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Critiquing the Presence and Absence of Children and Young People's
Participation in Policies for Looked After Children in Scotland

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Ph.D. in Social Work

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Acknowledgements.....	8
Abstract.....	9
List of Abbreviations	10
List of Tables and Figures	11
Chapter 1: Introduction.....	12
1.1 Background and Context.....	12
1.2 Researcher’s introduction to topic	15
1.3 A childhood studies approach through discourse analysis and poststructuralism	16
1.4 Research aim and questions	17
1.5 Structure of thesis	17
1.6 Chapter Conclusion.....	18
Chapter 2: Literature review, theoretical framework, and policy underpinnings	19
2.1 Introduction.....	19
2.1.1 A comment on the structure of this chapter	19
2.2 Operationalising ‘Looked After’ Children.....	19
2.3 Operationalising participation and protection.....	20
2.3.1 Operationalising participation.....	20
2.3.2 Conceptualising care, child protection, child welfare and permanence.....	24
2.3.3 Review of Scottish-focussed research on children’s participation in the child care, protection and permanence system	26
2.3.4 Considering international research on children’s participation in child protection and wider child welfare decision-making	29
2.4 Power	31
2.4.1 Research on power and children’s participation	31
2.4.2 Perspectives of power	32
2.5 Vulnerability	33
2.5.1 Research on vulnerability and children’s participation	33
2.5.2 Vulnerability and risk	37
2.6 Review and gaps within the literature.....	38
2.7 The Scottish Child Protection and Permanence System	39
2.8 The Tripartite System Institutional Actors	41
2.8.1 Local Authorities	41
2.8.2 Children’s Hearings System	42
2.8.3 Judicial System	45
2.9 Overview of Care orders	46
2.9.1 Types of Placements and placement-specific participation literature.....	48
2.10 Policies underpinning the child protection and permanence system in Scotland	57

2.10.1 Social Work (Scotland) Act 1968	57
2.10.2 Children (Scotland) Act 1995	58
2.10.3 Adoption and Children (Scotland) Act 2007	58
2.10.4 Children’s Hearings (Scotland) Act 2011	59
2.10.5 Children and Young People (Scotland) Act 2014.....	60
2.10.6 Children (Scotland) Act 2020	61
2.10.7 Looked After Children (Scotland) Regulations 2009	61
2.11 Broader policy framework	62
2.11.1 GIRFEC	62
2.11.2 The Promise	63
2.11.3 National Guidance on Child Protection 2014 and 2021	63
2.12 Conclusion: research aim and questions	64
Chapter 3: Methodology, Data Management, Analysis and Ethics	65
3.1 Introduction.....	65
3.2 Ontological and epistemological perspectives.....	65
3.3 Research design: policy analysis	66
3.3.1 Selecting policy analysis.....	66
3.3.2 Previous research utilising policy analysis and Bacchi’s What’s the Problem Represented to be? (WPR) Approach.....	69
3.3.3 Selecting policies for analysis.....	73
3.4 Using the CELCIS map to situate children’s participation.....	83
3.4.1 Mapping the Scottish Child Protection and Permanence System Decisions	84
3.5 Data management.....	88
3.5.1 Analytical Procedures	89
3.6 Ethical Considerations	95
3.6.1 Researcher reflexivity and positionality	95
3.6.2 Conducting and amending research in a pandemic.....	96
3.6.3 Ethics in conducting policy research	97
3.6.4 Ethics in undertaking ‘sense-checking’ with professionals	97
3.7 Writing Procedures	99
3.8 Conclusion	99
Chapter 4: Initial Findings: Map of Participation in Scottish Child Protection and Permanence System Decision-Making.....	100
4.1 Introduction.....	100
4.2 How vulnerability and risk are represented within the policies.....	100
4.3 Presence and absence of children and young people’s participation across the system areas	103
4.3.1 Presence	103

4.3.2 Absence.....	104
4.4. Presence and absence of children and young people’s participation across the care orders.....	105
4.4.1 Presence	106
4.4.2 Absence.....	107
4.5 Presence and absence of children and young people’s participation across placement types	108
4.5.1 Presence	108
4.5.2 Absence.....	109
4.6 Conclusion	111
Chapter 5: Vulnerability and Power	112
5.1 Introduction.....	112
5.2 Situating vulnerability and power to explain the presence and absence of participation within the policies	113
5.2.1 Vulnerability	113
5.2.2 Power	117
5.3 Child Protection and Permanence System	120
5.3.1 CPS	120
5.3.2 CHS.....	126
5.3.3 Permanence Decision-Making	129
5.3.4 Legal Permanence away from home.....	132
5.4 General Discussion and Conclusion	134
5.4.1 Main Themes	135
5.5 Conclusion	141
Chapter 6: The public-private and active-passive conceptualisations of family and children	142
6.1 Introduction.....	142
6.2 Public and private conceptualisations of children and family	142
6.2.1 Previous research	142
6.2.2 Operationalising public and private spheres	143
6.3 Passive and active conceptualisations of children and family	144
6.3.1 Previous research	144
6.3.2 Operationalising passive and active conceptualisations	147
6.4 Child Protection and Permanence System	147
6.4.1 CPS	147
6.4.2 CHS.....	156
6.4.3 Permanence Decision-making	163
6.4.4 Legal permanence away from home	167

6.5 General Discussion and Conclusion	171
6.5.1 Main Themes	171
6.5.2 Conclusion	174
Chapter 7: Regulation and Discretion surrounding participation	175
7.1 Introduction.....	175
7.2 Regulation and Discretion.....	175
7.2.1 Operationalising regulation and discretion	175
7.2.2 Participatory Opportunities	179
7.3 Child Protection and Permanence System	180
7.3.1 CPS	180
7.3.2 CHS.....	183
7.3.3 Permanence Decision-making	185
7.3.4 Legal Permanence away from home.....	186
7.4 General Discussion and Conclusion	190
7.4.1 Conclusion and Main Theme	191
Chapter 8: Discussion	192
8.1. Introduction.....	192
8.2 Summarising findings to answer research questions	193
8.2.1 Research Aim.....	193
8.2.2 First Research Question	193
8.2.3 Second Research Question.....	204
8.2.4 Third Research Question.....	207
8.3 Conclusion	212
Chapter 9: Conclusion	212
9.1 Introduction.....	212
9.2 Implications for future practice and policy	212
9.3 Implications for theoretical considerations	216
9.4 Implications for future research	216
9.5 Limitations	219
9.6 Concluding thoughts	221
References.....	222
Legislation Cited.....	256
Case Law Cited.....	259
Appendix A.....	260
Appendix B.....	261
Appendix C.....	265
Appendix D.....	266

Appendix E	268
Appendix F: ‘Sense-checking’ information sheet and consent form.....	269

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Abstract

There is a lack of research examining children and young people's participation *within* policies, especially as relates to children who are looked after and/or associated with protection and permanence systems. My Ph.D. research examines how children and young people's participation is present and absent within policies (from initial referral to permanency) for looked after children in Scotland, specifically as related to the area of care and permanence (child protection system, children's hearing system, permanence decision-making and legal permanence decision-making), the type of care order (child protection orders, section 25 orders, compulsory supervision orders, permanence orders) and placement, (being looked after at home, being looked after away from home [foster care, kinship care, residential care, secure care]). I utilised Bacchi's (2009) WPR (What's the Problem Represented to Be?) Approach to probe 13 policies primarily based upon the statutory legislation surrounding the four care orders that can designate children and/or young people as looked after. To enhance the trustworthiness of this research, I additionally consulted case law and completed 'sense-checking' interviews with seven policy professionals and social workers.

There are five main themes that have emerged from this analysis. The first theme is that children and young people perceived to be more vulnerable are less likely to be afforded opportunities for participation. The second theme is that children and young people who are viewed as more capable are more likely to be afforded opportunities for participation and the third theme is that children and family are framed as more active and/or passive within the policies particularly as related to factors linked to timings. The fourth theme concerns the different ways the state views children and family as existing in public and private spheres. Finally, the fifth theme is that discretion within the policies for children and young people's participation is often related to the age, perceived vulnerability, and practicability of the participation for children or young people. Overall, this research heralds future research to examine children and young people's participation in specific care pathways and the wider policy environment more closely.

List of Abbreviations

1968 Act – Social Work (Scotland) Act 1968

1995 Act – Children (Scotland) Act 1995

2007 Act – Adoption and Children (Scotland) Act 2007

2009 Regulations – Looked After Children (Scotland) Regulations 2009

2010 [or] 2011 Guidance - Guidance on Looked after Children (Scotland) Regulations 2009 and Adoption and Children (Scotland) Act 2007 (2010 and 2011 versions)

2011 Act – Children’s Hearings (Scotland) Act 2011

2013 Rules of Procedure – The Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013

2014 Act – Children and Young People (Scotland) Act 2014

2020 Act – Children (Scotland) Act 2020

CDA – Critical Discourse Analysis

CHS – Children’s Hearing System

CPCC – Child Protection Case Conferences

CPO – Child Protection Order

CPS – Child Protection System

CR – Critical Realism

CSO – Compulsory Supervision Order

GIRFEC – Getting It Right For Every Child

LA – Local Authority

PO - Permanence Order

SCRA – Scottish Children’s Reporter Administration

UN – United Nations

UNCRC – United Nations Convention on the Rights of the Child

WPR – What’s the Problem Represented to Be? (Bacchi’s 2009 approach)

List of Tables and Figures

Table 1. UNCRC (2009) General Comments Participation Process.	21
Table 2. Care Order Based on Placement Type.	46
Table 3. Linking the WPR approach to the Ph.D. project and analysis overall.....	78
Table 4. Care Orders and Associated Goals.	106
Table 5. Legislative Requirements of Children and Young People's Participation Across System Areas.	195
Table 6. Legislative Requirements of Children and Young People's Participation Across Care Orders.....	198
Table 7. Legislative Requirements of Children and Young People's Participation Across Placement Types.	198
Table 8. List of Policies Analysed and Legislative Level Assigned.....	261
Table 9. 'Interview' Schedule for Policies.....	263
Table 10. Categorisation of participation adapted from Bouma et al. (2018)	265
Table 11. Case Law Selection Process.	266
Table 12. List of 'sense-checking' participants.	268
Figure 1. Practicability of Participatory Opportunities Based on Vulnerability and Capability	140
Figure 2. CELCIS (2018) Child Protection and Permanence System Map.	260

Chapter 1: Introduction

This chapter is intended to serve as a foundation and map for the rest of this thesis and research. First, I will start with establishing the background and context of looked after children in Scotland and why they are of importance for research. Then I will place this research within its theoretical foundations of childhood studies and poststructuralism before presenting a reflexive section on how I came into this research and how it shifted with time and circumstances. Finally, I will outline the structure for the remainder of this thesis.

1.1 Background and Context

Previous research has examined the participation rights of looked after children in policy and practice (including Bouma, López López, Knorth, & Grietens, 2018; Murray & Hallett, 2000; Kendrick & Mapstone, 1991; van Bijleveld, Dedding, & Bunders-Aelen, 2015). Research has particularly recognised the value of participation rights for children who are looked after both in Scotland (including Griffiths & Kandel, 2000; Hallett & Murray, 1998; Kendrick & Mapstone, 1991) and internationally (Skauge, Storhaug, & Marthinsen, 2021) and has examined how it is perceived by practitioners and children and young people and their families in different states (van Bijleveld, de Vetten, & Dedding, 2021; Vis, Holtan, & Thomas, 2012; Zeijlmans, López López, Grietens, & Knorth, 2019). However, research with care-experienced young people reports their perceptions of inconsistent implementation of their participation rights across system areas, care orders and placement types, especially related to kinship care (Aldgate & McIntosh, 2006; Munro & Gilligan, 2013).

The alternative care of children and young people is a broad term used to describe any form of informal or formal care provided to children and young people when their biological parents are unable to provide adequate and/or appropriate care for them (United Nations [UN], 2010). Alternative care includes care of children and/or young people within a family setting or in an institutional environment such as residential care (UN, 2010, para. 29 b and c). In Scotland and the rest of the United Kingdom (UK), children and young people 'looked after' by the state are in formal alternative care with the definitions and practices differing slightly across the four nations.

Scotland distinguished itself from the rest of the UK in their child welfare policies long before devolution and the opening of the Scottish Parliament in 1999 which allowed Scotland to become more independent in the legislative and policy spheres (Cairney, 2012; Stafford & Vincent, 2008; Tisdall & Hill, 2011). Scotland had established the distinctive children's hearing system, which addressed both children in need of protection and those who had offended, following the 1964 Kilbrandon Report (Cohen, 2003). Compared to the rest of

the UK, Scotland has the largest ratio of children who are looked after away from home with 102 children and young people for every 10,000 of those under the age of 18 years (Scottish Government, 2020a). I will expand on the distinction between being looked after at home and away from home in the next chapter. However, to put it briefly, being looked after at home allows children and young people to be in the care of the state while still staying at home with their parents and/or guardians. By comparison, being looked after away from home involves children and young people being in the care of the state with a residence requirement that is not the home with their parents and/or guardians (Children's Hearings (Scotland) Bill Policy Memorandum) or through a voluntary section 25 order under the Children (Scotland) Act 1995.

According to statistics, as of 2021, there were reported to be just over 13,000 children and young people looked after in Scotland (including children and young people being looked after at home) (Scottish Government, 2022a). The majority were placed with family or in 'family-like' settings (including being placed with parents, other relatives and/or friends of the family, or certified foster carers), while the remaining approximately 1,300 children and young people were placed in residential settings (Scottish Government, 2022a). Moreover, Scotland has a much higher proportion (25% as of 2019) of children and young people being looked after at home compared to the rest of the UK where it ranges from 7% to 16% for the other countries in the UK (NSPCC, 2021). Overall, there is a relatively large proportion of children and young people who are looked after in Scotland, which has a rate of 136.2 per 10,000 of the population under 18 years of age, compared to the rest of the UK (with rates of 65.4, 74.8 and 108.7 in England, North Ireland, and Wales, respectively) – although differences are in part due to difference definitions of being 'looked after' or 'in care' (NSPCC, 2021). The distinctiveness of Scotland within the spheres of children protection and welfare compared to the rest of the UK has been noted in the literature, (Stafford & Vincent, 2008), particularly in regard to its children's hearings system (Tisdall & Hill, 2011) (as will be discussed in more detail in the next chapter. See [Chapter 2](#)).

Moreover, recent research has examined children and young people's participation¹ within the context of the child protection and permanence system in Scotland (Porter, 2020;

¹ Children and young people's participation can be defined as

ongoing processes, which include information-sharing, and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes. (UN Committee on the Rights of the Child [UNCRC], 2009, section 3)

Roesch-Marsh, Gillies, & Green, 2017). This builds upon a long history of previous research examining children and young people's participation in Scotland (Griffiths & Kandel, 2000; Hallett & Murray, 1998; Kendrick & Mapstone, 1991, 1992; Murray & Hallett, 2000). This is a reverberation of the wider sphere of research advocating for the importance of children's participation (Davidson, 2017; McMellon & Tisdall, 2020) and especially so for children and young people who are looked after (Skauge et al., 2021). However, further investigation of how opportunities for participation for children and young people are present and absent within policy is warranted and overdue (Bouma et al., 2018).

In Scottish-based research, children and young people who are looked after are reported to be more likely than non-looked after children to have problematic drug use (Carver, 2019), to be associated with poorer education outcomes and to face school exclusion (McClung & Gayle, 2010). Thus, looked after children in Scotland may be perceived as more 'vulnerable' and this intersects with their participation rights, as will be discussed in this thesis. Comparative cross-national research has highlighted that children and young people who are deemed to be more 'vulnerable' are less likely to have their rights to participation upheld compared to children and young people who are not considered 'more vulnerable' (Lundy, Kilkelly, & Byrne, 2013). Looked after children are frequently cited in research undertaken, in England and Wales, as being more 'vulnerable' due (in part) to their higher rates of mental health difficulties (46.4%) compared to the children and young people who are not looked after (23.6%), which can, in part, be attributed to the former's greater exposure to maltreatment and/or neglect (Bazalgette, Rahilly, & Trevelyan, 2015).

There is a history of examining children and young people's participation in policies for looked after children in Scotland (Hallett & Murray, 1998, 1999; Kendrick & Mapstone, 1992; Marshall, Tisdall, Cleland, & Plumtree, 2002; Murray & Hallett, 2000). Increasingly, policies have promoted the idea of participation among children and young people who are looked after (i.e., The Promise, the Children (Scotland) Act 2020) but these developments have been gradual and incremental, creating an uneven picture of how policies for looked after children and young people articulate participation, such as in the case of contact decision-making (Porter, 2020). Thus, an important part in understanding where the gaps are for participatory opportunities for children and young people who are looked after in

This definition of participation will be discussed more critically and in-depth in the literature review (see Chapter 2).

Scotland is to conduct research such as this to closely interrogate the policies that are intended to guide the process and practices.

1.2 Researcher's introduction to topic

My interest in this topic started when I read a book in high school about a young girl's experiences of being the equivalent of looked after by the state. I became stuck on the idea that many of the challenges she faced could likely have been (and ultimately were) avoided or at least alleviated when professionals listened to her. I did not know that there was a burgeoning field of children and young people's participation, particularly when they are looked after by the state until I first learned about it during my master's degree in Childhood Studies in 2015-16. I had completed my undergraduate degree in developmental psychology, so considering how children and young people can and do participate in decision-making that impacts them was refreshing and interested me immediately. Prior to undertaking my Ph.D. in Social Work, I had no background in social work, nor am I care experienced so there was a slight learning curve in grasping how social work theory and application melded together with my previous knowledge from psychology and childhood studies. With this interest in looked after children, I became particularly interested in how children and young people's views play into the related decision-making. I initially honed my focus of this topic to kinship care, since there was (and is) a notable lack of research examining children and young people's participation in kinship care. However, due to the COVID-19 pandemic, I had to pivot my research topic as I was near the beginning of my data collection when the COVID-19 pandemic was declared in March 2020. I discuss this more in relation to ethical considerations in Chapter 3, but it did leave me quite unmoored at first. My Ph.D. project (initially before the pivot) was intended to be a comparative project examining children and young people's participation in kinship care assessment decision-making in Scotland and Canada. It was intended to consist primarily of interviews with social workers, kinship carers and children and young people in kinship care with there being an additional component of analysing the national and local policies governing this decision-making. My supervisors served as calming beacons when I did not know what I should do and were supportive when I finally admitted defeat to the comparative element of my research.

