes delict from the ambit of the Act. The effect of this is that, in theory at least, a child may be liable in Scots law at any age in the Law of Delict.

European Convention on Human Rights and Articles 28 and 29[482] of the UNCRC respectively; and (ii) "the child's educational rights in [domestic] statute".[483] There it was noted, in particular, that there had been a definite shift, within Education Law and practice, away from recognition of parents' rights and claims towards those afforded to children. In the section entitled "The evolving focus of educational rights", it was observed that more "welfare-orientated rights" were being "bestowed upon children" in Scottish legislation drafted after ratification of the UNCRC by the UK. That parents gradually seemed to be yielding their rights to their children was noted to be:

> "a significant change in international and domestic focus. The child, rather than his or her parents, is perceived as the holder of educational rights and the beneficiary of the resultant state duties".[484]

Although, at the time of writing up *'The Child's Right to Education'* there was "no reported education case in Scotland" in which the orders sought by a "legally-represented child [had] contradicted those sought by her parents"[485] the underlying theme of the chapter was that, within education, the child's rights could not, and should not, be ignored. The extent to which this was the position (and it is the position today) is considered in section 5 below when the research outcomes of the publication are discussed.

In the remainder of Publication 4, in accordance with the rest of the textbook, key areas[486] within Education Law (and the field of education itself) were discussed under separate headings and section conclusions drawn throughout about provision for children's rights and participation.[487] The clearly 'signposted' approach proved useful because the textbook is intended for a multi-disciplinary readership.

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[482] These are the Articles of the UNCRC relating to school education. While other articles, such as Article 23 (concerning the Right of the disabled child to participate fully in his or her community, including access to "education and vocational services"), are concerned with education and related matters, school education is not the sole focus of these Articles. UNCRC available at: http://www2.ohchr.org/english/law/crc.htm.

[483] Sections 11.1 to 11.14 of Publication 4. Quote taken from p 212 of Publication 4. Notable statutes passed in recent years (post 1989 UNCRC ratification) included: Standards in Scotland's Schools etc. Act 2000; Special Educational Needs and Disability Act 2001; Education (Disability Strategies and Pupils' Educational Records)(Scotland) Act 2002; Education (Additional Support for Learning)(Scotland) Act 2004; Scottish Schools (Parental Involvement) Act 2006.

[484] Publication 4, at p 210.

[485] *Ibid.*

[486] Publication 4, section 11.15 – 11.26.

[487] In some areas, e.g, Provision of Transport, it was concluded that, "while there is little case law, [the] statutory provisions accord with the educational rights specified in the UNCRC" (p 229). In other areas, it was concluded that Scots Education Law may not measure up to its internationally imposed deadlines, as was the case in respect of provision for Additional Support Needs, where it was concluded that "A principal concern is

(ii) General Approach of Publications 5 and 6

Regardless of whether the field of Education Law itself made (or makes) real and accessible the stated rights proffered to the young in statute, Education Law stands in marked contrast to the Law of Delict, which is the focus of Publications 5 and 6.

Publication 5, *'Trips, Slips and Bangs',* retained as its focus the educational environs, its primary discussion concerning pupil injury claims, *i.e.*, proceedings raised against educators where a child had sustained injury:

> "following an alleged lapse by teaching staff in the supervision of pupils within the classroom, playground, extra-curricular setting, or exposure of pupils to dangerous educational experiences or materials."[488]

The injury claims considered pertained to the educator's broad duty of care to take reasonable steps, through the conduct of appointed staff,[489] to safeguard the health and welfare, or best interests, of pupil charges. Of particular interest were cases in which pupil injury occurred "on what is perceived to be the periphery of the educational milieu".[490] In these cases, irrespective of jurisdiction considered, it seemed that "a complex judicial exercise" ensued to "determine the precise boundaries of the teacher's duty of care".[491]

In terms of organising content, the approach used in *'Trips, Slips and Bangs'* was to break down the key research areas into three sections each of which addressed areas of particular legal difficulty. The sections were: Part A: "The Nature of the Teacher's Duty", Part B: "The Standard of (Appropriate Teacher) Care", and Part C: Conclusions.

[the law's] apparent failure to facilitate the disabled child's participation… it remains to be seen whether it will, in other respects, meet the educational needs of children and young people who have a disability" (p 223).

[488] Publication 5, at p 191.

[489] As is observed in Publication 5, at p 190: "In Scotland, as with many other jurisdictions, the educator's duty of care is recognised as encompassing management and supervision of pupils. An educator can be liable either directly, for failure to provide a safe educational environment or vicariously, for the fault of employees in the course of their employment." A range of significant cases decided in our own, and other jurisdictions, were discussed in Publication 5, including: *Scott v Lothian Regional Council* 1998 Rep LR 15 (educator liability for bullying); *Ahmed v City of Glasgow Council* 2000 SLT (Sh Ct) 153 (pupil injured in class); *Hunter v Perth and Kinross Council* 2001 SCLR 865 (pupil injury at the end of the school day); *Chittock v Woodbridge School* [2002] *EWCA* Civ 7 (pupil injured on skiing trip abroad with school); *Commonwealth v Introvigne* (1892) 150 CLR (school bullying/failure to supervise); *Benitz v New York City Board of Educators* 543 NYS 2d 29 (NY 1989) (pupil injured in school-led extra-curricular activity); *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Rep 81-399 (pupil injured at school bus stop).

[490] *Ibid*. Such cases have involved, for example, injuries sustained by pupils in the playground after school hours, or during an unsupervised lunch break, or even on the way to or from school (whether on foot or using in school, or public, transportation). Such cases are discussed in Publication 5.

[491] Publication 5, page 191.

In Part A, various factors observed to impact upon the duty of care were examined. Further sub-headings followed, allowing the "peripheral factors affecting the scope of the teacher's duty of care" to be addressed separately with reference to relevant judicial discourse around the world, including the location and time of injury.[492] In Part B, it was observed, in particular, that two standards of care existed: (i) *In loco parentis* (the parent-substitute standard), and (ii) that of the ordinarily competent professional (the professional standard). The ideology of each standard was discussed, as were the factors that seemed to affect judicial preference.[493] In Part C of Publication 5, overall conclusions were drawn which I think were, on the whole, satisfying.

Children spend much of their time at school. They do, however, also interact more widely with the world around them from time-to-time. While the young have rights, they also have (limited) responsibility in law for their conduct. In Publication 6, '*Contributory Negligence and the Child',* consideration was given to the consequences in the Law of Delict that might (or might not) be consequent upon accidents arising as a result of the limited ability of the young to:

> "(1)… understand cause and effect relationships in the physical world; (2) believe that actions produce outcomes in the physical world; and (3)… to exercise self-regulation"[494]

Due to the general dearth of case law available to answer contemporary questions in the field, injuries following upon the negligence, and contributory negligence of children were evaluated with reference to wide-ranging authorities. Accordingly, in an effort to achieve comprehensive and well-researched publication outcomes, case law: (i) dating from the early Nineteenth century to 2009, (ii) involving other "lack of capacity" individuals in society,[495] and (ii) originating from the UK and a number of other

[492] Publication 5, 191 – 197.
[493] Publication 5, p 197 – 206.
[494] Perrochet L & Colella U, *What a difference a day makes: Age presumptions, child psychology, and the standard of care required of children*, 24 Pac LJ 1323 (1993) at 1339. For a concurring UK University textbook overview see *How Children Think and Learn,* Wood D, 2nd ed, Blackwell Publishers, 1998, chapters 1, 4, 6 & 7. Quote taken from the article by Perrochet and Colell, as cited at p 204 of Publication 6. For a more recent (and fairly comprehensive) overview of aspects of child development, see Lindon J, (2005), Understanding Child Development: Linking Theory and Practice, Hodder Education.
[495] Youth (and certainly extreme youth), of itself, has long been viewed as a kind of legal disability: *Gardiner v Grace* 1858 1 F&F 359; *Hudson's Bay Co v Wyrzykowski* [1938] SCR 278; *Yachuk v Oliver Blais Co Ltd*, [1949] AC 386; *McKinnell v White*, 1971 SLT 61; *Mullin v Richards* [1998] 1 WLR 1304. Other limited capacity groups include, for example, *Furtado v Bird* (1914) 146 Pac 58 (deaf adult); *McLaughlin v Griffin* 1955 135 NW 1107 (blind adult); *Paris v Stepney BC* [1951] AC 367 (adult blind in one eye); *Haley v London Electricity* Board [1965] 778 (blind adult); *Daly v Liverpool Corp* [1939] 2 All ER 142 & *McKibbin v Glasgow Corp* 1920 SC 590 (cases involving elderly pursuers).

jurisdictions, including South Africa, Australia, America and Canada[496] was analysed. The publication was, again, highly structured, using sections and subsections addressing key issues, such as capacity, the standard of care, apportionment of compensatory awards and possible parental liability. The structure was directed towards enabling easy transferability of knowledge on areas of legal difficulty common to different jurisdictions.

I think, overall, the approach I adopted in '*Contributory Negligence and the Child'* was structurally sound and generally well-supported by traditional legal research methods. However, I wonder whether some of the topics considered in the article were so broad that more publications could have been produced at the time (about, e.g., the difficulties of theory involved in taking childhood into account in the first place in the Law of Delict, or the other limited capacity groups briefly discussed[497]). There is, of course, nothing to prevent my revisiting the areas that were not addressed in depth in Publication 6.

2.5. Reflections on Publication Research Outcomes

'*The Child's Right to Education'*, *'Trips, Slips and Bangs'* and *'Contributory Negligence and the Child'*, all published in 2009/2010, produced a range of research outcomes. Significant research outcomes are revisited here with reference to current law.

(i) Education Law: all talk and no action?

Publication 4 was written shortly after important legislation providing for pupils with "additional support needs" came into force.[498] Although there has been a slow, but steady, stream of reported judgments involving the (then) recently created Additional Support Needs Tribunal for Scotland, [499] there have been no landmark cases significantly impacting upon children's rights in the field of education since 2009. Section 2(1) of the Standards in Scotland's Schools etc Act 2000 provides an overarching education authority duty as follows:

[496] Some such judgments considered included, e.g: *Yachuk v Oliver Blais Co Ltd,*[1949] AC 386; *Van der Vyver* (1983) 100 S.A.L.J. 575; *Weber v Santam Versekeringsmaatskappy Bpk* 1983(1) SA 381(A); *McHale v Watson* (1966) 115 CLR 199; *Humphrey v Burlington* N R.R. 559 N.W.2d 749 (Neb. 1997) & *Christensen v Belmont* Springs, 916 P.2d 359 (Utah Ct.App.1996).
[497] This is discussed, in particular, in section C of Publication 6 (p 202 onwards).
[498] Notably, the Education (Additional Support for Learning)(Scotland) Act 2004.
[499] See, e.g, *City of Edinburgh Council v Additional Support Needs Tribunal* [2012] CSIH 48;*City of Edinburgh Council v K* [2009] CSIH 46; *K v Midlothian Council* [2012] CSIH 77.

> "Where school education is provided to a child or young person… it shall be the duty of the authority to secure that the education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential."

It was observed in Publication 4 that "the judiciary [had] so far been reluctant to engage with the term "fullest potential"[500] in proceedings brought before them. This remains the case today.[501] We do know that the duty to provide education to develop a child's "fullest potential" is tempered by legitimate considerations, such as valid economic constraints,[502] but no clear picture has yet emerged in Scotland as to the nature and scope of this duty.

Little further statutory provision has been made in respect of school education since 2009: the Education (Additional Support for Learning)(Scotland) Act 2009 made some amendments to the law in respect of placing requests, additional support needs and the Additional Support Needs Tribunal.[503] Also, there has recently been a National Review of Educational Provisions for Young People in need of Additional Support,[504] and much of the case law decided in recent years has related to this area within Scots Education Law.[505] This is hardly surprising since there are a high number of pupils in Scotland at present falling within the statutory definition of having "additional support needs".[506]

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[500] Quote taken from Publication 4, at p 212.

[501] See: *City of Edinburgh Council v Additional Support Needs Tribunal, ibid*; *City of Edinburgh Council v N* [2011] CSIH 13; *City of Edinburgh Council v K* [2009] CSIH 46.

[502] The limitations of educational rights are more easily observed in respect of provisions concerning the parent's rights. For example, Article 2, Protocol 1 was ratified with a UK reservation, being that the Right to Education was accepted "only [insofar] as compatible with the provision of efficient instruction and training , and the avoidance of unreasonable expenditure".

[503] The 2009 Act, essentially, increased parental rights in respect of making placing requests (still the parent's or young person's prerogative) and provides that all "looked after" children and young people have additional support needs unless the education authority determines that they do not require additional support in order to benefit from school education. Legislation available in pdf form at: http://www.legislation.gov.uk/asp/2009/7/pdfs/asp_20090007_en.pdf. The National Advocacy Service Under the Education (Additional Support for Learning Act) (Scotland) 2009 also bolsters the responsibility of Scottish Ministers to provide a single national advocacy service in respect of educational disputes between families and educators.

[504] HM Inspectorate of Education (HMIE) was asked to lead the review by the Minister for Children and Early Years. Other organisations, such as Enquire participated. The report 'Review of the Additional Support for Learning Act: Adding Benefits for Learners' was published in November 2010, and information about their report is available at: http://www.scotland.gov.uk/Topics/Education/Schools/welfare/ASL.

[505] See, e.g, *City of Edinburgh Council v Additional Support Needs Tribunal* [2012] CSIH 48; *K v Midlothian Council* [2012] CSIH 77.

[506] Section 1(1) of the Education (Additional Support for Learning)(Scotland) Act 2004 provides that "A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person." There are more than 35,000 pupils in Scotland who are either based in a special school or have additional support needs in primary or secondary schools: statistics cited by the Education Law Unit at: http://www.edlaw.org.uk/?page_id=34. Other cases

Other areas of Education Law have remained static in law[507] since 2009, and this is disappointing, particularly given the Scottish Government's apparent Commitment to ensuring that the "aims and objectives of the" Education Articles of the UNCRC were "given full effect in Scotland".[508] For example, certain research outcomes were reached in Publication 4 concerning the inability of those below the age of 16 years to make placing requests (i.e. a request that a child attend a particular school) on their own behalf. It was observed in *'The Child's Right to Education'* that this was unsatisfactory from a children's rights perspective and inconsistent with other, more children's rights-orientated, amendments made elsewhere in the field of Education law over the last decade or so.[509] It is odd that, while the child now has the right to challenge her exclusion from school, she does not have the right to any part of the decision made about which school she attends in the first place.[510] The lack of general capacity afforded in law to children to participate in a decision concerning which school they attend is also, importantly, and ongoing inconsistency with other statutory provisions in Scots law concerning the young.[511]

It remains the case that only a parent or a "young person" (i.e. a person of school-leaving age) may make a placing request.[512] A legally competent child is not empowered to do this by Education Law statute, and any subsequent attempt to judicially review a decision of an education authority concerning a placing request is still deemed, by Scottish courts,

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arising from pupil injury have also been decided since Publication 4. See e.g, *Wands v Fife Council* 2009 GWD 30-477 (school bullying: former pupil). It should be noted that there has been a recent, national review of provision of services for disabled children in Scotland conducted by the Scottish Government, text of review available at: http://www.scotland.gov.uk/Publications/2011/02/25151901/1.

[507] This is not true in respect of policy, however, and a current study by 'Having a say at school' (HASAS), which is the largest Scottish study of pupils councils undertaken, seeks to encourage greater participation of children and young people in the educational environment: see http://www.havingasayatschool.org.uk.

[508] Quote taken from Publication 4, at p 209.

[509] For example, the child's right to challenge his or her exclusion from school, found in s 41 of the Standards in Scotland's Schools etc Act 2000.

[510] It is to be hoped that education authorities would fulfil their duty, in terms of s 2(2) of the Standards in Scotland's Schools etc Act 2000 to take the views of the child "insofar as reasonably practicable" when making "decisions that significantly affect that child or young person". The recent 'Having a Say at School' initiative, *supra*, shows that there is certainly a will, if no legal requirement, to encourage the active participation of children and young people at school in respect of decisions affecting them.

[511] This is observed in Publication 4, at p 217 - 218. In particular, schooling could be defined as a "major decision" in terms of s 6(1) of the Children (Scotland) Act 1995.

[512] Education (Scotland) Act 1980, as amended, ss 28A and 28F. The terms "parent" and "young person" are defined in s 135 of the Education (Scotland) Act 1980: "parent" includes guardian and any person who is liable to maintain or has [parental responsibilities (within the meaning of s 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of] a child or young person" and "young person" means a person over school age who has not attained the age of eighteen years."

to be a matter concerning parents', rather than children's, rights.[513] This is the case notwithstanding that a child would, ordinarily, have capacity to bring a petition for judicial review.[514] In *S v Scottish Legal Aid Board* the Court of Session ruled that it was:

> "the parent of a child who has the title to pursue proceedings relating to a placing request," notwithstanding the terms of s 2(4) of the "Age of Legal Capacity (Scotland) Act 1991… it is clear from the provisions of the [Education (Scotland) Act 1980] that the underlying purpose is to give a parent a right to make a placing request in respect of a child because it is the parent's wishes that lie at the heart of the provisions so far as children are concerned."[515]

The court's rationale in *S v Scottish Legal Aid Board* meant that the Scottish Legal Aid Board's refusal to accept an application for legal aid made in the name of the child for legal aid (rather than the parent) for a sheriff court appeal against an education authority's refusal of their placing request was upheld.[516] This judgment continues to represent the judicial approach to such applications made in Scots Education law. Further, more recent statutory amendments mean that, even in Education law proceedings where the court is satisfied that a legal aid certificate can legitimately be issued in the child's name, parental resources are likely "to be treated as part of the child's own resources."[517] Contested

[513] See, e.g, *Sim v Argyll and Bute Council* [2006] CSOH 144; *Crossan v South Lanarkshire Council* 2006 Fam LR 28; *S v Scottish Legal Aid Board* [2007] CSOH 116.

[514] Age of Legal Capacity (Scotland) Act 1991, s 2(4A), provides that "A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with *any civil matter,* where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding*."(Italics added)*

[515] [2007] CSOH 116, Temporary Judge C J MacAulay, QC in the Outer House, at paras 38-39.

[516] This, residual, tension (or conflict) between children's and parents' rights has often been resolved, whether through practice, policy or law, in favour of the parents. See, e.g., *R (on application of Begum) v Denbigh High School Governors* [2006] UKHL 15, a case in which the young person concerned lost in her bid to wear certain religious clothing of her choice to a school that forbade such clothing, but she had no right to chose her school (this is true North and South of the border) and would have required on her parents to exercise that choice on her behalf. This case is discussed in Tisdall EKM *et al*, (2008), 'Reflecting on Children's and Young People's Participation in the UK, 16(3); 343-354. More recent child education cases perhaps provide greater scope for optimism, see: *R (on application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin); *G v St Gregory's Catholic Science College Governors* [2011] EWHC 1452 (Admin).

[517] Amendments in force since 31 Jan 2011, made to the Advice and Assistance (Scotland) Regulations 1996/2447, and the Civil Legal Aid (Scotland) Regulations 2000/494 by the Advice and Assistance (Scotland) Amendment Regulations 2010/462, Reg. 5(c) and the Civil Legal Aid (Scotland) Amendment Regulations 2010/461, Reg. 3(b) respectively. Parental/carer income will be taken into account where a legal obligation to aliment the child exists. These provisions do not apply to criminal matters or in any case where, in the "particular circumstances", it would be "unjust or inequitable" to treat parental resources as part of the child's own resources (this might, include, e.g. a scenario in which a child and parent are opponents in litigation).

litigation in Scotland in the Court of Session is costly – and the risks of being found liable for the expenses of an opponent in the event of failure can be prohibitive.[518]

The research outcomes of '*The Child's Right to Education'* have not been overtaken in contemporary law and, as observed in my closing comments in the publication:

> "Ratification of the [UNCRC] has brought about a continual process of, somewhat fragmented, reform throughout domestic Education Law… It remains to be seen in the coming years, whether these inconsistencies will be fully addressed in Scotland".[519]

In October 2008, the UN Committee made 124 recommendations to the UK.[520] A number of these recommendations (such as investing more money to ensure a child-inclusive educational experience, and doing more to prevent school bullying[521]) concerned education. In particular, the UK was asked to:

> "Strengthen children's participation in everything that affects them at school and in their education."[522]

Notwithstanding other (non-legal) positive developments in Scots education policy and practice,[523] it is hard to see how primary Education Law statute or the rationale in *S v Scottish Legal Aid Board,* discussed above in this section, accord with this recommendation. Certainly, the UK is due to provide its next Progress Report on implementation of the UNCRC into UK law in 2014.[524] It is to be hoped that further

[518] Fees, expenses and costs running into tens of thousands of pounds is not unusual in Scottish civil litigation. There have long been concerns expressed about the costs of litigating in Scottish civil courts. The Taylor "Review of Expenses and Funding of Civil Litigation In Scotland" is currently ongoing. Sheriff Principal Taylor began the review in May 2011 and it is anticipated that a final report will be issued in the summer of 2013. The final report will be sent to the Scottish Ministers for consideration of further action, on completion. http://scotland.gov.uk/About/Review/taylor-review.

[519] Publication 4, p 230 – 231.

[520] UN Committee 49th Session Report: Consideration of reports submitted by state parties under Article 44 of the Convention, concluding observations available at: http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf

[521] *Ibid.* Recommendations 84 and 89 respectively, explanatory text available at: http://www.crae.org.uk/assets/files/Translation%20Concluding%20Observations%202008.pdf.

[522] *Ibid.* Recommendation 90.

[523] See, e.g., the Scottish National Framework 'Education for Citizenship in Scotland', and the work currently being undertaken by Children in Scotland, the University of Edinburgh's Centre for Research on Families and Relationships (info available at: www.havingasayatschool.org.uk).

[524] The next period report is due by 14 January 2014. Timetable available at: http://www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/b0074766/uncrc/reporting-process.

steps[525] will be taken in respect of the remaining educational areas in which children's rights are not yet fully respected.

(ii) Are teachers quasi-parenting our children – or not?

Most cases in the UK involving claims made by, or on behalf of, children in Delict tend to involve incidents occurring in the educational environment.[526] Personal injury lawyers are increasingly viewing such litigation as part of their ongoing caseload[527] and the media are quick to make high profile the more curious claims in educational environments.[528] In state school cases, proceedings are typically raised against the education authority ('the Defender') responsible for maintaining the school. Education authorities are also vicariously liable for the conduct of teachers they employ. The primary line of argument advanced by the Pursuer (i.e. either the parent or child bringing the case) is often that the school has failed properly to supervise its pupil charges. When these cases are successful a financial award is made against the educator.

One of the main research outcomes of Publication 5 ('*Trips, Slips and Bangs'*) concerned the nature and extent of the teacher's duty of care, which was observed to be:

> "significantly affected by *where* and *when* injuries take place and the level of the teacher's perceived *control* over pupils… [meaning that] the application of the concept of a teacher's duty of care where pupil injury occurs on the educational periphery… is problematic"[529]

There existed "limited judicial rationale" in Scotland at in 2009, and this remains the case today. A further key research outcome concerned the, rather unsatisfying, co-existence of two "standards of care" applicable[530] to the teaching profession: (i) the "parent-substitute

[525] Here it is worth observing that, as part of the Scottish Government's broad commitment to giving the UNCRC full effect in Scots law the Children and Young People (Scotland) bill (passed on 19 Feb 2014).

[526] Ten pupils a week winning injury payouts from school accidents" Sunday 26th Sep 2012, Metro (London): http://mtero.co.uk/201/09/26/ten-pupils-a-week-winning-payouts-from-school-accident; See also "Accidents at school: the most common types of claim for children", Accident Claims Solicitors (reference to statistics): http://www.accident-claim-expert.co.uk/en/child-claims/accident-at-school.html. See guidance of the Health and Safety Executive on educational matters: http://www.hse.gov.uk/services/education/faqs.htm.

