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Report on the Legal Capacity and Responsibility of Minors and Pupils

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Scottish Law Commission

Item 2 of the First Programme and Items 12 and 14 of the Second Programme

LEGAL CAPACITY AND RESPONSIBILITY OF MINORS AND PUPILS

To: The Right Honourable The Lord Cameron of Lochbroom, QC,
Her Majesty's Advocate

We have the honour to submit our Report on the Legal Capacity and Responsibility of Minors and Pupils.

(*Signed*) PETER MAXWELL, *Chairman*
E M CLIVE
PHILIP N LOVE
JOHN MURRAY
GORDON NICHOLSON

KENNETH F BARCLAY, *Secretary*
1 October 1987

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Part I Introduction

1.1 In this Report[1] we make recommendations for reform of the law of Scotland relating to the legal capacity of persons under the age of 18. Our recommendations are confined to issues arising in the field of private law and are concerned primarily with the capacity of young people to enter contracts, to make a will, to take part as litigants in court proceedings and to give a valid consent to medical treatment. We also review separately the law governing the liability of children in delict.

Consultation and research

1.2 The Report follows on a consultative memorandum on Legal Capacity and Responsibility of Minors and Pupils which we published in June 1985.[2] This was a lengthy document in which we reviewed the present law, considered the law of other countries and set out options for reform. Some of the issues raised in the Memorandum were of a technical nature which required detailed analysis. In view of the importance of the subject matter, however, we were keen to attract comments on a wide basis. We therefore published along with the Memorandum a short pamphlet which explained the issues as simply as possible and which contained a questionnaire. The pamphlet was distributed to members of the public by making it available in public libraries and citizens' advice bureaux as well as by sending it direct to interested groups and enquirers. To encourage further discussion of our proposals, we also held a series of meetings in Edinburgh, Aberdeen and Glasgow at which, following short contributions from a panel of speakers, members of the public were invited to express their views. We are grateful to all those who responded to the Memorandum or pamphlet and to those who took part in the public meetings.[3] Their comments have been of great assistance to us.

1.3 We have also been greatly assisted by research carried out for us by System Three Scotland and by the Central Research Unit of the Scottish Office. The survey undertaken by System Three Scotland was of adult opinion on our provisional proposals for reform.[4] Separate surveys of pupils and school leavers carried out by the Central Research Unit sought information about young people's involvement in common types of legal transaction as well as their views on our proposals.[5]

Wider context of Report

1.4 This Report is presented as the first stage of a major project on the law of children.[6] In due course we will be going on to consider the related topics of custody and guardianship of children and, more generally, the scope of parental rights and

1. The Report is published as part of our separate programmes on obligations, legal capacity of minors and pupils and family law: First Programme of Law Reform (Scot. Law Com. No. 1, 1965) Item 2 and Second Programme of Law Reform (Scot. Law Com. No. 8, 1968) Items 12 and 14.
2. Consultative Memorandum No. 65, referred to in the Report as the "Memorandum".
3. A list of those who submitted written comments and those who contributed from the panel at each of our public meetings is contained in Appendix B.
4. System Three Scotland, "Research on the Legal Capacity of Minors and Pupils" April 1985.
5. Scottish Office Central Research Unit "The Legal Capacity of Minors and Pupils-Experiences and Attitudes to Change" May 1987. This Report also incorporates the main findings of the System Three survey.
6. See our Nineteenth Annual Report (Scot. Law Com. No. 89, 1984) para. 3.20.

duties. Clearly there are implications for the law of guardianship in any recommendations we might make concerning the legal capacity of young people. The recommendations in this Report are, nevertheless, self-contained and may be implemented on their own.

Arrangement of Report

1.5 The rest of the Report is arranged as follows. In Part II we summarise the present law on the legal capacity of minors and pupils and assess the need for reform. Parts III and IV set out our recommendations in the light of consultation. In Part V we discuss the liability of children, and of their parents, in delict. Part VI is a summary of our recommendations and Appendix A contains a draft Bill with explanatory notes.

Part II The present law and the need for reform

Summary of the present law[1]

General principles

2.1 Broadly speaking, a pupil (that is a girl under 12 or a boy under 14) has no legal capacity to act on his own behalf.[2] Any contracts purportedly entered into by him are void and all legal acts must be performed on his behalf by his tutor (that is his guardian, usually a parent). Some authorities qualify this rule to the effect that, although a contract entered into by a pupil is void against him, it is valid and enforceable by the pupil if it is to his benefit.[3] The general rule of incapacity is subject to two further qualifications. One is that if money is lent to a pupil and expended on his estate, or if money is otherwise spent for his benefit, he will be liable in so far as he has thereby been enriched.[4] The other is that, both at common law and under statute, a pupil is probably obliged to pay for necessaries supplied to him.[5]

2.2 The capacity of a minor (a girl aged 12-18 or a boy aged 14-18) varies depending on whether or not he has a guardian, known in this case as a curator. If a minor has no curators, for example, because both parents are dead, or if he is married or living an independent life,[6] he has the same legal capacity as an adult. This is subject to the qualification that any transaction which is prejudicial to him may be set aside by a court before he reaches the age of 22.[7] This procedure is known as reduction on the ground of minority and lesion. Where a minor does have a curator, most transactions require his curator's consent. However, the fact that his curator has consented does not prevent a prejudicial contract being set aside by a court.[8]

2.3 To justify reduction of a transaction, the minor must have suffered "enorm lesion" or considerable prejudice which proceeds from "the weakness of judgement or levity of disposition incident to youth".[9] In the words of Lord President Dunedin, "the consideration which the minor got must be immoderately disproportionate to what might have been got".[10] Prejudice is judged as at the date of the transaction and regard must be had to the whole circumstances, not only to the financial consideration involved. In certain kinds of transaction, lesion is presumed. The presumption is conclusive in the case of a donation, cautionary obligation or gratuitous discharge.[11] It may be rebutted in a sale of property by, or in payment of a debt to, a minor only by proof that the sum paid to the minor has been profitably applied or still forms part of his estate.[12] It is not enough to show that the terms of the transaction were reasonably fair. Once a transaction has been set aside, the minor must restore or repay anything he obtained under it unless the property or money received is no

1. For a fuller account with supporting references, see Part II of the Memorandum.
2. Stair, I.6.35 and I.10.13; *Whitehall* v. *Whitehall* 1958 S.C. 252 per Lord Mackintosh at p.259.
3. Erskine, I.7.33; Fraser, *Parent and Child* (3rd edn, 1906) (cited as "Fraser") pp.205-6.
4. *Scott's Trustee* v. Scott (1887) 14 R. 1043.
5. Gloag on *Contract* (2nd edn., 1929) (cited as "Gloag") p.78, footnote 6; Sale of Goods Act 1979, s.3. See further para. 2.5 below.
6. In legal terminology, "forisfamiliated": Erskine, I.6.53; *McFeetridge* v. *Stewarts & Lloyds Ltd.* 1913 S.C. 773.
7. *Hill* v. *City of Glasgow Bank* (1879) 7 R.68 per L.P. Inglis at pp.74-5.
8. Erskine, I.7.34; *Harkness* v. *Graham* (1833) 11 S. 760.
9. *Robertson* v. *Henderson & Sons Ltd* (1905) 7 F. 776 per L.P. Dunedin at p.785.
10. *Ibid.*
11. Stair, I.6.44.
12. *Harkness* v. *Graham, supra.*

longer in his possession.[1] If, for example, the price which the minor received under a contract of sale has been squandered, he is under no obligation to repay the purchaser even although the latter is obliged to return the goods purchased.

2.4 Reduction on the ground of minority and lesion is excluded if the contract has been ratified by the minor after his eighteenth birthday.[2] Ratification may be express or by any free and deliberate act inferring approval of the contract.[3] However, under section 5 of the Betting and Loans (Infants) Act 1892, where money has been lent to a minor or pupil, the lender cannot found on a purported ratification by the young person after majority in order to enforce any obligation of repayment.[4] Reduction is also excluded if the minor has fraudulently misrepresented his age, thereby inducing the other party to transact with him.[5]

2.5 There are a number of acts having legal effect which a minor is entitled to perform without the consent of his curator. He is, for instance, entitled to marry at 16[6] and a minor of any age may make a will.[7] A minor is bound by contracts entered into in the course of his profession, trade or business[8] and by contracts of apprenticeship or employment.[9] He is also bound to pay for necessaries supplied to him. Liability exists both at common law and under statute. At common law, a minor's obligation is to pay for goods or services furnished to him which are "suitable to his circumstances".[10] What constitutes necessaries has not been precisely defined in Scotland although, following comparable English authorities, the term is thought not to be restricted to the basic necessities of life but to include articles fit to maintain the particular person in the state, station and degree in life in which he is.[11] By section 3 of the Sale of Goods Act 1979, necessaries are defined as "goods suitable to the condition in life of such minor ... and to his actual requirements at the time of the sale and delivery." Liability under this provision is to pay a reasonable price for the goods delivered. Unlike the common law rule[12] which remains relevant for the supply of necessary services, the statutory provision requires the seller to establish that the minor was not already supplied with similar goods.

Consent to medical treatment

2.6 Before considering the present law on the capacity of minors and pupils to give legally effective consent to medical treatment, it is useful to outline what we understand to be present medical practice.

2.7 In January 1979, the Scottish Home and Health Department issued a circular for inclusion in hospital admission booklets[13] which clearly takes the view that the age of consent to medical treatment is 16. It indicates that where it is proposed to operate on a person under 16, the consent of his or her parents or guardians will be requested. This guidance was amended in September 1979 to include a statement to the effect that consent of parents or guardians may also be sought as a matter of accepted practice in the case of patients aged between 16 and 18.

2.8 Thus, as a general rule, the medical profession requires the consent of the parent or guardian of a child under 16.[14] In an emergency situation in which the parent or guardian is unavailable, doctors will in all probability proceed without consent. We

1. Erskine, I.7.41; *Houston* v. *Maxwell* (1631) Mor. 8986.
2. Stair, I.6.44.
3. *Forrest* v. *Campbell* (1853) 16 D. 16.
4. It is not clear whether the section applies only to loans which are actually void, such as a loan to a minor without his curator's consent, or whether it also applies to loans which are merely voidable on proof of lesion.
5. Erskine, 1.7.36; Fraser, p.527.
6. Age of Marriage Act 1929; Fraser, p.489.
7. Succession (Scotland) Act 1964, s.28; *Yorkston* v. *Burn* (1697) Mor. 8950.
8. Erskine, I.7.38.
9. *Stevenson* v. *Adair* (1870) 10 M. 919. Such contracts are, however, liable to reduction on proof of lesion.
10. Fraser, p.525.
11. *Peters* v. *Fleming* (1840) 6 M. & W. 42 at pp.46-7.
12. *Fontaine* v. *Foster* (1808) Hume 409; *Scoffier* v. *Read* (1783) Mor. 8936.
13. Circular SHHD (DS(79)2).
14. Although it was clear from our consultation that at least some practitioners were aware of the relevance of the age of minority in this field: see para. 3.64 below.

understand that the advice given to Health Authorities by the Scottish Health Service Central Legal Office is that, in an emergency, the doctor may proceed to treat the child if he has obtained the agreement of a colleague that immediate treatment is necessary to save life or prevent unnecessary suffering.[1] A further circular issued by the Scottish Home and Health Department in 1975[2] deals with the situation where parents refuse to consent to a blood transfusion or an operation for their child. In these circumstances, the hospital is regarded as justified in providing such treatment if the doctor obtains the opinion of a colleague that the child's life is in danger if the treatment is withheld and an acknowledgment from the parents that the danger has been explained to them and that their consent is still withheld.

2.9 Against this background, it must be admitted that the present law on this subject is not entirely clear. The view which we put forward in the Memorandum,[3] and to which we adhere, is that there is no legal foundation for the widespread belief that 16 is the age of consent to medical treatment in Scotland. In the absence of any statutory provision, the matter must be governed by the common law and at common law the only relevant age for matters relating to the person of the child is the age of minority-12 for a girl and 14 for a boy.[4] It would appear therefore that the present law is that a girl of 12 and a boy of 14 can give a legally effective consent to medical treatment.[5] It is, however, by no means certain that a child below these ages could not give consent, at least to certain types of medical treatment, which would provide an effective defence to a civil claim for damages for assault. Much would depend on the age and understanding of the child and on the nature of the treatment. The consent of an older pupil child to a simple treatment may well be legally effective.

Capacity in litigation

2.10 The principles outlined above concerning the legal capacity of young people in contractual matters apply equally to determine their capacity to take part in court proceedings. The general rule is that a tutor will act for a pupil and a curator will consent to a minor's acts.[6] Where a pupil is a litigant but is not represented by his tutor or where a minor is a litigant but is not assisted by a curator, the court will normally appoint a curator ad litem to represent the pupil or assist the minor. Indeed the court has a wide discretion to appoint a curator ad litem in any circumstances, even where the pupil or minor is not a party to the proceedings, if it considers it appropriate to safeguard the child's interests.[7] If decree goes against a minor without curators who has acted without a curator ad litem being appointed, the minor may seek to have the decree set aside on the ground of minority and lesion.[8] The same applies where he has acted with his curator's consent or where a curator ad litem has been appointed, but only if the granting of the decree has followed from some obvious omission, such as failure to state a full and proper defence.[9]

2.11 The special status of minors is recognised, although to varying degrees, in two particular types of proceedings. Firstly, while both minors and pupils may be the subject of adoption proceedings, an adoption order may be made in respect of a minor only if he or she gives formal consent to the adoption.[10] A pupil has no right to withhold consent but, in deciding whether to make an adoption order, the court must give due consideration to the wishes of the pupil (or indeed of the minor) having regard to his age and understanding.[11] Secondly, in petitions for approval of an arrangement for variation of trust purposes, minors are deemed incapable of assenting to the

1. See also BMA, *The Handbook of Medical Ethics* (1984) para. 2.17.
2. NHS Circular 1975 (GEN)81.
3. At para. 2.51.
4. But see Thomson, "The Gillick Case and Parental Rights in Scots Law: Another View" 1985 S.L.T. 223 where it is doubted whether modern Scots law fully recognises a minor's autonomy vis-a-vis his person. On this basis it can be argued that 18 is the age of consent to medical treatment in Scotland.
5. Questions concerning the requirement of a parent or guardian's consent to medical treatment on a child will be considered in a future consultative memorandum on guardianship.
6. *Drummond's Trustees* v. *Peel's Trustees* 1929 S.C. 484 per L.P. Clyde at p.493; *Cunningham* v. *Smith* (1880) 7 R. 424 per L.P. Inglis at p.425.
7. *Kirk* v. *Scottish Gas Board* 1968 S.C. 328 per Lord Guthrie at p.331.
8. Maclaren, *Court of Session Practice* (1916) pp.175-6.
9. *Op. cit.*, p.174. This also applies in the case of proceedings defended on behalf of a pupil by his tutor or curator ad litem: Fraser, p.512.
10. Adoption (Scotland) Act 1978, s.12(8).
11. 1978 Act, s.6.

arrangement and the court must give approval on their behalf.[1] Before doing so, however, the court is directed to "take such account as it thinks appropriate of [the minor's] attitude to the arrangement."[2]

Assessment of the present law

2.12 In our evaluation of the present law in the Memorandum,[3] we identified three objectives which we thought the law should try to fulfil. These were:

(*a*) that the law should protect young people from the consequences of their immaturity without restricting unnecessarily their freedom of action;

(*b*) that the law should not cause unnecessary prejudice to adults who enter into transactions with young people; and

(*c*) that the law should be clear and coherent and should accord with modern social and economic conditions.

The present law seems to us to be open to criticism on all three counts.

2.13 As regards the first objective, the law does not go far enough to protect all young people equally while at the same time it is overprotective in some circumstances. For example, it is difficult to see why a minor should be regarded as having full capacity (subject only to a right to challenge prejudicial transactions) simply because the death of his parents has left him without curators. Arguably, the law concedes too great a capacity on 12 or 14 year olds in this situation. Alternatively, it may be argued that if the sole protection of being able to seek reduction of prejudicial acts is considered adequate for a minor without curators, or for one who is married or leading an independent life, the same degree of protection should be adequate for all minors. The level of consumer protection available under the general law might, in fact, reduce the need for special protection for youngsters. It is also anomalous that a minor with curators, but acting without their consent, may be bound in trading contracts although he still needs his curators' consent to enter transactions of a generally common character, other than those coming within the definition of necessaries. The exception for trading transactions, which is of little relevance to the average 15 or 16 year old, seems to extend minors' capacity unnecessarily while the general rule can, strictly speaking, prevent them making the smallest cash purchase alone.

2.14 As for the objective of ensuring fairness to adults, we have no doubt that, in order to give a young person protection on account of his lack of experience and immaturity, the adult dealing with him must be prepared to accept a certain degree of prejudice. In our view, however, the prejudice which he suffers under the present law is more than is reasonable. In order to safeguard his position, the adult must ascertain the young person's age and whether he is married or living independently of his parents. Having established that, he must be able to appreciate the legal differences in terms of capacity between a pupil and a minor. He must ascertain whether the child has a guardian and, if so, he must ensure that the guardian participates in the transaction in the correct manner. The participation of a guardian may well be a reasonable requirement in the case of major transactions such as hire purchase agreements or the sale of heritable property, but it becomes impracticable in the everyday activities which young people are more likely to engage in, such as small cash purchases, payment for bus fares or entertainment and the like.

2.15 One important form of protection for young people under the existing law is the right to seek reduction of prejudicial transactions. On reduction, the child must restore goods or money received under the contract so far as they are still in his possession. Where the adult contracting party has taken advantage of the child's

1. Trusts (Scotland) Act 1961, s.1(1)(*a*) and (2).
2. 1961 Act, s.1(3).
3. Contained in Part III.

immaturity and the contract is clearly to the child's prejudice, it is perhaps reasonable that, if the child has squandered the benefit received, his obligation of restitution should not put his whole assets at risk. However, this principle applies in some kinds of transaction which are not actually prejudicial. Because of the strong presumption of lesion which arises in transactions involving payment of money to a child, the child may still be able to have set aside a contract the terms of which were perfectly fair. Even in that situation, he may escape his obligation of restitution if the money received no longer forms part of his estate. This particular aspect of the law on legal capacity cannot be said to operate fairly so far as the adult contracting party is concerned.

2.16 Some of the specific criticisms which we have made of the present law under the heading of either of the first two objectives reappear with equal force in the context of the third objective, which is that the law should be clear and coherent and should accord with modern social and economic conditions. It is readily apparent that the law is complex. The validity of a transaction depends on a bewildering number of factors, including: the age of the child; the existence or not of a guardian; whether the child is married or leading an independent life; the participation of a guardian, if any; and where the guardian does not participate, the degree of benefit to the child from the transaction.

2.17 The law is also bedevilled with uncertainty. In particular, it is unclear whether a transaction entered into by a pupil acting alone or by a minor acting without his curator's consent is completely void or enforceable by, but not against, the pupil or minor. It is not clear whether a young person can seek reduction of prejudicial transactions before he reaches the age of 18 or whether he has to wait until he attains adult status. There is also uncertainty in the extent to which minors and pupils are assimilated for the purpose of determining their liability for the supply of necessaries.

2.18 A further criticism of the present law is that it is unfair and anomalous. It is discriminatory in its treatment of the sexes, applying different ages of minority for boys and girls. It is lacking in coherent principle in the varying degree of protection afforded to minors with or without curators. It is inconsistent in its provision for the supply of necessary goods and services, the former being dealt with by statute, the latter being governed by slightly different common law rules.

2.19 One final criticism which may be directed at the present law is that it is out of touch with contemporary social and economic conditions. The ages of 12 and 14 have little relevance today. Children in this age group are unlikely to be in full-time employment or in business and therefore do not need the special capacity conferred on them in these areas. On the other hand, the law seems to ignore the fact that young people are economically active in more everyday matters, simply by having pocket money to spend[1] or, in the case of 16 and 17 year olds, by receiving wages or a training allowance or education grant.[2] In this respect, the present law may be too restrictive towards the upper limit of the minority age band.

The need for reform

2.20 The provisional view which we expressed in the Memorandum was that, in the light of these criticisms, the law on the legal capacity of minors and pupils was

1. The 15th annual survey of children's incomes conducted for Wall's by Gallup Polls (reported in The Guardian, 18 March 1987) reveals that Scottish children aged between 5 and 16 receive an average weekly pocket money of £1.44. The combined results for Scotland and England show that 5-7 year olds typically get 42p a week; 8-10 year olds 76p; 11-13 year olds £1.43; and 14-16 year olds £2.12. According to the CRU survey of pupils, more than half of those aged 14-18 have £5 or less spending money per week, with a further third between £6 and £10. A very small minority have more than £20 to spend per week. (These figures include money earned in part-time or holiday jobs). See CRU Report, para. 3.8 and Figure 3.1.
2. Over half the leavers in the CRU survey either went into full-time employment or joined a Youth Training Scheme. A further 28% undertook full or part-time education: CRU Report, para. 3.15 and Table 3.10.

in need of major reform. The existing law seemed to us to be ill-equipped to meet the needs of the young person and adult alike. One factor in particular which weighed with us in reaching this conclusion was the law's inherent complexity. If an adult were aware of the rules with which he had to contend in order to safeguard his position, he might be deterred from transacting with young people altogether. On the other hand, the fact that the law seemed to give rise to little difficulty in practice might simply mean that it was little understood by the people whom it affected. We suggested that if the law were to be simplified, knowledge of the relevant rules might become more widespread and the protection offered by them more effective.

2.21 The majority of those who responded both to the Memorandum and to the pamphlet agreed that some measure of reform was desirable. Views differed as to how far-reaching that reform should be. Most commentators favoured the sweeping approach that we ourselves had taken, on the ground that the present law was unduly complex and was ignored in practice. A few considered that, as the law was largely unproblematic, clarification of some of the existing rules was all that was required. A small minority thought that there should be no change at all either because the present law was not unworkable or because they considered that it reflected the gradual development of young people towards maturity. Some of those against change were concerned only with the question of consent to medical treatment. These arguments in themselves do not seem to justify leaving the law as it stands. In our view, there are other more coherent ways in which the law can endeavour to recognise the gradual maturing process towards adulthood.

2.22 Although the surveys which we commissioned did not seek views specifically on the need for reform, the results indicate some dissatisfaction with the existing law. Most respondents[1] considered that 16 was too young for full legal capacity. They would presumably also consider it inappropriate that in certain circumstances under the present law a child as young as 12 or 14 has substantial capacity to act alone.

2.23 The weight of consultation is clearly in favour of reform involving more than mere "tinkering" with the existing rules. We ourselves believe that this is the right approach. It has the added advantage of laying the foundation for extensive reform and simplification of the law of guardianship which is arguably the more important part of this exercise. Accordingly, in the next Part of the Report, we make recommendations which will sweep away most of the existing law, replacing it with a system of rules which we hope will be simpler to operate and better suited to the lifestyles which young people currently enjoy.

1. e.g. 76% of adults, 60% of leavers and 39% of pupils in relation to contracts of sale, hire purchase or bank loan agreements: CRU Report, Tables 6.1 and 6.2.

Part III Recommendations for reform

Our provisional proposals

3.1 In the Memorandum we put forward two options for reform, expressing a preference for the more radical of the two. Both options were, however, examined very fully and a series of proposals made on each one. We also made two suggestions regarding the general approach to reform which were fundamental to our provisional proposals and which remain fundamental to the scheme which we will be going on to recommend.

3.2 The first of these preliminary suggestions was that reform should be undertaken on the basis of a general principle of capacity or incapacity for private law purposes subject to a limited range of exceptions or qualifications.[1] There was broad agreement among consultees that this was the correct approach in order to achieve coherent reform in this area of the law. The recommendations which follow are made on this basis. Some criticism was, however, made of the fact that our proposals were limited to capacity in private law matters. A number of consultees and others who attended our public meetings thought that the opportunity should be taken to rationalise the age limits applying in relation to criminal responsibility, drinking, driving and so on, so as to remove anomalies in the sphere of public as well as private law. Similar views were expressed by young people themselves.[2] While we have considerable sympathy with this viewpoint, we remain of the opinion expressed in the Memorandum[3] that these matters lie outwith the scope of our current exercise; that age limits in the public law sphere raise different policy issues from those with which we are concerned; and that many of the age limits could not readily be changed for Scotland alone because they are laid down in statutes applying throughout the United Kingdom. Moreover, rationalisation of all such age limits goes beyond what we consulted on. Some review of statutory age limits within the United Kingdom may well be desirable but this is not something that we could properly undertake on our own.

3.3 The second suggestion was that, whatever scheme for reform was finally adopted, there should be the same age or ages of legal capacity for boys and girls.[4] Most commentators agreed on the ground that the current distinction between the ages of minority for boys and girls was unjustified and did not reflect modern social attitudes. A few argued, mainly in the context of consent to medical treatment, that the different ages of minority for boys and girls under the present law reflected their different rates of biological and psychological maturity and should therefore be retained. It is doubtful, however, whether this is sufficient justification for perpetuating this element of sex discrimination in an area of law which is primarily concerned with contractual capacity. The distinction is not made generally in the law so far as age requirements are concerned. We conclude, along with the majority of respondents, that it would be anomalous to continue it here.

3.4 Following on these broad propositions concerning the approach to reform, our preferred option was to have a single age of minority up to 16. Young people below 16 would, subject to a few exceptions, have no legal capacity. All transactions would have to be undertaken on their behalf by a parent or guardian. Those above 16 would

1. See para. 5.5 of the Memorandum. For a discussion of what is meant by legal capacity in this context see paras. 3.22 to 3.25 below.
2. CRU Report, para. 8.11.
3. At para. 5.143.
4. See para. 5.6 of the Memorandum.

have full legal capacity as if they were adult, with no special right to have prejudicial transactions set aside. The exceptions to the general rule would entitle a young person under 16 to enter into transactions of a kind commonly entered into by a child of the transacting child's age; would enable a young person under 16 to give a legally effective consent to medical treatment in certain circumstances; and would possibly entitle an under 16 year old to make a will.

3.5 We favoured this approach firstly on the grounds of clarity and simplicity. Secondly, we thought that the age of 16 represented a realistic dividing line between those who needed special protection on account of their immaturity and those who did not. This option would offer additional protection for those aged 12-16 and 14-16 to whom the present law gave too great a capacity in some cases and would increase the freedom of 16 and 17 year olds to engage in a wide range of transactions which seemed appropriate to that age group. We suggested that the law should not ignore the fact that many 16 and 17 year olds were economically active and some could be responsible for the major decisions affecting their lives. In our view, 16 was a more significant age than 12, 14 or 18 for the purposes of legal capacity in civil law matters, being the age when a young person can leave school, get married, take full-time employment, or claim supplementary benefit. Another consideration which influenced us was the impact of consumer protection under the general law. Our provisional view was that 16-18 year olds were not in any more need of protection than any other consumer and that existing consumer legislation was the most appropriate means to safeguard their interests.

3.6 There was a mixed response to this option on consultation. Of those who commented on the Memorandum or pamphlet, the majority were in favour, including bodies representing the legal and medical professions, some academic commentators, commercial organisations, those involved in community education and members of the public. As well as supporting our own arguments in favour of this approach, some made the additional comments that it would be unfair to restrict the capacity of those 16-18 year olds who were commercially competent; and that the exceptions to the proposed rule of incapacity would leave minors under 16 in at least as favourable a position as they were at present.

3.7 Although opponents of our preferred option were much fewer in number, they represented an equally wide cross-section of interests, ranging from legal and medical bodies and academic commentators to those involved in voluntary youth organisations or advice centres. Their opposition was for quite contradictory reasons. One line of argument, taken principally by the Scottish Legal Action Group, was that the scheme would deprive young people in the 12/14 to 16 age group of their existing capacity which was not shown to have caused them any serious prejudice or hardship. Particular concern was expressed about the effect any removal of capacity would have on the provision of accommodation for the homeless in that age group. The contrary argument was that young people needed special protection up to the age of 18. Some consultees mentioned in particular the danger of 16 and 17 year olds getting into debt by being able to obtain credit beyond their means. There were, however, a few common themes underlying the opposition to this proposal, namely, that age itself is not a conclusive indication of maturity; that the law should go some way to acknowledge the gradual process of development in young people; and that we should not commit ourselves to an age-point which is of significance at the present time but which might change in the future.