In the end, my present Ph.D. research has focussed almost entirely on policies and exclusively in Scotland, but on a wider sphere than I had initially intended. I shifted to examining how children and young people's participation is present and absent within policies for looked after children in Scotland, based on my supervisors' suggestions and encouragement. Following the completion of my analysis of the policies, I additionally

completed some ‘sense-checking’ interviews with relevant professionals and included relevant case law to help bolster my findings. Overall, it was not the research I came into the Ph.D. intending to do but I think it was ultimately positively influenced by the earlier iteration of my Ph.D. research through my focus on kinship care and start to my data collection in Scotland with social workers. I would have liked for my Ph.D. journey to have been smoother and less jarring but am gratified in where and how it has ended up. My Ph.D. research has highlighted the uneven articulation of children and young people’s participation in policies of looked after children in Scotland. Moreover, through this research, I have identified the lack of research that overviews participation across different care pathways in a single system.

1.3 A childhood studies approach through discourse analysis and poststructuralism

Childhood studies underpin this Ph.D. research and has helped to guide my choice of methods (policy analysis) alongside case law and ‘sense-checking’ interviews with social work and policy professionals to bolster the primary method of policy analysis. I am adopting a childhood studies approach that draws upon poststructural approaches particularly through discourse policy analysis. Moreover, I am examining what this means for participatory opportunities for children and young people and how these discrepancies and similarities could be considered and interrogated.

A childhood studies approach emphasises the importance of focussing on children and young people as active participants rather than passive agents in their lives (Prout, 2011) and focusses on who children and young people are and not only who they will become and grow into as adults (Qvortrup, 1994). Previous research has considered a discourse analytical approach to children and young people’s participation (Bouma et al., 2018). Previous research has also considered a poststructuralist approach to children’s participation (Spyrou, 2016) as has childhood studies more generally (Spyrou, 2019). More recent research has built on Spyrou’s research (2016; 2019), including research reviewing critiques of the ‘child’s voice’ (Facca, Gladstone, & Teachman, 2020) and how ‘children’s voices’ are represented and accessed (Spencer, Fairbrother, & Thompson, 2020). Research has additionally considered a poststructuralist approach to children’s participation (Garcia-Quiroga & Agoglia, 2020), but less so in the realm of policies. Regardless, a major theme of this research seems to be the necessity of taking this critique further by questioning the unquestioned.

1.4 Research aim and questions

This Ph.D. project aims to investigate and explain the presence and absence of children and young people's participation (as a concept) in policies across the care pathways² of being looked after in Scotland. The research questions intended to probe this aim further are as follows:

1. What are the legislative requirements for children's participation, from initial referral to permanence (while still being considered looked after)?
2. How are these requirements related to how children being or becoming looked after are conceptualised and problematised within policy?
3. Considering the policies and their wider context, how are the requirements of children and young people's participation impacted by the type of care order and placement?

Poststructural policy analysis will be my primary methodology to answer these questions, but I will be utilising select case law and 'sense-checking' seminars with policy and social work professionals to help verify and confirm my findings. I will be analysing 13 policies concerning looked after children in Scotland based on pre-determined inclusion and exclusion criteria (as will be discussed in detail in the methodology chapter, see Chapter 3). This approach will allow me to examine how the policies construct the problem of 'being looked after' and how children and young people's participation is included in this discourse and discussion.

1.5 Structure of thesis

The structure of this thesis will proceed as follows. Chapter 2, my literature review chapter, is divided into two sections. The first is a review of the relevant literature and theory that underpin this Ph.D. research and the second presents and examines the child protection and permanence system in Scotland in depth, including the different system areas and overview of the key policies. Chapter 3 is the methodology chapter, where I present my choices for methodology, data management and analysis and ethical considerations. I elaborate on my choice of policy analysis and the policies that I have selected for analysis. I also discuss the ethics and mechanics of conducting research during a global crisis.

Chapter 4 is my initial findings chapter and serves as a map for the remaining findings chapters for where participatory opportunities are present and absent across the Scottish child protection and permanence system decision-making processes via the policies selected.

² Care pathways (or care journeys) in this context refer to how children or young people may move through the child protection and permanence system, where there are numerable pathways in which a child or young person may enter, exit, or proceed through the system (Biehal, Cusworth, Hooper, Whincup, & Shapira, 2019).

Chapter 5 examines the presence and absence of participation based on how vulnerability is expressed through mechanisms and the concepts of time and power as through conceptualisations of capability. Chapter 6, the second findings chapter, shifts the focus to conceptualisations of family and considers how participatory opportunities are and can be situated for children and young people in different familial (or non-familial) environments. In Chapter 7, the final findings chapter, I examine how regulation and discretion are used in balancing participation, protection, and care as ensconced in the policies. In Chapter 8, I bring a discussion of my findings together with the results from my ‘sense-checking’ seminar series with policy professionals and social work professionals. Finally, Chapter 9 will be the denouement of this thesis by addressing the limitations of this Ph.D. research, direction for future research and potential implications for policy.

1.6 Chapter Conclusion

To conclude, this chapter is intended to serve as this research project in miniature, with each section being expanded upon and interrogated upon in later chapters. This chapter is an introduction to this Ph.D. research and to me, as the researcher. I have presented the background and context of the topic of the alternative care of children and young people in Scotland and why research into how participatory opportunities are presented within policies is a topic of importance that needs further study. Reflexivity is a key component of this research and of my chosen methodology of Bacchi’s WPR approach (See [Chapter 3](#)), and so will be included throughout this thesis.

This Ph.D. research is an original contribution in filling the research gap, particularly in the realm of policy, that has been conducted within a single system, in examining the presence and absence of children and young people’s participation in policies for looked after children and young people. Moreover, this Ph.D. research contributes to theory development in more critically considering the nuances of participation and protection within the field of child protection and permanence.

More diversity of methodologies and perspectives is warranted to understand better how participation proceeds in policy for children and young people who are looked after in Scotland, particularly when considering the lack of research examining the presence and absence of children’s participation within policies, specifically. Ultimately, this research is intended to serve as the foundation for future research particularly in identifying where the gaps within the policies examined exist and the implications this may hold for specific care orders, placement types and based on the characteristics of the children and young people (including age and [dis]ability).

Chapter 2: Literature review, theoretical framework, and policy underpinnings

2.1 Introduction

In this chapter, I will present the research, theoretical and policy foundations for this thesis. I will present a discussion of relevant terminology and an overview of the child protection and permanence system in Scotland. Moreover, this investigation will explore how factors including type of placement and care order can complicate and explain differences in how children and young people's participation is presented. I will specifically consider this within the policy and legal remit of the Scottish child protection and permanence system.

2.1.1 A comment on the structure of this chapter

I have divided this chapter into two sections. The first section focusses on the review of the relevant literature review and theoretical foundations of this Ph.D. research. The second section focusses on presenting and examining how the child protection and permanence system works in Scotland. Moreover, the second section focuses on how and what the relevant policies are that create the system and the different ways in which children and/or young people and their families can move through the system.

Section 1: Review of the literature and theoretical framework

2.2 Operationalising 'Looked After' Children

'Looked after children' is defined by law in Scotland by the Children (Scotland) Act 1995 (1995 Act), in section 17, as 'children "looked after" by a local authority'. This covers children given accommodation on a voluntary basis through section 25 of this 1995 Act, those who have a compulsory supervision order (CSO) (whether or not with a condition of residence) by the Children's Hearings Act 2011 (2011 Act) or who have a Permanence Order (PO) made after an application by a local authority (LA) under section 80 of the Adoption and Children (Scotland) Act 2007 (2007 Act). The latter is a court order, while the CSO takes place within the Children's Hearing System. In addition to the above three care orders that designate children and/or young people as being looked after, a child protection order (CPO) can often be considered an additional care order that can designate children and young people as looked after. CPOs are granted by the court and can be applied for by (usually) the local authority (2011 Act; SCRA, 2015). On the Scottish Government official website, it states that, '...the child or young person...is subject to an order made or authorisation or warrant granted by virtue of chapter two, three or four of Part 2 of the 1995 Act' (Scottish Government, 2021a). Thus, officially, children and young people on CPOs are not considered looked after (as they are not listed in section 17 of the 1995 Act). Yet, in section 44(2) of the 2011 Act, it states that, 'Subject to the child protection order, the local authority has the same duties towards the child as the local authority would have by virtue of section 17 of the 1995

Act if the child were looked after by the local authority'. Thus, even though children and young people on CPOs are not included in the definition for looked after children, they are treated as though they were based on section 17 of the 1995 Act. For the sake of clarity, I will be including CPOs as an avenue to becoming looked after in my review of the system, for the remainder of this thesis.

Several researchers have highlighted how young people resist the label of being 'looked after' (Mannay et al., 2017; Hallett, 2016). This can be linked to a more in-depth look at the terminology of 'looked after' in that it connotes 'lack' in its acronym of LAC quite literally illustrating a supposed shortcoming in some respect (TACT, 2019). A term that is particularly advocated for by children in care is 'care-experienced' and is used 'to describe any person who has experience of being in care, regardless of their placement length, type or age' (Scottish Government, 2018, p. 1). To avoid confusion, I will use the term 'looked after' when directly referring to the children and young people discussed in policies as it is the legal definition. However, I will avoid using the abbreviation (LAC) to not further perpetuate any supposed shortcoming of the children and young people.

2.3 Operationalising participation and protection

2.3.1 *Operationalising participation*

A common point of contestation and discussion within the literature pertains to how children and young people's participation and protection can and/or should be balanced and/or conceptualised alongside each other. Children and young people's rights to participation and protection have frequently been discussed in the literature as being in tension or requiring 'balancing' (Collins, Rizzini, & Mayhew, 2021). Particular reference is made regarding the need to reconcile the requirements of Article 3 of the United Nations Convention on the Rights of the Child (the best interests of the child being a 'primary consideration') with Article 12 (a child's views being given due weight in decision-making, subject to their 'age and maturity') (Tisdall, 2015). The literature notes, in regard to this balancing act, that adult concerns about children's best interests crowd out children's participation rights, following child protection inquiries (Sinclair, 2004). Yet, strong arguments were made for the 1995 Act provisions and onwards that children's participation can better protect their interests (Tisdall, 1997). However, before delving into that research, I will examine how participation and protection can be defined to set the foundation for further discussion about the literature. Participation has multiple definitions and gradations, but one encompassing definition is that participation, from a children's rights perspective, is:

...used to describe ongoing processes, which include information-sharing, and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes. (UNCRC, 2009, section 3)

This definition offers the view that simply involving children and young people is not enough to count as participation, under Article 12(1) of the UN Convention on the Rights of the Child; rather, respect granted to them is an important element that signifies children and young people as active participants who would ideally impact the outcome of matters in their lives (Tisdall, 2015). International bodies (UNCRC, 2009) and researchers (Bouma et al., 2018) have considered different ways in which participation may be operationalised. The UN Committee on the Rights of the Child (2009), in the General Comments for Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), specify in section 134 the different participation processes. I have included and elaborated upon each in the table below.

Table 1. UNCRC (2009) General Comments Participation Process.

Participation Process	Explanations from UNCRC (2009) General Comments specify that:
(a) Transparent and informative	‘Children must be provided with full, accessible, diversity-sensitive and age-appropriate information about their right to express their views freely and their views to be given due weight and how this participation will take place, its scope, purpose and potential impact’.
(b) Voluntary	‘Children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage’.
(c) Respectful	‘Children’s views have to be treated with respect and they should be provided with opportunities to initiate ideas and activities’.
(d) Relevant	‘The issues on which children have the right to express their views must be of real relevance to their lives and enable them to draw on their knowledge skills and abilities’.
(e) Child-friendly	‘Environments and working methods should be adapted to children’s capacities’.

(f) Inclusive	‘Children are not a homogenous group and participation needs to provide for equality of opportunity for all, without discrimination on any grounds’.
(g) Supported by training	‘Adults need preparation, skills and support to facilitate children’s participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities’.
(h) Safe and sensitive to risk	‘In certain situations, expressions of views may involve risks. Adults have responsibility towards the children with whom they work and must take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation’.
(i) Accountable	‘A commitment to follow-up and evaluation is essential’.

There have frequently been typologies made of children’s participation, including Hart’s ladder of participation (1992, 2008) which tailors Arnstein’s (1969) ladder of citizen participation specifically to children. Hart’s (1992) model presents eight categories or ‘rungs’ of children’s collective participation with the lowest three categories being gradations of non-participation and the remaining five presenting gradations of participation with ‘Child-initiated and shared decisions with adults’ being placed as the pinnacle of children’s participation. Researchers have noted the value of Hart’s model particularly in how it incorporates power and its usefulness in training with adults by recognising how children’s participation can be incorporated in practice (McMellon & Tisdall, 2020). Yet, despite these strengths, Hart’s model has been extensively critiqued for its limitations (Hart, 2008; McMellon & Tisdall, 2020; Tisdall, 2015; Tisdall, Hinton, Gadda, & Butler, 2014). For example, researchers have noted that Hart’s definition of participation does not provide much focus on the impact of participation compared to other models such as Lundy’s 2007 model of participation (Tisdall et al., 2014). Additionally, researchers have argued that power in Hart’s ladder of participation seems to exist as a binary where *either* children and young people *or* adults have power without considering the complexities of power that exist in relation to children’s participation (Tisdall et al., 2014). Thus, despite the initial potential usefulness of Hart’s model, I will not be using it to define and model participation for my

research as it does not focus on individual children's participation, nor does it appear to capture the nuance necessary to tease apart the relationship between participation and protection.

Bouma and colleagues' model (2018) is thus particularly useful, because of its focus on decision-making in child protection. The researchers identify three main components (informing, hearing and involving) of meaningful participation (Bouma et al., 2018). Their model is based on previous literature on the experiences of children and young people's participation and the above UNCRC (2009) General Comments to examine children's participation in child protection policy in Denmark. 'Informing' is considered a 'prerequisite for participation' such that children and young people would need to be informed about the decision being made, what sort of participatory opportunities are available and of their right to participation (Bouma et al., 2018, p. 281). 'Hearing' takes this one step further where children and young people can be '[ensured] that children can really express their views freely' (p. 281) and that there is a 'child-friendly dialogue in which willingness to listen to the child is shown' (Bouma et al., 2018, p. 281). Finally, the researchers view the 'involving' component of children and young people's participation as having 'their opinions and views [heard] beforehand to discuss the decision and decision-making process with them' (Bouma et al., 2018, p. 281) and that 'to involve children in decision-making processes, their perspectives should be considered' (p. 281). This latter component of 'involving' is arguably a bit confusing as it seems to insinuate that 'hearing' is about gathering views and 'involving' is about having those views be a part of decision-making in some capacity. Beyond these three main components of meaningful participation, Bouma and colleagues (2018) added a fourth coding category of participation as an ongoing process. Thus, this additional conceptualisation brings together these three dimensions of participation and participation as an ongoing process. Yet, Bouma and colleagues' (2018) framework of participation could be critiqued as to whether it fully incorporates the UNCRC (2009) General Comments process requirements.

Both iterations of participation (through the General Comments from the UN Committee on the Rights of Child on Article 12 and Bouma et al., 2018), are in consideration of individual rather than collective participation and encompass important elements of participation. Bouma and colleagues' (2018) classification of participation and related classifications can be viewed as rather vague and could lead to other aspects of participation being potentially overlooked (see Cornwall, 2008). I would argue that it can still prove helpful in setting the framework for broader discussions about participation as evidenced in

policies. However, it may be further critiqued that there are more sophisticated models of children's participation (including Lundy's 2007 model of participation). Yet, considering the similarities of the research focus between Bouma and colleagues (2018) and this Ph.D. thesis, I felt that this similarity (in addition to including the UNCRC (2009) General Comments processes that create opportunities for participation) was more important in ensuring it could be applied to my data in question (policies) instead of having a more sophisticated model that would need to be adapted to analysing policies. Lundy's (2007) model was created to help practitioners to implement children's participation in a meaningful way and is based on collective, rather than individual participation, so it is less suited to analysing policies.

For instance, focussing on Bouma's four aspects of participation *with the knowledge that they are collapsed categories* (of the processes specified in the 2009 General Comments) means that depending on the patterns that emerge, I can go into more depth based on the aspects presented by the UNCRC (2009) General Comments. This offers a multiple-pronged approach to analysing how participation is present and absent within the policies examined. Thus, I will be primarily using Bouma and colleagues' (2018) categorisation to specify if and how participation is present and will be using the UNCRC (2009) General Comments to delve deeper into understanding more specific aspects of participation depending on the patterns of presence and absence that emerge, as needed. Beyond categorising and defining participation, in my thesis, I will additionally examine the ways participation is understood through discourse. In particular, I will examine how participation is understood through discourse based on where and how it is mentioned and where and how it is not. Moreover, considering the overall complexity of the system in which the policies that I am analysing exist, it is understandably challenging (which seems quite pertinent in and of itself) to operationalise and categorise children and young people's participation as it exists within the policies.

2.3.2 *Conceptualising care, child protection, child welfare and permanence*

Within the context of children's welfare and protection, discussion of children and young people's participation tends to be considered alongside other key concepts including 'care' and 'protection'. 'Care' is also imbued throughout the literature in discussions of children and young people who are looked after (Hallett, 2016), in addition to be frequently discussed in research pertaining to children and young people's participation and protection. Several researchers have sought to define 'care', by differentiating those who care and those who are cared *for* (Hallett, 2016; Tomkins & Eatough, 2013; Twigg, 2000), thus closely linking the idea of care to vulnerability (Hallett, 2016). Other researchers have considered

care from a more theoretical perspective (Tomkins & Eatough, 2013). The latter researchers have examined care as being conceptualised in several ways including ‘care as intervention’, ‘care as anticipation’, ‘care as advocacy’, and ‘care as intersubjectivity’ (Tomkins & Eatough, 2013). The authors differentiate between the four ways that care can be conceptualised based on the goal underpinning each form of care. They specify ‘care as intervention’ as ‘[the] manifestation of care [as] substitutive...[carers] seem to take over from, or stand in for, their loved ones’ (Tomkins & Eatough, 2013, p. 10) and ‘care as anticipation’ ‘[involves carers] thinking ahead of the care recipient to try to predict and prevent problems’ (Tomkins & Eatough, 2013 p. 12). Finally, ‘care as advocacy’ is based around the idea that ‘[carers] also stand up for the people they are looking after’ and ‘care as intersubjectivity’ as ‘[allowing carers] to see the care recipients as a fellow human being, rather than as an object defined completely by their needs and frailties’ (Tomkins & Eatough, 2013, p.15). These different conceptualisations of care (Tomkins & Eatough, 2013) present alternate ways in which care can be considered and can likewise be linked to participatory opportunities. For instance, when children and young people are or are at risk of becoming looked after, participatory opportunities can exist as a way for their carers or the state to properly ‘stand in for their loved ones’ as is specified for care as intervention (Tomkins and Eatough, 2013, p. 10). Moreover, participatory opportunities can exist as a way to avoid future impermanence potentially (care as anticipation) and to ‘stand up for the [children and young people being or becoming] looked after’ (care as advocacy). Finally, participatory opportunities can help to view the children and young people as ones to work with and not just as ones to protect (care as intersubjectivity). This is particularly noteworthy in consideration that the previous phrase used before ‘looked after’ within the policies and legislation was ‘in care’ (Norrie, 2020).