[527] See, e.g., the well-known National firm, *Thomsons*, who have a department that specialises in such claims: http://www.thompsons.law.co.uk/other-accidents/accidents-injuries-school-compensation-claim.htm.

[528] See, e.g: The *Telegraph,* "Janitor sues school over Vaseline prank", 2 Nov 2012 available at: http://www.telegraph.co.uk/education/9650430/Janitor-sues-school-over-Vaseline-prank.html; Daily Record, "Pupil sues her Barra school over not being properly prepared for Higher English exam", 28 Nov 2010, available at: http://www.dailyrecord.co.uk/news/scottish-news/pupil-sues-her-barra-school-over-1077059.

[529] Publication 5, at p 206 – 207.

[530] Publication 5, at p 207. See also Eve N, 'Safety Implications for Partnerships – *in loco parentis*', (1994) Bulletin of Physical Education 6 and observations of Lord MacLean in *Scott v Lothian Regional Council* 1998

standard", *in loco parentis*, and (ii) the "ordinarily competent professional standard".[531] Both were noted to be "historically and currently established among, and within, the jurisdictions considered".[532] Courts continue to make their decisions on a case-by-case basis: judicial preference for one, or the other, standard often emerges without a clear rationale being provided throughout the course of the judgment.

However, in an English case decided last year, *Woodland v Swimming Teacher's Association,*[533] there is judicial commentary from the Court of Appeal suggesting that *in loco parentis* might be too low a standard of care to impose upon teaching staff in some circumstances. Laws LJ, who gave the court's opinion said (referring to Murphy J):

> "'the notion that a school teacher is *in loco parentis* does not fully state the legal responsibility of a [teacher], which in many respects goes beyond that of a parent'… A school should not be equated to a home. Often hazards exist in a home which it would be unreasonable to allow in a school."[534]

It seems, therefore, that (certainly insofar as *in loco parentis* is concerned) the law concerning which standard of care should be imposed upon the teaching profession is – if anything – even more opaque today than it was in 2009.[535] The question abides: are teachers quasi-parenting our children – or not? What is needed is a lengthy judgment from the Inner House or the Supreme Court on this question of law.

Rep LR 15, at 11, when referring to the teacher's duty to act as a "teacher of ordinary skill… acting with ordinary care".

[531] Publication 5, at p 207. The 'vying' standards of care were discussed throughout the publication in more depth, notably in section B, from p 197 – 204.

[532] Cases from a number of jurisdictions (and throughout the 20th century) were considered, including South Africa (*Transvaal v Provincial Administration v Coley* 1925 AD 24), Australia (*Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Rep 81-399), America (*Benitz v New York City Board of Educators* 543 NYS 2d 29 (NY 1989) and the UK (*Beaumont v Surrey County Council* (1968) 66 LGR 580).

[533] *Woodland v Swimming Teacher's Association* [2012] EWCA Civ 239 (Court of Appeal judgment).

[534] *Ibid,* at papa 40.

[535] See, e.g, *Brown v North Lanarkshire Council,* [2010] CSOH 156, when an education authority was found liable in respect of pupil injury sustained following a paint brush "penetrating a child's eye and brain" in classroom activity. Lady Dorian, in the Outer House, discussed the appropriate standard of care, referring to "*in loco parentis*" and quoting a general duty of care for teaching staff observed in DM Walker's authoritative text, Delict (2nd edn), p.1062: "A school teacher owes a duty to take reasonable care for the safety and health of the children under his charge, and must exercise care and forethought, having regard to their age, inexperience, carelessness and high spirits and the nature and degree of danger, not to subject them to avoidable risks of harm."

(iii) Children and Delict: it's not about the child's best interests

'Contributory Negligence and the Child' was concerned with civil claims made by (or on behalf of) children within the field of Delict. For the most part, the research outcomes clarified the state of legal uncertainty, in all jurisdictions considered, of the child's status: is she to be found in law as capable (and thus, to some extent, legally accountable) of contributing to her own injuries? If so, at what age does such capacity emerge?

An attempt was made, in Publication 6, to categorise judicial approaches to stages of childhood development when determining degrees of childhood contributory negligence in respect of injuries sustained.[536] Broadly speaking, it was concluded that below that age of about 4 years old a child was not generally likely to be considered capable of contributory negligence. Between 4 and 6 years of age, it was possible (although not the norm) that a finding of contributory negligence could be made. From about 6 years old upwards, it became progressively more likely, as a child moved towards adulthood, that he or she would be found capable of negligence or contributory negligence.[537]

However, the most significant and (so far) enduring conclusion of Publication 6 was that:

> "… there are few guaranteed 'safeguards and… legal protections to be found within the Law of Delict where child victims are concerned… only very limited patterns of consistent judicial rationale emerge… it should be a matter for contemporary concern that the Law of Delict has continued so long without clarity…"[538]

This remains the case today. Few judgments have been reported to since 2009 (either in Scotland or England) involving personal injury claims made about the young, and none that advance the law concerning the child's "capacity to neglect".[539] In essence, the Scottish legal approach concerning the contributory negligence of children is predicated on the assumption that the Law of Delict does not exist to serve the best interests of the child, and so the child's "best interests" are not a feature of judicial rationale. This contrasts with other areas of the law, such as Child and Family Law (discussed in Chapter 1 of this thesis).

[536] Publication 6, sections C and D.
[537] Publication 6, p 205 – 206.
[538] Quote taken from Publication 6, at p 213 – 214, and quote within the quote taken from the preamble to the UNCRC.
[539] The leading case on childhood capacity in Scots Law remains *Galbraith's Curator ad Litem v Stewart* 1998 SLT 1305.

(iv) Children and Delict: might it be about best interests after all?

Although there have been no significant developments since 2009 concerning child capacity, or child best interests, in respect of negligence (an *un*intentional wrong), there has been a recent, noteworthy decision concerning the intentionally committed Delicts of children. In late 2011, the South African Constitutional Court issued a landmark judgment in the case of *Le Roux v Dey.*[540] The court found a child and two young people[541] liable in defamation for causing the publication, online, of fabricated images of their deputy-principal and principal teacher in sexually compromising positions.

The *Le Roux* judgment is particularly interesting, since it is one of the first of its kind: a case in which the young have been found to possess clear capacity to be delictually liable and, perhaps more significantly, financially liable for their Delicts. This was the case notwithstanding that the court considered the application of the South African Children's Act 2005 to the Delictual proceedings.[542] Section 9 of that Act provides that:

> "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."[543]

The wrongdoers, aged between 15 and 17 years, were all "children" in terms of the Act.[544] The judgment raises an interesting question, discussed below: what approach might a Scottish court be expected to adopt in a similar scenario?

Cases involving children in the Law of Delict (particularly cases in which the child is the wrongdoer) are rare.[545] As the research outcomes of Publication 6 indicate, the Scottish legal approach concerning the *un*intentional wrongs of children is predicated on the

[540] [2011] ZACC 4.
[541] Three pupils were involved in the wrongdoing. The judgment states that "Mr Le Roux was about 15½ years old while Messrs Gildenhuys and Janse van Rensburg were about 17 years old" at the time they committed the Delict [para 12].

[542] Exactly "How should the "best interests" standard come into play in a matter such as this?" was a matter that was debated by the court: see, in particular, dissenting judgments of Skweyiya J (quote from para [211]) and Yacoob J.
[543] 2005 Act of South Africa available as pdf at: http://www.info.gov.za/view/DownloadFileAction?id=67892 , as amended by the Children's Amendment Act 2007 and Child Justice Act 2008.
[544] See s 1 of the South African Children's Act 2005, which provides that all persons below the age of 18 years are "children".
[545] One of the few examples of a UK court determining a child wrongdoer claim is *Mullin v Richards* [1998] 1 W.L.R. 1304, although it should be noted that allegations of negligence were countered with those of contributory negligence in the case which concerned a ruler fight between two 13 year old school girls that led to a serious eye injury.

assumption that the child's 'best interests' are not a feature of judicial rationale. It therefore seems very unlikely that the best interests of children would feature in judicial rationale concerning a case of intentional child Delict in Scotland.

In a *Le Roux* scenario, a Scottish Pursuer would, in technical legal terms, require to demonstrate that there was (i) an appreciation (or capacity) on the part of the child to comprehend the nature of the wrong done (as with unintentional delicts considered in Publication 6). Additionally, in respect of an intentional wrong, it would probably have to be demonstrated that (ii) the child had ostensibly acted maliciously or with a reckless disregard for the understood consequences. Were these two conditions met, it seems that a Scottish court could well hold a child liable for an intentional Delict.

Of course, it does not necessarily follow, just because a Scottish court *could* hold a child or young person delictually liable for an intentional Delict that it would. Finding children or young people financially responsible for their conduct is a thorny, and in reality impracticable, matter. Since few children have the financial resources to pay any court award made against them, would this not simply be back-door parental liability? We have no modern precedent in Scotland[546] on that particular matter. However, on account of such public policy, rather than legal, considerations our Scottish judiciary would I think be unlikely to make a finding against children in the Law of Delict.[547]

Somewhat ironically, therefore, it seems that without considering the child's 'best interests' at all, a Scottish court would be more likely in cases like *Le Roux* to issue a judgment that better serves a child's best interests. That is, of course, if we assume that it serves a child's best interests to be free of facing the prospect of paying his teacher almost £2,000[548] in damages for a practical joke gone wrong.

[546] There are some old cases, predating the 1945 Act, that relate to parental liability for failure to supervise very young children. These cases include *Reilly v Greenfield Coal and Brick Co Ltd*, 1909 SC 1328 (involving a child 3 years of age who was killed on a train line: the parents were found to have been contributory negligent on account of their failure to supervise); in *Christie's Tutor v Kirkwood* (OH) 1991 SLT 805, some more modern consideration was given to this issue. See p 213 – 214 of Publication 6.

[547] Other steps, such as school disciplinary measures or a brush with criminal law might form a preferred disposal of the case. Also, perhaps a referral into the Scottish Children's Hearing System might be a consideration (current law: Children (Scotland) Act 1995, s 52(2) grounds).

[548] In *Le Roux v Dey* the South African Supreme Court reduced the award made against the pupils from R45,000 to R25,000 (equating to a reduction in the "composite award" from c £3,200 to £1,800: see para 4 of the judgment).

2.6. Concluding Comments

In this chapter, I have critiqued published work having as its focus the first strand of my overarching research theme: a critical evaluation of the rights, status and capacity of the young in underdeveloped and emerging areas of law.

Conceptual Framework: Rights, Status and Capacity - Contribution of Publications 4, 5 and 6

Publications 4, 5 and 6 were placed within the broader academic literature in Section II of the Thesis Introduction. Insofar as both the fields of Education Law and Delict are concerned, *the young* possess underdeveloped rights, status and capacity. In Education Law, the status of the child is in the midst of change: much of this change has taken place within the last 15 years. Ratification by the UK of the UNCRC has played a part in accelerating reform in the field of Education Law – although the reform is as yet incomplete and the child's education rights are still in the process of emerging. Where the Law of Delict is concerned, our ratification of the UNCRC has done little to improve the legal status or capacity of the child: both remain in a rather static state of underdevelopment.

Publications 4, 5 and 6 publications are all contributions based on traditional legal research methods. As a contribution to the literature, these Publications are principally directed towards providing critical analysis for a legal community that creates, interprets and applies the law. By systematically addressing Publications 4, 5 and 6, I describe their contribution to an evaluation of the rights, status and capacity of the child in Scots Law, as follows:

Publication 4: is concerned with the extent to which the child's UNCRC *rights* are implemented within the field of Scots Education Law. The notion of the child as a valid rights-bearer has been developed in the wider socio-legal literature: it is in the possession of rights, as recognised and enforced, that legal *status* is realised. However, in Education law, it is observed that the child's status and rights are still superseded by the parents' rights in some respects – even although there is a growing tendency in Scots Education Law to view the child, rather than the parent, as more than a passive subject. Similarly, questions of *capacity* are explored in this publication, in particular, the capacity the child

does (or, in some cases, does not) possess in Scots Education Law to access remedies on his or her own behalf. The broad contribution of Publication 4 on the theme of rights, status and capacity is therefore to provide a traditional doctrinal analysis of how the relevant UNCRC rights of the child are framed in contemporary domestic 'black letter' law.

Publications 5 and 6: each of these publications is concerned with the *status* and *capacity* of the child within the Law of Delict. Publication 5 focuses on the child in the educational environs; Publication 6 focuses on the child within the wider community. Childhood capacity is discussed in these publications with reference to Delict, a field of law in which the *rights* vouchsafed the child in terms of the UNCRC have yet to make any real impact. The lack of clarity and outdated nature of the field of Delict is highlighted as a matter for judicial and policy concern. While publication 5 can most accurately be described as a doctrinal legal analysis, Publication 6 is, in some respects, traditional legal research that is reform-based. Both publications represent contributions to what is a general dearth of traditional Scottish (and UK) legal literature concerning children in the field of Delict. Accordingly, the broad contribution of Publications 5 and 6 is in providing an exposition of what is considered to be the current state of Scottish law and to recommend a need for reform in order that the law may better provide for the rights, status and capacity of the child.

My intention is that this general research strand concerning *the young* will grow to include consideration of disabled young people and adults both in private, family life and as they progress from a school education to higher or further education and, thereafter, into the workplace.

Next, in Chapters 3 and 4, the focus of this thesis shifts the second strand of my overarching research theme: a critical evaluation of the rights, status and capacity of *disempowered adults* in underdeveloped and emerging areas of law. To date, my research outputs have concerned transsexuals, although broad LGBT issues, including a deeper consideration of gender (and transgender) within the fields of education and employment, are potential areas of future research.

CHAPTER 3: Publication 7

3.1. General Introduction to Publication 7

In this chapter, a critical appraisal is given of:

- **Publication 7**: *'Gender Identity and Scottish Law: the Legal Response to Transsexuality',* Edinburgh Law Review, 2007, 11(2), 162 – 186 (hereinafter referred to as '*Gender Identity and Scottish Law'*).

As observed in Publication 7, a diversity of views and agendas has emerged over decades of public discourse about transsexuality and this has produced a "perplexing choice of terminology".[549] 'Transsexual', rather than 'transgendered person', is the term used in this chapter. At first glance, the more traditional term 'trans*sexual*' emphasises the biological sex of an individual (i.e. male or female) while the more contemporary term 'trans*gender* emphasises an individual's sense of personal identity (i.e. with either the masculine or feminine). However, the terms are broadly interchangeable and are understood to refer to the same group[550] of people: individuals conventionally understood as possessing the physical characteristics of one sex while psychologically belonging to the other. The term 'transsexual' is widely used and understood in cross-disciplinary discussions; it is concise and, significantly, remains the term most frequently adopted in case law throughout the jurisdictions considered.[551]

'Gender Identity and Scottish Law' was a comprehensive article published in a peer-reviewed journal[552] examining the rights, status and capacity of transsexuals – who were, and remain, disempowered individuals in Scots (and wider-UK) law. The article was written between 2005 and 2006 and was accepted for publication in March 2006. Since

[549] Publication 7, p 166.
[550] For an overview of key terms in the field, see Publication 7, Section C "Perceptions and Terminology" at p 164.
[551] This is discussed at pp165-166 of Publciation7. See also, e.g., recent media coverage: 'Transsexual, 16, forces school to let him sit exam dressed as a girl: Head threatened with Equality Act', Daily Mail, 22 July 2012; 'Transsexual differences caught on brain scan', J Hamzelou, New Scientist (online), 26 January 2011; e.g.); A recent judgment in point is *R (on the application of C) v Berkshire West Primary Care Trust* [2011] EWCA Civ 247, in which the term "transsexual" is used throughout the judgment.
[552] The Edinburgh Law Review aims to set "the law of Scotland in an international and comparative context" by providing comprehensive "analysis of developments in legislation and of court decisions". Quotes taken from the EUP Publishing webpages: http://www.euppublishing.com/journal/elr

the relevant law was in the midst of a period of reform, the text of the publication required to be revisited and several parts of it updated between March 2006 and 2007. Addressing feedback from an anonymous referee was part of the process of finalising the article and the final revisions to the edited text were made in early 2007. The *Edinburgh Law Review* is published in three volumes per annum: Publication 7 belongs to the May 2007 volume of the journal.

'Gender Identity and Scottish Law' considered how (and why) case law from different jurisdictions, ongoing medical progress and evolving social perceptions had influenced the legal recognition of the individual rights, status and capacity of transsexuals in the UK. A *Transsexuality Timeline* contextualising developments is provided in the thesis Appendix.

Publication 7 also considered the influence on Scottish law of the UK-wide Gender Recognition Act 2004 ('the 2004 Act'), and outlined various anomalies in the legal treatment of transsexuals found in both Scottish and English law at the time. The terms of the 2004 Act, which provided for the first time in history for the formal recognition of transsexuals in an "acquired" (i.e. desired) status, were discussed. The publication debated whether Scottish transsexuals might seek legal recognition of their acquired gender without following the procedure of the 2004 Act. In particular, several pertinent questions were posed on behalf of those disempowered groups falling outwith the scope of the 2004 Act and who lived in a legal "no [wo]man's land". Such categorisation had significant implications for transsexuals in their personal and professional capacities, and also for the public and private organisations with whom they interacted.

In section 2 below, *'Gender Identity and Scottish Law'* research rationale and independence outlined. In section 3, the research premise and aim will be examined. The general approach adopted using traditional legal research methods, and research outcomes reached, are critically analysed in sections 4 and 5. In section 6, concluding observations about the contribution of the publication to literature concerning rights, status and capacity are made.

3.2. Rationale and Independence of Publication 7

Transsexuality [553] was chosen in 2005 as the focus of Publication 7 for a number of reasons. The first, and chief, reason concerned the, almost uniform, lack of assured status possessed by transsexuals in domestic and international society throughout this and last century. Steps taken in the UK in the early years of the millennium towards the formal legal recognition of the transsexual in her desired status were sweeping and riddled with social, medical and legal complexity.[554] The transsexual therefore falls precisely within the overarching remit of my independent research:[555] she was (and, arguably, remains) a specific, and distinct, category of *disempowered individual* in respect of whom rights, status and capacity fall within an underdeveloped and emerging area of law.

Secondly, there was no body of consistent case law, or analytical commentary of case law, in Scotland, or in other jurisdictions, concerning transsexuality. This meant that comprehensive applied research could form an original and worthwhile contribution. The dearth of consistent judicial rationale made it difficult to predict what decisions were likely to be reached in cases about transsexuals across the range of jurisdictions considered.[556] No substantial legal research concerning the Scottish response to transsexuality had been published at the time of researching Publication 7. Further, no significant legal publications were found concerning transsexuality in any Western jurisdiction searched, with the exception of one article published in an American peer-reviewed legal journal in 1971.[557] The latter publication, which had as its focus

[553] The Department for Constitutional Affairs, *Government Policy concerning Transsexual People* (available at *www.dca.gov.uk/constitution/transsex/policy.htm)* "estimates vary, but it is thought one man in every 12,000 feels he is a woman. The proportion of women who feel they are men is smaller."

[554] Significantly, after decades of failure in bringing cases on behalf of the transsexual community, recent judgments (domestic and the European Court of Human Rights ('the ECHR')) had ruled that UK law was failing in its respect for the private life of the transsexual: *Corbett v Corbett (otherwise Ashley) (No 1)* [1971] P 83; *Cossey v UK* [1991] 2 F.L.R. 492; *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467; *Goodwin v UK* (2002) 35 EHRR 18.

[555] Research Strand 2: "*Critical Analysis of Legal Status and Capacity of Disempowered Adults*", it also forms part of my focus in respect of Research Strand 1: Critical Analysis of the Legal Status and Capacity of the Young: see, e.g., Publication 8, "Transsexuality and Kidulthood…" discussed in Chapter 4.

[556] The diversity in judicial attitudes towards legal recognition of the transsexual's desired status can be seen by considering the variety of approaches adopted in cases decided in the following jurisdictions: New Zealand (*Re T* [1975] 2 NZLR 449); Canada (*M v M(A)* (1985) 42 RFL (2d) 55); South Africa (*W v W* 1976 (2) SA 308); Ohio (*Re Ladrach* 513 NE 2d 828 (1987)); England (*C & D* (1979) 6 *Family Law Reports* 636); New Jersey (*MT v JT* 355 A 2d 204 (1976)).

[557] D K Smith, (1971), 'Transsexualism, sex reassignment surgery and the law', 56 Cornell L Rev 963-1009. Various brief case comments had been published (e.g., 'Right to private and family life: *Sheffield v UK*' (case comment) E.L. Rev. HR144) and the *Corbett* judgment has been written on several times since 1970, and overviews had been written on the broad terms of the Gender Recognition Bill and subsequent Act (see, e.g., 'Gender Reassignment' , Med. Leg. J. 2004, 72(4), 151-152). However, no comprehensive coverage of transsexuality from a legal perspective was found.

transsexuals and the law, was an interesting and useful point of reference but was considerably out of date.

A third factor which led to the selection of transsexuality as a research focus concerned interconnected developments in UK law at the time. In late 2005, the main provisions of the Gender Recognition Act 2004 and the Civil Partnership Act 2004 came into force, with both pieces of legislation creating rights and remedies in domestic law for cross-sections of the LGBT[558] community. The birth of civil partnerships throughout the UK had been the subject of considerable discussion, debate and publication by Scottish lawyers and other professionals.[559] However, the impact of a statutory system regulating and recognising the transsexual's status appeared to be rather neglected in comparison. This seemed to me unsatisfactory, and so a comprehensive study of legal responses to transsexuality, having as its primary focus Scots law, presented itself as a worthwhile research objective.

3.3. Publication 7 – Contextualising the Premise and Aim(s)

'Gender Identity and Scottish Law' was concerned with the "relatively recent emergence of transsexuality into the public forum"[560] and the ensuing (and diverse) legal response in Scotland and other Western jurisdictions. The premise of the publication was that, over

[558] A term in common usage since the 1990s: many publications have provided overviews of lesbian, gay, bisexual and transgender ('LGBT') terminology, perceptions and social attitudes: see, e.g., S S M Edwards, *Sex and Gender in the Legal Process,* Blackstone Press (1996), and M Blasius; S Phelan, *We are everywhere: a historical sourcebook in gay and lesbian politics,* Routledge (1997).

[559] For example, Kenneth McK Norrie, a leading Scottish Private / Family Law academic, has published extensively, and with some regularity, on this subject, advocating equality of status and in favour of gay rights in family and private life for several decades, see e.g.: 'Parental pride: adoption and the gay man', S.L.T. 1996, 33, 321-325; '*Early v Early* is dead', S.L.P.Q. 2000, 5(2), 169-170; 'What the Civil Partnership Act 2004 does not do', S.L.T. 2005, 6, 35-40. Norrie has written considerably less about the rights of the transsexual. Prominent transsexuals, such as the English campaigner Stephen Whittle OBE, have published on topical issues concerning rights, status and capacity but this has been with the intention of driving reform and promoting rights, rather than providing a critical academic analysis of the legal response.

[560] See *Transsexuality Timeline* in thesis Appendix. Little, it seems, was known socially of transsexuality before the Twentieth century. Secret accounts of transsexuals living in previous centuries are available. See R Perkins, "Famous Trannies in Early Modern Times", available at *www.gendercentre.org.au/8article11.htm* and S Whittle, (2003), 'Standpoint', 12 *Journal of Gender Studies* 137. Magnus Hirschfeld, the German doctor and sexologist, was one of the first professionals to study the condition. In his earlier publications (around 1900), he used the term "*Geschlechtsübergänge"* ("gender passage"). That term was later converted to *"psychopathia transsexualis"* (meaning a pathologic-morbid desire to become a member of the opposite sex) which was then adopted into common usage in around the 1940s: see D Cauldwell, (1949), 'Psychopathia transexualis', 16 *Sexology* 274. By the 1950s it was not uncommon that the transsexual "phenomenon" featured in articles in prominent Western medical journals, see, e.g., H Benjamin, (1954), 'Transsexualism and transvestism as psychosomatic and somatopsychic syndromes', 8 *American Journal of Psychotherapy* 219. However, debate as to the origin, nature and appropriate medical, social and legal treatment of the condition persisted: see pp 171-173; p 175; pp 184 – 186 of Publication 7.

the foregoing 80 years, understanding and making provision for the transsexual had become a journey that was simultaneously (i) medical, (ii) social and (iii) legal.

The overarching aim of the publication was to provide the first comprehensive, and critically reflective, examination of the past, present, and possible future Scottish legal response to transsexuality. Since it became apparent in the early stages of researching the topic that a close and (at times) "uneasy partnership" existed between evolving medical opinion, social perceptions and the legal response, three interconnected research questions were formed. These were to:

(i) Ascertain and rationalise the degree to which medical perceptions have impacted, and might continue to impact, upon on the legal response to transsexuality;

(ii) Examine the perceived effects of general social (or cultural) developments on legal rationale with reference to relevant decisions;

(iii) Consider the impact of the law itself: i.e. developments towards, and issues surrounding, recognition of the transsexual's status in terms of the recent Gender Recognition Act 2004 ('the 2004 Act').

3.4. Observations on Approach Adopted in Publication 7

'Gender Identity and Scottish Law' necessitated considering in some depth the three, distinctive, research questions outlined above.

The publication was written with, primarily, a legal readership in mind. Lawyers do not readily use medical terminology. Accordingly, any detailed consideration of the legal response to transsexuality demanded that a reasonably comprehensive, and neutral, introduction to the subject matter be provided. The reader also required to be familiarised at the outset with important terms and a critical overview of historic, current and evolving norms, views and attitudes concerning transsexuality. This proved particularly challenging, since there exists a wide and bewildering choice of terminology – itself "indicative of… wider debate surrounding the nature of transsexuality."[561] Even those

[561] Publication 7, p 166.

who are transsexual can find defining themselves an "extremely difficult task", as one prominent transsexual campaigner observed:

> "Any definition [of transsexuality] has to accommodate more than lifestyle. Cultural and temporal changes regarding our knowledge of gender also alter our view of who should be known and who would identify as such. It would be easier to list those not encompassed rather than vice versa, but it would be a very long list."[562]

Consequently, the early sections of Publication 7 (Sections A, B and C) were entirely taken up with outlining and critiquing subject-matter introductions, terminology and perceptions. Throughout the process of constructing these sections, the building blocks of my own knowledge of the subject-matter were being cemented. None of the terms explained in Publication 7 has evolved to assume a different meaning, and so the first three sections in the publication remain viable. However, there is little evidence to suggest that the term "transsexed", identified in Publication 7, as a potentially useful term for the transsexuality lexicon, has been assumed in common usage to date. [563]

Medical Progress was the first substantive area addressed in '*Gender Identity and Scottish Law'* (Section D) because, before the Twentieth Century medical community endorsed transsexuality as a viable condition,[564] the transsexual was socially invisible. Further, when legally acknowledged at all, she was perceived in the criminal law as a deviant and in the civil law as a contemptible riddle. [565] It was observed that, only when medicine recognised a need for "research, compassionate treatment and rectification… the law followed suit".[566] The enduring influence of medical opinion upon judicial rationale (from true sex "pastiche" to the contemporary possibilities generated by "brain structure"[567]) was believed to be of import and so was examined in some depth.

Distinctions between adopting a legal approach to transsexuality governed by a medical sex determination exercise or, alternatively, an approach based on the more "nebulous"

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[562] M McMullan and S Whittle, *Transvestism, Transsexualism and the Law: A Handbook* (Manchester, 1994) 16.
[563] Publication 7 at p 165 – 166. The lack of popularity of the term "transsexed" might be because it has been increasingly linked to the concept of intersex, rather than transsexuality/transgender: see, e.g., "Genderqueer": http://genderqueer.tumblr.com/post/1066509897/on-suffixes-and-considering-the-term-transsexed.
[564] Initially, transsexuality was believed to be a "disorder of the mind" (i.e. a mental illness to be rectified through mental health treatment alone), see Publication 7, p 167.
[565] Publication 7, pp 163; 167.
[566] Publication 7, p 166.
[567] Publication 7, pp 167 – 173; See also Section 'F' at pp184 – 186.

concept of each individual's personal gender identity (i.e. an inner sense of being male or female) were drawn.[568]

In Section 'E' of Publication 7, certain social developments, in particular the "growing awareness of gender", were critically evaluated. It might be argued, of course, that it is impossible to unravel in many scenarios the extent to which the law facilitates cultural change or, alternatively, cultural change facilitates legal reform. However, the judiciary worldwide seemed to recognise that the recent emergence of the transsexual into the public forum (and the resultant problem of whether or not to accommodate a newly acquired sexual/gender status) was a matter deserving of consideration:

> "Social developments are scarcely capable of proof but judges must be sensitive to these developments and must reflect them in their opinions… if the law is to meet the needs of society."[569]

My research indicated that the growing legal trend that legal decision-making reference the language and rationale of gender, rather than medicine, could be perceived (at least in part) as a product of an increasingly permissive, pragmatic and humane contemporary Western society. In that sense, it seemed that social factors had begun to contribute to a movement away from medical determinations [570] about sex and gender in case law.

In Section 'F' of '*Gender Identity and Scottish Law'* the terms of the (then) recently in force Gender Recognition Act 2004. The 2004 Act made it possible for transsexuals to be recognised in an "acquired" (i.e. desired) status in law, and the legilsation sets down a statutory process through which the acquisition of a transsexual's new status can be regulated. Possible lacuna in the 2004 Act (e.g. individuals excluded from the provisions of the Act) and anomalies (e.g. sexual offences involving transsexuals with artificially constructed genitalia) were critically examined.[571] Finally, in Section 'G', the possibility of an alternative means by which transsexuals might be afforded a new legal status in their desired gender was mooted.

Throughout Sections 'D' to 'G' of the publication, existing difficulties and issues likely to generate uncertainty in terms of the legal response to transsexuality were also

[568] Publication 7 pp 171 -176.
[569] Publication 7, p 173, quoting from *Bellinger v Bellinger* 2002 Fam 150, at para 157 per Thorpe LJ.
[570] *Corbett v Corbett* (otherwise Ashley) (No.1) [1971] P. 83 (PDAD). See discussions of the "*Corbett* pastiche" at p 167 onwards of Publication 7.
[571] Publication 7, p 178 – 184.

identified and conclusions reached as to a predicted legal approach. This can be seen, for example, in respect of the uncertain position of the young transsexual, in which it was concluded that Scottish case law to date:

> "… suggests that Scottish courts are more likely to see it as patently illogical that young people should be granted a general power to decide on medical treatment only to have this power removed when uncomfortable situations arise."[572]

In terms of overall research approach, it is difficult to see that '*Gender Identity and Scottish Law'* could have drawn on any other fields or broad areas of knowledge in an attempt to answer the research questions posed. Had I made an attempt to do that, it is likely that Publication 7 would either have (a) been unable to retain Scots law as its primary focus because a more strongly comparative publication would have evolved, or (b) required consideration of wider LGBT issues, such homosexuality or, alternatively, various forms of intersex/hermaphroditism. The outcome of a legal research approach embracing (a) above would have removed the publication from the remit of the *Edinburgh Law Review*, which has as its primary focus Scots law. The outcome of a legal research approach involving research of wider LGBT or intersex issues at (b) above would, almost certainly, have resulted in a number of publications, some of which would have addressed areas already written on in depth by other commentators.[573]

The imposition (early on in the research journey) of a, fairly rigid, publication structure was certainly of assistance to me in wielding a great volume of diverse research material spanning a variety of disciplines, and in retaining research focus. It was hoped that adopting this approach towards the burgeoning legal structure governing recognition and regulation of transsexuality would form an original contribution of both academic merit and practical use. The publication was certainly topical, and some of the anomalies observed and commented upon were later addressed by legal policy bodies in Scotland.[574]

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[572] Publication 7, p 178.

[573] See K McK Norrie publications on gay rights, *supra*; the condition of intersex is considered as complex: see A Fausto-Sterling, (1993), 'The five sexes: why male and female are not enough', *The Sciences,* March/April 1993, available at *www.nyas.org/publications/sciences/pdf/ts_03_93.pdf*.

[574] See, e.g., Publication 7, pp 182 – 184, in which the problematic and unclear question of "what constitute genitalia in law" is addressed in respect of gender specific offences, such as rape. This problem was later addressed by the Scottish Law Commission: see section 5(iii) below.

3.5. Reflections on Publication 7 Research Outcomes:

In this section, key research outcomes of *'Gender Identity and Scottish Law'* are outlined, contextualised and critically reflected upon with reference to ongoing developments and contributions concerning the Scottish legal response to transsexuality:

(i) The influence of Medical Progress on the Law

In the concluding remarks in Section D of Publication 7 it was observed that, while mainstream medicine had reached the stage of recognising a formal medical diagnosis of "gender dysphoria", ongoing medical research continued to generate diversity of opinion about the nature of the condition and the appropriate means of treatment.[575] However, it was considered that contemporary courts were less likely to be drawn into medical controversy concerning the classification and categorisation of transsexuality in what continued to be an evolving field of medicine. This was undoubtedly because:

> "… medical sex-determination has [demonstrably] generated outcomes for transsexuals which are 'profoundly unsatisfactory' in law." [576]

Little has changed since 2007 in respect of ongoing medical debate, although it seems that early research (between 1994 and 2006) concerning brain structure variations found in transsexuals has gathered momentum and attracted increasing support within (and beyond) the medical community.[577]

However, it is interesting to observe that, despite the currently favoured and rather nebulous terminology of "gender" dominating contemporary discourse, any diagnosis of "gender dysphoria" still requires to be made by doctors. And, such a diagnosis is made

[575] Publication 7, pp 171 – 173.
[576] This observation was made at p 173 in Publication 7, and is supported by reference to case law (including, in particular, the infamous and long-reigning *Corbett* judgment in which the court referenced a series of tests, including chromosomal and gonadotrophic testing, that could be used to determine "true sex" in questionable cases. The notion of someone's psychological sex, or gender identity, was not a significant factor in this process).
[577] See page 2 of the *Transsexuality Timeline* in the Appendix to this thesis. Newly surfacing medical research explored while researching for Publication 7 in 2006 concerning "brain structure" or verifiable biological matter as being either *a,* or *the,* component factor in establishing gender identity has continued to expand and develop. Expansions in knowledge have, it seems, become increasingly publicised from the early 2000s to date: see, e.g., J.N. *et al*, (1995), 'A sex difference in the human brain and its relation to transsexuality', Nature, 378, 68-70; Y Stafford and M Webb, (2004), 'Imaging the Transgendered Brain', chapter in *Mindhacks,* O'Reilly Media; 'Transsexual gene link identified', BBC News online (referencing the work of Professor Vincent Harley *et al* at Prince Henry's Institute of Medical Research in Australia), 26 October 2008; J Hamzelou, (2011), 'Transsexual differences caught on brain scan', New Scientist (online), 26 January 2011.

with reference to clinically recognised factors.[578] Further, the 2004 Act does not define what constitutes "gender dysphoria": it only provides that gender dysphoria is "the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism".[579] Thus, the medical community retains a sizable degree of control over how society, and subsequently, lawyers and courts, perceive "gender" within the context of cases concerning transsexuals.

On reflection, more might have been in Publication 7 of this rather interesting paradox. Certainly, an observation was made in the publication that the medical community retains the discretion (and power) to define what factors comprise gender dysphoria and, consequently, to define what a "transsexual" is.[580] Perhaps, though, the significance of that observation was not stressed strongly enough, nor was it developed or critically examined in any depth.

Further reflections, or predictions, might now be made. For example, the terminology used in contemporary statute (in particular, the 2004 Act) concerning transsexuals is grounded upon the language of "gender". This means that either a specialist medical doctor or a registered psychologist "practising in the field of gender dysphoria"[581] must produce evidence of the condition in the form of a report. Thereafter, on the basis of this evidence, a Gender Recognition Panel may issue a "Gender Recognition Certificate" allowing the individual concerned to be afforded a formal status in law (and in society) that is based on their "acquired gender".[582] In section 9(1) of the 2004 Act a rather blunt attempt is made broadly to equate gender with sex:

> "Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

[578] The terms of the 2004 Act require that a "report" must be provided to the Gender Recognition Panel containing "details of the diagnosis of the applicant's gender dysphoria" (s 3(2)).
[579] 2004 Act, s 25 ("Interpretation").
[580] This is observed at p 180 of Publication 7.
[581] 2004 Act, s 3(2). N.B. s 3(2)(b) was amended by Sch 5 of the Health Care and Associated Professions (Miscellaneous Amendments and Practitioner (Psychologists) Order 2009/1182, simply providing a change of terminology in the field from "chartered" to "registered" psychologist. A "registered psychologist" means, in terms of s 25 of Order 2009/1182, "a person registered in the part of the register maintained under the Health Professions Order 2001 which relates to practitioner psychologists".
[582] 2004 Act, ss 1 – 5A.

However, the growing trend in medical research [583] towards identification and classification of "brain sex"[584] appears now to be linking the medical understanding and diagnosis of transsexuality to biology and genetics rather than gender identity. According to research published in 2011, it is becoming more widely believed that something as simple as a brain scan[585] might be able to detect and diagnose transsexuality. This may mean that physical tests become the dominant means of clinical diagnosis, in preference to exploring gender dysphoria, an area of medicine/psychology that, arguably, is difficult to penetrate even for those working in the field.[586] Might, in time, defining and diagnosing transsexuality with reference to "gender" itself become redundant?

(ii) The effect of Social Developments on the Law

It was observed in Publication 7 that there appeared to be two evident dimensions to an individual's gender. The first of these, which might be termed 'gender identity', was recognised by Handler J A D in the New Jersey case of *MT v JT* when he said a person's sex, or sexuality "embraces an individual's gender" which in turn includes "self image, the deep psychological or emotional sense of sexual identity or character".[587] A second dimension to gender is the perception of self by others. The growing awareness, and perceived significance, of gender could thus be viewed as more of a social than a medical development.

Of course, transsexuals represent a small percentage of the public: while "estimates vary… it is thought one man in every 12,000 feels he is a woman. The proportion of

[583] See observations, *supra*, with particular reference to recent publications listed: e.g., 'Transsexual gene link identified', BBC News online (referencing V Harley *et al* at Prince Henry's Institute of Medical Research in Australia), 26 October 2008; J Hamzelou, (2011), 'Transsexual differences caught on brain scan', New Scientist (online), 26 January 2011.
[584] As opposed to the early "true sex" medical approach endorsed by the court in the infamous *Corbett* judgment, see Publication 7 at p 165 – 196.
[585] See note 577 above.
[586] For example, some authorities classify gender dysphoria as a "mental illness" while others do not, instead terming it a "condition" (the NHS, for example) for which "medical treatment is appropriate in some cases." See, e.g., NHS Patient Support pamphlet: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_097168.pdf. The current criterion, as stated in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM, 4th text revision, 2012 ICD-9-CM Diagnosis Code 302.85) published by the American Psychiatric Association are: (i) Long-standing and strong identification with another gender; (ii) Long-standing disquiet about the sex assigned or a sense of incongruity in the gender-assigned role of that sex; (iii) The diagnosis is *not* made if the individual also has physical intersex characteristics; (iv) Significant clinical discomfort or impairment at work, social situations, or other important life areas. It is worth noting that these criterion are not universally accepted, e.g., the *International Classification of Diseases* (ICD-10: version 2010: http://apps.who.int/classifications/icd10/browse/2010/en) lists only three diagnostic criterion.
[587] Case reported at 355 A 2d 204 (1976), quote at 209.

women who feel they are men is smaller."[588] Records available from the last few years in Scotland, however, now evidence a slow, but steady, growth in the numbers of transsexuals seeking formal recognition of their status in law since 2005.[589]

Insofar as Social developments are concerned, a key outcome of Publication 7 was that modern society had increasingly accepted the importance of respecting the transsexual's sense of personal identity.[590] Certainly, in the years immediately preceding the decisions in *Bellinger* and *Goodwin*[591] and the subsequent Gender Recognition Act 2004, courts worldwide had begun more frequently to base their decisions upon endorsing the "individual's quest for inner peace and personal happiness".[592] The rationale behind this accords with the self-determination (and Human Rights) movement and was encapsulated in Publication 7 by reference to the following judicial observation:

> "Transsexuals exist in our society. Many will not undergo surgery. Even fewer will ever want to marry. Allowing those few who qualify to marry will not impact greatly on society, but will provide relief and recognition for the few individuals affected."[593]

There remains, in contemporary law and society, a humane logic to this (very candid) approach. In practice it means that, notwithstanding the complex issues concerning evolving medical classification discussed at section 5.(iii) above, a legal remedy

[588] The Department for Constitutional Affairs, *Government Policy concerning Transsexual People* (available at *www.dca.gov.uk/constitution/transsex/policy.htm)*.
[589] The Registrar Gender for Scotland maintains a Gender Recognition Register in which the birth of all individuals who legally change gender/sex by means of the issue of a Gender Recognition Certificate granted in terms of the 2004 Act is recorded. The Registrar General must ensure that a traceable connection is maintained between "birth sex" and "acquired status". There were no comparative statistics available in Scotland at the time of writing Publication 7. However, in 2010, there were 18 entries in the Gender Recognition Register; in 2011, there were 24 entries in the Gender Recognition Register: http://www.scotland.gov.uk/Topics/People/Equalitys/DataGrid/Transgender.
[590] Publication 7, at heading "(3) Gender Identity… not Genitals" at p 175.
[591] *Goodwin v UK*((2002) 35 EHRR 18) and the House of Lords decision in *Bellinger v Bellinger* ([2003] UKHL 21, [2003] 2 AC 467) were the catalysts for the Gender Recognition Act 2004. In *Goodwin,* the ECHR found that the UK had breached the human rights of the transsexual concerned in failing to recognise her formally in her "acquired status" and in *Bellinger* the House of Lords granted a declarator of incompatibility in terms of s 4 of the Human Rights Act 1998, since there was no provision made in domestic law (namely in the Matrimonial Causes Act 1973 s 11(c)) for recognition.
[592] *MT v JT* 355 A 2d 204 (1976) at 204, 211 per Handler J A D. This was even noted in earlier case law: see, e.g., the observations of Judge Martens in respect of the "ever-growing awareness of the essential importance of everyone's identity" in *Cossey v UK* (1991) 13 EHRR 622 at 660 (despite the fact that this was a case in which the transsexual concerned failed, at the ECHR, in her quest for recognition of her acquired status via the issue of a fresh birth certificate reflecting her acquired status). See also, e.g., the general approach adopted by Ellis J in *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.
[593] *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 630, per Ellis J.

proffered could (in theory at least) be entirely "independent of, often controversial, medical sex-determination."[594]

The broad trend of what might be termed 'cultural compassion' identified in Publication 7 has continued, and developed, with general regard for the acquired status of transsexuals growing in law since 2007.[595] Transsexuals are becoming increasingly visible in public life and their existence, and the significance of their recent legal recognition,[596] is now evident in policy-making considerations. In particular, recognition by the state has led to further discussion about rights by the executive.

On 8th of December, 2011, the UK Government launched the "first ever transgender action plan to advance gender equality".[597] The plan has been praised by transsexuality action groups and high profile transsexuals.[598] Amongst its objectives, the plan commits the Government to reform Health services to ensure greater consistency in commissioning gender identity services, and to increase from 15 to 30 years the tariff in respect of any murders "motivated by hostility towards a transgender person".[599] Also, having identified areas in which public attitudes concerning transsexuals must improve,[600] the Scottish Government intends to follow the lead of the UK Government. To that end, the Scottish Government has said that it is currently "considering future

[594] See, e.g., J C Puffer, (1996), 'Gender verification: a concept whose time has come and passed?' 30 *British Journal of Sports Medicine* 278.

[595] In culture, various prominent issues have arisen concerning, e.g., athletes (CNN Special: 'Transsexual Athletes treated unfairly', 20 Oct 2010; 'Transgendered Athlete vies for spot on Olympic Team', Yahoo Shine, 21 Jun 2012) and teenagers ('I was born this way: Teenage Transsexual reveals how Lady Gaga inspired him to have full sex change', Daily Mail, 31 Jan 2012; 'BBC 3: Transsexual Teen – Beauty Queen', aired 28 Nov, 2012; 'Transsexual, 16, forces school to let him sit exam dressed as a girl: Head threatened with Equality Act', Daily Mail, 22 July 2012), also reported in the Telegraph from a more conservative perspective, but referencing to term "gender": 'School forced to allow transgender pupil (16) to sit exam in a skirt', Telegraph, 23 July 2012. For the most part, the media has been kind in its representation of transsexuals. For a legal example, in applying the terms of the 2004 Act, courts exercise particular care in granting anonymity orders, breach of which may attract criminal sanctions (see e.g,, recent Court of Appeal judgment: *R (on the application of C) v Berkshire West Primary Care Trust* [2011] EWCA Civ 247).

[596] The *Transsexuality Timeline*, in the Appendix to this thesis, provides an overview of relevant developments. See, e.g., article by Juliet Jack in the New Statesman, 'The turning of the Tide: the media's monstering of transgendered people is finally being challenged', 13 Feb 2012, available at: http://www.newstatesman.com/blogs/the-staggers/2012/02/transgender-media-transsexual.

[597] Plan and publicity statement available at: http://homeoffice.gov.uk/media-centre/news/transgender-action-plan.

[598] See, e.g., statement of the Gender Identity Research and Education Society (GIRES): "We applaud the Government's transgender equality action plan…" and the comments of Press for Change, who participated in the policy-making steps and advised the Government on the plan: http://www.pfc.org.uk/transactionplan.html.

[599] Strategy statement overarching the plan, available at: http://homeoffice.gov.uk/media-centre/news/transgender-action-plan.

[600] The results of the 2010 Scottish Social Attitudes Survey were concerning from an equality perspective: almost half (49%) of those polled said that they would be unhappy with a family member forming a relationship with someone who had had a sex change operation, and almost a third (31%) said that they believed someone who had had a sex change operation would be an unsuitable primary school teacher: information available on Scottish Government website Equality pages (accessed Dec, 2012).

work in the area", in particular in respect of aggravated crimes committed against transsexuals.[601] Accordingly, formal legal recognition of the transsexual in the status of his or her newly acquired gender is generating the growth (and creation) of other, more specific, rights pertaining to personal safety and wider "equality" rights.[602]

It was also predicted in Publication 7 that, once the transsexual's basic human right to be recognised in an acquired gender had been acknowledged, other issues concerning diagnosis, treatment and self-determination were likely to become prominent.[603] In *Goodwin v UK*,[604] a post-operative male-to-female transsexual was successful in her claim that the UK had breached Articles 8 and 12 of the European Convention on Human Rights in failing, for both legal and practical purposes, to recognise her acquired gender. It was observed in Publication 7 that the decision in *Goodwin* was an indication of two likely future legal developments in Scotland and elsewhere. It is worth revisiting these predictions from the perspective of contemporary law.

The first, and most obvious, legal development was formal recognition through statute: *Goodwin* was a catalyst for the Gender Recognition Act 2004 (the ongoing operation of the 2004 Act is discussed under heading 5. (iii) below). Secondly, the *Goodwin* decision created the potential for litigation in the UK, and elsewhere concerning: (a) the self-determination of young transsexuals, and (b) disputes over funding (in particular state funding) for "sex change"[605] surgery.

[601] The Scottish Government is currently developing for release data concerning criminal proceedings (information available on Scottish Government website Equality pages (accessed Dec, 2012) in which, during 2010-11, "3 persons were convicted in Scottish courts of a charge with an associated transgender aggravation".
[602] Section 7 of the Equality Act 2010 specifically provides that "gender reassignment" is a "protected characteristic" in terms of the Act's provisions directed towards "prohibit[ing] victimisation in certain circumstances;… eliminate[ing] discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions;… increase[ing] equality of opportunity…": taken from the preamble to the 2010 Act.
[603] Publication 7, pp 175 – 178.
[604] *Ibid,* citation: (2002) 35 EHRR 18.
[605] "Gender reassignment surgery" is often colloquially referred to as a "sex change" operation. It consists of a series of operations by which the male or female genitalia are removed and opposing genitalia are artificially constructed: The Looking Glass Society, *Transsexualism: A Medical Overview,* 3rd edn (1998) ch 10. It is believed that the first recorded attempt at a modern sex change operation took place in the 1930s, in Berlin, on a patient called Lili Elbe. One of the first publically announced "sex change" operations announced took place in November 1952, and was performed by a Danish doctor, Christian Hamburger, who had begun working in the field by experimenting with gender therapy through testing hormones on animals. The patient concerned is recorded as having written to her parents after the operation in the following terms: '"Nature made a mistake which I have had corrected, and now I am your daughter", Christine Jorgensen: 60 years of sex change ops', Hadjimatheou, BBC World Service, 30 Nov 2012.

(a) Young Transsexuals: the Schoolboy in a Dress? [606]

Publication 7 made reference to the, then very recent, landmark Australian case, *Re Alex*,[607] in which a 13 year old female-to-male transsexual had sought authorisation, which was eventually granted, to begin hormonal treatment in preparation for eventual gender reassignment surgery. The judgment raised interesting questions, including: would *Re Alex* be followed in Scotland or elsewhere? Is gender reassignment such a momentous decision that even a legally competent child may never consent? And, should the principles of consent be applied differently to reversible (e.g. hormone) and irreversible (e.g. certain surgery) gender reassignment treatments?

There is, as yet, no definitive, or wholly consistent, answer to the questions raised by *Re Alex* but there have been several cases since 2007 either reported at law [608] or in the worldwide media.[609] It is worth observing that two issues seem now to be surfacing in cases involving gender dysphoric children and young people. First, the desire to suppress puberty means that proceedings are likely to be raised by or on behalf of children around 12 years old and younger.[610] In cases involving particularly young children judicial discomfort is palpable.[611] Secondly, questions about parent/carer conduct and child protection issues are likely to be raised in such cases.[612]

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[606] See note 595 below and 613 above.

[607] *Re Alex* [2004] *Family Court of Australia* 297 (2004) 180 *Federal Law Reports* 89, judgment available at: http://www.austlii.edu.au/au/cases/cth/family_ct/2004/297.html.

[608] It is interesting to note that almost all of the cases reported concerning children since the decision of *Re Alex* have been decided in Australia by the Family court: *Re Brodie* (Special Medical Procedure) [2008] FamCA 334 (15 May 2008, 12 year old male-to-female transsexual – hormonal treatment to suppress puberty authorised); *Re: Jamie* (Special medical procedure) [2011] FamCA 248 (6 April 2011, 10 years, 10 months old male-to-female transsexual – child too young to make significant decisions about puberty and beyond).

[609] See note 613 above for coverage by worldwide media of issues concerning transsexuality and the young. In apparent contrast to *Re Alex*, a German court ruled, in early 2012, that an 11 year old male-to-female transsexual (also referred to as "Alex") could be institutionalised. The child concerned had apparently changed her own name to that of a girl before entering primary school: http://www.thelocal.de/society/20120210-40647.html#.UMJ7zI7w6SI.

[610] In *Re Brodie, supra,* the child was 12 years old; in *Re Jamie, supra,* the child was between 10 and 11 years old. These cases are discussed in more depth in Chapter 4.

[611] Honourable Justice Dessau, at para 124 in his judgment in *Re Jamie* that "… there is the unusual circumstance of a very young child, at 10, the youngest to be treated by the experts in this case. That means that decisions as to phase two of the treatment plan would not come into play for another five or six years, obviously a long way off and an extremely large proportion of this child's life. I cannot overlook that…"

[612] *Ibid*, re the German "Alex" case cited, a formal case report has not been found. Although some groups within the transsexual community worldwide have taken up the child's case, serious allegations have been made about parental conduct and inducements, and the issue may in fact be a more complex one of child protection: 'Transsexual Child could be sent to Mental Ward', The Local (Germany Edition), 12 Feb 2012, article available at: http://www.thelocal.de/society/20120210-40647.html#.UMJ7zI7w6SI and further commentary of the case available online. See, e.g., 'Transgender girl faces being institutionalised by father who rejects her gender expression', 31 Jan 2012: http://www.huffingtonpost.com/2012/01/31/transgender-german-girl-f_n_1245407.html.

Issues concerning self-determination and transsexual young people will be explored in more depth in the consideration of Publication 8 (in Chapter 4 below). However, media coverage of young transsexuals has significantly increased in the course of the last five or so years.[613] Greater awareness also exists about the nature of the condition within the contemporary paediatric and educational community.[614] Some debate surrounding how best to address transsexuality surfacing throughout childhood or teenage years exists.[615]

Regardless of whether it may be thought to be a socially uncomfortable area, transsexuality has, it seems, become a Children's Rights issue.[616] Accordingly, I still believe that we can continue to expect to see increasing (and increasingly high profile) case law worldwide concerning the rights of transsexual children and young people.

(b) Funding Disputes: Who Pays for the "Sex Change"?

Litigation over funding for gender reassignment surgery has not been as prevalent as I had anticipated when writing up Publication 7[617] Seven significant cases have been reported since 2006 in which UK courts (and in one instance,[618] the ECHR) have had as their focus aspects of the transsexual's rights, status and capacity.[619] Of these judgments, two concerned male-to-female transsexuals convicted of offences and who sought to challenge their secure detentions in male-only facilities.[620] Four cases related to National

[613] See, e.g., 'How to deal with a transsexual daughter (by a mother who knows)', The Independent, 19 Nov 2012;'I was born this way: Teenage Transsexual reveals how Lady Gaga inspired him to have full sex change', Daily Mail, 31 Jan 2012; 'BBC 3: Transsexual Teen – Beauty Queen', aired 28 Nov, 2012; 'School forced to allow transgender pupil (16) to sit exam in a skirt', Telegraph, 23 July 2012: 'Diary of a Teen Transsexual', Channel 4: http://www.channel4.com/programmes/ria-diary-of-a-teen-transsexual.

[614] See, e.g., Houk CO and Lee PA, (2006), 'The Diagnosis and Care of Transsexual Children and Adolescents: a Pediatric Endocrinologists' Perspective', J Pediatr Endocrinol Metab, 19(2), 103; Brill SA and Pepper S, (2008), 'The Transgender Child: A Handbook for Families and Professionals', Cleis Press; Pleak RR, (2011), 'Gender Variant Children and Transgender Adolescents: An Issue of Child and Adolescent Psychiatric Clinics of North America', Elsevier; Drescher J and Byne W, (2012), *Treating Transgender Children and Adolescents*, Routledge.

[615] See, e.g., 'Children born transsexual have the right to delay puberty', M Fox, 31 Aug 2011: http://ts-si.org/.

[616] See, e.g., NBC News short, dated 9 July 2012, about transgendered childhood in America (involving a child born male who adopted a female persona from the age of 6): http://insidedateline.nbcnews.com/_news/2012/07/08/12625007-transgender-children-in-america-encounter-new-crossroads-with-medicine?lite; For a discussion as to the Children's Rights aspects of transgendered childhood and youth, see Chapter 4 below, in which Publication 8. and the recent judgments in *Re Brodie* and *Re Jamie* considered further.

[617] Publication 7, at pp 176 – 177.

[618] *Grant v United Kingdom* (32570/03) (2007) 44 E.H.R.R. 1.

[619] Some of these reported judgments are listed at note 592 below.

[620] *R (on the application of DB) v Secretary of State for the Home Department* [2006] EWHC 659 (Admin): detention in an all male high security psychiatric hospital (no breach of Articles 3 or 8 found); *R (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220 (Admin): held that the detention of a male-to-female transsexual holding a Gender Recognition Certificate in a "male prison estate" was a violation of Article 8.

Insurance and Pension rights claimed by male-to-female transsexuals in respect of determining the appropriate "pensionable age".[621]

Insofar as funding of surgery is concerned, while the media has been wildly speculative about costs, [622] the costs recently specified by specialist clinics and the NHS are considerably more modest.[623] Since 1999,[624] the general approach in the UK has been that any blanket policy adopted by an NHS health care provider to refuse to fund gender reassignment treatment will be deemed unlawful.[625] However, Health authorities still retain discretion to prioritise treatments for viable medical reasons (e.g. evidence of clinical effectiveness[626]).

In practice, Health authorities are permitted to exercise considerable discretion in public expenditure: respecting individual human rights is, of course, an important factor in the decision-making exercise. It is not, however, the only factor to be considered. Particularly in our current economic climate, requests for any kind of treatments that are more aesthetic than corrective are likely to be refused on the NHS.[627] Insofar as transsexuals are concerned, there has only been one significant decision in the UK since

[621] *Richards v Secretary of State for Work and Pensions* [2006] 2 CMLR 49; G*rant v United Kingdom* (32570/03) (2007) 44 E.H.R.R. 1; *Timbrell v Secretary of State for Work and Pensions* [2010] EWCA Civ 701; *M v Revenue and Customs Commissioners* [2010] UKFTT 356 (TC). The overall picture from these judgments is generally favourable to the transxual: where a Gender Recognition Certificate (or an interim certificate) had been issued, this is the date from which the newly acquired status must be implemented by national law (in terms of Directive 79/7; Pensions Act 1995, Sch 4) and in cases where an individual lived in his or her acquired status prior to the coming into force of the Gender Recognition Act 2004, the date of surgery can be the relevant date from which the acquired gender-specific pension entitlements etc accrue.

[622] See, e.g., Telegraph, 'Number of NHS sex change operations triples', 21 Apr 2012: http://www.telegraph.co.uk/health/healthnews/7613567/Number-of-NHS-sex-change-operations-triples.html. According to the Daily Mail, 'Sex change ops on the NHS have trebled… since the procedure became a 'right', "…costing the taxpayer up to £10 million", 28 Jun 2009, although it is hard to see how these figures have been arrived at: http://www.dailymail.co.uk/health/article-1196024/Sex-change-ops-NHS-trebled--procedure-right.html.

[623] The surgery is estimated to cost between around £8,000 - £12,000 on the NHS: see, e.g., 'The Cost of Gender Reassignment', NHS Northwest publication: http://help.northwest.nhs.uk/storage/library/gid-paper-final.pdf. Costs are understood to be higher when the surgery is privately performed: http://www.transhealth.co.uk/; http://www.wlmht.nhs.uk/gi/gender-identity-clinic/frequently-asked-questions/.

[624] Following upon the English ruling in *R v North West Lancashire HA Ex parte A, D and G*, [1999] 1WLR 977 that an indiscriminate approach adopted by any Health authority that it will not fund gender reassignment treatment is unlawful.

[625] *North West Lancashire HA Ex parte A, D and G*, *supra.* The same indiscriminate approach will be unlawful in respect other surgeries that might be the subject of debate, such as bariatric surgery for the morbidly obese: *R (on the application of Condliff) v North Staffordshire Primary Care Trust* [2011] EWHC 872 (Admin).

[626] This was the rationale given for failing to fund gender reassignment surgery by *Berkshire West Primary Care Trust* decision in the 2011 AC case ([2011] EWCA Civ 247).

[627] Some Health authorities offer guidance as to which treatments that will not be funded by the public purse in their area. See, e.g., NHS Sheffield 'Treatments not routinely available from your Local NHS – Individual Funding Requests': http://www.sheffield.nhs.uk/services/ifr.php.

2006: the case of *R (on the application of AC) v Berkshire West Primary Care Trust*.[628] The litigation arose because Berkshire West Primary Care Trust had adopted the policy that gender reassignment surgery was a "low priority treatment". The Trust had also decided that:

> "Cosmetic surgery and other non-core procedures such as breast surgery, larynx reshaping, rhinoplasty, hair removal, jaw reduction and waist liposuction should not be considered as a core part of [Gender Recognition Surgery]."[629]

The Claimant ('AC') was a male-to-female transsexual who wanted breast augmentation surgery. The Trust had already funded hormone therapy to develop AC's breast tissue but, in accordance with its policy, it refused to fund breast augmentation surgery. AC challenged the Trust's policy: she argued that the policy was discriminatory. She was unsuccessful at first instance. Further, in dismissing AC's appeal, the Court of Appeal found that:

> "Discrimination was a problematic word because all choice involved discrimination… The material legal criteria were that gender and clinical needs were both relevant characteristics… the ethical and clinical judgment of the trust… did not transgress the law."[630]

Of course, not all people, or professionals, agree on what treatments are essential and what treatments might, instead, be optional (or more aesthetic) in nature. In *AC v Berkshire West Primary Care Trust,* there were medical professionals who supported the Claimant's position and, conversely, medical professionals who supported the Trust. Since the Court of Appeal's ruling in the case last year, there exists potential for more subtle disputes concerning, not merely gender reassignment surgery, but a diverse, growing[631] (and often costly) range of possible treatments for transsexuals.

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[628] [2011] EWCA Civ 247, Court of Appeal judgment (reported at first instance at [2010] EWHC 1162 (Admin)).
[629] Transcript of judgment at first instance, p 4, reported at [2010] EWHC 1162 (Admin).
[630] Court of Appeal, official transcript, at para 52, per Lord Justice Hooper.
[631] See, e.g., the recent "Primary Care Protocol for Transgender Patient Care", developed by the 'Centre of Excellence for Transgender Health' at the University of California and published online in April 2011 (available at: http://www.transhealth.ucsf.edu/trans?page=protocol-00-00) which outlines treatment, support and advice for transsexuals in respect of matters as diverse as physical appearance, musculoskeletal health, fertility treatments, further surgery, gender-specific therapy and sex segregation etc.

(iii) The Impact of the Gender Recognition Act 2004: Subsequent Law

The dearth of case law around the time of Publication 7 meant that any exploration of the legal issues facing the Scottish legal system was, inevitably, "an international and comparative exercise". However, the principal focus of the publication was the Scottish, and wider UK, legal response to transsexuality, culminating in a critique of our current legal recognition of the transsexual and regulation of her status: the Gender Recognition Act 2004 ('the 2004 Act'). Relevant cases decided since the date of the 2004 Act have briefly been canvassed at section 5(ii) above. [632] The focus of the present section is upon the 2004 Act itself and subsequent policy, statute, debate and general progression.

In January 2007, when the final revisions were made to Publication 7, the key sections of the 2004 Act had been in force for only 21 months.[633] There were two reported judgments on the terms of the 2004 Act, both of which had been decided on fairly narrow factual issues.[634] Most of the case law considered in the publication pre-dated the 2004 Act, and so was concerned with recognition of the transsexual's status and capacity in law – a matter that was, ultimately, resolved by the 2004 Act itself. Certain observations were made about the terms of the 2004 Act. Anomalies, and potential lacunae, believed to be significant were also highlighted.[635]

The anomalies/lacunae considered in Publication 7 which will be revisited with reference to contemporary law relate to: (a) gender specific offences, (b) marriage and (c) individuals left without a remedy in terms of the 2004 Act (notably transsexual children and young people).

[632] The most prominent cases have been reported since the date of Publication 7 are: *J v C (Void Marriage: Status of Children)* [2006] EWCA Civ 551; *Grant v United Kingdom* (32570/03) (2007) 44 E.H.R.R. 1; *R (on the application of B) v Secretary of State for Justice* [2009] EWHC 2220 (Admin); *Timbrell v Secretary of State for Work and Pensions* [2010] EWCA Civ 701; *M v Revenue and Customs Commissioners* [2010] UKFTT 356 (TC); *R (on the application of C) v Berkshire West Primary Care Trust* [2011] EWCA Civ 247 (reported at first instance and on appeal).

[633] Key sections, for the purpose of my research, were (and are) ss 1 – 4, 9, 20: these sections came into force in April 2005.

[634] (i) *R (on the application of DB) v Secretary of State for the Home Department* [2006] EWHC 659 (Admin): about the detention of a former prisoner who was a male to female transsexual in an all male high security psychiatric hospital (Queen's Bench ruled that there was no breach of Articles 3 or 8); (ii) *Richards v Secretary of State for Work and Pensions* (C-423/04) [2006] All E.R. (EC) 895: about refusal to grant a pension to a male to female transsexual at the same age as a woman (ECHR ruled that this was discriminatory).

[635] Publication 7, pp 180 – 186.

(a) Gender Specific Offences:

In '*Gender Identity and Scottish Law'*, it was concluded that, in Scotland at least, the legal system faced a new assortment of dangerous legal perplexities in respect of gender specific offences.[636] In particular, the 2004 Act permits the granting of a Gender Recognition Certificate in cases where gender reassignment surgery has not taken place.[637] It was, and is, accordingly possible that a trans-woman (i.e. a male-to-female transsexual) in possession of a Gender Recognition Certificate may still have a penis.

In an attempt to permit the state to penetrate the possible layers of obscurity in respect of relevant criminal offences, section 20(1) of the 2004 Act provides:

> "Where (apart from this subsection) a relevant gender-specific offence could be committed or attempted only if the gender of a person to whom a full gender recognition certificate has been issued were not the acquired gender, the fact that the person's gender has become the acquired gender does not prevent the offence being committed or attempted."

This section ensures that liability will continue to exist in respect of "relevant gender-specific offences", regardless of whether the victim or perpetrator has been issued at any stage with a Gender Recognition Certificate. "Gender specific offences" are defined as offences involving sexual activity and which may be committed only by or upon a person of a particular gender. [638]

Rape, for example is a gender specific offence throughout the UK. At the time of writing Publication 7, rape in Scots law was an offence that could only be committed by a man upon a woman, and the act of rape required vaginal penetration.[639] The terms of section 20 of the 2004 Act meant that as long a person was, or ever had been, male in law, he or she could have been capable of committing the offence of rape upon any other person

[636] Publication 7, at p 184.
[637] The 2004 Act requires only, in terms of s 3 ("Evidence") that the applicant "has undergone or is undergoing treatment for the purpose of modifying sexual characteristics… if treatment for that purpose has been prescribed or planned".
[638] Section 20(2) of the Act provides that "An offence is a "relevant gender-specific offence" if (a) either or both of the conditions in subsection (3) are satisfied, and (b) the commission of the offence involves the accused engaging in sexual activity. Subsection (3) provides that "The conditions are (a) that the offence may be committed only by a person of a particular gender, and (b) that the offence may be committed only on, or in relation to, a person of a particular gender, and the references to a particular gender include a gender identified by reference to the gender of the other person involved."
[639] This was in marked contrast to the law in force in England at the time which defined "rape" as an offence that "can be committed by a man on either a man or a woman, and the act of rape consists of penile penetration of the mouth, anus or vagina" (Sexual Offences Act 2003 ss 1, 2).

who was, or had been at the time of the offence, female in law. In practice, the police (and our courts) could ignore the issuing of a Gender Recognition Certificate in such circumstances.

The 2004 Act was silent, as was the rest of Scots criminal law in 2006, on the question of whether the artificially-constructed created genitalia of a either a perpetrator or a victim would be found to constitute a "penis" or a "vagina" in law.[640] This was an unsatisfactory state of affairs.

The whole issue of what constituted "rape", and indeed "genitalia", in Scots law was shortly afterwards canvassed by the Scottish Law Commission in its report on *Rape and Other Sexual Offences.*[641] Subsequent legislation specifically included "surgically constructed"[642] genitalia within the statutory definition of penis and the vagina. Further, the definition of "rape" was amended in statute to include a male victim (and penetration of the anus or mouth [643]), and so, since 2009, the gender, or sex, of the victim has become a matter likely to attract considerably less debate.

It is interesting to note that these, significant, loopholes discussed in '*Gender Identity and Scottish Law'* have now been addressed in Scots Criminal statute.[644]

(b) Marriage:

One key research outcome of Publication 7 concerned the potential vulnerability of the "post-operative" transsexual spouse in terms of perceived sexual capacity. In the (in)famous *Corbett* judgment in 1971, Ormrod J had referred to the apparent inability of the transsexual Respondent to consummate marriage because of her artificially created genitalia. He commented that he did not believe:

[640] Had, for example, a criminal court required "ordinary and complete intercourse" (see Publication 7 at p 182) then in the case of a rape involving artificially-constructed genitalia, the implementation of section 20 was problematic. The 'Looking Glass Society' noted that the results of surgery could "vary from very poor (looking most unlike natural female genitals, and having little sensation) to excellent (indistinguishable from natural female genitals without internal examination, and having full sexual sensation)." *Transsexualism: A Medical Overview,*3rd edn, para 10.1.
[641] Report 209, published Dec 2007, including a draft bill.
[642] Sexual Offences (Scotland) Act 2009, s 1(4).
[643] Sexual Offences (Scotland) Act 2009, s 1(1). "Rape" has also been defined to include penetration of "the vagina, anus or mouth" in that section. Section 1 of the 2009 Act came into force on 14 July 2009.
[644] Statutory (and other significant) developments can be plotted on the *Transsexuality Timeline* in the thesis Appendix.

> "sexual intercourse, using a completely artificial [vaginal] cavity … [could possibly amount to] 'ordinary and complete intercourse"'.[645]

The 2004 Act did not specifically address the issue of surgically constructed genitalia in civil law. However, if previous case law was any indicator, the transsexual remained vulnerable to being held incapable in law of consummating his or her marriage.[646] It was, therefore, possible that a transsexual might be found by a Scottish court to be "incurably impotent", a finding upon which a court may determine that a marriage is void.

"Incurable impotency" was, in 2006 (and remains today, notwithstanding the recommendations of the Scottish Law Commission[647]), a ground on which a marriage is voidable. The opportunity was not taken at the time the Family Law (Scotland) bill was passing through the Scottish Parliament to abolish voidable marriages and so the status is left untouched by the provisions of the Family Law (Scotland) Act 2006.[648]

(c) Individuals without a remedy in the 2004 Act: the young

A suggestion was made in the closing pages of Publication 7 that transsexuals who were either unable or unwilling to follow the procedures found in the 2004 Act might seek recognition on different terms.[649] Insofar as originality is concerned, I am not aware of any proposal to this effect having been made before, or since, the publication of *'Gender Identity and Scots Law.'*[650] The proposal built upon a previous publication (Publication 8), which had as its sole focus the rights of transsexual children and young people. Contemporary legal issues concerning transsexuality and the young will be discussed in

[645] *Corbett v Corbett* [1971] P 83 at 85 per Ormrod J, at 107.
[646] Publication 7, at p 183 – 184. In Scots law marriage has always been regarded as a union between a man and a woman: see, e.g., Stair, *Inst* 1.4.1-1.4.6.
[647] Scottish Law Commission, Report on *Family Law* (Scot Law Com No 135, 1992) 75 at paras 8.21 – 8.30 and recommendations 49 and 50. Scottish courts have traditionally taken the view that complete penetration is required (*"vera copula perfecta"*) and partial penetration by the husband of the wife is not enough: *J v J* 1978 SLT 128. Interestingly, ability to consummate is not required of civil partners.
[648] An action for declaratory of nullity of marriage may be raised either in the Court of Session or the Sheriff Court: Sheriff Courts (Scotland) Act 1907, s 5(1), as amended by s 4 of the Family Law (Scotland) Act 2006.
[649] Publication 7, at p 180; 184 – 186. The proposals related to those who did not, for whatever reason, meet the statutory requirements found in ss 1 – 3 of the 2004 Act for the grant of a Gender Recognition Certificate. This might, e.g., include a person who has no medical evidence supporting his/her having lived for 2 years in his/her "acquired gender".
[650] This was, in fact, what the Scottish court did in the case of *Forbes-Sempill,* 29 Dec 1967, Court of Session Outer House, court process available National Archives of Scotland, CS258/1991/P892 (a case in which twelve medical experts gave evidence), but not in *X, Petitioner*,1957 SLT (Sh Ct) 61. The rationale was that Forbes-Sempill, who was clearly a transsexual, might have instead been a hermaphrodite. Although the case has rarely been written on from a legal perspective, it has been widely commented on socially: http://en.wikipedia.org/wiki/Sir_Ewan_Forbes,_11th_Baronet.

greater depth in Chapter 4, although the relevant observations made in Publication 7 will be summarised in brief in this section.

The 2004 Act, in particular, requires that any applicant seeking a Gender Recognition Certificate is "aged at least 18" and has "lived in the acquired gender for throughout the period of two years ending with the date on which the application is made".[651] This means that medically competent transsexual children and young adults under eighteen living in Britain would be unable to use the provisions of the 2004 Act and so face the prospect of beginning a new school, and later a university or career, in their birth sex rather than their "acquired gender". Difficulties arising from this anomaly might be circumvented by Scottish courts considering an alternative application to change legal status. An application might be made, if supported by contemporary medical evidence (e.g. a brain scan showing a transsexual brain, or a chromosome test[652]), in terms of the Births, Deaths and Marriages (Scotland) Act 1965 to rectify "birth sex" the applicant's birth certificate.[653]

No test cases have been reported in Scotland, or elsewhere in the UK, involving a transsexual seeking to alter, or correct, "birth sex" status since the publication of '*Gender Identity and Scottish Law'*. In other jurisdictions,[654] courts have in recent years allowed certain steps to be taken by children and young people to delay puberty so as to postpone taking certain decisions until they are older.

It remains uncertain, given that transsexual children and young people are absent from the provisions of the 2004 Act, what approach Scottish courts would adopt in a similar scenario.

[651] 2004 Act, ss 1, 2.
[652] There is a growing body research concerning this e.g., J.N. Zhou *et al*, (1995), 'A sex difference in the human brain and its relation to transsexuality', Nature, 378, 68-70; J Hamzelou, (2011), 'Transsexual differences caught on brain scan', New Scientist (online), 26 January 2011; Y Stafford and M Webb, (2004), 'Imaging the Transgendered Brain', chapter in *Mindhacks*, O'Reilly Media: 'Transsexual gene link identified', BBC News online (referencing the work of Professor Vincent Harley *et al* at Prince Henry's Institute of Medical Research in Australia), 26 October 2008.
[653] Publication 7, p 184 – 186. Section 42 of the Births, Deaths and Marriages (Scotland) Act 1965 provides that, where a correction is made, an entry will be made in the Register of Corrections Etc in terms of s 44. The Act provides that an appeal to the sheriff is final (s 42(5)) but the sheriff's decision would be open to judicial review. See also s 48 of the 1965 Act, concerning "Decrees of court altering status".
[654] See broader discussion about the rights of transsexual children and young people in Chapter 4 below.

(d) Sportspersons

Insofar as the ongoing application and impact of the Gender Recognition Act 2004 is concerned, one matter left untouched in Publication 7 was that of the transsexual sportsman or sportswoman. At the time of publication, section 19(1) of the 2004 Act made provisions for sporting activities as follows:

> "A body responsible for regulating the participation of persons as competitors in an event or events involving a gender-affected sport may, if subsection (2) is satisfied, prohibit or restrict the participation as competitors in the event or events of persons whose gender has become the acquired gender under this Act"

Section 19 was one of the more controversial sections of the Gender Recognition bill, and its inclusion in the 2004 Act, as passed, was the subject of academic discourse and social debate.[655] One commentator observed around the time the 2004 Act came into force that section 19:

> "… [left] the decisions to individual sporting bodies, but the right to require participants to disclose information relating to this Act does not exist; rather it appears that there can only be a voluntary disclosure by the athlete. If this is the case, then it is clearly an inadequate [statutory provision] which will do nothing to maintain a level playing field in sport."[656]

It is interesting to note that section 19 was repealed by the Equality Act 2010.[657] While the Equality Act 2010 included transsexuals generally within its terms,[658] "sport" is a field forming an express exception[659] to the protective provisions of the 2010 Act. This means that separate sporting competitions can continue to be organised for men and women "where physical strength, stamina or physique are major factors in determining

[655] See, e.g., P Charlish P, (2005), 'Gender Recognition Act 2004: transsexuals in sport – a level playing field', ISLR, 2 (May), 38-42; the terms of s 19 were heatedly debated during the passage of the Bill, see, e.g., M. Bowness, *The Sun,* December 18, 2003: 'A BIZARRE sex-change law could give Tim Henman his best chance of winning Wimbledon for Britain.' However, for a more grounded response to the Bill, see the comments of Lord Carlisle of Berriew, in *Hansard,* HL, col.1302 (December 18, 2003):"I read some grossly exaggerated publicity this week about supposed cheating by transsexuals, who apparently in droves were going to change their gender so that they could win Wimbledon and score the winning goal in the Cup Final. For a start, it is quite difficult to do either, and changing one's gender does not generally achieve it for one."

[656] P Charlish P, (2005), 'Gender Recognition Act 2004: transsexuals in sport – a level playing field', *supra*, at p 42.

[657] Repealed by Equality Act 2010, Sch 27.

[658] Key sections of the 2010 Act came into force on 1 October 2010. Section 7(1) of the 2010 Act provides that "A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex."

[659] Equality Act 2010, ss 195(1) – 195(8).

success or failure, and in which one sex is generally at a disadvantage in comparison with the other."[660] Since section 19 has been repealed, it is also now lawful to "restrict participation of transsexual people in such competitions if this is necessary to uphold fair or safe competition, but not otherwise."[661]

It is perhaps worth observing, in closing, that fears of super-powered transsexual athletes sweeping the competitive sporting world have so far proved unfounded.[662] The recent Equality Act 2010 attempts set a precedent for resolving the, often sensitive,[663] issues that can arise within UK the sporting community[664] with reference to sporting regulators rather than the courts in the first instance. This accords with the broad adopted in other jurisdictions and at the international competition level.[665]

3.6. Concluding Comments

'*Gender Identity and the Law'*, discussed in the present chapter, was concerned with the second research strand of my overarching research theme: rights, status and capacity of disempowered adults.

[660] Annotations to the Equality Act 2010, s 195. It should also be noted that special provision has very recently been made in respect of childhood games and activities to restrict the broad power that exists to, effectively, discriminate on the grounds of gender assignation: Equality Act 2010 (Age Restrictions) Order 2012, Art 9.
[661] *Ibid.*
[662] See, e.g., story of American transsexual track and field athlete who did not qualify for the 2012 Olympics: 'Transgender athlete fails to qualify', New York Times, 21 Jun 2012: http://london2012.blogs.nytimes.com/2012/06/21/transgender-athlete-fails-to-qualify/. It appears that India has attempted to circumvent the issue entirely by hosting "Transgender Games": http://www.bbc.co.uk/news/world-asia-india-19554390.
[663] This is particularly the case where female athletes come from cultures in which aspersions on their femininity may be damaging. See, e.g., 'Is she really a HE? Women's 800 runner shrugs off gender storm to win gold', Daily Mail, 19 Aug 2009, available at: http://www.dailymail.co.uk/news/article-1207653/Womens-800m-gold-medal-favourite-Caster-Semenya-takes-gender-test-hours-World-Championship-race.html.
[664] For example, the FA has its own Equality Guidance which includes '*LGBT Football*': http://www.thefa.com/football-rules-governance, and a policy specifically providing that "An individual's sexual orientation or gender identity should never be a barrier to participating in, and enjoying, our national sport." This includes a pledge to "combat all forms of homophobic, biophobic and transphobic language and behavior".
[665]There are many international bodies with a regulatory / overseeing capacity in sport and who now have policies (and testing regimes) in place to address issues involving transsexual (or query transsexual) sportsmen and women, see, e.g., the 'IAAF' ('International Association of Athletics Federation'), policy on "Hyperandrogenism and Sex Reassignment", available at: http://www.iaaf.org/about-iaaf/documents/medical#hyperandrogenism-and-sex-reassignment. This does not mean that issues of considerable difficulty do not arise: see, e.g., "Expert view: gender testing imperfect for female athletes", CNN, 8 Aug 2012, available at: http://www.cnn.co.uk/2012/08/08/health/athletes-gender-testing/index.html.

Conceptual Framework: Rights, Status and Capacity - Contribution of Publication 7

Publication 7 was placed within a wider body of literature concerning the accommodation of new groups and 'voices' in Scottish law and society in Section II of the thesis Introduction. Adult transsexuals were noted to belong to a disempowered group for whom a range of issues concerning rights, status and capacity had either recently emerged or were still to emerge. These issues concern, e.g., the realisation of human *rights* in respect of private and family life – notably, the recognition of *status* in an 'acquired gender', *capacity* to marry in the gender of choice. Publication 7 is a piece of doctrinal research intended to form a contribution, from a traditional legal perspective, to the broader interdisciplinary discourse.

In order to contextualise my analysis of the legal approach in Scotland (and the UK), I critically evaluated a range of materials and perspectives that were non-legal in nature. These included, e.g., reference to social/medical research and historical publications contextualising developments in the medicine and in the law. The inclusion of this wider, interdisciplinary discourse allowed me to broaden my own considerations of the rights, status and capacity of the transsexual. As a contribution to the literature, Publication 7 evaluates the evolving rights, status and capacity of the transsexual in Scots Law with reference to other benchmarks, such as medical developments and cultural perceptions. While Publication 7 is principally directed towards providing a comparative legal analysis, it is intended that the publication also form a contribution that is accessible to a wider readership.

Next, in Chapter 4, a publication addressing a point of intersection between my two research strands, *the young* and *disempowered adults*, will be considered.

CHAPTER 4: Publication 8

4.1. General Introduction to Publication 8

The focus of this chapter is:

- Publication 8: *'Transsexuality and "Kidulthood": treatment and recognition'*, Scots Law Times, 2006, 25, 169 – 172 (hereinafter referred to as *'Transsexuality and "kidulthood"'*).

The purpose of Publication 8 was to consider the capacity of children and young people in Scotland to consent to medical treatment in respect of transsexuality,[666] and to discuss whether Scots law might formally recognise the status of an "acquired gender"[667] in the young. The article was written in late 2005 and submitted in early 2006 to the *Scots Law Times* for publication.[668]

Publication 8 arose as a by-product of my research for the more substantial publication '*Gender Identity and Scottish Law'* (discussed in Chapter 3). *Transsexuality and "kidulthood"* is, accordingly, a reflection of my own thoughts and developing knowledge at a particular, and unfinished, stage in a wider research process. It was also my first publication as an academic and, as such, provides ample scope for criticism.

An interesting feature, however, of Publication 8 is that it represents an interesting point of intersection between the two main research strands in my published work: rights, status and capacity of (i) the young, and (ii) disempowered adults. In Publication 8, the young[669] are considered within the context of the rights and recognition afforded in Scots law to disempowered adult transsexuals. While some legal difficulties are shared by

[666] For an explanation of choice of terminology used in this thesis, see Chapter 3 introduction.
[667] Gender Recognition Act 2004, s 1(2).
[668] The *Scots Law Times*, described as the Law Publisher W Green's "flagship title", is one of Scotland's most popular weekly practitioner Law journals. It contains "case reports, articles, book reviews, Acts of Adjournal and Sederunt, news and case commentaries. Quotes in this and the previous sentence taken from the *W Green/Sweet & Maxwell* webpages: http://www.sweetandmaxwell.co.uk/wgreen/scots-law-times.htm.
[669] "Gender identity disorders" in children are, it seems, considered by many professionals as "clinically distinct" from disorders of the same name surfacing in adolescence or in adulthood and for which different sorts of specialist approach and treatment are required: see, e.g., specialist NHS 'Gender Identity Development Service for Children': http://www.tavistockandportman.nhs.uk/node/534.

young and adult transsexuals there are also, quite distinct, issues that set them apart. *'Transsexuality and "kidulthood"'* has, accordingly, been included with other, more considered, published work in support of the present thesis.

In section 2 below, Publication 8 will be contextualised. Research rationale and independence will also be outlined. The research premise and aim will be examined in section 3. Thereafter, in sections 4 and 5, the broad research approach adopted, and research outcomes of Publication 8 will be critically evaluated. In section 6 concluding chapter observations are made about the contribution of the publication to literature concerning rights, status and capacity.

4.2. Rationale and Independence of Publication 8

'*Transsexuality and "kidulthood"'* principally addressed the uncertain legal position, in the wake of the Gender Recognition Act 2004,[670] "of Scottish children and young people who have a gender identity disorder."[671] Specifically, the publication considered "kidulthood", i.e. the "elusory years" of a young person's development from around the age of 16 to 18 years old. During this period of time, young people are, rather incongruently, defined in Scots law as adults for some purposes but remain in law children for others.[672] It seemed that there existed particular difficulties in academic law in respect of classifying (i) medical steps sought by, or on behalf of, transsexual children and young people and (ii) formal recognition of their "acquired gender".[673]

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[670] Hereinafter referred to as 'the 2004 Act'.

[671] Formal definitions of "gender dysphoria" are varied, as are the criterion for diagnosis (regardless of whether the patient is a child or an adult). Most contemporary definitions cite (i) long-standing and strong identification with another gender, and (ii) enduring personal disquiet about the sex assigned or a sense of incongruity in the gender-assigned role of that sex as essential criteria. A 'gender identity disorder' is defined, with reference to other similar terms, in a rather circular manner in s 25 of the Gender Recognition Act 2004, which provides that ""gender dysphoria" means the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism". International clinical definitions classify gender dysphoria as a "mental disorder" in both the current ICD (10)("International Classification of Diseases": http://www.who.int/classifications/icd/en/) and the current DSM-IV-TR (4th edition). A new edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), DSM-5, was approved by the Board of Trustees of the American Psychiatric Association on December 1, 2012: http://www.dsm5.org/Pages/Default.aspx. It is, however, worth observing that some authorities, e.g., the NHS, do not define gender dysphoria as a "mental disorder" at all, instead describing it as "a condition for which medical treatment is appropriate in some cases": http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_097168.pdf.

[672] Quote from the second paragraph of Publication 8 "*Kidulthood*" was a phrase taken from a movie made about young people falling within the 15 – 19 year old stage of life (see: http://www.rottentomatoes.com/m/kidulthood/). See thesis Introduction.

[673] Section 1(2) of the 2004 Act provides that "the acquired gender" is "the gender in which the person is living…"

Important, but largely untested Scottish statutory provisions[674] concerning children and young people were considered in the light of an Australian case ('*Re Alex*'[675]) in which an application had been made on behalf of a transsexual child to the Family Court for permission to begin medical treatment towards gender reassignment. This case, decided in 2004, was the first of its kind to be reported at length. Also, the impact (or, perhaps 'lack of impact' might be a more appropriate description) of the recently in force 2004 Act upon the status of the young was also discussed.

Publication 8 was written with a practitioner, rather than an academic or inter-disciplinary, readership in mind. In particular, the publication was intended to assist Scottish child lawyers who might be asked to provide legal advice to transsexual children or young people. In section 3, below, the premise and aim(s) of Publication 8 are discussed in more depth.

4.3. Publication 8 – Contextualising the Premise and Aim(s)

The broad premise of *'Transsexuality and "kidulthood"'* was that the young could be divided into two broad groups in Scots law for whom personal capacity [676] was either unclear or uncertain.

The first group might be termed the "autonomous generation" [677] (i.e. young people between the ages of 16 to 18 years). Individuals belonging to this group possess uncertain legal capacity: they may, for example, marry and enter into civil partnerships but they are unable to seek formal recognition in law of the "acquired gender" in which they may have been living for some years. It was thought that issues affecting this group of transsexual young people largely concerned status and access to remedies. Consideration was therefore given to the operation of the recently in force 2004 Act insofar as its provisions pertained to this group of "the young".

[674] Section 2(4) of the Age of Legal Capacity (Scotland) Act 1991, discussed in the chapter main text below.
[675] *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] Fam CA 297, a judgment of the Family Court in Australia.
[676] For the purpose of the 1991 Act, and the discussion in this chapter, "capacity" assumes its meaning in the ordinary English language sense. Thus, the capacity to act in law, for the purpose of the 1991 Act, simply means possessing the legally recognised ability to make autonomous decisions. This is reinforced by the terms of s 1(1)(a) of the 1991 Act in which the expression "legal capacity to enter into any transaction" is used.
[677] This is discussed in Publication 8 at p 172.

The second group of the young comprises individuals below the age of 16 years: the group most commonly referred to as "children"[678] in Scots law. The general capacity of this group to make decisions and interact with society is determined by the provisions of the Age of Legal Capacity (Scotland) Act 1991.[679] The 1991 Act does not supersede statutory age limits laid down for specific purposes, and it does not affect child capacity in certain, excluded fields of law (e.g. Criminal law and Delict[680]). However, for most purposes, the 1991 Act created a broad "binary scheme" providing that, subject to particular exceptions outlined in section 2 of that Act, those over 16 years of age have full "legal capacity" while those under 16 years of age have none.[681]

In order to reflect the growing maturity of children and young people throughout childhood, a number of specific exceptions to the general rule that a person under 16 years of age has no legal capacity were created by the 1991 Act. These statutory exceptions provide for the legal autonomy of the individuals below 16 years of age in certain scenarios including, for example, the capacity of a "competent" child to instruct a solicitor in civil proceedings or to consent to adoption and even, if so inclined, to draft her own will.[682] The difficulty with the application of the 1991 Act is that some of the statutory exceptions are vaguely expressed and, for the most part, the exceptions are untested in practice.[683] Thus, the personal capacity of "the young" who are under the age of 16 years is unclear. This is particularly true insofar as medical decisions about surgery or treatment are concerned.

Section 2(4) of the 1991 Act makes provision for the potential capacity of those below 16 years of age to consent to "surgical, medical or dental procedure[s] or treatment[s]".[684] In doing so, the 1991 Act provides a medical exception to the general rule that below the age of 16 years a person has no legal capacity. Publication 8 accordingly focused on

[678] See Thesis Introduction, Section (IV), for examples of the varied definitions of "child" in Scots law.
[679] Hereinafter referred to as 'the 1991 Act'.
[680] Section 1(3) of the 1991 Act provides, among other things, that "nothing in this Act shall… (c) affect the delictual or criminal responsibility of any person" or "(d) affect any enactment which lays down an age limit expressed in years for any particular purpose…"
[681] Quote taken from Publication 8 at p 170. Reference to the 1991 Act are references to s 1(1)(a) and (b).
[682] These exceptions are found in s2 (in particular, ss 2(2); 2(3) & 2(4A)) of the 1991 Act. The exception relating to the capacity of a child or young person below the age of 16 years to instruct a solicitor independently is discussed in depth in Chapter 1.
[683] See discussions in Chapters 1 and 2 concerning the general application of the 1991 Act.
[684] Section 2(4) of the 1991 Act requires that the child satisfy a "qualified medical practitioner attending him" that he is capable of "understanding the nature and possible consequences of the procedure or treatment". This is discussed further, below, in the main text.

section 2(4) of the 1991 Act, discussing the perceived capacity of those under the age of 16 years to request, and consent to, hormonal and surgical treatments for transsexuality.

On reflection, I do not think that a particularly clear distinction was drawn, in *'Transsexuality and "kidulthood"',* between the two groups of "young" transsexuals outlined above or, in particular, between the subtly different (but significant) legal difficulties with which each group contended. Thus, both the publication premise and aims lacked precision. Those older "young" people, between the age of 16 and 18, possess(ed) full capacity in law to make medical decisions, including decisions about hormonal treatment towards gender reassignment and surgical gender reassignment procedures. However, any such medical decisions effecting a social and medical change in personal sex/gender[685] could not (and still cannot) be legally endorsed using the gender recognition provisions of the 2004 Act.

The younger group of transsexuals, i.e. those below the age of 16 years, were (and remain) similarly unable to have an "acquired gender" formalised using the provisions of the 2004 Act. In addition, however, they were (and are) likely, in terms of the 1991 Act, to have questions asked about their general capacity to make decisions about medical treatments or procedures. It is possible that a doctor might, in terms of s 2(4) of the 1991 Act, find a person under the age of 16 incapable of "understanding the nature and possible consequences of the procedure or treatment" sought in respect of transsexualism.[686]

Since the overall publication aim(s) of Publication 8 were not unequivocally stated, the research outcomes lacked the clarity found in other publications supporting this thesis. This was an inevitable outcome of the publication, notwithstanding that a reasonable critical analysis of the relevant law was provided throughout. Issues surrounding specification of research aims, approach and outcomes will be discussed further in the sections below.

[685] Distinctions between 'sex' and 'gender' are discussed Publication 7and in Chapter 3.
[686] The 1991 Act, s 2(4).

4.4. Observations on Approach Adopted in Publication 8

In Publication 8, I approached transsexuality and the young, first, by outlining areas of perceived difficulty in Scots law; secondly, by posing research questions and, finally, by seeking (through review and analysis of available law) to generate valid conclusions. Observations about overall approach are made below:

(i) Approach and Structure of Publication 8

A general introduction was provided in the initial sentences to the subject matter and the relevant terminology was briefly explained. Thereafter, in the section entitled "Statutory provisions for transsexuals: a gap?" a concise overview was given of the provisions of the 2004 Act and of the anticipated worldwide ripples following a decision about medical treatment involving a 13 year old female to male transsexual in a reported Australian case.[687]

It was observed that the Australian case, *Re Alex,* raised "two interesting issues for Scots lawyers" at the time: first, "whether any Scottish young person might be deemed capable of consenting to treatment for transsexuality" and secondly, "whether Scots law will recognise a transsexual young person's acquired gender." [688] Next, in the section entitled "Surgical procedures, medical treatments and transsexuality" in Publication 8 section 2(4) of the Age of Legal Capacity (Scotland) Act1991 was reproduced:

> "A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment."

The above section was critically examined having regard in particular to decision of the Australian Family Court in *Re Alex*, i.e: what should be understood, in Scotland, by: (i) "consent… to any surgical, medical… treatment" (ii) "in the opinion of a qualified medical practitioner…"; (iii) "capable of understanding the nature and possible consequences". This approach was adopted because there were no significant decisions

[687] *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] Fam CA 297.
[688] Publication 8 at p 169.

in Scotland,[689] and few elsewhere in the UK,[690] concerning young people making medical decisions of a significant, and possibly permanent, nature affecting their sex/gender. Other judgments[691] concerning the capacity of children and young people to give consent in a medical context were briefly canvassed in an effort to posit what possible approach towards the medical autonomy of transsexuals below the age of 16 years might be expected in Scotland.

Thereafter, in the section entitled "Recognition of 'acquired gender' and young people", potential difficulties arising from the threshold requirement of sections 1 and 2(1)(b) of the 2004 Act were considered. These sections provide that an applicant must be over 18 years of age and must have lived for the preceding two years in an acquired gender. This, of course, prevents applications both by medically competent young people under 16 years of age and by young adults under the age of 18.

Some of the research questions that might (and perhaps should) have been asked in Publication 8 are discussed below:

(ii) Questions that Might Have Been Posed in Publication 8:

In particular, I think that three practical questions (likely to be of interest to solicitors instructed by children and young people) were left unasked in Publication 8.

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[689] The decision in *Houston, Applicant* (1996 SCLR 943) was observed in passing as one of the few reported authorities in Scotland concerning child capacity in a medical context. *Houston*, which was a Sheriff court judgment (and so is not binding), was concerned with a mentally ill teenager deemed capable in law of "understanding the nature and consequences of the proposed treatment". The decision, though, suggested that the s 2(4) capacity test was (and is) not a particularly arduous one.

[690] It is, of course, difficult in any consideration of child capacity in the medical sphere avoid discussing the English House of Lords judgment, *Gillick v West Norfolk and Wisbech Area Health Authority* ([1986] AC 112), and the famous retreat from that judgment into a more paternalistic approach in England in respect of uncomfortable medical decisions and the young. See Publication 8 at p 170 – 171. It is interesting to note, in passing, that in England, the trend to usurp decision-making autonomy of, even older, children and young people perceived to be ill-informed or lacking a balanced understanding of life has continued. Paternalistic judgments: *Re W (A Minor)(Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758, in which medical treatment refused by a girl of 16, suffering from anorexia nervosa, was authorised by the Court of Appeal against her will; *Re L (Medical Treatment: Gillick competence)* [1998] 2 FLR 810 in which a critically injured 14 year old Jehovah's Witness refused to consent to a blood transfusion, and the court overrode that decision. There are three points worth making here: (i) general issues surrounding child consent to medical treatment is a subject-matter that has been written on in depth in other jurisdictions and such broad, academic, medico-legal discussions fell outwith the scope of Publication 8; (ii) English courts do seem more willing to endorse the perceived autonomy of the young in matters concerning evolving sexual self-determination than in other areas (see, e.g, *R (on the application of Axon) v Secretary of State for Health* [2006] 2WLR1130]: *Gillick* followed), and (iii) we simply do not know what approach a Scottish court would take: see discussion in text above. *Gillick* is only a persuasive authority and the terms of s 2(4) have as yet not been the focus of any significant judicial consideration. Further reading on *Gillick,* see: Douglas, G, The Retreat from *Gillick*, 55 Mod L Rev 569 (1992).

[691] Publication 8 at p 170 – 172.

(a) Which Methods of Dispute Resolution?

Publication 8 did not canvas the (non-legal) methods through which a dispute about the capacity of a young transsexual to make medical decisions could, in reality, be resolved. These methods might include, for example, referral to a different medical practitioner for a second opinion,[692] or even arranging formal mediation with the Health authority concerned.[693] In exercising such options, a young transsexual would be likely to avoid considerable stress and other possible consequences, such as the risk of unwanted publicity,[694] consequent upon raising legal proceedings.

(b) Who Raises Proceedings – and How?

Publication 8 did not address pressing (and rather puzzling) practical questions concerning the appropriate means by which a formal application might be made to a Scottish court (whether the Sheriff Court or the Court of Session) to resolve questions about a young transsexual's capacity to consent to medical treatment or surgery.

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[692] In practice, this was, and remains, a straightforward process: http://www.nhs.uk/chq/Pages/910.aspx. Further, the recent Patient Rights (Scotland) Act 2011 largely, came into force on 1 April 2012. The overarching aim of the 2011 Act is to provide patients with the right that the health care they receive should be directed towards their needs and optimum personal benefit. The 2011 Act seeks to encourage patients to take a greater role in decisions being made about their health and wellbeing. It would seem, then, that there is more scope to obtain the medical treatment desired by the patient concerned: s 1 of the 2011 Act binds Scottish Ministers to publish a document to be known as the Charter of Patient Rights and Responsibilities and s 3 outlines patient rights.

[693] Since 2011, various NHS Trusts in Scotland have begun pilot programmes in collaboration with the Scottish Mediation Network towards greater services to resolve patient-care provider disputes and disagreements, see, e.g: http://www.scottishmediation.org.uk/about/types-of-mediation/healthnhs-mediation.

[694] It is likely that a child pursuer or applicant would qualify for legal aid in Scotland, since legal aid is largely means tested. In *Re Alex,* the Family Court in Australia granted an order "closing the proceedings from the public and prohibiting any identifying disclosure of Alex" (judgment, p 1). This procedure was adopted in the subsequent Australian judgments considered later in this chapter. UK courts (and tribunals) have the broad power to make an order protecting the anonymity of a party in litigation (this is often used where that party is a child). Such steps have also been taken before in proceedings concerning adult transsexuals in litigation about a range of matters, see e.g: *Chessington World of Adventures Ltd v Reed (Restricted Reporting Order)* [1998] I.R.L.R. 56, a case involving a complaint of sexual harassment brought by a transsexual against her employers and confidentially of the identity of the Complainant was a matter considered by the court; *AC v Berkshire West Primary Care Trust* [2010] EWHC 1162 (Admin), transsexual seeking particular NHS treatment, discussed in Chapter 3 above. However, there is always a risk that the identity of litigating parties will be revealed: judgments of academic interest and value are frequently reported in Law Reports (identity should be protected *if* there is a publicity ban: see, e.g., Court of Session Practice Note 2 of 2007 on the Parliament House website) and also in the media. Were the (online) media to be dogged in its pursuit, it would not be hard in as small a jurisdiction as Scotland, for the identity of a young transsexual applicant to be uncovered. Once confidentiality is breached, it is impossible to regain it, or possibly even to seek redress, particularly in an internet era in which the information source may not always reveal his or her identity. For an interesting discussion about (unlawful) tweeting and the operation of Article 8 Rights in Scottish courts, see: http://scotslawthoughts.wordpress.com/2012/11/05/open-justice-what-is-the-problem-with-tweeting-from-a-scottish-court/.

First, and perhaps most importantly, who raises proceedings? A different litigant process would most likely be adopted in Scottish proceedings than the process followed in the Australian Family Court by the applicants in *Re Alex.* There, the applicants were Alex's "legal guardians" and, as such, they bore the principal responsibility for persuading the court that the hormonal treatment sought for transsexuality was "in Alex's best interests".[695] A child in Scotland can instruct a solicitor to represent her from the age of around 12 years old,[696] so there would be no need for a guardian to raise proceedings on her behalf. Further, a Scottish young transsexual's argument as to capacity to consent would be based on her ability to "understand the nature and possible consequences"[697] of the medical treatment proposed. Thus, it would doubtless be detrimental to her case if she were so lacking in maturity that she required a parent[698] or guardian to make a court application on her behalf.

Secondly, while substantive rather than procedural law was (and remains) the focus of my research, it may have been helpful to outline briefly in Publication 8 the form by which proceedings concerning child medical capacity might be raised in Scotland. Since the provisions of s 2(4A) of the 1991 Act are largely untested there appears to be no clear answer to this question.

In practice, there might be a number of stages in any journey towards eventual litigation: (a) where a medical practitioner attending a person below 16 years of age did not find that person capable of consenting to treatment or surgery for transsexuality, then the patient could seek legal advice;[699] (b) the medical practitioner would normally be an employee of a Health authority and so any legal correspondence would be handled by the Health authority's legal department; (c) were a Health authority subsequently to endorse the opinion of the medical practitioner concerned proceedings could then be raised by the

[695] *Re Alex*, citation above, at para 5. The facts of the case will be outlined in section 5 below.
[696] Section 2(4A) of the 1991 Act provides: "A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding."
[697] 1991 Act, s 2(4).
[698] The power of a parent to bring proceedings on behalf of his or her child is found in ss 1(1)(d) and s 2(1)(d) of the Children (Scotland) Act 1995. Section 1(3) of that Act provides that this includes "title to sue, or defend, in any proceedings…" Strictly speaking, this power extends until a child is 16 years old (s 2(7)), and this means in practice that the parents of a child competent to instruct a solicitor could still agree with that child that they raise proceedings on his behalf *qua* parent.
[699] The power to do this is found in s 2(4A) of the 1991 Act (as long as the child is deemed competent to instruct by the solicitor he or she consults).

patient[700] against the Health authority, which would as a public body (or private trust) have title and interest to defend the action.[701]

The most obvious form of procedure for the child litigant would appear to be raising a petition in the Court of Session for Judicial Review[702] of the Health authority's decision. As the name suggests, this procedure would request that the Court exercise its power of "judicial review" over the decision-making process of the public body concerned. Thus, the Court could consider, for example, whether the decision the Health authority reached in terms of a transsexual child's capacity was reasonable in all of the circumstances. A competent child or young person could also seek incidental orders, including an interdict or an order suspending the implementation of any decision already taken by the Health authority to refuse treatment.

Since there are, as yet, no reported cases in Scotland concerning child capacity in terms of section 2(4) of the 1991 Act it is hard to predict whether any other form of proceedings might be raised: an action seeking specific implementation of the right to exercise capacity[703] perhaps? But, is there any sort of "right" to be found capable of consenting to medical treatment, or are there any other relevant rights that could give rise to an actionable point, and procedure, on this matter in Scots law? Simply put: we await what is sure to be a landmark ruling in terms of both substantive and procedural law.

(c) "Best Interests" or "Capacity"?

Publication 8 perhaps did not stress strongly enough that the "best interests" test applied by the Australian Family Court in *Re Alex* is not, ostensibly, the test set down in Scots law for determining whether or not a child who might have capacity to consent actually receives medical treatment. The legal decision in *Re Alex* turned entirely on the Alex's

[700] It should be noted that the rights of the patient to have an input in decisions made about her care and treatment appear to have significantly increased since April 2012 when the Patient Rights (Scotland) Act 2011 came into force.
[701] The National Health Service (Scotland) Act 1978 sets out the constitution, statutory functions and operation of the NHS in Scotland.
[702] For an overview of the nature and scope of judicial review proceedings generally, see the *Judicial Review Handbook*, 6th ed, Fordham M, Hart Publishing 2012 (focus largely on English law). For a, slightly more dated, but purely Scottish text on the subject, see *Judicial Review in Scotland*, Mullen T, Sweet & Maxwell, 1996.
[703] It may be that the broad rights set out in the United Nations Convention on the Child ('the UNCRC') could provide some assistance here. Articles 23 and 24 cover, amongst other rights, rights in medicine and health care for children and young people (i.e. those under the age of 18 years in terms of the UNCRC). The UK has ratified the Convention, but it does not have direct impact in current Scots law. It is envisaged that the Convention will form part of the substance of Scots law in early course. See, e.g, Consultation on the (recently passed) Children and Young People bill: http://www.scotland.gov.uk/Publications/2012/07/7181/12.

welfare, or as the Family Court of Australia termed it, her "best interests". In his written decision, Nicholson CJ, the presiding judge in *Re Alex*, neatly side-stepped the issue of child capacity throughout most of his judgment and observed:

> "The key issue before me is whether I should authorise medical treatment involving the administration of hormonal therapies that will begin what is colloquially described as a "sex change" process. In order to reach this decision I must be firmly satisfied upon clear and convincing evidence that the proposed treatment is in Alex's best interests." [704]

In other words, both a doctor and, subsequently, a court had to take the view that the treatment proposed was the best outcome possible for Alex in the circumstances. Alex's capacity to decide herself was a secondary issue because the final decision about the 13 year old transsexual's treatment in the Australian proceedings did not, ultimately, rest with her.[705] In the end, permission was given was given for Alex to receive hormone treatment to suppress the onset of puberty.[706] The 2004 decision of the Family Court in Australia in *Re Alex* represented a strongly paternalistic approach towards medical decisions made concerning the young. It is, however, an approach that has been not been wholly endorsed in later judgments of the Family Court in Australia about transsexual children.[707]

The key issue, in Scotland, in respect of all patients is normally[708] one of consent. Insofar as the young are concerned, parents may consent on behalf of children who lack capacity to consent themselves[709] or, alternatively, since 1991, children may consent on their own behalf where they possess such capacity in terms of section 2(4) of the 1991 Act.

As was observed in Publication 8, in proposing the Age of Legal Capacity (Scotland) bill that later became the 1991 Act, the Scottish Law Commission expressly rejected a best

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[704] *Supra.* Nicholson CJ, paras 1 and 4 of the judgment.
[705] This is made clear by the Family Court's observation at paras 168 - 169 of the judgment: "… the evidence does not establish that Alex has the capacity to decide for himself whether to consent to the proposed treatment. It is one thing for a child or young person to have a general understanding of what is proposed and its effect but it is quite another to conclude that he/she has sufficient maturity to fully understand the grave nature and effects of the proposed treatment… I therefore take the view that the capacity of Alex to give his own consent would be an academic question unless I were to refuse authorisation."
[706] Para 242 of the *Re Alex* judgment, per Nicholson CJ.
[707] See, e.g, *Re Brodie* (Special Medical Procedure) [2008] Fam CA 334; *Re: Jamie* (Special medical procedure) [2011] Fam CA 248, both discussed in text of chapter below.
[708] Medical staff treating patients who do not consent to that treatment commit an assault, unless there are circumstances (such as an emergency) to justify such medical/surgical steps.
[709] Such power is given to parents in the Children (Scotland) Act 1995, ss 1-2: section 2(1)(b) of that Act provides that any person with parental responsibilities and rights has the right "to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing".

medical interests test for the young as being "too restrictive" confirming instead that "*if* it has been accepted" a young person is capable of consenting in law then his consent should not be undermined simply because the treatment might not be for his own good. While the Scottish Law Commission said that it expected that "a greater level of understanding might be required" in respect of procedures not considered to be in the best interests of the child, the Commission concluded that the "young patient should be treated no differently from anyone else capable of consenting".[710] Thus, the terms of the Scottish 1991 Act focus solely on establishing capacity as opposed to the Australian "best interests" approach adopted in 2004 in *Re Alex*.

A child "capacity-only" approach would create an odd dual reality in practice in Scotland where parents and children are concerned. The parents of a child incapable of consenting herself to medical treatment would be subject to a "best interests" test by a Scottish court in the event that there was a dispute over medical treatment. This is because parents bear the legal responsibility of safeguarding their own child's welfare throughout childhood.[711] However, once a person below the age of 16 years becomes capable of making medical decisions herself it certainly seems that, in terms of current Scottish statute, she need satisfy no-one that a decision she makes about medical treatment is in her own best interests.[712] Of course, she must find medical practitioners willing and able to treat her.

(iii) Lessons Learned

It would have been a worthwhile exercise in Publication 8 to give some consideration to these three additional issues affecting children and young people that have been outlined above. Exploring the matters highlighted in this section would, however, almost certainly have produced two, perhaps more, practitioner articles outlining and critically evaluating the rights of Scottish child transsexuals within a medical context. That would have been a greater undertaking. As observed at the outset of this chapter, Publication 8 was not the primary focus of my research into the legal issues surrounding transsexuality. Notwithstanding this, the issues explored in the publication were (and remain) topical and seldom considered in academic or practitioner journals in Scotland. However, had I

[710] *Report on the Legal Capacity and Responsibility of Pupils and Minors*, Report 110, 1987, at para 3.61 onwards. Italics added.
[711] This is contained within the broad statutory overview of parental responsibilities and rights found in sections 1 and 2 of the Children (Scotland) Act 1995.
[712] Section 2(4). Of course, the ideal situation would be that both the transgender child and his or her parents jointly wish the treatment /surgery to take place.

submitted *'Transsexuality and "kidulthood"'* for publication some months later, I might then have taken the opportunity to form more significant reflections, ideas and opinions and a more rounded output might then have been produced.

Lessons have been learned from this publication. *Transsexuality and "kidulthood"'* represented an important step in my forming a more comprehensive, and definitive, view on the research subject.

4.5. Reflections on Publication 8 Research Outcomes

'Transsexuality and "kidulthood"' was concerned with two, largely untested, pieces of legislation in Scotland: the Age of Legal Capacity (Scotland) Act 1991, and the Gender Recognition Act 2004.

Although the 1991 Act has been in force since 25 September 1991, the legislation has only been recorded in national case reports as being the primary focus of two reported judgments to date.[713] One judgment predated Publication 8 and the other postdated Publication 8: neither was concerned with medical treatment. Insofar as the Gender Recognition Act 2004 is concerned, it had come into force on 4 April 2005 and not been the sole focus of any reported Scottish litigation at the time of writing up Publication 8. This remains the case today. The research outcomes of Publication 8 were, accordingly, tentative in nature, reflecting the existing uncertainties in Scots law.

It is interesting to note that there have been no major developments, cases, statutory amendments or repeals[714] either to the 1991 Act or the 2004 Act since *'Transsexuality and 'kidulthood'"* was published. A general lack of growth and discussion in a particular area of law is perhaps not the best argument for originality and significance of a publication. However, it may be worth observing that Publication 8 remains the only

[713] Westlaw search on19 December 2012: (i) *Bell's Curator Bonis, Noter* 1998 SC 365 (s 3 of the 1991 Act discussed: the possibility that the compromising actings of a *curator bonis* of a young *incapax,* rendered paraplegic in a road traffic accident, could be set aside as prejudicial); (ii) *X v BBC* 2005 SLT 796 (s 3 of the Act debated: prejudicial transaction of a teenager who had agreed to be part of a BBC documentary and wished to renege on that agreement). In practice, the underlying principles of the 1991 Act (such as the presumption, in terms of s 2(4A) of the Act that a young person over the age of 12 years old is mature enough to instruct his own solicitor) operate on an impliedly understood basis in Scots Family law, although they have rarely been the sole subject of a legal dispute to date.

[714] Some minor repeals/amendments have been made to both pieces of legislation, and s 19 of the 2004 Act (concerning the impact of a gender recognition certificate in sport) has been repealed. This is discussed in Chapter 3.

Scottish legal article focused on the capacity, status and rights of the transgendered young in Scotland.

The research outcomes of Publication 8 concerning child consent to medical treatment or surgery for transsexualism, and recognition of young transsexuals are revisited below:

(i) Consent to treatment (those below the age of 16 years)

The following observation, made in *'Transsexuality and "kidulthood"'* remains, I think, an accurate representation of contemporary law:[715]

> "… since Scottish courts possess no inherent welfare, or wardship, jurisdiction they are free (or, rather, bound) to determine medical, surgical and dental competency of under 16's purely on the basis of what appears to be a fairly unchallenging competency test."[716]

It was further observed in Publication 8 that it would be "most likely that reversible treatment [only] would be proposed for those under 16." It was also concluded that Scottish "medical experts will almost certainly view prepubescent children as lacking the level of understanding required to consent to irreversible gender reassignment surgery."[717] Determining whether these research outcomes have lasting significance is difficult because no reported cases so far uncovered[718] have involved anyone below the age of 16 years seeking permanent gender reassignment surgery in the UK.[719] Rather, the child has sought (or, in Australian practice, his or her representatives have tended to seek) reversible hormone treatment to delay or prevent puberty.[720]

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[715] See *Transsexuality Timeline* in Thesis Appendix. The terms of s 2(4) of the 1991 Act do appear to provide complete decision-making autonomy to the competent person under the age of 16, something that the "best interests" approach adopted in England and Australia towards child patients does not guarantee. In Australia, the terms of the Gender Reassignment Act 2000 require that the Gender Recognition Board are "satisfied that it is in the best interests of the child that the [Gender Recognition] certificate be issued."

[716] Publication 8 at p 172.

[717] Publication 8 at p 172.

[718] Search, late December 2012, with focus on Scotland, England and, indeed, Australia.

[719] There may, of course, be strong medical reasoning for delaying surgery until at least late teenage years from a psychological or physical perspective. For example, the Specialist NHS Gender Identity Development Centre, that takes referrals from the whole of the UK, states that "the likelihood of the patient going ahead with gender reassignment surgery varies dramatically according to age: "80% of those referred to us pre-puberty will not go ahead with sex reassignment surgery and will find another solution such as living as a lesbian or gay man. Post-puberty 80% of referrals will go ahead with it." The implication here is that surgery before puberty is not appropriate: http://www.tavistockandportman.nhs.uk/node/1613. According to the Daily Mail (perhaps not the most reliable source!) the youngest person in the world to have gender reassignment was 16 years of age and the operation was performed in Thailand: http://www.dailymail.co.uk/news/article-2140775/Jackie-Green-Youngest-person-sex-change-reaches-Miss-England-semi-finals.html.

[720] It is worth noting that hormone treatment is not always reversible, although the earlier stages of the treatment seems to be so. This complexity is something that was noted by Nicholson CJ in para 185 of his

There is, in addition, a dearth of Scottish (and UK-wide) case law concerning the general decision-making capacity of the young within the field of medicine (both at the time of writing Publication 8 and today[721]). This has generated little academic and practitioner discussion about the ethically uncomfortable scenarios such capacity/powers of the young might produce in Scotland.[722] Considerable legal debate has taken place about such issues in other jurisdictions[723] where problematic medical scenarios involving children have arisen.[724]

If Publication 8 were rewritten (or updated) today, it would be prudent, first, to 'revisit' Australia, which is the jurisdiction in which *Re Alex* was decided in 2004. In rather stark contrast to the lack of litigation in other jurisdictions searched, the Family Court in Australia has ruled on a number of cases involving child transsexuals seeking hormone treatment to prevent puberty. Unlike Scotland, it is already accepted as a matter of law in Australia that the authorisation of the Family Court is required in respect of treatments administered for transsexual young people or children.[725] The recent Australian

judgment when he observed "I was asked not to view the reversible first stage in isolation from the second stage of hormonal therapy which would have irreversible consequences and may involve injections or an implant".

[721] There are no further reported judgments concerning Scottish children or young people making significant/permanent medical decisions on their own behalf in terms of s 2(4) of the 1991 Act. In England, the case of Hannah Jones, a 13 year old child who initially refused a heart transplant (a decision supported by her parent and endorsed by the court) was agreed in the early stages of the procedure and so there is no detailed judgment providing judicial rationale in the case. See reports in media: http://www.guardian.co.uk/uk/2009/jul/21/hannah-jones-heart-transplant and: http://www.dailymail.co.uk/news/article-2019241/Hannah-Jones-16-refused-lifesaving-heart-transplant-tells-U-turn.html.

[722] Cleland A and Sutherland E.E, Children's Rights in Scotland, 3rd ed., W Green, 2011, at Chapter 3, is one of the few contemporary considerations of the rights of the Scottish child in respect of medicine that exists.

[723] Certainly, such scenarios have been provided for in clinical practice in the UK – but little litigation has followed. The General Medical Council has already drafted guidance for doctors in respect of clinical trails involving young people below the age of 18 years: http://www.gmc-uk.org/guidance/ethical_guidance/6469.asp. They recommend that doctors "should aim to reach a consensus with parents about a child or young person's participation in research."

[724] See, e.g: New South Wales: Mathews B, 'Children and consent to medical treatment', in White, Benjamin P, McDonald, F & Willmott, L (Eds), (2010), *Health Law in Australia,* Thomson Lawbook Co., Sydney, pp 113-147; India: Nandimath OV, (2009), 'Consent and medical treatment: The legal paradigm in India', *Indian J Urol*, 25:343-7; England: Selinger C. P, (2009), 'The right to consent: is it absolute?', *BMJ*, 2(2) 50-54; Douglas, G, (1992), 'The Retreat from *Gillick'*, 55 *Mod L Rev* 569; America: Cobill J, (1995), 'Outpatient Mental Health Care Services – A Minor's Right', 13 U Rich L Rev 915 (78-9); Australia: Parlett, K., and Weston-Sceuber, K-M, (2005), 'Consent to Treatment for Transgender and Intersex Children', 375 *Deakin LR (Australia),* Vol 9(2).

[725] It is settled that this falls within the jurisdiction of the Australian Family Court. See *Re Brodie*, at para 42, and the Family Court, as such, disposed of the case in the manner of general family proceedings: having "regard to Brodie's best interests as the paramount consideration" (para 32).

judgments may be considered persuasive authorities in any future Scottish cases, and so two significant decisions of the Family Court are discussed below. [726]

Re Brodie [727]

On 15 May 2008, the judgment of Carter J in *Re Brodie* was delivered. The case concerned "Brodie", a child who was a female to male transsexual and was, at the time of the judgment, 13 years old. Brodie's mother was seeking various orders on his behalf, including ongoing hormone treatment to suppress puberty.[728] The Family Court had previously authorised the earlier stages of hormone treatment when Brodie was 12 years old.[729] An independent "Children's Lawyer" was appointed to Brodie by the court. This recognition of child capacity, and provision for child participation, had been lacking in the earlier *Re Alex*[730] case of 2004 which had concerned a child of the same age.

Significantly, in finding that "on all the evidence the treatment is in [Brodie's] best interests" the court in *Re Brodie also* ruled that "Brodie is capable of making an informed decision about the procedure".[731] Capacity was determined in *Re Brodie* with reference a fairly straightforward test administered by a medical practitioner attending the child: she was found to be of "above average intelligence" for her age, and was considered well enough "informed" about the nature and "impact of puberty blocking medication" to consent.[732] The treatment sought at the time the judgment was delivered in *Re Brodie* was still "completely reversible". Carter J added that:

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[726] *Re Brodie* and *Re Jamie* (citations and discussions below). *Re Rosie (Special medical procedure)* [2011] FamCA 63 was also decided by the Family Court of Australia, but the "child" in that case was 17 years old (individuals are children, for the purpose of such proceedings in Australia). Since, in terms of s 1(1) of the Age of Legal Capacity (Scotland) Act 1991 any person over the age of 16 years "shall have legal capacity to enter into any transaction," *Re Rosie* is not considered in this chapter. Another case decided by the Family Court in Australia was *Re Bernadette* [2010] FamCA 94: this judgment of Collier J concerned a male to female transsexual in respect of whom a hearing took place in 2007. The judgment, which was handed down by the Family Court of Australia on 19 January 2010, was largely taken up with a debate over whether a parent of a transsexual child were able to consent to treatment without an order of court. The answer in Australia, certainly insofar as reasoned out in *Re Bernadette*, appears to be 'no'.

[727] (Special Medical Procedure)[2008] Fam CA 334

[728] The treatment was described at para 213 of the *Re Brodie* judgment as an implanted pellet, under the skin, "to suppress pituitary gonadotrophin secretion, which will in turn suppress ovarian function and oestrogen secretion for the duration of the course of treatment. This will have the effect of suppressing [Brodie's] pubertal development as a female…"

[729] This decision took place on 14 Dec 2007, and is mentioned in para 1 of the judgment of Carter J.

[730] In *Re Alex*, a "child representative" was appointed, but it is not clear from the judgment in what capacity the representative was intended to act (*Re Alex*, judgment at paras 13, 48-9).

[731] Judgment at paras 213 and 223.

[732] Judgment at para 223(g).

> "[I]t was envisaged that at a later stage a further application would be made for permission to commence treatment with testosterone, the male sex hormone. Testosterone would cause permanent physical changes."[733]

The court had regard to "the overall treatment plan", considering that "to do otherwise would be 'an artifice'."[734] While finding Brodie entirely capable of making a decision about treatment for transsexuality, the court was, in reality, finding her competent only to decide about *reversible* treatment (i.e. the first stages of treatment towards a permanent sex/gender change).

Re Jamie [735]

The second significant Australian judgment, *Re: Jamie,* was handed down by the Family Court of Australia on 6 April 2011. The case concerned an application made by the parents of "Jamie", a 10 years and 10 month old male to female transsexual. The parents sought, on Jamie's behalf (and, it should be noted, did so with the "unequivocal" support of the medical practitioners concerned[736]) orders to allow puberty suppressant hormones to be administered to Jamie. As happened in *Re Brodie*, an independent child lawyer was appointed to Jamie. The Family Court had previously agreed to the first stage of (reversible) hormone treatment on 28 March 2011. The parents of Jamie were seeking, it seems in an effort to avoid future stress and expense,[737] authorisation in advance to proceed to the second stage of hormone treatment which was not anticipated as necessary for some years. The second stage of hormone treatment was irreversible. The court refused to grant the order authorising irreversible treatment, Dessau J, the presiding judge, observing:

> "The issue is whether the court can comfortably determine this 10-year-old child's best interests, and therefore approve a particular procedure or treatment, irreversible in nature, not due for six years… I simply cannot determine in 2011, when Jamie is still only 10, what is likely to be in her best interests in 2016 or 2017 when she is aged sixteen."

The Family Court then went on to assure Jamie and her parents that a quick, and inexpensive, judicial resolution could be provided at a later stage:

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[733] *Re Brodie*, at paras 38-40.
[734] Judgment at para 39.
[735] (Special medical procedure) [2011] Fam CA 248.
[736] *Re Jamie*, Judgment, at para 5.
[737] Judgment, at para 131.

> "[I]f… Jamie remains determined to start stage two treatment, and her parents continue to understand and support her to be free of pressure to make her own decisions, and the treating medical practitioners continue in their view that it is in her best interests for the treatment to be administered".[738]

While the child in *Re Brodie* was 13 years old, and was found to possess medical decision-making autonomy the child in *Re Jamie* was only 10 years and 10 months old. Capacity was discussed in some detail in *Re Jamie*: it was said by Jamie's doctors (and endorsed by the court) that, although Jamie was bright and mature for her age, and understood many of the ramifications of her disorder:

> "clearly Jamie does not [at present] have the level of maturity to be responsible for [permanent] decisions of such gravity..."

It is interesting to note the emphasis placed by the Australian Family Court in *Re Jamie* on what appears to be a tripartite decision-making process in respect of child transsexuals' *irreversible* medical treatment: (i) the child wishes the treatment; (ii) the parents understand and support the child and (iii) the medical profession take the view that the treatment serves the child's best interests. It is quite possible, particularly where a child's capacity to consent is dubious, that this, more recent, Australian approach might be followed by a Scottish court in a similar situation.

These Australian judgments concerning transsexual children have sparked debate and discussion on an international scale. Opinions are polarised. Some commentators view the "transgendering of children" as an "increasing" and altogether "harmful cultural practice" founded upon societal, discriminatory notions of sex and gender.[739] Others consider the acceptance and recognition of the status in law of young transsexuals to be an issue for social compassion that goes to heart of basic individual rights, personal status and capacity.[740]

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[738] Judgment, at paras 125 – 131.

[739] Including, e.g., Professor Sheila Jeffreys in the School of Political Sciences at the University of Melbourne, Australia. Last year, Professor Jeffreys sent her views, in an open letter, to the Chair of the Australian Committee on the Rights of the Child: http://www2.ohchr.org/english/bodies/cedaw/docs/cedaw_crc_contributions/SheilaJeffreys.pdf Dr Jeffreys goes so far as to criticise the international Endocrine Society for its recommendations of hormonal treatments for children and young people to suppress puberty, arguing that "the long term effects of this treatment" are unknown on the physiology of young people. Clinical guidelines of the Endocrine Society available at: http://www.endo-society.org/guidelines/final/upload/Endocrine-Treatment-of-Transsexual-Persons.pdf.

[740] See, e.g, the Guidance for Creating Policies for Transgendered Children in Recreational Sports by the Transgender Law and Policy Institute: http://www.transgenderlaw.org/resources/trans_children_in_sports.pdf. The UK media is beginning to pick up on the rights of transgendered children within the LGBT community as a whole, see, e.g: Beadle, P, (2009), 'Who do you think you are?', The Guardian, 17 Feb 2009, at: http://www.guardian.co.uk/education/2009/feb/17/transgenderism-children.

There has been little debate in Scotland about child medical capacity and the meaning of section 2(4) of the 1991 Act in Scottish law and practice. The Best Interests 'versus' Rights debate is a long-standing one in the field of Children's Rights. The capacity of young transsexuals to consent in law to medical treatment and be formally recognised is, it seems, an emerging Children's Rights issue.[741]

(ii) Recognition of the "Young Transsexual"

Publication 8 also generated a research outcome in respect of recognition, concluding that there was "no recognition process"[742] for transsexuals under 18 years of age in Scots (and wider) UK law. Insofar as failure to recognise, formally, the status of the "acquired gender" of young transsexuals is concerned, UK law remains static – even in respect of those who may have undergone medical transsesxuality procedures.

At present, section 1(1) of the 2004 Act provides throughout the UK, as it did at the time of Publication 8, that any person applying for a "Gender Recognition Certificate" must be aged at least 18", while section 2(1) states that any applicant must, among other things,[743] have "lived in the acquired gender throughout the period of two years ending with the date on which the application is made".

No reported cases further afield concerning statutory recognition and the young have been found, although it is interesting to note that other jurisdictions regulate recognition differently. In Australia, for example, an application can be made on behalf of a "child"[744] below 18 years of age for statutory recognition of an acquired gender.

[741] Other Children's Rights issues that similarly affect the LGBT community have begun to be addressed in mainstream legal journals, and so it seems likely that greater academic discussion about transsexual young people will make its way into multi-disciplinary discourse: see Valetine, S. E, (2008), 'Traditional Advocacy for Non-Traditional Youth: Rethinking Best Interest for the Queer Child', *Mich. St. L. Rev*., 1053.
[742] Publication 8, at p 172.
[743] It must also be demonstrated to the Gender Recognition Panel that the applicant "has or has had gender dysphoria" in terms of s 2(1)(a). Gender dysphoria is proved, in terms of s 3 of the 2004 Act, by the inclusion in the application of "a report by.." at least one doctor or psychologist specialising in the field of gender dysphoria and one other medical report. The report by the specialist must "include details of the diagnosis of the applicant's gender dysphoria".
[744] The Gender Reassignment Act 2000 of Western Australia, s 15 outlines the process regulating the grant of recognition certificates. Section 15(2) provides that "where an application under section 14 relates to a child, the Board may issue a recognition certificate if… (a) one or more of the following applies: (i) the reassignment procedure was carried out in the State; (ii) the birth of the child is registered in the State; (iii) the child is a resident of the State and has been so resident for not less than 12 months; and (b) the Board is satisfied that it is in the best interests of the child that the certificate be issued." "Child" is defined in s 3 of the 2000 Act as someone under the age of 18. A child cannot make the application herself: her guardian must do that (s 14).

However, this might well give rise to a 'catch 22' scenario in Australia, since it seems that only a person who has undergone a "reassignment procedure"[745] may apply for recognition. It is not clear that hormonal treatment alone, to prevent puberty, necessarily falls within the statutory definition of "reassignment procedure". Australian courts, it seems, have yet to authorise full surgery in respect of any person below the age of 16. Thus, the reality for most Australian and Scottish young transsexuals insofar as formal legal recognition is concerned may be no different.

It might yet be that the increasing numbers of young transsexuals surfacing in the public forum, in the UK and elsewhere, will form the main catalyst for legal discussion and reform in the UK about status capacity and rights.[746] I believe, in the coming years, we can expect to see increasing debate[747] about the issues considered in Publication 8. It is, accordingly, hoped that, in terms of making a contribution, '*Transsexuality and "kidulthood"'* remains a useful point of reference within the legal framework existing today.

[745] Gender Reassignment Act 2000 of Western Australia, s 16 provides that "A recognition certificate is conclusive evidence that the person to whom it refers – (a) has undergone a reassignment procedure; and (b) is of the sex stated in the certificate". In terms of s 3 of the Act, "reassignment procedure means a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics."

[746] See, e.g: 'Children born transsexual have the right to delay puberty', M Fox, 31 Aug 2011: http://ts-si.org/; 'Diary of a Teen Transsexual', Channel 4: http://www.channel4.com/programmes/ria-diary-of-a-teen-transsexual; 'How to deal with a transsexual daughter (by a mother who knows)', The Independent online, 19 Nov 2012: http://www.independent.co.uk/life-style/health-and-families/features/how-to-deal-with-a-transexual-teenage-daughter-by-a-mother-who-knows-8329471.html ; 'I was born this way: Teenage Transsexual reveals how Lady Gaga inspired him to have full sex change', Daily Mail online, 31 Jan 2012: http://www.dailymail.co.uk/femail/article-2094296/Cambell-Kenneford-16-reveals-Lady-Gaga-inspired-sex-change.html ; 'School forced to allow transgender pupil (16) to sit exam in a skirt', Telegraph, 23 July 2012: http://www.telegraph.co.uk/education/educationnews/9419577/School-forced-to-allow-transgender-pupil-16-to-sit-exam-in-a-skirt.html ; NBC News short, 'Transgendered childhood in America', 9 July 2012: http://insidedateline.nbcnews.com/_news/2012/07/08/12625007-transgender-children-in-america-encounter-new-crossroads-with-medicine?lite; NHS 'Gender Identity Development Service for Children': http://www.tavistockandportman.nhs.uk/node/534; 'Transsexual Child could be sent to Mental Ward', The Local (Germany Edition), 12 Feb 2012, article available at: http://www.thelocal.de/society/20120210-40647.html#.UMJ7zI7w6SI; 'Transsexual, 16, forces school to let him sit exam dressed as a girl: Head threatened with Equality Act', Daily Mail, 22 July 2012: http://www.dailymail.co.uk/news/article-2177404/Transsexual-16-forces-school-let-sit-exam-dressed-girl-Head-threatened-Equality-Act.html; 'Transgender girl faces being institutionalised by father who rejects her gender expression', 31 Jan 2012: http://www.huffingtonpost.com/2012/01/31/transgender-german-girl-f_n_1245407.html

[747] See *Transsexuality Timeline*, in thesis Appendix. Sensitivity to the evolving rights of the transsexual is an issue faced by many jurisdictions, not merely the UK, see Human Rights Watch consideration of the current rights, status and capacity issues facing transsexuals, including children, in the Netherlands: http://www.hrw.org/news/2011/09/13/netherlands-transgender-law-violates-rights.

4.6. Concluding Comments

Here, in Chapter 4, area of overlap between the two research strands of my overarching research theme has been discussed with reference to *'Transsexuality and "kidulthood."'*

Conceptual Framework: Rights, Status and Capacity - Contribution of Publication 8

Publication 8 was contextualised in Section II of the thesis Introduction with reference to a wider body of literature concerned with the evolving capacity of the child to make medical decisions and to consent to complex medical or surgical treatment. While considerable UK and international literature exists about such matters, there is relatively little academic work of a legal nature in Scotland that focuses on the child's medical capacity within a 'Family law' forum.

Insofar as themes of rights, status and capacity are concerned, Publication 8 addresses the child's evolving *status* and *capacity* to act as an agent, or decision-maker, in his or her own life. In particular, the young person's *rights* in the context of medical decisions about transsexuality are discussed.

Publication 7 is a traditional doctrinal legal research contribution. Some conclusions reached in the publication about the child's rights, status and capacity are tentative. This is because of the absence of judicial determination. It is, accordingly, observed that, in questions of capacity, Scots law does not appear to impose a requirement that the child make a 'reasonable' decision about medical treatment. The, largely untested, s 2(4) of the Age of Legal Capacity (Scotland) Act 1991 indicate that a Scottish child need only possess the capacity to 'rationalise' (not justify) his or her decision. Where discourse about the child's rights, status and capacity are concerned, however, Publication 7 is limited as a contribution: it focuses on various factors only believed to shape legal perceptions of child capacity in Scots law.

Next, in Chapter 5, the significance, originality and impact (i.e. the overall contribution) of my published work is considered.

CHAPTER 5: Overall Contribution

5.1. Aim of Thesis

This thesis is produced in support of my application for an award of PhD by Published Works in accordance with the Research Degree Regulations of Edinburgh Napier University. The aim of the thesis is to demonstrate, in terms of the University Regulations, that I have made a distinctive contribution in my published work.[748]

My ongoing research forms a systematic and coherent study, using traditional legal research methods, within closely related fields of law. My overarching research theme is concerned with critically evaluating the legal capacity, status and rights of certain groups, or categories of individual, in underdeveloped and emerging areas of law. This theme encompasses my research to date concerning: (i) the young, and (ii) disempowered adults.

5.2. Bringing Together my Contribution: Rights, Status and Capacity of Distinct Categories of Individuals in Underdeveloped and Emerging Areas of Law

In this section, I outline how, when brought together, my publications concerning children and disadvantaged adults contribute to evaluating the rights, status and capacity of each distinct group in underdeveloped and emerging areas of law.

Rights, Status and Capacity: the Young

> "More than any other part of the legal system, child and family law could tell a visitor from Mars how our society is organised. In its ideal form… [such law] is the expression of our most profound beliefs about how we live our lives… At the outset, any discussion [in] this area… asks more questions than it answers…"[749]

Any consideration of the rights, status, and capacity of individuals in Scots law asks more questions than it answers. More than 30 years ago, Freeman observed that society should give children rights so that their personal status and dignity – within the family unit and

[748] Edinburgh Napier University Research Degree Regulations, Reg D15.9.
[749] Sutherland, E.E, (2009), Child and Family Law, 2nd ed., Thomson / W Green, at p 1.

beyond – was respected.[750] In more recent decades, our appreciation of children's rights, and in particular the right to participate in matters concerning them, has grown apace.[751] Giving the child the opportunity to be heard is seen as critically important because, without this, the child may be seen as merely "the object of other people's disputes or concerns" rather than a real human being.[752] Positive legal steps intended to make the child a more visible participant in various legal processes (including Family Law and Education Law) have been taken in Scotland – and are continuing – but there is some way to go.[753] In other fields, such as Delict, little has been done to see the child as anything other than an "object".

Insofar as legal rights and recognition are concerned, children arguably remain a disadvantaged group. It is unfortunate that lawyers, generally, "lack education about Childhood Studies."[754] This is almost certainly one reason why, across the spectrum of legal processes, certain rigidly applied factors observed in Section II of the thesis Introduction (i.e. age and maturity) 'gate-keep' the child's legal participation. Within the broad, interdisciplinary conversations ongoing about children and childhood, such rigidity has long generated (often well-founded[755]) criticism of the legal profession.

My own Publications concerning the child's rights, status and capacity have an in-depth but relatively narrow focus. My contribution is doctrinal in nature: traditional 'black letter' research in which core legal data[756] is critically evaluated with reference to established legal norms. In other words, my publications are concerned with the law, as it has been variously constructed in the fields of Scots Family Law, Education Law and Delict. For the most part, they discuss the law as it is, rather than what it arguably ought to be. My publications can, more specifically, be brought together and commented on as follows:

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[750] Freeman M, (1983), *Rights and Wrongs of Children*, Pinter (London), chapter 1.
[751] James A and Prout A (eds.), (1997), *Constructing and reconstructing childhood: Contemporary issues in the Sociological Study of Childhood*, (2nd ed.), London: Falmer Press.
[752] Baroness Hale, (2006), 'Children's Participation in Family Law Decision-Making: Lessons from Abroad', *Australian Journal of Family Law*, 119 at 124.
[753] See, e.g., the current Children and Young People (Scotland) Bill, recently passed, in the Scottish Parliament.
[754] Henaghan M, (2012), 'Why judges need to know and understand Childhood Studies', chapter in Freeman M (ed), *Law and Childhood Studies*, Open University Press, p 43. Age and maturity are considered by Childhood Studies scholars to be unreliable benchmarks for child development: James A and James A, (2012), *Key Concepts in Childhood Studies*, 2nd ed, Sage Publications, p 1-6.
[755] See, e.g., Henaghan M, (2012), 'Why judges need to know and understand Childhood Studies', *ibid*; Bruch CS, (2002), 'Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases', *Child and Family Law Quarterly*, 14(4), 381.
[756] See 'Traditional Legal Research Methods' Section (III) in thesis Introduction.

◦ *Children in the Family: Private Family Law Proceedings – Publications 1, 2 and 3*

For all its 'friendly sheen',[757] Scots Family Law has long been perceived as an overwhelmingly adult process:[758] it has as its main child-participation focus the articulation and recording of views given by the child with requisite "capacity". Comprehending non-verbal expressions of views by children (and placing a value on these expressions) is something that lawyers are not trained to do. This is to be contrasted with other professionals who, instead, focus on using the child's views "as windows on their worlds and to give them insights on how the children experienced family life." [759] However, my publications have inevitably focused on the issues have to date been observed and recorded within the existing legal framework and process. Thus, reported case law and legal academic discourse is typically concerned with children who have some degree of capacity to articulate views – in other words, older children.[760]

Publications 1, 2 and 3, which critically evaluate the rights, status and capacity of children in the context of Family proceedings have contributed to the existing body of traditional legal scholarship by providing: (i) an evaluation of the participation *rights* that are incorporated in substantive Scottish legislation and which, through the Scottish processes, can be enforced; (ii) a considered analysis of judicial determinations concerning the *capacity* of various "problem" children; (iii) an exploration of the procedural law (or 'machinery') underpinning the means by which children can express a view in the Family court process; (iv) a critical evaluation of the court's case management role in Family law cases involving children, with particular regard to the *status* of the alienated/contact resistant child and the question of non-obtempering and compliance orders of court; (v) a critique of the practical, ethical and academic

[757] Tisdall and Morrison observe that the perception of Scotland as a "success story" is undermined by other trends that "sideline" the child: Tisdall, E.K.M. and Morrison, F. (2012), 'Children's Participation in Court Proceedings ..', *supra*.

[758] This is despite the fact that the welfare of the child is stated to be the court's "paramount consideration" (Children (Scotland) Act 1995, s 11(7)(a)). See Smart C, Wade A, and Neale B, (1999), 'Objects of Concern? – Children and Divorce', *Child and Family Law Quarterly*, 11(4): 365-376. See also Raitt F (2007), Hearing Children in Family Law Proceedings: Can Judges Make a Difference?, *Child and Family Law Quarterly*, 204-224, *c.f.* Kirby P, Lanyon C, Cronin K, and Sinclair R (2003), 'Building a Culture of Participation: Involving children and young people in policy, service planning, delivery and evaluation' (research report), London, Department for Education and Skills.

[759] Cashmore J and Parkinson P, 'What responsibility do courts have to hear children?', *supra*, (2009), p21.

[760] This is something that was identified in Marshall K, (1997), *Children's Rights in the Balance: The Protection Participation Debate*, Stationary Office Books – see chapters 5 and 6 for a discussion about wider, and more effective ways of involving children (including younger children) in legal, and other, systems and processes. See, e.g., *Stewart v Stewart,* 2007 SC451, concerning the "views| of a child of around 3 years old (discussed in Publications 1 and 2).

difficulties judicially observed in children's view versus children's best interests/parental rights scenarios.

◦ *Children in the Wider Community: Education Law; Delict – Publications 4, 5 and 6*

Where children's interaction with the wider community is concerned, Publication 4 is focused on Education Law, and Publications 5 and 6 are focused on the Law of Delict. As with my Family Law publications, my contribution to the research in Education Law and Delict is traditional legal doctrinal research. Education Law is observed, in particular, to be an area of law in which the certain of the child's rights have recently emerged in domestic statute. Delict is an underdeveloped field in Scots law, certainly insofar as the child and his or her rights are concerned. Accordingly, I critically analyse the child's legal status as a rights-bearer in terms of how the UNCRC is expressed and implemented in Scottish statute (Publication 4), and explore the status and capacity of the child within the Law of Delict (Publications 5 and 6).

Specifically, Publications 4, 5 and 6 form a contribution to literature on the themes of rights, status and capacity by doing the following: (i) providing a critique of the child's educational *rights* (in particular the 'right to education') as constructed in substantive Scottish primary legislation; (ii) outlining and evaluating the procedural law governing applications made to Scottish courts by, or on behalf of, children, depending on their *status* in domestic statute, in respect of educational rights; (iii) a critique of the extent to which Scots Educational Law implements key UNCRC rights; (iv) an exploration of the duties owed by the state towards children in a school environs; (v) an analysis of the appropriate standard of care owed to the child while in or around school; (vi) providing a systematic analysis of *capacity* for contributory negligence in the young; (vii) critically evaluating the resistance within the Law of Delict to consider childhood as a homogenous *status*, instead of categorising them with other disability groups.

◦ *Children and Complex Medical Treatment: Transsexuality – Publication 8*

In Publication 8, the capacity of the child to consent to complex medical treatments, such as surgery for gender-reassignment, is discussed with reference to case law and statute. The transsexual child is considered to be a distinct category of individual within an

underdeveloped area of law: legal recognition of acquired status is considered within the context of a discussion about medical treatment for transsexuality.

More specifically, Publication 8 forms a contribution to literature about rights, status and capacity in which: (i) the child's developing *status* and *capacity* to act as an autonomous decision-maker is analysed; (ii) a systematic exposition is provided of the legal capacity of children to consent to medical treatments and procedures, as framed in s 2(4) of the Age of Legal Capacity (Scotland) Act 1991; (iii) a range of possible interpretations and applications of the statutory provisions are posited; (iv) the statutory anomalies that undermine the transsexual child or young person in achieving legal recognition and *rights* in his or her acquired gender are considered. In Chapter 4, above, Publication 8 is observed as having limited value as a contribution because of the tentative nature of the conclusions reached about children's capacity and status in Scots law.

The second strand of my research theme is considered below.

Rights, Status and Capacity: Disadvantaged Adults

In Publication 7, I observed that certain transsexuals remain, notwithstanding the coming into force of the Gender Recognition Act 2004, trapped in a "no [wo]man's" land.[761] In some regards,[762] this remains the position today. Transsexuals, therefore, continue as a category of individuals for whom the law is both underdeveloped and emerging. While the notion of the transsexual as a being "in legal exile"[763] is perhaps overstated in contemporary law, the transsexual remains, in some regards, a legal refugee. This is because, even in a human rights' orientated culture:

> "Every society exerts close controls over the transfers of persons from one status to another"[764]

And, for such individuals, questions surrounding legal rights, status and capacity assume great importance.

[761] Publication 7, at p 186.
[762] See longer discussion in Chapter 3.4; 3.5.
[763] S S M Edwards, (1996/ 2001), *Sex and Gender in the Legal Process,* Blackstone Press, p 8.
[764] *Ibid*.

◦ *Underdeveloped and Emerging Area of Law: Transsexuals – Publication 7*

Publication 7 is concerned with what was termed the "relatively recent emergence of transsexuality into the public forum".[765] The Publication represents my contribution, from a Scottish doctrinal legal research perspective, to a phenomenon that has generated a diverse legal response worldwide. The development of *rights* and recognition for the transsexual in law is observed to be heavily influenced by social perceptions of the transsexual, which are, in turn, connected to the dominant medical theories concerning transsexuality. Difficulties surrounding legal recognition by the transsexual of his or her new *status* in an acquired gender are discussed and the transsexual's *capacity* to enter into legally recognised adult relationships is explored. Here it must be acknowledged that this remains an underdeveloped area of law: there has been little case law and new statutory provision for same-sex marriage will lead to amendments in the law concerning transsexuals.[766]

Although Publication 7 provides a comparative legal analysis, the publication is also intended to form a contribution that is accessible to the interdisciplinary community. Specifically, where rights, status and capacity are concerned, the publication: (i) critically evaluates the impact of medical terminology, diagnoses and research upon evolving law governing recognition of transsexuality; (ii) discusses the impact of social factors upon the law and engages in comparative judicial analysis; (iii) provides a critique of the (then) recently in force Gender Recognition Act 2004, both in England and Scotland with reference to case law in the UK and elsewhere; (iv) analyses human rights issues affecting transsexuals and predicts future issues relating to rights within the realm of treatment and self-determination; (v) provides a considered analysis of those excluded from the terms of the 2004 Act and posits whether such individuals may acquire the status they desire through other means. Accordingly, as a contribution to the literature Publication 7 seeks to comprehensively address a range of questions about rights, status and capacity concerning the transsexual.

In this Section, my publications have been brought together and their contribution to the thesis overarching conceptual themes of individual rights, status and capacity critically

[765] Publication 7, at p 162.
[766] The current Marriage and Civil Partnership bill, recently passed, Stage 3 debate: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/64983.aspx.

evaluated. Next, in Section 5.3, the overall contribution of my published work is considered.

5.3. The Overall Contribution of my Published Work

In Part 1 of this thesis, my published work has been critically appraised and set within its wider and thematic legal framework. In other words, I have provided a reflective commentary in Chapters 1, 2, 3 and 4 of my publication premises and aims, and research outcomes.

Insofar as the overall contribution is concerned, my publications have targeted particular questions of significance and complexity. Affording individuals parity of rights, status and capacity is a predominant feature of any just and compassionate society. The recent, and wide-ranging, Equality Act 2010 demonstrates that the process of ensuring adequate measures are in place to protect against unfair treatment at home, at work and in wider society is far from complete.

Accordingly, taken together as a whole, my publications form a distinctive contribution in respect of important, and pressing, issues arising in contemporary life. A more specific commentary about the contributions made by my published work is provided below:

Publications 1, 2 and 3: Overall Contribution

Publications 1, 2 and 3 (*'A child is, after all, a child'*, '*Moral actors in their own right'* and *'Re A-H (Children)'*) were all written in 2008/9 with the aim of promoting knowledge exchange that would generate "identifiable benefits"[767] to family lawyers, academics and, I hope, wider society. Each of these publications was concerned with an underdeveloped, or emerging, area of Scots, and wider-UK, law that had not yet been the subject of comprehensive analysis.[768]

[767] Edinburgh Napier University, "*Research, Knowledge Transfer and Commercialisation Strategy 2009-15*", available at: http://www.napier.ac.uk/randkt/documents/rktc_strategy.pdf.

[768] Some practitioner publications had already addressed unyielding contact disputes and parental alienation, in England, around the time of Publications 1,2 and 3 but, as explained in Chapter 1, none had done so in depth..

Since 2008/9, the broad areas that were the focus of Publications 1, 2 and 3 have been canvased, almost exclusively, in shorter publications written by the practitioner community in the UK.[769] In terms of diagnosing, classifying and contextualising wide-ranging legal difficulties affecting the young in family proceedings, I believe my publications were (and remain) significant and original contributions.[770]

Insofar as impact is concerned, in 2009, my publications were used by the *Faculty of Advocates* (the Scottish Bar) in a lecture given to the Attorneys and Judges of the Bronx Family Court in New York City.[771] Publications 1 and 2 have been cited as authorities by prominent academics, a recent citation being in March 2012.[772] These publications also feature on the reading lists of Scottish Universities teaching undergraduate and postgraduate legal studies.[773] My published work concerning the rights, status and capacity of the young in their home environs has been, and is being, critiqued and used by others in both the academic and the wider professional community.

Publications 4, 5 and 6: Overall Contribution

Publications 4, 5 and 6 (‘*The Child’s Right to Education, ‘Contributory Negligence and the Child’* and *‘Trips, Slips and Bangs: the Teacher’s Duty of Care’)* are concerned with the rights, status and capacity of the young in education and the wider community.

Insofar as impact is concerned, the text of which my chapter (*’The Child’s Right to Education’*) belongs, *Children’s Rights in Scotland,* is cited as a leading authority on its subject-matter: successive editions have, for example, been routinely referred to by the

[769] Interestingly, much more has been written about children and their general participation in family proceedings concerning them in other jurisdictions. See, e.g, Ryrstedt E, (2012), ‘Mediation Regarding Children: Is the Result Always in the Best Interests of the Child? A View from Sweden’, *Int J Law Policy Family* 26 (2): 220; Morag T, (2012), ‘Child Participation in the Family Courts, Lessons from the Israeli Pilot Project’, *Int J Law Policy Family* 26 (1): 1; Birnbaum R, (2011), “Children's Experiences with Family Justice Professionals in Ontario and Ohio”, *Int J Law Policy Family* 25 (3): 398; D Smith, (2011), ‘Fought all the way’, *Journal of the Law Society of Scotland* (‘JLSS’), 56(2), 44; Morris G,(2009), ‘Family: Children’s Voices’, 159 *NLJ* 1721; Shaw M and Bazley J, (2011), ‘Effective strategies in high conflict contact disputes’, *Fam. Law*, 41(10), 1129-1137.

[770] Articles 1 and 2, which were submitted to the REF ‘dry run’ and assessed by leading Scottish academic Kenneth McK Norrie were assessed by him (jointly) as a 3 star contributions, being “an important point of reference in [their] field.”

[771] *Faculty of Advocates*, information available on request.

[772] Freeman M (ed.), (2012), *Law and Childhood Studies: Current Legal Issues*, Vol 14, 978-0-19-965250-1, published 8 March 2012, Oxford University Press, reference in discussions about the contemporary position in Scots law at p 160.

[773] See, e.g, Edinburgh University reading list for *Family Law* (handouts), available at: http://www.law.ed.ac.uk/courses/viewcourse.aspx?ref=82.

Scottish Government and other policy-making bodies in their studies concerning children across a wide range of legal issues.[774]

In reviewing the book for the *Journal of the Law Society*, Rachael Kelsey, solicitor and Fellow of the International Academy of Collaborative Professionals, commented that 'Education Law' had been "handled in typically lucid style by… Lesley-Anne Barnes".[775] In her review for the *Edinburgh Law Review*, Dr Jane Mair of the University of Glasgow wrote: "Lesley-Anne Barnes' discussion of a child's right to education, show[s] a very complex and fragmented framework of regulation. One of the strengths of the book is that the contributors succeed in illuminating these areas even where, as in education, there is "a general dearth of case law".[776] Also, following the publication of my chapter on Education Law (and connected publications), I began research towards the *W Green* textbook, *'Children and Delict'* (anticipated publication date: 2017/8).[777] It is hoped that *'Children and Delict'* will be an authority on its subject in Scotland and that it will be the first comprehensive text in this field for UK academics and professionals.

Publications 5 and 6 have been, and are being, reviewed, assessed and used by others. Following their publication in the *Juridical Review* in 2009 and 2010*,* I have been asked more frequently by academics and practitioners worldwide to comment on issues concerning the personal liability and self-determination of the young. In 2010, I produced the materials for a *Certificated Course in Education Law* for teachers and other education professionals for the commercial training organisation, Central Law Training.[778] In late 2011, I contributed a commentary, on request, on the landmark decision of the South African Constitutional Court, *Le Roux v Dey*[779] (discussed in Chapter 2) for a colloquium held at Stellenbosch University.

[774] A Google search will bring up international and domestic citations. For citation by the Scottish Government in particular, see: http://www.scotland.gov.uk/Publications/2011/01/07142042/8 and http://www.scotland.gov.uk/Publications/2002/09/14905/6742. See also, e.g., 'Critical Perspectives on Safeguarding Children', Broadhurst K *et al*, (2009), J Wiley & Sons; 'Supporting Children's Rights and Entitlements in Higher Education'*, Scottish Further Education Unit*, 2005, Policy Report.
[775] J.L.S.S. 2010, 55(5), 53.
[776] Edin.L.R. 2011, 15(1), 153-154.
[777] A Google search will bring up international and domestic citations. For citation by the Scottish Government in particular, see: http://www.scotland.gov.uk/Publications/2011/01/07142042/8 and http://www.scotland.gov.uk/Publications/2002/09/14905/6742
[777] Link to forthcoming book: http://www.bookdepository.co.uk/Children-Delictual-Liability-Lesley-Anne-Barnes-Macfarlane/9780414018990.
[778] Materials 'Education law in Scotland', available on request.
[779] ([2011] ZACC 4).

Publication 7: Overall Contribution

Publication 7 (‘*Gender Identity and the Law’*) was concerned with the gamut of evolving transsexual rights and capacity and it was a matter upon which few legal commentators had written comprehensively within the UK or elsewhere – and this remains the case today. To date, academic and practitioner legal publications in the UK can be divided into two, broad, categories.

The first category comprises publications that have focused on transsexuality only insofar as gender reassignment impacts upon a particular field of (or issue in) law. These publications have addressed, for example, issues affecting the transsexual arising within the realms of employment, pensions, conveyancing, sport, and domestic abuse.[780] Insofar as the UK is concerned, almost all of these publications are in a short case or legislation comment format.[781] One substantial, peer-reviewed English publication recently addressed the issue of disclosure by transsexuals of their “gender history” before entering into a marriage. That article considered in some depth whether such a requirement is discriminatory: the publication was, however, solely concerned with that topic.[782]

The second category of academic and practitioner legal publications in the UK that address transsexuality is concerned with publications that, often tangentially, touch upon the transsexual within a general consideration of a range of wider issues discussed. So, for example, these publications might discuss a diverse range of LGBT issues[783] or even have as their focus topics as diverse as writing wills or football hooliganism.[784] Latterly, publications concerning same-sex marriage have considered, as an aside, issues that might also affect transsexuals. An example of this is Annex D in the documentation

[780] See: “Employment and discrimination: denial of state pension payments to male to female transsexual at 60”, editorial case comment, EHRLR, 2005, 5, 545-547; Cousins M, JSSL, (2006), “*Timbrell v SOS for Work and Pensions:* retirement pension – discrimination”, 13(4), D112-113; Kenny P, Conv, (2005), “Conveyancer’s Handbook”, Jan/Feb, 1-6 (transsexuality not principal focus of publication); Charlish P, ISLR, (2005), “Gender Recognition Act 2004: transsexuals in sport – a level playing field?”, 2 (May), 38 -42; Dempsey B, (2010), “Trans-people’s experience of domestic abuse”, SCOLAG (Oct) 208-212.

[781] The contributions listed at note 780 above are between 2 and 4 pages in length.

[782] Transgender marriage and the legal obligation to disclose gender history, Sharpe A, M.L.R. 2012, 75(1), 33-53.

[783] See, e.g., K McK Norrie, (2012), “Religion and same-sex unions: the Scottish Government's consultation on registration of civil partnerships and same-sex marriage”, Edin. L.R, 16(1), 95; Dwyer, A, (2011), "It's not like we're going to jump them": how transgressing heteronormativity shapes police interactions with LGBT young people”, Youth Justice, 11(3), 203-220; Ashcroft, R.E, (2010),“Could human rights supersede bioethics?”, HRL Rev, 10(4), 639-660.

[784] See: Atkinson H, (2010), “Will drafting pitfalls”, PCB, 1, 59-67 (transsexuality not principal focus of publication); Christie S, (2011),“The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill - strong on rhetoric but weak on substance? Legislative comment”, SLT, 25, 185-189.

supporting the recently passed Marriage and Civil Partnership (Scotland) bill which addresses the existing requirement that married transsexuals must divorce before they can be issued with a full Gender Recognition Certificate.[785]

On an international level, more has been written about the transsexual's emerging and comprehensive range of evolving rights in recent years, although many of these publications also address a broad range of LGBT issues.[786] However, I believe that Publication 7 remains a publication forming a contribution to legal literature on its subject-matter in the UK.

Publication 7 has also had cross-jurisdictional impact, and this can be seen through its citation across other legal systems.[787] Publication 7 has also been cited as an authority by various national and international organisations across a wide range of disciplines, including SCOLAG, Deepdyve, Bioscience Encyclopaedia, Linsert.Org, American research bodies and Universities worldwide.[788] (Insofar as indications of broader social impact are concerned, '*Gender Identity and the Law'* is also now – somewhat

[785] The Bill itself is published on the Scottish Government website at: http://www.scotland.gov.uk/Publications/2012/12/9433/downloads. Supporting documentation (including consultation questions on the Bill) can be found here: http://www.scotland.gov.uk/Resource/0041/00410328.pdf. In its present form, the Bill does not include provisions about transsexuals' existing marriages. Annex D to the 2012 Bill, at page 53, the Scottish Government proposes that the "requirement [that transsexuals] divorce before obtaining a full 'GRC' even where the married couple wish to stay together will be removed". The Scottish Government has undertaken to consider these proposals with the UK Government because the 2004 Act extends to the whole of the UK.

[786] See, e.g., Rosenfeld M, (2012),"Introduction: gender, sexual orientation, and equal citizenship", I.J.C.L, 10(2), 340-354; Cornides J, (2012), "Three case studies on anti-discrimination", EJIL, 23(2), 517. Issues concerning the transsexual continue to be addressed on the international forum in conjunction with other LGBT groups, see, e.g.: Gupta K, (2012), "The global decriminalization of homosexuality" (focus of article Jamaica), CL & J 2012, 176(43), 614; Barker N, (2011), "Ambiguous symbolisms: recognising customary marriage and same-sex marriage in South Africa", Int. J.L.C. 7(4), 447. See also: Fishbayn, L, (2006), "Not Quite One Gender or the Other: Marriage Law and the Containment of Gender Trouble in the United Kingdom"; Fishbayn, L, 15 Am. U. J. Gender Soc. Pol'y & L. 413, published around the time of Publication 7 by an American researcher at the Hadassah-Brandeis Institute, a Jewish sponsored University in Massachusetts, also having as its principal focus women's studies rather than law.

[787] See: Knott G, (2009), "Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict", University of Connecticut Foundation, Saint Louis University Law Journal. Available at SSRN: http://ssrn.com/abstract=1433019, discussing from the perspective of an American Research foundation the decision of "Germany's Federal Constitutional Court" in holding "the country's Transsexual Law unconstitutional."

[788] For organisations see, e.g: SCOLAG: www.scolag.org/system/files/2010_SCOLAG_208-212.pdf; Deepdyve (resource); http://www.deepdyve.com/lp/edinburgh-university-press/gender-identity-and-scottish-law-the-legal-response-to-transsexuality-la7iJEJLYG; Biosceince Encyclopaedia: http://www.bioscience.ws/encyclopedia/index.php?title=Sir_Ewan_Forbes,_11th_Baronet; Linsert.Org: http://www.linsert.org/Resources/Bibliographies/non-fiction.htm; Saint Louis University School of Law: slu.edu/Documents/law/Law%20Journal/Archives/Knott_Article.pdf.

surprisingly – cited as an authority on the life of the colourful Scottish peer and 'trans-personality', Ewan Forbes-Sempill by *Wikipedia* ![789])

Following the publication of *'Gender Identity and the Law'*, I have been contacted by various campaign groups and other organisations to contribute to seminars and conferences on multi-disciplinary legal issues concerning transsexuality.[790] This has been encouraging from a knowledge exchange perspective.

Publication 8: Overall Contribution

In assessing overall impact, and lasting contribution, the strengths and weakness of *'Transsexuality and "kidulthood"'* are considered.

I think that the greatest weakness of Publication 8 is that it presents, as a static research outcome, conclusions that are representative of a step in an ongoing research process of absorbing the legalities surrounding transsexuality. However, the publication content was topical and it clearly outlined key areas of the law and provided some detailed analysis for Scottish practitioners. Further, some of the issues raised, and observations made, in the publication about statute and case law had not been addressed before (or since) in a Scottish legal journal and so have some enduring use.

Perhaps the greatest strength of *'Transsexuality and "kidulthood"'* is that it helps to illustrate the beginnings of story of my research journey and the inception of my overarching research theme. The law concerning young transsexuals is certainly something that I would like to revisit, in a more substantial publication, at some point in the near future.

[789] http://en.wikipedia.org/wiki/Sir_Ewan_Forbes,_11th_Baronet (English pages) and http://fr.wikipedia.org/wiki/Ewan_Forbes (German pages). The reference is also used on the Swiss pages: http://www.swisscorner.com/wiki.php?title=Ewan_Forbes,_11th_Baronet, and on Spoken Web: http://www.spoken-web.com/read_article_wiki.cgi?bbeyal=bbeyal&key=Sir_Ewan_Forbes,_11th_Baronet.

[790] Email communications etc can be produced to verify this: for example, on 16 May 2012, the Scottish Transgender Alliance invited me to speak at an event.

5.4. Concluding comments: Limitations of my Published Work and Future Research

My research and research outcomes are supported by the review and analysis of primary and secondary sources of law, legal policy documents and other materials arising from the practice of law. This is the conventional legal research methods approach. As with all research, however, certain limitations can be observed in my published work. Some of these have been discussed in my thesis Introduction under the heading "(III) My Research Method: traditional legal research (benefits and disadvantages)".

Further, reflections have already been made in this thesis about research limitations in respect of individual publications. For example, it was observed in Chapters 1 and 2 that outstanding questions remain in respect of various aspects of Child Law, Education Law and Delict concerning the young: this is because there is insufficient material available in contemporary law and practice to enable these questions to be fully addressed. In Chapter 3, the difficulties involved in considering, in depth, broad research questions, wide-ranging materials and complex terminology spanning a range of disciplines was acknowledged. In Chapter 4, in my *Lessons Learned* section, I observed weaknesses in my own general research approach, as a young academic, to the field(s) of law researched and indicated how greater research experience would have produced different research outcomes. Notwithstanding these limitations, I believe my published work as a whole forms a valid contribution to legal scholarship and the practice of law.

In respect of future research, I intend to revisit each area of law addressed by the publications considered in due course.

Insofar as contemporary issues concerning the rights of the young are concerned, I will consider in more depth the research outcomes of Publication 5 (*'Trips, Slips and Bangs: the Teacher's Duty of Care')* with the intention of considering the educator standard(s) of care believed applicable in contemporary law to further and higher education, as well as to school education. I also intend to develop my research into the rights (and voice) of disabled children, young people and adults both in private life and as they progress from a school education to higher or further education and, thereafter, into the workplace.

Gender and sexuality are ongoing themes of research interest. In writing this reflective commentary, I identified a number of areas (including, e.g., treatment and self-

determination) in which my critique of Scots, and wider UK, law remains the only comprehensive legal commentary available. I also discovered some recent developments that merit further consideration (for example, the rights of the child transsexual and transsexuality and gendered issues arising in the workplace). I had planned to revisit this broad field in a few years' time to provide a comprehensive update, but 2014 may be an ideal time to begin work on a new, reflective publication targeting topical issues. In terms of personal impact, this critical reflection of my published work has therefore been a particularly beneficial exercise.

APPENDIX to Part 1

TRANSSEXUALITY TIMELINE: Developments in Medicine, Society and Law

(Strand 2 *Disempowered Adults*: Contextualising Publications 7 & 8)

TRANSSEXUALITY TIMELINE:
Developments in Medicine, Society and Law

1909: **Magnus Hirschfeld,** the German sexologist, researches and publishes on the transsexual condition

1913: ***Horton v Mead*** (UK):
Man convicted of "solicitation" in public lavatory, court refers to **"this class of men"** in finding guilt

1945: ***Re Leber*** (Swiss decision):
Newly acquired **"gender"** of transsexual recognised

1949: **Mainstream medical** community in Europe/America begin to adopt transsexuality as a "syndrome" deserving research, compassion and "cure"

1957: ***X, Petitioner*** (UK, Scotland):
Transsexual fails to prove that she should have her birth certificate altered to reflect her acquired sex/gender (**medical sex** determination)

1967: ***Forbes-Sempill*** case (Court of Session)
Scottish court "corrects" birth certificate of likely transsexual, finding that he is, instead, a "hermaphrodite" (**medical sex** determination)

1971: ***Corbett v Corbett*** (UK):
Emergence of the public transsexual in UK civil law: **medical determination of "true sex"** means no legal recognition of status since the transsexual is only a "pastiche" of femininity

1976: ***MT v JT*** (New Jersey):
Recognition of transsexual's status "in no way **disserving any social interest, principle of public order or precept of morality"**

1991: ***Cossey v UK*** (ECHR):
Transsexual unsuccessful in attempt to find the UK in breach of her human rights but ECHR refers to **"ever-growing awareness of the essential importance of everyone's identity"**

1990s: Medical researchers publish increasingly about a possible **"sex difference" in the transsexual human** brain…

1995: ***Attorney-General v Otahuhu Family Court*** (New Zealand):
"Relief and recognition" provided by court to transsexuals who wish to marry

1999: ***R v North West Lancashire HA Ex parte A, D and G*** (UK):
Blanket policy to refuse to fund gender reassignment unlawful

2002: ***Goodwin v UK*** (ECHR):
UK failure to recognise "acquired status" of transsexual is, in found **contemporary law and society**, to breach of Article 8 and 12

2002/3: ***Bellinger v Bellinger*** (UK):
UK failure to recognise transsexual's "right to marry" incompatible with Convention Rights

2004: ***Re Alex*** (Family Court, Australia):
Authority granted for 13 year old transsexual to begin gender assignment hormone treatment

2004: **Gender Recognition Act 2004** passed (in force 2005):
Gender Recognition Certificate = recognition in acquired status for "all purposes"

2006/7: **Publications 7 and 8 produced**

2008: ***Re Brodie*** (Family Court, Austria):
Hormonal treatment to suppress puberty authorised for 12 year old transsexual

2009: **Sexual Offences (Scotland) Act 2009** passed (key sections in force):
"surgically constructed" penis / vagina constitute genitalia in law

2010: **Equality Act 2010** passed and (mostly) comes into force:
Gender reassignment is a "**protected characteristic**"

2010: **18 entries on the Gender Recognition Register** in Scotland

2011: ***Re: Jamie*** (Family Court, Australia):
10 year, 10 months old transsexual too young to make significant decisions about puberty and beyond

2011: ***R (AC) v Berkshire West Primary Care Trust*** (UK):
Gender reassignment treatments can be categorized as "low priority" as long as individual cases considered

2011: UK Government launches **"first ever transgender action plan to advance gender equality"**

2011: **"Transsexual differences caught on brain scan"** by medical researchers

2011: **24 entries in the Gender Recognition Register** in Scotland

2012: **Marriage and Civil Partnership (Scotland) Bill** (December) published (bill passed on **4 Feb 2014**)

2012: Scottish Government evaluating data relating to **aggravated crimes** committed against transsexuals: it is hoped policy steps will follow

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VOLUME II

Part 2:

Body of Evidence in Support of Thesis

List of Publications Included

List of Evidence in Support of Thesis

1. '"A child is, after all, a child": ascertaining the ability of children to express views in family proceedings', *Scots Law Times*, 2008, 18, 121-127

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