3.8 The majority support for this option from our own consultees was not reflected in the survey results. In the System Three survey of adult opinion, [1] 41% of respondents were in favour of our preferred option, 50% were against, basically on the ground that young people aged 16-18 were too immature to enter into contracts on their own. A repeated concern was that they would get into debt. Opposition to our proposals increased when respondents were asked about capacity to enter into

1. A total of 1038 adults aged 18 and over were interviewed in 39 sampling points throughout Scotland during the period 20-26 March 1985.

specific types of contract at 16.[1] Single people tended to be more positively inclined towards the proposals than others.[2] The older the age group, the more negative the attitude of respondents became.[3] However, when views were sought on raising the age at which a young person can enter into legal transactions on his or her own from 12 or 14 to 16, 81% thought that this was a good idea; only 13% disapproved.[4]

3.9 The CRU surveys of pupils and school leavers[5] produced a similar, though less decisive, response. Both surveys indicate majority support for raising the age of contractual capacity from 12 or 14. [6]Among leavers, most were against the idea that 16 year olds should be able to enter into credit transactions or rent a flat [7]whereas the majority of pupils were in favour of these propositions, believing that 16 year olds were mature enough to contract on their own and that the proposals gave them the opportunity of independence.[8] A substantial number, however, considered these types of transaction inappropriate for a young person of 16 to enter into on his own.[9] Opposition among both groups was mainly on the basis either that 16 year olds were irresponsible or that they would get into debt.[10]

3.10 Our second option was intended to give some measure of special protection to minors over the age of 16. It involved a two tier system, with age bands of 0-16 and 16-18. As in the preferred option, the general rule for young people under 16 would be one of incapacity. This rule would be subject to exceptions for "everyday" transactions, consent to medical treatment and, possibly, making a will. 16 and 17 year olds would have full legal capacity to enter into binding transactions but would be able to apply to the court for reduction of certain transactions on the ground of substantial prejudice (equivalent to reduction on the ground of minority and lesion under the present law). We considered this to be the most realistic alternative to a single regime of minority up to the age of 16 although, in our view, the additional safeguards which such a system would bring did not justify the complexity which would inevitably be required.

3.11 This option was favoured as a first choice by some consultees but was strongly opposed by others. Some who supported our preferred option, such as the Law Society of Scotland and the Sheriffs' Association, accepted this as the next best alternative. Support for the scheme was obviously based on the need to protect 16 and 17 year olds from the consequences of their inexperience. However, critics pointed to its complexity and to the adequacy of protection available under the general law. One influential body thought that, if our preferred option of a single tier system were not acceptable, there would be no advantage in altering the present law. The complexity and uncertainty of the present law would, in their view, be perpetuated in any two tier system so that any reform along the lines of our second option would have little more than cosmetic effect. Another considered that the 16-18 years tier was too short a period to warrant an intricate system of limited protection

1. e.g., in response to the proposition that a 16 or 17 year old would be able to enter into an HP agreement, open a mail order credit account or take out a loan without parental consent, 76% considered this to be "a bad idea", 18% a "good idea": Table 6 and CRU Report, Table 6.2.
2. 52% as against 38%: Table 1.
3. 57% of those aged 55 and over, compared with 42% of 18-24 year olds thought that the proposals were "a bad idea": Table 1.
4. System Three Survey, Table 8.
5. The questionnaire was completed by 2017 pupils aged 13-18 attending 20 secondary schools throughout Scotland (excluding Highland Region and Dumfries and Galloway). The school leaver sample comprised 1932 young people throughout Scotland who had left school at the end of the 1983-84 session. Their age at the time of the survey ranged from 17-21.
6. 58% of pupils and 78% of leavers thought that young people under 16 should not be able to enter into a hire purchase or bank loan agreement: CRU Report, Table 5.1.
7. An average of 59% against and 31% in favour as regards credit transactions; as regards renting a house or flat the results were more evenly balanced at 47% against and 45% in favour. See CRU Report, Tables 6.1, 6.4, 6.6 and 6.8.
8. An average of 51% in favour and 39% against as regards credit transactions; 51% in favour and 43% against as regards renting a house or flat. Among both pupils and leavers, there was a slight variation in the strength of support of and opposition to 16 year olds entering into credit transactions, depending on the type of credit facility concerned, i.e. whether it was an HP or bank loan agreement, personal account agreement or mail order credit. See CRU Report, Tables 6.1 and 6.3 to 6.8.
9. 39% and 43%: see previous footnote.
10. CRU Report, Tables 6.3, 6.5, 6.7 and 6.10.

for that age range. None of the surveys sought views expressly on this approach to reform. However, it may be assumed from the general reaction to our preferred option, particularly among the adult respondents, that any scheme involving protection for 16-18 year olds would have been thought more appropriate than our preferred one tier system.

Conclusion

3.12 In assessing the response to our provisional proposals, it is difficult for us to reconcile all the views which have been expressed either directly to us or through the surveys. Some, indeed, are irreconcilable. What complicates matters even further is that individuals with similar voluntary or work experience with young people and representative bodies or interest groups within the same profession disagreed as to the desired approach to reform. For example, we received diametrically opposing views from workers in different Citizens' Advice Bureaux and from members of the Children's Panel in different areas. Among lawyers and academics, a few thought that even our preferred option was too paternalistic while others would have favoured something along the lines of our second option.

3.13 We are still attracted, in principle, to our preferred option. This approach to reform is justified on the strength of our own consultation. However, it is not supported by the results of either the System Three or the CRU surveys. The public perception is that 16 year olds are too immature to shoulder the responsibility of full legal capacity. This was the view expressed not only by the majority of the adult sample but also by a significant percentage of young people themselves. There was particular concern about young people obtaining credit beyond their means.

3.14 The CRU surveys also provide useful information about young people's lifestyles which suggests that 16 is not the age at which they generally achieve independence. Nearly all of the young people sampled, including those who had left school some two years earlier, still lived at home with their parents.[1] As might be expected, pupils were mainly dependent on their parents[2] but a significant proportion of leavers seemed to have no income other than that obtained from parents and student grants while others relied solely on state benefits.[3] Where respondents had money to spend they made their own decisions about how to spend it. Even among leavers, however, purchases made before the age of 18 were fairly modest in nature.[4] All this tends to suggest that while an important dividing line between capacity and incapacity may still be drawn at the age of 16, unqualified capacity at 16 is perhaps unnecessary as well as being regarded by many as undesirable.

3.15 The significance of the opinion survey results should certainly not be underestimated, nor should they be accepted without some qualification. It is important to bear in mind that the questionnaires used in the surveys concentrated only on the essential aspects of our preferred option—the loss of limited capacity for those below 16 and the acquisition of full capacity at 16. It would have been impracticable to design the questionnaires in any other way without making them unduly complicated and thus risking confused responses. The public reaction was obviously not based on any detailed examination either of the present law or of the implications of our proposed changes. Nor were informants required to consider the ramifications of rejecting this option: how any alternative scheme might be worked out; and the legal complexities which an intermediate stage of limited capacity might introduce.

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1. 98% of pupils lived with either both parents or one parent: CRU Report, para. 3.7. By the time of the survey, 76% of leavers were still living at home, 11% having moved out since leaving school: Table 3.9.
2. Although over one third had some form of part-time or holiday job: Table 3.4. Available weekly spending money, from whatever source, was £5 or less for more than half the pupils though a small minority had resources exceeding £20 a week: Figure 3.1.
3. Only a quarter of school leavers went directly into full-time work although the numbers in full-time employment had almost doubled by the time of the survey. On leaving school, 33% went on to a Youth Training Scheme, 28% undertook either full or part-time education while 8% were unemployed. The corresponding percentages at the time of the survey were 5%, 23% and 17% respectively: Table 3.10.
4. Almost a quarter of purchases made by leavers before the age of 18 cost less than £50, one fifth cost £50-£100 and a similar proportion cost £100-£200. Around 15% of purchases cost £200-£500. Clothing, particularly leather jackets, was the most popular purchase. Others included record players, sports equipment, holidays and, in a few instances, cars. See para. 3.17.

Despite these caveats, we think that the general tenor of the survey results is clear: conferring full capacity on young people at 16 is not acceptable to public opinion. While not the sole criterion in formulating recommendations for reform, public acceptability is particularly important in an area of the law such as this which raises issues of social policy and which, directly or indirectly, affects every member of the community. For this reason, we do not consider it appropriate to proceed with our preferred option.

Recommended scheme for reform

3.16 The survey results show that some special protection is considered desirable for young people at least up to the age of 18. A few people responding to the Memorandum or pamphlet suggested going even further to limit the legal capacity of people up to the age of 19 or 21. We do not consider this to be a viable proposition given 18 as the age of majority, nor did it receive any significant measure of support on consultation. We do accept, as was pointed out by one or two commentators, that age in itself is not conclusive evidence of maturity.[1] Nevertheless, we believe that some age indicator of capacity is necessary for the law in this area to be workable. In our view, the basic options for reform remain on the same lines as presented in the Memorandum: a single tier of incapacity up to the age of 18; or a two or more tier system below the age of 18.

3.17 The vast majority of consultees considered any scheme involving three or more age bands too complicated. A few suggested variations on our second option using age bands of, for example, 0-13 and 13-18. However, the majority response on consultation and the results of the opinion surveys both suggest that in a two tier system the ages of 12, 13 or 14 would be unacceptably low for the start of the second age band of limited capacity.

3.18 The choice, in our view, lies between a single tier system up to the age of 18 and a two tier system with age bands of 0-16 and 16-18. The former would probably be acceptable to public opinion but most of our own consultees regarded it as unrealistic and overprotective. Moreover, a rule of incapacity up to the age of 18 would require a fairly extensive array of exceptions in order to be workable, bearing in mind that by that age some young people will be in full-time employment and a few will probably be married with children.[2] We do not think it is a feasible proposition.

3.19 We therefore favour reform based broadly on our second option, that is, a two tier system with age bands of 0-16 and 16-18, with the upper age group enjoying only limited protection in the form of being able to have prejudicial transactions set aside. We have reached this conclusion for two reasons. First, it attracted a broad measure of support from consultees, including those who would have preferred our more radical alternative of conferring full capacity at 16. Second, it reflects the tenor of public opinion as revealed in the System Three and CRU surveys while at the same time acknowledging the range of experience which young people in the upper age group may have. Even though few 16 and 17 year olds live completely independent lives, the age of 16 is still an important social reality. It is, after all, the age at which a person can get married. More importantly, a substantial proportion of young people

1. Although there is evidence to suggest that many children reach adult levels of cognitive development between the ages of 12 and 14: Freeman, *The Rights and Wrongs of Children* (1983) p.46; Grisso and Vierling, "Minors' Consent to Treatment: A Developmental Perspective" Professional Psychology (1978) 412 at p.420. See also Piaget, "Intellectual Evolution from Adolescence to Adulthood" Human Development 15:1-12 (1972); Conger and Peterson, *Adolescence and Youth, Psychological Development in a Changing World* (3rd ed., 1984) pp. 158-173; Maturity is not just a question of intellectual capacity, however. Other considerations are relevant, such as emotional and moral development, perception of social expectations and so on. An adolescent's capacity for exercising independent judgment is generally thought to be limited, not by his intellectual abilities, but by lack of relevant experience and information: Ferguson, "The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement" Journal of Social Issues (1978) 114 at p.120.
2. 2% of school leavers were married or had children before they were 18: CRU Report, para. 3.14.

do leave school at 16 and enter jobs or training schemes.[1] That step towards adulthood should, we think, be recognised in our rules on legal capacity.

3.20 Accordingly the basic reform which we recommend is that:

1. **The law on the legal capacity of young people in private law matters should be restructured into a two tier system comprising age bands of 0-16 and 16-18, with those in the upper age group enjoying only limited protection.**
(Paragraphs 3.2 to 3.19; clause 1(1)).

Position of the under 16s

General rule of incapacity

3.21 The proposition which we put forward in the Memorandum was that young people under 16 should, as a general rule, have no legal capacity to act on their own behalf.[2] We suggested that this was the most realistic solution for the lower age group in any two tier scheme. It would be regarded as the usual solution in most legal systems and would be in line with the general rule on the legal capacity of pupils. The rigidity of the basic rule would be tempered by a range of exceptions appropriate to the age group. We thought that the alternative—a rule of capacity subject to exceptions—would require too substantial qualification to reflect the limited range of transactions entered into by those under 16. This proposition was agreed by virtually all who commented. The only dissent came from one commentator who suggested that the general rule should allow the young person to take any benefit from his transactions but not to bind himself to the other party. The creation of such "limping" contracts can, however, cause difficulties. The young person opting to take the benefit would presumably have to perform his obligation to the other contracting party and would therefore be able to choose to be bound by his contract. This seems an unprincipled solution.[3] Bearing in mind the general response to our provisional proposal on consultation, we remain convinced that the rule for those under 16 should be one of incapacity, subject to exceptions.

3.22 It is helpful at this stage to clarify exactly what we mean by legal capacity. In formulating our recommendations for reform, we have drawn an important distinction between what may be called "active" and "passive" capacity, that is, between capacity to perform civil acts having legal effect and capacity simply to hold rights. What we are concerned with in this Report is capacity to act—to enter contracts, make promises, grant conveyances or discharges, make a will, give consent, participate in court proceedings or perform any act of legal significance in the field of private law. In short, our recommendations deal with capacity to enter into transactions, using that term in its broadest sense.[4] We do not attempt to give an exhaustive definition in the Bill annexed to this Report of what is meant by "transaction" in this context. That would, in our view, be impracticable. However, we think the Bill should give some indication of the range of acts which the term is meant to include, so as to avoid the possibility of its being construed only in the strict sense of a contractual relationship.[5] The particular kinds of "juristic act" which we think it would be helpful to include specifically are:

1. Over half the school leaver sample were aged 16 or under when they left school: CRU Report, para. 3.12. Of the total sample, 30% went into full or part-time employment and a further 33% entered a Youth Training Scheme: CRU Report, Table 3.10.
2. This proposition applied both to our preferred and second options: see paras. 5.24 to 5.27. In the remainder of this part of the Report we will re-assess only the provisional proposals made in relation to our second option for reform. There will be some cross-referencing to paragraphs in the Memorandum where a number of the same proposals were discussed more fully in the context of our preferred option.
3. Although there is some authority for it in the present law: see para. 2.1 above. See also para. 5.81 of the Memorandum where we discussed this solution as a possible modification of the principle of invalidity of the young person's transactions.
4. In civil law systems the equivalent term is "juristic act" which has been defined as "an expression of will, the intention and normal effect of which is to produce a lawful change in the legal position of its author": Amos and Walton, *Introduction to French Law* (3rd ed., 1967) p.21.
5. cf. New South Wales Minors (Property and Contracts) Act 1970 which uses the concept of a "civil act" to form the basis of its rules on capacity of young people. Adopted from the civilian "juristic act", the term is defined in section 6(1) inter alia as a contract, disposition of property, disclaimer, or "any act relating to contractual or proprietary rights or obligations or to any chose in action whether having effect at law or in equity". See Harland, *Law of Minors* (1974) ch.3.

(*a*) any unilateral transaction (i.e. not imposing any reciprocal obligations on another party), such as donation or discharge of legal rights of succession;

(*b*) the making of a will, including the exercise of any testamentary or inter vivos power of appointment;

(*c*) the giving of any consent having legal effect;[1]

(*d*) participation in civil court proceedings (other than as a witness);

(*e*) acting as arbiter or trustee or as witness to the signing of a deed.

3.23 Our recommendations will not affect the capacity of a young person to hold an interest in property or to enjoy the benefit of more abstract rights, such as the right not to be assaulted or defamed. Our intention is that such rights should be preserved. There is, however, some confusion in the present law regarding the passive capacity of a pupil, at least in the sense of his capacity to receive or hold a beneficial interest in property. Some institutional writers speak in general terms of a pupil having no legal capacity whatsoever.[2] Such statements are misleading because they are made in the context only of granting deeds, raising court actions or entering contracts.[3] What is at issue is simply the pupil's incapacity to act. Nowhere is it stated that a pupil cannot own property or be the recipient of a gift or donation.[4] Indeed the law is quite clear on this as regards title to heritable property. A tutor does not have any right of ownership to the property which he administers on behalf of a pupil. Although he is deemed to be a trustee for the purposes of the Trusts (Scotland) Act 1921, that does not make him a trustee in the ordinary sense of having title to the trust property held on behalf of beneficiaries.[5] Thus, where land is acquired on behalf of a pupil, title must be taken in the pupil's name, not in the name of his tutor.[6] Even if, in a case where a pupil child has a right (such as a right to aliment[7] or to damages), a claim to vindicate the right is made by someone else on his behalf, the pupil is nevertheless the real creditor.[8] The fact that he cannot give an effective discharge for the payment and cannot administer the money himself simply means that arrangements must be made for payment to someone else for his benefit.[9] Usually any payment is made to his tutor or to a factor loco tutoris.[10] Fraser deals succinctly with the question of a pupil's passive capacity where he states:[11]

> "... though the tutor represents the pupil in all cases, where some act requires to be performed, such as signing deeds and making bargains, which ... calls for a mature and experienced judgment, yet where no act is to be done, and where it is only necessary to remain passive, the pupil is then as if *sui iuris*."

3.24 A recent decision of the Inner House of the Court of Session is relevant here. In *Finnie* v. *Finnie*[12] the First Division held that awards of aliment to two pupil children, to be paid to their mother as tutor, were small maintenance payments within the meaning of section 65(1)(*b*) of the Income and Corporation Taxes Act 1970 and were therefore to be paid without deduction of income tax. Section 65(1) defines "small maintenance payment" to include a payment within certain monetary limits

1. This includes not only consents required by law such as consent to adoption or to medical treatment but also any other consent which has legal consequences, such as allowing someone to enter or occupy your house.
2. Bell, *Princ.* s.2067; *Com.* 1.128; Erskine, 1.7.14.
3. e.g., Erskine, 1.7.14: "... a pupil has no person in the legal sense of the word. He is incapable of acting or even of consenting."
4. cf. *Linton* v. *Commissioners of Inland Revenue* 1928 S.C.209 where a disposition of land granted in favour of two pupil children and registered on their behalf was held to constitute an effective or irrevocable donation to them.
5. *Linton* v. *Commissioners of Inland Revenue, supra* at p. 214.
6. Bell, *Lectures on Conveyancing* (3rd ed., 1882) 1.117: Fraser, pp. 204-5; *Linton* v. *Commissioners of Inland Revenue, supra.*
7. See Family Law (Scotland) Act 1985, s.2(4); *Huggins* v. *Huggins* 1981 S.L.T. 179.
8. *Bell* v. *McCurdie* 1981 S.L.T. 159; *Huggins* v. *Huggins, supra.*
9. cf. *Jack* v. *The North British Railway Co.* (1886) 14 R. 263. Provision is made by rules of court for the administration of sums of damages recoverable by persons under a legal disability: R.C. 131-4 and Sheriff Court Rules, rule 128.
10. *Boylan* v. *Hunter* 1922 S.C. 80.
11. At p. 307. See also McBryde, *The Law of Contract in Scotland* (1987), para. 8.07.
12. 1984 S.L.T. 439, rev. 1984 S.L.T. 109. On appeal no argument was submitted by the defender in support of the Lord Ordinary's interlocutor.

"(*b*) to any person under 21 years of age for his own benefit, maintenance or education". The Court held that payment to the tutor was payment to the pupil children themselves and not payment to one person for the benefit of another.

3.25 This decision accords with the principles set out above in regarding the pupil children as the real creditors and the payment to the tutor as being the same, in legal effect, as payment to the children. Dicta in the case to the effect that pupil children have no legal personality must, it is thought, in view of the decision reached, be regarded as referring only to active capacity, meaning the capacity to give an effective receipt. In case there should be any doubt on this matter, we think that our recommendations on the legal capacity of young people should include an express saving for the passive capacity of a person under 16.

3.26 Our recommendations for the general rule affecting those under 16 are:

2. (*a*) Subject to limited exceptions, a person under 16 should have no legal capacity to enter into any transaction.

(Paragraph 3.21; clause 1(1)(*a*))

(*b*) It should be made clear that this general rule of incapacity is without prejudice to the legal capacity of a person under 16 to receive or hold any right, title or interest in property or otherwise.

(Paragraphs 3.23 to 3.25; clause 1(4)(*e*))

(*c*) In paragraph (*a*) above, "transaction" means transaction having legal effect and includes

(i) any unilateral transaction;

(ii) the making of a will, including the exercise of any testamentary or inter vivos power of appointment;

(iii) the giving of any consent having legal effect;

(iv) participation in civil court proceedings (other than as a witness);

(v) acting as arbiter or trustee or as witness to the signing of a deed.

(Paragraph 3.22; clause 1(3))

Consequences of the general rule

3.27 Being subject to a general rule of incapacity, a young person below the age of 16 would be similar to a pupil under the existing law. All acts of legal significance, other than those coming within the excepted categories,[1] would have to be performed by his parent or guardian.[2] What must now be determined is the effect of any purported actings by the young person himself.

3.28 We provisionally proposed in the Memorandum[3] that all transactions entered into by a person under 16 and not falling within one of the exceptions should be void. This approach, we argued, had the obvious merit of simplicity. No rights or obligations would be conferred on either party by virtue of the transaction. There would be no need to have such transactions set aside by the court although, in the event of any dispute between the parties, it would be competent to have the transaction declared null on the ground of the young person's incapacity. There was general support on consultation for this proposal.

3.29 As possible modifications of this rule, we considered, first, whether the person under 16 should be bound in any transaction which he has induced through fraudulent misrepresentation of age and, second, whether protection should be given to rights acquired by bona fide third parties.[4] We did not form a provisional view on either of these issues.

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1. See paras. 3.40 to 3.92 below.
2. The powers of a guardian in relation to the child's estate will be examined in a future memorandum: see para. 1.4 above.
3. See paras. 5.79, 5.102 and 5.103.
4. See paras. 5.82 to 5.93, 5.102 and 5.103. We also considered at para. 5.81 whether the adult party should be compelled to fulfil his obligation under the transaction but this idea has already been rejected: see para. 3.21 above.

3.30 There was a mixed response on consultation to the notion that where a young person under 16 has fraudulently misrepresented his age, thereby inducing another person to transact with him, the resulting transaction should, at the option of the other person, be binding on both parties. Most commentators thought that this was the equitable solution. The dishonest young person should not be able to rely on his incapacity if he has deliberately held himself out to be over 16. Any other rule would cause undue prejudice to the adult party. The opposing line of argument, advanced by one or two consultees, was that it was illogical to give the adult the option of specific performance when a remedy was already available to him in delict. Moreover it would be at odds with the rule of incapacity to allow an immature youngster to transact in this way. In order to preserve the coherence and simplicity of the scheme, the transaction should remain void.

3.31 Having reconsidered the matter, we see much to commend the minority view. If an adult is the victim of fraudulent misrepresentation by the young person, he is entitled to raise an action of damages in delict.[1] A specific remedy which would make the young person liable under his contract as well would be unnecessary. The adult party already has some means of safeguarding his position under our recommendations in that he would be able to have the transaction declared null and thereby excuse himself from future performance. Under existing law, fraudulent misrepresentation of age is not a relevant consideration in relation to pupils. There is no reason in principle why a different approach should be taken now in relation to a reformed rule of incapacity for the under 16s.

3.32 Our survey results suggest that fraudulent misrepresentation of age is not a very live issue as regards the under 16s. There is little evidence of people in that age group trying to obtain credit by holding themselves out to be 18.[2] If they did, however, and given the concern expressed about young people obtaining credit beyond their means, we think that the policy should be to retain the protection of incapacity rather than make such transactions binding. In practice, shops and banks and mail order firms would probably not want, in the ordinary type of case, to sue young people for damages for fraud. So the practical effect of leaving the adult to his remedy in delict would probably be to increase the protection afforded to young people in such cases[3] while still preserving the principle that they are liable for fraud and while still preserving a remedy for the victims of fraud who care to take proceedings.

3.33 On the question of third party rights, we invited views in the Memorandum[4] as to whether provision should be made to protect the rights of a bona fide third party which had been acquired for value and which depended on the validity of a void transaction entered into by an under 16 year old. The clear response on consultation was that there was no good reason why transactions void on the ground of non-age should be treated differently from other void transactions. The matter should therefore be determined by the general law. We so recommend.

3.34 Under the general law, the rights of parties to a void transaction are governed by principles of unjustified enrichment. Broadly speaking, the parties are to be restored to the position they would have been in had they never purported to contract in the first place. Both parties are under an obligation to return anything received under the contract. If one is unable to do so, the other is released from his obligation of restitution as well. However, in the case of transactions which are either void on the ground of non-age or challengeable on the ground of minority and lesion, this rule is relaxed in favour of the young person under the present law so that he is bound

1. There is no minimum age of delictual liability in Scots law: see para. 5.1 below.
2. Discounting the survey results dealing with mail order credit, the CRU pupil survey shows that under 5% of fourth and fifth year pupils try to obtain some form of credit: Table 4.1. Misrepresentation of age is unlikely to be a factor in pupils' use of mail order credit because most of those who use such credit facilities are personally known to the agent for the mail order company who is often a parent, friend or neighbour: CRU Report, para. 4.3.
3. Under the present law minors aged 12-16 or 14-16 may be bound by transactions induced by fraudulent misrepresentation of age: see para. 2.4 above.
4. At paras. 5.90 to 5.93. See also para. 5.103.

to make restitution only in so far as the goods received are still in his possession or the money paid to him has been invested and still forms part of his estate. If what he has received has been destroyed or squandered, he is not liable to repay the other party even though the latter is still bound to make restitution to the young person.

3.35 We commented in the Memorandum[1] that this modification of a young person's obligation of restitution was appropriate where the adult had taken advantage of the young person's immaturity in transacting with him. In such circumstances, it is fair that the obligation of restitution should not jeopardise the rest of the child's property. If an adult decides to transact with a person under 16 he should do so at his own risk. That risk should arguably include the possibility that the young person may not be able to restore the benefit received because it is no longer in his possession. Against this we argued that a rule limiting a young person's obligation of restitution to property still in his possession would be too arbitrary. No consideration would be given to the circumstances of the particular transaction or to the young person's reason for disposing of the benefit received. His inability to make restitution might arise unintentionally or he might deliberately dispose of the benefit so as to escape his obligation to restore. This led us to suggest that a more flexible rule would be desirable, providing that the rights of the parties would be determined according to common law principles of unjustified enrichment but that the court should be able to modify the young person's obligation to make restitution or recompense in any way it considered equitable in the circumstances of the case.

3.36 A difference of opinion emerged among consultees on this question. The majority agreed with our provisional proposal for the reasons stated in the Memorandum. However, three weighty consultees thought there was no reason for a special modification of the ordinary rules in this case. It was considered anomalous to create a special rule to achieve fairness where the law on unjustified enrichment was meant to be based on equitable principles in the first place. Reform of the law on unjustified enrichment should not be undertaken only in the context of transactions entered into by young people. We believe that there is force in this view. It would be in line with the approach which we have taken to third party rights, namely that a transaction void on the ground of non-age should not be treated any differently from other void transactions. Again, we suggest that, if hardship results from the application of the ordinary rules here, the correct approach would be to consider general reform of the law of unjustified enrichment. In the meantime we recommend that the ordinary rules should apply in the case of void transactions entered into by persons under 16.

3.37 The present law permits adoption, on attaining the age of 18, of all transactions entered into during pupillarity and minority which are void. This is simply an application of the general law concerning the adoption of void obligations although, in the context of pupils and minors, it is subject to the rather ambiguous exception provide by section 5 of the Betting and Loans (Infants) Act 1892 regarding loans of money.[2] Our provisional proposal was that the common law rules on adoption should continue to apply as regards void transactions entered into by persons under 16. In our view, no rational distinction could be drawn between capacity to enter into a fresh obligation at 16 and capacity to adopt an existing, though invalid, one. Nor was there any justification for prohibiting adoption of a loan. The method of effective adoption, whether express or implied from the actings of the young person, should also be left to the common law. There was complete agreement among consultees with this proposal. We therefore recommend that any obligation purportedly entered into by a person under 16 should be capable of being adopted as binding by that person on or after attaining that age.[3]

3.38 The general rule of incapacity would clearly apply to participation in civil court proceedings, other than as a witness. A person under 16 would be unable to raise

1. At para. 3.14. See also paras. 5.96 to 5.99.
2. See para. 2.4 above.
3. The act of adopting a transaction would, in itself, be a transaction entered into by a person over 16. As such, any obligation adopted at the age 16 or 17 would be subject to challenge on the ground of substantial prejudice: see paras. 3.102 to 3.113 below.

or defend an action. The parent or guardian would have to sue and be sued on his behalf. There is, however, a procedural device under the present law whereby an action may be initially raised or defended in the name of a pupil although the proceedings will only be continued on appointment of a curator ad litem to act on the pupil's behalf. This device is used where, for example, the pupil has no tutor or where the tutor refuses to act or has an adverse interest. We suggested in the Memorandum[1] that the existing procedure should be preserved and, more generally, that the courts should retain their inherent power to appoint a curator ad litem to a person under 16 in any case where it appeared just and expedient in the interests of the young person to do so. Both proposals were agreed unanimously by consultees and we confirm them now.

3.39 Our recommendations concerning the consequences of the rule of incapacity may be summed up as follows:

3. (*a*) **Any transaction entered into by a person under 16, other than one coming within the specified exceptions, should be void but should be capable of being adopted as binding by the young person on or after attaining that age by any means effective under the existing law.**
(Paragraphs 3.28 and 3.37; clause 2(5))

(*b*) **Any transaction purportedly entered into by a person under 16 should not become binding on him by reason of the fact that he had fraudulently misrepresented his age to the other party, thereby inducing that other party to transact with him. This should be without prejudice to the young person's potential liability in damages for fraud.**
(Paragraphs 3.29 to 3.32)

(*c*) **Protection of third party rights which depend on the validity of a transaction purportedly entered into by a person under 16 should be determined by the general law.**
(Paragraph 3.33)

(*d*) **The rights of parties to a transaction which is void on the ground of nonage should be determined according to common law principles of unjustified enrichment.**
(Paragraphs 3.34 to 3.36)

(*e*) **The rule of incapacity should not affect the procedure whereby court proceedings may be raised or defended in the name of a person under 16 and continued on appointment of a curator ad litem to act on the young person's behalf.**
(Paragraph 3.38; clause 1(4)(*f*)(i))

(*f*) **The courts should retain their inherent power to appoint a curator ad litem to a person under 16 where it appears just and expedient in the interests of the young person to do so and notwithstanding that he may have a guardian.**
(Paragraph 3.38; clause 1(4)(*f*)(ii))

Exceptions to the general rule

3.40 Possible exceptions to the general rule of incapacity fall into two categories: capacity to enter into particular kinds of transaction; and capacity dependent on the existence of general or special authorisation. These will now be considered in turn.

(1) Excepted transactions

Ordinary transactions

3.41 The principal exception which we proposed in the Memorandum[2] was for "everyday" transactions, that is for transactions commonly entered into by a child of the transacting child's age. The intention was to legitimise current practice whereby children engage in a range of economic activities although, strictly speaking, they have no legal capacity to do so. Examples include the purchase of sweets by a 5 year old or the purchase of a cinema ticket by a 15 year old, neither of which come within the existing category of necessaries. Lack of legal capacity in what are strictly cash transactions probably does not matter much in practice. Nevertheless it is desirable to put such transactions on a proper footing so that the young person can rely on

1. At paras. 5.126 and 5.134.
2. At paras. 5.30 to 5.35 and 5.63.

his contractual remedies or on the specific remedies provided, for instance, by the Sale of Goods Act 1979 in the event of the transaction going wrong.

3.42 The exception was to be flexible enough to cater for children at the two extremes of the age group so that, for instance, a child of 5 would have capacity to enter into transactions appropriate for his age group but not those appropriate for an older child. Thus there would be built-in recognition of the different levels of understanding of young people at different ages. The main advantage of the exception was said to be its adaptability to changing social conditions, the main disadvantage being that it would introduce an element of vagueness into the law. Our provisional conclusion was that so long as the exception was clearly confined to transactions that could be regarded as common for a young person of a particular age to enter into, it would be to the young person's benefit.

3.43 The CRU surveys give some indication of the sort of transaction which young people regularly engage in. They include part-time and holiday jobs[1] and the operation of bank and building society accounts.[2] Virtually all school pupils have money to spend, ranging from less than £5 per week to over £20 per week.[3] It is safe to assume that most young people under 16 regularly enter into a variety of contracts for the purchase of goods, payment of bus fares and so on. The law should therefore give them the legal capacity to engage in these sorts of everyday activities.

3.44 There was almost unanimous support on consultation for an exception along these lines and we received a number of constructive comments on its wording. Most concerned the problem which we identified in the Memorandum,[4] namely that an exception in terms of "transactions commonly entered into" could be too restrictive. In some communities, for example a remote fishing village, under 16 year olds might commonly enter into transactions of a type never entered into elsewhere and it would be unfair to deprive them of their capacity in this situation. Others pointed out that age and geographical location were not the only relevant factors. Whether a child would enter into a particular type of transaction would depend also on his home circumstances and the extent to which he had ready access to money. To meet these difficulties, a number of commentators suggested using the concept of reasonableness, for example, framing the exception in terms of "transactions which it is not unreasonable for the child to enter into having regard to all the circumstances of the transacting child". One respondent, in a detailed critique of our proposals, suggested a more elaborate test of reasonableness, having regard to a list of specific criteria including: whether the transaction was one commonly entered into at that child's age and in his circumstances; the apparent mental capacity of the child; the complexity of the transaction, including in the case of a written contract its expression and layout; whether the transaction fell within arrangements approved by the child's guardian; and whether the child was assisted by his guardian or other responsible person.

3.45 We were at first attracted to a reasonableness test although without the detailed elaboration mentioned above which in our view would make the exception unworkable for the adult party. Such a test would be able to deal with the unusual transactions entered into in particular circumstances and would also protect the young person from exploitation. However, even without elaboration, it is not an easy test for the adult party to apply. His own experience may indicate what are ordinary transactions for young people of a certain age to enter into but how can he tell whether it is reasonable for a person to enter into a particular type of transaction? A qualitative judgment would have to be made and there could be a wide variety of views as to the reasonableness or otherwise of young people entering into certain types of obligation. The test would be too imprecise to be of any practical value to the adult party who wishes to know in advance whether the young person with whom he is dealing is likely to be bound by his obligation. A further worry is that a test of reasonableness might encourage courts to take an overly paternalistic attitude and

1. 40% of the pupils surveyed had some kind of part-time job, 37% had a holiday job: Table 3.4.
2. Nearly all pupils aged 16 and under had some form of savings account: Table 3.5.
3. Figure 3.1.
4. At para. 5.33.

to ask themselves what types of transaction young people ought to be entering into, as opposed to deciding what transactions young people do, in fact, engage in.

3.46 Having weighed the arguments again and having carefully considered the views of those advocating the general criterion of reasonableness, we remain of the view that the more objective, factual test of transactions "commonly entered into" is to be preferred. This test would relate to the nature of the transaction falling within the exception. The basic formula which we now recommend, and which was suggested to us by some consultees, refers to transactions commonly entered into by a child of the transacting child's age and circumstances. This formula enables both geographical location and all other circumstances to be taken into account. The relevance of other circumstances will depend on the nature of the transaction. Purchase of computer equipment may require closer examination of the young person's circumstances than purchase of an LP at the local record shop. We imagine that in cases of real doubt the adult party would, quite properly, insist on dealing instead with the young person's parent or guardian.

3.47 We do not, however, discount a reasonableness test altogether. We believe it can still have a useful, though more limited, role. We recommend later in this Report[1] that young people aged 16 to 18 should have full legal capacity subject to the right to have prejudicial transactions set aside. This gives rise to an anomaly. Any obligations undertaken by a 16 or 17 year old could be challenged on the ground of substantial prejudice: obligations undertaken by a person below 16, if of a kind falling within the "ordinary" exception, would be binding regardless of whether the particular transaction was in its terms prejudicial to the young person. For example, a contract entered into by a person under 16 to buy a bicycle, perhaps at an excessive price and on unreasonable credit terms, could not be challenged if it was common for a person of that age to buy a bicycle whereas the same transaction entered into by a 17 year old could be set aside if shown to have caused him substantial prejudice. To meet this problem we think it important that the exception should refer not only to the nature of the transaction but also to the terms on which it was made. Accordingly, a transaction by a person under the age of 16 would come within this exception only if (*a*) it was of a type commonly entered into by children of his age and circumstances and (*b*) it was entered into on terms which were not unreasonable. Both requirements would have to be met for the transaction to be binding. If either one was not satisfied, the transaction would be completely void.

3.48 Some degree of vagueness is inherent in this type of approach. There will always be difficulty in borderline cases. However, the same could be said for the present law on necessaries which does not appear to cause insuperable problems in practice. Our hope is that the recommended exception to the rule of incapacity for the under 16s will be better suited to the way young people live nowadays and will be more readily understood by the public. Among the everyday transactions which we believe this formula could cover are: small shopping transactions; payment of bus or train fares; payment for skating lessons or a hair cut; Saturday or holiday jobs; booking accommodation at a Youth Hostel; the operation of bank deposit accounts and the like. Where appropriate, the formula could extend to enable a person under 16 to contract for accommodation with, say, a Young Person's Refuge.

3.49 One criticism which was made of this exception was that it would be limited to transactions which were common at the time our recommendations were implemented. There would therefore be no scope for development to cover new forms of contracting which might be introduced in the future. This is certainly not our intention and should not be the effect of the clause in our draft Bill implementing this recommendation.[2] The draft provision should be able to cater for common practice among children from time to time and, even if new types of transaction fell outwith the exception initially, they should be covered in time if commonly entered into.

1. See para. 3.97 *et seq.*
2. See clause 2(1).

3.50 The Memorandum also discussed whether the exception for ordinary transactions should be in terms of the child's actual or apparent age.[1] Difficulties could arise on either basis if there was an extreme discrepancy between the child's age and his appearance. The adult party could be prejudiced on the actual age basis if he transacted with a young person he reasonably believed to be 15 years old but who turned out to be only 11 years old. If the exception were in terms of apparent age, the "baby-faced" teenager could be prevented from entering into quite reasonable transactions. We expressed no concluded view on this issue in the Memorandum. The results of consultation were, however, decisive. Virtually all who commented favoured the "actual age" approach. An exception framed in terms of the child's apparent age was thought to be too difficult for the adult party to operate and to introduce too much uncertainty. On an actual age basis, on the other hand, the adult could protect himself in cases of doubt by requiring evidence of the child's age. We agree with this view.

3.51 Our recommendations are therefore as follows:

4. (*a*) **As an exception to the general rule of incapacity, a child under the age of 16 should have capacity to enter into a transaction which is of a type commonly entered into by a child of the transacting child's age and circumstances and which is entered into on terms which are not unreasonable.**

(Paragraphs 3.41 to 3.49; clause 2(1))

(*b*) **Reference to the child's age in paragraph (*a*) above means his actual, not apparent, age.**

(Paragraph 3.50)

Capacity to make a will

3.52 The main arguments for and against conferring testamentary capacity on a person under 16 were set out in the Memorandum[2] and may be summarised as follows. On the one hand, it may be argued that it would be a retrograde step to deprive 12 or 14 to 16 year olds of their existing capacity which has not been shown to have caused them any harm. A testator is not prejudiced by the terms of his will and can revoke it at any time. Accordingly, why should a 14 year old not be able to leave all his property to a friend if that is what he wants to do? Moreover, for a small minority of young people who own substantial property, disposal of their property on death may raise complex issues of tax planning and so on which make it desirable that they should have power to settle their estate to best advantage. Capacity to make a will would benefit a few and be irrelevant to most. The contrary argument is that probably very few people under 16 make a will and to deprive them of their capacity in this respect would make little difference in practice. Indeed, in the course of consultation, we have not come across any evidence of widespread will-making by young people. Even for those few with substantial assets the rules on intestate succession may provide a satisfactory solution. In addition, there may be concern about conferring capacity on very young children who would not fully appreciate what was involved.

3.53 In the Memorandum, we reached no provisional view on this issue. A substantial majority of consultees were in favour of the under 16s having capacity to make a will, at least in one form or another. Although most acknowledged that it would be of little practical relevance, they still considered that in some circumstances testamentary capacity would be desirable for the reasons advanced in the Memorandum. One or two weighty commentators were opposed to the idea partly because it was unnecessary and partly because it would detract from the simplicity and coherence of our proposals. The results of the System Three and CRU surveys were more evenly balanced.[3] Having reconsidered the matter, we agree on balance with the majority. There is, in our view, no convincing argument for removing minors'

1. See paras. 5.34 and 5.35.
2. At paras. 5.41 to 5.43.
3. 50% of pupils, 40% of leavers and 42% of adults considered that young people under 16 should be able to make a will: 35%, 39% and 52% respectively thought that they should not. See CRU Report, Table 7.1. The main reason given in favour of capacity was that young people have a right to dispose of their own property: the main reasons against were that young people have few possessions to leave on death and that they are immature. See Table 7.2.

existing capacity to make a will. The fact that young people do not usually have much property to leave is no doubt true but it is not a good reason for denying capacity in the first place. While it would be desirable to preserve the simplicity of a single age of capacity at 16, we accept, as do our consultees, that a few exceptions to the rule are necessary to make it a practicable proposition. The exception which we have already recommended for everyday transactions acknowledges that children under 16 do have some capacity to act on their own behalf. We are not therefore being inconsistent in recommending a further exception in this limited area. As one influential commentator put it, it would not upset the essential logic of our general rule of capacity at 16 to treat testamentary capacity as a special case. Moreover, as was stated in the Memorandum,[1] the policy considerations underlying testamentary capacity are different from those which we identified as relating to capacity generally. What is at stake is not possible prejudice caused to the young person on account of his immaturity, but protection of the interests of his successors. We do not think that this consideration should, in principle, override the freedom of a young person to dispose of his estate on his death as he wishes.

3.54 It remains to consider exactly what form the exception should take. The main options which we canvassed in the Memorandum[2] are, briefly:

(*a*) A person under 16 should have testamentary capacity but the will would be valid only if made with his guardian's consent. Alternatively the will should be made by the guardian on his behalf.

(*b*) A person under 16 should have unlimited testamentary capacity. Alternatively, capacity should be conferred on those above the age of, say, 12.

(*c*) Capacity should be conferred on a person under 16 provided he has sufficient understanding to comprehend the nature and effect of his testamentary act.

(*d*) A person under 16 should be able to make a will only in respect of half of his property.

(*e*) A person under 16 should have capacity to make a will but it would not be valid unless confirmed by a court which would require to be satisfied that the will gave effect to the young person's intentions and that he understood its nature and effect.

(*f*) A court should be empowered to make a will on behalf of a person under 16, based on general criteria as to the reasonableness of its terms.

3.55 There was little support among consultees for any proposal involving court intervention in the making of a young person's will. Most thought that any such court procedure would be too cumbersome. Moreover, it would be difficult to decide what criteria the court should apply if it was empowered to make a will on a child's behalf. A number of people responding to the pamphlet—including some who would prefer testamentary capacity to be conferred at 16—were attracted to the idea that a will made by a person under 16 should be valid only if confirmed by a court. However, we are not convinced that this would be worthwhile. The court would simply ascertain, during the child's lifetime, that the will gave effect to his intentions and that the child could, in fact, understand the nature and effect of his testamentary act.[3] There would be no control over the provision which the child could make. We doubt whether the introduction of a new court procedure to such limited effect would be merited. Moreover, some who favoured this option did so on the ground that it afforded some measure of protection to the young person. We have seen, however, that protection of the young person is not really a relevant consideration in this area.

3.56 Of the remaining options, some commentators favoured unlimited capacity; a slightly larger number opted for capacity based expressly on the young person's understanding of the nature and effect of his testamentary act; and a few preferred a fixed minimum age of capacity at 10, 12 or 14. There was no support for any proposal

1. At para. 5.43.
2. At para. 5.44.
3. See para. 5.44(vii) of the Memorandum.

allowing a child to make a will with his guardian's consent or enabling a guardian to make a will on the child's behalf. Both options were rightly criticised on the ground of undue parental influence and on the ground that the parent or guardian would often be acting in his own interests.

3.57 Unlimited capacity, which would equate all youngsters with people aged over 16, would, we think, be unacceptable. A child of 3 or 4 would not be able to understand the terms even of a simple will and it would be unrealistic for the law to presume otherwise. Capacity according to the young person's level of understanding is conceptually the most attractive solution, giving the flexibility necessary to cater for the 6 year old and the 15 year old. However, we foresee difficulties with this rule in practice. It would be in terms of conferring capacity on a person under 16 provided he could comprehend the nature and effect of his testamentary act. Although any will made by a person under 16 would be prima facie valid it would be open to challenge. Once challenged, the onus would be on the person seeking to uphold the will to show that the young person, now deceased, had the requisite understanding. In our view, it could be extremely difficult to establish this in the absence of the best source of evidence, the young person himself. This option would create too much uncertainty after death. The unscrupulous might be tempted to make speculative challenges which could be successful, not because of positive evidence of the young person's lack of capacity, but simply because there was insufficient evidence one way or another. In the absence of any clear demand for extending the present rule on testamentary capacity, we do not think we would be justified in making a recommendation which could simply encourage litigation.

3.58 We have therefore come to the conclusion that there should be a fixed minimum age of testamentary capacity below 16. We recognise that this will be an arbitrary rule and that, to some, it may appear inconsistent with our general approach to reform. Nevertheless, on policy grounds and for reasons of practicality, we believe that an exception along these lines is appropriate. Given the fact that capacity to make a will probably has little relevance to most young people, we do not think we could justify constructing a flexible but complex rule, perhaps requiring court confirmation of the will, where a hard and fast rule of capacity would provide the answer in the majority of cases. Moreover a fixed minimum age has the great advantage of certainty in an area of the law where there are always likely to be difficulties of proof.

3.59 Two factors have weighed with us in deciding what would be the right age at which to confer capacity to make a will. The first is that the present law on testamentary capacity does not appear to have created any practical problems. Secondly, our consultation has not shown any strong demand to extend capacity below the present minimum ages. Indeed, to go below the age of 12 without imposing any further safeguards, could involve the risk that the testator would lack the mental capacity to understand the import of the more complex testamentary provision that might be contained in his will. We do not therefore favour changing the present law except to introduce a single age of capacity for both boys and girls. In our view and in the view of at least some of our consultees, it would be preferable to extend the lower age limit for boys rather than deprive 12 and 13 year old girls of their present capacity.

3.60 Accordingly, we recommend that:

5. A person aged 12 or over should have capacity to make a will.

(Paragraphs 3.52 to 3.59; clause 2(2))

Consent to medical treatment

3.61 Of all our provisional proposals for reform, those concerning consent to medical treatment generated the largest response and most controversy. We are particularly grateful to those individuals and organisations within the medical profession who gave us the benefit of their views and experience in this sensitive area.

3.62 Our basic proposition in the Memorandum[1] was that capacity to consent to medical treatment should be conferred at 16. This would be in line with our general approach to reform and would also accord with the belief apparently held within some quarters of the medical profession itself that 16 is already the age of consent for

1. See paras. 5.46 and 5.63.

this purpose. We recognised, however, that such a rule, if unqualified, would be unrealistic and too rigid. It would be perfectly acceptable, for instance, to allow a doctor to treat a 10 year old with a cut knee without first having to seek the consent of the child's parent or guardian. To achieve a measure of flexibility we canvassed four possible exceptions to the rule:

(1) A doctor should be able to give medical treatment to a person under 16 with the consent of the patient himself where it is in accordance with approved medical practice to act on the basis of such consent.

(2) A person under 16 should be entitled to consent to treatment for specified illnesses or conditions.

(3) Medical treatment should be given to a person under 16 on the basis of his own consent where that person is capable of understanding the nature and consequences of the treatment proposed.

(4) Comprehensive provision should be made following the model of the Canadian Uniform Medical Consent of Minors Act to the effect that

(*a*) a person over 16 would have capacity to consent to medical treatment as if he had attained the age of majority;

(*b*) a person under 16 would have capacity to consent to medical treatment where, in the opinion of a qualified medical practitioner attending the young person, supported by the written opinion of another,

(i) the young person was capable of understanding the nature and consequences of the treatment; and

(ii) the treatment and procedure to be used was in the best interests of the young person and his continuing health and well-being;

(*c*) consent of a person under 16 or that of his parent or guardian would not be required where

(i) the young person was incapable of understanding the nature and consequences of the medical treatment or, being capable of understanding the nature and consequences of the treatment, was incapable of communicating his consent; and

(ii) a qualified medical practitioner attending the young person was of the opinion that the medical treatment was necessary in an emergency to meet imminent risk to the young person's life or health;

(*d*) where the consent of a parent or guardian to medical treatment of a person under 16 was required and was refused or was otherwise unobtainable, the court could dispense with it, if satisfied that the withholding of medical treatment would endanger the life or seriously impair the health of the young person.

3.63 The response to our basic proposition that 16 should be the normal age at which a person could give an effective consent to medical treatment was, on the whole, favourable. The majority of those responding to the Memorandum or pamphlet agreed with the proposal on the basis that some form of exception to it would be provided. Support also came from the survey results. In the System Three survey of adult opinion, 59% thought that 16 was the right age.[1] In the CRU surveys, pupils and leavers were asked what was the appropriate age of consent to different types of medical treatment. Again, the overall response indicated majority support for the age of 16.[2] The tendency among pupils and leavers was to favour 16 or under:[3] among adults, the tendency was to favour 16 or over.[4]

3.64 There was, however, some division of opinion among members of the medical profession. The proposal was supported by a number of influential bodies such as the British Medical Association, the Royal College of General Practitioners and the

1. Table 14. See also CRU Report, Figure 7.2.
2. The breakdown of the results is as follows: 16 was selected as the age of consent to operations by 44% of pupils and 54% of leavers; as the age of consent to contraception by 48% of pupils and 60% of leavers; as the age of consent to abortion by 36% of pupils (a further 27% being anti-abortion) and 50% of leavers. See CRU Report, Tables 7.3, 7.6 and 7.9.
3. .For operations, 40% of pupils and 32% of leavers suggested 14 or younger; 14% and 12% suggested ages over 16. For contraception, the figures were 43% and 28% in favour of 14 or younger; 7% and 10% in favour of ages over 16. For abortion, the figures were 26% and 16% in favour of 14 or younger; 10% and 25% in favour of ages over 16. See CRU Report, Tables 7.3, 7.6 and 7.9.
4. 31% selected the age of 18: System Three Survey, Table 14 and CRU Report, Figure 7.2.

Royal College of Surgeons. It was also agreed by some local health boards, the Association of Local Health Boards and by a few individual practitioners. Opposition came from the Royal College of Nursing, the Scottish Hospital Junior Staff Committee of the BMA, the Family Planning Association, the medical and nursing staff of the Lothian Health Board Family Planning Services and the Brook Advisory Clinic. The various reasons given for their opposition were that: the present law gave flexibility and protection to both young people themselves and to doctors and did not create problems in practice; a fixed rule of capacity at 16 might give rise to difficulties in giving non-emergency treatment to a person under 16 whose parents could not be contacted; the rule would be detrimental to the welfare of the under 16s because their access to contraceptive advice and treatment would be restricted: the present ages of capacity (12 and 14) made sound biological sense; if consent of the under 16s was seen as an exception to the general rule, the willingness of doctors to give treatment, and of young people to seek help, would be reduced.

3.65 We accept that the present law does not seem to give rise to practical problems but this does not necessarily mean that it is satisfactory. Some doctors are aware of the legal significance of the age of minority and act on the basis of the consent of a girl from the age of 12 or a boy from the age of 14. Others regard 16 as the age of consent and, as we have seen, consent of a parent or guardian is often required as a matter of practice in relation to hospital treatment for patients up to the age of 18.[1] It is, in our view, undesirable that such different practices should be adopted on the basis of what is believed, correctly or incorrectly, to be the existing law. For the protection of both the young patient and the doctor, the law in this area should be clear. Young people can probably give effective consent from the ages of 12 or 14 but the matter is not beyond doubt. The position of children under these ages is uncertain. Even if a 12 year old girl can understand the nature and risks of some treatments, it does not necessarily follow that she can understand all the risks involved in major surgical procedures. To this extent, a general rule conferring capacity on children as young as 12 may be too arbitrary to be applied to all questions of consent to medical treatment.[2]

3.66 We share the concern vigorously expressed by some commentators that any change in the law should not restrict young people's access to contraceptive advice and treatment. While it is clearly desirable that parents should be involved when such treatment is sought, we accept that this is not always possible.[3] More generally,

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1. See para. 2.7 above.
2. Opinion among child psychologists varies as to the age at which a child can competently consent to medical treatment. One school of thought is that adolescents (ie aged 14 and over) are as capable as adults of giving effective consent and that most school-age children can participate in the consent process to some extent: Weithorn, "Developmental Factors and Competence to make Informed Treatment Decisions," Child and Youth Services, Vol. 5, Nos 1/2 (1982) 85. Another is that by the age of 13 a child is developmentally competent to make reasonable judgments and to analyse actions and consequences in relation to consent to medical treatment although in each case the doctor should temper the arbitrary age of 13 with knowledge of the individual child: Grodin and Alpert, "Informed Consent and Pediatric Care" in *Children's Competence to Consent* (Melton, Koocher and Saks, eds., 1983) at p. 99. Yet another is that cognitive development stages associated with ages below 11-13 might exclude such children from giving meaningful consent. The tendency toward deference in early adolescence calls into question the capacity for voluntary consent in children up to the age of 14 although there are no psychological grounds on which a young person aged 15 or over cannot provide competent consent: Grisso and Vierling, "Minors' Consent to Treatment: A Developmental Perspective" Professional Psychology (1978) 412.
3. The latest DHSS Circular (LAC(86)3) on Family Planning Services for Young People, issued after the House of Lords decision in *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1985] 3 W.L.R. 830 recognises the importance of parental responsibility and family stability in requiring the doctor to try to persuade a patient aged under 16 to involve his or her parents when contraceptive advice or treatment is sought. Exceptionally, however, advice and treatment may be given without parental knowledge or consent, provided the doctor was satisfied:
   (1) that the young person could understand his advice and had sufficient maturity to understand what was involved in terms of the moral, social and emotional implications;
   (2) that he could neither persuade the young person to inform the parents, nor to allow him to inform them, that contraceptive advice was being sought;
   (3) that the young person would be very likely to begin, or to continue having, sexual intercourse with or without contraceptive treatment;
   (4) that, without contraceptive advice or treatment, the young person's physical or mental health, or both, would be likely to suffer;
   (5) that the young person's best interests required him to give contraceptive advice, treatment or both without parental consent.

it is not our intention to inhibit young people from seeking any kind of medical treatment on their own, subject, of course, to certain safeguards. This is the purpose of the proposed exception. Some consultees were worried that, by speaking in terms of an exception to the general rule of capacity at 16, we would convey the impression that the giving of consent by those under 16 would be possible only in very unusual circumstances. This is not necessarily so. For some minor kinds of treatment, we imagine that the doctor's acting on the basis of the child's own consent would be the norm. We hope that the drafting of the Bill on this point will go some way to allay these fears.[1]

3.67 Given the degree of support which our provisional proposal received, we believe that a rule of capacity at 16, coupled with a flexible exception below that age, is preferable to the present uncertain state of the law. A statutory provision along these lines would clarify the position of 16 and 17 year olds. It would reinforce existing medical practice based on 16 as the normal age of consent but would give clear authority for doctors in all areas of medical practice to rely on the consent of a child under that age in appropriate circumstances. Having carefully considered the views of the minority of consultees, we have concluded that our provisional proposal should be confirmed.

3.68 There was general agreement among consultees that this rule of capacity at 16 should be subject to an exception. There was a more mixed response from pupils and school leavers.[2] We ourselves believe that a broad and flexible exception is essential. As for the four options canvassed in the Memorandum, there was little enthusiasm among consultees for allowing a person under 16 to consent to treatment for specified illnesses or conditions. Most considered this formulation to be both undesirable and unworkable. We agree.

3.69 The other three options met with varying degrees of support. The first of these, allowing a doctor to proceed on the basis of the young person's consent if it was in accordance with approved medical practice to do so, appealed to some commentators, including the British Medical Association, as being a flexible but straightforward solution. A few suggested that the exception should be framed in terms of "proper" or "rightly approved" medical practice so as to give a greater degree of protection to both patient and doctor and to make it clear that the final determination of the matter rested with the courts.[3] Another suggestion was that this option should be combined with one of the others offered so as to deal effectively with both contentious and non-contentious treatment. In other words, a doctor would rely on approved medical practice to give minor forms of treatment to a child on the basis of his own consent but, in contentious areas of treatment, the validity of the child's consent would depend on his understanding the nature and consequences of the treatment involved.

3.70 Other commentators expressed strong opposition to this proposal, firstly, on the ground that it would be difficult to determine what was approved medical practice, particularly in relation to controversial areas of treatment for the under 16s and, secondly, because it would be unacceptable to surrender law-making in this area to the medical profession itself. We ourselves had expressed similar reservations about this option.[4] Even if used in combination with some form of "mature minor" rule,

1. See clause 2(4) of the draft Bill annexed.
2. A majority of pupils and leavers favoured an exception to the general rule for consent to operations (52% as against 34% and 70% as against 27% respectively). As regards contraception, the results were 31% of pupils in favour, 54% against; 55% of leavers in favour, 42% against. For abortion the results were 42% of pupils in favour, 43% against; 48% of leavers in favour, 46% against. See CRU Report, Tables 7.4, 7.7 and 7.10. The System Three survey did not seek adult opinion specifically on this question.
3. cf. the standard of care required of the medical profession in *Sidaway* v. *Bethlem Royal Hospital Governors and Others* [1985] 1 All E.R. 643, i.e., to act in accordance with a practice rightly accepted as proper by a body of skilled and experienced medical men.
4. See para. 5.54 of the Memorandum.

it would be difficult to determine the limits of operation of the two doctrines. If an exception based on the young person's understanding is considered acceptable in the first place, we think that it should operate across the whole spectrum of medical treatment. Given the strength of opposition to this option, which came from representatives of both the medical and legal professions including the Law Society of Scotland and the Royal College of General Practitioners, we do not think it should form the basis of reform in this area.

3.71 The two remaining options were both founded on the capacity of the young person to understand. One entitled a doctor to act on the basis of the consent of a person under 16 where the young person was capable of understanding the nature and consequences of the treatment proposed and, on the basis of that understanding, of reaching a decision whether or not to agree to the treatment. This was said to be a flexible rule which could take into account the needs and capacity of the individual patient. It attracted a broad measure of support from within the legal and medical professions (although it was not the option preferred by main representative bodies of the medical profession). It also appealed to some with direct experience of working with or counselling young people. In its favour, some argued that it was in line with current medical practice and that it was a means of giving proper protection to the young patient. Others would have added the further qualification that the proposed treatment should be in the young person's best interests.

3.72 However, not all commentators were satisfied with this approach. A few considered that it was too vague and that it was unreasonable to expect a doctor to assess the maturity of a girl seeking contraceptive treatment, for example, without knowing anything about her emotional stability or parental relationships. A further criticism of this option was that it would put too great an onus on the medical practitioner to decide, as a matter of fact, whether or not the young person had sufficient understanding of the treatment proposed.

3.73 This last criticism is, in our view, significant. It would be extremely difficult for a doctor to come to a definite decision as to the maturity of his young patient. Even if he did honestly decide that his patient did have capacity to understand, another doctor or a court might come to the opposite conclusion. An objective test like this would give little protection to doctors and might make them reluctant to give treatment on the basis of a young person's own consent except in the most obvious and uncontroversial cases. For this reason and despite the support it attracted on consultation, we do not think this option is acceptable in its present form.

3.74 This is not to say that we would reject altogether an exception based on the young person's capacity to understand. Indeed, we believe that this is the most appropriate solution, given the degree of flexibility that is necessary to cater for both the very young child and the mature 15 year old. An element of uncertainty is obviously inherent in this approach and is, in our opinion, acceptable. However, in order to be practicable, the exception would have to be couched in terms of the doctor's opinion as to the young person's capacity to understand.[1]

3.75 This leads us to consider the final option canvassed in the Memorandum which is based on the Canadian Uniform Medical Consent of Minors Act. Leaving aside for the moment the provisions dealing with emergency treatment and the non-availability of parental consent, the basic proposal was that a person under 16 should have capacity to consent to medical treatment where, in the opinion of a qualified medical practitioner attending the young person, supported by the written opinion of one other,

(*a*) the young person is capable of understanding the nature and consequences of the treatment; and

(*b*) the treatment and the procedure to be used is in the best interests of the young person and his continuing health and well-being.

1. cf. the DHSS Circular on Family Planning Services for Young People referred to in para. 3.66, footnote 1, above. There it is stated that decisions about whether to prescribe contraception to under 16 year olds (i.e., whether the five criteria set out in the Circular are met) are for a doctor's clinical judgment.

As with the previous proposal, this option attracted widespread support from representatives of the medical profession and others. Some who had opposed the "approved medical practice" option preferred the Canadian approach because it would mean that evidence of medical practice would still be relevant, but not decisive. Again, the basic concept of capacity according to the young person's level of understanding was considered to be in line with current practice. Criticism of this option was mainly on points of detail which, if well-founded, could readily be met. Objection was taken most strongly to the requirement of a second supporting opinion. Critics argued that it was unrealistic for a general practitioner in a remote area to obtain an opinion from another doctor. Even if practicable, the doctor attending the young person would be likely to seek a second opinion from a colleague known to be sympathetic towards the treatment of young people on the basis of their own consent. The intended protection of a second opinion could become no more than a rubber stamp.

3.76 The second area of concern related to the requirement that the treatment and procedure to be used should be in the young person's best interests. A number of commentators pointed out that this would be too restrictive. It could prevent a young person consenting to a tissue donation for another member of his family or to any other non-therapeutic treatment. More importantly, practitioners would have different ideas of what was in a child's best interests. A family planning doctor or a surgeon specialising in cosmetic surgery may take a different view from that of a general practitioner. It would be difficult to establish a consistent policy throughout the medical profession on the circumstances in which a young person's consent would be effective.

3.77 We see force in both these arguments. The requirement of a second opinion would be too cumbersome and would not necessarily provide any safeguard for either the doctor or the patient. The best interests test seems too restrictive and would, in our view, be unnecessary. If it is accepted that a child may consent if he is of sufficient maturity to understand the treatment proposed then that test should apply whether the treatment concerned is for his benefit or not. In that respect, the young patient should be treated no differently from anyone else capable of consenting.[1] In the case of non-therapeutic treatment such as cosmetic surgery or tissue donation, a greater level of understanding might be required; nevertheless the test remains the same.[2] Additional "best interests" protection is unnecessary. In our view, this is the logically coherent approach. The young person's best interests are irrelevant to the question of consent although they may have a bearing on the issue of professional negligence.[3] Our conclusion is that a person under 16 should have capacity to consent to medical treatment if, in the opinion of the doctor attending him, he is capable of understanding the nature and consequences of the treatment proposed.

3.78 By "medical" we mean to include "surgical" and "dental" and we intend "treatment" to include examination. We did initially consider following the example of section 8 of the (English) Family Law Reform Act 1969 and providing that surgical, medical or dental treatment would include

> "any procedure undertaken for the purposes of diagnosis and any procedure (including, in particular, the administration of an anaesthetic) ancillary to surgical, medical or dental treatment".

We have in the end opted for a simpler solution, framing the provision in terms of consent to "any surgical, medical or dental procedure or treatment".[4] This has the

1. cf. Lord Scarman's opinion in *Gillick* v. *West Norfolk & Wisbech Area Health Authority* [1985] 3 W.L.R. 830. See also Norrie, "Gillick again: the House of Lords decides" 1986 S.L.T. 69.
2. The fact that a child's consent to donate non-regenerative tissue could be legally valid would not necessarily mean that he would be considered a suitable donor: cf. BMA *The Handbook of Medical Ethics* (1984) paras. 10.12 and 10.13.
3. Medical ethics already take account of the patient's best interests in the context of the appropriateness or otherwise of particular treatment: see BMA, *The Handbook of Medical Ethics,* para. 2.20; the Hypocratic Oath (p.69) and the World Medical Association's Declaration of Lisbon on the rights of the patient (p.72). On medical negligence, see *Hunter* v. *Hanley* 1955 S.L.T. 213; *Sidaway* v. *Bethlem Royal Hospital Governors* [1985] 1 All E.R. 643.
4. This would, of course, cover any surgical or medical treatment for psychiatric conditions.

advantage of covering procedures not connected with any treatment required by the patient, for example, blood donation.[1] It also clearly includes non-essential surgery or preventive medical procedures such as the fitting of a contraceptive device which may not be regarded as treatment in the sense of providing a remedy for the patient's illness or condition.[2] In our view this broad definition is consistent with the approach we have taken to the question of the patient's best interests. Moral and ethical considerations may rule out a particular medical procedure—for example, experimental surgery—as inappropriate but do not affect the validity of the patient's consent.

3.79 The Canadian model law deals not only with the capacity of the young patient himself but also with the giving of emergency treatment without consent and the non-availability of parental consent. The comprehensive nature of the statute appealed to some commentators, as confirming existing medical practice and providing a special court procedure for resolving cases where parents refuse to consent to treatment or where they are simply not available to give consent. Others, however, considered it unnecessary to regulate these matters by statute. The procedure to be followed in cases of emergency was already well-established for all patients, regardless of age and, on the analogy of *In re B. (a minor)*,[3] a court ruling dispensing with parental consent could be obtained in appropriate circumstances.

3.80 We share this view. In our opinion there is no need for statutory provision on emergency treatment. Moreover we believe that the issue of non-availability of parental consent falls more properly within the scope of our future work on guardianship and parental rights and duties. We readily acknowledge that the relationship between a child's own capacity to act and that of his parents to act for him is important, particularly in the field of consent to medical treatment, but it would be more consistent with our general approach to reform to defer consideration of this particular topic until the next stage of our project. A decision to postpone consideration of this question will not prejudice the final outcome. Although our recommendations on legal capacity will influence the shape of our eventual proposals on guardianship (to the extent that we will be proposing to replace tutors and curators with a single category of guardian), they will not necessarily determine the way in which we deal with specific issues arising in the context of parental rights. We do not therefore recommend in this Report that the remaining provisions of the Canadian legislation be adopted.

3.81 To sum up, our recommendations are concerned only with the capacity of a young person under 16 to consent to medical treatment on his own behalf. They are made without prejudice to the existing law and practice regarding the giving of treatment without consent. Nor do they affect the right of a parent or guardian to consent to medical treatment on behalf of a child or to be consulted about proposed treatment. Problems of conflict between parent and child over medical treatment are deliberately left untouched as is the question of whether any treatment given with the effective consent of a child nonetheless infringes parental rights.[4] Needless to say, the fact that legally effective consent is given to treatment does not oblige a doctor to proceed with that treatment.

3.82 So far we have spoken in general terms of capacity to give effective or valid consent. It is not necessary, in our view, to spell out in the draft legislation the consequences of giving legally effective consent to medical treatment. The matter can be left to turn on the general law. In the Memorandum.[5] we suggested that a valid consent to treatment was necessary to protect the doctor from either criminal

1. This would not necessarily mean that young people under the age of 16 would be accepted as donors. Indeed, medical opinion may be against taking blood donations from people of this age: see Report of the Committee on the Age of Majority (The Latey Committee) (1967) paras. 485 to 489. This is not, however, a question of consent but of clinical judgment regarding the effect of loss of blood on this age group.
2. Skegg, *Law, Ethics and Medicine* (1984) pp. 50-51; Foulkes, "Consent to medical treatment" 1970 N.L.J. 194: cf *Gillick* v. *West Norfolk & Wisbech Area Health Authority* [1985] 3 W.L.R. 830 per Lord Scarman at pp. 851-2.
3. [1981] 1 W.L.R. 1421.
4. *Gillick* v. *West Norfolk & Wisbech Area Health Authority, supra.*
5. At paras. 2.47 and 5.46.

or civil liability for assault. This statement was challenged by one commentator on the ground that a doctor will not have the *mens rea* or evil intention which is a necessary element of the crime.[1] Even if he were to have that intent, an assault would be committed regardless of whether or not the patient had consented. We would agree that in the vast majority of cases, the *mens rea* required to constitute a criminal assault will be lacking. We would also accept that the defence is not generally applicable in criminal cases unless lack of consent is an element of the crime itself, as in rape, for example. Although absence of legally effective consent is said to be an essential element of the crime of battery in English law[2] this may not be so in the case of the Scottish crime of assault.[3] However, the possibility still exists that a doctor will be liable in damages for assault if he provides treatment without consent.[4] Failure to obtain consent could also perhaps be regarded as negligent conduct on the part of the doctor and so give rise to a claim for professional negligence. The fact that consent to treatment has been obtained would not, of course, be any defence if the treatment was, in fact, given negligently, causing injury to the patient. On the basis of recent English authorities,[5] a claim for damages for assault is appropriate only where there has been no real consent at all. If a claim is based on failure to disclose risks inherent to the proposed treatment, the proper remedy is an action for negligence.

3.83 Our recommendation regarding consent to medical treatment is as follows:

6. **Without prejudice to the existing law and practice regarding the provision of treatment without consent, a person below the age of 16 should have capacity to consent to any surgical, medical or dental procedure or treatment if, in the opinion of a qualified medical practitioner attending that person, he is capable of understanding the nature and consequences of the treatment proposed.**
(Paragraphs 3.61 to 3.82; clause 2(4))

Consent to adoption

3.84 Our proposal in the Memorandum was to amend the rule whereby a minor has the right to veto his or her own adoption so that it would apply only in relation to 16 and 17 year olds.[6] We argued that this change would make little practical difference to the court's determination of an application to adopt a child in the 12-16 or 14-16 age group because the court would still be obliged to give due consideration to the child's wishes and feelings, having regard to his age and understanding.[7] While most consultees agreed with this proposal, a significant minority did not. Opposition was also voiced at one of our public meetings. Opponents regarded it as an unjustified erosion of a minor's rights, pointing to the difference between a formal requirement of consent and an obligation merely to take account of the child's wishes. Becoming a member, legally, of a new family is such an important step that it should not be imposed against the will of a child old enough to have a decided view. Consultees taking this view thought that the consent of a child to his or her own adoption should be required from the age of 14.

3.85 We see the force of these arguments. On reflection, we believe that the existing right of veto should be preserved. One possibility would be to require the consent of a child to his own adoption unless, in the opinion of the court, he lacked the necessary mental capacity or understanding. Another would be to require the consent of a child over a certain age. We prefer the latter approach on the grounds of simplicity and certainty. It would also remove the element of sex discrimination in the present law. We have already recommended that a child aged 12 or over should have capacity to make a will. For the sake of consistency and so as not to deprive a female child of her existing capacity in this area, we consider that the same rule should apply here.

1. i.e. intent to injure and do bodily harm: *HMA* v. *Smart* 1975 S.L.T. 65 at p.66. See also Macdonald, *Criminal Law* (5th ed.) p.115.
2. *Fagan* v. *Commissioner of Metropolitan Police* [1969] 1 Q.B. 439 at p.444; *Attorney-General's Reference (No. 6 of 1980)* [1981] Q.B. 715 at p.718.
3. *HMA* v. *Smart, supra*; although see Gordon, "Consent in Assault" 1976 J.L.S. 168; Norrie, "The Gillick case and parental rights in Scots Law" 1985 S.L.T. 157 at p.158.
4. Walker, *Delict* (2nd ed.) p. 493; *Thomson* v. *Devon* (1899) 15 Sh. Ct. Rep. 209. Consent as a defence to an action in delict is often expressed in terms of *volenti non fit iniuria* or assumption of risk.
5. *Chatterton* v. *Gerson and Another* [1981] 1 All E.R. 257; *Sidaway* v. *Bethlem Royal Hospital Governors, supra. Sidaway* also rejected the doctrine of informed consent as part of English law.
6. See para. 5.129 and Adoption (Scotland) Act 1978, s.12(8).
7. 1978 Act, s.6.

3.86 We therefore recommend that:

7. The rule whereby a minor must consent to his or her own adoption should be amended to apply to any child aged 12 or over.

(Paragraphs 3.84 and 3.85; clause 2(3))

Necessaries

3.87 We provisionally proposed in the Memorandum[1] that there should be no exception to the rule of incapacity to enable young people under 16 to contract for necessaries. We argued that, given the broad exception proposed for everyday transactions, a special exception for necessaries would be of little practical value. Necessaries would in any event be normally provided by a parent or guardian; children below 16 should not *need* to buy food and clothing on credit or obtain accommodation for themselves. We surmised that many purchases of necessaries, if made at all, would be carried out, not on behalf of the child himself, but on behalf of his parent where, for example, the child undertakes the family's weekly shopping. In such circumstances, the parent and not the child would be liable on principles of agency. This would remain the case even if the young person had no capacity to purchase necessaries for himself.

3.88 Most consultees supported this proposal but a few did not. Opponents argued that children did not always have a parent or guardian available to supply them with food and clothing etc and that they should not be prevented from obtaining necessary items on their own behalf. We accept that some youngsters may find themselves in this position. Nevertheless we believe that their interests will nearly always be adequately safeguarded by our general exception enabling young people to enter into ordinary transactions. Given the rewording of this exception to take account both of the young person's age and circumstances,[2] it should obviate the need for any special capacity to contract for the supply of necessary goods and services.

3.89 Concern was expressed by one or two commentators about the implications of our proposal as regards housing for young people,[3] and in particular the use of Short Stay Refuges operated by local authorities. Under the present law, Social Work Departments rely on minors' general liability for necessaries or on the doctrine of forisfamiliation to enable them to enter into short-term leases of accommodation with young people who might otherwise be taken into care. Any doubt as to their future capacity to contract for housing might jeopardise the operation of these facilities. We do not doubt the importance of such Refuges but again we believe that the general exception can cater for these arrangements where appropriate. Our conclusion is therefore that there is no need to have an exception for necessaries under our recommended scheme for reform.

3.90 We did consider whether a separate case could be made out for retaining the statutory obligation to pay for necessaries which is imposed on a minor under section 3(2) of the Sale of Goods Act 1979. On one view, the rule would be superseded by the exception for ordinary transactions for the under 16s. Repeal would be consistent with our general approach to reform and would be supported by consultation. Moreover, we had criticised this statutory provision in the Memorandum[4] as being difficult to operate, requiring the trader to know whether or not the minor was already supplied with similar goods. On the other hand, it could be desirable to retain some uniformity within the United Kingdom on this point. The obligation to pay for necessaries under section 3(2) is not a matter of contractual capacity but rather a separate statutory obligation requiring payment of a reasonable price even if there is no capacity and hence no contract. Our conclusion on this matter is that it is preferable to ensure consistency with our other recommendations for reform. It is

1. At paras. 5.36 and 5.37, and para. 5.63.
2. See para. 3.51 above.
3. The survey results suggest, however, that young people themselves are not worried about contracting for housing under the age of 16. 68% of pupils and 78% of leavers were not in favour of people under 16 having capacity to rent a house or flat. Among the 22% and 13% respectively who favoured capacity, the main reason given for their response was that it might be necessary for a young person to find independent accommodation. See CRU Report, Tables 5.3 and 5.4.
4. See paras. 2.14 to 2.19 and 5.36.

likely in any event that a similar obligation could arise under the common law, on the basis of recompense, to pay for goods whether falling within the definition of necessaries or not. The provision is probably already unnecessary for Scotland and will be even more so, in the light of our general exception for ordinary transactions.

3.91 We therefore recommend that:

8. (*a*) There should be no exception to the rule of incapacity for the purchase of necessaries.

(Paragraphs 3.87 to 3.89)

(*b*) Section 3(2) of the Sale of Goods Act 1979 should be disapplied to Scotland in so far as it requires a minor to pay a reasonable price for necessary goods supplied to him.

(Paragraph 3.90; Schedule 2)

Employment and trading contracts

3.92 There was general agreement among consultees that there was no need for an exception for either employment or trading contracts.[1] Any such transactions would, where appropriate, fall within the general exception. We endorse this view. The most obvious example of contracts which would be permitted are contracts for holiday or Saturday jobs. Other more unusual transactions, such as selling fish caught by the young person himself, could also be covered depending on the circumstances of the case. Accordingly we recommend that:

9. There should be no exception to the rule of incapacity enabling a person under 16 to enter into employment or trading contracts.

(Paragraph 3.92)

(2) Exceptions depending on general or special authorisation

3.93 Under this heading in the Memorandum,[2] we invited views on whether the doctrine of forisfamiliation should be retained and whether it should be possible for a young person under 16 to enter into transactions with the consent of his parent or guardian or with the consent of the court. Our own provisional view was that none of these exceptions to the general rule was necessary.

3.94 The doctrine of forisfamiliation permits a minor, living independently of his parents, to act on his own behalf subject to reduction of his transactions on the ground of minority and lesion. In the context of our proposals we thought that this rule, or any updated version of it, would be irrelevant. It would be unlikely that a person under 16 would be living completely independently in the first place. Even if he was, we doubted whether it would be right to confer on him full legal capacity. As regards enabling an under 16 year old to act with the consent of his parent or guardian, we thought it consistent with the principle of incapacity to provide that a parent or guardian should transact for the young person. There would therefore be no advantage in providing for a special category of transaction in which the intervention of a parent or guardian would still be required, although in a different form. We also considered it unnecessary to provide for court approval of the young person's actings. The main circumstance in which this might be thought appropriate would be if the child had no parents or guardians to act for him and the consent of the court to the child's actings was proposed instead. In our opinion, appointment of a new guardian to act generally for the child would be preferable.

3.95 Our provisional view on these matters was confirmed on consultation. Some concern was, however, expressed about possible difficulties arising in relation to Deeds of Family Arrangement where a young person is a beneficiary. It was suggested that a child of, say, 10 or over should be able to consent to such a deed with the approval of one parent provided this did not derogate from the benefit otherwise

1. 85% of adults responding to the System Three survey considered it "a good idea" that people under 16 should not be able to enter employment contracts: Table 12 and CRU Report, Figure 5.3. In the CRU survey, 33% of pupils were in favour of this proposal, 54% against; among leavers, 51% were in favour, 31% against. Opposition was mainly on the ground that it could be necessary for a young person to obtain work. We are not, however, ruling out this possibility: it would be accommodated within the general exception where appropriate. See CRU Report, Tables 5.5 and 5.6.
2. See paras. 5.64 to 5.68.

conferred on him. The idea of having a specific exception for this, which would concern only a small number of children, is not attractive. In any event it is the child's guardian who has the task of deciding whether to claim, renounce, compromise or agree on the child's behalf. Accordingly, we have concluded that a specific exception would be unnecessary.

3.96 In the light of the response on consultation, we recommend that:

10. (*a*) The doctrine of forisfamiliation should be abolished.

(*b*) The rule of incapacity should not be subject to any exception entitling a person under 16 to act with the consent of a parent or guardian or with the consent of a court.

(Paragraphs 3.93 to 3.95)

Position of the 16 and 17 year olds

General rule of capacity

3.97 There was widespread support on consultation for our proposal that young people aged 16-18 should be entitled to act on their own behalf.[1] Subject to two qualifications to which we refer below,[2] our recommendation is that they should have full legal capacity as if they were adults. People in this age group would not therefore need parental consent to enter into valid contracts. Any transaction entered into by a 16 or 17 year old would be binding on him. Their consent to medical treatment would be as effective as that of a person aged 18 or over. They would be able to participate in civil court proceedings without appointment of a curator ad litem simply on account of their age. One area where our recommendations might be of particular benefit to 16-18 year olds is housing. A clear rule of legal capacity, not depending on outmoded doctrines of forisfamiliation or necessaries, might make it easier for them to obtain rented accommodation both in the private and the public sector.[3] One commentator working with the single homeless particularly welcomed our proposals for this reason.

3.98 A major issue raised on consultation and especially in the opinion surveys was the availability of credit facilities for young people. The concern was that the lowering of the age of full legal capacity from 18 to 16 would encourage people in that age group to take on long-term financial obligations which they would not be able to meet. It is appropriate, first of all, to try to put this concern into perspective. The CRU surveys of pupils and leavers show that most young people do not use credit facilities.[4] Indeed, some positively disapprove of the idea.[5] The only significant use of credit is through mail order catalogues which can be explained largely by the individual's personal acquaintance with the company's agent who was often a parent, relative or neighbour of the young person.[6] Among the credit-users, few had regular problems with keeping up repayments[7] but a number experienced occasional difficulties.[8]

3.99 It would appear therefore that, despite credit companies' stated policy of refusing facilities to those under 18, some young people do obtain credit under this

1. See paras. 5.27 and 5.136 of the Memorandum.
2. At paras. 3.102 to 3.113 and paras. 4.1 to 4.6.
3. Under sections 19(1)(*a*) and 20(2)(*a*)(iii) of the Housing (Scotland) Act 1987 it is no longer permissible for housing authorities, in the admission of applicants to their housing list or in their allocation of local authority housing, to take any account of the fact that the applicant is under 18 years of age, provided he has reached the age of 16.
4. Only 4% of pupils and 5% of leavers had applied for a personal credit account with a shop and a total of 3% in each case were successful in their application: CRU Report, paras. 4.4 and 4.7 and Table 4.1. Discounting mail order credit facilities, 2% of pupils and 8% of leavers had tried to obtain other forms of credit. Most of these applications were successful: CRU Report, paras. 4.5, 4.8 and 4.9 and Table 4.1.
5. 8% of pupils and 21% of leavers said they disapproved of credit. Other reasons given for non-use of credit were: preferred to save up (25% of pupils and 35% of leavers); borrow from parents (10% and 14%); parents pay for purchase (35% and 12%); cannot afford credit (6% and 2%). See Table 4.2.
6. 26% of pupils and 25% of leavers had tried to get mail order credit. Most applications were successful, giving totals of 24% and 23% using this form of credit: paras. 4.3 and 4.6 and Table 4.1.
7. 5% of pupils and 6% of leavers: para. 4.10.
8. 11% of pupils and 20% of leavers: *ibid.*

age. We doubt, however, whether our recommendations would alter the pattern of credit-use among the young. We are reassured to learn from a number of financial institutions which we consulted that any change in the law to confer full capacity at 16, even though subject to safeguards, would not affect their policy of extending credit facilities only to those aged 18 and over. One company stated specifically that it would not be willing to offer credit to a 16 or 17 year old if there was a possibility that the credit agreement would be open to challenge.[1] Even among young people themselves, the prospect of being able to obtain credit at 16 got only modest support, many respondents being aware of the risks involved,[2] although a significant number realised that the ability to obtain credit might sometimes be necessary.[3]

3.100 Assuming that the policy of financial institutions is unchanged, a minority of 16 and 17 year olds will no doubt continue to obtain credit facilities by misrepresenting their age and, of those, a small proportion may get into financial difficulty. One answer may be for credit companies to check more thoroughly the personal information supplied by applicants or for there to be increased consumer education in schools.[4] Even if some lenders were to offer credit facilities to 16 and 17 year old on the basis of our recommended rule of capacity, there would, if our later recommendations on this point are accepted, be protection available in the form of a right of challenge. If the credit transaction was shown to be substantially prejudicial to the young person, it could be set aside. We believe that this is the most appropriate way of safeguarding the young person's interests in this, or indeed, in any kind of transaction.

3.101 Our basic recommendation for this age group is accordingly that:

11. Young people aged 16-18 should, subject to certain qualifications, have full legal capacity to enter into valid transactions on their own behalf.

(Paragraphs 3.97 to 3.100; clause 1(1)(*b*))

The main qualification referred to concerns the right to challenge prejudicial transactions.[5]

Challenge of prejudicial transactions

3.102 The principal safeguard proposed for 16-18 year olds in the Memorandum was a right to have set aside transactions which were shown to be prejudicial to the young person.[6] On the assumption that some measure of protection was desirable for this age group, most consultees were content with this approach. We ourselves believe that it is consistent with our fundamental policy objective of protecting young people from the consequences of their immaturity without restricting unnecessarily their freedom of action. The right of challenge affords general protection where necessary. It does not limit directly the kind of transaction a 16 or 17 year old may enter into. Some of our later recommendations should minimise any prejudice which adults might suffer as a result of the right of challenge and should help overcome any reluctance on their part to deal with people in this age group.

Ground of challenge

3.103 As regards formulation of the ground of challenge, three possibilities were canvassed in the Memorandum, namely, that a person should be entitled to have set aside a transaction entered into when he was 16 or 17 if:

(*a*) it had caused him substantial prejudice;

(*b*) it had caused him substantial prejudice and it was not one which a reasonable person acting in the same circumstances would have entered into; or

(*c*) it had caused him substantial prejudice and the prejudice was of a kind which was, or should have been, manifest at the time of the transaction.

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1. See paras. 3.102 *et seq.*
2. e.g. 51% of pupils and 31% of leavers considered it a good idea that a 16 year old should be able to obtain a personal account with a shop: CRU Report, Table 6.6. The main reason given for regarding this proposal as a bad idea was that the young person would get into debt: Table 6.7.
3. This was the reason given by 10% of pupils and 23% of leavers for approving this proposal: *ibid.*
4. See CRU Report, paras. 8.9 and 8.10.
5. In addition, special provision is recommended at para. 4.6 below regarding the court's power to consent to variation of trust purposes on behalf of any beneficiary under 18 but this would affect only a very few young people.
6. See paras. 5.104 to 5.109.

The choice depended, in our view, on the weight to be given to the competing interests of the young person and the other party. A straightforward test of prejudice might be weighted too heavily in favour of the young person. It could allow reduction of a transaction which, on its terms, was perfectly fair but which turned out to be prejudicial for reasons beyond the control of either party. An additional test of reasonableness or a requirement that the prejudice was or should have been manifest would do more to safeguard the interests of the adult party, but at the expense of introducing an element of uncertainty. Ultimately this might discourage adults from transacting with people in this age group.

3.104 Among consultees, some favoured a simple test of substantial prejudice provided certain restrictions were placed on use of the right of challenge.[1] Others considered this option gave too much latitude to the young person to reduce a contract, ignoring the legitimate interests of the other party. Opinion was evenly divided as to which of the other two formulations was more appropriate. Some considered a reasonableness test was preferable because it was already a familiar concept in the law. Others suggested that a test of manifest prejudice gave the contracting adult the best chance of assessing whether or not there was a real risk of the transaction being set aside. In our view, there is little to choose between these tests but we accept that either of them would be better, on policy grounds, than the first and simplest option. The purpose of the right of challenge is to protect the 16 or 17 year old from the consequences of his immaturity and to give him a special right to withdraw from rash bargains. It would be going too far to give him an unqualified right to challenge a transaction which was unobjectionable at the time it was entered into but which unexpectedly turned out to be prejudicial, perhaps for reasons not directly related to the transaction itself. Our conclusion, which is shared by a number of those we consulted, is that the familiar test of reasonableness would be the best solution.

3.105 Thus there are two limbs to the ground of challenge. The first is proof of substantial prejudice. A transaction would not be set aside where the young person had suffered only minimal loss.[2] Whether or not the prejudice was substantial would be determined by the court on the facts of the case. There would be no presumption of prejudice in certain types of transaction. The question would not simply be whether the transaction was prejudicial at the time it was entered into, but whether it did, in fact, turn out to be substantially prejudicial thereafter.

3.106 The second limb is the reasonableness test. We are happy to adopt the suggestion made to us by one commentator that the test should be in terms of whether a reasonably prudent adult acting in the same circumstances would have entered the transaction in question. This ensures that the standard is not that of a reasonable but equally immature and inexperienced 16 year old. The reasonableness test should be applied at the time the transaction is entered into, not at the time application is made to have it set aside. It is intended to ensure that the transaction is judged objectively and that the young person should not be able to have set aside a transaction which, at the time it was entered into, was perfectly reasonable but which turned out to have disastrous and unforeseen consequences for him. Moreover, the formula envisaged should not mean automatic reduction of a transaction which an adult would never contemplate entering into, regardless of the fairness of its terms, for example, an application for membership of a youth club. The test would require the reasonably prudent adult to put himself into the shoes of a person the age of the child in question.

Method of challenge

3.107 Under the existing law, challenge on the ground of minority and lesion is by action of reduction in the Court of Session or by way of exception, that is as a defence in other proceedings in either the Court of Session or the sheriff court.[3] This has two disadvantages. The first is that, except as a defence, challenge may be made in

1. For example, by excluding it where the young person had fraudulently misrepresented his age: see paras. 3.121 to 3.124 below.
2. This is the existing rule for reduction of transactions on the ground of minority and lesion: see para. 2.3 above.
3. Erskine, 1.7.34; Rules of Court, R.174; Sheriff Court Rules, rule 68.

separate proceedings only in the Court of Session. The second is that, because challenge is by action of reduction, it is arguably limited to obligations constituted by deed or writing.[1]

3.108 In our view, it is unnecessary to impose either of these restrictions on the new right of challenge which we are proposing. The draft clause implementing our recommendations on this question is therefore in terms of an application to have a transaction "set aside" on the ground of substantial prejudice.[2] Any transaction, however constituted, may be challenged unless the right of challenge has been expressly excluded.[3] The application would be made by action in either the Court of Session or the sheriff court[4] or by incidental application in other proceedings.

Time for challenge

3.109 Our provisional proposal was that the right of challenge should subsist until the young person concerned reached the age of 21.[5] Although most consultees supported the suggestion, a few considered this period too long and suggested instead either a one year limit from the date of the transaction or that the right of challenge should subsist only until the age of 18. Neither of these proposals is, however, satisfactory. A one year time limit would mean that transactions entered into by a 16 year old would have to be challenged before he reached the age of majority and therefore at a time when he was still entitled to additional protection on account of his inexperience and immature judgment. A straight cut-off point at 18 would give little opportunity for reflection on those transactions entered into just before the young person's eighteenth birthday. On the other hand, we accept that the adult party should not be exposed to the risk of challenge indefinitely. It is to the advantage of both parties that a young person should be able to have a transaction set aside before he attains the age of 18 if it has become clear by that time that the grounds for challenge have been substantiated. This, however, is not always feasible and a reasonable time must be allowed for the young person to reconsider his position after the age of 18. We still believe, as do most of those who expressed a view, that a right of challenge up to the age of 21 strikes the right balance. This means that the minimum period of challenge would be three years from the age of 18. The maximum period, applying where a young person entered a transaction on his sixteenth birthday, would be five years which is now the normal period of prescription for most obligations.

Title to sue

3.110 We recommend that the plea should be available not only to the young person himself but also to his successors. By this we mean to include his executor, trustee in bankruptcy, trustee acting under a trust deed for creditors or other personal representative such as a curator bonis. As a matter of policy, we do not think it would be acceptable to include the young person's creditors in this list as that would allow a creditor to have set aside a transaction which was entirely unrelated to the debt in question. Nor would it be right to allow an assignee under the young person's contract to attempt to have it set aside (although if the assignee was also aged 16-18, the assignation itself could be open to challenge).[6] The same period of challenge would be applicable to successors as to the young person himself. In other words, successors would have to apply to have the transaction set aside before the young person reached, or would have reached, the age of 21.

Effect of challenge

3.111 In the Memorandum[7] we canvassed opinion on the suggestion that, once a transaction had been set aside, the parties' rights should be determined according to common law principles of unjustified enrichment subject to a power in the court to modify the young person's obligation to make restitution or recompense in any way considered equitable in the circumstances of the case. The response was the

1. Erskine, 1.7.35.
2. See clause 3(1) of draft Bill annexed.
3. See paras. 3.119 to 3.134 below.
4. Jurisdiction would be determined by the ordinary rules under the Civil Jurisdiction and Judgments Act 1982.
5. See para. 5.122 of the Memorandum.
6. A young person, having once raised an action to set aside the transaction would, of course, be able to assign his rights under that existing action.
7. At para. 5.123.

same as that made in the context of our proposals affecting those under 16.[1] While most agreed with the proposal, there were one or two notable exceptions who favoured applying the general law without modification. As before, their arguments have weighed heavily with us.[2] In our view, the same approach should be taken here as we have taken in relation to void transactions. We therefore recommend that, on setting aside, the parties' rights should be determined by the general law. The only additional recommendation we would make is to empower the court to make orders, say, for recompense or restitution in the action of setting aside itself rather than require the parties to take separate proceedings to adjust their property rights.

3.112 We also recommend that the question of third party rights should be left to the general law. Again, this is in line with our recommendations on void transactions.[3] Leaving the matter to the general law means that there would be no prejudice to a third party who has acquired property from the young person in good faith and for value and without notice of the fact that the original transaction under which the young person acquired the property was voidable.[4]

3.113 Our recommendations on the general question of setting aside prejudicial transactions may be summed up as follows:

12. (*a*) **Any transaction entered into by a person aged 16-18 should be liable to be set aside by a court, on the application of that person before he attains the age of 21, on the grounds that**

(i) it had caused him or was likely to cause him substantial prejudice, and

(ii) it was not one which a reasonably prudent adult acting in the same circumstances would have entered into.

(Paragraphs 3.102 to 3.106 and 3.109; clause 3(1) and (2))

(*b*) **Application for setting aside a transaction should be by action in the Court of Session or the sheriff court or should be made by incidental application in other proceedings.**

(Paragraphs 3.107 and 3.108; clause 3(5))

(*c*) **The young person's personal representatives and successors should also be entitled to apply to have a transaction set aside provided they do so before the young person reaches, or would have reached, the age of 21.**

(Paragraph 3.110; clause 3(4))

(*d*) **Once a transaction has been challenged successfully, the rights of the parties should be determined by the general law of unjustified enrichment. On setting aside the transaction, the court should be empowered to make such order or orders as seem appropriate to give effect to the parties' rights.**

(Paragraph 3.111; clause 3(5))

(*e*) **The rights of third parties which depend on the validity of a transaction entered into by a 16 or 17 year old should be determined by the general law.**

(Paragraph 3.112)

This broad framework for challenge of prejudicial transactions is subject to our further recommendations on exclusion of the right of challenge to which we now turn.

Where challenge excluded

(1) *No right of challenge in respect of particular transactions*

3.114 There are certain kinds of transaction where a right of challenge would be meaningless. Into this category come the making of a will and the giving of consent to medical treatment. In the former, the remedy is obviously for the young person to revoke his will.[5] In the latter, his consent to treatment can also be withdrawn although it would be meaningless to do so after the event. There are other transactions

1. See para. 3.36 above.
2. *Ibid.*
3. See para. 3.33 above.
4. In the case of sale of goods, this matter is regulated by statute. Section 23 of the Sale of Goods Act 1979 provides that "When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."
5. It may even be doubted whether a will would ever be to the substantial prejudice of the testator.

where a right of challenge would be inappropriate on policy grounds. One of these is the giving of consent to an adoption order. In our opinion, it would be highly undesirable to allow an adoption order to be overturned by challenge of either the child's or the young parent's consent up to five years after the adoption order was made.[1] There are already procedural steps built in to the adoption process to safeguard the interests of the parties concerned.[2] These are, in our view, sufficient.

3.115 We also consider that a young person should be precluded from challenging transactions entered into in the course of his trade, business or profession. Although it may be the case that few people in the 16-18 age group set up in business on their own or in partnership, there is undoubtedly encouragement, from Government and other sources, for people of all ages to do so. For those youngsters who do become self-employed, the risk of their transactions being set aside could be a disincentive to adults proposing to have business dealings with them, whether as supplier, customer or professional adviser. In this instance we believe that the need for special protection is outweighed by the importance of not impeding their legitimate business activities. This is the justification for the present rule prohibiting reduction of trading contracts entered into by minors. In the absence of express consultation on this point, we are reluctant to disturb this rule, so far as it applies to 16-18 year olds.

3.116 Another kind of transaction to be considered here is the bringing or defending of court proceedings. The present law allows reduction of court decrees on the ground of minority and lesion in certain circumstances.[3] In principle, this seems wrong. The granting of a decree is not an act of the young person but of the court. If a young litigant is badly advised and, on the strength of that advice, decides to pursue or defend a hopeless action, then he may have a claim for professional negligence. If decree goes against him, there may be grounds of appeal. If his appeal fails, challenge of the decree on the ground of substantial prejudice cannot be justified if the granting or refusal of the decree was correct as a matter of law. We tend to the view that any prejudice suffered by a young person by his participation in court proceedings is best remedied, if appropriate, either by action against his professional adviser or by taking further steps in the court action itself. We therefore recommend that the right of challenge should not apply to the bringing or defending of, or the taking of any steps in, such proceedings.

3.117 We suggested in the Memorandum[4] that the right of challenge should not apply to ordinary transactions entered into by 16-18 year olds, that is, to transactions commonly entered into by young people of that age. This seemed to us to follow logically from the fact that ordinary transactions could be validly entered into by persons under 16. It would be odd if such transactions were binding on persons under 16 but challengeable by 16 and 17 year olds. Although this proposal was agreed by all who commented, we ourselves have had second thoughts. Our doubts stem from the fact that even an everyday transaction, of a type commonly entered into, could be prejudicial in its terms. Why should a 16 or 17 year old not be able to have it set aside if it met the criteria for challenge, that is, if it had caused him or was likely to cause him substantial prejudice and it was not one which a reasonably prudent adult acting in the same circumstances would have entered into? In the case of transactions validly entered into by those under 16, similar concern about the risk of prejudice to the young person led us to incorporate a test of reasonableness in the exception itself.[5] In the case of the over 16s we see no reason in principle why prejudicial transactions of any kind should not be open to challenge.

1. Under the present law, an adoption order is not reducible on the ground of minority and lesion: *J and J* v. *C's Tutor* 1948 S.C. 636.
2. For example, by appointment of a curator ad litem to the child: Adoption (Scotland) Act 1978, s.58.
3. See para. 2.10 above.
4. At para. 5.110.
5. See para. 3.47 above. An alternative possibility would have been to extend the right of challenge to the under 16s, as well, in respect of transactions validly entered into under the "ordinary" exception. However, we consider it undesirable to extend the possibility of court action more than is strictly necessary. In our view, the reasonableness test used in the exception extends the protection afforded to the under 16s while remaining consistent with the basic distinction made for this age group between void and valid transactions.

3.118 In reaching this conclusion, we are conscious of the fact that we are recommending an entirely new type of application to the court and we do not wish to encourage the proliferation of actions to have transactions set aside. However, our view is that use of the new right of challenge is unlikely to be widespread. The existing right of reduction on the ground of minority and lesion is, so far as we are aware, little used. There is no reason to anticipate a spate of applications under the new scheme. We are confident that, as a matter of practice, the right of challenge will be confined to the more significant transactions in which either substantial sums of money or continuing onerous obligations are at stake. The formulation of the right of challenge, requiring the young person to have suffered substantial prejudice, will go some way to achieve this.

(2) *No right of challenge in certain circumstances*

3.119 Our recommendations regarding the circumstances in which the right of challenge should be excluded come under three headings:

(*a*) Fraudulent misrepresentation by the young person;

(*b*) Ratification by the young person; and

(*c*) Ratification by a court.

One further possibility which we canvassed in the Memorandum[1] was whether a 16 or 17 year old should be prevented from challenging transactions entered into with the consent of his parent or guardian. We did, however, express some reservations about this principally because it would be harsher on 16 and 17 year olds than the present law under which consent of a minor's curator does not bar reduction on the ground of minority and lesion and because there would be difficulty in obtaining consent if the young person was living away from home. On the other hand, it would be a simple means of protecting the adult contracting party which, to avoid possible conflicts, could be limited to transactions in which the parent or guardian did not himself have any interest.

3.120 In the event, the results of consultation were divided. Some commentators were attracted by the apparent simplicity of the proposal. Others argued that parental or guardian's consent should simply be one factor to be weighed by the court in deciding whether the grounds for setting aside the transaction had been established. We ourselves prefer the latter approach. It would, in our view, complicate the scheme unnecessarily to give parental or guardian's consent a specific role in relation to transactions entered into by 16-18 year olds. It would perpetuate the concept of a minor's curator to some extent. If the ground of challenge is to include some form of reasonableness test,[2] the parent's or guardian's approval of the transaction will clearly be relevant but not decisive. We think this is preferable to a hard and fast rule. If the adult party wants more direct participation of a parent or guardian, he may insist on his acting as guarantor of the young person's obligation.[3] Having reconsidered this question, we see no advantage in excluding the right of challenge simply because the young person's parent or guardian has consented to the transaction in question.

(*a*) *Fraudulent misrepresentation by young person*

3.121. We suggested in the Memorandum[4] that a person aged 16-18 should be barred from challenging transactions which he had induced the other party to enter into by his fraudulent misrepresentation of age. The proposal was agreed by virtually all who commented and we re-affirm it now. However, we now recommend going further to cover fraudulent misrepresentation of any material fact which has the effect of inducing the other party to enter the transaction. There is no logical reason for treating fraudulent misrepresentation of age differently from any other kind of fraudulent misrepresentation. The only relevant criterion is that the misrepresentation should have induced the other party to deal with the 16 or 17 year old.

1. At paras. 5.118 and 5.119.
2. See para. 3.106 above.
3. Our recommendations do not affect the existing rule whereby a guarantee of a contract which is voidable on account of a young person's incapacity is fully enforceable against the cautioner. The cautioner in these circumstances cannot claim relief from the young person whose obligation he has met: Erskine, 3.3.64. A similar rule is thought to apply in the case of guarantees of contracts which are void on the ground of non-age: Fraser, pp. 649-50; *Stevenson* v. *Adair* (1870) 10 M. 919.
4. At paras. 5.111 and 5.112.

3.122 There is support for this broader approach in the existing law. Although authority on fraudulent misrepresentation by minors relates primarily to misrepresentation of age, there is also authority that a minor will be barred from reducing his contract if he fraudulently stated that his curator had consented.[1] Our recommended policy will generalise the present rules to encompass misrepresentation on any relevant matter, for example, as to whether the young person is married or in employment.

3.123 We intend that the basic principles of the existing law should apply.[2] If the misrepresentation is to preclude challenge, it must actually have induced the other party to deal with the young person. If the adult would have transacted with him in any event, the misrepresentation should be ignored. The misrepresentation must have been made fraudulently, that is, with the deliberate intention to deceive. This is simply a question of fact to be proved by the adult party. The misrepresentation may take the form either of a positive misstatement of the truth or, if the other party is clearly mistaken as to the age or circumstances of the young person, by failing to acquaint him with the true position. None of this requires elaboration in the draft Bill implementing our recommendations.[3]

3.124 The Memorandum also raised the possibility of making special provision to the effect that a false declaration of age in a standard form contract prepared by the other party should not of itself be treated as a fraudulent misrepresentation of age.[4] On the one hand, it is arguable that, where a young person is invited by the party with greater bargaining power to make a false declaration of age, his position should be expressly safeguarded. He should be barred from challenging the transaction only if the declaration of age is coupled with independent evidence of intention to deceive. This would, however, mean that in "long distance" contracts, such as a contract of purchase with a mail order form, where there are no personal negotiations between the parties, it would be virtually impossible to show that the misrepresentation had been fraudulent. Against this it is argued that if the young person has chosen to sign a standard form contract, he should bear the consequences. It is an unnecessary refinement of the existing law to give special protection in this situation.[5] The result would be unduly harsh on the adult party, particularly in the mail order type of case. Following this line of argument, the question should be left to turn on the general law. The balance of opinion among consultees favoured the latter approach. It is also consonant with the policy underlying a number of our earlier recommendations. We ourselves believe that special provision is unnecessary. In the light of consultation, we therefore recommend that the question whether a false declaration of age in a standard form contract amounts to fraudulent misrepresentation should be determined by the principles of the general law.

(*b*) *Ratification by the young person*

3.125 We provisionally proposed in the Memorandum[6] that the right of challenge should be excluded by any actings or events taking place after the young person reaches the age of 18 which constitute homologation, *rei interventus* or other form of personal bar. We can see that, in principle, the same rules should apply across the whole spectrum of personal bar. Indeed our proposal was unanimously supported on consultation. On reconsidering the matter, however, we hesitate to make such a sweeping recommendation. The problem is that some forms of personal bar, such as waiver or acquiescence, require no more than a lack of action on the part of the person concerned. To preclude a young person's right of challenge simply because of his failure to respond to certain actings by the other party seems unduly harsh if, in fact, the young person did not appreciate the legal significance of his own inaction. Given that our recommendations are based on the premise that a 16 or 17 year old

1. *Harvie* v. *McIntyre* (1829) 7 S. 561.
2. See paras. 2.27 and 2.28 of the Memorandum.
3. See clause 3(3)(*g*).
4. See paras. 5.86 to 5.89 and para. 5.113.
5. There is, in fact, old authority that a mere assertion of age in a deed may not amount to a fraudulent misrepresentation if the young person has been induced to make the assertion by the other party: *Kennedy* v. *Weir* (1665) Mor. 11658.
6. At paras. 5.114 to 5.116.

needs special protection on account of his inexperience and that we have recommended he should have until the age of 21 to decide whether or not to invoke that protection,[1] we are not sure it is appropriate to deprive him of it by the actings of the other party.

3.126 Our concern is to ensure that a young person should not lose his right to have a transaction set aside except by his own positive act or failure to act in full knowledge of his right of challenge. Knowledge of the right of reduction is relevant to homologation barring reduction on the ground of minority and lesion under the present law, but it is not certain whether it is relevant over the whole field of personal bar. A clear policy on this question is desirable from the point of view of both parties. The policy which we now recommend is therefore more limited than that originally proposed and, in effect, more generous to the young person. Our conclusion is that the right of challenge should be barred only by the conscious actings of the young person ratifying the transaction in the knowledge that it is open to challenge. What would be required is positive conduct on the part of the young person, after he attains the age of 18, by which he indicates his acceptance of the contract. He could ratify the transaction expressly or his conduct may be such as to imply ratification. Allowing the other party to act in reliance on the contract, such as would found a plea of *rei interventus* would not be sufficient, unless it was clear that the young person had applied his mind to the matter in a way which showed he accepted the contract as binding on him. In our view it should not matter greatly that this policy appears to be more generous to the young person than that originally proposed and supported on consultation. Even if the young person retains the right of challenge in circumstances where he has apparently allowed the other party to act in reliance on the transaction, he still has to overcome the hurdle of proving *substantial* prejudice in order to have the transaction set aside.

3.127 As regards implementation, we see this recommendation simply as an application of the existing law on homologation of voidable contracts. The terms, homologation and ratification, are used fairly interchangeably in the present law[2] and, in the draft Bill annexed,[3] we use the term, ratification, as it is the more comprehensible of the two. It is, however, intended to import the same meaning as is conveyed by the more technical expression, homologation.[4] Thus, ratification may be either express or implied. The act confirming the validity of a transaction must be absolute, must not proceed on error or fraud and must be unequivocally referable to the transaction itself.[5] The young person must know of his right of challenge before his approval of the transaction can be effective. That knowledge may be constructive but knowledge[6] of the relevant facts before the age of 18 may not necessarily infer knowledge after majority.[7] Once ratified, the transaction is binding from the date on which it was originally entered into.

(*c*) *Ratification by a court*

3.128 Without making any firm proposal ourselves, we invited views in the Memorandum[8] whether there should be a procedure for judicial ratification of transactions entered into by 16 and 17 year olds. We suggested that, as a means of excluding challenge on the ground of substantial prejudice, ratification by a court would have some positive advantages over parental consent. It would always be available no matter where or in what circumstances the young person was living. The court's assessment of a particular transaction would be more objective than that of a parent. The usefulness of judicial ratification would, however, be lost if the procedure

1. In effect this recommendation deals with the question of personal bar on the ground of the party's delay in challenging the transaction.
2. See Fraser, p.531; Gloag, p.89. In contexts other than legal capacity of minors, a distinction is sometimes made between ratification, in the sense of express acknowledgment of the validity of the contract, and homologation, meaning implied approval of the contract: Erskine, I.7.39; but see Bell, *Principles*, s.27 and *Johnston* v. *Hope* (1630) Mor. 9041 (ratification by payment to creditor).
3. See clause 3(3)(*h*).
4. Although for the avoidance of any doubt, clause 3(3)(*h*) makes express reference to the young person's knowledge of his right of challenge.
5. Bell, *Principles*, s.27.
6. *Gardner* v. *Gardner* (1831) 9 S. 138 at p.140.
7. *McGibbon* v. *McGibbon* (1852) 14 D. 605.
8. At paras. 5.120 and 5.121.

involved were to be lengthy and expensive. It could have the opposite effect to that which was intended and actually discourage adults from having any significant dealings with people in this age group. We suspected that the procedure would be little used, in which case it was perhaps not worth introducing in the first place.

3.129 This idea received a mixed response on consultation. Numerically, commentators were fairly evenly divided. Some were against the introduction of such a procedure because of the expense and complexity involved. A further criticism was that it would be incompatible with normal commercial arrangements and would, in practice, be ignored. Others accepted that the procedure would rarely be used but nevertheless considered that its introduction would be worthwhile in order to safeguard the position of the adult party entering any major transactions with young people in this age group. We have found this a difficult question to resolve. There is merit in both arguments. On balance, we have come down in favour of such a procedure. We believe that it could serve a useful function in those transactions where a successful challenge at a later date could have significant consequences for the parties involved. In the course of consultation we have been told of a couple of instances where judicial ratification might have been desirable to prevent challenge under the existing law on the ground of minority and lesion. One concerned the purchase of shares by a minor in a private limited company. The other concerned the sale of a house. In the latter case, although the purchaser's solicitors took reasonable steps to safeguard their client's position, by, for example, obtaining confirmation from the selling agents that the property had been advertised on the open market and that their client's offer had been the highest, the transaction was still open to challenge by the seller until the expiry of the *quadriennium utile*. In this type of case, where substantial sums may be at stake, we think it only fair that parties should be able to take effective steps to put the matter beyond doubt.

3.130 In making this recommendation, we have considered whether any limitations should be placed on the right to seek court approval of a young person's transaction. We are anxious to avoid unnecessary proliferation of court proceedings and therefore want to direct the new procedure towards those situations where it could be of most practical benefit. In our opinion there would be little advantage in being able to seek court approval after the event, i.e. once the transaction had been entered into. At that stage, the parties have already agreed to go ahead. In relation to completed transactions, we consider it more appropriate to rely directly on the procedure for setting aside rather than introduce an intermediate step in the process. The adult party in this situation would simply have to wait and see whether the young person would seek to challenge the transaction before he reached the age of 21.

3.131 Where, however, the ratification procedure would be useful would be in relation to proposed transactions, where the adult party wants to secure his position before committing himself to go ahead with the deal. We are not suggesting that there should be a procedure for advance ratification in the abstract, for example, to obtain court approval for the sale of a house to an, as yet, unidentified purchaser at a price exceeding £X,000. That would not be very meaningful. What we envisage is court approval of a specific transaction, the terms of which have been provisionally agreed between the parties. In the case of a sale of heritable property, for instance, we imagine that the draft missives would be put before the court along with evidence of the value of the property and of its having been advertised on the open market. In all cases, the court's decision whether or not to ratify a prospective transaction would be based on consideration of the detailed provisions proposed.

3.132 Court approval of a proposed transaction would prevent subsequent challenge on the ground of substantial prejudice. The grounds on which ratification may be obtained should therefore be linked to the grounds on which a court may set aside a transaction, that is, in terms of whether or not a reasonably prudent adult, acting in the same circumstances, would enter the transaction in question. This would be the only criterion. The likelihood of the young person actually suffering prejudice may be ignored because unless the proposed transaction can get over the hurdle of the reasonableness test, there is no basis on which it can be set aside in any event, even if substantial prejudice follows.

3.133 We would stress that a procedure for obtaining court approval of a young person's transactions would be a facility only. It would not be mandatory. In making this recommendation we are acutely aware of the risk that an adult party might be deterred from transacting in any major way with a 16 or 17 year old if he were to be faced with cumbersome court proceedings in order to safeguard his position. To be of any practical value, the procedure would have to be quick and simple. We therefore recommend that court approval should be sought by means of a summary application in the sheriff court. It is intended to be an administrative type of procedure, application being made jointly by all the parties to the proposed transaction. As regards jurisdiction, the application would be made to the sheriff of the sheriffdom in which any of the parties resides or, if none of the parties resides in Scotland, to the sheriff at Edinburgh. Again, in order to streamline the procedure as much as possible, we recommend that the sheriff's decision should be final. We did consider whether the adult party should be able to apply on his own, if, for example, the young person refused to co-operate in making a joint application. On balance, however, we think not. If the young person refused to apply, that would be a clear indication that he wanted to keep open the option of challenging the transaction at a later date. In practical terms, the adult party's response would be either to insist on participation of a guarantor or not to proceed with the transaction at all.

3.134 Our recommendations on the question of when the right of challenge should be excluded are as follows:

13. (*a*) **There should be no right of challenge by a 16 or 17 year old on the ground of substantial prejudice in respect of**

(i) the making of a will;

(ii) the giving of consent to medical treatment or to the making of an adoption order;

(iii) any transaction entered into by him in the course of his trade, business or profession;

(iv) the bringing or defending of, or the taking of any step in, civil proceedings;

(v) any transaction into which he induced the other party to enter by his fraudulent misrepresentation of age or other material fact;

(vi) any transaction ratified by him after attaining the age of 18 in the knowledge that it was open to challenge on the ground of substantial prejudice; and

(vii) any transaction ratified by a court in accordance with paragraph (*b*) below.

(Paragraphs 3.114 to 3.129; clause 3(3))

(*b*) **(i) All parties to a transaction proposed to be entered into by a 16 or 17 year old should be entitled to make a joint application to the sheriff to have it ratified, which application should be granted unless it appears to the sheriff that an adult, exercising reasonable prudence and in the circumstances of the young person, would not enter the transaction in question.**

(Paragraphs 3.130 to 3.132; clause 4(1) and (2))

(ii) Application for ratification should be by means of a summary application to the sheriff of the sheriffdom in which any of the parties resides or, if none of the parties resides in Scotland, to the sheriff at Edinburgh.

(Paragraph 3.133; clause 4(3))

(iii) The decision of the sheriff on an application for ratification should be final.

(Paragraph 3.133; clause 4(3))

Overall effect of recommendations

3.135 The net result of our recommendations is to sweep away virtually all of the existing law on the legal capacity of minors and pupils.[1] Some of the present rules, for instance, on consent to medical treatment and reduction of prejudicial transactions, are replaced by updated provision. Others, such as the rules on necessaries and contracts for employment, are superseded by the general rule of capacity at 16, coupled with the exception for ordinary transactions. A few have no direct equivalent within our scheme. Into this category come the doctrine of forisfamiliation and the rule whereby a minor can validly contract with the consent of his curator. Abolition of the existing common law rules is clearly implied in our recommendations[2] but we think it desirable to put the matter beyond doubt. We therefore recommend that:

14. It should be expressly provided that the existing common law rules on the legal capacity of minors and pupils, insofar as they are inconsistent with our scheme for reform, should cease to have effect.

(Paragraph 3.135; clause 1(5) and (6))

Matters unaffected by recommendations

3.136 Our scheme for reform is expressly limited to questions of capacity in the private law field.[3] It deliberately leaves untouched existing statutory age limits and questions of delictual or criminal responsibility. Neither does it affect the *actual* capacity of a young person. A person with legal capacity by virtue of our recommendations may still lack capacity to act on his own behalf for other reasons such as mental disorder, for example. One final area unaffected by our recommendations is parental rights. A person under 16 would still be entitled to exercise parental rights in relation to any child of his and could indeed be appointed guardian to his child by will or by court order.[4]

3.137 For the avoidance of any doubt, we think it desirable to make express saving provision on these matters. Our recommendation is therefore as follows:

15. It should be made clear that our scheme for reform does not

(*a*) affect existing statutory age limits or questions of delictual or criminal responsibility;

(*b*) confer legal capacity on any person who is under disability or incapacity (other than by reason of non-age);

(*c*) affect the exercise of parental rights by a person under 16 in relation to any child of his or prevent any such person from being appointed guardian of his child.

(Paragraph 3.136; clause 1(4)(*b*),(*c*),(*d*) and (*g*)

1. A few aspects will remain relevant, for example, the rules on what constitutes a trading contract and on what amounts to fraudulent misrepresentation of age: see paras. 3.115 and 3.123 above.
2. In some cases, we make recommendations to this effect: see paras. 3.91 and 3.96 above.
3. See para. 3.2 above.
4. Under section 3 or 4 of the Law Reform (Parent and Child)(Scotland) Act 1986. Appointment by a court would, of course, require the court to be satisfied that the appointment was in the best interests of the child: 1986 Act, s.3(2).

Part IV Miscellaneous

Variation of trust purposes

4.1 In petitions for variation of trust purposes, the Inner House of the Court of Session has power under the Trusts (Scotland) Act 1961[1] to approve the arrangement for variation on behalf of beneficiaries who are incapable of assenting by reason of non-age. Those incapable of assenting include minors as well as pupils.[2] It is expressly provided that an arrangement approved by the court is not reducible on grounds of minority and lesion and that, in giving such approval, the court is bound to take such account of the minor (not the pupil) beneficiary's attitude as it thinks appropriate.[3]

4.2 We invited views in the Memorandum[4] whether the court's power to approve arrangements for variation should be restricted to approval on behalf of beneficiaries under the age of 16. We suggested that if this were to be the case assent given by 16 and 17 year old beneficiaries should not be open to challenge on the ground of substantial prejudice because the right of challenge would itself be unduly prejudicial to other beneficiaries and third parties dealing with the trust and might, in any event, be difficult to apply in this context. If, on the other hand, some protection was considered necessary for beneficiaries in this age group, we thought that the existing provision should be retained. On either basis, we proposed that the court should be required to have regard to the beneficiary's attitude to the variation proposed.

4.3 Consultees were divided on this question although the clear majority took the view that the court should continue to have power to approve arrangements on behalf of beneficiaries aged 16-18. Some measure of protection was considered desirable because of the substantial sums of money that could be involved. The existing provision was regarded as the most convenient means of providing it. All agreed that the beneficiary's attitude should be a relevant consideration for the court so far as appropriate having regard to his age.

4.4 Our initial preference had, in fact, been to restrict the court's power to approval on behalf of beneficiaries under 16. This would be in line with the general scheme for reform. However, we had some doubts about our original suggestion to exclude the right of challenge by 16 and 17 year olds in respect of their own consent to variation. It seemed to us that this could give rise to anomalies. The court, in giving approval on behalf of beneficiaries under 16, would be directed to take account of the risk of prejudice to such beneficiaries[5] but the possibility of prejudice to 16 and 17 year old beneficiaries would be irrelevant to the validity of their consent. Given the shape of our final recommendations, the principled approach would be to allow 16 and 17 year olds to give their own consent to variation but that consent would be open to challenge on the ground of substantial prejudice or could be ratified by a court in order to preclude challenge. Moreover, if the consent of a 16 or 17 year old beneficiary were to be open to challenge and hence also to ratification by a court, it would be odd to allow for ratification by the sheriff court in summary procedure[6] whereas approval on behalf of beneficiaries under 16 could be given only by the Inner House of the Court of Session.

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1. s.1(1)(*a*).
2. s.1(2).
3. s.1(2) and (3).
4. At para. 5.135.
5. 1961 Act, s.1(1).
6. See para. 3.133 above.

4.5 In the end we have concluded, along with most commentators, that the sensible solution is to keep the existing provision in the 1961 Act. This is, in our view, more practicable than trying to rely on the general rule of capacity at 16 coupled with the right of challenge and so on. It has the advantage of dealing with the question of prejudice to all beneficiaries under 18 in the same proceedings. As under the present law, the court's approval would not be liable to be set aside on the ground of substantial prejudice. This recommendation amounts to only a minor exception to the general rule, affecting few 16-18 year olds in practice. If there is to be a special incapacity for this age group for the purposes of the 1961 Act, we think it appropriate to allow for the appointment of a curator ad litem to a 16 or 17 year old in this situation. Again, this is a minor departure from what we have recommended more generally, i.e. that for 16-18 year olds, appointment of a curator ad litem should not be necessary on grounds of non-age.[1]

4.6 Our recommendations on this question are that:

16. (*a*) The Court of Session should continue to have power under the Trusts (Scotland) Act 1961 to approve arrangements for variation of trust purposes on behalf of beneficiaries under 18.

(*b*) Any such approval given on behalf of a beneficiary under 18 should not be liable to be set aside on the ground of substantial prejudice to that person.

(*c*) The court, in approving an arrangement for variation on behalf of a beneficiary under 18,

(i) should be required to take such account of the beneficiary's attitude as it thinks appropriate; and

(ii) should continue to have power to appoint a curator ad litem to such beneficiary.

(Paragraphs 4.1 to 4.5; clause 1(4)(*f*)(iii), Schedules 1 and 2)

Capacity to act as witness to a deed

4.7 Under the present law, a person may witness the signing of a legal document when he or she has attained the age of 14.[2] We did not make any proposal in the Memorandum on this issue, preferring to postpone consideration to our project on execution and authentication of deeds.[3]. On reflection, however, we think that the question should be tackled here. It would be anomalous to leave the present law as it stands, given the tenor of our recommendations on legal capacity generally[4]. We therefore recommend that:

17. Capacity to act as witness to a deed should be conferred at 16, instead of at 14.

(Paragraph 4.7; clause 1(1) and (3) and Schedule 2)

Domicile

4.8 We did not make any specific proposal in the Memorandum concerning the age at which a person should be able to acquire an independent domicile. It follows, however, from our general recommendations that capacity would be conferred, not at 12 or 14 as under the present law, but at 16.[5] Since acquisition of domicile does

1. See para. 3.97 above.
2. *Davidson* v. *Charters* (1738) Mor. 16899 (capacity for male minor at common law); Titles to Land Consolidation (Scotland) Act 1868. s.139 (capacity for females aged 14 and over).
3. Para. 5.142. See Consultative Memorandum No. 66 on *Constitution and Proof of Voluntary Obligations and Authentication of Writings* (1985), paras. 7.9 and 7.27 where we provisionally proposed raising the minimum age for witnesses to 16. The proposal was generally supported on consultation.
4. See also para. 3.22 above where we suggest that acting as witness to a deed should be included in the definition of "transaction". Such capacity therefore comes within the general rules of clause 1(1) of the draft Bill annexed.
5. We make a similar recommendation in the recent joint Report on *The Law of Domicile* (Law Com. No. 168/Scot. Law Com. No. 107, 1987), paras. 4.27 and 4.28.

not fit easily into the concept of a "transaction", we think it desirable to make a separate recommendation on this point. Accordingly we recommend that:

18. 16 should be the age at which an independent domicile can be acquired.
(Paragraph 4.8; clause 7)

Attainment of age

4.9 In the Memorandum,[1] we considered two questions under this heading. The first concerned the time at which a person attains a particular age. The present rule, that a person attains a particular age at the precise moment of time occurring on the relevant anniversary of his birth, can give rise to strange results in the application of minimum age qualifications for certain activities.[2] We therefore proposed a new rule to the effect that a person attains a specified age at the commencement of the appropriate birthday.[3] This suggestion was approved by virtually all who commented.

4.10 The second issue which we considered was the birthday in a non-leap year of a person born on 29 February. There is no clear rule on this at present. We agree with the vast majority of consultees who expressed a preference for 1 March rather than 28 February. This would be consistent both with English law and with the practice adopted by the Department of Health and Social Security for the purposes of social security legislation.

4.11 We did consider what effect this recommendation might have on school leaving and commencement dates laid down in the Education (Scotland) Act 1980. As regards leaving dates, the answer is none. Section 33 of the Act allows a person who reaches 16 on or after 1 March to leave school at the end of the following May whereas a person who reaches 16 before 1 March can leave in the previous December. A person born on 29 February will always celebrate his sixteenth birthday in a leap year and will therefore be entitled to leave at the end of the winter term, having reached the age of 16 before 1 March.

4.12 The position about school commencement dates is perhaps less straightforward. In terms of section 32 of the 1980 Act, a child who reaches the age of 5 on or before the school commencement date fixed by the education authority must start school on that date. However, a child who is not yet 5 by that date may still enter school then if he will reach the age of 5 by a later date, also to be fixed by the authority. Our enquiries about the individual schemes operated by each education authority reveal that, by and large, a child may enter school in August if he reaches the age of 5 either (in the case of some authorities) on or before 1 March in the following year or (in the case of other authorities) by the last day of February in the following year. In all cases, a leap year child may, in practice, enter school in the August before his fifth birthday. We would not want to alter this. We suggest that education authorities may wish to reconsider the precise wording of their schemes in the light of our recommendation to fix the anniversary as 1 March in a non-leap year.[4]

4.13 Our recommendations on the attainment of age are:

1. At paras. 5.138 to 5.140.
2. See the illustrations given in para. 5.138.
3. This is already the rule in England and Wales under section 9 of the Family Law Reform Act 1969 and there is specific provision to this effect in some statutes applying throughout the United Kingdom: e.g., British Nationality Act 1981, s.50(11)(*b*).
4. Alternatively, the flexibility within the education system to allow early entry to school may mean that our recommendation has no real implications even for those authorities for whom the relevant date is the last day of February.

19. (*a*) **A person should be regarded as attaining a particular age at the beginning of the anniversary of the day of his birth.**

(Paragraph 4.9; clause 6(1))

(*b*) **The anniversary, in a non-leap year, of the day of birth of a person born on 29 February should be 1 March.**

(Paragraphs 4.10 to 4.12; clause 6(2))

Guardianship reform

4.14 As has already been explained,[1] the next stage of this exercise will be to propose reform of the law of guardianship. In the meantime, however, certain changes in the legal framework of guardianship follow automatically from the recommendations which we have already made.

Getting rid of tutors and curators

4.15 The broad result of the recommendations contained in this Report is to sweep away the existing law on legal capacity of minors and pupils and to replace it with a new scheme based on a category of young person broadly similar to that of a pupil. Under this scheme, a person below the age of 16 would, generally speaking, have no capacity to act on his own behalf. Subject to a few exceptions, all transactions would have to be entered into by his parent or guardian. Thus, the parent or guardian of a person under 16 would be like a tutor under the existing law. There would be no equivalent of a curator for 16-18 year olds because there would be no requirement of a parent's or guardian's consent for validity of their transactions. Some consequential reform of the law of guardianship is clearly necessary to put this into effect.

4.16 The minimalist approach would be to abolish altogether the concept of curator as a type of guardian to a young person while retaining the concept of tutor to a pupil, pupil being redefined to mean a person of either sex under the age of 16. We, however, favour going somewhat further and getting rid of the labels of "tutor" and "pupil" as well. This terminology is outmoded and only serves to confuse the public. We therefore recommend that in future the guardian of a child under the age of 16 should be known simply as a guardian and that as such he should have all the powers exercised by and the duties imposed on a tutor under the present law. There is, in our view, no need to invent a technical expression for a person under the age of 16. In so far as the term "pupil" remains on the statute book[2] otherwise than in the context of education or training, it should be taken to mean a person under 16 years of age. Similarly, any remaining references to a tutor should be construed to refer to a guardian of a person under 16. References to a minor would in future mean any person under the age of 18.[3]

4.17 One consequence of this approach is that we can also get rid of factors loco tutoris as a special category of judicial factor appointed to administer the estate of a pupil. Such factors have the same powers as any other judicial factor: it is only the label that is different. Abolition of factors loco tutoris would not, of course, prevent appointment of any other factor to administer the affairs of someone under the age of 16.

4.18 As for our recommendation to abolish the concept of curatory, this would obviously be limited to curatory in the sense of guardianship of a minor child. It would not prevent future appointment of a curator ad litem to a person under 16 in court proceedings[4] or of a curator bonis to a person under 18 who was of unsound mind.

4.19 There is one further recommendation on guardianship which we think is possible to make at this stage in our examination of the law of children. This concerns

1. At para. 1.4 above.
2. See also paras. 4.23 and 4.24 below regarding consequential amendments and repeals.
3. See the Age of Majority (Scotland) Act 1969, s.1(1) and (2).
4. Or to a person aged 16-18 in respect of a variation of trust purposes under section 1 of the Trusts (Scotland) Act 1961: see para. 4.5 above.

the method of appointment of a guardian. In our Report on *Illegitimacy*[1] we made a number of recommendations with a view to rationalising the statutory provisions on guardianship. The recommendations contained in that Report were implemented in the Law Reform (Parent and Child)(Scotland) Act 1986. As well as covering the main issues concerning the legal position of children born out of wedlock, the 1986 Act makes concise but comprehensive provision on the appointment of a tutor or curator by court order and appointment by a parent of a tutor or curator to act after his death.[2] These are the two most obvious and most useful methods of appointment. There are, however, other methods of appointment of a tutor[3] available at common law:

(*a*) *Tutors legitim or tutors-at-law.* If both parents die without appointing a tutor to act after their death or if any tutor so nominated dies or does not accept the appointment, a relative of the pupil, known as his nearest agnate,[4] is entitled to be tutor by operation of law.[5] The procedure for obtaining appointment of a tutor legitim is fairly antiquated, requiring a petition for a brieve issued from Chancery. His title to act is constituted by letters of tutory. The tutor legitim is excluded if he seeks appointment more than a year and a day from the death of the child's surviving parent and a tutor-dative has been appointed in the meantime.

(*b*) *Tutors-dative.* In the absence of tutors appointed by the child's parent or tutors legitim, a tutor-dative may be appointed.[6] Petition for appointment of a tutor-dative is made to the Court of Session. The petition must be intimated to the pupil's next-of-kin and to the Crown as it is part of the Crown prerogative to make the appointment. No appointment may be made within a year and a day from the death of the surviving parent or the failure of any tutor nominated by a parent if the person qualified to be tutor legitim objects.

(*c*) *Appointment of tutor by donor of property.* It is sometimes said that if any person leaves property to a pupil he is entitled to nominate a tutor to the donee.[7] "Tutor" seems to be a misnomer here. What is really involved is nomination of a factor to administer the property in question. As a matter of public policy, it is extremely doubtful whether any tutor so appointed would be allowed any control over the person of the child.

4.20 For all practical purposes, these common law methods of appointment of a tutor are obsolete. We see no need to retain them any longer. In all cases where a common law procedure could be used, application for appointment of a tutor under section 3 of the Law Reform (Parent and Child (Scotland) Act 1986 would also be possible and would undoubtedly be simpler. Where all that is at issue is management of a child's property, appointment of a curator bonis may be preferred. We therefore recommend that these ancient methods of appointment should be abolished,[8] leaving only those provided by the 1986 Act for appointment under the will of a parent or by court order.[9]

4.21 Our recommendations on guardianship are mainly consequential on those contained earlier in this Report. Where they go further, they simply represent another step in the gradual process of simplification begun in our Report on *Illegitimacy*. To an extent, these recommendations are simply "clearing the decks" for consideration of substantive reform in this area. They certainly do not predetermine the more significant reforms which we might recommend at the next stage of this project.

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1. Scot. Law Com. No. 82 (1984), paras. 9.11 to 9.27.
2. Ss. 3 and 4.
3. It is also possible for a minor to choose his own curators under section 12 of the Administration of Justice (Scotland) Act 1933. However, as there is to be no role for curators under our recommendations, this provision should be repealed: see Schedule 2 of the draft Bill annexed.
4. i.e., a person related through the child's father.
5. See Fraser, pp. 249-258.
6. Fraser, pp. 258-261.
7. *Dishington* v. *Hamilton* (1558) Mor. 8913. For discussion of a donor's appointment of a tutor, see Fraser, p.240.
8. This would not affect the appointment of a tutor-dative to an incapax.
9. 1986 Act, ss. 3 and 4.

As self-contained measures of reform affecting only the framework of the law of guardianship, they are valid regardless of what other proposals might in time be made.

4.22 Our recommendations in this area may be summed up as follows:

20. (*a*) **The guardian of a person under 16 should have the powers and duties which a tutor has in relation to a pupil under the present law. Any reference to the tutor or tutory of a pupil child should be construed accordingly as a reference to the guardian or guardianship of a person under that age. Any reference to a pupil, other than in the context of education or training, should be construed as a reference to a person under the age of 16.**

(Paragraphs 4.15 and 4.16; clauses 1(2) and 5(1))

(*b*) **Without prejudice to the appointment of any other judicial factor to administer the estate of a person under 16, appointment of a factor loco tutoris should no longer be competent.**

(Paragraph 4.17; clause 5(4))

(*c*) **Without prejudice to the appointment of a curator ad litem or curator bonis to a person under 18, no one under that age should be subject to the curatory of another person.**

(Paragraph 4.18; clauses 1(4)(*f*)(ii),(iii) and (iv) and 5(3))

(*d*) **The only methods of appointing a guardian to a person under 16 should be those provided for in sections 3 and 4 of the Law Reform (Parent and Child)(Scotland) Act 1986.**

(Paragraphs 4.19 and 4.20; clause 5(2))

Consequential amendments and repeals

4.23 A number of consequential amendments and repeals follow from our recommendations. These are set out in Schedules 1 and 2 to the draft Bill appended to this Report. The reasons for them and the effects of them are, where necessary, explained in the notes accompanying the Schedules. In summary, the broad aim is to remove all statutory references to curators (except in the context of curator bonis to an incapax) and minors (in the sense of girls aged 12-18 and boys aged 14-18); to leave references to minors (not minors and pupils) where the term is simply used as a factual description of those under the age of 18; and to replace references to tutors (in relation to pupils, but not in relation to the mentally disordered[1]) by references to guardians.

4.24 For the term "pupil" we propose substituting either "child under 16" or "person under legal disability by reason of non-age" depending on the context. The latter expression is apt to cover not only questions of capacity falling to be determined under Scots law but also cases where the matter is governed by a foreign law under private international law rules. For domestic law purposes we want to make clear that the expression does in fact refer to a person lacking legal capacity under our scheme. Accordingly, we recommend that:

21. Any statutory reference to a person under disability or incapacity by reason of non-age should be construed, where Scots law is applicable, as a reference to a person under the age of 16.

(Paragraph 4.24; clause 1(2))

Transitional arrangements

4.25 It is clear to us that amendment of the law in this area should not have any retrospective effect. Accordingly, the reforms recommended in this Report are to

1. *Dick* v. *Douglas* 1924 S.C. 787; Ward, "Revival of Tutors-Dative" 1987 S.L.T. 69.

apply only to transactions entered into after implementing legislation comes into force. We also think it appropriate that the old law should continue to determine the rights and obligations arising out of transactions already entered into at that time. The Bill appended to the Report makes provision to this effect.[1]

4.26 There is one area where more specific transitional provisions are required. This concerns the computation of periods of prescription and limitation under the Prescription and Limitation (Scotland) Act 1973. The Act provides[2] that the five year prescriptive period and the three year period of limitation do not run against an individual while he is under legal disability by reason of non-age, in effect, while he is under the age of 18.[3] However, our scheme for reform includes the recommendation that legal disability by reason of non-age should cease at 16.[4] The consequences of this may be illustrated as follows. Take the case of a 15 year old injured in a car accident who is aged 17 by the time implementing legislation is in force. Under our general recommendations, he would be treated as of full legal capacity from the age of 16 and therefore the three year limitation period within which he would have to claim damages would run only until he was 19. In effect, the injured party would have only two years within which to act. This is obviously unfair. The party's right of action should not be prejudiced by the coming into force of our legislation. He should retain the benefit of the full three year period of limitation within which to make his claim. We therefore want to preserve the rights of those who might otherwise find that the relevant prescriptive or limitation period had expired before they had had the complete five or three year period of legal capacity within which to act. In the case of a person aged 16 or over when the Act comes into force, this means that the period in question should run from the date of commencement of the legislation.

4.27 Our recommendations concerning transitional provisions are as follows:

22. (*a*) **The new rules on legal capacity of young people should apply only in respect of transactions entered into after the implementing legislation comes into force.**

(Paragraph 4.25; clause 1(4)(*a*))

(*b*) **The existing law on the legal capacity of young people, including the rules on reduction on the ground of minority and lesion, should continue to determine the rights and obligations arising out of transactions already entered into at that time.**

(Paragraph 4.25; clause 1(4)(*a*) and 1(6))

(*c*) **Where, immediately preceding the coming into force of the legislation,**

(i) a period of prescription or limitation is not or has not been running against a person because that person is or was under legal disability by reason of non-age;

(ii) the effect of the Act in relation to that person is to terminate that disability at 16 instead of 18; and

(iii) that person is aged 16 or over when the Act comes into force;

then the period in question should run from the date of commencement of the Act.

(Paragraph 4.26; clause 8)

1. See clause 1(4)(*a*) and 1(6).
2. Ss. 6(4), 15(1), 17(3), 18(3) and 18A(2).
3. Although in our Consultative Memorandum No. 74 on *Prescription and Limitation of Actions (Latent Damage)* we canvass the possibility that legal disability, whether by reason of non-age or otherwise, should not suspend the running of such periods; see paras. 6.1 to 6.7 and 6.13 to 6.20.
4. See para. 4.24 above.

Part V Liability of children in delict

The present law

5.1 There is no fixed minimum age of delictual liability in Scotland.[1] Any person is legally capable of being liable in damages for loss or injury caused to another by his wrongful acts, the only question being whether the requisite intention or negligence on his part can be established. Whether a child has a particular intention will be a question of fact, depending on the child's mental capacity and the nature of the act.[2] In relation to unintentional wrongdoing, there is little direct authority on the liability of young children for negligence, that is, conduct in breach of a duty of care owed to another.[3] Guidance may, however, be drawn from contributory negligence cases in which children have been held capable of negligence in failing to look after their own safety from the age of about five onwards.[4] Again it is a question of fact in each case whether the child had the requisite mental capacity to appreciate the risk involved in his conduct.[5] He is required to show only the degree of care to be expected from a child of the same age, intelligence and experience in the circumstances.[6] Although the considerations are not exactly the same, it seems likely that the same standard would apply if a child were sued directly.[7]

5.2 Parents do not incur any automatic liability for delicts committed by their children. However, if the parent instructed or otherwise authorised the child's action, he may be vicariously liable on principles of agency.[8] He will be similarly liable if the child was acting as his employee.[9] The parent will incur personal liability for his own negligence if this caused or contributed to the child's delictual conduct, for example, if he failed to supervise the child properly[10] or if he placed the child in dangerous circumstances.[11]

Possible reform

5.3 In the Memorandum, we first considered whether there should be a fixed minimum age of liability in delict instead of the more flexible approach adopted by the present law.[12] The arguments in favour of a fixed age limit were that it would be

1. Walker, *The Law of Delict in Scotland* (2nd edn., 1981) (referred to as "Walker"), pp.86-7; cf. *Somerville* v. *Hamilton* (1541) Mor. 8905.
2. Walker, pp.86-7.
3. There appear to be no cases in Scotland. For England, see *Williams* v. *Humphrey*, The Times, February 20, 1975, quoted in Charlesworth and Percy on *Negligence* (7th edn., 1983) p.82. Cf. *McHale* v. *Watson* (1966) 115 C.L.R. 199 (Australia).
4. e.g. *McKinnell* v. *White* 1971 S.L.T. (Notes) 61; *Banner's Tutor* v. *Kennedy's* Trustees 1978 S.L.T. (Notes) 83.
5. *Campbell* v. *Ord & Maddison* (1893) 1 R. 149 per L.J.C. Moncrieff at p.153; *Stevenson* v. *Magistrates of Edinburgh* 1934 S.C. 226.
6. *Frasers* v. *Edinburgh Street Tramways Co.* (1882) 10 R. 264 per Lord Fraser at p.269; *Plantza* v. *Corporation of Glasgow* 1910 S.C. 786.
7. Walker, p.202; cf. *McHale* v. *Watson, supra.*
8. Walker, p.86.
9. Ibid.
10. e.g. *Hastie* v. *Magistrates of Edinburgh* 1907 S.C. 1102.
11. e.g. *Lumsden* v. *Russel* (1856) 18 D. 468.
12. See paras. 6.3 and 6.4.

clear and easy to apply. It would be in line with the approach taken to capacity in criminal law matters.[1] It would save the court the difficult task of determining the degree of care to be expected from a very young child. Against this it was argued that such a rule would be too arbitrary. In view of the variety of ways in which a child could cause loss to others and the differing level of maturity and experience among children of the same age, it would be difficult to draw the line below which children should be completely immune from delictual liability. It could cause hardship in some cases by preventing an injured party from recovering any damages at all where the child, although below the relevant age, did in fact understand the nature and consequences of his act.

5.4 Our provisional view was against the introduction of a fixed minimum age of liability. We considered that the present law achieved a satisfactory balance between, on the one hand, the interests of the child in being held only to a standard of care which he could reasonably be expected to understand and fulfil and, on the other, the interests of the injured party in being compensated for the harm which he had suffered. The majority of consultees supported this view. It was, however, put to us quite forcefully by one commentator that, in relation to liability for primary fault as opposed to contributory negligence, there should be an irrebuttable presumption of absence of fault in the case of a child under the age of, say, seven. This would be better than a flexible, subjective rule which, it was suggested, would lead to elaboration of proof and confused results. Moreover, the doctrine of liability for fault was not based on the same principles as contributory negligence and it was wrong to assume that the same test should apply in each.

5.5 We have given the matter careful consideration in the light of these comments. We have also looked at the operation of this sort of presumption in the law of South Africa which, with its Roman-Dutch origins, offers a useful model for comparison. There, a child under the age of seven is presumed conclusively to be incapable of fault.[2] Above that age, it is a question of fact whether a child has the requisite capacity and that is determined by reference to the personal attributes of the child in question, such as his intelligence, maturity, education and impulsiveness and by reference to the more general consideration of the irresponsibility and weaknesses of youth.[3] Thereafter, having established that the child was capable of fault at the time of the alleged wrongful act, the court must decide whether the child was, in fact, negligent. The test of negligence is an objective one, whether the child's behaviour complied with that expected of the *diligens pater familias* (broadly speaking, the standard of the reasonable adult).[4] This test does, however, take account of the circumstances that existed at the time and place of the act in dispute. So, in the apportionment of damages between an adult wrongdoer and a contributorily negligent child, their respective degrees of fault will be affected by the fact that one of the parties is a child. An adult's degree of fault is greater when he ought to have anticipated the presence of children towards whom a higher standard of care is owed.[5]

5.6 The law in South Africa has been criticised by some writers as not going far enough to recognise the "personal shortcomings and limitations of the young"[6]but it still contains important subjective elements, namely that the particular child in question must be shown to have the requisite capacity. We do not think that this requirement should be departed from here. If that is the case, there seems little point in limiting capacity to commit a delictual act to children above a certain age. As regards the distinction between liability for fault and contributory negligence, we accept that the underlying principles of the two doctrines are not identical, one being a duty not to injure others and the other being care for one's own safety, but we are not convinced that the flexible approach worked out in relation to contributory negligence cases would not also be appropriate where the child was defending an

1. The minimum age of criminal responsibility is 8 years: Criminal Procedure (Scotland) Act 1975, ss.170 and 369.
2. Boberg, *The Law of Persons and the Family* (1977) p.661.
3. *Weber* v. *Santam Versekeringsmaatskappy Bpk* 1983(1) S.A. 381 (A).
4. *Ibid.* See also Boberg, *op. cit.*, pp. 673-5; Van der Vyver (1983) 100 S.A.L.J. 575.
5. Boberg, *The Law of Persons and the Family* (1977) p. 675.
6. e.g. Van der Vyver *loc. cit.*, at pp. 588-93.

action for damages. The standard of care expected in either situation should not, in our view, be that of the reasonable adult but should be what could reasonably be expected of someone in the position of the child in question and in relation to the particular circumstances of the case. The present law seems to us to be capable of achieving this result. We do not therefore recommend any change.

5.7 One or two consultees suggested that there would be an inconsistency in having a fixed age for contractual liability but no fixed age for delictual liability. We think, however, that the considerations are different. A contract is premeditated and voluntary on both sides. It is reasonable enough for the law to say to an adult, "You should not enter into an important contract with a person under such-and-such an age. Instead you should contract with his guardian." A similar approach cannot reasonably be taken in the case of delict, which is neither premeditated nor voluntary on the part of the victim. The law cannot reasonably say to an adult, "You should not allow yourself to be injured by a child under such-and-such an age."

5.8 We went on in the Memorandum to identify two possible criticisms of the present law.[1] One was that a person injured as a result of a child's conduct could be deprived of a remedy because the child was too young to be held responsible for his act. The other was that, even if the child was found liable, he might have insufficient funds to settle an award of damages made against him. To meet these criticisms, two solutions were canvassed:[2] the introduction of a rule of equitable compensation; and the imposition of some form of automatic liability on parents.

5.9 A rule of equitable compensation would oblige a child to compensate for loss caused to another even though, because of his age, the child could not be found liable for that loss. Our provisional view was that such a rule would be of little practical benefit because few children have the financial resources to meet claims for compensation in the first place. Moreover, we considered it unprincipled to require a child to make compensation in respect of harm for which he was not legally responsible. This view was shared by all but one of those who commented. We do not pursue this option further.

5.10 The option of making parents liable automatically for the delicts of their children generated more interest among consultees, although it was still regarded as being fraught with difficulty. The scheme tentatively canvassed in the Memorandum would have imposed liability without proof of fault on parents for delicts committed by a child "in their care and control". The first problem would be one of definition. Would parents still be liable if, for example, the harm was caused while the child was in the temporary care of a babysitter? Secondly, should parents be able to avoid liability if they could prove that they had exercised proper control of the child? Most consultees, even among the few positively in favour of automatic parental liability, thought that this should be the case which would perhaps make this option little different from the present law. A further difficulty perceived by consultees was the hardship that such reform could cause. The philosophy behind the imposition of vicarious liability for the acts of employees, namely the transfer of liability to one better able to pay, did not necessarily apply in the case of parents. Few parents could afford to compensate for the more serious kinds of damage which their children might cause—one need only think of the cost of fire damage to a school building or the amount of damages likely to be awarded on account of a permanent disability—and it would be going too far to require parents to insure against such liability. One or two consultees suggested that a state-funded compensation scheme would be a better solution although we doubt whether that could be justified in the context of what is simply one aspect of a more widespread problem concerning the inability of an injured party to recover damages from the less-well-off wrongdoer. One commentator tentatively suggested that if liability were to be introduced it should be restricted to malicious, wilful and intentional acts of the child on the basis that a degree of blame attaches to parents in such circumstances in that they have failed to exercise the necessary degree of care and control whereas the same criticism cannot be made of

1. See paras. 6.5 and 6.6.
2. See paras. 6.5 to 6.11.

parents of children guilty only of negligence. Moreover, it might be argued that the imposition of such liability would encourage better standards of parental supervision. Even so, it was thought unfair and unreasonable to single out parents for the imposition of strict liability in the context of the present law of reparation.

5.11 One final criticism made of this proposal was its restriction to parents. We suggested in the Memorandum.[1] that, to avoid anomalies, there was an argument in favour of extending liability to any person *in loco parentis* who had care and control of the child. While this would be a logical solution, there would again be difficulties in determining exactly who should be liable and in what circumstances. Liability would presumably extend to local authorities in respect of children in care or to a school in so far as the child was in its actual care and control at the time the damage was caused. Inevitably the imposition of liability on such institutions would lead to a requirement of insurance, thus adding to the cost of the child's care. Logically it should also extend to foster parents or relatives who, for example, had taken in a child on the death of his parents. How much further it would go, on this formula, is unclear. One consultee was worried that a general imposition of liability on persons with care of a child would have the drastic effect of closing down voluntary youth organisations as they could not run the risk of incurring such liability. Another felt that it would be unacceptable to impose liability on people such as foster parents or relatives and that therefore liability would have to be restricted to parents. This in itself was regarded as unsatisfactory, singling them out for unfavourable treatment compared with other sections of society.

5.12 The implications of imposing automatic liability in this way would be considerable and, in the absence of clear support on consultation, we hesitate to recommend such a step. Indeed, although consultees sympathised with the position of an injured party who had no hope of recovering compensation from the child himself, there was little weighty support for any scheme of this sort even in relation to parents. Most shared the doubts which we ourselves had expressed. The general tenor of comment at all three of our public meetings was also against this proposal. We do not therefore recommend its adoption.[2]

Conclusion

5.13 Our tentative view in the Memorandum was that there was no evident need for reform of the law on the delictual liability of children. This was confirmed on consultation. The only real possibility which we canvassed was the imposition of automatic liability on parents for delicts committed by their children and, as we have seen, this idea was rejected by the majority of those who commented. In the light of this response, we make no recommendations for reform in this area.

1. At para. 6.11.
2. A similar conclusion has been reached recently by the Law Reform Commission in the Republic of Ireland: see Report on the Liability in Tort of Minors and the Liability of Parents for Damage caused by Minors, LRC 17-1985, pp.66-73.

Part VI Summary of recommendations

1. The law on the legal capacity of young people in private law matters should be restructured into a two tier system comprising age bands of 0-16 and 16-18, with those in the upper age group enjoying only limited protection.

(Paragraphs 3.2 to 3.20; clause 1(1))

2. (*a*) Subject to limited exceptions, a person under 16 should have no legal capacity to enter into any transaction.

(Paragraphs 3.21 and 3.26; clause 1(1)(*a*))

(*b*) It should be made clear that this general rule of incapacity is without prejudice to the legal capacity of a person under 16 to receive or hold any right, title or interest in property or otherwise.

(Paragraphs 3.23 to 3.26; clause 1(4)(*e*))

(*c*) In paragraph (*a*) above, "transaction" means transaction having legal effect and includes

(i) any unilateral transaction;

(ii) the making of a will, including the exercise of any testamentary or inter vivos power of appointment;

(iii) the giving of any consent having legal effect;

(iv) participation in civil court proceedings (other than as a witness);

(v) acting as arbiter or trustee or as witness to the signing of a deed.

(Paragraphs 3.22 and 3.26; clause 1(3))

3. (*a*) Any transaction entered into by a person under 16, other than one coming within the specified exceptions, should be void but should be capable of being adopted as binding by the young person on or after attaining that age by any means effective under the existing law.

(Paragraphs 3.28, 3.37 and 3.39; clause 2(5))

(*b*) Any transaction purportedly entered into by a person under 16 should not become binding on him by reason of the fact that he had fraudulently misrepresented his age to the other party, thereby inducing that other party to transact with him. This should be without prejudice to the young person's potential liability in damages for fraud.

(Paragraphs 3.29 to 3.32 and 3.39)

(*c*) Protection of third party rights which depend on the validity of a transaction purportedly entered into by a person under 16 should be determined by the general law.

(Paragraphs 3.33 and 3.39)

(*d*) The rights of parties to a transaction which is void on the ground of non-age should be determined according to common law principles of unjustified enrichment.

(Paragraphs 3.34 to 3.36 and 3.39)

(*e*) The rule of incapacity should not affect the procedure whereby court proceedings may be raised or defended in the name of a person under 16 and

continued on appointment of a curator ad litem to act on the young person's behalf.

(Paragraphs 3.38 and 3.39; clause 1(4)(*f*)(i))

(*f*) The courts should retain their inherent power to appoint a curator ad litem to a person under 16 where it appears just and expedient in the interests of the young person to do so and notwithstanding that he may have a guardian.

(Paragraphs 3.38 and 3.39; clause 1(4)(*f*)(ii))

4. (*a*) As an exception to the general rule of incapacity, a child under the age of 16 should have capacity to enter into a transaction which is of a type commonly entered into by a child of the transacting child's age and circumstances and which is entered into on terms which are not unreasonable.

(Paragraphs 3.41 to 3.49 and 3.51; clause 2(1))

(*b*) Reference to the child's age in paragraph (*a*) above means his actual, not apparent, age.

(Paragraphs 3.50 and 3.51)

5. A person aged 12 or over should have capacity to make a will.

(Paragraphs 3.52 to 3.60; clause 2(2))

6. Without prejudice to the existing law and practice regarding the provision of treatment without consent, a person below the age of 16 should have capacity to consent to any surgical, medical or dental procedure or treatment if, in the opinion of a qualified medical practitioner attending that person, he is capable of understanding the nature and consequences of the treatment proposed.

(Paragraphs 3.61 to 3.83; clause 2(4))

7. The rule whereby a minor must consent to his or her own adoption should be amended to apply to any child aged 12 or over.

(Paragraphs 3.84 to 3.86; clause 2(3))

8. (*a*) There should be no exception to the rule of incapacity for the purchase of necessaries.

(Paragraphs 3.87 to 3.89 and 3.91)

(*b*) Section 3(2) of the Sale of Goods Act 1979 should be disapplied to Scotland insofar as it requires a minor to pay a reasonable price for necessary goods supplied to him.

(Paragraphs 3.90 and 3.91; Schedule 2)

9. There should be no exception to the rule of incapacity enabling a person under 16 to enter into employment or trading contracts.

(Paragraph 3.92)

10. (*a*) The doctrine of forisfamiliation should be abolished.

(*b*) The rule of incapacity should not be subject to any exception entitling a person under 16 to act with the consent of a parent or guardian or with the consent of a court.

(Paragraphs 3.93 to 3.96)

11. Young people aged 16-18 should, subject to certain qualifications, have full legal capacity to enter into valid transactions on their own behalf.

(Paragraphs 3.97 to 3.101; clause 1(1)(*b*))

12. (*a*) Any transaction entered into by a person aged 16-18 should be liable to be set aside by a court, on the application of that person before he attains the age of 21, on the grounds that

(i) it had caused him or was likely to cause him substantial prejudice, and

(ii) it was not one which a reasonably prudent adult acting in the same circumstances would have entered into.

(Paragraphs 3.102 to 3.106, 3.109 and 3.113; clause 3(1) and (2))

(*b*) Application for setting aside a transaction should be by action in the Court of Session or the sheriff court or should be made by incidental application in other proceedings.

(Paragraphs 3.107, 3.108 and 3.113; clause 3(5))

(*c*) The young person's personal representatives and successors should also be entitled to apply to have a transaction set aside provided they do so before the young person reaches, or would have reached, the age of 21.

(Paragraphs 3.110 and 3.113; clause 3(4))

(*d*) Once a transaction has been challenged successfully, the rights of the parties should be determined by the general law of unjustified enrichment. On setting aside the transaction, the court should be empowered to make such order or orders as seem appropriate to give effect to the parties' rights.

(Paragraphs 3.111 and 3.113; clause 3(5))

(*e*) The rights of third parties which depend on the validity of a transaction entered into by a 16 or 17 year old should be determined by the general law.

(Paragraphs 3.112 and 3.113)

13. (*a*) There should be no right of challenge by a 16 or 17 year old on the ground of substantial prejudice in respect of

(i) the making of a will;

(ii) the giving of consent to medical treatment or to the making of an adoption order;

(iii) any transaction entered into by him in the course of his trade, business or profession;

(iv) the bringing or defending of, or the taking of any step in, civil proceedings;

(v) any transaction into which he induced the other party to enter by his fraudulent misrepresentation of age or other material fact;

(vi) any transaction ratified by him after attaining the age of 18 in the knowledge that it was open to challenge on the ground of substantial prejudice; and

(vii) any transaction ratified by a court in accordance with paragraph (*b*) below.

(Paragraphs 3.114 to 3.129 and 3.134; clause 3(3))

(*b*) (i) All parties to a transaction proposed to be entered into by a 16 or 17 year old should be entitled to make a joint application to the sheriff to have it ratified, which application should be granted unless it appears to the sheriff that an adult, exercising reasonable prudence and in the circumstances of the young person, would not enter the transaction in question.

(Paragraphs 3.130 to 3.132 and 3.134; clause 4(1) and (2))

(ii) Application for ratification should be by means of a summary application to the sheriff of the sheriffdom in which any of the parties resides or, if none of the parties resides in Scotland, to the sheriff at Edinburgh.

(Paragraphs 3.133 and 3.134; clause 4(3))

(iii) The decision of the sheriff on an application for ratification should be final.

(Paragraphs 3.133 and 3.134; clause 4(3))

14. It should be expressly provided that the existing common law rules on the legal capacity of minors and pupils, insofar as they are inconsistent with our scheme for reform, should cease to have effect.

(Paragraph 3.135; clause 1(5) and (6))

15. It should be made clear that our scheme for reform does not

(*a*) affect existing statutory age limits or questions of delictual or criminal responsibility;

(*b*) confer legal capacity on any person who is under disability or incapacity (other than by reason of non-age);

(*c*) affect the exercise of parental rights by a person under 16 in relation to any child of his or prevent any such person from being appointed guardian of his child.

(Paragraphs 3.136 and 3.137; clause 1(4)(*b*),(*c*),(*d*) and (*g*))

16. (*a*) The Court of Session should continue to have power under the Trusts (Scotland) Act 1961 to approve arrangements for variation of trust purposes on behalf of beneficiaries under 18.

(*b*) Any such approval given on behalf of a beneficiary under 18 should not be liable to be set aside on the ground of substantial prejudice to that person.

(*c*) The court, in approving an arrangement for variation on behalf of a beneficiary under 18,

(i) should be required to take such account of the beneficiary's attitude as it thinks appropriate; and

(ii) should continue to have power to appoint a curator ad litem to such beneficiary.

(Paragraphs 4.1 to 4.6; clause 1(4)(*f*)(iii), Schedules 1 and 2)

17. Capacity to act as witness to a deed should be conferred at 16, instead of at 14.

(Paragraph 4.7; clause 1(1) and (3) and Schedule 2)

18. 16 should be the age at which an independent domicile can be acquired.

(Paragraph 4.8; clause 7)

19. (*a*) A person should be regarded as attaining a particular age at the beginning of the anniversary of the day of his birth.

(Paragraphs 4.9 and 4.13; clause 6(1))

(*b*) The anniversary, in a non-leap year, of the day of birth of a person born on 29 February should be 1 March.

(Paragraphs 4.10 to 4.13; clause 6(2))

20. (*a*) The guardian of a person under 16 should have the powers and duties which a tutor has in relation to a pupil under the present law. Any reference to the tutor or tutory of a pupil child should be construed accordingly as a reference to the guardian or guardianship of a person under that age. Any reference to a pupil, other than in the context of education or training, should be construed as a reference to a person under the age of 16.

(Paragraphs 4.15, 4.16 and 4.22; clauses 1(2) and 5(1))

(*b*) Without prejudice to the appointment of any other judicial factor to administer the estate of a person under 16, appointment of a factor loco tutoris should no longer be competent.

(Paragraphs 4.17 and 4.22; clause 5(4))

(*c*) Without prejudice to the appointment of a curator ad litem or curator bonis to a person under 18, no one under that age should be subject to the curatory of another person.

(Paragraphs 4.18 and 4.22; clauses 1(4)(*f*)(ii), (iii) and (iv) and 5(3))

(*d*) The only methods of appointing a guardian to a person under 16 should be those provided for in sections 3 and 4 of the Law Reform (Parent and Child) (Scotland) Act 1986.

(Paragraphs 4.19, 4.20 and 4.22; clause 5(2))

21. Any statutory reference to a person under disability or incapacity by reason of

non-age should be construed, where Scots law is applicable, as a reference to a person under the age of 16.

(Paragraph 4.24; clause 1(2))

22. (*a*) The new rules on legal capacity of young people should apply only in respect of transactions entered into after the implementing legislation comes into force.

(Paragraphs 4.25 and 4.27; clause 1(4)(*a*))

(*b*) The existing law on the legal capacity of young people, including the rules on reduction on the ground of minority and lesion, should continue to determine the rights and obligations arising out of transactions already entered into at that time.

(Paragraphs 4.25 and 4.27; clause 1(4)(*a*) and 1(6))

(*c*) Where, immediately preceding the coming into force of the legislation,

(i) a period of prescription or limitation is not or has not been running against a person because that person is or was under legal disability by reason of non-age;

(ii) the effect of the Act in relation to that person is to terminate that disability at 16 instead of 18; and

(iii) that person is aged 16 or over when the Act comes into force;

then the period in question should run from the date of commencement of the Act.

(Paragraphs 4.26 and 4.27; clause 8)

Appendix A

AGE OF LEGAL CAPACITY (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

DRAFT

OF A

BILL

TO

Make fresh provision in the law of Scotland as to the legal capacity of persons under the age of 18 years to enter into transactions, as to the setting aside and ratification by the court of such transactions and as to guardians of persons under the age of 16 years; to make provision in the law of Scotland relating to the time and date at which a person shall be taken to attain a particular age; and for purposes connected therewith.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Age of legal capacity.

1.—(1) As from the commencement of this Act—

(*a*) a person under the age of 16 years shall, subject to section 2 below, have no legal capacity to enter into any transaction;

(*b*) a person of or over the age of 16 years shall have legal capacity to enter into any transaction.

(2) Subject to section 8 below, any reference in any enactment to a pupil (other than in the context of education or training) or to a person under legal disability or incapacity by reason of non-age shall, insofar as it relates to any time after the commencement of this Act, be construed as a reference to a person under the age of 16 years.

(3) In this Act, unless the context otherwise requires,—

"existing" means existing immediately before the commencement of this Act;

"parental rights" has the same meaning as in section 8 (interpretation) of the Law Reform (Parent and Child) (Scotland) Act 1986;

1986 c.9.

"transaction" means a transaction having legal effect, and includes—

(*a*) any unilateral transaction;

(*b*) the exercise of testamentary capacity;

(*c*) the exercise of any power of appointment;

(*d*) the giving by a person of any consent having legal effect;

(*e*) the bringing or defending of, or the taking of any step in, civil proceedings;

(*f*) the making of any gift;

(*g*) acting as arbiter or trustee;

(*h*) acting as an instrumentary witness.

(4) Nothing in this Act shall—

(*a*) apply to any transaction entered into before the commencement of this Act;

(*b*) confer any legal capacity on any person who is under legal disability or incapacity (other than by reason of non-age);

(*c*) affect the delictual or criminal responsibility of any person;

(*d*) affect any enactment which lays down an age limit expressed in years for any particular purpose;

(*e*) prevent any person under the age of 16 years from receiving or holding any right, title or interest;

(*f*) affect any existing rule of law or practice whereby—

(i) any civil proceedings may be brought or defended, or any step in civil proceedings may be taken, in the name of a person under the age of 16 years who has no guardian or whose guardian is unable (whether by reason of conflict of interest or otherwise) or refuses to bring or defend such proceedings or take such step;

(ii) the court may, in any civil proceedings, appoint a curator ad litem to a person under the age of 16 years;

(iii) the court may, in relation to the approval of an arrangement under section 1 of the Trusts (Scotland) Act 1961, appoint a curator ad litem to a person of or over the age of 16 years but under the age of 18 years; or

1961 c.57.

Clause 1

Clause 1 implements the general policy of the Report that the existing rules on the legal capacity of young people, based on the classification of those under 18 as either pupils or minors, should be replaced by a two tier system based on age bands of 0-16 and 16-18 years (see Recommendation 1).

Subsection (1)

This subsection implements Recommendations 2(*a*) and 11. It lays down the general rules applicable to the two age groups: those under 16 should, broadly speaking, have no legal capacity to enter transactions while those aged 16 and 17 should have such capacity subject to the protection referred to in clause 3.

Subsection (2)

This subsection implements Recommendation 20(*a*), in part, and Recommendation 21. Most statutory references to pupils disappear in the consequential amendments and repeals. Those that remain, other than in the context of education or training, are to be taken to refer to a person under 16. Similarly, the expression "person under legal disability or incapacity by reason of non-age" is to refer to a person lacking legal capacity under our scheme.

The term "minor" will in future mean any person under 18 (see the Age of Majority (Scotland) Act 1969, section 1(1) and (2)).

Subsection (3)

This is an interpretation provision. In particular, it implements Recommendation 2(*c*) giving an inclusive definition of "transaction".

Subsection (4)

This subsection implements Recommendations 2(*b*), 3(*e*) and (*f*) 15, 22(*a*) and (*b*), 16(*c*)(ii) and part of 20(*c*). Paragraph (*a*), when read with subsection (6) makes it clear that the rules on reduction on the ground of minority and lesion will continue to apply to transactions entered into before the legislation comes into force.

Paragraph (*b*) ensures that the legislation will not confer legal capacity on someone who lacks actual mental capacity to act on his own behalf.

Paragraph (*f*)(iii) is in implementation of Recommendation 16(*c*)(ii) (see paras. 4.1 to 4.6 of the Report).

(iv) the court may appoint a curator bonis to any person;

(*g*) prevent any person under the age of 16 years from—

(i) being appointed as guardian to any child of his, or

(ii) exercising parental rights in relation to any child of his.

(5) Any existing rule of law relating to the legal capacity of minors and pupils which is inconsistent with the provisions of this Act shall cease to have effect.

(6) Any existing rule of law relating to reduction of a transaction on the ground of minority and lesion shall cease to have effect.

Paragraph (*g*) simply preserves the position regarding the exercise of parental rights by a person under 16.

Subsections (5) and (6)

These subsections implement Recommendations 8(*a*), 9, 10, in part, and 14. Broadly speaking, the existing law on the legal capacity of young people is swept away. Thus there is no special rule enabling a person under 16 to purchase necessaries or enter employment or trading contracts; no rule enabling him to act with the consent of his parent or guardian; and no doctrine of forisfamiliation. The concept of trading contracts does, however, remain relevant for the 16 to 18 year old (see clause 3(2)(*f*)). The rules on reduction on the ground of minority and lesion will continue to apply to transactions entered into before the legislation comes into force (see subsection (4)(*a*) above).

Exceptions to general rule.

2.—(1) A person under the age of 16 years shall have legal capacity to enter into a transaction—

(*a*) of a kind commonly entered into by persons of his age and circumstances, and

(*b*) on terms which are not unreasonable.

(2) A person of or over the age of 12 years shall have testamentary capacity, including legal capacity to exercise by testamentary writing any power of appointment.

(3) A person of or over the age of 12 years shall have legal capacity to consent to the making of an adoption order in relation to him; and accordingly, for section 12(8) (adoption orders) of the Adoption (Scotland) Act 1978, there shall be substituted the following subsection— 1978 c.28.

"(8) An adoption order shall not be made in relation to a child of or over the age of 12 years unless with the child's consent; except that, where the court is satisfied that the child is incapable of giving his consent to the making of the order, it may dispense with that consent".

(4) 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.

(5) Any transaction—

(*a*) which a person under the age of 16 years purports to enter into after the commencement of this Act, and

(*b*) in relation to which that person does not have legal capacity by virtue of this section,

shall be void.

Clause 2

This clause implements Recommendations 3(*a*) in part, 4,5,6 and 7. It sets out, firstly, the exceptions to the general rule of incapacity for those under 16 and, secondly, the legal consequences of the general rule.

Subsection (1)

This subsection implements Recommendation 4 and provides for the most important of the exceptions, that for "everyday" transactions entered into by young people under 16. The scope of the exception is discussed at paras. 3.41 to 3.50 of the Report.

Subsection (2)

This subsection implements Recommendation 5.

Subsection (3)

This subsection implements Recommendation 7.

Subsection (4)

This subsection implements Recommendation 6 (see discussion at paras. 3.61 to 3.82 of the Report).

Subsection (5)

This subsection is in part implementation of Recommendation 3(*a*). The consequences of a young person's incapacity—the rights of parties to a void transaction and the effect of such a transaction on third party rights—are left to turn on the general law (see Recommendation 3(*c*) and (*d*)). Although any transaction purportedly entered into by a person under 16 which does not come within one of the exceptions will be void, it may be adopted as binding once the young person reaches the age of 16 (see para. 3.37 of the Report).

Setting aside of transactions.

3.—(1) A person under the age of 21 years ("the applicant") may make application to the court to set aside a transaction which he entered into while he was of or over the age of 16 years but under the age of 18 years and which is a prejudicial transaction.

(2) In this section, "prejudicial transaction" means a transaction which—

(*a*) an adult, exercising reasonable prudence, would not have entered into in the circumstances of the applicant at the time of entering into the transaction, and

(*b*) has caused or is likely to cause substantial prejudice to the applicant.

(3) Subsection (1) above shall not apply to—

(*a*) the exercise of testamentary capacity;

(*b*) the exercise by testamentary writing of any power of appointment;

(*c*) the giving of consent to the making of an adoption order;

(*d*) the bringing or defending of, or the taking of any step in, civil proceedings;

(*e*) the giving of consent to any surgical, medical or dental procedure or treatment;

(*f*) a transaction in the course of the applicant's trade, business or profession;

(*g*) a transaction into which any other party was induced to enter by virtue of any fraudulent misrepresentation by the applicant as to age or other material fact;

(*h*) a transaction ratified by the applicant after he attained the age of 18 years and in the knowledge that it could be the subject of an application to the court under this section to set it aside; or

(*i*) a transaction ratified by the court in terms of section 4 below.

(4) Where an application to set aside a transaction can be made or could have been made under this section by the person referred to in subsection (1) above, such application may instead be made by that person's executor, trustee in bankruptcy, trustee acting under a trust deed for creditors or curator bonis at any time prior to the date on which that person attains or would have attained the age of 21 years.

(5) An application under this section to set aside a transaction may be made—

(*a*) by an action in the Court of Session or the sheriff court, or

(*b*) by an incidental application in other proceedings in such court;

and the court may make an order setting aside the transaction and such further order, if any, as seems appropriate to the court in order to give effect to the rights of the parties.

Clause 3

This clause implements Recommendations 12 and 13(a) dealing with the right of a 16 or 17 year old to have prejudicial transactions set aside by the court.

Subsections (1) and (2)

These subsections, taken together, implement Recommendation 12(*a*). The right of challenge is available only in respect of transactions entered into by 16 to 18 year olds and must be exercised before the young person reaches the age of 21 (see also subsection (4) below). The ground of challenge is discussed at paras. 3.103 to 3.108 of the Report.

Subsection (3)

This subsection implements Recommendation 13, excluding the right of challenge either in respect of particular kinds of transaction or in particular circumstances.

Subsection (4)

This subsection implements Recommendation 12(*c*), enabling the young person's personal representatives to challenge prejudicial transactions provided they do so within the same time limit as would apply to the young person himself.

Subsection (5)

This subsection implements Recommendation 12(*b*) and (*d*). Once a transaction has been set aside, the rights of third parties which are dependent on it are determined by the general law (see Recommendation 12(*e*)).

Ratification by court of proposed transaction.

4.—(1) Where a person of or over the age of 16 years but under the age of 18 years proposes to enter into a transaction which, if completed, could be the subject of an application to the court under section 3 above to set aside, all parties to the proposed transaction may make a joint application to have it ratified by the court.

(2) The court shall not grant an application under this section if it appears to the court that an adult, exercising reasonable prudence and in the circumstances of the person referred to in subsection (1) above, would not enter into the transaction.

(3) An application under this section shall be made by means of a summary application—

(*a*) to the sheriff of the sheriffdom in which any of the parties to the proposed transaction resides; or

(*b*) where none of the said parties resides in Scotland, to the sheriff at Edinburgh;

and the decision of the sheriff on such application shall be final.

Clause 4

This clause implements Recommendation 13(*b*). It provides for judicial ratification of transactions proposed to be entered into by a 16 or 17 year old. The effect of ratification is to preclude later challenge (see clause 3(3)(*i*)).

Subsections (1) and (2)

These subsections, taken together, implement Recommendation 13(*b*)(i). The ratification procedure applies only to proposed, not completed, transactions. All parties to the transaction must apply. It would, of course, be possible for the young person to attach conditions to his agreeing to apply, for example, that the other party should bear the expenses of the application. The basis on which a court may ratify a transaction corresponds to the ground of challenge (see clause 3(2) and para. 3.132 of the Report).

Subsection (3)

This subsection implements Recommendation 13(*b*)(ii) and (iii), conferring jurisdiction on the sheriff court and excluding any right of appeal.

Guardians of persons under 16.

5.—(1) Except insofar as otherwise provided in Schedule 1 to this Act, as from the commencement of this Act any reference in any rule of law, enactment or document to the tutor or tutory of a pupil child shall be construed as a reference to the guardian or, as the case may be, guardianship of a person under the age of 16 years; and accordingly the guardian of such a person shall have in relation to him and his estate the powers and duties which, immediately before such commencement, a tutor had in relation to his pupil.

(2) As from the commencement of this Act, subject to section 1(4)(*f*) above, no guardian of a person under the age of 16 years shall be appointed as such except under section 3 (orders as to parental rights) or section 4 (power of parent to appoint guardian) of the Law Reform (Parent and Child) (Scotland) Act 1986.

1986 c.9.

(3) As from the commencement of this Act, no person shall, by reason of age alone, be subject to the curatory of another person.

(4) As from the commencement of this Act, no person shall be appointed as factor loco tutoris.

Clause 5

This clause implements most of Recommendation 20, making a number of consequential changes to the law of guardianship.

Subsection (1)

This subsection is in further implementation of Recommendation 20(*a*) (see also clause 1(2)). Its effect is to convert tutors under the present law into guardians of persons under 16.

Subsection (2)

This subsection implements Recommendation 20(*d*). It provides that the only methods of appointing a guardian shall be those provided by the Law Reform (Parent and Child) (Scotland) Act 1986, i.e. by court order or testamentary writing of the parent. In effect, it abolishes the old methods of appointment applying to tutors of law and tutors dative (see para. 4.19 of the Report).

Subsection (3)

In part implementation of Recommendation 20(c), this subsection abolishes the whole concept of curatory of a minor. It does not, however, prevent the appointment of a curator bonis or a curator ad litem to a young person (see clause 1(4)(*f*)(ii),(iii) and (iv)).

Subsection (4)

This subsection implements Recommendation 20(*b*) and prohibits future appointment of factors loco tutoris. It does not prevent the appointment of any other judicial factor to administer the property of a person under 16.

Attainment of age.

6.—(1) The time at which a person attains a particular age expressed in years shall be taken to be the beginning of the relevant anniversary of the date of his birth.

(2) Where a person has been born on 29th February in a leap year, the relevant anniversary in any year other than a leap year shall be taken to be 1st March.

(3) The provisions of this section shall apply only to a relevant anniversary which occurs after the commencement of this Act.

Acquisition of domicile.

7. The time at which a person first becomes capable of having an independent domicile shall be the date at which he attains the age of 16 years.

Transitional provision. 1973 c.52.

8. Where any person referred to in section 6(4)(*b*), 17(3), 18(3) or 18A(2) of the Prescription and Limitation (Scotland) Act 1973 as having been under legal disability by reason of nonage was of or over the age of 16 years but under the age of 18 years immediately before the commencement of this Act, any period prior to such commencement shall not be reckoned as, or as part of, the period of five years, or, as the case may be, three years, specified respectively in section 6, 17, 18 or 18A of that Act.

Amendments and repeals.

9.—(1) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments therein specified.

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title, commencement and extent.

10.—(1) This Act may be cited as the Age of Legal Capacity (Scotland) Act 1987.

(2) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.

(3) This Act shall extend to Scotland only.

Clause 6

This clause implements Recommendation 19. *Subsection (3)* makes it clear that the provision has prospective effect only.

Clause 7

This clause implements Recommendation 18. A similar recommendation is made in the recent joint Commission Report on *The Law of Domicile* (Law Com. No. 168/Scot. Law Com. No. 107, 1987) at paras. 4.27 and 4.28 and clause 1 and Schedule, rule 7 of the draft Bill annexed. If the recommendations made in that Report were to be implemented, this provision would not be necessary.

Clause 8

This clause implements Recommendation 22(*c*) and makes transitional provision for the computation of periods of prescription and limitation. The aim is to ensure that those aged 16-18 when the legislation comes into force retain the full three or five year period within which to act, notwithstanding the general rule that legal disability by reason of non-age ceases at 16 (see discussion at para. 4.26 of the Report).

SCHEDULE 1

Section 9

AMENDMENT OF ENACTMENTS

The Defence Act 1842 (c.94)

In section 15, for the words "persons within the age of twenty-one years" substitute the words "or, being persons under legal disability by reason of non-age"; and for the words "come and be at the age of twenty-one years," substitute the words "cease to be under legal disability by reason of non-age or come and be".

In section 27, for the words "infancy or" substitute the words "persons under legal disability by reason of non-age or of".

The Lands Clauses Consolidation (Scotland) Act 1845 (c.19)

In section 7, for the words "infants, minors," (wherever those words occur) substitute the words "persons under legal disability by reason of non-age".

In section 67, for the words "infant, minor," substitute the words "persons under legal disability by reason of non-age".

In section 69, for the word "infancy" substitute the words "legal disability by reason of non-age".

In section 70, for the word "infancy" substitute the words "legal disability by reason of non-age".

The Judicial Factors Act 1849 (c.51)

In section 1, before the definition of the word "tutor" insert the words "the word 'guardian' shall mean any person appointed to be the guardian of a person who is under the age of 16 years".

In section 10, after the word "factors" insert the word "guardians".

In section 25(2), for the words from "person" (where that word first occurs) to "person" (where that word second occurs) substitute the words "guardian who shall, by virtue of his office, administer the estate of any person under the age of 16 years shall be subject to the provisions of this Act, but".

In section 27, after the word "factors" insert the word "guardians".

In sections 31 and 32, before the word "tutor" insert the word "guardian,".

In sections 33 and 34, after the word "factor" (wherever it occurs) insert the word "guardian".

In section 36, before the word "tutories" insert the word "guardianships,".

In section 37, before the word "tutor" insert the word "guardian,".

In section 40, before the word "tutors" (wherever it occurs) insert the word "guardians,".

The Improvement of Land Act 1864 (c.114)

In section 18, for the words "an infant or infants, or a minor or minors" substitute the words "a person under legal disability by reason of non-age".

In section 24, for the words "infants, minors" substitute the words "persons under legal disability by reason of non-age".

In section 68, for the word "infant" substitute the words "person under legal disability by reason of non-age".

Schedule 1

General. A number of the amendments made in this Schedule (and some of the repeals in Schedule 2) are consequential on our recommendation to use the term "guardian" meaning the person who, in relation to a person under 16, has the rights and duties equivalent to those of a tutor under the present law (see Recommendation 20(*a*)). Others follow from Recommendation 21, using the expression "persons under legal disability by reason of non-age" to refer to persons who cannot act on their own behalf, i.e. who are under the age of 16 (see also clause 1(2). In some instances, references to pupils and minors are not made in the context of legal disability but are simply a way of describing persons under the age of majority. In these cases, the expression "person under the age of 18 years" is substituted.

The Defence Act 1842

Section 15 is concerned with payment of compensation in respect of land compulsorily acquired under the Act and deals specifically with claims for compensation by persons under the age of 21. It is thought that references to the age of 21 should have been amended when the age of majority was reduced to 18 in 1969. However, what is relevant is not the age of majority as such but the age at which legal capacity to act on one's own behalf is acquired, hence the amendment to refer to persons being under legal disability by reason of non-age.

The Titles to Land Consolidation (Scotland) Act 1868

Section 24, dealing with completion of title by a judicial factor, refers to a judicial factor for a pupil or minor. The amendment replaces all references to a pupil or minor with a reference to a person under legal disability by reason of non-age.

The amendment to section 62 is simply for the sake of consistency.

The substituted words in section 119 make a general reference to a person being subject to any legal incapacity, whether by reason of non-age or otherwise.

The Titles to Land Consolidation (Scotland) Act 1868 (c.101)

In section 24, for the words "pupil, minor" (wherever they occur) substitute the words "person under legal disability by reason of non-age".

In section 62, for the words "in nonage" substitute the words "under legal disability by reason of non-age".

In section 119, for the words "of full age, or in pupillarity or minority, or although he should be subject to any legal incapacity" substitute the words "subject to any legal incapacity or not".

The Heritable Securities (Scotland) Act 1894 (c.44)

In section 13, for the words "in pupillarity or minority, or subject to any legal incapacity" substitute the words "subject to any legal disability by reason of non-age or otherwise"; and after the word "curators," insert the word "guardians".

The Merchant Shipping Act 1894 (c.60)

In section 55(1), for the word "infancy" substitute the words "legal disability by reason of non-age".

The Trusts (Scotland) Act 1921 (c.58)

In section 2, in the definitions of "trust" and "trust deed", after the word "curator" insert the word "guardian", and, in the definition of "trustee", for the words from "tutor" to "curator" substitute the words "tutor, curator, guardian (including a father or mother acting as guardian of a child under the age of 16 years)".

The Conveyancing (Scotland) Act 1924 (c.27)

In section 41(1), for the words from "in pupillarity" to "incapacity" substitute the words "subject to any legal disability by reason of non-age or otherwise".

The Trusts (Scotland) Act 1961 (c.57)

In section 1, in subsection (1)(*a*), after the word "who" insert the words "because of any legal disability", and, in subsection (2), for the words "over the age of pupillarity" substitute the words "of or over the age of 16 years".

The Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c.49)

In section 20(3)(*c*), for the word "18" substitute the word "16".

In section 43(10), for the words "tutor or curator" substitute the word "guardian".

The National Loans Act 1968 (c.13)

In section 14(5)(*a*), for the words from "of unsound" to "disability" substitute the words "under legal disability by reason of non-age or otherwise".

The Social Work (Scotland) Act 1968 (c.49)

In section 16(11)(*c*), for the words "tutor or curator" substitute the word "guardian".

In section 18(4), for the words "tutor or curator of an infant" substitute the words "guardian of a child".

The Taxes Management Act 1970 (c.9)

In section 73, for the words "parent, guardian or tutor" substitute the words "parent or guardian".

In section 118(1), in the appropriate alphabetical position, insert the following definition—

> "infant", in relation to Scotland, except in section 73 of this Act, means a person under legal disability by reason of non-age, and, in section 73 of this Act, means a person under the age of 18 years.

The Trusts (Scotland) Act 1961

These amendments are in part implementation of Recommendation 16.

The Registration of Births, Deaths and Marriages (Scotland) Act 1965

Section 20(3), as added by the Law Reform (Parent and Child) (Scotland) Act 1986, makes provision as to who may apply for re-registration of a person's birth. If the person is under 16, application may be made by the person's mother or by his father if he is the person's guardian or is entitled to custody or applies with the mother's consent. If the person is aged 16-18, application may be made by the person himself with the consent of a parent or guardian. For those over 18, application may be made by the person himself. Under our scheme, the policy is that any person aged 16 or over should be able to apply on his own for re-registration. This is implemented by the amendment to subsection (3)(*c*) and the repeal of subsection (3)(*b*). Corresponding changes are made to section 43 in relation to the recording of a change of name: see Schedule 2.

The National Loans Act 1968

Section 14(5) provides that rules may specify the persons by whom an application accepting an offer of exchange of securities etc may be made in cases where (*a*) the holder has died or is outside the United Kingdom or is of unsound mind or is an infant, pupil or minor or is otherwise under a disability. The amendment gets rid of the inappropriate reference to "an infant, pupil or minor". Amendment will also be required to the relevant statutory instrument (S.I. 79/1678).

The Taxes Management Act 1970

Section 73 provides that if a person chargeable to income tax is an infant, his parent, guardian or tutor is liable in the event of his defaulting in payment. The deletion of the reference to "tutor" follows from Recommendation 20(*a*). However, as a matter of policy, it is thought that the law on revenue matters such as this should be uniform throughout the United Kingdom. Accordingly, the amendment to section 118(1), translating "infant" to mean, for Scottish purposes, a person under legal disability by reason of non-age, incorporates a special definition for the purposes of section 73, ensuring that "infant" will continue to mean a person under 18. As applied to Scotland, the provision will mean that a parent will be liable until the child is 18 whereas a guardian other than a parent will be liable only until the child is 16.

The Sheriff Courts (Scotland) Act 1971 (c.58)

In section 37(2A), for the words "tutory, curatory" substitute the word "guardianship".

The Finance Act 1974 (c.30)

In Schedule 7, in paragraph 10, for the words "pupil or minor" substitute the words "person under the age of 18 years".

The Adoption (Scotland) Act 1978 (c.28)

In section 65(1), in the definition of "guardian", in paragraph (*b*), for the words "tutory, curatory" substitute the word "guardianship".

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59)

In section 7(1)(*d*), for the words "a minor" substitute the words "under legal disability by reason of non-age".

The Civil Jurisdiction and Judgments Act 1982 (c.27)

In Schedule 9, in paragraph 3, for the words "tutory and curatory" substitute the words "guardianship of children".

The Finance Act 1984 (c.43)

In section 100(3), for the words "pupil or minor" substitute the words "person under the age of 18 years".

The Companies Act 1985 (c.6)

In sections 203(1), 327(2)(*b*) and 328(8), for the words "pupil or minor" substitute the words "person under the age of 18 years".

The Family Law (Scotland) Act 1985 (c.37)

In section 2(4)(*c*)(i), for the words "father or mother" substitute the words "parent or guardian".

The Law Reform (Parent and Child) (Scotland) Act 1986 (c.9)

For section 4 substitute the following section—

"Power of parent to appoint guardian.

4. The parent of a child may appoint any person to be guardian of the child after his death, but any such appointment shall be of no effect unless—

(*a*) the appointment is in writing and signed by the parent; and

(*b*) the parent at the time of his death was guardian of the child or would have been such guardian if he had survived until after the birth of the child."

In section 6(2), for the words "pupil child" substitute the words "child under the age of 16 years", and for the word "tutor" substitute the word "guardian".

In section 8, in the definition of "child", in paragraph (*a*), after the words "in relation to" insert the word "guardianship," and, in paragraph (*d*), for the words from "custody" to "curatory" substitute the words "guardianship, custody or access"; and in the definition of "parental rights", for the words "tutory, curatory" substitute the word "guardianship".

The Matrimonial Homes (Family Protection) (Scotland) Act 1981

Section 7(1)(*d*) allows the court to dispense with the non-entitled spouse's consent to dealing if the non-entitled spouse is a minor, the intention being to avoid the possibility of reduction of the sale on the ground of minority and lesion. The policy implemented by this amendment is to allow the court to dispense with the consent of a spouse under the age of 16 but not to dispense with the consent of a spouse aged 16 or 17. In the latter case, the solution is to apply for court ratification of the giving of consent by the non-entitled spouse so as to preclude later challenge (see clauses 3(3)(*i*) and 4).

The Family Law (Scotland) Act 1985

Section 2(4) specifies the parties entitled to bring an action for aliment, including (*c*) on behalf of a child under the age of 18 years

(i) the father or mother of the child

(ii) the tutor of a pupil.

This amendment amalgamates the two sub-paragraphs into one (see also the repeal of sub-paragraph (ii) in Schedule 2).

The Law Reform (Parent and Child) (Scotland) Act 1986

Section 4, in its original form, made provision for the appointment of a tutor or curator by a parent after his death. It provided in subsection (2) that a tutor so appointed would automatically become the child's curator and, in subsection (3), that nothing in the section would affect the appointment of a tutor to administer any property given or bequeathed to a child. The amendment, substituting a completely new section, replaces references to tutor or curator with references to guardian. The original subsections (2) and (3) are no longer necessary. Under clause 5(4) of the Bill, appointment of a tutor by a donor of property is no longer competent. Nothing in section 4 of the 1986 Act, as amended, will affect any power to appoint a judicial factor to administer a young person's estate.

The Family Law Act 1986 (c.55)

In section 1(1)(*b*)(ix), for the words "tutory or curatory" substitute the word "guardianship".

In section 16, in subsections (1) and (4), for the words "tutory or curatory" substitute the word "guardianship", and for the words "pupil or minor" substitute the word "child"; and in subsection (2), for the words "factor loco tutoris" substitute the words "judicial factor".

In section 18(2), for the words "tutory or curatory of a pupil or minor" substitute the words "guardianship of a child".

In section 35(4)(*b*), for the words "tutor or curator" substitute the word "guardian".

The Family Law Act 1986

These amendments are consequential to Recommendation 20(*a*) and (*b*).

SCHEDULE 2

Section 9

REPEALS

Chapter	*Short title*	*Extent of repeal*
1474 c.6.	The Tutors Act 1474.	The whole Act.
1672 c.2.	The Tutors and Curators Act 1672.	The whole Act.
1681 c.85.	The Oaths of Minors Act 1681.	The whole Act.
1696 c.8.	The Tutors and Curators Act 1696.	The whole Act.
12 & 13 Vict. c.51.	The Judicial Factors Act 1849.	In Section 1, the words "factor loco tutoris", "to any pupil" (where those words first occur) and "pupil or" (where those words second occur). In section 25(1), the words "to any pupil" (where those words first occur) and "pupil or" (where those words second occur). In section 26, the words "to a pupil" and "pupils or". Section 30. In section 31, the words "loco tutoris".
31 & 32 Vict. c.101.	The Titles to Land Consolidation (Scotland) Act 1868.	In section 3, the words "factors loco tutoris". In section 119, the words "whether of full age or in pupillarity or minority, or". In section 121, the words "in pupillarity or minority or". Section 139.
43 & 44 Vict. c.4.	The Judicial Factors (Scotland) Act 1880.	In section 3, the words "a factor loco tutoris".
52 & 53 Vict. c.39.	The Judicial Factors (Scotland) Act 1889.	Section 11.
55 & 56 Vict. c.4.	The Betting and Loans (Infants) Act 1892.	The whole Act.
23 & 24 Geo. 5 c.41.	The Administration of Justice (Scotland) Act 1933.	Section 12.
12, 13 & 14 Geo. 6. c.75.	The Agricultural Holdings (Scotland) Act 1949.	In section 84, the words "a pupil or a minor or is".

Schedule 2

The Tutors Act 1474

This Act, dealing with the "brief of tutorie", is superseded by clause 5(2) specifying how a guardian may be appointed.

The Tutors and Curators Act 1672

This Act concerns the making up of inventories by tutors and curators "of any Pupil, Minor, Idiot or furious persone". This matter is now covered by the Judicial Factors Act 1849. The remaining effects of the Act relate (*a*) to what tutors etc must show to debtors and (*b*) to gifts of tutory. The former is outdated and unnecessary; the latter is superseded by clause 5(2) of the Bill.

The Oaths of Minors Act 1681

This Act provides that ratification of a writ by oath of a minor is not to deprive the minor of his right of reduction. This is superseded by the provisions in the Bill concerning ratification and the right of challenge (see clause 3).

The Tutors and Curators Act 1696

This Act deals with the nomination of tutors and curators by the child's father. It has been superseded by the provisions of the Law Reform (Parent and Child)(Scotland) Act 1986.

The Judicial Factors Act 1849

These repeals simply delete references to factors loco tutoris and to pupils. The repeal of section 30 follows from repeal of the Tutors and Curators Act 1672.

The Titles to Land Consolidation (Scotland) Act 1868

See also the amendments in Schedule 1 and the general note to that Schedule. The repeal of section 139, dealing with the minimum age of witnesses to a deed, is in part implementation of Recommendation 17.

The Judicial Factors (Scotland) Act 1889

Section 11 provides that a factor loco tutoris appointed to a pupil child will automatically become his curator bonis on the child's reaching minority. This provision is superseded by our scheme.

The Betting and Loans (Infants) Act 1892

Repeal of this Act partly implements Recommendation 3(*a*) (see para. 3.37 of the Report).

The Agricultural Holdings (Scotland) Act 1949

Section 84 provides that where the landlord or tenant of an agricultural holding is a pupil or minor or is of unsound mind, not having a tutor, curator or other guardian, the sheriff may appoint a tutor or curator to him for the purposes of the Act. The application of this section to persons under legal disability by reason of non-age is no longer necessary in view of the provisions of the Law Reform (Parent and Child) (Scotland) Act 1986 concerning appointment of a guardian by court order.

Chapter	*Short title*	*Extent of repeal*
9 & 10 Eliz. 2 c.57.	The Trusts (Scotland) Act 1961.	In section 1, in subsection (2), the words "(whether acting with the concurrence of a curator, administrator-at-law or other guardian or not)", and subsection (3).
1964 c.41.	The Succession (Scotland) Act 1964.	Section 28.
1965 c.49.	The Registration of Births, Deaths and Marriages (Scotland) Act 1965.	In section 20(3), paragraph (*b*). In section 43, in subsections (5), (6) and (7), the words from "and under" to "over eighteen years of age". In section 56(1), the definitions of "guardian" and "tutor or curator".
1968 c.49.	The Social Work (Scotland) Act 1968.	In section 94(1), in the definition of "guardian" the words "tutor, curator or".
1973 c.29.	The Guardianship Act 1973.	In section 13(1), the definition of "guardian".
1974 c.39.	The Consumer Credit Act 1974.	In section 189(1), the definition of "minor".
1974 c.53.	The Rehabilitation of Offenders Act 1974.	In section 7(2), the words "including a pupil child".
1975 c.45.	The Finance (No. 2) Act 1975.	In section 73(5), the words "pupil or".
1975 c.72.	The Children Act 1975.	In section 47(2), the words "tutor, curator" in each place where they occur.
1978 c.28.	The Adoption (Scotland) Act 1978.	In section 12(3)(*a*)(ii), the words "tutor, curator or other".
1979 c.54.	The Sale of Goods Act 1979.	In section 3, in subsection (2), the words "to a minor or", and, in subsection (3), the words "minor or other".
1982 c.50.	The Insurance Companies Act 1982.	In section 7(8), the definition of "minor" in relation to Scotland. In section 31(7), the definition of "minor" in relation to Scotland.
1984 c.37.	The Child Abduction Act 1984.	In section 6(7), the words from "a tutor" to "1986 or".
1985 c.37.	The Family Law (Scotland) Act 1985.	In section 2(4), in paragraph (*b*), the words "or the curator of a minor who is an incapax", and, in paragraph (*c*), head (ii).
1986 c.9.	The Law Reform (Parent and Child)(Scotland) Act 1986.	Section 3(3). In section 8, in the definition of "child", paragraphs (*b*) and (*c*), and the definitions of "curator" and "tutor". In Schedule 1, in paragraph 9, in sub-paragraph (2), the words from "and for" to the end, and in sub-paragraph (6), the words from "for the words" (where they first occur) to "and"; and paragraphs 11, 12, 14(1)(*b*) and 20(*b*).
1986 c.33.	The Disabled Persons (Services, Consultation and Representation) Act 1986.	In section 16, in the definition of "guardian" in paragraph (*b*), the words "tutor, curator or".

The Trusts (Scotland) Act 1961

Repeal of the words in section 1(2) follows from our general recommendation that there should be no rule allowing a young person to act with the consent of his parent or guardian.

Subsection (3) falls with the abolition of the rules on reduction on the ground of minority and lesion. The approval given by the Court on behalf of a young person will not be open to challenge under our scheme because it is not a transaction entered into by the young person himself.

The Registration of Births, Deaths and Marriages (Scotland) Act 1965

See the note to Schedule 1 on this Act.

The Sale of Goods Act 1979

This repeal implements Recommendation 8(*b*).

The Child Abduction Act 1984

This repeal restores the original definition of guardian in the Act which had been amended to refer to a tutor or curator appointed under the Law Reform (Parent and Child) (Scotland) Act 1986.

The Family Law (Scotland) Act 1985

See the note to Schedule 1 on this Act.

Appendix B

(1) List of those who submitted written comments on the Memorandum or pamphlet or who assisted with comments in the course of preparation of the Report.

Aberdeen Citizens' Advice Bureau
Aberdeen University, Faculty of Law
Ambrose Wilson plc
D S C Arthur, Helensburgh
Association of British Insurers
Association of Directors of Social Work
Association of Scottish Local Health Councils
Bellshill and District Citizens' Advice Bureau
Anne Black, Divisional Director of Social Work, Lothian Regional Council
Charles R Black, WS, Edinburgh
The Boys' Brigade
British Medical Association
British Medical Association, Scottish Hospital Junior Staff Committee
Brook Advisory Centre, Edinburgh
Nigel Bruce, Edinburgh
Building Societies Association
Church of Scotland Woman's Guild
Committee of Scottish Clearing Bankers
Convention of Scottish Local Authorities
John Cran, Lenzie
Cumbernauld Citizens' Advice Bureau
Dixons Group plc.
T F N Donald, Edinburgh
Professor M C Donaldson-Salter, Edinburgh University
Dumfries and Galloway Health Board
Dundee Women's Aid
Lord Dunpark
Edinburgh Council for the Single Homeless
Faculty of Advocates
Family Planning Association, Scottish Region
Fife Health Board
Gordon J Ford, Livingston
D A R Forrester, Strathclyde University
General Register Office for Scotland
The Girls' Brigade
Glasgow Chamber of Commerce
Mrs Lesley G Glen, Glasgow
Professor W M Gordon, Glasgow University
Grampian Health Board
Grampian Regional Council
Adrian C Grant, Freuchie
Grattan plc.
George Gretton, WS, Edinburgh
Anne Griffiths, Edinburgh University
Highland Area Medical Committee, General Practitioner Sub-Committee
Highland Health Board
Human Sexuality Group, Royal Edinburgh Hospital
J B Hunter, Area Dental Committee, Dumfries and Galloway
Inland Revenue

Institute of Housing, Scottish Branch, Chief Housing Officers Group
Dr Sultan Kermally, Monifeith
Law Society of Scotland
D G Little, Penicuik
The Littlewoods Organisation
Lothian Division of Obstetrics and Gynaecology
Lothian Health Board
Lothian Health Board, Family Planning Services Medical Staff
Lothian Health Board, Family Planning Services Nursing Staff
Dr W W McBryde, Aberdeen University
Agnes F MacVicar, Area Reporter to the Children's Panel, Strathclyde
Professor J K Mason, Edinburgh University
Ministry of Defence
Morag Morrell, Aberdeen
The Mothers' Union in Scotland
Lord Murray
Next plc
P N Parkinson, UWIST
Penicuik and District YMCA/YWCA
Margaret Porter, Glasgow
Registrar of Companies for Scotland
Dr D H H Robertson, Edinburgh University and Royal Infirmary, Edinburgh
Royal College of General Practitioners
Royal College of Midwives, Scottish Board
Royal College of Nursing, Scottish Board
Royal College of Physicians
Royal College of Surgeons
Royal Scottish Society for Prevention of Cruelty to Children
T Graham Salmon, Edinburgh
Sheriff R J D Scott
Scottish Association of Youth Clubs
Scottish Child and Family Alliance
Scottish Community Education Council
Scottish Consumer Council
Scottish Law Agents' Society
Scottish Legal Action Group
Scottish National Blood Transfusion Service
Scottish National Council of YMCAs
Scottish Society for the Mentally Handicapped
Scottish Standing Conference of Voluntary Youth Organisations
John W Shaw, Blairgowrie
Sheriffs' Association
Professor Emeritus Sir Thomas Smith, QC
Students' Representative Council, Deans Community High School, Livingston
Claire M Sturrock, Elie
Elaine E Sutherland, Edinburgh University
Welbeck Financial Services Ltd
John R White, Glasgow
Dr E S B Wilson, Family Planning Services, Greater Glasgow Health Board
Dr Sula Wolff, Edinburgh University

(2) List of those participating at public meetings

Edinburgh: Dr E M Clive, Scottish Law Commission
Dr J Bury, Co-ordinating Doctor, Brook Advisory Centre
John Griffiths, Scottish Health Service Central Legal Office
Dr R McCreadie, Faculty of Scots Law, Edinburgh University

Aberdeen: Dr E M Clive, Scottish Law Commission
Dr D J Bell, General Practitioner
D J Cusine, Faculty of Law, Aberdeen University
Professor F P Glasser, Department of Chemistry, Aberdeen University and former Chairman of the Children's Panel
In the chair: I M S Park, solicitor

Glasgow: Dr E M Clive, Scottish Law Commission
Sheriff Brian Kearney
Dr A Miller, Consultant, The Queen Mother's Hospital
R Poor, Divisional Director of Social Work, Strathclyde Regional Council
In the chair: J Ross Harper, solicitor

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