In discussion of the connotations of the word, ‘care’, other researchers have considered more of the immediately emotive elements (Hallett, 2016; Twigg, 2000). Twigg (2000) focusses on the emotional resonance of ‘care’, while Hallett (2016) focusses more on the relationship between care recipient and caregiver, including care as being ‘Those in the care of others are under their protection and authority. To care is to provide for and look after’ (p. 2139). Thus, closely linked to the concept of care (particularly in the realm of child welfare) is that of protection perhaps best seen through the ‘care as anticipation’ classification (Tomkins & Eatough, 2013). The 2021 National Guidance for Child Protection in Scotland defines child protection as ‘the process involved in consideration, assessment and planning of required action, together with the actions themselves, where there are concerns

that a child may be at risk of harm’ (para. 1.50). This further emphasis on the process appears to be a new development compared to the definition in the 2014 National Guidance for Child Protection in Scotland where it states that, ‘[“]child protection[”] means protecting a child from abuse or neglect. Abuse or neglect need not have taken place; it is sufficient for a risk assessment to have identified a *likelihood* or *risk* of significant harm from abuse or neglect’ (para. 38) (emphasis in original). Both definitions of child protection seem to offer further insight into how this focus on risk or the likelihood of risk seems to match the view of ‘care as anticipation’. Sometimes used interchangeably with child protection is child welfare, where children and young people’s welfare can be something to be protected (Scottish Government, 2021b) and offers a wider view than solely protection. However, considering that child protection is the term more often used to describe the Scottish system (Norrie, 2020; Scottish Government 2014, 2021b), I will be predominantly using ‘child protection’ in relation to the Scottish system.

Another term that frequently comes up in relation to child protection and welfare, particularly in relation to longer-term goals, is that of permanence. The 2021 National Guidance on Child Protection in Scotland clarifies that permanence is based on the idea that ‘Permanent, loving, nurturing relationships are what matter most to children. The optimal route to permanence depends on the needs and circumstances of the child’ (Paragraph 4.271). The definitions and categorisations of participation, care, protection, welfare, and permanence provide context to how each exist in the context of the others (especially when considering children’s participation in child protection systems). For instance, the 2021 Guidance definition of child protection and how it is organised within a state’s system for child protection and permanence seem to set out how children’s participation can be utilised and how care can be used to examine the relationship between protection and participation. In Scotland, ‘permanence’ is frequently utilised alongside longer-term protection in discussing the broader system and ‘welfare’ is more often used to describe potential support and safeguarding broader than protection (Scottish Government, 2021b).

2.3.3 Review of Scottish-focussed research on children’s participation in the child care, protection and permanence system

There has been a large body of research that has examined children’s participation in the Scottish child care, protection and permanence system, particularly in relation to children’s hearings (Emond, 2007; Griffiths & Kandel, 2000; Hallett & Murray, 1998, 1999, 2000), child care reviews (Kendrick & Mapstone, 1989, 1991, 1992), care planning reviews for children who are looked after and accommodated (Roesch-March, Gillies, & Green,

2016) and child protection case conferences (Bruce, 2014). This previous research in the Scottish context that has examined children's participation has tended to focus on a specific aspect of the care and protection system, such as the children's hearing system (Griffiths & Kandel, 2000; Hallett & Murray, 1999; McGhee & Waterhouse, 2002; Murray & Hallett, 2000). Moreover, further research has also examined children and young people's views of the child protection processes more generally in Scotland (Woolfson, Heffernan, Paul, & Brown, 2010). Additionally, previous research has been conducted in relation to children's participation in child protection settings including in residential care in England (Willow, 1996).

Research has also been conducted in the Scottish context that has examined children's participation in child protection settings (Griffiths & Kandel, 2000; Hallett et al., 1998; Kendrick & Mapstone, 1992; Murray & Hallett, 2000). Such research presents additional nuance by suggesting that children and young people 'involved in welfare systems' may have more opportunities for participation compared to children and young people not involved with welfare systems (Murray & Hallett, 2000). Yet, other research focussing on the children's hearing system seems to purport a view that, 'the child is the centre of concern focussed on him or her by others, but not the locus of rights assertion or decision-making' (Griffiths & Kandel, 2000; p. 286). This can likewise be considered in light of Sinclair's (2004) UK overview concerning the practice of participation, which the researcher says concerns 'four key dimensions for understanding participation: the level of participation; the focus of the decision-making in which children may be involved; the nature of participatory activity; and the children and young people involved' (p. 108). Moreover, Sinclair (2004) clarifies that for participation to be impactful and helpful to children and young people, it needs to be considered from a more structural standpoint and not more tokenistic isolated instances. Much of the previous research conducted has employed a variety of methodologies including observations and interviews with children and young people and/or professionals (Griffiths & Kandel, 2000; Hallett & Murray, 1998; Kendrick & Mapstone, 1992; Murray & Hallett, 2000). Previous research has additionally utilised action research focussed methodology (Roesch-Marsh et al., 2017) and analysis of documentation and reports associated with the child protection process (Bruce, 2014).

Previous research has highlighted that children and young people's participation in children's hearings was reported to be limited (Hallett et al., 1998). Moreover, previous research has examined children's perspectives and children's panel members' views of children and young people's participation in children's hearings in Scotland (Griffiths &

Kandel, 2000). Particularly, the researchers reported that many of the children and young people they interviewed reported the process and prospect of voicing their views to be 'scary' (Griffiths & Kandel, 2000). Additionally, panel members reported a difference between ages of children and young people and their apparent desire to participate, with younger children often being less resistant compared to their older teenage counterparts (Griffiths & Kandel, 2000). One possible solution to these potential imbalances in participation across ages is independent advocacy, but such an option has been noted not to be consistently present in children's hearings (Hallett & Murray, 1999) and/or errs more toward protection instead of promoting the participation of children and young people in children's hearings (Murray & Hallett, 2000).

Additionally, previous research has noted that there appear to be varying ways in which children and young people's participation in relation to child care reviews is discussed in pertinent policy and procedural documents (Kendrick & Mapstone, 1992). For instance, Kendrick and Mapstone (1992) note that 'the degree to which young children contribute to the review is determined to a large degree by the efforts of the chairperson' (p. 149). This seems to illustrate a discretionary space wherein the policies could be consistent, but this could be dependent on the chairperson in practice. Previous research in the context of child protection case conferences in Scotland has also critiqued the child's views and 'voice' as presented in child protection documentation (Bruce, 2014). This research has commented on the extent to which professionals 'filter' and 'interpret' children and young people's views when written in documentation. This seems to point toward the tension between protection and participation of children's rights as previously discussed (Collins et al., 2021).

Overall, participation of children and young tends to be limited across the system, with teenagers being reported as more likely to be resistant to participate in children's hearings compared to younger children (Griffiths & Kandel, 2000). However, Griffiths and Kandel (2000) go on to note that most of the children interviewed in their study found participating in the children's hearing to be potentially intimidating. Children's participation tends to be heavily dependent on discretionary decisions and practices of key (adult) personnel, such as the chair of reviews. This can happen even if the legislation or other policy recognises children and young people's rights to participate (Griffiths & Kandel, 2000). Moreover, even when participation is present, previous research (Bruce, 2014) has critiqued the extent the 'child's views are represented in writing' (p. 514) within child protection documentation and how it may be 'filtered' and/or 'interpreted' by professionals. Additionally, there have been further developments of strengthening children's participation in child protection settings in

Scotland, including in relation to furthering advocacy within the children's hearing system (Scottish Government, 2020b) and further consideration in a more recent report by the Promise (The Promise Scotland, 2023). Beyond this review of Scottish literature, more recent research has often been conducted in other contexts as will be reviewed next.

2.3.4 Considering international research on children's participation in child protection and wider child welfare decision-making

Research outwith Scotland has also considered children's participation in child protection decision-making, particularly in relation to child protection (Thomas, 2002; Larsen, 2011; Van Alst, 2012; Arbeiter & Toros, 2017). Both research in and outwith Scotland is important because it widens the evidence base about the multiplicity of reasons why children's participation in decision-making matters. Several researchers have noted the potential link between positive decision-making outcomes and the children's and their families' participation in the decision-making process (Lindsay, 1995; Vis et al., 2012; van Bijleveld et al., 2015; Minkhorst et al., 2016), but it is a relatively small area of research. Several studies have noted that children and young people wish to participate in decision-making (van Bijleveld et al., 2015; Lee, Choi, Lee, & Kramer 2017). Likewise, researchers have discussed that offering children and young people opportunities to participate in decision-making allows children and young people to be viewed as and to view themselves as social actors (Minkhorst et al., 2016). Researchers also note that offering children opportunities to participate (with children and young people having the choice *to* or *not* to participate) could encourage interest and hope for their future (Minkhorst et al., 2016).

In distinguishing looked after children and young people from those residing with their parents without social work involvement, Holland and Crowley (2013) discuss 'hidden histories' and 'nomadic childhoods' as being differentiating factors for young people who are care experienced. The former term refers to many children who enter care from a young age and are unaware of why they are there in the first place, while the latter refers to the fact that most children who are looked after have moved between primary carers throughout their childhoods (Holland, 2010; Holland & Crowley, 2013). Both concepts of 'hidden histories' and 'nomadic childhoods' connote adults as controlling what is hidden and where children and young people are moved, thus not respecting children and young people as social actors.

Yet, conceptualisations of children and young people within child protection settings are not without debate (Cossar, Brandon, & Jordan, 2014; Hallett, 2016; Heimer et al., 2018; Skivenes & Sørdsdal, 2018). For instance, children are frequently viewed as ones to protect and so participation is often viewed as not in the children or young people's best interests

(Skivenes & Sørdsdal, 2018). In a review conducted by Skauge and colleagues (2021) examining conceptualisations of participation in child welfare in the literature, the authors reached the conclusion that the reason for participation was primarily based around three themes: ‘rights, intrinsic values and instrumental values’ (p. 61). The authors presented rights (namely, that it is a requirement in itself), intrinsic values, such as children’s well-being, self-esteem, self-efficacy and self-confidence’ (Skauge et al., 2021, p. 61) and instrumental values including service outcomes (or that children’s participation would lead to better decisions and thus better outcomes) (Skauge et al., 2021, p. 54). These three themes offer insight into how participation can be approached. Furthermore, much of the research that more broadly examines children and young people’s participation within child protection or welfare settings and/or procedures does not make a distinction between the timing within the procedures nor the type of placement or care order the child or young person is being subjected to (Middel, Post, López López, & Grietens, 2021; Skauge et al., 2021; Toros, 2021). This leads to questions of how the focus of research into a more comparative approach might provide further insight into how and why these potential differences and/or similarities in participatory and protection practices may exist not only across countries (Zeijlmans et al., 2017) but in a single system.

Recent research by Skauge and colleagues (2021) has noted that, ‘When the authors [of previous research] do not sufficiently explain the context from which they report, they give the impression that “children’s participation” always implies the same thing, regardless of context, which leaves interesting differences undetected’ (Skauge et al., 2021, p. 63). This connects back to how I am operationalising participation in this research project, and how there is an aura of complexity that surrounds the different angles in which participation can be considered, especially in child protection settings. Some research, particularly in the Scottish context (including Bruce, 2014; Kendrick & Mapstone, 1991) has examined the interplay and complexities surrounding and underlying participation and protection in the microcosm of a single state’s system, but this has often focussed to specific areas of the system (such as the children’s hearings system or child protection case conferences) and not to the broader protection and permanence system.

This international literature can be helpful in considering the Scottish literature and context in several ways. First, there are ways of understanding participation that could be helpful (Sinclair, 2004; Skauge et al., 2021). Sinclair (2004) elaborates on four dimensions of participation while Skauge and colleagues (2021) identify three types of values that can underlie participation. Second, there are substantive findings that are similar or additive to

those from Scottish research (including Griffiths & Kandel, 2000; Skivenes & Sørdsdal, 2018). Particularly, in child protection and/or welfare settings, adults' concerns about children and young people's best interests and overall protection can override their rights to participation (Murray & Hallett, 2000; Skivenes & Sørdsdal, 2018). This latter point can be linked to my previous discussion in Section 2.3.1 on the balancing of children and young people's rights to protection and participation (Collins et al., 2021).

International research adds further nuance to this discussion, specifically that when children are not provided with opportunities to participate in relevant decision-making, they are more likely to experience harm, such as being more vulnerable to child sexual exploitation (Hallett, 2016) compared to if they had been provided the opportunities (Cossar et al., 2014; Heimer et al., 2018). Finally, there is a small but indicative area of research that there is preliminary evidence that children and young people's participation in decision-making can lead to better outcomes for them which would ultimately lead to allowing their best interests to be better met in the future (Lindsay, 1995; Minkhorst et al., 2016; van Bijleveld et al., 2015; Vis et al., 2012).

2.4 Power

2.4.1 Research on power and children's participation

Power frequently emerges in research pertaining to children's participation (Christensen, 2004; Davidson, Milligan, Quinn, Cantwell, & Elsley, 2017; Gallagher, 2008; Warming, 2019). This encompasses research regarding the role of power in participatory research with children (Christensen, 2004; Davidson et al., 2017) and how power can be used to understand children's participation (Gallagher, 2008; Warming, 2019). Moreover, in the Scottish context, research examining children's participation has included discussions of power (including Emond, 2007; Kendrick & Mapstone, 1992). Researchers have considered how adults exercise power, by choosing to include children and young people's participation or to exclude them from participating (Emond, 2007; Kendrick & Mapstone, 1992), and that 'the rhetoric of participation needs to acknowledge the boundaries of control which are set up by social work professionals [and systems]' (Kendrick & Mapstone, 1992, p. 174). Gallagher's (2008) conceptualisations of power, drawing on Foucault, can extend these considerations of power. He argues for understanding that power exists as an 'exercise' (p. 397), in a multitude of ways and is not a top-down process. Rather, Gallagher (2008) proposes power is more dispersed and depends on the results of participatory opportunities rather than 'professed intentions of the people involved in designing and implementing those initiatives' (p. 400). Furthermore, Gallagher (2008) argues that governmental power is

associated with how ‘the rise of children’s participation might be seen as emerging from the recognition that the effective government of children depends upon securing their complicity in the process’ (p.402).

Thus, power is often used in discussion and/or interrogations of children and young people’s participation and particularly steers such research more into the realm of poststructuralism alongside childhood studies. I will first consider how power is and can be conceptualised within the literature before shifting to how it fits into poststructuralism and children’s participation research.

2.4.2 Perspectives of power

Power has been researched and theorized across a diverse range of disciplines. (Cairney, 2012; Fairclough, 2001; Lukes, 2005; Newman & Clarke, 2009). It has been particularly influential in sociology; for instance, by Lukes (2005). Lukes (2005) begins his discussion of power, by stating that, ‘...we may say that human powers are, typically, abilities activated by agents choosing to do so (though the choice may be highly constrained, and alternative paths unlikely to be taken) and passive powers which the agents may possess irrespective of their wills’ (p. 71). Moreover, in the literature, there are often considered to be four ‘faces’ of power (Akram, Emerson, & Marsh, 2015; Cairney, 2012; Digeser, 1992; Lukes, 2005). The first ‘face’ of power can be considered as the explicit decision-making present within, and surrounding policies and the second ‘face’ describes a process of ([‘] non-decision-making [’]) or the less visible actions taken to ensure that some individuals and groups do not engage’ (Cairney, 2012, p. 47). By contrast, the third ‘face’ of power is based upon the notion that if all the information is not provided to make an informed decision, then agreement reached is based upon who has the power to dispense information, like the idea of informed consent (Lukes, 2005). Lukes (2005) continues to elaborate that this ‘third face of power’ can be seen through discourses such as policies where those with power can control what is and is not focussed upon within policies themselves. Researchers have additionally added a fourth face of power (Akram et al., 2015; Digeser, 1992), wherein this fourth face of power, ‘...not only directs our focus to the making of citizens, but to the making of individuals capable of taking on the responsibilities of citizenship’ (Digeser, 1992, p. 991). Thus, the fourth face takes on Foucauldian ideas of being critical of the concept of power and how the ‘subjects’ of power are socially constructed (Digeser, 1992).

Other researchers, such as Fairclough (2001) have examined how power exists and presents itself in language and discourse, particularly arguing that those with less power are restricted by those with more within discourses, but also how power can exist ‘behind’ the

discourse, like Lukes' (2005) and Cairney's (2012) discussions of 'faces' of power. Bacchi bridges Fairclough's idea with policies as discourse (Bacchi, 2000; 2005). Bacchi argues that by viewing policies as discourses, 'it sees the battles not simply at the level of wanting or resisting a particular policy initiative, but at the level of constituting the shape of the issues to be considered' (Bacchi, 2000, p. 50). Thus, power very much shapes policies and people's respective power(s). Alternatively, power can also be considered by how the policies themselves shape power.

Beyond conceptualisations of power, researchers have additionally considered how power exists across the policies themselves (Newman & Clarke, 2009) and from the perspective of governmentality (Foucault, 1982). Newman and Clarke (2009) elaborate on the connection between power and policies, particularly in how it allows, 'the state [to inscribe] the appropriate boundary between public and personal responsibility of care, welfare and other socially valued goods' (p. 25). By contrast, Bacchi and Goodwin (2016) argue that,

the dominant view in most approaches to policy is that the task of government is (simply) to address and to attempt to solve "problems that exist" ... the intent and purpose of the [What's the problem represented to be] approach is to challenge this premise. It makes the case that policies do not *address* problems that exist; rather, they *produce* "problems" as particular sorts of problems. (p.16)

This builds upon Foucault's conceptualisations of governmentality which puts forth how power can be governed or, 'elaborated, rationalized, and centralized in the form of, or under the auspices of, state institutions' (Foucault, 1982, p. 793). Bacchi and Goodwin (2016) likewise link their analytical approach to Foucault's governmentality, including, 'a conception of power as relational and productive' (p. 45). Thus, when considering this research together, the power imbued within the *types* of policies and what is chosen by the policymakers to regulate (or leave up to the discretion of those implementing the policies) is an additional way to consider power.

2.5 Vulnerability

2.5.1 Research on vulnerability and children's participation

The terms 'vulnerability', 'vulnerable' and 'risk' were present throughout the policies I was interested in and thus already orientated my focus. Research has examined the 'vulnerability' of children and young people and how it relates to how they participate, and the participatory opportunities granted to them (Hallett, 2016; Heimer et al., 2018; Tisdall, 2017). The consensus from such studies appear to point towards vulnerability as a potential barrier to participatory opportunities and a consequence when participation is not pursued (Hallett, 2016; Heimer et al., 2018; Tisdall, 2017). In extension of this, research has

increasingly pointed toward vulnerability not only being a result of a lack of participation, but also being indicative that protection and support can be more helpful and tailored to the specific situation when children and young people are given participatory opportunities (Kosher & Ben-Arieh, 2020a; van Bijleveld et al., 2021). Research has noted that this is especially the case when children and young people can specify the type of participation that would be the most meaningful to them (van Bijleveld et al., 2021). Thus, the intersection of vulnerability and children's participation is a key theme for this thesis and one that will be explored in the role that care and protection play in that relationship.

2.5.1.1 Perspectives of vulnerability

There are several classifications and definitions of vulnerability within the literature (Mackenzie, Rogers, & Dodds, 2013; Herring, 2018; Parley, 2011). In a study examining how individuals working in care settings defined vulnerability, Parley (2011) found that often a broad definition was adopted and that it seemed to depend on the individual practitioner's discretion on how they defined vulnerability. Mackenzie and colleagues (2013) have divided 'vulnerability' based on the source of where the vulnerability manifests, whether that be inherent, situational, or pathogenic, where each refers to an increasingly wider view of the source of vulnerability (individual, situation specific, and broader societal context, respectively). By contrast, Herring (2018) also discusses sources of vulnerability but proposes a definition of vulnerability for individuals that is based on three components being present: a risk of harm; that the individual does not possess the support or resources needed to circumvent the harm; and that the individual is unable to respond in a way to minimise or bypass the harm should it come about. As pertinent to this research project, both typologies help to capture the complexity and nuance surrounding vulnerability specifically in what can lead to one individual being considered vulnerable and what this could mean for them in their opportunities and outcomes, more broadly.

Vulnerability often appears as a rationale to direct interventions. The relationship between vulnerability and childhood has frequently been examined in the literature (Daniel, 2010; Brown, 2013; Herring, 2018), as has that between vulnerability and adults with learning difficulties (Fawcett, 2009; Hollomotz, 2011). From a legal perspective, Herring (2018) identifies two facets that are prominent in discussions of childhood and vulnerability, 'the first is that [children], unlike adults, lack the ability to defend themselves from a wide range of risks' and 'the second, is that children are a valuable asset' (p. 4). This first facet can be considered as a definition of vulnerability in children. Much of the research into vulnerability (especially as relates to children) concerns the need for greater caution and/or

higher ethicality particularly for children and young people who are involved with child welfare systems as compared to children and young people who are not (Appell, 2009; Bracken-Roche, Bell, Macdonald, & Racine, 2017). For this latter subset of children and young people who are involved with child welfare systems, their perceived vulnerability is compounded twice over (both for their status as children or young people and in their involvement with the child welfare system), irrespective of any further exacerbation, including but not limited to those based upon age, class, gender, and race (Appell, 2009; Bracken-Roche et al., 2017).

Across the literature, this duality of vulnerability seems to be common in discussions of vulnerability (Brown, 2013; Herring, 2018). Ultimately, Herring (2018) argues that all individuals possess a degree or potential of vulnerability and that the focus should instead shift to one of ‘universal vulnerability’. Universal vulnerability highlights how vulnerability is and can be related to power. It is a way to positively shift how one considers power differentials by viewing vulnerability as a common factor that all individuals hold. At the same time, ‘universal vulnerability’ can allow for a more critical examination of how and who defines and holds the power of when vulnerability becomes ‘problematic’ (Herring, 2018). In contrast to ‘universal vulnerability’, other research has pointed towards the value of using vulnerability to pinpoint where support can be needed (Hollomotz, 2011). Namely, that vulnerability as a concept *can* be useful to identify where extra support *might* be needed, but that perhaps, ‘this could [also] modify cultural assumptions of passivity and ‘vulnerability’ and enable us to recognise the potential...to exercise autonomy’ (Hollomotz, 2011, p. 148) not only of adults with learning difficulties (as Hollomotz discusses) but also with children and young people. Other research has adopted a more nuanced approach to vulnerability by arguing that,

the dominant construction of vulnerability constrains and devalues what is important to an individual, focusing instead on functional incapacity. However, it is also important to highlight how strengths-based approaches can have a double-edged component and can be used to justify a reduction in services or inaction. (Fawcett, 2009, p. 481)

Thus, perhaps focussing on *only* the problematic elements or the strengths of vulnerability is a detriment, when considering *both* can help to capture the nuance that exists wherever vulnerability does. Vulnerability can be considered a divisive concept, especially in whether it serves to promote a deficit model that focuses on individuals’ weakness rather than strengths (Fawcett, 2009; Hollomotz, 2011; Segrin, McNelis, & Swiatkowski, 2016) or a more critical approach to this deficit model (Göttsche, 2021; Hassouri, 2021). Additionally,

vulnerability as a concept can be critiqued from a systems approach for not recognising the structural mechanisms that enable and perpetuate vulnerability (Andresen, 2014). Overall, vulnerability is a nuanced concept that also seems to help elucidate the relationship between children's participation, care, and protection. In particular, the positive and negative connotations of vulnerability (as discussed above) seem to capture the interplay of how in contexts of protection and care, depending on the perspective of vulnerability, participation can be seen as more or less possible and necessary. For instance, if vulnerability is viewed through a deficit model lens, it can highlight where and how participation may be viewed as appropriate and inappropriate. Whereas, if vulnerability is considered more as a way to highlight where further support may be needed, it seems more likely that participation may be used as a way to complement protection rather than if the need for protection is viewed as low or less urgent.

Yet, Göttsche (2021) notes the value of being critical of viewing vulnerabilities as solely focussing on weaknesses, 'In other words, to recognise vulnerabilities as part of life is to recognise vulnerabilities not only as problematic but also as possibilities' (p. 5) and moreover that, 'vulnerability inevitably determines discourses around empowerment and resilience' (p. 8). Thus, instead of viewing 'vulnerability' to pinpoint weaknesses, it can instead be viewed to indicate where support might be needed. This view is supported by several researchers (Hassouri, 2021; Lundy, Kilkelly, & Byrne, 2013). For instance, Hassouri (2021) continues this argument by stating that, 'seeing vulnerability as the inherent human condition, as opposed to a weakness or a special need, shifts the focus onto the state and the adequacy of their interventions and response' (p. 47). Petherbridge (2016) and Herring (2018) also highlight the strengths of focussing on vulnerability, but also the potential for both positive and negative 'states of being' (Petherbridge, 2016, p. 591).

In recognition of the implications and complexity surrounding conceptualisations of vulnerability, I do purport the value of 'vulnerability' as a conceptualisation (Fawcett, 2009; Herring, 2018; Mackenzie et al., 2013), but also note its limits (Fawcett, 2009; Hollomotz, 2011). There can be great beneficence to considering vulnerability from a universal standpoint (Herring, 2018), but that vulnerability has more often been utilised to highlight a particular group of individuals, who usually do not find such a label supportive of their participation nor want to be considered as vulnerable (Fawcett, 2009; Hollomotz, 2011). With this in mind, I will position myself as being open to how vulnerability is presented within the discourse that I am analysing in this research project and will determine which theoretical framework(s) would be the most relevant based on this. Yet perhaps this openness is a

persuasive way to view vulnerability – namely that, it can be conceptualised and considered in several ways. Many of these ways can be helpful, based on the source of the vulnerability (Mackenzie et al., 2013). The categorisations of vulnerability can be useful in identifying where support may be needed through what and who is valued (Hassouri, 2021; Herring, 2018), but those conceptualisations of vulnerability can potentially serve as a hindrance to an individuals' autonomy (Fawcett, 2009; Hollomotz, 2011). Thus, I am adopting this multifaceted view of vulnerability for the remainder of this thesis to identify where further protections and participatory opportunities may be warranted in legislation and policy. Moreover, closely linked to vulnerability, is risk, which I will now consider and critique.

2.5.2 Vulnerability and risk

Several researchers have considered the difference between vulnerability and risk (Brown, Ecclestone, & Emmel, 2017; Clough, 2017; Daniel, 2010; Parley, 2011; Stanley & de Froideville, 2020). Taylor (2017) defines risk in the social work context as '[meaning] a decision-making situation where the outcomes are uncertain and where the benefits are sought but undesirable outcomes are possible' (p.13), and vulnerability as, 'the susceptibility of an individual to suffer from an identified, undesirable event' (p. 231). By contrast, Daniel (2010) states that, 'when viewed primarily in terms of bad outcomes, 'risk' essentially means the risk of bad outcomes resulting from the impact of adversity upon a vulnerable child' (p. 235). This latter point is similar to how Taylor (2017) defines vulnerability which also appears to highlight the enmeshed relationship between the two concepts.

While Daniel (2010) does not offer a definition exactly, the researcher does present a way in which risk and vulnerability can be considered in juxtaposition to each other. Parley (2011) expands on this and uses temporality as a way to distinguish the two terms by stating that, '["risk["] is often used interchangeably with probability and implies a potential negative outcome at a future time, whereas vulnerability relates to the present time' (p. 267). Hollomotz (2011) offers a slightly different view by differentiating between vulnerability and risk in stating that, '["Vulnerability["] thus results from interactions with external risk factors such as inescapable natural disasters. Risk is seen as entirely situational' (p. 36), but that 'a focus on risk may at times neglect an appraisal of the potential of individuals with learning difficulties to act autonomously and to manage hazards independently' (p. 152). In considering this alongside my previous discussion of vulnerability, risk adds an additional layer of nuance especially considering the centrality to risk and social work research more generally. It is important to tease apart adjacent but distinct concepts such as 'vulnerability' and 'risk'. Overall, vulnerability and risk can be considered as distinct, but related concepts

such that vulnerability focusses on more inherent and present factors impacting an individual and/or situation, whereas risk focusses more on the *potential* for a future situation to impact an individual at a specific time in a certain way.

2.6 Review and gaps within the literature

Participation, protection, care, power, and vulnerability are all closely related and interwoven within the field of child protection and permanence. Such concepts warrant further examination about how conceptualisations and representations of each can and do vary across and within a single system. Moreover, there are gaps in the literature in extrapolating the research highlighting the importance of children and young people defining who they consider to be kin and family and the implications this holds from a participatory standpoint regarding the success or challenge of child protection and welfare interventions (Heimer et al., 2018; Mason & Tipper, 2008). For both vulnerability and risk, there seems to be a degree of contention of how each can be conceptualised based upon the population and/or situation of interest. In particular, the way that vulnerability is considered alongside care, protection and participation seems to be the greatest point of friction (Andresen, 2014). It is also interesting to consider how the relationship between these concepts differs depending on the *type* of ‘vulnerable’ population in question, as can be seen most evidently in how ‘vulnerable’ children are often conceptualised compared to ‘vulnerable’ adults (Hollomotz, 2011). Through this latter discussion, how care, protection and participation are realised in situations with individuals who are considered vulnerable, seems to illustrate a way in which this relationship between vulnerability and power can be further critiqued and evaluated. More specifically, the relationship between vulnerability and power in who and how someone is defined as ‘vulnerable’ and who does that defining helps to indicate where the power lies and how the definition of vulnerability and ‘vulnerable’ can shift based on power. With this review in mind, gaps in the literature exist in how children’s participation is considered alongside concepts such as power and vulnerability, particularly in the context of a child protection and/or welfare system (Heimer et al., 2018; Skauge et al., 2021).

Most generally, section one presents and critiques the terms related to specific groups of individuals (i.e., looked after children and young people, families) in relation to child welfare research and children’s participation. Following this, I have conceptualised the key concepts of this Ph.D. research: participation, care, protection, power, vulnerability, and risk. One main point that can be taken from this review of the literature is that there are negative and positive points in considering vulnerability as a category and one that warrants further critical examination particularly in contexts where it is frequently used (such as in policies

for children who are looked after). I will situate this conceptual discussion from previous research in the context of the Scottish child protection and permanence system where participation, protection, care, power, and vulnerability are rife within the policies and surrounding discourse.

Section 2: System and policy underpinnings

2.7 The Scottish Child Protection and Permanence System

The legal and policy landscape for children and young people becoming looked after in Scotland is a complex and nuanced, tripartite institutional system. Children who become looked after in Scotland are served by a tripartite institutional system which includes the local authority, the Children's Hearing System and the judicial system (Sheriff Court). The Scottish Child Protection and Permanence System has also been divided based on the area of the broader child protection and permanence system. This latter approach is based on the child protection system, children's reporter decision-making, the children's hearings system, permanence decision-making and legal permanence away from home system (CELCIS, 2018). These tripartite institutions include the local authorities, the Children's Hearings System, and the courts (Biehal et al., 2019). The institutional system that the children and their families are involved with depends on several factors. These factors include the needs of the children and whether the services offered and/or provided are voluntary or not and the extent to which the services offered and/or provided are suitable to the child and their family. More structurally, factors of children and families' involvement in the child protection and permanence system are often influenced by factors related to poverty and race (Dettlaff et al., 2011; Rivaux et al., 2008). Thus, elements of intersectionality add further complexity to an already complex system. Depending on the stage of the care journey (i.e., initial referral, emergency measures, plans for permanence) and the type of care order pursued, different systems may come to the forefront of decision-making. However, from the initial referral up to potential permanency options, all three institutional systems are likely to be involved in the decision-making to some extent.

By contrast, the CELCIS map of Scotland's Child Protection and Permanence System is based more around the different areas in which children and young people and their families may become involved or pass through depending on their care pathways. Both models offer useful insight into understanding how the Scottish system proceeds, with Biehal and colleagues (2019) focussing more on the institutional actors in the overall state system, while the CELCIS diagram maps out the different system areas based on potential care pathways. Both are useful in detangling and understanding how the child protection and

permanence system is structured and proceeds in Scotland. Thus, I will be using both throughout this thesis, but with slight amendments for clarity. First, I will consider Biehal's 'tripartite' approach based around the institutional system actors, rather than considering them as systems themselves. Second, as I am considering the entire Scottish child protection and permanence system as the system on which I am focussing, I will label the different smaller 'systems' within it as designated in the CELCIS diagram as 'system areas' because though they may exist as their own system, they exist within the wider microcosm of the child care system in Scotland. I will start by detailing the three key institutional system actors (Biehal et al., 2019) before overviewing the different care orders and placement types as relevant to this research. I will provide further elaboration of the CELCIS (2018) diagram in my methodology chapter (see Chapter 3.4: Using the CELCIS map to situate children's participation). I would additionally like to note that 'care journey' and 'care pathway' are terms often used in relation to how a child or young person can progress through the broader child protection and permanence system, where both are indicative of the complexity inherent such that there are multiple pathways in which a child or young person may enter, exit, or proceed through the system (which is in part why complexity is needed) (Biehal et al., 2019; Children's Hearings Scotland, 2022). This discussion can be directly linked to the broader child care system in Scotland which addresses not only children and young people who are looked after but also children and young people who are offending and/or are in need of other further supports if they have a disability, for instance (Kendrick, 1995). The child care system is often used in official policy, as a descriptive term. It can be a helpful term, as it has equivalence in international literature when discussing the wider system of care, but as Kendrick, Steckley, and McPheat (2011) note specifically in relation to residential care, there is inconsistency in how it is defined.

While I would like to recognise the breadth of the Scottish child care, protection and permanence system, including the 'child care system' would misrepresent the focus of this research project. This research project is intended to focus solely on children and young people who are looked after and/or may be at risk of becoming looked after. Instead, I propose to use the terminology of the CELCIS map of 'child protection and permanence system' (CELCIS, 2018, see Figure 2 in Appendix A). This justification will be further elaborated upon in Chapter 3.4: Using the CELCIS map to situate children's participation) but thought it necessary to introduce here.

2.8 The Tripartite System Institutional Actors

2.8.1 Local Authorities

In Scotland, there are 32 local authorities with each covering specific geographic regions (Scottish Government, 2017). The role of local authorities in relation to social welfare services includes the duty,

...to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate, and such assistance may....be given in kind or in cash to, or in respect of, any relevant person... (Social Work (Scotland) Act 1968, section 12).

Local authorities provide a range of care services for children. Some of these are universal, like early years provision, while others are specialist and targeted at children with particular needs, such as services and support for young people involved in offending behaviour, children and young people who are disabled or affected by disabilities, respite care, foster and residential care and/or aftercare (following a child or young person's exit or growing out of being looked after). There is also a role for social work to conduct assessments to determine the need for protection and/or support, for instance (Part II, Chapter 1, 1995 Act).

In section 22 (promotion of welfare of children in need) of the 1995 Act, there is further detail provided where it states,

- (1) A local authority shall –
- (a) safeguard and promote the welfare of children in their area who are in need.

and in section 25 (Provision of accommodation for children, etc.) further stipulates that,

(1) A local authority shall provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision because –

- (a) no-one has parental responsibility for him,
- (b) he is lost or abandoned; or
- (c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.

For children and young people and their families, a local authority can be their introduction to the child protection and permanence system (often by way of a safety concern reported to a LA).

The 2009 Regulations further specify requirements for local authorities, in relation to looked after children. The intention of the 2009 Regulations is presented in the 2011 Guidance for the 2009 Regulations and 2007 Act, where it states in Chapter 2.1 that,

These regulations replace the Arrangements to Look After Children (Scotland) Regulations 1996 and Fostering of Children (Scotland) Regulations 1996. They also affect parts of the Residential and Other Establishments (Scotland) Regulations 1996 where they apply to the placement of a child or young person in residential care.

The 2009 Regulations bring together the regulation of care planning services with care provision for those children separated from their birth parents. The 2009 Regulations also outline the requirements when children are looked after by kinship carers.

The 2009 Regulations further specify that when a child or young person becomes looked after by a local authority that an assessment (Regulation 3 [2a]) must be made followed by a child's plan (Regulation 5), then periodic reviews of the situation and next steps to determine if a referral to the Children's Hearings System (CHS) for more long-term measures is needed (Biehal et al., 2019). A local authority is more likely to make a direct referral to the Children's Reporter, but anyone can make a referral to the Children's Reporter. A local authority can apply for an emergency child protection order through the Sheriff, themselves (SCRA, 2015).

2.8.2 Children's Hearings System

The Children's Hearings System is a distinct feature of the Scottish Child Care, Protection and Permanence System. Scotland held jurisdiction over their child care system prior to devolution and distinguished itself from the rest of the UK by introducing the Children's Hearing System (Norrie, 2013). This followed the 1964 Kilbrandon Committee's Report and implementation in the Social Work (Scotland) Act 1968 (Norrie, 2013) and was officially established in 1971. The children's hearing is a forum consisting of three lay volunteers from the Children's Panel (who ideally reside in the local authority area of the issue at hand) and are chosen by the National Convener (2011 Act, sections 4-6).

A LA may refer a case to the Children's Reporter (but anyone can directly), if 'the child is in need of protection, guidance, treatment or control' and if 'it might be necessary for a Compulsory Supervision Order to be made' (Scottish Government, 2021b, para. 1.66). A child or young person may be referred to the Children's Reporter for many reasons including, if, 'A child... is not being adequately cared for in the home', 'if a child is being abused' and/or if 'a child is becoming involved in offending behaviour' (Scottish Government, 2013, p. 250). This may follow a CPO being granted (in relation to the child or young person) by the sheriff, if there were concerns for the ongoing protection of the child or young person.

The children's hearing will become involved initially through a second working day hearing, 'unless an immediate application has been made to vary or terminate the CPO or the reporter decides to terminate the [CPO]' (Scottish Government, 2013, p. 385).

There are about 120 Reporters in Scotland who work for the Scottish Children's Reporter Administration (SCRA) and one of their main roles is to assess incoming referrals and determine if the child so referred should be referred to the Children's Hearing System (SCRA, 2020). Following a referral, a Reporter must establish what evidence appears to exist and whether one or more of the grounds for a children's hearing is established. The Reporter then has discretion to refer a child or young person to a hearing, to refer the child and family to services on a voluntary basis, or to take no action. The Reporter will only refer a child or young person to a hearing if there is one or more grounds for referral and there is a need for compulsory measures of supervision (SCRA, 2020).

The grounds for which the Reporter may make a referral to the Children's Hearing System are specified in the 2011 Act, section 67(2a-q).

'(2) The grounds are that—

- (a) the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care,
- (b) a schedule 1 offence has been committed in respect of the child,
- (c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence,
- (d) the child is, or is likely to become, a member of the same household as a child in respect of whom a schedule 1 offence has been committed,
- (e) the child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that—
 - (i) the child will be abused or harmed, or
 - (ii) the child's health, safety or development will be seriously adversely affected,
- (f) the child has, or is likely to have, a close connection with a person who has carried out domestic abuse,
- (g) the child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009 (asp 9),

- (h) the child is being provided with accommodation by a local authority under section 25 of the 1995 Act and special measures are needed to support the child,
- (i) a permanence order is in force in respect of the child and special measures are needed to support the child,
- (j) the child has committed an offence,
- (k) the child has misused alcohol,
- (l) the child has misused a drug (whether or not a controlled drug),
- (m) the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person,
- (n) the child is beyond the control of a relevant person,
- (o) the child has failed without reasonable excuse to attend regularly at school,
- (p) the child—
 - (i) [has been, is being] is likely to be, subjected to physical, emotional or other pressure to enter into a [...] civil partnership, or
 - (ii) is, or is likely to become, a member of the same household as such a child.
- [(q) the child—
 - (i) has been, is being or is likely to be forced into a marriage (that expression being construed in accordance with section 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (asp 15)) or,
 - (ii) is, or is likely to become, a member of the same household as such a child. (Section 67 [2a-q], 2011 Act)

A compulsory supervision order 'is a substantive decision and should only be made following the acceptance or establishment of the [section 67] grounds [of the 2011 Act] for a referral and a full discussion at a hearing' (Children's Hearings Scotland, 2022, section 3.3).

Moreover, following a referral of a child or young person to a Children's Hearing, a grounds hearing is held, and the grounds for referral must be 'explain[ed] to the child and each relevant person in relation to the child' (Section 90(1) of the 2011 Act). The grounds can either be accepted, not accepted, not understood or if it is determined by the grounds hearing to not satisfy the necessary grounds for referral, this can lead to the referral being discharged (Section 91-95, 2011 Act; SCRA, 2020). If the grounds are not accepted nor understood, the Reporter may be directed to apply to the Sheriff court 'to determine whether the ground is

established' (Section 94(2), 2011 Act). If the grounds are accepted, a hearing will determine if compulsory measures of supervision would be necessary. Compulsory supervision orders can decide where a child should live, whether there is contact with family members, and if any other measures need to be attached to the statutory order. Compulsory supervision orders must be reviewed by a children's hearing within a year of making the order, earlier if requested by the local authority, or any time after three months if requested by the child or parent, or if a hearing has specified an earlier date for review (Scottish Government, 2013).

2.8.3 Judicial System

The judicial system or sheriff courts become involved in the issuance of three of the four care orders classifying children and young people as being looked after. The judicial system grants CPOs and POs following the child protection and/or children's hearing system areas, such that the local authority can make an application for a PO (with or without authority to adopt) to the judicial system. While the judicial system is not usually considered a central component of the CHS, it can be considered a player that becomes involved as needed, with more specific issues emerging for young people who offend between the approximate ages of 16 and 18 (Scottish Government, 2020b). These issues include that if a young person is 16 years old and not yet subject to a CSO or 'an open referral to the Reporter [they] cannot be referred to the children's hearings system, unless by the court following guilt being accepted or established' (Scottish Government, 2020b, p. 5). Children or young people can be referred in relation to offending in specific circumstances (through particular provisions) (Biehal et al., 2019). Moreover, the judicial system can also become involved with the CHS if the grounds for referral to the CHS are not accepted or understood or if a child or relevant person appeals a decision that had been made by the Children's Hearing (2011 Act; Scottish Government, 2013). If the sheriff grants an emergency order (including a CPO) for a child or young person, a Children's Hearing must be arranged on the second working day following the child or young person's removal to safety. Finally, if the local authority's decision-maker has determined that following a CSO and permanence panel, that a PO with authority to adopt is necessary, an application and notification must be made to the court and Children's Reporter, respectively (Biehal et al., 2019). In consideration of the remaining care orders that can designate a child or young person as being looked after, the judicial system can also issue a PO (with and without the authority to adopt) but not Section 25 orders as the latter are voluntary orders not issued by the courts (SCRA, 2011). Thus, all three system actors have intersecting purposes and jurisdictions within the broader child protection and permanence system in Scotland. This is even more complicated when

considering these artfully entangled actors and systems alongside the possible care orders and placements.

2.9 Overview of Care orders

For children and young people who are looked after in Scotland, there are four possible care orders that could designate them as such: Section 25 orders, Child Protection Orders (CPOs), Compulsory Supervision Orders (CSOs), and Permanence Orders (POs) (See Table 2 below for how these care orders are matched with placement types).

Table 2. Care Order Based on Placement Type.

	Placement Type	Looked after at home	Kinship Care	Foster Care	Residential Care	Secure Care ³
Care Order						
Section 25 Orders			X	X	X	X
CPOs			X	X	X	X
CSOs		X	X	X	X	X
POs		X	X	X	X	X

The ‘X’ indicates where the care order and placement type is possible (see appropriate sections of looked after away from home and looked after at home in the CELCIS Map in Figure 2 of Appendix A for an illustration of how the care orders fit within the broader protection and permanence system, as the placement types do not appear in the CELCIS Map). Of the care orders that can designate a child and/or young person as being looked after, a Section 25 Order is the only voluntary order as set out in the 1995 Act. This ‘voluntary’ nature is due to the parent and/or guardian getting assistance from the State voluntarily rather than being required to do so by a legal instrument such as those issued through judicial means or the Children’s Hearings (1995 Act; SCRA, 2011). Thus, the goal of a Section 25 order is meant to be one of temporary and voluntary assistance and can often be a child or young person’s introduction to the protection and permanence system (SCRA, 2011) directly

³ In order for a child to be placed in secure accommodation there are additional conditions which must be met. These are outlined in Sections 83(6), 87(4) and 88(3) of the Children’s Hearings (Scotland) Act 2011 (the 2011 Act).

through a local authority. A Section 25 order can result in any placement away from home (foster care, kinship care, residential care, or secure care).

In the 2011 Act explanatory notes (as I stated above in relation to defining ‘looked after’, see section 2.2), it states that where subject to the CPO, ‘...the local authority has the same duties towards the child as the local authority would have by virtue of section 17 of the Children (Scotland) Act 1995 toward the child as it would have if the child were a “looked after” child, subject to any conditions of the child protection order’ (Paragraph 46). The goal of a CPO is one of involuntary emergency protection. Like Section 25 orders, CPOs can likewise be a starting point of intervention (potentially following intervention to a ‘place of safety’) and can result in any of the away from home placement options (foster care, kinship care, and secure care). Moreover, CPOs directly feed into the Children’s Hearings System by way of a second working day hearing to determine the appropriateness of the current placement (and care order) and to determine if longer-term measures might be needed (Scottish Government, 2011).

CSOs or interim CSOs are issued through the Children’s Hearings System with the goal of granting longer-term protection for the child and/or young person. CSOs or interim CSOs can have a residence requirement or not. CSOs with a residence requirement could result in any placement away from home, whereas a CSO without a residence requirement specifies that the placement does not *have to* be away from home so can result in the child staying at home. More specifically, this compulsory supervision order can include measures of, ‘(a) a requirement that the child reside at a specific place, (g) a direction regulating contact between the child and a specified person..., (i) a requirement that the implementation authority carry out specified duties in relation to the child’ (2011 Act, section 83).

POs are legislated in Section 80 of the 2007 Act with the goal of providing permanence to children and young people with or without the authority to adopt. This is a court order and can result in a placement away from home or potentially later at home with birth parents (Scottish Government, 2010a). Furthermore, compared to the multiple ways in which the three other care orders can be initiated, POs can only be applied for by LAs (2007 Act Policy Memorandum). The goal of POs is further specified in the 2010 version of the Guidance on Looked After Children (Scotland) Regulations 2009 and Adoption and Children (Scotland) Act 2007⁴ where it states that, ‘The order is designed to remove uncertainty from a

⁴ To note that there are two versions of the Guidance on Looked After Children (Scotland) Regulations 2009 and Adoption and Children (Scotland) Act 2007. I have predominantly used the 2011 version as it supersedes

child's life and to empower his or her carers so that the daily experience of the child is of nurture and predictability; of someone being there for him or her' (p. 9). Thus, this goal of permanence is markedly different from goals of protection with the goal of permanence being less concerned with the immediate safety of the children and young people and more with overall long-term stability. Following from these four care orders are the potential placement types that can be more likely associated with initiating or following a certain care order.

2.9.1 Types of Placements and placement-specific participation literature

Children who are 'looked after' can be looked after at home or away from home (2011 version of the Guidance on Looked After (Scotland) Regulations 2009 and Adoption and Children (Scotland) Act 2007). The former is when there is no constraint of residence through a Compulsory Supervision Requirement or under a permanence order. The latter can result from any of the four care orders. This would include when there is a Supervision Requirement with a condition of where the children can reside, including with kinship carers, foster carers, in a residential unit or a secure unit. 'Looked after at home' or equivalent is a more unusual designation that many countries do not recognise (Gadda, 2012). Yet, of the countries which have both, there are different connotations for children who are looked after *at home* and *away from home* (Welch, 2018). For instance, Welch (2018) expands on these different connotations in that the young people looked after at home and in kinship care in the study often did not think the term 'looked after' was pertinent to them since they were still with their family (or at least people known to them) compared to if they had been in other formalised forms of care (including foster care, residential care and/or secure care).

In studies conducted about children who are the equivalent of looked after in international contexts, it is often presumed that children are looked after away from home (van Bijleveld et al., 2015). In such studies, it is often highlighted that such children would have more adults involved in the decision-making than might be expected for those children looked after at home (van Bijleveld et al., 2015). Most of the research examining children and young people's participation in child welfare systems (when specified) encompasses only away from home placements (Bessell, 2011; van Bijleveld et al., 2015; Zeijlmans et al., 2019) with a very small (but growing) body of research examining children's participation in decision-making when at home (Bjerke, 2011; Gadda & Fitzpatrick, 2012; Martin, Forde, Horgan, & Mages, 2018; Slavković, Pavić, & Golubović, 2021). In the following sections, I will present each of the placement types in the Scottish context alongside the discussions and

the 2010 version. However, I have sparingly used the 2010 version where certain aspects were not mentioned in the 2011 version.

findings that have emerged from associated literature. Additionally, I will specifically consider the research undertaken in relation to participatory opportunities and research for the specific placement types.

2.9.1.1 Looked after at Home

Being looked after at home is meant, ‘to promote beneficial changes in the life of the child while enabling him or her to remain at home’ (Scottish Government, 2011, p. 43). In Scotland, in the 2011 Guidance regarding regulation 8(3) of the 2009 regulations, it states, ‘that any arrangements local authorities make for looked after children to live with their parents, or with other people who have parental responsibilities and rights, must be subject to the terms of any existing supervision requirements, warrants, authorisations, or permanence or other orders’ (p. 43). Of the almost 15,000 children and young people who were being looked after in Scotland as of July 2021, just over 2,800 children and young people were being looked after at home (Scottish Government, 2022a).

Children and young people who are looked after at home still have opportunities to participate, as do other looked after children, in the children’s hearing system (2011 Act; Gadda & Fitzpatrick, 2012). Research on participation for children and young people who are looked after at home finds that there tends to be ‘a great deal of instability of placements and people’ (Gadda & Fitzpatrick, 2012, p. 7), with ‘young people’s and parents’ most often voiced complaint being about the frequent changes of social workers and other professionals’ (Gadda & Fitzpatrick, 2012, p. 8).

Moreover, there is less research about children’s participation, when they are looked after at home, than for looked after children away from home. This lack of research seems to be based on two factors, the first being that, at least in part, there may be more practicalities involved that make access for research more difficult (Soliman et al., 2016). The second is likely associated with a presumption of where participation is appropriate and needed and that parents are viewed as having the child’s best interests in mind (Križ & Skivenes, 2017; Skauge et al., 2021). This suggests that, beyond more research being needed to examine the participatory opportunities for children and young people granted, the ‘appropriateness’ and ‘necessity’ of conducting research examining participatory opportunities should likewise be further critiqued, especially in comparison to placements away from home.

2.9.1.2 Looked after away from home: Foster Care

Like other placement types, including kinship care, foster care definitions tend to vary slightly across jurisdictions depending how other types of placements are defined (Urrea Monclús et al., 2021; Pastor et al., 2022). The UN Guidelines for the Alternative Care of

Children (2010) define foster care as, ‘situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care’ (Section 29 [c(ii)]). In Scotland, foster carers are approved, trained, and paid by a local authority (whether directly or through an independent fostering agency) (2009 Regulations). Of the approximately 15,000 children and young people being looked after in Scotland as of July 2021, there were noted to be just under 4,500 children and young people in foster care (Scottish Government, 2022a). There are several types of foster care that are possible in Scotland, including: short-term (or respite) fostering, emergency fostering, interim fostering (in between children and/or young people returning home to their parents or to a more permanent placement), longer term fostering (this includes any fostering that exceeds two years), permanent fostering (this would be achieved through a PO), specialist foster care and intensive foster care where the nature and function of foster care would vary on the type in question (Scottish Government, 2020c).

Previous research about foster care in Scotland has explored a range of challenges for this type of provision (Clapton & Hoggan, 2012; Hill, 2002; MacKay, Smith, Morton, Jones, Scullion, & Taylor, 2015; Triseliotis, Borland, & Hill, 1998). Triseliotis and colleagues (1998) focussed on the recruitment and retention of foster carers in Scotland by understanding the characteristics of foster carers and interviewing foster carers to gain their perspectives. By contrast, MacKay and colleagues (2015) focussed on very young children in foster care in Scotland for reasons of maltreatment or risk of maltreatment by their parents and the everyday care provided by foster carers. Previous research in relation to children’s participation in the context of foster care in Scotland has noted that there is a lack of research (Clapton & Hoggan, 2012) and that, when the views of children and young people are considered (Hill, 2002), the research is often not concerning their views on the decision-making processes.

Compared to research on the other possible types of placements, there appears to be the most international research examining children and young people’s participation in foster care decision-making (including Nordenfors, 2016; Pastor, Balsells, Vaquero, Mateo, & Ciurana, 2022; Urrea Monclús, Mateos Inchaurreondo, Fernández-Rodrigo, & Balsells Bailón, 2021; Weisz, Wingrove, Beal, & Faith-Slaker, 2011; Zeijlmans et al., 2017; Zeijlmans et al., 2019). This is perhaps indicative of the children and young people being easier to access for involvement in research compared to the other placement types (Soliman et al., 2016). Some of these researchers make a distinction in the timing of the participation under examination,

particularly at the start of the foster care process (Pastor et al., 2022) or in foster care review hearings (Weisz et al., 2011). Moreover, some of the research seems to indicate a difference in terminology across jurisdictions such that kinship care is often subsumed within foster care as ‘kinship foster care’ in addition to ‘residential foster care’ (Urrea Monclús et al., 2021; Pastor et al., 2022), making the participation between *types* of placements difficult to separate.

Previous research has examined foster carers’ biological children in the Scottish context (including Sutton & Stack, 2013) and highlighted the value of the participation of the foster carers’ biological children. Research undertaken in Sweden considers this more extensively, with a study examining the participation of birth children of foster carers in the decision-making process and found that the children were not granted participatory opportunities on par with adults (Nordenfors 2016). Moreover, Nordenfors (2016) argued that ‘the rationale may stem from ideas of the child as insufficiently competent to take responsibility, and/or as vulnerable and in need of protection from being charged with too much responsibility’ (p. 868). Thus, ‘vulnerability’ and ‘insufficiently incompetent’ are presented here as a potential reason of why children and young people, even when they are not the ones at the centre of the decision-making, are not granted more participatory opportunities. This view of the ‘vulnerability’ of children in foster care appears consistent across previous research (Zeijlmans et al., 2017). Further, this leads to questions about how these conceptualisations of vulnerability and incompetency vary or remain constant across different types of placements and/or care orders. There is a small body of research that has examined placement decision-making in foster care (Zeijlmans et al., 2017) and regarding the participation of service users in foster care, including children (Zeijlmans et al., 2019). Zeijlmans and colleagues (2019) found that ‘In general, older children were seen as more active participants in approving and accepting the foster care placement, while younger children remained uninformed or unheard on occasions’ (p.7). Thus, there appear to be many characteristics of the children and young people, the placement, the care order and thus the associated level of risk that can influence associations with vulnerability and thus participation. This suggests that just as there are varying reasons for why participatory opportunities may be pursued (including being viewed as less ‘vulnerable’ such as in older children), there are likewise varying reasons for why it would or should not be pursued (including that it is considered to not be necessary and viewing children as more vulnerable due to their younger age) (Skauge et al., 2021).

2.9.1.3 Looked after away from home: Kinship care

Specific definitions vary slightly between countries, but Pitcher (2014) collated characteristics that are typically present in cases of kinship care: that a member of the children's social network is responsible for their care, that this care is not a one-off or part time situation, that it has the potential to persist, that it is in reaction to a problem faced by the children's biological parents that make them unable to care for their own children and that it may exist in formal or informal arrangements. In the Scottish context, the Looked After Children (Scotland) Regulations 2009 define a kinship carer in regulation 10(2) as, 'a person who is related [where related "means to the child either by blood, marriage or civil partnership"] to the child; or a person who is known to the child and with whom the child has a pre-existing relationship'. Distinctions can be made between formal and informal kinship care, where formal kinship care refers to when, 'A local authority may make a decision to approve a [kinship carer] as a suitable carer for a child who is looked after by that local authority in terms of section 17(6) of the 1995 Act...' (2009 Regulations, regulation 10.1). By contrast, informal kinship care exists in situations where children and young people are cared for by family members or friends of the family and are not considered looked after by the local authority but can still often access varying degrees of support (2014 Act). The number of children and young people in formal kinship care in Scotland has risen four-fold from 2001 to 2014 culminating in an estimated 4,000 children (Scottish Executive, 2003; Scottish Government, 2020a) where it seems to have remained (Scottish Government, 2022a). The number of children and young people in informal kinship care is more difficult to gauge since many arrangements can be decided on privately among family and/or friends. One recent avenue of research and policy has been the need for an assessment for kinship carers as distinct from foster carers (Calder, 2006; Brisebois & Lee, 2012; O'Brien, 2014; Fuentes-Peláez, Amorós, Pastor, Molina, & Mateo, 2015). Particularly, researchers have noted that kinship carer assessments are more likely to be expedited, completed later and/or be less comprehensive than that of foster carers (Calder, 2006; McHugh & Hayden, 2014). A unique feature of assessments of kinship carers compared to that of foster carers is that the former is assessed for care with (a) specific child(ren) in mind, while the latter for their ability more generally to care for children (Pitcher, 2014).

There is a paucity of research related to kinship care and children's participation (McHugh, 2009; Talbot, 2006) with some of this research being conducted in Scotland (Burgess, Rossvoll, Wallace, & Daniel, 2010). Moreover, this lack of research is perhaps indicative of a similar view towards participatory opportunities for children looked after at

home and in kinship care, since for both they are still being cared for by their family (or someone previously known to them). Thus, there might be a greater presumption that the children and young people's best interests can be subsumed in that of their relative or known carers and that participatory opportunities are less needed or appropriate. This can additionally be considered in light of the previous discussions in relation to the 'appropriateness' of children's participation when they are still being cared for by family (see Section 2.9.1.1: Looked after at home). This potentially suggests that there could be a view of the 'inappropriateness' for children and young people who are viewed as extra vulnerable (e.g., younger children) and those who are viewed as not necessarily vulnerable (e.g., children and young people looked after at home and/or in kinship care) in terms of their need to participate.

2.9.1.4 Looked after away from home: Residential Care

Most generally, the UN Guidelines for the Alternative Care of Children (2010) define residential care as, 'care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes' (Section 29[c(iv)]). In the Scottish context, residential care or placement in a residential establishment has been defined through the 2011 Act in the interpretation of section 202 where it states that it is, '(a) an establishment in Scotland (whether managed by a local authority, a voluntary organisation or any other person) which provides residential accommodation for children for the purposes of this Act, the 1995 Act or the Social Work (Scotland) Act 1968'. Compared to the UN definition, the above definition used in Scotland is more generalised without reference to specific types or variations of residential care, but this is not the only definition used in Scotland. Residential care in Scotland can be divided into different subtypes, with these being residential units, residential schools, secure care and 'crisis care and assessment units' (Audit Scotland, 2010). These subtypes each have different roles and functions, with residential units being mostly offered through local authorities (Audit Scotland, 2010) and intended '...to play a role in acting as an initial placement and as a safety net for other parts of the system, particularly fostering...' (Milligan, Hunter, & Kendrick, 2006, p. 2). By contrast, residential schools are intended 'for those who need specialist education and care' (Audit Scotland, 2010, p. 6). Secure care units are mostly offered by independent providers (Audit Scotland, 2010) and are intended for young people who meet the 'secure criteria'. These include absconding which places them at physical, mental, or moral welfare at risk and/or engaging in self-harming conduct and/ or is likely to cause injury to another person (Roesch-Marsh,

2014). Finally, there are crisis care and assessment units, ‘where a child’s needs can be assessed before making decisions about the longer term’ (Audit Scotland, 2010, p. 25) or a child can be placed there because of ‘unplanned or emergency placements after problems at home or in their previous placement’ (Audit Scotland, 2010, p. 30). In the same July 2021 statistics of the types of placements for children and young people looked after (see section 2.9.1: Types of placements and placement-specific participation literature), approximately 1,300 were in any form of residential accommodation (including secure care) (Scottish Government, 2022a). Previous research has examined residential care in Scotland (Emond, 2003; Kay, Kendrick, Stevens, & Davidson, 2007; Punch, McIntosh, & Emond, 2012; Skinner, 1992). A subset of this research has considered the role of children and young people in the decision-making surrounding residential care (Emond, 2003; Punch et al., 2012; Skinner, 1992). Much of this research highlights the lack of involvement that children and young people report in the decision-making (Skinner, 1992) and the overall lack of research examining the topic (Emond, 2003).

There have been several international studies examining the participation of children and young people looked after (or equivalent in other jurisdictions) in residential care (Borić, Čosić, & Prskalo, 2021; Brady et al., 2019; McCarthy, 2016; McPherson et al., 2021; Southwell & Fraser, 2010). One commonality that appears to thread through these studies is the exacerbated vulnerability of children and young people in residential care (Gatwiri et al., 2021; McPherson et al., 2021) and that opportunities for participation in residential care are often viewed as optional by social workers (McPherson, 2021). Interestingly, some researchers have noted a distinction in the participatory opportunities available and realised between residential care and foster care, with the former being more likely to be informed of their participatory rights but also that complaint mechanisms were not consistently employed nor utilised by children and young people across both foster care and residential settings (Brady et al., 2019). Moreover, several researchers have highlighted the inadequacy of the participatory opportunities for children and young people in residential care (Borić et al., 2021; McCarthy, 2016; Pålsson, 2017; Southwell & Fraser, 2010). McCarthy (2016) noted that participation of children and young people in their (admittedly small-scale) study often appeared to be in more singular circumstances as opposed to the ongoing nature that is oft highlighted as a crucial aspect of participation (UNCRC, 2009; Bouma et al., 2018).

By contrast, Southwell and Fraser (2010) conducted a study examining the perspectives of children and young people in residential care in Australia on various topics including their views on their participation in the related decision-making for their care.

Specifically, the researchers noted that there were inconsistent practices of participation, particularly in what they designated as ‘higher order decisions’ (‘such as those concerning care and contact arrangements and young people’s health and education’, Southwell & Fraser, 2010, p. 225) as opposed to involvement in more everyday decision-making. Similarly, Borić and colleagues (2021) conducted a study examining young people’s participation in residential settings in Croatia and concluded that, ‘adolescents’ participation in educational institutions is perceived as limited, characterized by restriction and a lack of choice, which results in decreased motivation for participation’ (p. 142). This appears to indicate a cyclical approach to participation as since there are a lack of participatory opportunities, children and young people are less interested in the participation that *is* available. This likely makes those determining the opportunities less likely to consider further and more meaningful opportunities. Pålsson (2017) examined the role of children and young people’s participation in residential care in Sweden and found that there are ‘difficulties in giving children’s views substantial impact on the inspection process. This can be attributed to the fact that most of the regulatory quality criteria used by the authority diverge from the aspects of care that children attach most importance to’ (Pålsson, 2017, p. 33). Thus, compared to the previously discussed placements, participation in residential care placements seems often to be limited due to perceptions of children and young people’s increased vulnerability. Yet, it is interesting to note that even with this in mind there is more research examining children and young people’s participatory opportunities in residential care compared to those looked after at home and in kinship care. This is perhaps indicative of the greater ease in accessing children and young people for research when they are involved in more formal types of state care compared to more informal or intermediary types of placements (Soliman et al., 2016).

2.9.1.5 Looked after away from home: Secure Care

Secure care is often subsumed within definitions of residential care or considered as a specification of it (UN, 2010). Secure care or secure accommodation has been defined in Scotland through the Secure Accommodation (Scotland) Regulations 2013 in regulation two (interpretation) as, ‘accommodation provided for the purpose of restricting the liberty of children in a residential establishment’. Furthermore, of the approximately 1,300 children and young people in any form of residential accommodation, only 38 of those were in secure accommodation (Scottish Government, 2022a). Previous research has examined secure care in Scotland (Francis, Kendrick, & Pösö, 2007; Littlewood, 1987; Roesch-Marsh, 2014, 2018; Smith & Milligan, 2004), with some research particularly considering children and young

people's views (Littlewood, 1987; Roesch-Marsh, 2014). Roesch-Marsh (2014) particularly considers, in part, how young people were involved in the decision-making surrounding secure care and how they would like to be more involved in the decision-making. Roesch-Marsh (2014) argues that regarding 'out of control' behaviour of young people in secure care, 'we need to understand the multiple meanings of this behaviour and be willing to [go] further in our attempts to involve young people in decision-making' (p. 197). This points towards the importance of involving young people in decision-making and particularly those in secure care, as different stakeholders can hold different presumptions of the reason for 'out of control' behaviour (Roesch-Marsh, 2014). Additionally, considering that secure care exists within residential care, a small body of research has examined the participation of children and young people in the decision-making as a distinct type of residential care (Henriksen, 2022; Roesch-Marsh, 2012; ten Brummelaar et al., 2018a; 2018b). In these studies, examining children and young people's participation in residential care (ten Brummelaar et al., 2018a; 2018b), only three of the four studies seem more specific to secure care (Henriksen, 2022; Roesch-Marsh, 2012) or 'coercive care' as is used in the article (ten Brummelaar et al., 2018b). The researchers examined professionals' perspectives of young people's participation in 'coercive care' in the Netherlands and found that participation was often used as a reward for good behaviour which, '...instead of as a basic need in the care and treatment process contravenes the need for young people to develop within the institutions' walls' (ten Brummelaar et al., 2018b, p. 708). Thus, in this study, it seems that participation is used to control and since the young people in this study were seemingly involved with the justice system as opposed to the child welfare system, it seems that more research would be needed to examine this in secure care establishments in the case of child welfare, more generally. Moreover, Henriksen's (2022) study was based on young people's participation in secure care in Denmark and found that of the participants in their study, 'young people express a limited understanding of the decision-making process resulting in secure placement' (p. 796). In particular, the researcher noted that the young people were often not provided information about the decision-making process based on presumptions of the young person's vulnerability and/or incapability and that this influenced whether the young people could be seriously regarded in the relevant decision-making (Henriksen, 2022). Overall, this view of vulnerability being a barrier and deterrent to children and young people's participation in alternative care settings appears to be a trend within the literature (Gatwiri et al., 2021; Garcia-Quiroga & Agoglia, 2020) and one that has not been examined much across different placement options.

Secure care has a role in protecting the children and young people in care from their families, but also in some cases from themselves and/or others (Barclay & Hunter, 2008). Moreover, in consideration of perceptions of vulnerability of children and young people in residential care (Gatwiri et al., 2021; McPherson et al., 2021), there is evidence that illustrates that children and young people in secure care would be more likely to be perceived as even more vulnerable than children and young people in other forms of care, as there are reported to be a higher rate of adverse childhood experiences (Children and Young People's Centre for Justice, 2021). Moreover, the mechanisms for children and young people's participation across placement types have received little attention in research (Lausten & Kloppenborg, 2022). This lack of research is perhaps indicative that the presumption of vulnerability is so high (Children's Hearings (Scotland) Bill Policy Memorandum 2010) that further research into the participatory opportunities could be viewed as unnecessary.

2.10 Policies underpinning the child protection and permanence system in Scotland

Following the discussion of the institutional actors, system areas, care orders and different placements options, it is likewise important to consider how all are established through the primary legislation and thus the different care orders and pathways in which children and young people can be considered looked after in Scotland. The key legislation that underpins the child protection and permanence system in Scotland are the Social Work (Scotland) Act 1968, the Children (Scotland) Act 1995, the Adoption and Children (Scotland) Act 2007, the Children's Hearings (Scotland) Act 2011, the Children and Young People (Scotland) Act 2014, and the Children (Scotland) Act 2020. The secondary legislation includes the 2009 Looked After Children Regulations and the non-statutory guidance includes the 2011 Guidance for the 2009 Regulations and 2007 Act, the 2014 Act and 2021 National Child Protection Guidance. Finally, the more generalised framework documents (without statutory power) include the GIRFEC documents and the Promise, each of which I will overview in turn.

2.10.1 Social Work (Scotland) Act 1968

The Social Work (Scotland) Act 1968 heralded several key developments in child care, protection and permanence, as alluded to earlier in Section 2.8.1: Local authorities in detailing the role of LAs in Section 12 of the 1968 Act. The preamble of the Social Work (Scotland) Act 1968 states that it is, 'An Act to make further provision for promoting social welfare in Scotland; to consolidate with amendments certain enactments relating to the care and protection of children...; to establish children's panels to provide children's hearings in the case of children requiring compulsory measures of care...'. Moreover, Norrie (2020)

elaborates that the 1968 Act provided an ‘increased focus on preventive measures’ (p. 46), ‘greater involvement of the child’s family’ (p. 48), ‘the end of the boarding-out preference’ (p. 49) and ‘clarifying and enhancing the role of the local authority’ (p. 49) by placing the role of social work services with local authorities. The foundations for participatory opportunities for children and young people were established as part of the children’s hearing system, which was later extended by the 1995 Act (Norrie, 2020). Additionally, Kendrick, Lux, McGregor and Withington (2021) discuss the emergence in the 1968 Act of the possibility that children and young people could be on compulsory supervision measures at home. Thus, this Act set the foundation for many of the elements of the current child care, protection and permanence system in Scotland.

2.10.2 Children (Scotland) Act 1995

The preamble of the Children (Scotland) Act 1995 states that it is, ‘An Act to reform the law of Scotland relating to children, to the adoption of children and young persons who as children have been looked after by a local authority; to make new provisions; to make provisions as respects residential establishments for children and certain other residential establishments; and for other connected purposes.’ Moreover, Norrie (2020) argues that the 1995 Act brought an enhanced focus to children and young people’s participation rights, first utilised the term ‘looked after child’ in Scottish legislation, clarified the role and jurisdiction of local authorities and introduced new care orders including child protection orders, among others. In addition, the 1995 Act brought in several other key elements including consistently putting in other key principles around best interests, non-intervention and considering the race of the child and young person. The 1995 Act remains a crucial foundation of the legislation for looked after children in Scotland and includes the present legislation for section 25 or voluntary care orders. Moreover, amendments have been made in subsequent acts, including through the 2007, 2011 and 2014 Acts. These textual amendments are throughout the 1995 Act and reflect the shifting ways children, family, care, protection, and participation are conceptualised within the policies. For instance, Norrie (2020) notes that, ‘the children’s hearings provisions in the Children (Scotland) Act 1995, together with those relating to child assessment orders and child protection orders, were replaced by the Children’s Hearings (Scotland) Act 2011’ (p. 71) with the 2011 Act becoming the current legislation for children’s hearings provisions.

2.10.3 Adoption and Children (Scotland) Act 2007

The Adoption and Children (Scotland) Act 2007 explanatory notes clarify that,

The Act maintains the existing adoption service and local authorities continue to have a duty to provide an adoption service for placing children with adopters and assessing adopters. A wider range of people are able to adopt. Provisions modernise and improve the existing service and the broader services available to children who cannot live with their original families. The Act introduces a new court order for accommodating such children (a “permanence order”).

In relation to children and young people who are looked after, this Act primarily covers the legislation relating to permanence and most specifically permanence orders. Further information about the 2007 Act can also be found in the Act’s explanatory notes, policy memorandum and associated guidance. The policy objectives for the Adoption and Children (Scotland) Bill in the policy memorandum of the 2007 Act note that its goal, ‘...is to improve, modernise and extend adoption in Scotland and to provide greater stability for children who cannot live with their original families’ (Section 2). In the 2007 Act explanatory notes, it states that, ‘the Act also amends the 1995 Act’ (Section 5). The associated non-statutory guidance is found in the ‘[2010] Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007’ and specifies that,

This guidance is intended to support the work of all those who take part in the assessment and planning process for children and young people, in the provision of resources in the recruitment, assessment and support of carers and those individuals who through kinship, foster-care or adoption offer children and young people on a daily basis, nurture, respect, comfort and all the many experience[s] which will make for a happy childhood and adolescence. (Page 10)

Thus, the 2007 Act and adjacent policies (such as the explanatory notes and policy memorandum) focusses on the ‘modernis[ation]’ of the system and services, particularly in relation to permanence orders and how it extends the definition of looked after to include children and young people on permanence orders.

2.10.4 Children’s Hearings (Scotland) Act 2011

The Children’s Hearings (Scotland) Act 2011 is the most recent legislation that primarily concerns the law, purpose, and jurisdiction of children’s hearings before, during and after a children’s hearing (2011 Act). This serves as a primary piece of legislation for children and young people who are looked after, encompassing two of the four care orders (child protection orders and compulsory supervision orders) in addition to the legal basis for the children’s hearing system. Further information about the Children’s Hearings (Scotland) Act 2011 can be found in the associated explanatory notes and policy memorandum. In 2011 Act Policy Memorandum, it states that, ‘the Children’s Hearings (Scotland) Bill will underpin reform of the Children’s Hearings system – reform that provides the opportunity to improve the ways we support our most vulnerable children and their families’ (Section 4).

Norrie (2020) likewise notes in his examination of the history of Scottish child protection law, that ‘the [Children’s Hearings (Scotland) Act 2011] did not affect any fundamental change, but was designed to strengthen the existing system and make it more consistent with both the European Convention on Human Rights and the United Nations Convention on the Rights of the Child’ (p. 71-2). In addition, the procedures of the Children’s Hearings are further specified in the secondary legislation of Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013, where it elaborates that, ‘the Scottish Ministers make the following Rules in exercise of the powers conferred by sections 177 and 195 of the Children’s Hearings (Scotland) Act 2011 and all other powers enabling them to do so’ (2013 Rules of Procedure, Preamble).

2.10.5 Children and Young People (Scotland) Act 2014

The Children and Young People (Scotland) Act 2014 (2014 Act) focusses less on establishing the legislation for children and young people being and becoming looked after and more on setting the groundwork for a generalised framework for children and young people’s rights in Scotland. More specifically, the Act legislated for GIRFEC (Getting it Right for Every Child) as a national framework in Scotland that is intended to improve children and young people’s wellbeing through a focus on placing the child at the centre, early intervention (only as deemed necessary) and ‘joined-up working’ (Scottish Government, 2022b). GIRFEC is based around eight principles of wellbeing or SHANARRI (Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included). Furthermore, there are particular provisions for kinship care (Part 13: Support for Kinship Care) in part through kinship care orders where a local authority, ‘must make arrangements to secure that kinship care assistance is made available for a person residing in its area who falls within subsection (3)’ which includes an ‘eligible child’ ‘who the local authority consider – (a) to be at risk of becoming looked after...’ (2014 Act, Section 71). These particular provisions for kinship care resulted from discussions regarding the inadequacy of current allowances for kinship carers (The Fostering Network and BAAF, 2008). In the introduction of the 2014 Act, it states that it is, ‘An Act of the Scottish Parliament to make provision about the rights of children and young people; to make provision about investigations by the Commissioner for Children and Young People in Scotland; to make provision for and about the provision of services and support for or in relation to children and young people’. Further information about the 2014 Act is additionally elaborated upon in the associated explanatory notes, policy memorandum and guidance.

2.10.6 Children (Scotland) Act 2020

More recent than the 2014 Act is the Children (Scotland) Act 2020 (2020 Act). The explanatory notes of the 2020 Act provide an update to the legislation relating to children and young people with the policy objectives being to:

- ensure the views of the child are heard in contact and residence cases;
- further protect victims of domestic abuse and their children;
- ensure the best interests of the child are at the centre of all contact and residence cases and children’s hearings; and
- further compliance with the United Nations Convention on the Rights of the Child [UNCRC] in family court cases. (Section 3)

Moreover, the 2020 Act, in relation to previous legislation including the 1995 and 2011 Acts, is primarily meant to amend such primary legislation in addition to amending private family law (which goes beyond this scope of this thesis). For instance, in the policy memorandum of the Children (Scotland) Bill, it states in section 16 that, ‘Sections 1 to 3 of the Bill remove the legal presumption that a child aged 12 or over is considered mature enough to give their view in sections 6, 11 and 16 of the Children (Scotland) Act 1995, as well as in sections 14 and 84 of the Adoption and Children (Scotland) Act 2007 and section 27 of the Children’s Hearings (Scotland) Act 2011’. Thus, this Act cements children and young people’s rights more resolutely in Scottish law and legislation. However, as this Act has very recently been granted Royal Assent in October 2020, much of the legislation was not yet in force at the time of writing.

2.10.7 Looked After Children (Scotland) Regulations 2009

The Looked After Children (Scotland) Regulations 2009 (2009 Regulations) provide further details about the placements that may result and the process leading up to children and young people becoming and/or being looked after. The 2009 Regulations include sections on: care planning, general matters affecting looked after children, looked after children cared for by parents, kinship care, fostering panels, fostering, fostering and kinship care allowances, looked after children placed in residential establishments, emergency measures, case records, review of the child’s case, and arrangements with registered fostering services (among other general and less categorised themes). These Regulations are further elaborated upon in the associated explanatory notes and guidance. The Regulations’ explanatory notes specify that, ‘These Regulations make provision for the duties and functions of local authorities in respect of children who are looked after by them in terms of section 17(6) of the Children (Scotland) Act 1995 Act (“the 1995 Act”)’ (p. 36). In addition, the intention of the Regulations is further expanded upon in the 2011 Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007 where it states, ‘The 2009 Regulations

bring together the regulation of care planning services with care provision for those children separated from their birth parents' (p. 6). Thus, the 2009 Regulations supplement the previously presented Acts with further regulations about specific care planning and provision options.

2.11 Broader policy framework

The policies underpinning how children and young people become looked after in Scotland are set within a broader policy framework in which those policies are situated, including: the Getting it Right for Every Child (GIRFEC) national framework, The Promise document, and the National Guidance on Child Protection 2014 and updated 2021 documents.

2.11.1 GIRFEC

The GIRFEC national framework is noted by the Scottish Government to be, '...a way for families to work in partnership with people who can support them, such as teachers, doctors and nurses' (Scottish Government, 2022b) and the principles are reported to be 'child-focused, based on understanding of the wellbeing of a child in their current situation, based on tackling needs early [and] requires joined-up working' (Scottish Government, 2022c). There are several policies associated with GIRFEC, but many are meant to encompass all children and young people in Scotland. With my desire to focus on specific legislation and policy for children and young people who are looked after, I decided to pick the two GIRFEC documents that were either specific to looked after children OR highlighted the role of children's rights within the national framework as that is specifically what I am examining and critiquing in this thesis. These two GIRFEC documents include: 'Getting it Right for Looked After Children and Young People: Early engagement, early permanence and improving the quality of care' strategy (Scottish Government, 2015) and a report titled, 'UNCRC: the foundation of Getting it Right for Every Child' (Aldgate, 2013), where the Scottish Government commissioned a report by Professor Jane Aldgate on the connection between GIRFEC and the UNCRC. The former report clarifies that, 'This strategy is built on the principles of GIRFEC, reaffirms our commitment to improve outcomes for looked after children and lays out our vision for the future' (Scottish Government, 2015, paragraph 5). In the latter report, Aldgate (2013) specifies that, '*Getting it right for every child* translates the UNCRC approach to special care and assistance by embedding UNCRC Articles within the GIRFEC values and principles. Most importantly, GIRFEC requires every practitioner to apply a UNCRC approach in day-to-day practice by **putting children at the centre**'

(Aldgate, 2013, p. 4) (emphasis added in the original). Thus, both the strategy (Scottish Government, 2015) and report (Aldgate, 2013) provide further elaboration on the GIRFEC national framework that is meant to underpin the entirety of the Scottish Child Protection and Permanence System (among other areas).

2.11.2 The Promise

The Promise was published by the Independent Care Review in February 2020. It occupies a different position from the other more ‘official’ policies, and sets out at the beginning that, ‘When reading The Promise, do not look for the place, role and purpose of the current features of the [“]care system[“]. Whilst certain aspects of the current structures are referenced, The Promise sets out an overall view of what the new approach should be’ (Independent Care Review, 2020, page 6). Moreover, within the Promise, there are noted to be five concepts that are meant to serve as the foundation, with these being: voice, family, care, people, and scaffolding. The intention of the Promise is to radically reform the experiences of children and young people who are care experienced (Independent Care Review, 2020). The Promise is based upon the Independent Care Review consulting with approximately 5,500 children, young people, and adults, including those who are care-experienced and professionals who work within the care and permanence system (Independent Care Review, 2020). The Promise occupies an interesting role in policy as it is not statutory but rather establishes how the care and permanence system should proceed, but not necessarily how it proceeds in policy and/or practice.

2.11.3 National Guidance on Child Protection 2014 and 2021

The National Guidance on Child Protection provides further information relating to child protection situations in the 2014 and updated 2021 versions. The 2014 version specifies that,

This national guidance sets out common standards for child protection services in Scotland, making it clear how all agencies should work together where appropriate to respond to concerns early and effectively and ensuring that practice is consistent and of high quality. (Scottish Government, 2014, paragraph 3)

The 2021 version updates that, ‘This non-statutory national guidance describes responsibilities and expectations for all involved in protecting children in Scotland’ (Scottish Government, 2021b; paragraph 1) and that ‘This version reflects seven years of changes in legislation, as well as standards and policy, developments in practice, findings from research, Significant Case Reviews and Inspections’ (Scottish Government, 2021b; paragraph 2). Furthermore, the updated 2021 version ‘builds on the four-part structure of the 2014 Guidance’ rather than overhauling it completely, such that all sections are ‘revised and

supplemented' (Scottish Government, 2021b, paragraph 17). Both versions of this guidance provide more general guidance to child protection matters across Scotland, thus serving as a useful document that elaborates on topics and areas not touched upon in other policies (e.g., providing a more general overview of child protection in Scotland and defining key concepts such as child protection).

2.12 Conclusion: research aim and questions

Overall, the child protection and permanence system in Scotland is a complex system that warrants further examination, especially in consideration of how and why participation is present and absent within the policies. Key concepts including 'participation', 'protection', 'care', 'vulnerability', 'risk' and 'power' all appear frequently in the literature pertaining to participation and looked after children, especially in considering how the complexities across and within child welfare systems might be better understood. There is a lack of research examining the discourse of child welfare policies, especially within rather than across systems, and is one that warrants further critical examination. Moreover, these complexities of the system are echoed in the purpose of the 2014 Guidance where it states,

Child Protection is a complex system requiring the interaction of services, the public, children and families. For the system to work effectively, it is essential that everyone understands the contribution they can make and how those contributions work together to provide the best outcomes for children (Scottish Government, 2014, paragraph two).

I will be focussing on the presence and absence of participatory opportunities for children and young people surrounding the system areas, care orders and placement types within the subsequent findings and discussion chapter. Ultimately, I am arguing in this Ph.D. research that children and young people who are looked after need special attention because of their status and thus the imposed vulnerability that follows. Moreover, children and young people who are looked after are involved with formalised systems of care, protection and/or support and thus may not always have relatives and/or guardians who can advocate for their rights, so more formal attention (via statutory policies and legislation) is needed to preserve their participatory rights, to ensure that they are appropriately encouraged and respected.

This Ph.D. project aims to investigate and explain the presence and absence of children and young people's participation (as a concept) in policies across the care pathways of being looked after in Scotland. In this research aim, there are several key components: the requirements of the children and young people's participation within this specific corner of policy in Scotland, individual participation as a concept and how the potential differences and

similarities that become apparent across the care pathways can be explored and critiqued. I have probed this further through three research questions:

1. What are the legislative requirements for children and young people's participation, from initial referral to permanence (while still being considered looked after)?
2. How are these requirements related to how children and young people being or becoming looked after are conceptualised and problematised within policy?
3. Considering the policies and their wider context, how are the requirements of children and young people's participation impacted by the type of care order and placement?

This research aim and questions will be examined in further detail in the next chapter detailing this research project's methodology.

Chapter 3: Methodology, Data Management, Analysis and Ethics

3.1 Introduction

In this chapter, I will present the methodology of this research project before presenting the data management, analytical and ethical procedures that underpin this research. Additionally, I will discuss relevant debates and research to support my justification for my methodological, data management, analytical and ethical decisions throughout my research project. I aim to be reflexive of my choices for this research project and myself as a researcher at every stage.

3.2 Ontological and epistemological perspectives

The ontological and epistemological perspectives that underlie this Ph.D. research are rooted in childhood studies, discourse analysis and poststructuralism, particularly how what is written within the policies can be understood and parsed. As I discussed in the introduction of this thesis (see Chapter 1.3: A childhood studies approach through discourse analysis and poststructuralism), childhood studies is a central ontological and epistemological perspective, particularly in how children and young people can be viewed as active participants rather than passive agents in the decision-making directly concerning them (Prout, 2011).

Moreover, the aspect of poststructuralism that is particularly of interest to this project, is how it intersects with childhood studies by way of Spyrou's research (2016, 2019) and his contemporaries (Facca et al., 2020; Spencer et al., 2020). These perspectives can particularly be aided by discourse analysis in the context of policies. My understanding of discourse analysis offers a way to frame the ontology and epistemology of this research project.

Discourse analysis highlights the focus and value of discourses and the texts themselves.

Discourse analysis offers a way of knowing (Bacchi, 2000; 2005). Bacchi (2000) elaborates upon 'the claim that we cannot provide definitions of discourse because the whole idea of

discourse is that definitions play an important part in delineating knowledge' (p. 46). This is further linked to poststructuralism as a way of thinking by Chia (1996) and Bletsas (2012) as focussing less on the problems or solutions present and more on how a concept becomes a problem within the policies. Thus, the ontology and epistemology of this research project is based upon the value of discourse and policy analysis specifically. This is less as a way to be interpreted by frontline workers and those involved with creating and implementing policies and more as a way to examine the value and constitution of the policies themselves (especially considering the role and value that policies play in society and research). Moreover, in considering this together with what I presented above about childhood studies and its link to poststructuralism, Bacchi and Goodwin (2016) offer a way to marry these concepts in stating that, 'poststructuralism challenges the privileging of all forms of expertise and knowledge and, as such, the implication that policy analysts are mere technicians who are produced by and who produce policy' (p. 8). Adding a perspective of childhood studies to this likewise would challenge how and why children and young people's 'voices' are not privileged compared to their adult counterparts.

3.3 Research design: policy analysis

3.3.1 Selecting policy analysis

In situating this section on policy analysis within my wider discussion of my justification and procedure of analysis for my Ph.D. project, I will first present a review of the literature and previous research to justify my selection of policy analysis as my analysis of choice. Then, I will present my analytical procedure by starting with the general approach to Bacchi's WPR approach that I will be adopting before delving into the specifics of how all steps from document selection to sense-checking and dissemination have proceeded.

There is a breadth of literature on the possibilities in policy analysis (Bacchi, 2000; Browne, Coffey, Cook, Meiklejohn, & Palermo, 2019; Hyatt, 2013; Fairclough, 2003; Fairclough & Fairclough, 2018). Policy analysis can be defined as, 'a way for understanding how and why governments enact certain policies and their effects' (Browne et al., 2019, p. 1032). Researchers have considered policy analysis as existing within three broader types: traditional, mainstream, and interpretive (Browne et al., 2019; Yanow, 2000). Browne and colleagues (2019) define traditional policy analysis as '[aiming] to identify the 'best' solution, through undertaking objective analyses of possible solutions' (p. 1032) and mainstream policy analysis as, '[focussing] on the interaction of policy actors in policymaking' (p. 1032). More specifically, this mainstream perspective focusses on policies from more of a top-down perspective including through how values and interests of

policymakers can be found in policy texts and are labelled ‘mainstream’ due to the prevalence of the method in previous research (Browne et al., 2019; Collins, 2005).

Compared to the latter two types, interpretive policy analysis focusses less on finding definite answers within the policies and more on the ‘framing’ of problems based on the position of the policy within the broader policy and societal sphere (Browne et al., 2019; Yanow, 2000). A more specific type of interpretive policy analysis is that of poststructural policy analysis. Poststructural policy analysis has been critiqued that while allowing researchers to become more aware of and open to more epistemological debates, there is a risk that it will lose its potency once such a discussion enters the realm of policy and practice (Williams, 2014). This ‘potency’ is primarily regarding the potential and strong research backing of poststructuralism to interrogate and probe commonly presumed assumptions and conceptualisations. Williams (2014) critiques poststructuralism as an analysis that can be too open to subjectivity and is not a specific approach to policymaking and/or analysis. Yet, poststructuralism does offer a way to question assumptions (which can apply to any text [including policies]) and offers room for more creative and revolutionary solutions to the problem at hand. Thus, the pitfalls of the lack of specificity underlying the approach are overridden by the potential for more critical and nuanced considerations of the policies.

To bring this idea of poststructuralism back to policy analysis, Bacchi and Goodwin, (2016) overview that ‘...the ways in which “problems” are represented, policies are involved in shaping what is possible for “subjects” to become, with important implications for how governing takes place’ (p.81). To further magnify this discussion, there are several popular types of policy analysis including policy discourse analysis (Bacchi, 2000; Hyatt, 2013) in addition to more specific subsets including critical discourse analysis (Fairclough, 2013; Hyatt, 2013) and poststructural policy analysis (Bacchi, 2015; Bacchi & Goodwin, 2016; Remling, 2018). Policy discourse analysis serves as an umbrella term for poststructural and critical discourse analysis. These forms of policy analysis are each underpinned by different ontological paradigms which would ultimately shape and/or be shaped by the research aims and questions of the project. Policy analyses such as critical discourse analysis (Bacchi, 2000; Fairclough, 2003; Hyatt, 2013; Hood, 2016) fall more into the dominion of critical realism. I will present an overview of the above ontological paradigms and types of policy analyses to help justify and defend my choice of poststructural policy analysis.

3.3.1.1 Ontological underpinnings for policy analysis

The ontological underpinnings for policy analysis build upon my earlier discussion of the ontology and epistemology of this research project. I will be providing an overview of

potential ontological underpinnings, including critical realism, critical discourse analysis, poststructuralist policy analysis and Bacchi's WPR approach, before justifying my choices. Critical realism (CR) embraces the idea that '...physical and social entities [have] an independent existence irrespective of human knowledge or understanding...Structures also exist and exercise power irrespective of whether that is known or recognised by individual humans' (Clark, Lissel, & Davis, 2008, p. E69). Critical realism puts forward the notion that knowledge is present regardless of who and how it is interpreted. This offers a realist perspective to policy and knowledge. Researchers have offered their critiques of CR (Torsten, 2012; Brown, 2014a). Torsten (2012) argues that '[CR] is therefore not proposing a renewed focus on ontology but exhibits an always already posited understanding of the meaning of being manifested in scientific enquiry which itself is never questioned or scrutinised' (p.218). This quotation focusses on the lack of originality underpinning CR as a theoretical approach. Additionally, Brown (2014a) argues that [CR] oversimplifies and often fails to be translated to a conclusive understanding that goes beyond the theoretical. In this instance, Brown (2014a) posits that rather than its unoriginality, CR often remains too abstract to reach definitive and specific conclusions. Thus, CR seems to be quite limited in what it could bring to this research project, particularly by focussing primarily on a realist perspective.

By contrast, critical discourse analysis (CDA) builds on a realist perspective, '...which sees both concrete social events and abstract social structures as part of social reality' (Fairclough, 2013), p.74). Using this type of analysis with policies, adopts a 'policy-as-discourse' view (Bacchi, 2000), wherein how the policies have evolved and been created become a key aspect of this analysis (Bacchi, 2000). However, in later iterations, Bacchi incorporated this more as a component of the broader analysis rather than the drive for the analysis in the first place (Bacchi & Goodwin, 2016). Policy discourse analysis builds upon Fairclough's notions with CDA by creating a more systematic approach to analysis. Many researchers have utilised CDA to great avail through a focus on education (Liasidou, 2008; Lewis, 2018; Hyatt, 2013) and health policies (Evans-Agnew, Johnson, Liu, & Boutain, 2016). From a more technical standpoint, CDA can involve several aspects to assist researchers in conceptualising policies. These several aspects can include the ways policies can be situated temporally, including the immediate socio-political context and structures, and organisations and individuals that make up the socio-political environment such as policymakers. Another aspect is the epoch or more general mindset that infiltrates the levels of governance by way of what can be considered evidentiary and fact (Hyatt, 2013) to how

this can be discerned based upon the language used (including how ‘power manifests itself through language’) (Liasidou, 2008, p. 487). Nevertheless, CDA is not without its critiques (Liasidou, 2008), namely, that it is not so much an analytical method as a theoretical view. Yet, CDA is an established approach that has been used successfully in many instances (Fairclough, 2013; Hyatt, 2013; Evans-Agnew et al., 2016).

Researchers have adapted this to policy analysis by way of poststructuralist policy analysis (Bacchi, 2015; Bacchi & Goodwin, 2016; Remling, 2018). Poststructural policy analysis builds upon Foucault’s (1982) ideas of power and that the purpose is to thoroughly question the choice and use of terms and/or concepts considered to be an established fact within policies (Bacchi & Goodwin, 2016). Compared to CDA and/or policy discourse analysis, the use of power in analysis differs from the poststructural approach in that, the latter, allows for more room to question *why* certain words or concepts might be used (or not) rather than just *how*. These ideas have been consolidated by researchers (Bell, 2011), who have provided a more in-depth review of the philosophy contributing to such discussions. For instance, Bell (2011) examines child abuse conceptualisations through this perspective from a more historical standpoint such that it allows the researcher to recognise the role of power in creating the notions that have evolved and become attached to the concept of child abuse. Similarly, Remling (2018) uses an approach with a more explicit poststructural foundation by overviewing how such an analysis can proceed. The researcher discusses how ‘fantasmatic logic’ can help to explain how certain terms or concepts emerge within policies through the analysis of policies from temporally distant to recent (Remling, 2018). Overall, poststructural policy analysis offers a useful and critical way to examine policies, particularly as a way to critique what is presumed within the policies and how power is embedded in the analysis as it is in this research. Moreover, compared to the other approaches (critical realism and critical discourse analysis), poststructural policy analysis is specifically intended for policies rather than any discourse.

3.3.2 Previous research utilising policy analysis and Bacchi’s What’s the Problem Represented to be? (WPR) Approach

Research has examined the discourse within the policies themselves (Bacchi & Goodwin 2016; Fairclough, 2013; Guion Akdağ & Swanson, 2018), but there appears to be little research in this regard to child welfare policies (Williams-Butler, Golden, Mendez, & Stevens, 2020). Just as research into more ‘prominent’ areas of policy such as education (Tawell & McCluskey, 2021) and drug use (Lancaster, Seear, & Ritter, 2017) has critically

analysed policies to great avail, why should child welfare policies not be granted the same critical lens?

One particular type of poststructural policy analysis is Bacchi's 2009 guided approach, the WPR (What's the Problem Represented to Be?) approach. This WPR approach includes six questions where one begins with determining what the problem represented is, where, '...To identify a problem representation one "works backwards" from a proposal, broadly understood, to see what is problematized' (p. 20). Several researchers have presented an overview of the WPR approach (Komai, 2021; (Tenório Cordeiro & Carvalho Benício de Mello, 2020). Tenório Cordeiro and Carvalho Benício de Mello (2020) note that the 'WPR [approach] implies questioning how a problem has been represented in a discursive field, highlighting that 'problem' representations in policies limit what is said to be 'possible' or 'desirable', 'impossible' and 'undesirable' (p. 1762). Relatedly, Komai (2021) argues that through the WPR approach,

1) knowledge is inherently political, and by extension, all 'problems' do not exist independently of outside forces, but only in relation to specific mentalities and models of governance; 2) phenomena underlying 'problems' are not fixed per se but rather remain continuously in flux. (p.1)

Researchers have additionally noted that the WPR approach primarily focusses on representations of problems within the policies and *not* to find the mismatch between practice and policy (Tawell & McCluskey, 2021).

Previous researchers have utilised the WPR approach to ground their poststructural policy analysis, particularly in recent years (Alfrey, Lambert, Aldous, & Marttinen, 2021; Beutler & Fenech, 2018; Brown & Wincup, 2020; Horsell, 2020; Pienaar, Murphy, Race, & Lea, 2018; Widding, 2011). Several of these researchers have used this analysis particularly in the social work context (Horsell, 2020; Pienaar et al., 2018; Widding, 2011). In examining past iterations of the WPR approach applications within the literature, I can discern possible techniques and ways in which I may adapt the approach to best suit my research project. For instance, Alfrey and colleagues (2021) used Bacchi's WPR approach to analyse Health and Physical Education policy in Australia, the U.S.A. and Wales and '[examined] how learners are represented within and across [Health and Physical Education] policy documents' (p. 2). Moreover, the researchers determined that their research, '(i) demonstrates how certain discourses and voices are amplified and silenced within curriculum policy documents and policy work more broadly; (ii) makes education and health politics visible; and (iii) creates spaces for the profession to develop greater critical consciousness related to policy' (p. 1). By contrast, Brown and Wincup (2020) focussed more specifically on the 'problematization of

vulnerability in English drug policy’ (p. 1), while Beutler and Fenech (2018) utilised the WPR approach to ‘identify potential influences on parents’ childcare choices’ (p. 16). Thus, this brief review illustrates the potential scope of the method in both interrogating policies and in its ability to be adapted to the specific research project. Bacchi and Goodwin (2016) especially mention the flexibility inherent to the WPR approach.

3.3.2.1 Bacchi’s WPR analytical procedure

Bacchi’s WPR approach includes six questions and one additional reflexive component. The first question is ‘What is the problem represented to be?’ with the goal being to find a starting point for analysis and understanding that a number of starting points exist in any one policy. The second question is, ‘What presuppositions or assumptions underlie this representation of the ‘problem’?’ The goals of this question include ‘...how this particular problem representation was possible by identifying the meanings (presuppositions, assumptions...) that needed to be in place for it to make sense or be intelligible’ and ‘now the problem representation is constructed – which concepts and binaries, such as public/private...does it rely upon?’ (Bacchi & Goodwin, 2016, p. 21). The final goal of this question considers the potential for trends to exist within the policies in relation to the problem representations that might signal the operation of a particular political or governmental ‘rationality’ (Bacchi & Goodwin, 2016, p. 21). This question thus, focusses on unpacking how the problem representation is created within the policy or policies analysed. The third question focusses on how the problem representation evolved with ‘the intent [being] to disrupt any assumption that what *is* reflects what *has to be*’ (Bacchi & Goodwin, 2016, p. 22) (emphasis in original). The fourth question is intended to build upon the earlier question where ‘the point is to destabilize an existing problem representation by drawing attention to silence, or unproblematized elements, within it’ (Bacchi & Goodwin, 2016, p. 22). In continuance, the fifth question considers more of what the results of the problem representation in question are and ‘...makes it possible to reflect on the complex array of implications that [problem representations] entail to certain contexts and to promote interventions that aim to reduce deleterious consequences for specific groups of people’ (Bacchi & Goodwin, 2016, p. 23). The sixth and final question of the WPR approach is, ‘How or where is this representation of the ‘problem’ produced, disseminated and defended? How could it be questioned, disrupted and replaced?’, which provides further room for analysis based on the second and third questions. This is done by digging further on ‘the practices that install and authorize a particular problem representation’ (Bacchi & Goodwin, 2016, p. 24) and how such problem representations could potentially be opposed within the

policy or policies. Finally, the seventh step is intended to be a self-reflexive approach to the researcher and project more generally.

3.3.2.1.1 Critiques

Overall, Bacchi's approach to policy analysis has been well regarded and utilised by previous scholars but considering that one of the cruxes of the approach is to question one's own assumptions, it has not lent itself to many critiques (Marshall, 2012). This can itself be a critique considering that all reputable theories and approaches *should* be able to be refuted as a practice that is a central part of the academic research dialogue. However, researchers have noted some limitations of the approach (Archibald, 2020; Marshall, 2012). Archibald (2020) stated that '...viewed through the WPR lens, the public is not governed by policies and programs but by problematizations, by how problems are constituted. There is a risk here in reading this claim as simple perspectival constructivist epistemology, grounded in differing *perspectives* of life' (p. 13 [italics in original]). Thus, Archibald (2020) is cautioning that the poststructural foundations of the WPR approach can be limited. Namely, that if everything is presumed to be subjective, it can be difficult to draw definitive conclusions.

Marshall (2012) additionally notes that a potential weakness of the WPR approach is the possible disconnect between analysing concepts and empowering individuals who are the ones at the centre of the policy, which in the case of my project would be care experienced children and young people and their families. This possible disconnect is based upon the notion that there is the potential that individuals specified within the policies can be objectified rather than empowered since the approach focusses on the policies about specific individuals instead of the individuals themselves. Marshall (2012) further highlights that that weakness particularly comes to fruition '...as a mode of thinking opens up, especially for a researcher for whom political commitment to disability equality is a powerful motivator' (p. 60). Thus, Marshall (2012) is arguing that when researchers take the time to problematise the ways in which individuals and/or issues are conceptualised within policies, it offers the option to be more inclusive of perspectives of the ones most affected by the policies. More explicitly, Marshall (2012) is arguing that since the WPR approach does not involve the subjects of the study, it can be more challenging to empower individuals most affected by the policies. There is a danger in using this approach to study policies in that the care experienced children and young people at the centre of the policies I am analysing may be treated as objects rather than subjects. To avoid this potential risk, I will be reflecting throughout the analytical process on how care experienced children and young people are being considered and placed in my discussions. Moreover, the final aspect of the WPR

approach is specifically intended for self-reflexivity on my own presumptions and the like as a researcher. Thus, this reflexivity is built into the approach so I can ensure care experienced children and young people are treated as subjects, rather than objects of the policies analysed. However, the lack of involvement by children and young people will remain a potential limitation of this research. Thus, compared to previous approaches to policy analysis discussed (CR, CDA), Bacchi's WPR approach offers a more guided but flexible analytical approach that is specific to policies. Thus, I will be utilising Bacchi's WPR approach as the primary means of analysis for this research.

3.3.3 Selecting policies for analysis

Previous research has employed several ways to select policies for analysis (Browne et al., 2019; Yue, Mu, & Liu, 2020). In their research, Yue and colleagues (2020) selected 'comprehensive and representative policy documents for China's integrated care' (p. 5); wherein I am adapting this approach to focus on the four care orders by first discerning the legislation and associated policies (policy memoranda, explanatory notes, and guidance). Moreover, considering that my research aims and questions centre around the legislative requirements, one aspect of the selection criteria will include that the policies or legislation are the official government documents and/or guidelines. This might be a point of contention depending on how one views the policymaking process, such that focussing on the more 'official' and/or legal documents tends to enforce a top-down policymaking approach. With this focus on formal policy documents, I am mirroring Tawell and McCluskey's (2021) 'acknowledge[ment] that formal policy documents comprise only one aspect of larger policymaking and implementation processes' (p.4). Yue and colleagues (2020) undertook three methods to ensure the validity and reliability of their policy selection which were: validity checking, content analysis, and form selection. More specifically, validity checking is confirming that the policies are up-to-date and content analysis encompasses checking the relevance of the policies to the research. The final method of form selection is focussed on the type of policy being selected (i.e., legislation, regulations, guidance, national strategies, and statutory instruments) and not more informal nor local policies.

Additionally, as my Ph.D. research is not focussing on the pandemic specifically, it would inevitably shift the focus with the wider scope of policies introduced since the pandemic. Thus, as part of my inclusion and exclusion criteria for policy selection, documents must have been enacted as policies prior to the start of the pandemic in March 2020. As the pandemic was declared in March 2020, many emergency policies were created and enacted to deal with the lockdown and online services (including the Coronavirus

(Scotland) Act 2020 which temporarily updated aspects of the policies of interest to this research project). However, including these ‘emergency’ policies would warrant a study in and of itself and would thus go beyond the scope of the aims and questions grounding this research. In order to be able to analyse policies with an appropriate amount of depth; I am selecting only policies that are specific to my research aim and questions. More recent policies pertaining to children and young people who are looked after more broadly beyond the care orders and protection and permanence system specifically include the Children and Young People (Scotland) Act 2014, the Children (Scotland) Act 2020, The Promise by the Independent Care Review published in February 2020 and the National Guidance for Child Protection in Scotland 2021 where the latter document is an updated document of the National Guidance for Child Protection in Scotland 2014. I have overviewed these policies in my literature review chapter (see Chapter 2.10: Policies underpinning the child protection and permanence system in Scotland). However, as these policies do not specifically elaborate on the care orders that designate a child or young person as looked after (2014 Act), were published after my March 2020 policy threshold (National Guidance on Child Protection in Scotland 2021) or can be argued not to be officially considered a policy (The Promise), I have chosen to exclude them from my analysis. I still wanted to acknowledge them in the overall context of the policy environment as they still do play an important role but go beyond the scope of this research. To clarify, for the 2014 Act, I am excluding most of it (for its irrelevance to the specificity heralded by this research) but I am including the textual amendments that update earlier legislation and/or policies that I am analysing. These policies are recent and important strides for children’s participation more generally, but many of the most recent additions (the Children (Scotland) Act 2020; the National Guidance on Child Protection 2021) were either not completely in force at the time of writing (Children (Scotland) Act 2020) or were published quite late in my analysis process (National Guidance on Child Protection 2021). In addition, some of the ‘policies’ (i.e., the Promise) do not occupy an official legislative or policy role as has been the focus of this research. Finally, the Children and Young People (Scotland) Act 2014, while fitting into the pertinent time frame, mostly did not relate specifically to the care orders and/or placement types with which looked after children can be associated. Moreover, like previous research (Bouma et al., 2018; Kilkelly, 2019; Lundy, Kilkelly, & Byrne, 2013), I will be focussing on a specific subset of national legislation. Thus, I set the boundaries of this study with documents that had legislative standing (for instance, the guidance that I did include does have some legal power, even if it is not as strong as primary legislation). In addition to setting a forward limit of

March 2020 for the policies I have chosen to include I have also set a backwards limit of the 1995 Act. This is for several reasons, but I would still like to acknowledge the foundation that the 1968 Act and other policies set for the proceeding acts and policies in addition to the rest of the care, protection, and permanence system more broadly, which are reviewed in the earlier literature review. For the purposes of this dissertation's research aims and questions, I have focused on a particular and recent time frame, to consider how children's participation is present and absent and how children's participation varies across the system. A particular contribution of this research is to consider breadth, rather than the more typical historical approach to a narrower concept (for example, as itemised in Bacchi's third question in her WPR approach, as discussed previously). I have set the 1995 Act as the backwards limit as that is the oldest Act in which a care order that designates a child or young person as looked after in Scotland is still utilised in practice. The Children (Scotland) Act 1995 was landmark legislation, that largely set out to replace the children's services component of the 1968 Act both in terms of 'children in need' and the children's hearings (Tisdall, 1997). There is thus a logic in recognising the foundational nature of the 1968 Act both in terms of social welfare and the children's hearings, but to start the 'breadth' of this thesis' research focus with the 1995 Act.

Through a similar process as Yue and colleagues (2020), I first identified what the care orders are that designate children and young people as looked after (CPO, CSO, Section 25 Orders, POs) and where they are legislated for in primary (2011 Act, 1995 Act and 2007 Act) and secondary legislation (2009 regulations). Additionally, explanatory notes and policy memoranda were also included where available, as was the case for the 2007 and 2011 Acts. Then I looked for any accompanying guidance documents, that specifically provided further elaboration of the legislation and/or understanding of the four care orders of which I identified the Guidance for the 2007 Act in conjunction with the 2009 regulations. I additionally looked for the secondary legislation for the 2011 Act, including the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, Children's Hearings (Scotland) Act 2011 (Safeguarders Panel) Regulations 2021 and the Children' Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013. Of these secondary legislation documents, the first and third documents were enacted prior to March 2020, so were eligible for inclusion in the policies that I selected for analysis. The 2013 Rules of Procedure in Children's Hearings provide further details and elaboration of the procedures of the Children's Hearings including as relates to care orders that designate a child or young person as looked after, so will be

included in my analysis. The 2013 Regulations of the Implementation of Secure Accommodation Authorisation provides specific elaboration on the decision-making around secure accommodation authorisation. However, since I am focussing on all the care orders and placement options equally, it seems that adding only the 2013 Regulations for Secure Care would add an imbalance for the policies selected for analysis. Moreover, there is also associated guidance specifically for secure care which would make it necessary for me to include other placement-specific guidance, making the number of policies to analyse more unwieldy.

However, as I wanted to select policy documents that also represented aspects of the wider scope of participatory opportunities in relation to child protection beyond the specific care orders, I included the National Guidance for Child Protection in Scotland document 2014 (as the updated version was published after my March 2020 limit) and two documents overviewing the national strategy GIRFEC (Getting it Right for Every Child) as related to looked after children (UNCRC: Foundation of GIRFEC and Getting it Right for Looked After Children and Young People) (See the Table 8 in Appendix B for a summary of the documents). Thus, in total, I selected 13 policies and adjacent documents to analyse. I conducted an extensive and in-depth analysis for each of the pathways for looked after children regarding children and young people's participation as set out for each through relevant legal, policy and guidance documents.

Furthermore, Lundy and colleagues (2013) particularly point towards having specific mention of participatory opportunities for children and young people viewed to be 'more vulnerable' such as those who are looked after (Bolger, 2018; Heimer et al., 2018). More specifically, Lundy and colleagues (2013) elaborate upon that point in stating that 'in all countries in the study, the most vulnerable groups of children (separated children, asylum seekers, indigenous children, and children in conflict with the law) continued to fare less well compared to their peers irrespective of the steps taken to incorporate the CRC' (p. 454). Thus, this helps to further explain and justify my focus on examining the *specific* presence and absence of participatory opportunities for children and young people who are looked after, primarily based at the legislative level (with guidance and accompanying documents enacted prior to March 2020 being used when they help to elucidate the legislation surrounding the four care orders, *specifically*). Moreover, considering my focus on legislative underpinnings for care orders underpinning being and/or becoming looked after, I likewise excluded consultation papers, other Parliament discussions and papers and other 'third-order' policies (such as *These Are Our Bairns* by the Scottish Government in 2008) (see further

discussion in relation to ‘third-order’ policies in Table 3 below) as I am particularly interested in the specifically targeted participatory opportunities for children and young people who are or are at risk of becoming looked after with statutory and/or legislative power. I am not focussing on more encompassing legislation that would *also* include children and young people who are looked after.

3.3.3.1 Intertextuality

An adjacent methodological decision in determining how documents related to the research project are selected, is considering how to incorporate intertextuality. Most simply, intertextuality can be defined as ‘instances of texts linking to other texts (explicitly, implicitly, by referring to them or incorporating elements of them)’ (Farrelly, 2020, p. 359). Moreover, intertextuality is a central component of Fairclough’s (1992; 2013) critical discourse analysis. Fairclough (1992) summarises that, ‘the concept of intertextuality points to the productivity of texts, to how texts can transform prior texts and restructure existing conventions (genres, discourses) to generate new ones’ (p. 270). Thus, from both a methodological and analytical perspective, it is important to acknowledge how I will be addressing intertextuality in my policy selection and subsequent analysis. Several researchers have distinguished between types of intertextualities (Kristeva, 1986; Fairclough, 1992). Kristeva (1986) distinguishes between horizontal and vertical intertextuality, where horizontal intertextuality focusses on where a text fits in with texts that exist at the same time as it, and where vertical intertextuality focusses on where a text historically fits in with texts that proceed and precede it (Kristeva, 1986). Fairclough (1992) identifies two subtypes of intertextuality: manifest and constitutive or interdiscursivity. For the former, ‘individual other texts are explicitly present in the text under analysis’ (p. 271) and the latter, ