Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 65

Legal Capacity and Responsibility of Minors and Pupils

JUNE 1985

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PART V - OPTIONS FOR REFORM

Policy Considerations

5.1 In assessing the defects of the present law, we have identified three objectives which we consider that the law should fulfil. These are:

(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.[1]

In making our provisional proposals, we shall attempt to achieve a balance between the first two objectives, while still satisfying the third.

Our approach to reform: the main variables

5.2 There are, in our view, two possible methods of presenting the options for reform of the law in this area. One is to set out the various options in the form of complete "models". Each "model" would comprise a number

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[1] The first two of these considerations are similar to those identified by the Law Commission: See Working Paper No. 81, para. 3.5.

of integrated proposals dealing with different aspects of the law which, when taken together, would represent a scheme for reforming the law as a whole. The disadvantage of this approach is that, for consultees, no single scheme may represent the desired solution. They may wish to see aspects of one scheme coupled with aspects of another. If none of the options for reform commends itself in its entirety, the results of consultation may be difficult to assess. This leads us to favour the alternative approach which is to consider each variable, or aspect of the law separately. The end result will be a scheme which will incorporate our provisional conclusions on each variable and consultees will be invited to comment both on the whole scheme for reform and on the individual proposals which make up that scheme.

5.3 The main variables which will be examined in turn are:

(a) the grouping of capacities and responsibilities;
(b) the relevant age of capacity;
(c) the content of the general rule for those under the relevant age;
(d) exceptions and qualifications to the general rule; and
(e) the consequences of the general rule.

GROUPING OF CAPACITIES AND RESPONSIBILITIES

5.4 The issue here is to what extent questions of a young person's civil capacity and responsibility should be determined by a single set of rules. It would be possible, for example, to have one relevant age for the

purposes of contractual capacity, capacity to make a will, capacity to raise and defend court actions, responsibility for delicts, and so on. This, however, would be wholly inappropriate, at least in relation to delictual liability. The considerations applying to delictual liability are quite different from those applying to capacity to contract, make a will or litigate. Accordingly, the law on delictual liability of children will be discussed independently of our proposals on legal capacity.[1] At the other extreme, it would be possible to deal only with contractual capacity (the approach adopted in England and Wales) or to deal with various aspects of legal capacity but adopt a different set of rules for each sub-category of legal capacity - for example, capacity to contract, to convey property, to make a will, to raise or defend actions - as well as a set of rules dealing with liability in delict. This solution also seems unattractive. The law would remain extremely complex and as the rules would, of necessity, descend to a certain amount of detail in respect of specific types of transaction, they might not be very adaptable to further changes in young people's social and economic circumstances.

5.5 In our view, the most satisfactory approach is to have one set of rules governing legal capacity in the field of private law generally.[2] This seems to be the approach

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[1] See Part VI below.

[2] We are not concerned in this Memorandum with such questions as the age for voting, driving or drinking. Nor are we concerned with the age of majority as such. Under all the options considered in this Memorandum the general age of majority would remain at 18 as laid down in the Age of Majority (Scotland) Act 1969. See also para. 5.143 below.

best suited to achieving coherent reform of the law based on principles of general application. Our provisional proposals will therefore be framed in terms of broad concepts of capacity or incapacity, rather than in terms of, say, enforceable or unenforceable contracts. It is not inconsistent with this approach that there should be a few exceptions which relate to specific legal acts, for example, the making of a will. Such exceptions may be regarded simply as qualifications to the general rule on capacity. Similarly, it would still be possible, as under the existing law, to differentiate between specific age groups according to their capacity. In order to ascertain whether or not our approach to reform is acceptable, we invite views on our provisional conclusion that reform of the law 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 and qualifications.

THE RELEVANT AGE

5.6 We have already commented that the present ages of pupillarity and minority are anomalous and that the law discriminates unfairly between the sexes. It is clear to us that whatever proposals are made as regards the age of capacity, the law should be reformed so as to apply equally to males and females. We have also suggested that the ages of 12 and 14 are out of touch with present economic and social conditions and that the present law is unduly restrictive towards the upper limit of the minority age band. To meet these criticisms of the present law, it is necessary to consider two separate

questions regarding the age of capacity. One concerns the appropriate age for full legal capacity. The other concerns the number of categories below full capacity and the appropriate age range for each category. Our provisional conclusion on the former question is, to some extent, conditioned by our views on the latter. Before examining these questions, however, we invite views on the preliminary proposition that the present ages of minority (12 for girls and 14 for boys) are inappropriate. At the very least there should be the same age, or ages, of legal capacity for boys and girls.

A one, two or more tier system?

5.7 So far as the age bands below full capacity are concerned, there are obviously a number of possible permutations. It would, for example, be possible to have a system with as many as four age bands below majority - such as 0-6/6-12/12-16/16-18- with young people in each age group being subject to a different degree of incapacity according to their perceived level of maturity and responsibility. Such a system would, however, be extremely complicated and would, we suspect, be ignored in real life. To differentiate between such narrow age groups would involve a fairly exact assessment of a child's level of understanding at different ages. In view of the extent to which children's rates of development vary, such an assessment may be patently inaccurate for children at the extremes of their age band. Without some degree of flexibility, which would add further to its complexity, this type of system could produce arbitrary and artificial

results. For this reason, we do not think that it merits serious consideration. At the other extreme, a system with no age bands - i.e. based on a presumption that all persons have full legal capacity which would be rebuttable by proof that the person was incapable of giving proper consent to the act in question - would not provide the element of certainty which is required in order to safeguard the interests of both young people and adults.

5.8 In our view, there are two viable options, either to have an improved two-tier system, akin to the existing distinction between minors and pupils whereby the degree of special protection given to young people is modified in respect of the older age group, or to have a single tier system in which young people above a certain age are accorded full legal capacity in private law matters.

5.9 One justification for retaining a two-tier system is that there is an age after which most young people become recognisably more responsible and therefore in less need of the law's protection. After this age, they become more active economically and should not be prevented from entering into a range of transactions as part of their ordinary life. Until they attain full capacity, however, the law should continue to safeguard them from entering into unwise bargains. A two-tier system could take a variety of forms - for example, 0-12/12-16, 0-14/14-18 or 0-16/16-18. The difficulty is in identifying the right age at which to make the intermediate

division. The general rule governing each age group must be appropriate for both the upper and lower age limits of that group. The present law may seem inappropriate in that it classes 12 and 17 year olds together. We think this would be equally true under any reformed two-tier system which drew a line at, or around, the age of 12. There is too great a difference in maturity between 12 year olds and 17 year olds to allow the law to treat them in exactly the same way. A 12 year old may have barely started secondary education: a 17 year old may be married and in full-time employment. We hope that the social research survey which we have commissioned[1] will provide valuable information about young people's involvement in transactions of all kinds. In the meantime, it may be reasonable to assume that the greatest economic activity will be concentrated in the upper range of the present minority age group, the 16 and 17 year olds. While most of their activity may fall into the category of small cash purchases, payment for entertainment and so on, it may also include transactions incurring more long-term obligations, such as employment contracts, leasing heritable property or obtaining credit. It is hard to conceive of younger children being ordinarily involved in anything more than small cash transactions. It seems to us that the lower age group could cover a wide age range without restricting unnecessarily the normal activities of a child at the upper limit of that age group. Without the benefit of the survey results and

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[1] See para. 1.5 above.

comments from people and organisations directly involved with young people, it is difficult to reach any firm conclusion on this point. Our provisional view, however, is that it would be undesirable to commence the upper age group before the age of 16.

5.10 If a two-tier system is to be retained, the strongest argument may be made out in favour of a 0-16/16-18 system. We return to this particular option at para. 5.22 below. It is certainly not one which we would rule out altogether at this stage. The main objection to it is, however, that it may not be worth having an extra layer of protections for young people in the 16-18 age band, given the protections now provided by the general law on such matters as hire purchase and unfair contract terms, and given that extra protections for young people would mean extra risks of unfairness to people dealing with them. A two-tier system, however improved, would also perpetuate some of the difficulties experienced under the present law. An adult would still have to contend with two different sets of rules. The consequences of his transacting with a young person under the age of full capacity would still vary according to the young person's age. The law would still be relatively complex. On the other hand, a single tier system would avoid this criticism. While simplification of the law is certainly not the sole purpose of reform, we think that if a single tier system could achieve the main objective which we have identified, that of protecting young people from the consequences of their immaturity while not causing unnecessary prejudice to adults, it would be a

radical improvement on the present law and would be preferable to any rationalisation of the existing age bands of pupillarity and minority.

5.11 We have, therefore, been led to consider as a first option a one-tier system based on some age not less than 16. We consider later what the general rule should be on the capacity of young people below the relevant age.[1] For present purposes we shall assume that, subject to important qualifications, those below the relevant age would lack legal capacity in private law matters and that those above that age would have full legal capacity. The qualifications would be designed to ensure, among other things, that children under the relevant age could continue to enter into everyday transactions of the type commonly entered into by children of their age.

Our preferred option - a one-tier system based on the age of 16

5.12 For all practical purposes, the choice of the age of full capacity is limited to the ages of 16, 17 or 18. To go above or below those ages would, we think, be both unacceptable and unrealistic. Our provisional preference is for the age of 16. To have a single tier of incapacity (akin to pupillarity under the present law) extending to the ages of 17 or 18 would, in our view, be too restrictive. Young people of 16 or 17 may be, to a greater or lesser extent, independent, mature and economically active. On grounds of convenience alone, there is merit in

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[1] Paras. 5.24 and 5.25 below.

choosing an age which is of practical significance in other areas and the age of 16 is already an important watershed in a young person's life. It is the age at which compulsory education ceases; a 16 year old may seek full-time employment; generally speaking, he may no longer be made subject to a custody order, nor may he, as a general rule, be made subject to a supervision requirement as being in need of compulsory measures of care; he becomes eligible to claim social security benefits; he or she may marry and lawfully engage in sexual relations. A 16 year old may be financially independent and supporting a family, with all the responsibilities and commitments that that entails. In short, at 16, young people may have considerable responsibility for managing their own affairs.[1] By contrast, a person below that age, generally speaking, is still attending school, is dependent on his parents or guardian and exercises little or no control, either in financial terms or in terms of decision-making, over major events in his own life. To change the law so as to

[1]The age of 16 is significant in the criminal law as well. It is the age at which in general a child becomes subject to the ordinary criminal courts rather than the children's panel. It also affects the disposal of cases - whether or not the court must remit a case to a children's hearing for advice - and, if the court decides to dispose of a case itself it determines the kind of custodial sentence which may be imposed. In addition it determines whether or not a young person is the potential victim of certain offences, e.g. under section 12 of the Children and Young Persons (Scotland) Act 1937 (wilful ill-treatment, neglect etc. likely to cause unnecessary suffering or injury to health).

give 16 and 17 year olds less capacity than they (as minors) enjoy under the present law of Scotland would in our view be retrogressive, particularly as the general law now gives more protection than ever before to those in a weak bargaining position. This is an important consideration, to which we now turn.

5.13 Protection of the general law. In recent years the law has increasingly recognised the inequality of bargaining power between consumer and supplier and has done much to strengthen the position of the individual consumer and to restrict the freedom of the stronger contracting party to impose his own terms and conditions. The credit industry is now regulated by the Consumer Credit Act 1974[1] and is subject to the supervision of the Office of Fair Trading. Credit transactions which do not conform with the statutory requirements are unenforceable. Extortionate credit bargains may be re-opened by the court "so as to do justice between the parties".[2] In deciding whether or not a bargain is extortionate, the court is directed

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[1] Section 50 of the 1974 Act makes it an offence to send a circular to a person under 18 inviting him to borrow money or to obtain goods on credit or hire purchase.

[2] s.137(1).

to consider, inter alia, the age and experience of the debtor.[1] The Sale of Goods Act 1979[2] provides the individual with various protections, including implied terms as to the fitness and condition of the goods purchased and remedies in the event of default. Other consumer protection measures are contained in the Trades Descriptions Acts 1968 and 1972, the Unsolicited Goods and Services Acts 1971 and 1975, the Fair Trading Act 1973, the Unfair Contract Terms Act 1977 and the Consumer Safety Act 1978. In the field of employment, the law intervenes, through the Employment Protection (Consolidation) Act 1978 and related legislation, to protect the employee from unfair dismissal, to secure the employee's maternity rights and rights on redundancy, to safeguard his rights in relation to notice of termination of employment and trade union membership, and to enforce his rights through the industrial tribunal system.

5.14 We believe that this range of legislation provides the most appropriate means to safeguard the interests of

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[1] ss. 138(2) and (3)(a).

[2] The 1979 Act consolidates the Sale of Goods Act 1893 and amendments made to it by, for example, the Consumer Credit Act 1974, the Sale of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977. It is presently under review by the two Law Commissions: Law Commission Working Paper No. 85; Scottish Law Commission Consultative Memorandum No. 58 - Sale and Supply of Goods.

16 and 17 year olds. They are not, in our view, in any more need of protection from the unscrupulous than any other consumer. Indeed, their interests might perhaps be better protected by legislation of general application then by special rules applying only to their own age group which, if weighted too heavily in their favour, might deter adults from dealing with them at all.

5.15 Our provisional proposal is, therefore, that the present two-tier law on the legal capacity of pupils and minors, with its divisions at the ages of 12 or 14 and 18, should be replaced by a single tier system based on the age of 16. Above that age a person should have full legal capacity in private law matters without any special protections beyond those afforded by the general law applying to all persons. This would enable the law to be greatly simplified[1] and would, we hope, make it more comprehensible to the layman. It would, we believe, be a practical solution which would bring the law into live with social and economic reality.

Assessment of our preferred option

5.16 More importantly, we believe that reform along these lines would satisfy the primary aim of protecting the

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[1] As well as simplifying the rules on legal capacity, it would pave the way for abolition of tutors and curators and their replacement with a single category of guardian: see para. 5.144 below.

young from the consequences of their immaturity without causing unnecessary prejudice to adults. We suggest later in this Memorandum[1] that the realistic rule for the under-16s would be one of incapacity. This age group would therefore be fully protected against entering into unwise bargains. They would be entitled to withdraw from such "contracts" without incurring any obligations thereunder and to demand return of money or goods which had been handed over to the other party, on principles of restitution. We think that an adult entering into a transaction with a person under 16 which does not come within the limited range of exceptions proposed[2] should bear any hardship which he might suffer as a result. If he chooses not to safeguard his position, and contracts with the child instead of with his guardian, it is not unreasonable that the adult should accept the risks that are involved in that choice.

5.17 So far as 16 and 17 year olds are concerned, we have already made clear our view that an adequate level of protection is provided by the general law. As for the adult contracting party, he would not suffer any particular prejudice in dealing with this age group. The contract would simply be reducible on the same grounds as are available under the general law of obligations.[3] While there may be fears that conferring full legal capacity on 16 and 17 year olds would encourage them to undertake obligations which they could not fulfil,

[1] See paras. 5.24 and 5.25 below.

[2] See paras. 5.30-5.57 below.

[3] E.g. where one party has exercised what is regarded in law as undue influence over the other.

we doubt whether our proposal would have this effect in practice. Indeed, the impact of our proposal on this age group may be less significant than is first imagined. It would mean, of course, that 16 and 17 year olds would be bound by all their contracts whereas under the present law, they incur contractual liability only in certain circumstances or certain areas. The importance of this extension of liability, however, depends on what type of transaction young people in this age group most commonly enter into. While we recognise that young people in this age group may engage in quite major transactions, we suspect that most of their dealings still fall into the category of small cash transactions with the result that the law would continue to be largely irrelevant. The transaction is completed almost immediately and no long term obligations are incurred. Where a 16 or 17 year old is the seller of goods, for example, having advertised his old hi-fi equipment for sale, our proposal would mean that he would be bound by his agreement with the purchaser in so far as it was not implemented at once. This, in our view, is perfectly reasonable. As regards contracts coming within the Sale of Goods Act 1979, the reduction of the age of legal capacity would mean that 16 and 17 year old purchasers could rely on the provisions of the 1979 Act to enforce the seller's obligations.[1]

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[1]Under the existing law, a contract entered into by a minor with curators but without their consent is, in principle, void and accordingly the minor cannot make use of the 1979 Act to enforce what is a non-existent contract.

5.18 Minors are at present held bound by their trading contracts and, in this respect, our proposal would not increase the liability of 16 and 17 year olds. In any event, we doubt whether many young people enter into this type of contract. As regards employment contracts, these are presently reducible on proof of lesion. The effect of our proposal would be that a 16 year old would be bound by his contract, no matter how unfair its terms. We do not think that this change would be to his disadvantage in practice. A 16 year old's conditions of employment will, by and large, be the same as those of an older employee, except in relation to pay, and may often be the result of collective bargaining. We doubt whether there are many instances in which a minor employee can show that he has suffered "enorm lesion" arising from the terms of his contract. In effect, his contract of employment is probably already binding under the present law. Even in cases where our proposal would prevent a 16 year old from reducing a contract of employment which is clearly to his prejudice, he still has the practical solution of simply resigning from his job. It would be unusual for an employer to seek to enforce the contract in such circumstances or to claim damages for breach of contract. His interest is more likely to be in replacing that employee as quickly as possible. If on the other hand, the 16 year old chooses to remain in his job, he is still protected by law from being dismissed unfairly.

5.19 One area where our proposal may give rise to more concern is in the field of loan and credit transactions.

It may be argued that 16 and 17 year olds would be particularly susceptible to the temptation to acquire consumer goods on credit and thus incur continuing obligations which they could not meet. We believe this concern is exaggerated. In the first place, we understand[1] that reduction of the age of majority to 18 did not result in a sudden increase in credit transactions among 18-21 year olds. We do not anticipate that 16 and 17 year olds would react any differently to their newly acquired capacity. More importantly, credit dealers will not willingly assume a bad risk. Their concern is not the maturity or experience of the borrower, but his ability to pay. If a prospective borrower cannot satisfy the dealer that he has the financial resources necessary to meet future payments, commercial reality dictates that he will not obtain credit. This factor alone would prevent most 16 and 17 year olds from entering into what would be regarded as unwise credit transactions.

5.20 One final comment on the effect of our proposal concerns the leasing of residential property. Under the present law, a minor has capacity to enter into a tenancy agreement if he is forisfamiliated or is without curators or if the tenancy agreement is regarded as a contract for necessaries. This application of the law on legal capacity is, we think, irrelevant to the under 16s, but may be significant to some 16 and 17 year olds. Housing

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[1] See Law Commission Working Paper No. 81, para. 12.13.

authorities and private sector landlords may well be reluctant to offer tenancies to people in this age group if they are uncertain about their ability to enforce the agreement.[1] They cannot reasonably be expected to go into questions of forisfamiliation or necessaries, matters on which the law is archaic and unclear. Our proposal would remove this uncertainty, and in so doing, might help reduce the level of homelessness among the young. 16 and 17 year olds would become fully bound by the terms of the lease. They would, of course, still enjoy the protection afforded by the Rent (Scotland) Act 1984[1] to private sector tenants as regards rent control and security of tenure, and that afforded by the Tenants' Rights, Etc. (Scotland) Act 1980 to local authority tenants as regards security of tenure and variation of terms of the lease.

5.21 In summary, we do not believe that our provisional proposal should have any adverse effect on the position of 16 and 17 year olds. Certainly, they would, in theory, be exposed to more actions for breach of contract than at present, but such a change in the law would probably make little difference to most over 16s, simply because their lack of financial resources restricts the range of transactions which they are likely

[1]Under section 26 of the Tenants' Rights, Etc. (Scotland) Act 1980, a housing authority may not refuse to admit applicants over the age of 18 to its housing list solely on the ground of age and may not discriminate against them in the allocation of housing on that basis. It retains full discretion as regards applicants under 18.

[2]This consolidates the Rent Acts 1965-74.

to enter into. The risk of court proceedings against them is correspondingly limited. The principle of full legal capacity would, however, conform with social reality and, in so far as the proposal would have a practical impact on this age group, it could be positively beneficial in clarifying their rights under the consumer protection legislation.

Other options

5.22 Despite what we see as the balance of arguments in favour of our provisional proposal, we accept that some people may find this solution too radical and may feel that some measure of additional protection should still be given to minors over the age of 16. If, on reconsidering the matter in light of our consultation, we were to be convinced of this view, we believe that the most realistic alternative would involve only minor modification of our original proposal to incorporate an intermediate stage of limited capacity for 16-18 year olds. Although we have expressed a preference for a single tier system, we do not consider that this approach to reform would be acceptable if the age of full capacity were to remain 18. As we have already indicated, young people of 16 and 17 years old may be earning or living away from home or both. Too many exceptions would be required to cater for the needs of this age group to make incapacity below the age of 18 a practicable solution. Instead, we suggest that a modified two-tier system would be more appropriate, with age bands of 0-16 years and 16-18 years. Those in

the lower age group would be fully protected, as under our preferred option, from the legal consequences of their entering into contracts. Those in the upper age group would have only limited protection: they would have capacity to bind themselves in any obligation or to undertake any juristic act, but any such obligation or act could be set aside within a specified period of majority on grounds corresponding to an updated minority and lesion.[1] We refer to this proposal throughout the Memorandum as "our second option". While this type of system would combine the advantage of contractual freedom for minors over the age of 16 with some additional safeguards, it would be at the expense of causing what we would regard as unnecessary prejudice to the adult party. In order to facilitate important transactions, such as the sale of a house, there might have to be provision for judicial ratification of minors' contracts which would preclude later reduction. Such a system would inevitably be more complex than our preferred solution.[2]

5.23 Other options, such as a one-tier system based on some age other than 16, or a revised two-tier system with the same age divisions for boys and girls, or even a three or four age band system, would also be possible.

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[1] See paras. 5.105-5.109 below.

[2] The implications of this particular option will be discussed when we consider the remaining aspects of the law on legal capacity at paras. 5.26-5.27, 5.63-5.67, and 5.102-5.124 below.

We should be grateful, therefore, for a response to the following invitation for views:

(a) If our preferred option, that is, a one-tier system based on the age of 16 with no special protection afforded by the law to young people over that age, were to turn out not to be acceptable, would you favour our second option that there should be a two-tier system, comprising age bands of 0-16 years and 16-18 years with the upper age group enjoying only limited protection?

(b) If not, what other age system would be appropriate - for example, a one-tier system with a different age specified for full legal capacity, a revised two-tier system with divisions at the ages of, say, 14 and 18, or a three or four age band system?

THE GENERAL RULE FOR THOSE BELOW THE RELEVANT AGE[1]

5.24 Under our preferred option. In introducing our provisional conclusion that there should be a one-tier system based on the age of 16, we assumed, for the purposes of explanation, that the general rule should, subject to some exceptions and qualifications, be one of incapacity below that age. It would, however, be equally possible to reverse this proposition and frame the rule in terms of capacity, subject to exceptions. In other words, the

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[1] Throughout our discussion of the options for reform we refer to transactions between young people and adults. It is, however, intended that our proposals would apply equally to transactions between two young people below the age of full capacity.

two options for the content of the general rule for those below the age of 16 are:

(a) they could have full legal capacity subject to certain exceptions and qualifications; or

(b) they could have no legal capacity subject to certain exceptions and qualifications.

5.25 Both options, if unqualified, would be open to the criticism that they would be unrealistic when applied to the two extremes of the age band. It is unrealistic to ascribe full legal capacity to infants and it is equally unrealistic to provide that a 14 or 15 year old should have no legal capacity whatsoever. In either case, however, the rigidity of the basic rule may be tempered by a range of exceptions and qualifications in order to achieve the desired measure of flexibility. It is a question of presentation, rather than of substance, which solution would be more appropriate. Although either solution could be used to the same practical effect, our inclination is to favour a general rule of incapacity, rather than one of capacity, for those under the age of 16. Our reasons are threefold. First, a rule of incapacity would be regarded as the usual solution in most legal systems and is in line with the existing general rule on the legal capacity of pupils. Second, this rule seems, in principle, to be more consistent with the distinction that is being made between those who have full legal capacity and children who do not. Third, if we are correct in our assumption that young people under 16 normally engage in only a limited range of transactions, it is probably simpler to work from a general rule of

incapacity which need be subject to only minor exceptions than from a rule of capacity which might require more substantial qualification. Our provisional conclusion is, therefore, that the general rule affecting those below the age of 16 should be one of legal incapacity.[1]

5.26 Under other options. This conclusion would be equally applicable if the law were to be reformed along the lines of a 0-16 years and 16-18 years system. Indeed, it would be the realistic solution for the lower age group in any two-tier system. The content of the general rule for the upper age group would depend on the precise age range involved. Under our second option, we suggest that the appropriate rule for 16 and 17 year olds should be one of capacity subject to some form of protection against oppressive contracts. Any other rule would be impracticable. On the other hand, a wider age range might call for continuation of the general rule of incapacity which would be made subject to a greater number of exceptions and qualifications to reflect the increased maturity of that age group.

5.27 We do not express any firm opinion on this matter

[1] Although a general rule of incapacity would mean that a person under 16 could not perform any acts of legal significance himself, that is not to say that such acts could not be performed on his behalf. The corollary of a young person's incapacity under this, or any other option, is that he should have a guardian to represent him and to act in his interests. We discuss briefly the implications of our proposals on the law of guardianship at paras. 5.144-5.145 below.

except in relation to our second option. Views are therefore invited on the following questions:

(a) Do you agree with our provisional conclusion that, under our second option, the general rule should be one of incapacity for those under 16 years and one of capacity for those between the ages of 16 and 18?

(b) What should be the content of the general rule under any other option favoured by consultees?

EXCEPTIONS AND QUALIFICATIONS TO THE GENERAL RULE

5.28 In the interests of simplicity in the law, it is desirable that the number of exceptions and qualifications to the general rule should be kept to a minimum. To a large extent, the exceptions and qualifications necessary depend on what age is chosen as the age of full legal capacity. If the age of capacity were to remain at 18, more exceptions would be needed than if it were reduced to 16, so as to deal with the wider range of transactions likely to be entered into by 16 and 17 year olds.

5.29 Exceptions and qualifications may be grouped according to whether they depend on the nature of the transaction or on the existence of general or special authorisation. The question will be examined primarily in the context of our preferred option. Thereafter we will consider what further exceptions might be required under any other option.

A. Under our preferred option

(1) Exceptions depending on the nature of the transaction

5.30 (a) Transactions commonly entered into by a child of that age. It seems clear to us that the general rule of

incapacity should be modified to enable, for example, a child of 5 to go into a shop to buy a bag of sweets and a teenager of 15 to purchase a bus or train ticket. In other words, a person under the age of 16 should be entitled to enter into everyday transactions of a kind which are ordinarily entered into by a young person of his age.[1] This type of exception would achieve the flexibility necessary to cater for children at the two extremes of the age group. It would also have the advantage that it could adapt automatically to changes in young people's social habits so that it would not become outdated, as has the existing concept of necessaries. We hope also that such an exception would be readily understood by the people whom it affects.

5.31 Undoubtedly, an exception of this nature would introduce an element of vagueness into the law. It may be said, however, that the present law on necessaries is also vague, and it does not seem to have given rise to insuperable difficulties in practice. As long as the exception is confined to what are regarded as "ordinary" acts, we believe that it would be to the young person's benefit. No-one would suggest that it was common for a person under 16 to buy or sell a house, to borrow substantial sums of money or to enter into a partnership agreement. The exception would ensure that the more important transactions remained outwith his capabilities.

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[1] This exception is similar to that found in French law which provides, in Article 3893 of the Code Civil, that the administrator at law acts for a minor except where law or usage authorises the minor to act himself. See para. 4.16 above.

5.32 The most obvious kinds of transaction which would come within this exception are minor shopping transactions, bus fares, payment for entertainment. It would also cover such activities as skating lessons, a Saturday job or a morning paper round. It would not mean, however, that all under 16s would have the same capacity in relation to these transactions generally. Their capacity would be determined according to whether the particular transaction was one commonly entered into by a young person of that age. Hence a distinction could reasonably be made between the capacity of a 15 year old and that of a 5 year old to enter into a contract for the purchase of, for example, a piece of electrical equipment. Nor would the exception mean that a child who was particularly advanced for his age would be able to enter into the sort of transaction normally reserved for older children. That would put the adult contracting party at too great a disadvantage. The scope of the exception would instead be determined objectively according to the level of understanding of the average child.

5.33 Although we believe that a broad exception along these lines would be necessary, its precise formulation may prove more difficult. The criterion of "transactions commonly entered into" by a child of the transacting child's age may be too restrictive. Certain types of transaction may be commonly, and quite reasonably, entered into by children in particular circumstances but may be regarded as unusual transactions for most children to enter into. For example, a 15 year old living in a fishing village may regularly take holiday-makers out in his rowing boat or may supplement his pocket money by selling fish which he has caught himself. Neither of these activities would be classed as usual for the majority of 15 year olds, but this may not be a good

reason for depriving the few, for whom these activities are common, of their capacity in this respect. If this argument is accepted, it is not certain that this type of transaction could be accommodated under our general exception as presently formulated. One possible solution would be to refer instead to transactions reasonably entered into by a child of the transacting child's age. Although this would be wide enough to take account of the particular circumstances of the child in question, it would, we think, be too vague 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. It may be, therefore, that further, more specific exceptions would be necessary to deal with this situation or that a different formulation of the general exception would be appropriate. We invite comments on both of these possibilities below.

5.34 There is a further difficulty in using the criterion of the child's age as this impliedly puts the onus on the other party to ascertain the actual age of the child concerned. This may be unfair in some cases. Young people often appear much older or younger than they actually are. A trader may reasonably believe that his customer is 15 years old and transact with him accordingly only to discover that he is in fact 11 years old and is not bound by the contract because it is not one that an 11 year old would ordinarily enter into. However, if he tries to ascertain the child's age before entering the contract, he may not get an honest answer.[1] One means of resolving this difficulty would be to refer to the apparent age of the child rather than to his actual age. This would

[1] Fraudulent misrepresentation of age is discussed at paras. 5.82-5.89 below.

avoid causing prejudice to the trader in the most extreme cases of discrepancy between age and appearance. It would, however, penalise the child aged 15 who looks only 12 years old. There would also be some inconsistency in relying on apparent age in relation to children under 16 while referring to actual age in relation to persons over 16. What should be the position of a person aged 17 who looks only 15, if he enters a contract that no person under 16 would normally have entered into? What would be the justification for using different interpretations of the same basic criterion of age for the under 16s and the over 16s?

5.35 It seems to us that the arguments on this question are fairly evenly balanced. In exceptional circumstances, the adult may be prejudiced under the "actual age" exception. In equally exceptional circumstances, the "apparent age" exception may prevent the child from entering into quite reasonable transactions. In most cases, where the child's appearance may be only slightly misleading, we suspect that it would make little difference which way the exception was framed. The decisive factor is whether, in the context of this exception, greater emphasis should be placed on protection of the adult or on protection of the child, and, on this point, we have formed no concluded view.

5.36 (b) Necessaries. As we have seen,[1] the present law on necessaries is unsatisfactory and should perhaps be amended if this exception were to be retained. The Law Commission provisionally recommended in their Working Paper on Minors' Contracts[2] that necessaries should be replaced by a new concept of necessities which would be more

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[1] See paras. 2.14-2.19 above.

[2] Working Paper No. 81, paras. 7.1-7.25.

objectively defined to comprise only items essential to maintain a minimum standard of living and in which the minor's status, financial position and state of supply of similar goods would be irrelevant. This proposal was, however, rejected in their Report[1] on the ground that the distinction between the two concepts was largely verbal ar that the introduction of a new concept so similar to the excisting one might cause confusion in an area of the law where little difficulty was experienced in practice. We agree that a minimal reform along these lines would not be desirable. It may be, however, that, under our preferred option, there would be no need to retain a doctrine of necessaries in any form. The doctrine's only purpose is t enable traders to supply goods or services on credit which minors need to be able to acquire. Children under the age of 16 should not normally need to enter into contracts for the basic necessities of life. Essential goods and services such as food, clothing and accommodation, would b supplied by their parents or other persons having responsi bility for their care. An exception for the purchase of necessaries would therefore be largely irrelevant to them.

5.37 In any event, we suspect 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, for example, where the parent is ill and unable to go out and order goods in person. In such circumstances the parent and not the child is liable on principles of agency. Even for children under 16 who, in exceptional circumstances, are living independently, the practical

[1] Law Com. No. 134 (1984) paras. 5.4-5.6.

application of such an exception would be minimal. They would still be able to acquire essential items in exchange for cash. The only advantage of having a special exception for necessaries would be to enable them to purchase such items on credit and we doubt whether credit facilities would ever be extended to a person of that age. For these reasons we have reached the tentative view that the doctrine of necessaries is of little practical value and accordingly suggest that it should not be retained under our preferred option.

5.38 (c) Contracts of employment. There would, in our opinion, be no need to retain an exception for contracts of employment under our preferred option. Children under 16 are still subject to full-time education and are unlikely to enter into employment contracts of any great significance. If they do, for example, in the field of entertainment, they should probably be safeguarded against entering into oppressive contracts and accordingly should not be able to contract on their own behalf. On the other hand, a person under 16 would still be entitled to take on a Saturday job or a paper round, under the proposed exception for "ordinary" transactions, if it was usual for a minor of his age to do so.

5.39 It may be noted in passing that there are a number of statutory provisions dealing with the employment of young people, including 16 and 17 year olds, which regulate conditions on which they may be employed and restrict their

employment in certain occupations.[1] We do not however, propose to examine this legislation here, as it is concerned not with questions of a young person's contractual capacity, but with his health, safety and, for a child below school leaving age, his educational needs.

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[1]The more stringent control is exercised in relation to those under 16. Young people aged 16-18 years are protected primarily in the number of hours which they may work in certain occupations. See, for example, the Children and Young Persons (Scotland) Act 1937 s.28, as amended by the Employment of Children Act 1973, which inter alia prescribes 13 years as the minimum age for employment; restricts the number of hours which under 16s may work; empowers the Secretary of State to make regulations to control further the conditions on which they may be employed or to prohibit their employment in specified occupations or to prohibit their employment except in accordance with a permit. The power of the education authority to make byelaws on the conditions of employment for 16-18 year olds is repealed by the 1973 Act. The education authority does, however, have a supervisory function in relation to the employment of children and is empowered by section 2 of the 1973 Act to prohibit, or impose conditions on any proposed employment of a person under 16 which, although lawful, appears to be unsuitable for the child by reference to his age, state of health or otherwise prejudicial to his education. His participation in a public performance requires a licence under section 37 of the Children and Young Persons Act 1963 which will be granted only if he is fit to take part, if provision is made to secure his health and kind treatment and if his education will not suffer. See also the Employment of Women, Young Persons and Children Act 1920, s.1 (restrictions on employment in mines, factories, construction works and transport); Children and Young Persons Act 1933, s.25 (restrictions on persons under 18 going abroad for the purpose of performing for profit); Young Persons (Employment) Act 1938, ss. 1 and 7 (restriction on hours which persons under 16 and those between 16 and 18 may work as messengers, or in operating machinery, or in laundries etc); Shops Act 1950, ss. 24, 25 and 27, Mines and Quarries Act 1954, ss. 125-7, Factories Act 1961, ss. 86 and 87 (restriction on hours of employment for persons under 16 and those between 16 and 18); Merchant Shipping Act 1970, s.51 (restriction on employment of persons under 18 on board ship).

5.40 (d) Trading contracts. We imagine that it is unusual for a person under 16 to carry on a business on his own or in partnership. For this reason, we doubt whether any type of trading contract would come within the "ordinary" transaction exception as it is presently worded. Indeed, this may be a justification for not making any specific provision to deal with this type of contract at all. Nevertheless there may be certain categories of small transaction which would, strictly speaking, be defined as trading contracts but which children under 16 should be able to enter into. These are the regular rowing boat excursions and the like to which we have already drawn attention[1] and which may be reasonable transactions for a young person in a particular geographic location to enter into. An exception for trading contracts could therefore be made in order to deal with this type of case. Such an exception would, however, cover a much wider range of transactions than this. It would be wholly irrelevant to, and perhaps inappropriate for, most children under 16. We have some reservations about using a broad exception to cater for very specific circumstances and prefer not to express a concluded view on this matter. Comments are simply invited whether, in the light of the foregoing discussion, an exception should be made for trading contracts or whether a different exception or a different formulation of the general exception for "ordinary" transactions would be appropriate.

5.41 (e) Wills. One effect of the general rule under our preferred option would be to remove the capacity of a person aged between 12 or 14 and 16 to make a will. We

[1] At para. 5.33 above.

imagine that under the present law there are few occasions on which minors in this age group exercise their powers to dispose of their property by will. Even if they do, their parents or legal advisers may take the view that the rules on intestate succession will provide an adequate solution. In the usual case, where an unmarried minor dies intestate without surviving children, but with a surviving parent or parents and brothers or sisters, the parent(s) will succeed to one half of the estate and the brothers or sisters to the other.[1] If there are no brothers or sisters, the parents take the whole estate and vice versa.[2] A person under the age of 16 and domiciled in Scotland is most unlikely to be married but could have a child born out of wedlock. Such a child has rights of succession to the exclusion of the minor's parents and brothers and sisters.[3]

5.42 There would, of course, be no problem under our preferred option for 16 and 17 year olds. They would retain their capacity to make a will as part of their general legal capacity. In any event, they are probably more likely to make use of their present testamentary capacity than those at the lower end of the minority age bracket. The question is whether the under 16s should also retain this power. For most in this age group, the existing rules on intestacy may be satisfactory. To that extent, perhaps nothing more is required. On the other hand, it may be argued that, irrespective of whether or not the rules on intestacy are generally fair,[4] a minor under 16 should

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[1] Succession (Scotland) Act 1964, s.2(1)(b).
[2] s.2(1)(c) and (d).
[3] s.4(1).
[4] This question will be considered in our exercise on the law of succession: see our Nineteenth Annual Report (Scot. Law Com. No. 89)(1984) para. 3.37.

continue to have power to override them. Why shouldn't a 14 year old, for example, be able to leave all his property to a close friend if that is what he wants to do? Moreover, for a small minority who have substantial estate, disposal of their property on death may raise more complex issues. There may be tax planning considerations to be taken into account. The setting up of trusts may be desirable. In certain circumstances a young person's inability to make a will on the basis of legal advice could have adverse consequences for members of his family.

5.43 It seems to us that the policy considerations relevant to questions of testamentary capacity are different from those which we have identified as underlying the law on capacity generally. The testator cannot be prejudiced by the terms of his will. His family may be. If any limitation is to be imposed in this area, it would have regard to the interests of the minor's successors on intestacy, rather than his own and would be imposed on the ground that a person under 16 lacks the maturity of judgment necessary to dispose of his estate otherwise than in accordance with the rules of intestacy.

5.44 If an exception were to be made enabling a person under 16 to make a will, what form should it take? There are several possibilities:

(i) The will could be valid only if made with his guardian's consent[1]. This solution would not be

[1]We use the word "guardian" to cover the person who would under our preferred option fulfil the function of the tutor under the present law. Normally both parents would be guardians as under the present law.

acceptable. The child may well wish to leave his property to his parents and it would be inappropriate that the law should require their consent, for a guardian should not act in his own interest. A formal requirement of consent would place the guardian in an invidious position and would invite criticism of undue influence or facility and circumvention. Hence the existing rule that a minor may make a will unassisted by his curator.

(ii) The will could be made by the guardian on the child's behalf. This suggestion is open to the same criticism that the guardian would be acting in his own interest.

(iii) A person under 16 could have capacity to make a will without any restrictions.[1] This would be an extension of the present rule, conferring testamentary capacity also on pupil children. The argument in favour of such a rule is that a will is always revocable and therefore the child himself cannot be harmed by its provisions, quite apart from the fact that it takes effect only on

[1] Provided, of course, that he is not incapacitated at the relevant time by reason of insanity. See Sivewright v. Sivewright's Trs. 1920 S.C. (H.L.) 63 in which the test of mental capacity to make a will laid down in the English case of Banks v. Goodfellow (1870) L.R. 5 Q.B. 549 was adopted, requiring the testator to understand the effect of his wishes being carried out at his death, the extent of the property of which he is disposing and the nature of any claims on him.

his death. Children would very rarely make use of this power in any case. The counter-argument is that very young children are not mature enough to make a will on their own and it is unrealistic that the law should presume otherwise.

(iv) A variant on (c) would be a rule whereby a child under the age of 16 would be able to make a will, but it would take effect only if and when he attained 16 years of age. The justification would be that if, having attained the age of 16, he has not revoked the will, he should be deemed to have ratified it. We do not, however, see any great advantage in this compromise solution. It puts the testator in no different position than if he had made a will on his sixteenth birthday.

(v) A further possibility would be to use an age limit below 16, conferring capacity to make a will on those above the age of, say, 12. This would meet any concern over the position of very young children. It would, however, be inconsistent with our general approach to reform, particularly with the broad exception which we have proposed for transactions commonly entered into by a child of the transacting child's age. Alternatively, a flexible test could be introduced entitling a person under 16 to make a will provided he had sufficient understanding to comprehend the nature and effect of his testamentary act.[1] In practice,

[1] This would, in effect, be a particular application of the test of mental capacity referred to in the previous footnote. It would also be broadly similar to the test used to determine whether or not a young person is liable in delict: see para. 6.1 below.

this would mean that a will made by a person under 16 would be prima facie valid but could be declared null if it was shown that, in fact, he lacked the necessary mental capacity.

(vi) Another form of compromise would be that a person under 16 could make a will but could only dispose of half of his estate. This proposal would safeguard the interests of his successors to some extent, but would be difficult to justify. If a person is regarded as competent in relation to half his property, why is he not so regarded in relation to his whole estate?

(vii) A person under the age of 16 could make a will but it would not be valid unless confirmed by a court. It would, of course, be necessary to identify the criteria which the court should use in deciding whether or not to approve a young person's will. In our view, it would be essential that the child should be able to make his wishes known and that the court should be satisfied that:

(a) the will gave effect to his genuine intentions, and

(b) the child did, in fact, understand the nature and effect of the will.

The court should also be satisfied that the will was prima facie not open to challenge on grounds of, for example, illegality or uncertainty or on the ground that its provisions were contrary to public policy. This is not intended to exclude the possibility of challenge at a later date but would ensure that

the court would not give its approval to a will which was clearly ineffective. It is implicit in this option that confirmation of the will should only be possible during the testator's lifetime, as otherwise there would be endless scope for litigation at a time when the testator's intentions and understanding of the will would be difficult to ascertain. This option also assumes that the young person has some testamentary intention of his own in the first place and therefore would exclude very young children from its ambit. It would, however, mean that, provided the criteria had been met, the court would be required to give effect to the child's intentions, no matter how absurd and unreasonable they might appear to be.

(viii) It may be thought that the option outlined in the previous paragraph would be of only limited utility. The young person would still have complete freedom to bequeath his property as he liked. The interests of his successors would not be protected. Arguably, if the court were to have any role at all in this area, its intervention should be to ensure the reasonableness of the terms of the will, rather than simply

to ensure that the child understood what he was doing and that the will reflected his clear testamentary intentions. On this basis, the court could be empowered either to confirm a child's will or to make a will on his behalf, if satisfied that, having regard to the child's intentions, so far as they could be ascertained, the terms of the will were reasonable. Again we suggest that the power to confirm should be exerciseable only during the testator's lifetime and that before approving a young person's will the court should be satisfied that prima facie it is not open to challenge. The advantage of this proposal is that it would enable the court to make a will for a young child who does not have testamentary intention of his own. Its disadvantage is in applying the criterion of reasonableness. In making its decision, the court would be able to take into account the interests of the child's family, the size of his estate in relation to the proposed bequests, the extent to which the will reflected the rules on intestate succession, tax planning considerations as well

as the child's own views on the matter.[1] Ultimately, however, it would be a matter of opinion

[1] The nearest equivalent in the United Kingdom to this type of solution is the power of the Court of Protection in England and Wales to order the execution of a will on behalf of an adult who, on account of mental illness, is incapable of making a valid will for himself (Mental Health Act 1983, s.96(1)(e) and (4)). No guidelines are given, however, as to what provisions should be inserted in the will beyond the general indication that, in discharging its functions with respect to the property and affairs of a mentally disordered patient, the court may do anything necessary or expedient for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered (1983, Act, s.95(1) (c)). The only specific limitations are that the will may not dispose of heritable property situated outside England and Wales and that where the patient is not domiciled in England and Wales, it should take effect only in so far as it relates to property in respect of which, under the law of his domicile, any question of his testamentary capacity is to be determined by English law (1983 Act, s.97(4)). The matter is otherwise left to judicial discretion. In Re. D. (J) [1982] 2 All E.R.37, Megarry V-C identifies, at pp.42-3, a number of considerations which the court should have in mind when deciding on the provisions to be inserted. These include (a) that the court should not take an objective approach to the making of the will but should contemplate the particular patient as testator; (b) that the patient's known antipathies and affections for particular people or causes should be given effect, unless they are beyond reason; and (c) that it should be assumed that the patient is receiving competent legal advice on the making of his will.

whether or not a 13 year old should be permitted to leave everything to his best friend rather than to his family. We are not convinced that this broad criterion would work very satisfactorily in practice. Nonetheless, a court-oriented approach may provide a solution for those few cases where a young person's capacity to make a will is a relevant issue. If either this option, or that outlined in the previous paragraph, commends itself to consultees, we should be grateful for views as to whether the power should be conferred on the Court of Session or the sheriff court. The proposal discussed in this paragraph raises a further question, namely, who should be entitled to ask the court to make a will on behalf of a young child with no testamentary intention of his own. The most obvious person to apply would be the child's parent or guardian although it may be thought that some other person would also be appropriate. Comments are invited.

5.45 It may be argued in favour of conferring testamentary capacity on children under the age of 16, that those most likely to make use of this power (i.e. those with substantial assets) would probably have the benefit of professional advice on the best way to arrange their affairs and that this would reduce the risk of their bequeathing their estate unwisely. Young people in the present minority age group already have capacity to make a will and it does not appear to give rise to difficulty in practice. It would be a retrograde step now to deprive them of this power. Its extension to children in

pupillarity would benefit a few and be irrelevant to most. At least some of the options we have put forward would guard against capacity being conferred on very young children who would not fully appreciate what is involved. On the other hand, considerations of principle and the balance of convenience and practicality may be against making any such exception from the general rule of incapacity. Indeed, 16 may be the right age at which to empower young people to make a will for the first time. Having considered the various options on this difficult issue[1] we have reached

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[1] The approach taken by other legal systems to this question varies considerably. In some countries, testamentary capacity is conferred at 18 years, whether or not that is also the age of majority - e.g. England and Wales, Australia, New Zealand (or below 18 years if married), Denmark, Switzerland, and the United States (under the Uniform Probate Code which has been adopted in 14 states). In others, limited testamentary capacity is conferred on 16 year olds - e.g. in France, a minor between the ages of 16 and 21 years may dispose by will of half of the estate of which he could dispose were he of full age. In Sweden, a 16 year old may make a will in respect of property derived from his earnings. Otherwise, full testamentary capacity is conferred on majority (18 years) and on any person below majority who is or has been married. In Germany, a 16 year old has full capacity to make a will except in holograph form. In Austria, persons between the ages of 14 and 18 years may make a will orally before the court. In its Report on Reform in the Law of Wills (1983, No. 35), the Law Reform Commission of Tasmania has recommended that the age of testamentary capacity should be reduced from 18 to 16.

no firm conclusion and prefer to leave the question open for consideration by consultees.

5.46 (f) Consent to medical treatment. We consider that our preferred option - replacing the present two-tier system based on the ages of 12 or 14 and 18 by a one-tier system based on the age of 16 - would provide a satisfactory solution to the question of the relevant age for consent to medical treatment. The age of 16 seems to us to be a more appropriate age than 12 or 14 for this purpose. Moreover a change to the age of 16 would bring the law of Scotland into line with current medical practice in Scotland[1] and with the law of England and Wales.[2] We believe, however, that an exception to this general rule would be necessary to enable a child under 16 to give his own consent in appropriate circumstances. It would seem to be right, for example, to enable a doctor to act in certain cases on the basis of a young person's own consent, without fear of a prosecution or civil action for assault. For instance, a doctor should be allowed to treat a 10 year old with a cut knee, without first having to obtain the parent's consent. There appear to us to be a number of ways of dealing with this. One would be to apply, with modifications, the exception which we have already proposed for transactions commonly entered into by a child of a particular age. Others would require formulation of an entirely separate exception. The exception could be limited to treatment for specified conditions, or it could

[1] See paras. 2.48-2.50 above.

[2] See para. 4.4 above.

be based on the young person's capacity to understand or it could deal more generally with questions of consent to treatment on a young person, including the circumstances in which consent would not be required at all or in which consent could be dispensed with. We consider each of these possibilities in turn.

5.47 (i) Modification of the exception for "ordinary" transactions. As regards the exception for transactions commonly entered into by a child of a particular age, the actual wording would, of course, have to be altered in this context. The word "transaction" would not be appropriate for consent to medical treatment and the relevant test should perhaps not be what is commonly consented to by young people (which might not only be vague and difficult to apply in this context but might also allow undesirable practices to set the standard) but rather what is approved medical practice (which would allow the law and medical ethics to keep in step). The position under this proposal would accordingly be that doctors could give medical treatment to a young person without committing an assault if they acted -

(a) with the consent of the young person, if he or she was over 16,

(b) with the consent of the young person's parent or guardian if the young person was under 16, or

(c) with the consent of the young person if he or she was under 16 and it was in accordance with approved medical practice to act, in the circumstances of the case, on the basis of the young person's own consent.

All of this would be without prejudice to the existing position in cases of emergency and in cases where necessary consents are unobtainable.

5.48 (ii) Exception limited to treatment of specified conditions. This solution, entitling a person under 16 to consent to treatment for particular illnesses or conditions, is to be found in a number of American states.[1] There, the emphasis is on treatment for conditions which present particular medical difficulties among young people, for example, treatment for alcohol or drug abuse or abortion. It has been said[2] that the policy of these statutory provisions stems from recognition of widespread breakdown in family communication. It is therefore directed at encouraging young people to obtain prompt medical help in circumstances where, if parental consent was required, they might refrain from or delay seeking treatment at the risk of causing themselves harm.

5.49 We do not suggest that a solution along these lines should necessarily be construed in this way. It could cover the type of treatment more usually required by persons under 16 and which involves no serious risk to the patient's life or health, eg. minor surgical operations, treatment of common ailments. Alternatively, the exception could specify the type of treatment to which it is thought, for medical or other reasons, a young person should not be able to give his consent. Neither formulation would, however, be easy to draft and neither would deal satisfactorily with treatment of a very young child who may not comprehend even the most routine medical procedures.

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[1] See para. 4.8 above.

[2] W J Wadlington, "Consent to Medical Care for Minors: The Legal Framework", Children's Competence to Consent, Melton, Koocher and Sachs, Editors (1983) pp. 61-2.

Again, all of this would be without prejudice to the existing position regarding emergency treatment and cases where necessary consents are unobtainable.

5.50 (iii) Exception based on capacity to understand. This would be a flexible rule, sometimes referred to as the "mature minor" doctrine,[1] entitling a doctor to act on the basis of the consent of a person under 16 where the young person is capable of understanding the nature and consequences of the medical treatment proposed and, on the basis of that understanding, of reaching a decision whether or not to agree to the treatment. In practice, this would be a matter of judgment for the doctor concerned, but if it was thought preferable the rule could be formulated so as to require a decision from two practitioners as to whether or not the patient did, in fact, understand and consent to what was being proposed. Should the treatment give rise to litigation, the question of consent would, of course, be for the court to decide. Clearly, a young person's capacity to consent would vary according to his age, the complexity of the treatment, the seriousness of the risks involved and so on. One advantage of this proposal is that it would require the level of understanding of the particular patient to be taken fully into account. Again, this would be without prejudice to the existing position regarding emergency treatment and cases where consent is unobtainable.

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[1] See e.g. W.J. Wadlington, op. cit., p.60; University of Alberta Institute of Law Research and Reform, Consent of Minors to Medical Treatment (Background Paper No. 9, 1975), pp.6-8.

5.51 (iv) Comprehensive provision on consent to medical treatment. A further possibility would be to make provision dealing more generally with consent to medical treatment on persons under 16: the young person's capacity to consent; the circumstances in which consent is not necessary or in which consent may be dispensed with. The Canadian Uniform Medical Consent of Minors Act[1] provides a convenient model on which to base our proposals. The effect of its principal provisions is that:

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

(b) a young 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 one other,

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

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

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

[1]Contained in Consolidation of Uniform Acts of the Uniform Law Conference of Canada (1978).

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

(ii) a qualified medical practitioner attending the young person is of the opinion that the medical treatment is necessary in any 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 young person under 16 is required and is refused or is otherwise unobtainable, the court may dispense with it, if satisfied that the withholding of medical treatment would endanger the life or seriously impair the health of the young person.

5.52 In all of these proposals we intend "medical" to include "surgical" or "dental" and we intend "treatment" to include "examination". We envisage that any implementing legislation might use similar terminology to that in section 8 of the (English) Family Law Reform Act 1969 and might provide 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."

All of our proposals would deliberately leave untouched the difficult and sensitive question of what infringements of a child's bodily integrity a parent or guardian can properly and effectively consent to. This is not a question of the child's capacity and falls outside the scope of this Memorandum. They would also deliberately leave untouched the questions of whether any treatment given with the effective consent of a child nonetheless infringes parental rights[1] and when, as a matter of good practice, a doctor would wish a young person's parent or guardian to be consulted before proceeding on the basis of the young person's own consent. We need hardly add that the fact that legally effective consent is given to a treatment (whether by a young person or his or her parent or guardian) would not oblige a doctor to proceed with that treatment.

5.53 We should also make it clear that our proposals do not deal with the fundamental question of what is necessary to make the consent effective, that is, what information the doctor should give to enable his patient to weigh up the pros and cons of the treatment before deciding whether or not to consent. This raises issues in relation to persons under 16 which are no different from those relevant to the effectiveness of consent generally and, in our opinion, the question whether consent is effective

[1] Cf. Gillick v. West Norfolk & Wisbech Area Health Authority And Another, /1985/ 1 All E.R. 533. This question is one of parental rights rather than the child's capacity and belongs in a later consultative memorandum.

from this point of view in any particular case should be left to turn on the principles of the general law.[1] In so far as a patient's capacity to consent to treatment may be relevant in claims for negligence,[2] none of our proposals affect general questions of delictual liability, such as the existence of a duty of care, the standard of care required, proof of causation and so on. Nor are we concerned with a person's capacity to contract for treatment: that would be governed by the general rule conferring capacity at 16.[3]

5.54 Although we believe that an exception from the general rule of incapacity for those under 16 is necessary for consent to medical treatment we have had some difficulty deciding on the precise formulation of that exception. Of the proposals which we have canvassed, the first, based on the exception for "ordinary" transactions, would be relatively simple. It would be compatible with the general scheme of our preferred option and would be

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[1] See, for example, Chatterton v. Gerson and another /1981/ Q.B. 432; Sidaway v. Bethlem Royal Hospital Governors and others /1984/ 1 All E.R. 1018 and /1985/ 2 W.L.R. 480.

[2] It may be theoretically possible, particularly if no physical treatment is involved, to found a claim for negligence on the doctor's failure to obtain consent, rather than raise an action for assault based on touching without the patient's consent.

[3] 16 is the age at which a person may be registered as a patient under the National Health Service.

flexible enough to take account of developments in medical ethics. Nevertheless, we have some reservations about it. Our principal concern is whether it would be proper to empower doctors themselves, in effect, to determine the law in this area by controlling what is "approved medical practice". Moreover, even if this test were to be adopted, it is not clear what should be accepted as evidence of approved medical practice - the opinion of a paediatrician or of another doctor expert in the particular field in which the question of consent has arisen, or a ruling by the British Medical Association or other similar body.

5.55 We also have doubts about the desirability of introducing an exception for treatment for specific illnesses or conditions. This appears to us to be an unprincipled solution. It would not necessarily depend on an assessment of the young person's capacity but rather it could be used on grounds of expediency as a means of dealing with only one particular aspect of consent to medical treatment which might be perceived as causing special problems for adolescents. Moreover, we can foresee difficulty in identifying the range of treatment to which the exception should apply, unless it was to be so restricted. Even if the criterion for inclusion in the list were to be a general notion of a young person's capacity to understand, this approach would not be flexible enough to accommodate the different levels of understanding of children at different ages. For these reasons we do not advance this option as a very practicable solution to the problem.

5.56 The remaining two options are very similar as regards the central issue of capacity to consent. The Canadian model is the more detailed, providing a further limitation on a young person's capacity in that not only must he be able to understand the nature and consequences of the treatment proposed but the treatment must also be in his best interests. This additional refinement could, of course, be incorporated into the other proposal, if thought desirable. The advantage of both these proposals is that they enable the court to have due regard to the circumstances and maturity of the individual patient. Evidence of medical practice would be influential but not decisive. Both proposals would be consistent with our general approach to questions of legal capacity. The Canadian solution, however, deals with more than just capacity to consent. It makes provision for emergency treatment and for dispensing with parental consent, which issues are, strictly speaking, outwith the scope of this Memorandum. On the question of emergency treatment, we imagine that this proposal would conform to and clarify present medical practice. As for cases where parental consent is refused, it would replace the current practice of relying on the consultant's clinical judgment, supported by a colleague,[1] with a procedure for obtaining an independent determination by a court. It would fill what may be a gap in present procedures for cases where parental consent is not refused but is unavailable for some other reason and the circumstances do not amount to an emergency. However

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[1] See para. 2.50 above.

we do not know whether such reform would be desirable either from the point of view of the medical profession or from the point of view of the patient and his parents or guardians. In order to encourage full discussion of this difficult issue, we do not express a concluded opinion but invite comment on the four proposals which we have canvassed, and on any other which consultees might wish to put forward for consideration.

5.57 Any other exceptions? Our suggested exception for transactions commonly entered into by a child of the transacting child's age may be sufficiently general in its terms to cover the full range of activities appropriate for a person under 16 to enter into, in which case no further exceptions would be necessary. This would not mean, however, that the rule of incapacity for young people under 16 would replace all statutory age limits in civil law matters.[1] Such a comprehensive review of the relevant legislation would be outwith the scope of this exercise and would, in our view, be inappropriate.[2] A saving would therefore be made under our proposals for enactments specifying a different age for particular purposes. Views are invited whether, in addition to this

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[1] E.g. National Savings Bank Act 1971, s.8 (1)(f) and S.I. 1972/764, reg. 5 (child aged over 7 may be a depositor in the National Savings Bank); Credit Unions Act 1979, s.9 (person under 16 entitled to make a deposit of up to £250 in a credit union).

[2] See para. 5.143 below.

saving, any other exceptions should be made to the rule of incapacity under our preferred option.

5.58 Questions for consideration. Views are invited on the following preliminary conclusions and questions concerning the range of transactions which young people under 16 should be able to enter into:

(a) Do you agree that there should be an exception to the rule of incapacity for persons under 16 for transactions commonly entered into by a child of the transacting child's age, or would a different formulation of a general exception along these lines be more appropriate?

(b) In formulating the exception referred to in paragraph (a) above, should reference be made to the actual or apparent age of the child in question?

(c) If an exception of the above type were introduced, would there be any need for further exceptions for the purchase of necessaries, for contracts of employment or for trading contracts?

(d) Views are invited whether or not a person under 16 should have capacity to make a will and, if so, whether it should be subject to any of the limitations canvassed at paragraph 5.44 above.

(e) Our preferred option should apply to consent to surgical, medical or dental treatment so that, subject to the exception referred to in paragraph (f) below, 16 would become the legal age of consent to such treatment in Scotland.

(f) Views are invited on which of the following proposals should be adopted as an exception to the general rule on consent to medical treatment:

(i) the exception for ordinary transactions outlined in paragraph (a) above could be modified so as to enable treatment to be given on the basis of the consent of a person under 16 where it is in accordance with approved medical practice to act on the basis of such consent;

(ii) a person under 16 could be entitled to consent to treatment for specified illnesses or conditions;

(iii) treatment could be given on the basis of the consent of a person under 16 where he is capable of understanding the nature and consequences of the treatment proposed;

(iv) provision could be made corresponding to the Canadian Uniform Medical Consent of Minors Act outlined at paragraph 5.51 above, entitling a person below the age of 16 to consent to treatment in the circumstances outlined at paragraph 5.51(b) above, enabling emergency treatment to be given to such a person without consent and empowering the

court to dispense with parental consent to treatment on a person below the age of 16 where consent is refused or otherwise unobtainable.

(v) any other proposal which consultees might prefer.

(g) Views are invited whether, in addition to an express saving for enactments to the contrary, any further exceptions should be made to the general rule of incapacity for persons under 16.

(2) Exceptions depending on the existence of general or special authorisation

5.59 (a)Forisfamiliation. In our view, there would be no need to retain the concept of forisfamiliation under our preferred option. A child under 16 years of age is normally dependent on his parents whether or not he actually lives with them. He is not entitled to marry nor can he undertake full-time employment. He would only require capacity to act on his own behalf if there were circumstances in which he could be self-supporting. Such circumstances are probably very uncommon today. Even if a person under 16 were to find himself in this position, the fact that he is living independently is not a reason for giving him full capacity. He is likely to be acting without adult advice and may therefore be in particular need of protection. Accordingly, we suggest that if full legal capacity were to be conferred at 16, the doctrine of forisfamiliation (including emancipation by marriage) should be abolished.

5.60 (b) Consent of parent or guardian. Similarly, we believe that no exception should be made for transactions entered into by a child with the consent of his parent or guardian. In a single tier system such as we are proposing, it would be consistent with the principle of incapacity to provide that a parent or guardian should enter into contracts or other legal transactions for the child. In the light of that general rule, there would be no advantage in providing for a special category of transactions in which the intervention of a parent or guardian would still be required, although in a slightly modified form.

5.61 (c) Consent of court. Having rejected the notion that a child should be able to act on his own behalf, albeit with the consent of a parent or guardian, we do not think it necessary to provide that he should be able to act with the consent or ratification of a court.[1] There would seem to be only two circumstances in which such a provision would be useful. One would be if we were to suggest that transactions entered into by a child alone should have some effect, for example, that they should be binding on the child unless they were to his prejudice. In these circumstances, an adult dealing with a person under 16 might wish to safeguard his position and ratification by a court would be a means of precluding

[1] This is not intended to exclude the possibility that a person under 16 might be empowered to make a will with the consent of a court: see para. 5.44(vii) and (viii) above.

any later argument that the contract was prejudicial. We do not, however, make any such proposal.[1] The other would be if the child had no parents or guardians and the consent of the court were proposed as a substitute for appointment of a new guardian. In our view, it would be more appropriate that a guardian should be available to act generally for the child than that the consent of a court should be required for every transaction that the child might enter into. As we discuss below,[2] there should not be any difficulty in a child's instituting court proceedings for appointment of a guardian, which proceedings would be conducted on his behalf by a curator ad litem. Accordingly, we do not propose that any provision should be made enabling a person under 16 to act with the consent of a court.

5.62 To sum up, our provisional conclusions are that, if our preferred option is adopted,

(a) the doctrine of forisfamiliation should be abolished, and

(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, except possibly in relation to

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[1] See para. 5.79 below.

[2] See para. 5.131 below.

the making of a will, with the consent of a court.

B. Under our second option

(1) Exceptions depending on the nature of the transaction

5.63 It will be recalled that our second option involves a two-tier system, comprising age bands of 0-16 and 16-18. For those under 16, the general rule would be one of incapacity, as under our preferred option. For those aged 16 and 17, the only protection offered by this option is the possibility of reduction of their contracts, within a specified period, on grounds corresponding to minority and lesion. The general rule affecting this age group would, therefore, be one of legal capacity. There would be no restriction on the type of transaction which they could enter into. They would, for example, have full capacity to make a will. We discuss later whether the protection of reduction should be excluded in relation to particular types of transactions.[1] What we are concerned with here is the question of exceptions to the general rule of incapacity for young people in the 0-16 years age group. On this basis, the proposals we have made and the questions we have raised in relation to our preferred option are equally applicable. Comments are therefore invited as follows:

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[1] See para. 5.110 below.

(a) Do you agree that, under our second option as under our preferred option, there should be an exception to the rule of incapacity for persons under 16 for transactions commonly entered into by a child of the transacting child's age, or would a different formulation of a general exception along these lines be more appropriate?

(b) If an exception of the above type were introduced, would there be any need for further exceptions for the purchase of necessaries, for contracts of employment or for trading contracts?

(c) Views are invited whether or not a person under 16 should have capacity to make a will and, if so, whether it should be subject to any of the limitations canvassed at paragraph 5.44 above.

(d) Subject to the exception referred to at paragraph (e) below, 16 should become the legal age of consent to surgical, medical or dental treatment.

(e) Views are invited on which of the following proposals should be adopted as an exception to the general rule on consent to medical treatment:

(i) the exception for ordinary transactions outlined in paragraph (a) above could be modified so as to enable treatment to be given on the basis of the consent of a

person under 16 where it is in accordance with approved medical practice to act on the basis of such consent;

(ii) a person under 16 could be entitled to consent to treatment for specified illnesses or conditions;

(iii) treatment could be given on the basis of the consent of a person under 16 where he is capable of understanding the nature and consequences of the treatment proposed;

(iv) provision could be made corresponding to the Canadian Uniform Medical Consent of Minors Act outlined at paragraph 5.51 above, entitling a person under 16 to consent to treatment in the circumstances outlined at paragraph 5.51(b) above, enabling emergency treatment to be given to such a person without consent and empowering the court to dispense with parental consent to treatment on a person under 16 where consent is refused or otherwise unobtainable;

(v) any other proposal which consultees might prefer.

(f) Views are invited whether, in addition to an express saving for enactments to the contrary, any further exceptions should be made to the general rule of incapacity for persons under 16.

(2) Exceptions depending on the existence of general or special authorisation

5.64 (a) Forisfamiliation. Again we take the view that the concept of forisfamiliation would be unnecessary for young people under 16. As for 16 and 17 year olds, they would already be able to enter into all kinds of legal transactions, whether they were living independent lives or not subject only to reduction on the ground of lesion or its equivalent. They would not need any form of legal emancipation in order to extend their capacity. On the other hand, it is arguable that a modernised version of forisfamiliation could serve a useful purpose if it were to have the effect of barring reduction on this ground. We discuss this later.[1]

5.65 (b) Consent of parent or guardian. Similarly, we do not consider that it would be appropriate for young people under 16 to be able to enter into transactions with the consent of their parent or guardian. The general rule for this age group would be that the parent or guardian would act on the child's behalf. As under the preferred option we see no particular benefit in modifying the rule to require, as an alternative, that the parent or guardian

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[1] See paras. 5.71-5.78 below. We remain of the view, however that it would add an unnecessary complication to this option. In view of our reservations about giving any new form of emancipation this extended effect (see paras 5.76 and 5.77 below), we do not pursue this possibility further in relation to our second option.

should consent to the child's actings. This would only complicate the system unnecessarily.

5.66 There may, however, be an argument in favour of using the consent of a parent or guardian to preclude reduction of transactions entered into by 16 and 17 year olds. We consider this later when we discuss the scope of any such right of reduction.[1]

5.67 (c) Consent of court. For the reasons we identified in discussion of our preferred option,[2] we do not consider it appropriate to empower a person under 16 to enter into legal transactions with the consent of a court. On the other hand, judicial ratification may well serve a useful purpose under this option as a means of excluding the subsequent reduction of contracts entered into by those in the 16-18 years age group. Again, we consider this later when we discuss the right of reduction.[3]

5.68 Comments are therefore invited, in relation to our second option, on the following propositions:

(a) The doctrine of forisfamiliation should be abolished.

(b) As under our preferred option, the rule of incapacity should not be subject to any exception

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[1]See paras 5.118 and 5.119 below.

[2]See para. 5.61 above.

[3]See paras 5.120 and 5.121 below.

entitling a person under 16 to act with the consent of a parent or guardian or, except possibly in relation to the making of a will, with the consent of a court.

C. Under other options

5.69 We do not propose to identify all the exceptions which would be necessary under other possible options for reform. There are too many variable factors in each scheme to make this practicable. We would, however, make the following general observations.

(i) If there were to be a single age band of minority up to the age of 17 or 18, consideration would have to be given to widening the range of transactions which a young person below that age could enter into. Employment and trading contracts are two obvious examples of the kind of transaction which a person over 16 might reasonably enter into. Leasing residential accommodation, making a will, or joining a trade union would also be relevant. The problem with a single tier system is that any such specific exception would apply throughout the age range. This could produce unrealistic results for younger children. The alternative would be to rely on the broad exception for "ordinary" transactions in order to extend the capacity only of those at the upper limit of the age range. A contract of apprenticeship, for example, would be one commonly entered into by a 16 or 17 year old, but not by a person below

that age. This approach would also have its drawbacks. For a 16 or 17 year old, the exception could become so extensive that it would be more important than the general rule itself. There would be some uncertainty as to what transactions he could properly enter into. There would be borderline cases involving transactions of some importance where a more definite rule might be desirable.

(ii) A revised two-tier system, with a division at, say, 14 and full capacity at, say, 18, would avoid some of this difficulty. If the general rule were to be one of incapacity for both groups under the age of full capacity, the only exception necessary for the younger group would be that for "ordinary" transactions. The older age group could enjoy a wider range of exceptions more appropriate to their level of understanding and to the range of activities which they are likely to engage in. Alternatively, the rule for those in the upper age group could be reversed: they could have capacity to perform all acts of legal significance except those specified, for example, the purchase or sale of heritage. The precise scope of the transactions to be excepted would, of course, depend on the age range chosen.

(iii) Under any system which conferred only limited capacity, or no capacity at all, on 16 and 17 year olds there would be scope for an updated

doctrine of forisfamiliation[1] enabling people in that age group who were living independently of their parents to enter into all types of transactions. This could be without prejudice to their right to seek reduction of contracts which were disadvantageous to them.

(iv) Under any system involving two or more tiers, consideration should be given to empowering those in the upper age group(s) to act with the consent of a parent or guardian. This would be an obvious way, as under the present law, to differentiate between the levels of competence of younger and older children. It could be combined with an exception for a range of transactions which a person in the relevant age group would be entitled to enter into alone.

(v) As mentioned in relation to our second option, a procedure for judicial ratification of a young person's contracts might be an appropriate way to preclude later reduction.

5.70 We do not make any specific proposals here. We would, however, be grateful for views as to <u>what exceptions and qualifications would be appropriate under any system, other than our preferred or second option,</u>

[1] See paras. 5.71-5.78 below.

which is favoured by consultees.

Forisfamiliation - options for reform

5.71 It is clear that the present law on forisfamiliation is unsatisfactory.[1] One of the advantages of our preferred option, and of our second option, is that rules on forisfamiliation would not be necessary. In case some other option finds favour with those consulted, we discuss here some alternatives to forisfamiliation. If some form of legal emancipation were to be retained in order to advance the age at which young people could acquire capacity to enter into legal transactions, it would be desirable if it were to be achieved by some formal procedure which would provide ready evidence of a young person's new status. Apart from emancipation by marriage,[2] which affects only comparatively few young people, and which would not therefore be acceptable as the sole means of emancipation, there are, in our view, two practicable options:

(a) Emancipation by judicial decree. The court could, after due inquiry, grant capacity to

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[1] See paras. 2.24-2.26 above.

[2] The Law Reform (Husband and Wife) (Scotland) Act 1984, s.3(1), which implements a recommendation in our Report on Outdated Rules in the Law of Husband and Wife (Scot. Law Com. No. 76) (1983), provides that marriage automatically frees a minor from the curatory of his parent or of any person appointed by his parent. See para. 2.25 above. We assume in this Memorandum that that would continue to be the law, if those above the age of 16 were to be subject to legal incapacity.

individuals who applied for it. Before granting decree, the court would have to be satisfied that, in all the circumstances, it would be reasonable for the applicant to enter into legal transactions on his own behalf.

(b) Declaration of emancipation by parents or guardians. This could be by a formal document sworn before a notary public.

5.72 There is a third option, that of implied emancipation, which could take effect on the occurrence of some identifiable event, such as entry into full-time employment. However, we doubt whether, in a major overhaul of the doctrine of forisfamiliation, it would be appropriate to make use of this notion. It would not represent any great improvement on the present law. To discriminate between young people who are employed and those who have been unable to find work or who have chosen to further their education would be irrational. If the means by which implied emancipation could take place were to be extended, the scope of the doctrine would be too vague to be of any practical benefit. Apart from entry into full-time employment, other events which would be used as evidence of legal capacity are less precise in their definition and might not be readily verifiable. For example, if emancipation could result from a young person "leaving home", would it include the case of a student living away from home for most of the year? What about a young person moving into a flat on his own, but still relying on some financial support from his parents?

5.73 Our tentative view is that, if emancipation were to remain part of the law on the legal capacity of young people, it should:

(a) reflect the maturity and circumstances of the individual, and

(b) be evidenced by some formal document.

Both these criteria could be met, to a greater or lesser degree, by a procedure for emancipation by the court or for emancipation by declaration of the parents or guardians.

5.74 Of these two procedures, emancipation by parental declaration would probably be the more convenient and inexpensive. It would, nonetheless, have some disadvantages. The young person might not have any parents or guardians to make the appropriate declaration. The parents might disagree as to whether emancipation was appropriate or might refuse unreasonably to make the declaration. Although these difficulties would not be insuperable,[1] it might be preferable if a court procedure

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[1] For example, the young person could apply for appointment of a guardian. In addition, the court has power, under section 6 of the Guardianship of Infants Act 1925 and section 10(3) of the Guardianship Act 1973 to resolve disputes between parents or guardians as to the child's welfare. In our Report on Illegitimacy , we have recommended that the court should have a general power to make orders relating to parental rights (defined so as to include questions of tutory and curatory) on the application of any person claiming an interest: (Scot. Law Com. No. 82) (1984) paras. 9.11-9.13. This would be wide enough to cover the type of situation envisaged here.

were available as an alternative. Moreover, under a system of parental declaration, the assessment of a young person's needs and of his maturity would rest solely on the parents or guardians whose judgment might not be entirely objective. There might indeed be a conflict of interest between parents and child. Judicial emancipation, on the other hand, would involve an independent evaluation of the young person's circumstances. The court would undertake any further investigation which might be necessary to deal with difficult cases, where, for example, there was contradictory evidence as to the desirability of conferring capacity on the applicant. This procedure would appear to be the only one to take individual circumstances fully into account in order to reach the right decision in the interests of the young person concerned. This could, however, be a difficult task. All the parties involved could be in favour of the application being granted. In those circumstances, the court would find it hard to reach a balanced view on whether emancipation would be in the young person's interests.

5.75 We do not express any concluded view on this matter. Nevertheless, it is clear from what we have proposed in our preferred and second option that we would not consider any form of emancipation necessary for young people under the age of 16. In our opinion, emancipation would only serve a useful function under a system which restricted the legal capacity of the 16-plus age group. The choice of the appropriate form or forms of emancipation depends partly on considerations of convenience and practicality - which would favour inclusion of parental declaration - and partly on what effect it is intended that emancipa-

tion should have.

5.76 Under the present law, forisfamiliation and emancipation by marriage under the Law Reform (Husband and Wife) (Scotland) Act 1984 entitle a minor to act on his own behalf but his transactions are still subject to reduction on the ground of minority and lesion. Should this be the effect of any new form of emancipation (assuming that the law on legal capacity were to retain the notion of reduction on grounds corresponding to minority and lesion)? The answer is probably yes, as regards emancipation by parental declaration. This form of emancipation would not lay any real emphasis on an objective assessment of the young person's maturity and, in those circumstances, it might be appropriate to confine its effect to ending parental control over the young person's actings without affecting his legal position with third parties. The young person would therefore be empowered to act on his own behalf but would still enjoy the protection of being able to reduce any transactions which were prejudical to him. In contrast, emancipation by court decree could have the additional effect of treating the young person as if he were of full legal capacity. This would amount to a form of judicial ratification, obtained in advance, for all his actings. Accordingly, his transactions would be reducible only on grounds available under the general law.

5.77 On this analysis, there would be scope for two distinct types of emancipation: emancipation by marriage or parental declaration, on the one hand, which would

have only the limited effect described above, and judicial emancipation, on the other, which would confer full capacity on the young person as if he were an adult.[1] We are not, however, convinced that it would be right to give this extra significance to emancipation by the court. It would re-introduce an undesirable element of complexity into the law. In addition, as has already been indicated, we have some doubts whether the court would always be made aware of the full circumstances surrounding the application. If there is any force at all to this view, we would hesitate to give court emancipation such wide-reaching effect.

5.78 Although emancipation does not form part of either our preferred or second option, it is for consideration whether reform of the present doctrine of forisfamiliation might be appropriate under any other option put forward by consultees. We do not, however, express any final view on what form such emancipation should take, but simply invite comment as follows:

(a) If emancipation (otherwise than by marriage) were to be retained as part of the law on the legal capacity of young people, should such emancipation be effected by -

(i) judicial decree,

(ii) declaration by parents or guardians,

(iii) a combination of (i) and (ii), or

(iv) some other procedure?

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[1] The result would be similar to that achieved in some states in the USA. See para. 4.7. above.

(b) Should the form of emancipation favoured by consultees have the effect of empowering the young person -

(i) to act on his own behalf, without affecting his right to reduce his transactions, or

(ii) to act on his own behalf as if he were of full legal capacity?

CONSEQUENCES OF THE GENERAL RULE

A. Under our preferred option

(1) Invalidity of the transaction

5.79 It is a logical result of having a single rule of incapacity for persons under 16 that all their transactions, apart from those coming within the specified exceptions,[1] should be regarded as void. Thus, the position of those under the age of 16 would be equated with that of pupils under the existing law. One obvious attraction of this approach is its simplicity. No rights or obligations would be conferred on either party by virtue of the transaction. There would be no scope for reduction of transactions on grounds corresponding to minority and lesion. All transactions, other than excepted ones, could be declared null on the ground of the young person's lack of capacity and the parties' rights would be determined according to principles of restitution and recompense.[2] Not only would this solution

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[1] See paras. 5.30-5.57 above. Such transactions would be binding.

[2] See paras. 5.94-5.99 below.

be relatively uncomplicated, but it would also achieve what we believe to be the right result in practice. If, for example, a 14 year old purported to buy expensive stereo equipment from a hi-fi dealer, the contract would be void on account of his incapacity. No rights would be conferred on either party. The 14 year old could not enforce conditions in the sale relating to, say, replacement of defective parts. The dealer could not demand payment of the price. He would, nevertheless, be entitled to claim the equipment back and the 14 year old would be able to demand return of any money paid.

5.80 There may, however, be circumstances in which the principle of invalidity of the transaction should be modified. Three possibilities merit consideration: first, whether the adult party should be compelled to fulfil his obligation under the transaction; second, whether the person under 16 should be bound in any transaction which he has induced through fraudulent misrepresentation of age; and third, whether protection should be given to rights acquired by bona fide third parties.

5.81 Obligation of the adult party. As under the existing law,[1] it would be possible to make the transaction binding on the adult party only, so that he would not be able to found on the young person's incapacity in order to escape his obligation. This would create a 'limping' or 'one-sided' contract which the young person would be entitled to enforce if it were to his advantage. A provision along

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[1] See para. 2.2 and 2.10 above.

these lines might be useful in some circumstances in order to protect the young person's interests. For example, if an antique dealer agreed to sell a painting to a 15 year old, it might appear unfair if, before the sale was completed, he could sell it to someone else for a better price, by founding on the invalidity of the original agreement. On the other hand, it could operate just as unfairly against the trader if, for example, he supplied goods to be paid for on delivery and then discovered that the young person had no funds with which to meet the payment. This latter situation could be covered by a further modification that if the person under 16 chooses to take the benefit of the other party's performance of the contract, he must also perform his part.[1] There is, however, an inconsistency between this qualification which would allow a minor to choose to perform a juristic act and the general rule of incapacity which prevents him from making that choice. As for the basic proposal that a transaction should be binding on the adult but unenforceable against the child, we do not think that this would be appropriate. It would discriminate in favour of young people who purported to enter into contracts which they were not legally entitled to enter into and would discriminate against adults, who might themselves be young or inexperienced people contracting in complete good faith. To avoid gross injustice, there would probably need to be complicated rules to deal with return of property or to

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[1] A rule to this effect probably exists under the present law: see paras. 2.3 and 2.10 above.

provide for special defences available to the adult. The effect would be that in some cases the young person would have to be held to his contract. For example, he could hardly be allowed to claim specific implement without giving some binding assurance that he would perform his side of the bargain. We do not believe that this proposal would produce any better result, for either party, than the general rule of invalidity. For the sake of simplicity and in order to preserve the rational basis of our main proposals, we suggest that the principle of invalidity of transactions entered into by a person under 16 should not be modified so as to make such transactions binding on the adult party.

5.82 Fraudulent misrepresentation of age. There are two lines of argument here. On the one hand, it may be argued that to hold a young person liable under a contract which he has induced by fraudulent misrepresentation of age would detract from the simplicity and coherence of the rules under our preferred option. It would be inconsistent with the rule of incapacity to empower a person under 16 to transact in this way. Misrepresentation of age may itself, in certain circumstances, be a sign of, or result of, immaturity. Moreover, our proposals already provide the adult party with some means of safeguarding his position in that he would be able to challenge the contract on the ground of its invalidity and thereby excuse himself from future performance. Our proposals on restitution would also mean that in appropriate cases the young person would be bound to restore all of the

benefit which he had received.[1] In addition the adult party would be entitled to raise an action of damages in delict based on the fraudulent misrepresentation.[2] The onus would, of course, be on the adult to establish the fraud and to quantify his loss but that would be little different from what he would have to prove in order to hold a fraudulent minor bound by his contract under the present law. Indeed, the young person might be unlikely to try to avoid liability under the contract because he would then be exposed to the possibility of a claim in delict against him. To that extent, the adult party would often achieve the desired result, so far as he was concerned, of securing performance of the contract. Express provision to this effect would therefore be unnecessary.

5.83 The alternative view is that the policy of the present law is correct. If a young person has deliberately set out to deceive the adult party in this way and the adult has made reasonable efforts to avoid dealing with anyone under 16, it seems unfair that a dishonest 15 year old should retain his protection from liability. It is unrealistic to ignore the consequences of the fraud merely because it has been committed by a person under 16. The misrepresentation, far from indicating the young person's immaturity, is a conscious attempt on his part to get round the difficulties which he might otherwise face in

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[1] See paras. 5.94-5.99 below.

[2] Boyd & Forrest v. Glasgow and South Western Railway 1914 S.C. 472 and 1915 S.C. (H.L.) 20; Smith v. Sim 1954 S.C. 357.

entering into any sort of commercial bargain. In such circumstances, the policy should be to safeguard the adult's position at the expense of making the young person liable for the consequences of his deception and therefore bound by the contract.

5.84 The arguments for and against holding a person under 16 liable under a transaction induced by his fraudulent misrepresentation of age seem to us to be fairly evenly balanced and we do not express any provisional view on the matter. Comments are simply invited as to which of the two approaches to the problem should be adopted.

5.85 If a young person were to be held liable on account of fraudulent misrepresentation of age, it remains to consider whether the existing common law rules are in need of reform. The basic policy of the present law is that a minor is bound in any contract which is induced by fraudulent misrepresentation of his age which is reasonably believed by the other party.[1] Subject to the possible clarification of one particular issue,[2] we think that the common law rules would work satisfactorily under our preferred option. Accordingly, the fraudulent young person would not be able to found on his incapacity in order to have the transaction set aside. At the option of the person induced to deal with him, the contract would instead be binding on both parties. This should not impose too great a liability. Under the general law,

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[1]See paras. 2.27 and 2.28 above.

[2]See paras. 5.88-5.89 below.

fraudulent misrepresentation is constituted by the making of a false statement, knowing it to be false or without honest belief in its truth or recklessly, not caring whether it is true or not, and with the intention that it should be relied on by the person to whom it is made. In the context of misrepresentation of age, the child, unless he is very young, will know that the statement is false. Applying these general principles, therefore, the misrepresentation will be fraudulent if it is made with the intention that it should be relied on and if it has the effect of inducing the other party to enter into the transaction. As essential element in the fraud is an intention to deceive. The common law principles should therefore catch only the young person who had deliberately or recklessly lied about his age. Again on the basis of the existing common law, the adult party would fail to prove that he had been induced to enter the transaction by the young person's representation if the circumstances were such as to put him on his guard, for example, if the young person's appearance suggested that he was younger than he was holding himself out to be.

5.86 There is, however, one aspect of the law on fraudulent misrepresentation of age which might need to be clarified if the common law principles were to be retained. This concerns the effect of a false declaration of age in the deed constituting the contract. There is old authority[1] that a mere assertion of age in the deed may not amount to a fraudulent misrepresentation if the young

[1] Kennedy v. Weir (1665) Mor. 11658.

person has been induced to make the assertion by the other party. It is not certain how this proposition would be applied in the modern context of standard form contracts between supplier and consumer such as hire purchase agreements or applications in mail order catalogues. This application of the law is particularly relevant today and it may be desirable to clarify the position.

5.87 In any standard form contract, the consumer is at a disadvantage in that he cannot negotiate amendment or deletion of any of the provisions. He may sign the contract without reading the small print. A person under 16 may, in effect, be invited by the party with the greater bargaining power to make a false statement as to his age whether he wants to or not.[1] There is an argument that in these circumstances the position of the young person should be expressly safeguarded and that he should not be held bound by the contract. If this were thought desirable, it could be provided that a false declaration of age by a person under 16 in a standard form contract prepared by the other contracting party should not of itself be treated as a fraudulent misrepresentation of age.[2]

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[1] Such a statement may take the form either of a positive assertion by the young person where he has to fill in his age before signing the contract or it may be contained in the contract itself, as a printed declaration stating "I am over 18 years of age".

[2] A recommendation to this effect has been made by the Law Reform Commission of British Columbia: Report on Minors' Contracts (1976, L.R.C.26) pp.37,38.

If the declaration of age were coupled with independent evidence of intention to deceive, for example, in negotiations between the parties prior to concluding the transaction, that would be sufficient to make the young person liable under the contract. Similarly a false declaration of age in a contract the terms of which the young person had an opportunity to adjust could amount to fraud. It would, of course, be a question of fact in each case whether the fraud was established and whether it had actually induced the contract.

5.88 One effect of this proposal would be that in "long distance" contracts, such as a contract of purchase with a mail order firm, where there are no personal negotiations between the parties, it would be virtually impossible to show that the misrepresentation was fraudulent. There would be no dealings between the parties other than the sending of the order form and despatch of the goods and therefore no independent evidence of intention to deceive. The young person could not be held bound under the contract.

5.89 This may be thought to be unduly harsh on the mail order supplier. If this view is taken, it may give force to the counter-argument that no provision should be made to deal with this situation. It may be regarded as an unnecessary refinement of the existing law. If the young person has chosen to sign a standard form contract he should bear the consequences. The matter should, accordingly be determined by the general law under which it is possible that, on common law principles, a deliberately

false declaration of age in a standard form contract would be held to be a fraudulent misrepresentation. We prefer not to express a concluded view on this question but invite comment whether, if the common law rules were to be retained, provision should be made to the effect that a declaration of age in a standard form contract should not of itself be deemed to be a fraudulent misrepresentation of age.

5.90 Protection of third party rights. We have seen[1] that, as regards the position of third parties, the general law makes a distinction between transactions which are void and those which are merely voidable. No protection is afforded to third parties who have acquired property originally obtained under a void contract. They are bound to restore the property to the true owner. In the case of voidable contracts, there is no obligation of restitution on bona fide third parties who have acquired for value before the original contract has been reduced. Applying these principles, a person not involved in a direct contractual relationship with the child, whether acting in good faith or not, would be bound to make restitution under our proposals. There may, however, be circumstances in which this would cause hardship to the third party involved. Take, for example, the sale of a bicycle by a 12 year old, A, to an adult, B. B then sells it to another adult, C. A then has the original sale declared void and recovers the bicycle from C. C has to

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[1] Para. 2.43 above.

face the inconvenience and expense of raising an action against B for repayment of the price. If he is successful, he is no worse off than if he had not tried to buy the bicycle in the first place. However, he runs the risk of not being able to recover the price, either because of difficulty in proving his claim or because B does not have the assets to meet the debt. He is the only one of the three parties who is prejudiced on account of the second sale which, so far as he is concerned, has been entered into in good faith, without notice of the defect in B's title.[1]

5.91 There are two possible solutions to this problem. It may be argued, on the one hand, that the intervention of a third party acting in good faith means that his interests should also be taken into account in determining the extent to which the young person is entitled to recover his property. The need to protect the young person from the consequences of his immaturity should be weighed against the need to safeguard the interests of the innocent third party. If the view were taken that the interests of the third party should prevail, provision could be made to the effect that no transaction entered into by a person under 16 should be challengeable as void in so far as a bona fide third party had acquired rights for value which depended on its validity. This would not

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[1] B. on the other hand, is in the same position as if the second sale had not taken place, in that he may be able to recover the price he paid to A: see paras. 5.94-5.99 below.

mean that the young person or the adult who was party to the original transaction would be completely without remedy. Each would be able to enforce the contract against the other. This solution could therefore be regarded as a practical compromise between the competing interests of the three parties involved.

5.92 Against this, it may be said that there would probably be few occasions on which a person under 16 would attempt to participate in transactions of any great significance, in which case the hardship caused to third parties by an application of the general law would be minimal. Again it may be argued that an exception from the principle of invalidity in these circumstances would be incompatible with our basic proposals. It would seem strange if a void transaction were to become valid simply on account of the chance intervention of a third party. The liability of a young person and the extent to which he is able to recover his property should not be determined by such extraneous factors. In addition, there is perhaps no justification for protecting third party rights where the original transaction is void on the ground of minority but not on any other ground. The problem here is merely an illustration of a wider issue encountered in the law of contract: that is, the extent to which the interests of bona fide third parties should be safeguarded. Following this line of argument, if any reform were thought necessary, proposals should be made in the context of the general law of obligations.[1] Until such time, a third party, acting in

[1] See, for example, our Memorandum on Corporeal Moveables: Protection of the onerous bona fide acquirer of another's property, No. 27 (1976).

good faith or not, would be bound to make restitution to the child.

5.93 Either approach to the question of third party rights could, in our view, be justified and we have not formed a concluded opinion in favour of one or the other. Comments are therefore invited on both proposals, that is, whether specific provision should be made to protect third party rights dependent on the validity of a transaction which is void on the ground of minority, or whether the matter should be left to turn on the general law.

(2) Obligation of restitution

5.94 We have suggested that the doctrine of unjust enrichment should be used to regulate the rights of parties in any invalid transaction involving a person under 16. Indeed the application of principles of restitution and recompense appears to us to be particularly apposite in a one-tier system founded on a single rule of incapacity. It would mean that, where property is exchanged or one party confers some benefit on the other under an invalid transaction, an obligation would be imposed on each party to restore the other to the position he had been in prior to the transaction.

5.95 Although we propose that the common law principles of unjust enrichment should be applicable under our preferred option, it is for consideration whether there are any circumstances in which the young person's liability to make restitution or recompense should be modified.

5.96 Modification of the young person's obligation. As under the present law, the obligation of restitution could be relaxed in favour of the young person to the effect that he would be obliged to make restitution only in respect of goods, money or any benefit received which still formed part of his estate. If on the other hand, he had squandered the benefit, by, for example, spending the price received in exchange for goods, he would be under no obligation to repay the money although the other party would still have to return the goods which he had purported to buy. We commented in relation to the present law[1] that this modification was appropriate where the adult party had taken advantage of the young person's immaturity and where the transaction was clearly to the latter's prejudice. In such circumstances, the obligation of restitution should not put the rest of the child's property at risk. But we also indicated that this rule could operate harshly against the adult party in some situations where, for example, a minor could reduce certain transactions which were prima facie perfectly reasonable in their terms.

5.97 In the context of our preferred option, this criticism admittedly has less force. The prejudice suffered by adults under the present law is caused principally by the presumption of lesion which arises in specific types of transactions. An adult may conclude what appears to be a fair and binding contract, only to have it set aside up to four years later, by which time

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[1] Para. 3.14 above.

it is unlikely that the minor will retain the benefit which he had received. Under our proposals, his position would be clear. No transaction entered into with a person under 16, except one falling within the "ordinary" exception, would be binding. If an adult decides to transact with a 14 year old in such circumstances, he should do so at his own risk. Arguably, that risk should include the possibility that the 14 year old may not be able to restore the benefit he received because it is no longer in his possession. The justification for this approach would be that it would protect the young person from having to bear the full consequences of his inexperience which would be contrary to the main policy objective which we have identified.

5.98 We are not, however, convinced by this argument. A rule limiting the 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 may arise quite unintentionally simply as a result of his lack of understanding or he may deliberately and fraudulently dispose of the benefit so as to escape his obligation to restore. If, for example, a 13 year old bought a bicycle, then challenged the transaction as void and recovered the money which he had paid, it would be unfair if he could avoid the obligation to return the bicycle simply by giving it away to a friend. Moreover the notion of a benefit still being in the young person's possession does not apply very easily where the

benefit received is cash. It would be difficult for the adult party to identify the money which he had paid and to show that it had not yet been spent. And even if these particular pound notes had been spent, should he not be entitled to payment out of other funds belonging to the young person?

5.99 This reasoning leads us to suggest that it would be better to adopt a more flexible solution and to provide that the rights of the parties should be determined according to common law principles of unjust enrichment but that the court may modify the young person's obligation to make restitution or recompense in any way it considers equitable in the circumstances of the case. Where the young person is in a position to return the property received it is unlikely that the court would modify his obligation to do so. However, where the obligation is to pay the value of any benefit received, whether by way of recompense or as damages in the event of being unable to return the property received, the particular circumstances of the transaction and of the young person himself may well have a bearing on the court's decision. The court would be entitled to consider all the relevant facts in determining the extent to which the young person should make payment: his age and maturity, whether he had deliberately disposed of the goods received under the transaction, whether the obligation to make payment would put his whole assets at

risk and so on.[1] The young person would still be protected from the consequences of his immaturity if the court was satisfied that he deserved such protection. A result could be achieved which would be just to the particular young person concerned, and also, so far as possible, to the adult party. Our provisional view is therefore that the rights of parties to a transaction which is void on the ground of minority should be determined according to common law principles of unjust enrichment, but that the court should be empowered to modify the obligation of the person under 16 to make restitution or recompense in any way considered equitable in the circumstances of the case.

(3) Adoption of transactions entered into while under the age of 16

5.100 The present law permits adoption, on attaining the age of 18, of all transactions entered into during pupillarity and minority which are void.[2] This is simply an application of the general law concerning the adoption

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[1] If no provision were to be made to hold a young person bound by a contract which he had induced by fraudulent misrepresentation of age, the deliberate misrepresentation would be an additional factor which the court could take into account. See also paras. 5.82-5.89 above.

[2] See para. 2.42 above.

of void obligations although, in the context of pupils and minors, it is subject to the rather ambiguous exception provided by the Betting and Loans (Infants) Act 1892 regarding loans of money.[1] We think that the common law principles on adoption should continue to apply under our preferred option. No rational distinction can be drawn between capacity to enter into a fresh obligation and capacity to adopt an existing, though invalid, one. Nor is there any justification for prohibiting adoption of a loan. If a person can enter into any binding contract after his sixteenth birthday, it is illogical to suggest that he cannot agree to be bound by a contract which he has purported to enter into before he reaches that age. Moreover, we do not consider it necessary to specify what form the adoption should take under our preferred option. The result achieved by the common law, in allowing adoption to be express or, in appropriate circumstances, to be inferred from actings of the party which give a clear indication of his willing acceptance of liability, is, in our view, satisfactory. Any reform of the law concerning the circumstances in which adoption of an obligation may be implied should be left to judicial development. Our tentative conclusion is therefore in favour of retaining the existing rules on adoption of void contracts subject to repeal of section 5 of the Betting and Loans (Infants) Act 1892[2].

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[1] See para. 2.38 above.

[2] The Law Commission have also recommended repeal of this provision: see their Report on Minor's Contracts (Law Com. No. 134) (1984) para. 4.11.

5.101 Questions for consideration. To sum up, views are invited on the consequences of incapacity under our preferred option as follows:

(a) Do you agree with our provisional view that any transaction entered into by a person under 16, other than one coming within one of the specified exceptions, should be void?

(b) Should this rule be qualified to the effect that where a person under 16 has fraudulently misrepresented his age, thereby inducing another person to transact with him, the resulting transaction should, at the option of that other person, be binding on both parties?

(c) If the rule of invalidity of the transaction were qualified to take account of the young person's fraudulent misrepresentation of age, should it be provided that a false declaration of age by a person under 16 in a standard form contract prepared by the other contracting party is not, of itself, to be deemed a fraudulent misrepresentation?

(d) Should the rule of invalidity of the transaction be qualified to the effect that no transaction entered into by a person under 16 should be challengeable as void in so far as a bona fide third party has acquired rights for value which depend on its validity, or should the question of protection of third party rights be determined by the general law?

(e) Do you agree with our provisional view that the rights of parties to a transaction which is void on the ground of minority should be determined according to common law principles of unjust enrichment, but that the court should be empowered to modify the obligation of the person under 16 to make restitution or recompense in any way considered equitable in the circumstances of the case?

(f) Do you agree with our provisional view that any obligation purportedly undertaken by a person under 16 may be adopted as binding on or after his attaining that age, by any means effective under the existing law?

B. Under our second option

Consequences of the rule of incapacity for young people under 16

5.102 We have reached the same general conclusions under this option as under our preferred option about the consequences of the rule of incapacity affecting those under 16. The provisional proposals made and the questions raised in the preceding paragraphs are equally applicable here, subject, however, to minor amendment. This concerns adoption of transactions and is necessary to take account of the intervening age group of 16-18 year olds to whom this option, while conferring on them capacity to transact, still affords limited protection. If a person

aged 18 or over, i.e. of full legal capacity, adopts a contract made while he was under 16, the position would be straightforward: the contract would be binding on him as a new obligation from the date of adoption. If on the other hand, he adopts the contract while he is still 16 or 17, we think that, logically, the rules governing the legal capacity of 16 and 17 year olds under our second option should apply. In other words, the effect of adoption would be to create a contract voidable at his instance.[1] If, of course, he were to continue to indicate acceptance of the contract after his 18th birthday the contract would no longer be open to challenge. A similar modification would be required if the rule of incapacity were to be qualified on account of the young person's fraudulent misrepresentation of age: the effect of the misrepresentation would vary according to whether the young person held himself out to be 16 or 17, or 18 and over.

5.103 These modifications to our basic proposals would undoubtedly complicate the law to some extent. Nevertheless we believe that this is unavoidable if the rationale of the second option is to be maintained. Views are invited as follows:

(a) Do you agree that, subject to the qualifications mentioned at paragraphs (b) and (c) below, our provisional conclusions on the consequences of

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[1] We discuss formulation of the ground of reduction and the circumstances in which reduction should be excluded at paras. 5.105-5.121 below.

the rule of incapacity under our preferred option are equally applicable to the rule of incapacity affecting persons under 16 under our second option?

(b) Adoption by a person aged 18 or over of a void transaction entered into while under 16 should have the effect of making the transaction binding on him; adoption by a person aged 16 or 17 of such a transaction should render it voidable at his instance on grounds corresponding to minority and lesion.

(c) If the rule of incapacity were to be qualified to take account of fraudulent misrepresentation of age by a person under 16, the effect of the misrepresentation, in the case of a person holding himself out to be 18 or over, should be to render the transaction binding on him; in the case of a person holding himself out to be 16 or 17, the effect should be to make the transaction voidable at his instance on grounds corresponding to minority and lesion.

Consequences of the rule of capacity for young people aged 16-18

5.104 The general principle upon which the second option is based is that persons in the 16-18 age group should have capacity to enter into all types of transaction subject to a right to reduce those which are shown to be oppressive or prejudicial to them. These

transactions would therefore be voidable, rather than void, that is, binding upon the parties until challenged by the former 16 or 17 year old. On reduction, the law on unjust enrichment would regulate the parties' rights. What must be considered is, first, formulation of the ground of reduction and, second, the circumstances in which the right of reduction should be excluded.

Reduction of transactions

5.105 The result which we want to achieve is that a 16 or 17 year old should not be bound by a transaction which is considered prejudicial to him. Whether or not a transaction is prejudicial should be judged objectively, without reference to the particular circumstances of the young person which would not be known to the other contracting party. There should not, in our view, be any presumption of prejudice arising in certain types of transaction. One possible formulation would be simply to permit reduction if the obligation incurred by the young person or the juristic act performed by him had caused him substantial prejudice. The requirement of substantial prejudice would be the modern equivalent of enorm lesion. It would ensure, quite reasonably in our view, that a young person would not be able to reduce transactions where he had suffered only minimal loss. Whether or not the prejudice was substantial would be determined by the facts of the particular case.

5.106 It may be thought that a straightforward test of prejudice would be weighted too heavily in favour of the young person. Such a test would be objective to the

extent that there would be no presumption of prejudice in specific types of transaction but it would not exclude the possibility that the circumstances of the young person might have a bearing on whether or not the transaction had in fact been harmful to him. The terms of the transaction might have been perfectly fair but, for reasons beyond the control of either the adult party or the young person himself, it might ultimately have been to the young person's prejudice. To meet this problem, a second condition could be added. One formulation would be to provide that reduction would be possible if the obligation or juristic act had caused the young person substantial prejudice and it was not one which a reasonable person acting in the same circumstances would have incurred or performed. In other words, reasonable but prejudicial transactions could not be challenged.

5.107 This additional test would do more to safeguard the interests of the adult party, but at the expense of diminishing the level of protection afforded to the young person. The test of "the reasonable person" would ensure an objective standard by which to judge the transaction but it would also introduce an element of uncertainty. There would be no very clear guidelines for the contracting parties as to what a reasonable person would do. Would he lend money to a friend at substantially less than the going rate of interest? Would he enter into a deal which carried with it a small risk of financial loss or would he only enter into transactions which he was satisfied bore no such risk? Ultimately this uncertainty could be to the disadvantage of the 16 or 17

year old as well as to the disadvantage of the adult.

5.108 In view of the difficulties of the "reasonable person" test, an alternative formulation of the second condition of reduction might be more appropriate. For example, reduction could be allowed if the transaction had caused the young person substantial prejudice and the prejudice suffered was of a kind which was, or which should have been, manifest at the time of the transaction. On the face of it, this test would give rise to less uncertainty than one based on reasonableness. It would prevent the reduction of transactions which turn out to be prejudicial to the young person for reasons which neither party could have foreseen. However, there could still be problems in deciding whether or not the prejudice should have been manifest at the time of the transaction. It might still involve the notion of what a reasonable person should have known at the time he entered into the transaction, in which case it would be little different in effect from the first formulation.

5.109 We have found it difficult to form a concluded opinion on this topic. As with all aspects of the law in this area, a balance must be struck between the competing interests of the young person and the adult party. The weight of policy considerations may be firmly in favour of the young person in which case the simple test of prejudice would be appropriate. Alternatively it may be thought that a more acceptable balance is struck by the combination of proof of substantial prejudice and either the "reasonable person" test or the requirement that the

prejudice was or should have been manifest at the time of the transaction. Even if a double formulation were preferred, the protection afforded to the adult party might still be limited. His interests can be safeguarded, firstly, by ensuring that the transaction is judged objectively and not according to the circumstances of the individual and, secondly, by giving him a fairly clear idea in advance whether a particular transaction is likely to be voidable at the instance of the other party. A test of reasonableness, however it is framed, can offer the first kind of protection only at the expense of the second. A test based on "manifest" prejudice may provide a more definite answer in some cases, but would not be easy to apply in those borderline cases where the obvious nature of the prejudice is an issue between the parties. We do not express a concluded opinion on this issue but invite comments on the three formulations of the ground of reduction outlined above. Our reservations about the uncertainty resulting from either of the double tests may be met, to some extent, if the right of reduction were excluded in certain circumstances and this is the question to which we now turn.

Circumstances in which the right of reduction should be excluded

5.110 (a) "Ordinary" transactions. Our second option confers capacity on young people under 16 to enter into transactions ordinarily entered into by persons of that age. The assumption is that such transactions would be binding on them. It follows that the right of reduction

should also be excluded in respect of such transactions entered into by 16-18 year olds. Consequently, the right of reduction would be confined to what could loosely be described as major transactions, e.g. buying a house, borrowing a substantial sum of money. This would probably mean that in most dealings with 16-18 year olds, the adult would be protected from challenge. His position could be protected even further if the law were to specify exactly what types of transaction were voidable. This would not, however, be practicable. In attempting to provide an exhaustive list of transactions, some might be omitted. Social and economic circumstances of 16-18 year olds might continue to change so that the list would become out-of-date. Certainly that would be the case if an attempt was made to define major transactions according to their monetary value. We suggest that the preferable approach would be to identify, in general terms, the transactions or acts of legal significance in respect of which reduction is to be excluded. In our view this should be transactions ordinarily entered into by a person of that age.[1] This category would obviously

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[1]The question of reduction of consent to medical treatment could hardly arise. If the treatment has not taken place consent could be withdrawn. If it has, reduction would not alter the fact that the treatment was with consent at the time. Similarly the question of reduction by a young person of his will could not arise. If the young person is alive he can simply revoke a will. If he is dead it is too late for him to reduce it and we would not suggest that anyone else should be able to do so.

encompass a wider range of transactions than that covered by the equivalent exception for those under 16. Full-time employment contracts would be one obvious example, leasing a flat would be another. The question would also arise here whether reference should be made to the apparent or actual age of the individual.[1]

5.111 (b) Fraudulent misrepresentation of age. Although we have not expressed a concluded opinion whether or not a person under 16 should be bound by transactions which have been induced by his fraudulent misrepresentation of age, we feel able to reach a more definite view as regards misrepresentation by 16 and 17 year olds. This is because the legal concepts involved in the two sets of circumstances are different. Under both our preferred and second options, a transaction entered into by a person under 16 would, generally speaking, be void on the ground of his incapacity. Arguably, no actings by the young person himself or by a third party should alter that principle. On the other hand, a transaction entered into by a 16 or 17 year old under our second option would be prima facie valid and would be binding until reduced on the ground of substantial prejudice to the young person. Since it is a valid transaction, we think that the general principles of the law of obligations should apply. This would mean, firstly, that the transaction would be voidable at the instance of the party induced

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[1] See paras. 5.34 and 5.35 above.

to contract by the misrepresentation.[1] Secondly the young person would be prohibited from acting in a manner contrary to what he represented to be the truth. In other words, he would be barred from reducing the transaction on the grounds of substantial prejudice, as that ground of reduction would be available only to persons aged 16 or 17. In making this proposal, we are not affecting the validity of the transaction but merely excluding a particular ground of reduction which would otherwise be open to the 16 or 17 year old. To this extent our proposals amount, as does the present law, to a particular application of the equitable doctrine of personal bar based on representation.[2]

5.112 Our provisional view is consistent with the policy of the present law which provides that a minor is barred from reducing on the grounds of minority and lesion any contract which is induced by fraudulent misrepresentation of age. We have already said in relation to our preferred

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[1] Gloag, p.479. The adult party would also have a claim in damages against the young person for loss caused by his entering the contract: Smith v. Sim 1954 S.C. 357.

[2] See paras. 5.114-5.116 below. Under the general law, a person is barred from challenging the truth of his misrepresentation whether it is made innocently, negligently or fraudulently: Carr v. The London and North Western Railway Co. 1875 L.R.10 C.P. 307 per Lord Justice Brett at p.317; Buchanan v. Duke of Hamilton (1878) 5 R. (H.L.) 69 at pp. 82-3. However it is not necessary to consider innocent or negligent misrepresentation in this context. Any misstatement of age by a 16 or 17 year old will be made in knowledge of the truth.

option[1] that we believe the present law on fraudulent misrepresentation of age to be generally satisfactory. Accordingly we suggest that the common law rules should be applied under this option to young people aged 16 and 17.

5.113 It remains to consider whether any provision should be made to the effect that a declaration of age by a 16 or 17 year old in a standard form contract should not, of itself, be deemed to be a fraudulent misrepresentation. We have already set out the arguments for and against such a provision[2] and do not repeat them here. The only additional point to be mentioned in the context of this option is that the wording of the ground of reduction may have a bearing on the view which is ultimately taken. As we have indicated,[3] an express provision on declarations in standard form contracts might be regarded as unfair to the mail order supplier or other adult party to a postal contract. He would not be able to rely on the misrepresentation of age in the contract in order to hold the young person liable. This concern might, however, be alleviated if a double formulation of the ground of reduction were to be adopted, i.e. proof of

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[1] At para. 5.85 above.

[2] At paras. 5.86-5.89 above.

[3] At para. 5.89 above.

substantial prejudice and either the "reasonable person" test or the requirement that the prejudice was, or should have been, manifest at the time of the transaction.[1] The second limb of the ground of reduction would give the adult party some protection in that the young person would be bound by the contract if, depending on the formulation, it was one which a reasonable person acting in the same circumstances would have entered into or the prejudice was, or should have been, apparent when the contract was concluded. Either formulation of the ground of reduction might therefore make provision on declarations in standard form contracts more acceptable. As under our preferred option, we do not express a concluded view on this question but invite comment whether provision should be made to the effect that a false declaration of age by a person aged 16 or 17 in a standard form contract is not, of itself, to be deemed a fraudulent misrepresentation of age, or whether the question should be left to the general law, with the result that it would be a question of fact in each case whether the declaration was fraudulent.

5.114 (c) Personal bar. The doctrine of personal bar operates to prevent a person from asserting rights which he would otherwise have possessed. He is barred from enforcing legal rights or challenging claims made against

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[1] See paras. 5.106-5.108 above.

him which, but for certain acts or omissions on his part, he would be entitled to enforce or challenge.[1] Personal bar may take a variety of forms including homologation, rei interventus, waiver, acquiescence and misrepresentation.[2] We have already dealt with fraudulent misrepresentation of age[3] which in the context of the law on the legal capacity of young people merits separate treatment. A distinction can in any event be drawn between personal bar based on misrepresentation inducing the transaction and other forms of personal bar arising from conduct or events which occur after the transaction has been entered into. What we are concerned with here is personal bar of the latter kind.

5.115 In this area of law, personal bar by homologation is probably most relevant. As we have seen,[4] the present law permits homologation after attaining majority of all voidable transactions entered into during pupillarity and minority with the possible exception of contracts for loans of money. We have already drawn attention to this

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[1] In Gatty v. Maclaine 1921 S.C.(H.L.)1 at p.7, Lord Chancellor Birkenhead summarised the doctrine of personal bar as follows: "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time".

[2] See generally Rankine on Personal Bar (1921).

[3] See paras. 5.111-5.113 above.

[4] See para 2.37 above.

anomaly in the context of our proposals for adoption of void obligations purportedly entered into by persons under 16.[1] It is, in our view, unjustified and we suggest that the common law rules on homologation should apply under this option to all voidable transactions entered into by 16 and 17 year olds.[2] Moreover, we consider that homologation should be possible by any means effective under the existing law. In other words, homologation should be express or be inferred from any actings of the party after he attains the age of 18 whereby he recognises the validity of the contract in the knowledge that it is, in fact, voidable. Whether or not acceptance of the contract is to be inferred would depend on the facts of the case. Although the circumstances are too varied to be listed exhaustively, there is authority for inferring homologation in the following situations: receipt of rent on a voidable lease;[3] payment of interest on a bond;[4] assignation after majority of a contract entered into while a minor.[5] In a modern context, payment of instalments under a hire purchase contract would probably indicate acceptance.

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[1] See para. 5.100 above.

[2] As with our proposals on adoption this would involve repeal of section 5 of the Betting and Loans (Infants) Act 1892.

[3] Lord Advocate v. Wemyss (1899) 2 F.(H.L.)1

[4] McCalman v. McArthur (1864) 2 M.678. Homologation will not be inferred where payment is made for the sole purpose of avoiding court action or diligence: Cockburn v. Hallyburton (1672) Mor. 9009.

[5] Montrose v. Livingstone (1697) Mor. 9046.

5.116 Our discussion so far has been limited to confirmation of the existing law on homologation. We take the view, however, that our provisional conclusion should be stated more broadly in terms of personal bar, that is, that the general principles of personal bar should apply under this option to transactions entered into by 16 and 17 year olds. We do not think that this represents a departure from existing law. The doctrine of personal bar can operate, in appropriate circumstances, to preclude reduction of any voidable transaction irrespective of what the ground of reduction might be. We think that this should continue to be so. The only distinguishing feature of personal bar in relation to a transaction entered into by a 16 or 17 year old would be that the conduct on the part of the young person concerned or other events barring reduction could not take place before the young person's 18th birthday. Accordingly, we propose that the right of reduction should be excluded by any actings or events taking place after the young person in question reaches the age of 18 which amount to homologation, rei interventus or other form of personal bar.[1]

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[1]Personal bar on the ground of the party's delay in challenging the transaction is, in effect, dealt with under the existing law by restricting the right of reduction to the quadriennium utile. We make a separate proposal at para. 5.122 below regarding the period within which reduction should be sought.

5.117 (d) Protection of third party rights. Apart from the exceptions which we have suggested,[1] transactions entered into by 16 and 17 year olds would be voidable under our second option. On general principles, therefore, there would be no obligation of restitution on bona fide third parties who had acquired rights for value before the original transaction entered into by the young person had been reduced.[2] The application of the general law here seems to achieve the right result. Accordingly, we suggest that the right of reduction proposed for 16 and 17 year olds should be excluded in such circumstances.

5.118 (e) Consent of parent or guardian. This would be a convenient and simple means of protecting the adult contracting party. The justification for relying on parental consent in order to preclude reduction would be that the parent (or guardian), by the very nature of his position, would not agree to a contract which was prejudicial to the young person. This assumes, rightly or wrongly, that a parent is automatically better equipped to judge the fairness of a particular contract and whether it is one appropriate for a 16 or 17 year old to enter into. In order to deal with possible conflicts of interest between parent and child, the proposal would be limited to precluding reduction of transactions in which the parent or guardian did not have any interest.

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[1] See paras. 5.110-5.116 above.

[2] See para. 2.43 above.

5.119 Although the proposal seems theoretically attractive, we have some reservations about giving parental consent this automatic effect. 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 grounds of minority and lesion.[1] As a means of protecting the adult party it may be of little practical benefit. The adult contracting party would be most anxious to safeguard his position in important transactions - e.g. loan agreements, leasing of property and so on. Young people in the 16-18 age group are perhaps unlikely to enter into this type of transaction unless they are living independently of their parents in which case parental consent may be difficult to obtain. The delay involved in obtaining consent in such circumstances may deter the adult from contracting at all. Alternatively he may prefer to require participation of a cautioner to guarantee the young person's obligation.[2] From the adult's point of view, that is just as effective as ensuring that the obligation is fully enforceable against the young person himself. Moreover, if the ground of reduction were to include "the reasonable person" test,[3] the parent or guardian's approval of the transaction in question would be a relevant factor for the court to take into account in deciding whether or

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[1] See para. 2.9 above.

[2] See para. 5.141 below.

[3] See para. 5.106 above.

not the ground of reduction had been established. This approach, giving due weight to the parent's giving or withholding of consent in the circumstances of the case, may be preferable to an arbitrary rule. In order to elicit views on this question, we do not express a concluded opinion, but invite comment whether or not the right of reduction should be excluded in respect of transactions entered into by a 16 or 17 year old with the consent of his parent or guardian provided that the parent or guardian does not have any interest therein.

5.120 (f) Judicial ratification. As a means of excluding reduction of contracts entered into by a 16 or 17 year old, judifical ratification would have some advantages over parental consent. First, it would always be available no matter where or in what circumstances the young person was living. Secondly, the court's assessment of a particular transaction would probably be more objective than that of a parent whose personal involvement might exercise too great an influence over his decision. The usefulness of judicial ratification would, however, be lost if the proceedings by which the court's consent was obtained were to be lengthy and expensive. The trader might well prefer to transact his business elsewhere, or the employer to take on an adult employee, rather than put up with the delay and uncertainty involved in dealing with a 16 or 17 year old. A simplified procedure would have to be devised to ensure that such applications would be disposed of with the minimum of delay. Consideration would also have to be given to the criteria by which the court should judge the propriety of the proposed transaction. It would, we think, be difficult to lay down

precise rules as to what factors should be taken into account. What the court would have to establish to its satisfaction is that the ground for reduction does not exist, that is, in broad terms, that the transaction is to the young person's benefit. Depending on the formulation of the ground of reduction, relevant considerations would be the reasonableness of the terms of the transaction, the financial position of the young person, particularly in the case of contracts involving a continuing obligation to pay, his family circumstances, other obligations and so on. The weight attached to each consideration would vary depending on the nature of the transaction in question. Ultimately, a great deal would be left to the court's discretion.

5.121 The difficulties which we have encountered in framing the grounds of reduction may be an argument in favour of introducing a procedure for judicial ratification as an appropriate method of safeguarding the position of the adult when entering into any major transactions with a young person in this age group. Nevertheless, we are not convinced that it would be of great practical benefit. In the first place, we do not know that the absence of any such procedure under the present law causes problems. If it does not, there may be something to be said for not proposing any change. Secondly, even if judicial ratification were to be introduced, the court would face a difficult task in deciding whether or not to give its approval to a particular transaction. It might be virtually

impossible for the court to reach a balanced view of what would or would not be to the young person's benefit. Again, even if judicial ratification were available, the adult might still prefer to transact with another adult, rather than have to obtain court approval to a contract with a 17 year old. Alternatively, he might be prepared to go ahead with the transaction, without considering the possibility of its being reduced at a later date. In either event, the adult would avoid involvement with the courts. On that basis, we suspect that the procedure would be little used and, therefore, perhaps not worth introducing. In view of these doubts, we make no firm proposals on this question, but invite consultees to consider whether, in the light of the possible formulation of the ground of reduction, a procedure for judicial ratification of transactions entered into by 16 and 17 year olds should be introduced in order to exclude subsequent reduction.

Period within which a transaction may be challenged

5.122 It is, of course, a matter of judgment what would be the appropriate period within which to permit reduction of voidable contracts. The young person should be given an adequate opportunity to reconsider his position after reaching 18. The adult should not be exposed indefinitely to the possibility of reduction. An appropriate period might be three years from age 18. This would mean that the maximum period of challenge, applying where a transaction was entered into immediately on attaining the

age of 16, would be five years, which is now the normal period of prescription in relation to obligations. We also believe that the right of reduction should be available to the young person while he is still under 18, should it become clear to him at that time that a particular transaction is prejudicial to him. Accordingly, we propose that the right of reduction should subsist from the time the transaction is entered into until the young person concerned attains the age of 21.

Obligation of restitution

5.123 Where a transaction has been reduced, the parties' rights would be determined according to general principles of restitution and recompense.[1] It is, however, for consideration whether the obligation of restitution or recompense should be relaxed in favour of the 16 or 17 year old. We have reached a provisional conclusion to this effect for persons under 16,[2] and we believe that the same reasoning should apply in the case of persons aged 16 to 18. We therefore suggest that on reduction of a transaction entered into by a 16 or 17 year old, on the grounds of substantial prejudice, the rights of the parties should be determined according to common law principles of unjust enrichment, but the court should be empowered to modify the obligation of the 16 or 17 year old to make restitution or recompense in any

[1] See paras. 2.44-2.46 above.

[2] See paras. 5.94-5.99 and 5.102 above.

way considered equitable in the circumstances of the case.

5.124 Questions for consideration. Views are invited on the following provisional proposals and questions regarding the consequences of the general rule affecting 16 and 17 year olds under our second option.

(a) Subject to the qualifications referred to below, should a person be entitled to reduce a transaction entered into while he was 16 or 17 if:

(i) it had caused him substantial prejudice

(ii) 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

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

(b) The right of reduction should be excluded in respect of transactions ordinarily entered into by a person of the age of the young person in question.

(c) (i) The right of reduction should be excluded where a person aged 16 or 17 has fraudulently misrepresented his age, thereby inducing another person to transact with him.

(ii) Should it be provided that a false declaration of age by a person aged 16 or 17 in a standard form contract prepared by the other contracting party is not, of itself, to be deemed a fraudulent misrepresentation?

(d) The right of reduction should be excluded by any actings or events taking place after the young person in question reaches the age of 18 which amount to homologation, rei interventus or other form of personal bar.

(e) The right of reduction should be excluded in so far as it affects rights acquired for value by bona fide third parties which depend on the validity of the original transaction entered into by the 16 or 17 year old.

(f) Should the right of reduction be excluded in respect of transactions entered into by a 16 or 17 year old with the consent of his parent or guardian provided that the parent or guardian does not have an interest therein?

(g) Should a procedure for judicial ratification of transactions entered into by a 16 or 17 year old be introduced in order to preclude subsequent reduction?

(h) The right of reduction should subsist from the time the transaction is entered into until the young person concerned attains the age of 21.

(i) On reduction of a transaction entered into by a 16 or 17 year old, on the grounds of substantial prejudice, the rights of the parties should be determined according to common law principles of unjust enrichment, but the court should be empowered to modify the obligation of the 16 or 17 year old to make restitution or recompense in any way considered equitable in the circumstances of the case.

C. Under other options

5.125 The proposals which we have made in relation to the consequences of the general rule under our preferred and second options may also be relevant in any other scheme favoured by consultees. It is clearly impracticable for us to canvass exhaustively the implications of all such schemes for reform. The salient questions are, however, whether transactions entered into by a young person should be void or voidable; whether they should be enforceable against the adult party; what the ground of reduction should be, if applicable, and in what circumstances should reduction be excluded; how should the rights of parties to such transactions be resolved? In addition to the proposals under our first two options, we put forward the following points for consideration.

(i) In any scheme conferring capacity on children in a certain age group to act with consent of

a guardian, provision could be made to exclude reduction of transactions for which consent had been obtained;

(ii) The possibility of reduction of prejudicial contracts could be excluded altogether if judifical ratification were to be required in respect of certain transactions. Without judicial ratification such transactions would be void.

Views are invited as to what the consequences of the general rule should be as regards any other scheme favoured by consultees.

CAPACITY OF YOUNG PEOPLE IN LITIGATION

A. Under our preferred option

5.126 General principles. We have seen[1] that the existing rules governing capacity to litigate reflect the principles of the general law dealing with capacity of pupils and minors. The tutor acts for the pupil: the minor acts with the consent of his curator. This is supplemented by the rule providing for appointment of a curator ad litem to act in place of the tutor or curator in certain circumstances. It is simple, convenient and rational to apply the same general rules of capacity as apply in other legal transactions and we intend to treat the question of

[1] At para. 2.55 above.

capacity to litigate in the same way under our present proposals for reform. Accordingly, we propose that the general rule governing capacity of young people should apply, subject to the possibility of appointment of a curator ad litem to represent the young person in appropriate cases. This means that under our preferred option children under 16 would have no capacity in litigation: the guardian would sue and be sued on their behalf. There would be no need to raise or defend an action in name of the guardian and the child. The proceedings would be taken or defended simply in name of the guardian acting in that capacity.

5.127 A person under 16 should, however, be able to initiate proceedings or intimate his intention to defend proceedings in circumstances where the guardian cannot do so. This would be where, for example, the child has no guardian; the action is against the guardian; there is a conflict of interest between the child and his guardian; the guardian refuses to act or is incapacitated or has disappeared. It is in such circumstances that the court should have power to appoint a curator ad litem to enable the child to proceed with the action or with his defence. Under the present law, the cases in which a curator ad litem may be appointed are not listed exhaustively, neither is his appointment mandatory. We think that this should continue to be so. Innumerable situations, which cannot be readily identified in advance, may arise where independent representation of the child might be desirable. The court should also retain a discretion to

refuse to appoint a curator ad litem if it was considered inappropriate to do so. This could arise if the action proposed by the child was ill-founded or frivolous. On the other hand, there would be some cases where the appointment would be virtually automatic. If, for example, the proceedings were for appointment of a guardian, it is inconceivable that the court would not decide that such proceedings were in the child's interests.

5.128 Applying the general principles of our preferred option along with the rules governing the effect of incapacity in court proceedings would produce the following results.

Person under 16 as pursuer. If the person under 16 has a guardian, the action would be brought in name of the guardian, otherwise it could not be entertained. If, in a very exceptional case, the child acts alone and the court in ignorance of his age grants decree, the decree would be reducible on this ground. If he has no guardian, the action would be brought in the child's own name and a curator ad litem would be appointed once the action was in court. Any decree granted in such circumstances would be binding on both parties subject, of course ,to the usual rights of appeal. If the court refuses to appoint a curator ad litem the action could not proceed.

Person under 16 as defender. The guardian would be called as defender and the child would be bound by any decree granted (subject to the usual rights of

appeal). If he is not called the action could not proceed. Where the child has no guardian, a curator ad litem could be appointed. If the curator ad litem decides to defend the action, the decree would be binding (subject to the usual rights of appeal). If he does not, the decree would be regarded as a decree in absence. A decree taken in error against a child without a guardian or curator ad litem would be reducible on that ground.

Person over 16 as litigant. He would be able to sue and be sued without any need for consent or concurrence. Appointment of a curator ad litem would not be necessary in any circumstances other than those applying generally to adult litigants.

Particular types of proceedings

5.129 (1) Adoption proceedings. Our proposals would entail an amendment to the rule whereby an adoption order can only be made in respect of a minor (in the sense of a girl aged 12-18 or a boy aged 14-18) if he or she gives formal consent to the adoption.[1] What we suggest in its place is that a 16 or 17 year old should continue to have the right to veto his adoption and that for children under 16 reliance should be placed instead on the court's existing duty to give due consideration to the child's wishes and feelings, having regard to his

[1] Adoption (Scotland) Act 1978, s.12(8).

age and understanding.[1] We do not think that this amendment would make very much practical difference to the court's determination of an application to adopt a child in the 12-16 or 14-16 age group. The other provisions in the adoption legislation concerning the age of adoptive parents and the role of natural parents would be unaffected.[2] The only change would be that where a 16 or 17 year old was the natural parent, there would no longer by any need for the court to consider appointment of a curator ad litem to represent the young parent's interests.

5.130 (2) Petitions to vary trust purposes. In order to be consistent with the general scheme of our proposals, the court's duty to take account of a minor beneficiary's attitude to an arrangement for variation of trust purposes should either be disapplied in relation to those under 16 or be applied throughout the age group. On balance, we think that the latter formula is preferable. The court's duty is phrased in terms of taking "such account as it thinks appropriate" of the beneficiary's attitude, which would enable the views of a very young child to be disregarded while attaching some importance

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[1] Adoption (Scotland) Act 1978, s.6.

[2] See para. 2.64 above.

to the views of, say, a 15 year old. This would be compatible with our proposals in adoption proceedings. As for 16 and 17 year olds, we suggest, again to be consistent with the general scheme, that they should be entitled to give their own approval to such arrangements and that section 1 of the Trusts (Scotland) Act 1961 should be amended accordingly. There would, of course, be no question of the arrangement approved by the 16 or 17 year old, or by the court on behalf of beneficiaries under 16, being reducible on grounds corresponding to minority and lesion.[1]

5.131 (3) Petitions for appointment of a guardian or judicial factor. As has already been noted, we have made recommendations in our Report on Illegitimacy for rationalisation and generalisation of the rules contained in the Guardianship of Infants Act 1886 and 1925 dealing inter alia with petitions for appointment of a tutor.[2] The effect of our recommendations is that any person claiming an interest should be able to apply to the Court of Session or the sheriff court for an order relating to parental rights, which are defined to include tutory and

[1] Cf. 1961 Act, s.1(3) which precludes reduction on the grounds of minority and lesion of any arrangement approved by the court.

[2] Scot Law Com. No. 82 (1984) paras. 9.11-9.13 and recommendation 42.

curatory. This provision is wide enough to enable a pupil to apply himself, subject to appointment by the court of a curator ad litem, for appointment of a guardian. If this recommendation were implemented, and subject to more general reform of the law of guardianship consequent on our proposals in this Consultative Memorandum,[1] it would be possible for a child under 16 to apply in his own name for appointment of a guardian. The court would have power to appoint a curator ad litem to proceed with the petition on the child's behalf. We do not therefore make any proposals for further reform in this area but simply endorse the recommendations made in our earlier Report.

5.132 As for appointments of judicial factors to administer a young person's estate, the present law allows the petition to be presented by any person claiming an interest in the pupil or his estate, including a curator ad litem. Again this seems an adequate provision when adapted to a single tier system of minority and we make no proposals for change.

5.133 Provisional conclusions. Comments are invited on the following propositions:

(a) A person under 16 should not have capacity

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[1] This would involve abolition of tutors and curators and their replacement with a single category of guardian whose function would be similar to that of a tutor: see para. 5.144 below.

to litigate but, in cases where he has no guardian or his guardian has disappeared or where his guardian refuses to act or it would be inappropriate for his guardian to act, he should be entitled to raise an action or intimate a defence, subject to appointment by the court of a curator ad litem to act on his behalf.

(b) 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.

(c) A person aged 16 or over should have full capacity to litigate.

(d) The present rule whereby a minor must consent to his own adoption should be amended to apply only to 16 and 17 year olds.

(e) Section 1 of the Trusts (Scotland) Act 1961 should be amended so as to:

(i) restrict the court's power to approve an arrangement for variation of trust purposes on behalf of minor beneficiaries to approval on behalf of beneficiaries under 16;

(ii) require the court, in giving such approval, to take such account of the beneficiary's attitude as it thinks appropriate; and

(iii) make it clear that an arrangement for variation of trust purposes is not reducible on grounds corresponding to minority and lesion.

B. Under our second option

5.134 The same general principles which we have discussed in the preceding paragraphs would apply also under our second option. A person under 16 would have no capacity to litigate but a person of 16 or 17 would have. We do not think that it would be appropriate to allow decrees granted against a 16 or 17 year old to be reducible on the grounds corresponding to minority and lesion which we have outlined above.[1] The decree would be the act of the court, not that of the young person.

5.135 A 16 or 17 year old would retain the right to refuse to consent to his own adoption. An adoption order is, however, irrevocable and could not be reduced at his instance. As for arrangements for variation of trust purposes we do not consider it appropriate to enable a 16 or 17 year old beneficiary to reduce such an arrangement on grounds corresponding to minority and

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[1] At paras. 5.105-5.109.

lesion. A right of reduction would be unduly prejudicial to other beneficiaries and third parties transacting with the trust and, in any event, the concept of reduction on the ground of substantial prejudice seems difficult to apply in this context. If it is thought that some form of protection is needed for 16 and 17 year olds here, and that is the principle upon which our second option is based, it could be provided by retaining the court's power to approve an arrangement for variation on behalf of beneficiaries in that age group. Indeed, under section 1(1) of the Trusts (Scotland) Act 1961, the court may not approve an arrangement on behalf of a beneficiary unless it is of the opinion that the carrying out thereof would not be prejudicial to him. This, in our view, gives more than adequate protection, if any is required. Alternatively, consultees may consider protection unnecessary in this area of law, in which case the proposals under our preferred option, restricting the court's power of consent to consent on behalf of beneficiaries under 16, would be applicable. Comments are invited on both these possibilities.

5.136 We invite views on the following provisional conclusions and questions in relation to our second option:

(a) A person under 16 should not have capacity to litigate but, in cases where he has no guardian or his guardian has disappeared or where his guardian refuses to act or it would be inappropriate for the guardian to act, he should be entitled to raise an action or intimate a

defence, subject to appointment by the court of a curator ad litem to act on his behalf.

(b) 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.

(c) A person aged 16 or over should have capacity to litigate.

(d) The present rule whereby a minor must consent to his own adoption should be amended to apply only to 16 and 17 year olds.

(e) (i) Should the court continue to have power under this option to approve arrangements for variation of trust purposes on behalf of beneficiaries under 18 or should the power be restricted to approval on behalf of beneficiaries under 16?

(ii) If the court's power of approval were to be so restricted, any approval by a 16 or 17 year old beneficiary to an arrangement for variation should not be open to reduction at his instance on the ground of substantial prejudice.

(iii) Section 1 of the Trusts (Scotland) Act 1961 should be amended so as to require the court, in approving an arrangement for variation on behalf of a beneficiary, whether under 16 or under 18 in terms of sub-paragraph (i) above, to take such account of the beneficiary's attitude as it thinks appropriate.

C. Under other options

5.137 Capacity in litigation will be determined by the general rule or rules to be adopted under the scheme as a whole. Accordingly we do not express any opinion on the matter but simply invite views on what the rules governing capacity of young people to litigate should be under any other option favoured by consultees.

MISCELLANEOUS MATTERS

Attainment of Age

5.138 Under Scots common law, a person attains a particular age at the precise moment of time occurring on the relevant anniversary of his birth.[1] This can give rise to strange results in the application of minimum age qualifications for certain activities. For example, it is an offence under the Licensing (Scotland) Act 1976[2] for

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[1] Fraser, p. 200; Drummond v. Cunninghamhead (1624) Mor. 3465

[2] s.68(2) and (7).

a person under 18 to buy or consume alcohol in a bar. If a person born at 8.15 pm goes out to celebrate his 18th birthday, then, strictly speaking, he commits an offence if he buys a round of drinks at 8 pm, but is not liable to prosecution if he orders a second round at 8.30 pm. Similarly, if a person gets married on his 16th birthday, but before the exact anniversary of the moment of his birth, the marriage is presumably void.[1] The rule in English law is now that a person attains a specified age at the commencement of the appropriate birthday.[2] Some statutes applying throughout the United Kingdom also adopt this formula.[3] From a practical point of view, we consider this to be a more satisfactory approach. It also seems desirable that the rule on this point should be the same in the different areas of Scots law. Accordingly, we suggest that a person should attain a particular age at the beginning of the anniversary of the day of his birth.

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[1] Marriage (Scotland) Act 1977, s.1(2).

[2] Family Law Reform Act 1969, s.9. This replaced the common law rule that a person attained a specified age at the first moment of the day before the appropriate anniversary of the day of his birth.

[3] E.g. British Nationality Act 1981, s.50(11)(b); Representation of the People Act 1983, s.202(2). Section 18 of the Social Security Act 1980 makes specific provision to this effect for Scotland only (the reason for the limited application being that the same effect in England and Wales is achieved by the general rule in the Family Law Reform Act 1969).

5.139 We have also considered the question of the anniversary of the day of birth of a person born on 29 February. Before the introduction of the Gregorian calendar in the 18th century, a day was interposed, in every fourth year, between 24 and 25 February. This was the "intercalated" day. The anniversary of a person born on that day was, in a non-leap year, held to be 24 February, and in a leap year, 25 February. By analogy, under the present calendar, the anniversary of a person born on 29 February should, in a non-leap year, be held to be 28 February. On the other hand, we are informed by the Department of Health and Social Security that, for the purposes of the social security legislation, the birthday of such a person is deemed to be 1 March. This is consistent with the interpretation given to section 9 of the Family Law Reform Act 1969, in the light of the English common law rule that it is necessary to complete 366 days in order to cover a year which includes a leap day.[1]

5.140 We do not know whether computation of the age of a person born on 29 February gives rise to difficulties in practice. If it does, either 28 February or 1 March could be chosen as the anniversary in a non-leap year. In view of the desirability of achieving consistency within the United Kingdom on this matter, particularly for the application of UK statutes, our slight preference would be for 1 March. We do not, however, express a concluded opinion, but invite views on whether provision

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[1] R v. Worminghall (Inhabitants) (1817) 6 M.& S. 350.

should be made to determine, in a non-leap year, the anniversary of the day of birth of a person born on 29 February and, if so, whether the anniversary should be 28 February or 1 March.

Guarantees of contracts entered into by young people

5.141 Under the present law, a guarantee of a contract which is void or voidable on account of a pupil or minor's incapacity is valid and fully enforceable against the cautioner who is presumed to know the debtor's condition.[1] We believe that this principle should continue to apply, however the law on legal capacity of young people is reformed. It does not conflict with the aim of protecting a young person from the consequences of his inexperience and we imagine that it accords with the parties' expectations. The participation of a cautioner may be required by the adult party, simply because of the young person's lack of capacity and it would be absurd if the guarantee were to be of no effect for the same reason. We therefore propose no change in the law in this area.

Capacity to act as witness to a deed

5.142 Under the present law, a person may witness the signing of a legal document when he or she has attained

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[1] Stevenson v. Adair (1870) 10 M. 919; Erskine, Institute, III.3.64.

ıe age of 14.[1] Although there may well be a case for linking the age of capacity to act as witness to the age of capacity in private law matters generally, we prefer not to make any proposals for reform in this Consultative Memorandum. The question will instead be considered in our future work on execution and authentication of deeds.[2]

Other statutory age limits to be unaffected by our proposals

5.143 In addition to the common law age bands of pupillarity and minority, there are numerous age limits imposed by statute for particular purposes. Some lay down the age at which a person is entitled to engage in certain activities or acquires certain rights.[3] Others determine whether certain conduct can amount to a criminal offence or whether a person is the potential victim of an

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[1] Davidson v. Charters (1738) Mor. 16899 (capacity for male minors at common law); Titles to Land Consolidation (Scotland) Act 1869, s.139 (capacity for females aged 14 and over).

[2] See our Nineteenth Annual Report (Scot. Law Com. No. 89) (1984) para. 3.23.

[3] E.g. Road Traffic Act 1972, s.4(1) (minimum age of 17 for driving motor car or agricultural vehicle); Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, S.1(1) (minimum age of 18 for service on jury); British Nationality Act 1981, ss.6 and 50(11)(a) (minimum age of 18 for application for naturalisation as a British citizen); Local Government (Scotland) Act 1973, s.29(1), (minimum age of 21 for candidature and membership of local authority).

offence.[1] We do not propose to consider any of these age limits in the context of reform of the law on the legal capacity of young people. Many of these statutory provisions deal with matters of public law and raise policy issues different from those with which we are presently concerned. Many apply to the United Kingdom as a whole and it would be inappropriate to amend them for Scotland only. Although we believe that a multiplicity of age distinctions should be avoided as far as possible, it is outwith the scope of this exercise to examine whether there might be room for rationalisation and simplification in other areas. In particular we do not propose any amendment to the age of majority in Scotland. All we are concerned with here is a person's capacity in the field of private law, to act on his own account in his personal affairs. The fact that, under our proposals, 16 would supersede the age of 18 as the dividing line between capacity and incapacity in this area does not necessarily provide any justification for

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[1] E.g. Civic Government (Scotland) Act 1982, s.50(2) (offence to be drunk in a public place while in charge of a child under 10); Firearms Act 1968, s.24(4) (offence to make a gift of an air weapon or ammunition for an air weapon to a person under 14); Tattooing of Minors Act 1969, s.1 (offence to tattoo a person under 18); Betting, Gaming and Licensing Act 1963, s.10(1) and Sched. 4, para. 2 (offence to admit a person under 18 to betting office premises).

abandoning the age of 18 as an age of legal significance in other matters.[1] The idea that a person can acquire a large measure of civil capacity while still under the general age of majority is, after all, not a new one in Scots law where minors (particularly those without curators) have always been in this position.

Implications of our proposals for the law of guardianship

5.144 We have already indicated that our proposals to introduce a single tier of incapacity for persons under 16 would pave the way for reform and simplification of the law of guardianship. Such reform would be required under either our preferred or second option. In summary, it would involve replacement of tutors and curators with one category of guardian. His role would be similar to that of a tutor under the present law, in that he would act for the child generally, except in those areas specified as exceptions to the rule of incapacity. As a consequence, all the statutory and common law rules dealing with tutory and curatory (some of which are archaic)[2] would be examined with a view to their amendment or possible replacement with modernised provisions in the form of a comprehensive code dealing with guardianship of persons under 16.

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[1] For example, the age of majority is particularly important in the civic field, entitling a young person to vote, act as a juror and become a naturalised British citizen: see footnote to previous para.

[2] See e.g. the Tutors Act 1474, the Tutors and Curators Act 1672, the Tutors and Curators Act 1696.

5.145 We intend to examine this area of the law in the next consultative memorandum to be issued as part of our exercise on the law of children.[1] Clearly we are not at this stage committed to any particular course of action. Pending the results of consultation on the present Memorandum, no firm proposals can be made. Nevertheless, when commenting on our proposals for reform of the law on the legal capacity of young people, consultees are invited to bear in mind the consequences which those proposals would have for the law of guardianship.

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[1] See para. 1.2 above. In addition to considering the possibility of a major restructuring of the law of guardianship, we will be reviewing, more generally, the functions and powers of a guardian, inter alia: the extent of his powers in relation to the child's person; his liability for management of the child's estate; whether his actings should be binding, thus leaving the child to seek his remedy under trust law, or whether they should be open to reduction if shown to be prejudicial. Whatever the outcome of consultation on the present Memorandum, we believe that, having analysed the state of the existing law of guardianship, we will be likely to identify a need for reform on issues such as these.

PART VI - DELICTUAL CAPACITY OF MINORS AND PUPILS

The present law

6.1 There is no fixed minimum age for delictual liability in Scotland.[1] Both minors and pupils are legally capable of being liable for their wrongful acts, the only question being whether the requisite intention or negligence on their 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 delicts, little direct authority exists as to the liability of young children for primary negligence.[3] This is presumably because they rarely have sufficient financial resources to make claims against them worthwhile. Guidance may, however, be drawn from contributory negligence cases, in

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[1] See Walker, The Law of Delict in Scotland (2nd edn. 1981) (referred to as "Walker",) pp. 86-87; cf. Somerville v. Hamilton (1541) Mor. 8905.

[2] Walker, pp.86-87.

[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) and Tillander v. Gosselin (1966) 60 D.L.R. (2d) 18 (Ontario).

which children have been held capable of negligence in failing to look after their own safety from the age of about five onwards.[1] Again it is a question of fact in each case whether the child has the requisite mental capacity to appreciate the risk involved in his conduct.[2] At one time the attitude of the courts may have been to require children to conform to the adult standard of care.[3] However it is now firmly settled in relation to ontributory negligence that they need show only the degree of care to be expected from a child of the same age, intelligence and experience in the circumstances,[4] and it is thought that the same standard would apply if a child were sued directly.[5]

6.2 Parents do not incur any automatic vicarious liability for the delicts of their children. However if the parent instructed or otherwise authorised the

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[1] See, e.g., McKinnell v. White 1971 S.L.T. (Notes) 61; Banner's Tutor v. Kennedy's Trustees 1978 S.L.T. (Notes) 83.

[2] 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.

[3] See Grant v. Caledonian Railway Co, (1870) 9 M. 258.

[4] Frasers v. Edinburgh Street Tramways Co. (1882) 10 R. 264 per Lord Fraser at p.269; Campbell v. Ord & Maddison, supra; Cass v. Edinburgh and District Tramways Co. Ltd. 1909 S.C. 1068 Plantza v. Corporation of Glasgow 1910 S.C. 786. A plea of contributory negligence has been successful, for example, against a child aged 5 who ran blindly across the road (Banner's Tutor v. Kennedy's Trustees 1978 S.L.T. (Notes) 83 and against a child aged 5½ who fell through a gap in the stair railing of a common stair (Shillinglaw v. J.G. & R Turner 1925 S.C. 807).

[5] Walker, p.202; cf. McHale v. Watson, supra.

child's action, he may be vicariously liable on principles of agency.[1] He will be similarly liable if the child was acting as his employee.[2] The parent will incur personal liability for his own negligence if this caused or contributed to the child's delict, for example, if he failed to supervise the child properly,[3] or to give him adequate instructions,[4] or if he placed the child in dangerous circumstances.[5]

Assessment of the present law and possible alternative approaches

6.3 (a) Liability of the child. The law in this area must take account of two competing interests: that of the child in being held only to a standard of care which he can reasonably be expected to understand and fulfil; and that of the injured party in being compensated for the harm which he has suffered. The present law seems to us to achieve a fairly satisfactory balance between the two. On the one hand, the child is not expected to behave as

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[1] Walker, p.86.

[2] Ibid.

[3] E.g. Hastie v. Magistrates of Edinburgh 1907 S.C. 1102; Hardie v. Sneddon 1917 S.C. 1.

[4] Cf. Muir v. Wood and Anr. 1970 S.L.T. (Notes) 12; Gorely v. Codd /1966/ 3 All E.R. 891.

[5] E.g. Lumsden v. Russel (1856) 18 D. 468.

an adult would in similar circumstances. On the other hand, the injured party is not automatically deprived of a remedy simply because the harm to him was caused by a child.[1] The child will be liable if he has failed to show the care reasonably to be expected from someone of his age, intelligence and experience. Thus third parties coming into contact with children are justified in assuming that they will conform to the standards of behaviour usual for their age group.[2] As the child gets older, a higher standard of care will be expected of him.[3] A further argument in favour of the present law is its flexibility: not only the age of the child but also the nature of the allegedly negligent act may be taken into account in determining whether the child should be held liable for the harm he has caused.[4]

6.4 The main alternative to the general approach taken

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[1] The possible hardship caused to the injured party where the child is not liable or where he has insufficient funds to settle an award of damages against him is discussed separately at paras. 6.5-6.11 below.

[2] Although, by including a reference to the more subjective qualities of intelligence and experience, the standard of care required does seem to make some allowance for the individual child whose conduct is in question.

[3] E.g. Gorely v. Codd /1966/ 2 All E.R. 891; Buckpitt v. Oates / 1968/ 1 All E.R. 1145.

[4] E.g. McHale v. Watson, supra at p.215; Yachuk v. Oliver Blais Co /1949/ A.C. 386.

by Scots law at present would be to have a fixed minimum age of liability. Such age limits exist in some European countries.[1] A minimum age limit applies in Scotland in relation to criminal liability: thus no child under the

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[1] E.g. East Germany 6 years: West Germany 7 years: Greece 10 years. Thereafter a minor up to the age of 18 (14 in Greece) will be liable unless he was unable to appreciate the wrongful nature of his act: East Germany C.C. art. 348; West Germany B.G.B. art. 828; Greece C.C. arts. 916-7. Some countries provide complete immunity from liability up to a certain age with no intermediate rule for older minors: e.g. Poland 13 years (C.C. art. 426). However, other European legal systems base immunity from liability not on a precise age limit but on an absence of discretion or lack of discernment which will be determined as a matter of fact in each case. This type of rule is found in France (C.C. arts. 1310, 1382-4), Switzerland (C.C.art. 16, 19 para.3) and Austria (C.C. art. 1308). See also Black,"The tort liability of children under the laws of England and France" (1973) 6 Comparative and International Law Journal of Southern Africa 365. In common law countries, on the other hand, there is no fixed age below which children are immune from liability. In Canada and the United States, for example, the general rule is that children of "tender age" are not liable in tort and it is thought that this immunity applies generally to children under 4 or 5. The test applied there is whether the child exercised the care expected from a child of like age, intelligence and experience. Where, however, the child engages in adult activities, he may be judged by the adult standard of care. In England and other common law countries, a minor may not be liable where the tort is connected with a contract which is unenforceable against him if the effect of suing the minor would be to enforce the contract indirectly. For Canada, see Linden, Canadian Tort Law (3rd edn. 1982)pp. 122-7; for United States, see Restatement, Second, Torts s.283A and Prosser, Torts (4th edn. 1971) p.997; for England see Salmond and Heuston on Torts (18th edn. 1981) pp.407-10.

age of 8 is legally capable of committing a crime.[1] If such a rule were introduced in relation to liability in delict, it would be clear and easy to apply. It would save the court the difficult task of determining the degree of care to be expected from a very young child. However, several objections can be made to the idea of a fixed minimum age. First, not only can children of the same age vary in experience and ability, but there is also considerable variation in the type of act by which they may cause harm to others. There would thus be great difficulty in deciding where to draw the line below which children would be completely immune from delictual liability. Second, the policy considerations which underlie the minimum age limit for criminal responsibility are not the same as those which apply in delict. In the former case, the public interest in the prevention and punishment of socially harmful acts is subordinated to the private interest of a very young child in not being found guilty of a criminal offence. In delict, on the other hand, the child has not offended against society in general, but has caused harm to another individual. The private interest of the injured party in being compensated for that harm also demands attention. If the child is old enough and mature enough to appreciate the nature of his act and the risks involved in it, there is no reason why he should not be held responsible for harm which he has caused either intentionally or negligently. A fixed minimum age of delictual liability would in all cases prevent the injured

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[1]Criminal Procedure (Scotland) Act, ss. 170 and 369.

party from recovering if the child was below the relevant age. In our opinion, it would be undesirable to have such an arbitrary limitation on liability and our provisional view is therefore that the law on the delictual liability of children should remain unchanged.

6.5 (b) Equitable compensation in the absence of liability. One criticism which may be levelled at the present law is that it may cause hardship to people who suffer loss or injury as a result of the actings of a child who is too young to be held responsible for his wrongdoing. Some legal systems meet this problem by imposing on the child an equitable duty to compensate notwithstanding that he has no delictual liability for the harm caused.[1] Such a rule could be introduced into Scots law[2] but it would, in our view, be of little practical utility. Very few children have significant financial resources of their own to make such a rule worthwhile. Moreover, it seems to us to be an unprincipled solution to require a child to make compensation in respect of harm for which he is not legally responsible. The

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[1] In West Germany, for example, where a child is not responsible for damage caused by him and no compensation can be obtained from a third party charged with the duty of supervision, the child may nevertheless have to make compensation to the injured party if this is required on grounds of equity, having particular regard to the financial position of the parties: B.G.B. art. 829. A similar rule exists in Switzerland: Code des Obligations, art. 54(1).

[2] See Smith, "The Age of Innocence" (1975) 49 Tulane L.R. 311 at pp. 319-320.

obligation to compensate would depend not on general rules of liability in delict but on extraneous factors such as the relative financial position of the parties, whether adequate compensation was available from another source and so on. In the light of these considerations, our provisional view is against the introduction of such a rule into Scots law.

6.6 (c) Liability of the parents. We have already identified one possible criticism of the present law, namely, that a person injured as a result of a child's conduct may be deprived of a remedy because the child is too young to be held responsible for his act. A further criticism is that even if the child is found liable he may have insufficient funds to settle an award of damages made against him. This may be regarded as an acceptable and unavoidable risk. Indeed an injured party may find himself in the same position as regards a claim against an adult wrongdoer. On the other hand, it might be possible to meet both this and the earlier criticism by extending the liability of parents for the delictual conduct of their children. Representations have been made to us on this matter and although it falls outwith the general subject-matter of this Memorandum, we think it appropriate that this proposal be considered and views invited upon it.

6.7 We have seen[1] that under the present law a parent may be liable only if he authorised the child's action or if he was personally at fault, for example, in failure to supervise the child properly. It would, however, be possible to impose some form of automatic liability on parents in respect of delicts committed by their children. Support for this type of approach is to be found in a number of legal systems[2], although it is not without its difficulties.

6.8 The first problem would be in defining the class of parent to be held liable. A blanket imposition of liability on all parents, whether or not they had any contact with their children, would clearly be inappropriate. A more reasonable approach would be to confine liability to parents with care and control of the child. By this we

[1] At para. 6.2 above.

[2] In West Germany, for example, there is a rebuttable presumption of fault in supervision against the person charged with the duty of looking after the child who has committed the wrongful act: B.G.B. art. 832. In France parents, to the extent that they exercise the right of guardianship, are jointly liable for the damage caused by their minor children residing with them: C.C. art. 1384 para. 4. The common law approach bases parental liability on proof of fault, but in many American states vicarious liability is imposed on parents or guardians for the malicious, wilful or intentional acts of their unemancipated children which cause damage to property: see under heading "Infants" in Martindale - Hubbell Law Directory, (1979) Vol. VII (State Law Digests). In some, eg. Illinois, liability is restricted to damage caused by a minor aged over 11. In Pennsylvania, however, a parent is liable for virtually all injuries caused by a child under 18: Pa. Stat. Ann. tit. 11s. 2001-2005 (Purdon's Supp. 1974-1975).

mean the factual care and control which would generally be exercised by both parents living together. If there was a custody order in favour of one parent that would usually, but not necessarily,[1] mean that he or she had care and control of the child. If both parents had care and control at the relevant time their liability would be joint and several.

6.9 This general formula still leaves a number of policy issues to be resolved. For example, what should be the legal position if the harm was caused while the child was in the case of a babysitter or was living temporarily with a relative? Should liability be imposed on parents only if they have physical care and control at the precise time when the harm is caused? Should liability be confined to harm caused by the child's intentional wrongdoing or should it also cover harm resulting from his negligence? Should the parent's liability be limited to a specified sum in respect of each delict or should there be an overall maximum liability?[2] At what age should a child cease to transfer delictual liability to

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[1] See e.g. Robertson v. Robertson 1981 S.L.T. (Notes) 7 (custody to father, care and control to mother).

[2] Financial limitations on liability are common in the U.S. statutes imposing vicarious liability: see under heading "Infants" in Martindale - Hubbell Law Directory (1979) Vol. VII (State Law Digests).

his parents?[1]

6.10 Other more fundamental questions concern the legal basis of this liability, whether it should be characterised as a form of vicarious or strict liability. It would be more limited if it were treated as a form of vicarious liability, analogous to the liability of an employer for delicts committed by an employee in the course of his employment, since in Scots law vicarious liability depends on the personal liability of the wrongdoer himself.[2] Thus in the absence of fault on the part of the child, which might be excluded on account of his age, the parent would be under no obligation to make reparation. If it is thought that there is a defect in this area of law which requires to be remedied, this is perhaps not the most appropriate solution. The other option would be to impose liability on parents for any harm caused by the child, irrespective of whether or not the child was also liable to the injured party. At one extreme, this could take the form of an absolute liability to which there could be no defences, thus equating parents with insurers of the child's conduct. Alternatively, liability could be based

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[1] In most countries where such a rule exists, the child involves his parents in liability up to the age of majority, or, possibly, as in France, up to the age of his earlier emancipation. Less frequently, parental liability ceases generally before majority: e.g. at age 13 in Poland (C.C. arts. 426-7).

[2] Baxter v. Colvilles Ltd. 1959 S.L.T. 325.

on a presumption of fault which would be rebuttable by proof that the parent had exercised all reasonable supervision over the child. This type of solution is common in continental legal systems. In France, for example, the child's parents will avoid liability if they can show that they fulfilled their duties of care and supervision and could not have prevented the harm.[1] It is arguable that such a rule covers few cases which would not come within the present Scottish rule whereby parents, and indeed anyone in charge of a child,[2] may be sued for their own negligence if their failure to exercise proper control led to the child's delict. However, fault may be difficult to establish under the present rule whereas, under a rule of automatic liability, the onus would be shifted on to the parent to prove the contrary. Lack of fault might be equally hard to establish[3] thus giving rise to more findings of liability against the parents than is presently possible.

6.11 Although we can appreciate the attractions of a rule of automatic liability from the standpoint of the injured

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[1] C.C. art. 1384 para. 7. A similar rule operates in West Germany: B.G.B. art. 832.

[2] Cf. Carmarthenshire County Council v. Lewis /1955/ A.C. 549 where the duty of a teacher was described, at p.561, as being that of a careful parent.

[3] This would be particularly so if, as in France, the presumption of fault was held to apply to both supervision and upbringing of the child: Cass. civ. 12 Oct. 1955, D.S. 1956, 301, note Rodiere.

party, we do have some reservations about it. We have already drawn attention to some of the difficult policy issues which such a reform would entail. Our more general concern, however, is whether it is reasonable to expect parents to indemnify a third party against harm caused by a child. The analogy with the vicarious liability of an employer is inappropriate. Its underlying philosophy, which is, broadly speaking, to transfer the burden of inevitable losses on to those best able to bear them, is inapplicable in this context. A parent may have few resources to meet any claim arising out of his child's wrongdoing and to compel him to insure against all damage caused by his child seems excessive. Moreover, the imposition of liability on parents without proof of fault would create other anomalies - for example, where the child is in local authority care or in the care of a relative or appointed guardian or in the actual care and control of a school. There seems to us to be a strong argument in favour of extending such liability to any person in loco parentis who has care and control of the child.[1]

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[1] In Switzerland, for example, the head of the family (i.e. exercising domestic authority over persons living in a common household) is answerable for damage caused by minors placed under his authority: C.C. art. 333. The West German rule imposes liability on a person who is obliged by law to exercise supervision over a minor or who undertakes the supervision by contract: B.G.B. art. 832. This includes private, but not state teachers. Italian law imposes liability on guardians, trustees and teachers, as well as on parents: C.C. art. 2048.

6.12 To enable us to form a concluded opinion on this difficult issue, we should be grateful for a response to the following invitation for views:

(a) Should liability without proof of fault be imposed on parents for delicts committed by a child in their care and control?

(b) If so, should it be

(i) vicarious liability dependent on the personal liability of the child himself; or

(ii) strict liability, irrespective of whether or not the child is also liable?

(c) Should parents be able to avoid liability by proof that they had exercised proper control of the child?

(d) Should such liability be extended to other parties with care and control of the child and, if so, to whom?

(e) Any other comments?

PART VII - SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

In this Part, comments are invited on our general conclusions regarding reform of the law on the legal capacity of young people; on our preferred and second options for reform and on any other option which consultees may wish to put forward; and on our provisional conclusions and questions about the delictual liability of young people. It would be helpful to receive comments on the various aspects of both our preferred and second options, whether or not consultees agree with the general proposition on which each is based. In order to facilitate comparison between the present law and the law as it would be if either our preferred or second option were implemented, we include at Appendix A a table setting out the principal existing rules on the legal capacity of young people and the corresponding rules under each of our two options.

Consultees' attention is drawn to the notice at the front of the Memorandum concerning confidentiality of comments. If no request for confidentiality is made, we will assume that comments submitted in response to this Memorandum may be referred to or attributed in our subsequent report.

General conclusions

1. The law of Scotland on the legal capacity of minors and pupils is in need of major reform. (para. 3.24)

2. Reform of the law 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 and qualifications. (para. 5.5)

3. The present ages of minority (12 for girls and 14 for boys) are inappropriate. At the very least, there should be the same age, or ages, of legal capacity for boys and girls. (para. 5.6)

Our preferred option

4. The present two-tier law on the legal capacity of pupils and minors, with its divisions at the ages of 12 or 14 and 18, should be replaced by a single tier system based on the age of 16. Above that age, a person should have full legal capacity in private law matters without any special protections beyond those afforded by the general law applying to all persons. (para. 5.15)

5. The general rule affecting those below the age of 16 should be one of legal incapacity. (para. 5.25)

6. (a) Do you agree that there should be an exception to the rule of incapacity for persons under 16 for transactions commonly entered into by a child of the transacting child's age, or would a different formulation of a general exception along these lines be more appropriate?

(b) In formulating the exception referred to in paragraph (a) above, should reference be made to the actual or apparent age of the child in question?

(c) If an exception of the above type were introduced, would there be any need for further exceptions for the purchase of necessaries, for contracts of employment or for trading contracts?

(d) Views are invited whether or not a person under 16 should have capacity to make a will and, if so, whether it should be subject to any of the limitations canvassed at para. 5.44 above.

(e) Our preferred option should apply to consent to surgical, medical or dental treatment so that, subject to the exception referred to in paragraph (f) below, 16 would become the legal age of consent to such treatment in Scotland.

(f) Views are invited on which of the following proposals should be adopted as an exception to the general rule on consent to medical treatment:

(i) the exception for ordinary transactions outlined in paragraph (a) above could be modified so as to enable treatment to be given on the basis of the consent of a person under 16 where it is in accordance with approved medical practice to act on the basis of such consent;

(ii) a person under 16 could be entitled to consent to treatment for specified illnesses or conditions;

(iii) treatment could be given on the basis of the consent of a person under 16 where he is capable of understanding the nature and

consequences of the treatment proposed;

(iv) provision could be made corresponding to the Canadian Uniform Medical Consent of Minors Act outlined at para. 5.51 above, entitling a person below the age of 16 to consent to treatment in the circumstances outlined at para. 5.51(b) above, enabling emergency treatment to be given to such a person without consent and empowering the court to dispense with parental consent to treatment on a person below the age of 16 where consent is refused or otherwise unobtainable;

(v) any other proposal which consultees might prefer.

(g) Views are invited whether, in addition to an express saving for enactments to the contrary, any further exceptions should be made to the general rule of incapacity for persons under 16. (para. 5.58)

7. (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, except possibly in relation to the making of a will, with the consent of a court. (para. 5.62)

8. (a) Do you agree with our provisional view that any transaction entered into by a person under 16, other than one coming within one of the specified

exceptions, should be void?

(b) Should this rule be qualified to the effect that where a person under 16 has fraudulently misrepresented his age, thereby inducing another person to transact with him, the resulting transaction should, at the option of that other person, be binding on both parties?

(c) If the rule of invalidity of the transaction were qualified to take account of the young person's fraudulent misrepresentation of age, should it be provided that a false declaration of age by a person under 16 in a standard form contract prepared by the other contracting party is not, of itself, to be deemed a fraudulent misrepresentation?

(d) Should the rule of invalidity of the transaction be qualified to the effect that no transaction entered into by a person under 16 should be challengeable as void in so far as a bona fide third party has acquired rights for value which depend on its validity, or should the question of protection of third party rights be determined by the general law?

(e) Do you agree with our provisional view that the rights of parties to a transaction which is void on the ground of minority should be determined according to common law principles of unjust enrichment but that the court should be empowered to modify the obligation of the person under 16 to

make restitution or recompense in any way considered equitable in the circumstances of the case?

(f) Do you agree with our provisional view that any obligation purportedly undertaken by a person under 16 may be adopted as binding on or after his attaining that age, by any means effective under the existing law? (para. 5.101)

9. (a) A person under 16 should not have capacity to litigate but, in cases where he has no guardian or his guardian has disappeared or where his guardian refuses to act or it would be inappropriate for the guardian to act, he should be entitled to raise an action or intimate a defence, subject to appointment by the court of a curator ad litem to act on his behalf.

(b) 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.

(c) A person aged 16 or over should have full capacity to litigate.

(d) The present rule whereby a minor must consent to his own adoption should be amended to apply only to 16 and 17 year olds.

(e) Section 1 of the Trusts (Scotland) Act 1961 should be amended so as to:

(i) restrict the court's power to approve an arrangement for variation of trust purposes on behalf of minor beneficiaries to approval on behalf of beneficiaries under 16;

(ii) require the court, in giving such approval, to take such account of the beneficiary's attitude as it thinks appropriate; and

(iii) make it clear that an arrangement for variation of trust purposes is not reducible on grounds corresponding to minority and lesion. (para. 5.133)

Our second option

10. If our preferred option, that is, a one-tier system based on the age of 16 with no special protection afforded by the law to young people over that age, were to turn out not to be acceptable, would you favour our second option that there should be a two-tier system, comprising age bands of 0-16 years and 16-18 years with the upper age group enjoying only limited protection? (para. 5.23)

11. Do you agree with our provisional conclusion that, under our second option, the general rule should be one of incapacity for those under 16 and one of capacity for those between the ages of 16 and 18? (para. 5.27)

12. (a) Do you agree that, under our second option as under our preferred option, there should be an exception to the rule of incapacity for persons

under 16 for transactions commonly entered into by a child of the transacting child's age, or would a different formulation of a general exception along these lines be more appropriate?

(b) If an exception of the above type were introduced, would there be any need for further exceptions for the purchase of necessaries, for contracts of employment or for trading contracts?

(c) Views are invited whether or not a person under 16 should have capacity to make a will and, if so, whether it should be subject to any of the limitations canvassed at para. 5.44 above.

(d) Subject to the exception referred to at paragraph (e) below, 16 should become the legal age of consent to surgical, medical or dental treatment.

(e) Views are invited on which of the following proposals should be adopted as an exception to the general rule on consent to medical treatment:

(i) the exception for ordinary transactions outlined in paragraph (a) above could be modified so as to enable treatment to be given on the basis of the consent of a person under 16 where it is in accordance with approved medical practice to act on the basis of such consent;

(ii) a person under 16 could be entitled to consent to treatment for specified illnesses or conditions;

(iii) treatment could be given on the basis of the consent of a person under 16 where he is capable of understanding the nature and consequences of the treatment proposed.

(iv) provision could be made corresponding to the Canadian Uniform Medical Consent of Minors Act outlined at para. 5.51 above, entitling a person under 16 to consent to treatment in the circumstances outlined at para. 5.51(b) above, enabling emergency treatment to be given to such a person without consent and empowering the court to dispense with parental consent to treatment on a person under 16 where consent is refused or otherwise unobtainable;

(v) any other proposal which consultees might prefer.

(f) Views are invited whether, in addition to an express saving for enactments to the contrary, any further exceptions should be made to the general rule of incapacity for persons under 16. (para. 5.63)

13. (a) The doctrine of forisfamiliation should be abolished.

(b) As under our preferred option, 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, except

possibly in relation to the making of a will, with consent of a court. (para. 5.68)

14. (a) Do you agree that, subject to the qualifications mentioned at paragraphs (b) and (c) below, our provisional conclusions on the consequences of the rule of incapacity under our preferred option (proposal no. 8) are equally applicable to the rule of incapacity affecting persons under 16 under our second option?

(b) Adoption by a person aged 18 or over of a void transaction entered into while under 16 should have the effect of making the transaction binding on him: adoption by a person aged 16 or 17 of such a transaction should render it voidable at his instance on grounds corresponding to minority and lesion.

(c) If the rule of incapacity were to be qualified to take account of fraudulent misrepresentation of age by a person under 16, the effect of the misrepresentation, in the case of a person holding himself out to be 18 or over, should be to render the transaction binding upon him: in the case of a person holding himself out to be 16 or 17, the effect should be to make the transaction voidable at his instance on grounds corresponding to minority and lesion. (para. 5.103)

15. (a) Subject to the qualifications referred to below, should a person be entitled to reduce a trans-

action entered into while he was 16 or 17 if:

(i) it had caused him substantial prejudice;

(ii) 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

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

(b) The right of reduction should be excluded in respect of transactions ordinarily entered into by a person of the age of the young person in question.

(c)(i) The right of reduction should be excluded where a person aged 16 or 17 has fraudulently misrepresented his age, thereby inducing another person to transact with him.

(ii) Should it be provided that a false declaration of age by a person aged 16 or 17 in a standard form contract prepared by the other contracting party is not, of itself, to be deemed a fraudulent misrepresentation?

(d) The right of reduction should be excluded by any actings or events taking place after the young person in question reaches the age of 18 which amount to homologation, rei interventus or other form of personal bar.

(e) The right of reduction should be excluded in so far as it affects rights acquired for value by bona fide third parties which depend on the validity of the original transaction entered into by the 16 or 17 year old.

(f) Should the right of reduction be excluded in respect of transactions entered into by a 16 or 17 year old with the consent of his parent or guardian provided that the parent or guardian does not have an interest therein?

(g) Should a procedure for judicial ratification of transactions entered into by a 16 or 17 year old be introduced in order to preclude reduction?

(h) The right of reduction should subsist from the time the transaction is entered into until the young person concerned attains the age of 21.

(i) On reduction of a transaction entered into by a 16 or 17 year old on the grounds of substantial prejudice, the rights of the parties should be determined according to common law principles of unjust enrichment, but the court should be empowered to modify the obligation of the 16 or 17 year old to make restitution or recompense in any way considered equitable in the circumstances of the case. (para. 5.124)

16. (a) A person under 16 should not have capacity to litigate but, in cases where he has no guardian

or his guardian has disappeared or where his guardian refuses to act or it would be inappropriate for the guardian to act, he should be entitled to raise an action or intimate a defence, subject to appointment by the court of a curator ad litem to act on his behalf.

(b) 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.

(c) A person aged 16 or over should have capacity to litigate.

(d) The present rule whereby a minor must consent to his own adoption should be amended to apply only to 16 and 17 year olds.

(e) (i) Should the court continue to have power under this option to approve arrangements for variation of trust purposes on behalf of beneficiaries under 18 or should the power be restricted to approval on behalf of beneficiaries under 16?

(ii) If the court's power of approval were to be so restricted, any approval by a 16 or 17 year old beneficiary to an arrangement for variation should not be open to reduction at his instance on the ground of substantial prejudice.

(iii) Section 1 of the Trusts (Scotland) Act 1961 should be amended so as to require the court, in approving an arrangement for variation on behalf of a beneficiary, whether under 16 or under 18 in terms of sub-paragraph (i) above, to take such account of the beneficiary's attitude as it thinks appropriate. (para. 5.136)

Other options

17. If neither our preferred or second option were to be acceptable, what other age system would be appropriate - for example, a one-tier system with a different age specified for full legal capacity, a revised two-tier system with divisions at the ages of, say, 14 and 18, or a three or four band age system? (para. 5.23)

18. What should be the content of the general rule under any other option favoured by consultees? (para. 5.27)

19. What exceptions and qualifications would be appropriate under any system, other than our preferred or second option, which is favoured by consultees? (para. 5.70)

20. (a) If emancipation (otherwise than by marriage) were to be retained as part of the law on the legal capacity of young people, should such emancipation be effected by -

(i) judicial decree

(ii) declaration by parents or guardians

(iii) a combination of (i) and (ii), or

(iv) some other procedure?

(b) Should the form of emancipation favoured by consultees have the effect of empowering the young person -

(i) to act on his own behalf without affecting his right to reduce his transactions, or

(ii) to act on his own behalf as if he were of full legal capacity? (para. 5.78)

21. What should be the consequences of the general rule under any other option favoured by consultees? For example, should transactions entered into by a young person be void or voidable? If voidable, what should be the ground of reduction? In what circumstances should reduction be excluded? (para. 5.125)

22. What should be the rules governing capacity to litigate under any other option favoured by consultees? (para. 5.137)

Attainment of age

23. A person should attain a particular age at the beginning of the anniversary of the day of his birth. (para. 5.138)

24. Should provision be made to determine, in a non-leap year, the anniversary of the day of birth of a person born on 29 February and, if so, should the anniversary be 28 February or 1 March? (para. 5.140)

Liability in delict

25. The law on the delictual liability of children should remain unchanged. (para. 6.4)

26. Do you agree with our provisional view that there should be no rule of equitable compensation in the absence of liability for the harm caused? (para. 6.5)

27. (a) Should liability without proof of fault be imposed on parents for delicts committed by a child in their care and control?

(b) If so, should it be
(i) vicarious liability dependent on the personal liability of the child himself; or
(ii) strict liability, irrespective of whether or not the child is also liable?

(c) Should parents be able to avoid liability by proof that they had exercised proper control of the child?

(d) Should such liability be extended to other parties with care and control of the child and, if so, to whom?

(e) Any other comments? (para. 6.12)

COMPARATIVE TABLE

	Present Law	Preferred Option	Second Option
General rule concerning legal capacity of young people	Pupils (girls under 12, boys under 14) have no capacity to act on their own behalf. All transactions must be entered into by their tutors. Minors (girls aged 12-18, boys aged 14-18) who do not have a curator may enter into valid transactions subject to a right of reduction (see consequences of the general rule below). Minors with a curator have capacity to act, subject to a right of	Children under 16 would have no capacity to act on their own behalf. All transactions should be entered into by their guardian. Full legal capacity would be conferred at 16.	Children under 16 would have no capacity to act on their own behalf. All transactions should be entered into by their guardian. Young people aged 16-18 would be able to enter into valid transactions subject to a right of reduction (see consequences of the general rule below). Full legal

	Present Law	Preferred Option	Second Option
	reduction, but most transactions require their curator's consent. Full legal capacity is conferred at 18.		capacity would be conferred at 18.
Legal emanci-pation	Forisfamiliated minors may contract validly on their own behalf subject to a right of reduction. Forisfamiliation takes place on the minor's commencing business for himself, setting up an independent home or on his	There would be no provision for any form of legal emancipation in order to advance the age at which young people could acquire capacity to enter into transactions.	There would be no provision for any form of legal emancipation in order to advance the age at which young people could acquire capacity to enter into transactions.

	Present Law	Preferred Option	Second Option
	marriage.		
Main exceptions to the general rule	Minors, whether with or without curators, are entitled to make a will, enter into trading contracts and contracts of employment and to consent to medical treatment. Both minors and pupils are liable to pay for the supply of necessaries.	Children under 16 would be entitled to enter into transactions /̄commonly/ reasonably/ entered into by a child of the transacting child's /̄actual/ apparent/ age. They might be entitled to make a will. As regards consent to medical treatment, there are four proposals for consideration: (a) children under	Children under 16 would be entitled to enter into transactions /̄commonly/reasonably/ entered into by a child of the transacting child's /̄actual/apparent/ age. They might be entitled to make a will. As regards consent to medical treatment, there are four proposals for consideration:

Present Law	Preferred Option	Second Option
	16 should be able to consent to medical treatment where it is in accordance with approved medical practice to act on the basis of such consent; (b) children under 16 should be entitled to consent to treatment for specified illnesses or conditions; (c) treatment should be given on the basis of the consent of a child under 16 where he is capable of understanding the nature and consequences of the	(a) children under 16 should be able to consent to medical treatment where it is in accordance with approved medical practice to act on the basis of such consent; (b) children under 16 should be entitled to consent to treatment for specified illnesses or conditions; (c) treatment should be given on the basis of the consent of a child under 16 where he is capable of

Present Law	Preferred Option	Second Option
	treatment proposed; or (d) comprehensive provision should be made as outlined at paragraph 5.51 of the Memorandum detailing the circumstances in which a child under 16 should be able to consent to medical treatment, enabling emergency treatment to be given without consent and empowering a court to dispense with parental consent where such consent is refused or is otherwise unobtainable.	understanding the nature and consequences of the treatment proposed; or (d) comprehensive provision should be made as outlined at paragraph 5.51 of the Memorandum detailing the circumstances in which a child under 16 should be able to consent to medical treatment, enabling emergency treatment to be given without consent and

	Present Law	Preferred Option	Second Option
			empowering a court to dispense with parental consent where such consent is refused or is otherwise unobtainable.
Consequences of the general rule	A transaction entered into by a pupil is void against him but may be enforceable by the pupil if it is to his benefit. If he takes the benefit he may also have to perform his obligation under the contract. The same principle applies to transactions entered into by a minor with	A transaction entered into by a child under 16 would be void and could not be enforced against either party.	A transaction entered into by a child under 16 would be void and could not be enforced against either party. A transaction entered into by a person aged 16-18 years would be voidable at his instance on the ground of sub-

	Present Law	Preferred Option	Second Option
	curators but without their consent. A transaction entered into by a minor without curators or by a minor with curators and acting with their consent is reducible on the ground of minority and lesion, within four years of the minor's attaining the age of 18.		stantial prejudice and could be reduced at any time until he attained the age of 21.
Circumstances excluding reduction or affecting in-	Minors' trading contracts and contracts for the supply of necessaries are not liable to reduction on the grounds of minority	Void transactions entered into by a child under 16 could be adopted by him on or after his attaining the age of 16.	Void transactions entered into by a child under 16 could be adopted by him on or after his attaining the

	Present Law	Preferred Option	Second Option
validity of the transaction.	and lesion. Reduction is also excluded where: (a) the minor has fraudulently misrepresented his age thereby inducing the other party to enter into the transaction; (b) a real right of property has been transferred to a third party, provided that he has acquired the property in good faith and for value and without notice of the defect in the title. (c) the transaction, other than a loan of money to a minor or pupil, has been	Possibly, a child under 16 would be bound by transactions which had been induced by his fraudulent misrepresentation of age. Possibly, a child under 16 would be bound by transactions in so far as a bona fide third party had acquired rights for value which depended on their validity.	age of 16. Adoption at age 16 or 17 would render the transaction voidable at his instance on the ground of substantial prejudice. Adoption at age 18 or over would make it binding on him. Possibly, a child under 16 would incur obligations under transactions induced by his fraudulent misrepresentation of age. The effect of the misrepresentation

Present Law	Preferred Option	Second Option
ratified by the young person after attaining the age of 18.		in the case of a child holding himself out to be 18 or over, would be to render the transaction binding on him: in the case of a child holding himself out to be 16 or 17, it would make the transaction voidable at his instance on the ground of substantial prejudice. Possibly, a child under 16 would be bound by transactions in so far

as a bona fide third party had acquired rights for value which depended on their validity.

Reduction of transactions entered into by a 16 or 17 year old would be excluded where:

(a) the transaction was one /commonly/ reasonably/ entered into by a person of the age of the young person in question;

(b) the 16 or 17 year old had

Present Law	Preferred Option	Second Option
		fraudulently misrepresented his age thereby inducing the other party to enter into the transaction; (c) a bona fide third party had acquired real rights for value which depended on the validity of the transaction; (d) there were any actings or events after the young person in question attained the age of 18 which amounted to

	Present Law	Preferred Option	Second Option
			homologation, rei interventus or other form of personal bar; and possibly where (e) the transaction had been entered into with the consent of the young person's parent or guardian or had been ratified by a court.
Effect of reduction or invalidity of the transaction: restitution	Each party is bound, on principles of unjust enrichment, to restore the other to the position he was in prior to the transaction. The obligation of	Each party would be bound, on principles of unjust enrichment, to restore the other to the position he had been in prior to the transaction. This obligation	Each party would be bound, on principles of unjust enrichment, to restore the other to the position he had been in prior to

Present Law	Preferred Option	Second Option
restitution is, however, relaxed in favour of the minor or pupil in that he is bound to restore the benefit received under the transaction only in so far as it is still in his possession.	would, however, be relaxed in favour of the child under 16 in that the court would be empowered to modify his obligation to make restitution or recompense in any way considered equitable in the circumstances of the case.	the transaction. This obligation would, however, be relaxed in favour of the child under 16 in that the court would be empowered to modify his obligation to make restitution or recompense in any way considered equitable in the circumstances of the case. The same relaxation would apply following reduction of a transaction entered into by a

	Present Law	Preferred Option	Second Option
			16 or 17 year old.
Capacity in litigation	Actions by or against a pupil must be raised or defended by his tutor. A minor may sue alone but his curator should consent to the proceedings. Where a minor is the defender to an action, his curator should also be called. A curator ad litem may be appointed to look after the interests of a pupil or minor in litigation, e.g. to act on behalf of a	Actions by or against a child under 16 should be raised or defended by his guardian. In cases where he had no guardian, or where it was inappropriate for the guardian to act, he would be entitled to raise an action or intimate a defence subject to appointment by the court of a curator ad litem to act on his behalf. Where he had a guardian, decree in favour of or against	Actions by or against a child under 16 should be raised or defended by his guardian. In cases where he had no guardian, or where it was inappropriate for the guardian to act, he would be entitled to raise an action or intimate a defence, subject to appointment by the court of a curator ad litem

Present Law	Preferred Option	Second Option
pupil where he has no tutor. Decree against a pupil or minor may, in some circumstances, be challenged on the ground of minority and lesion.	the child himself would be reducible on this ground. A young person over 16 would have full capacity to litigate.	to act on his behalf. Where he had a guardian decree in favour of or against the child himself would be reducible on this ground. A young person aged 16 or over would have full capacity to litigate. A decree against him would not be reducible on the ground of substantial prejudice.

APPENDIX B

Members of the Working Party on the Legal Capacity of Minors and Pupils

The Hon. Lord Kilbrandon, LL.D., Scottish Law Commission (Chairman)[1]

Mr Farquhar Gillanders, Assistant Registrar, University of Glasgow[2]

Miss Ethel Houston, Solicitor, Edinburgh

Professor T.B. Smith, Q.C., Scottish Law Commission[3]

Mr Kevin Sweeney, C.A., Solicitor, Glasgow, representing the Institute of Chartered Accountants of Scotland

Professor D.M. Walker, Q.C., University of Glasgow

Secretary: Miss M Stevenson, Scottish Law Commission.

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[1]Lord Kilbrandon, now the Rt Hon. Lord Kilbrandon, was Chairman of the Scottish Law Commission until September 1971.

[2]Mr Gillanders is now Registrar at Glasgow University.

[3]Professor Smith, now Professor Emeritus Sir Thomas Smith, retired from membership of the Scottish Law Commission in December 1980.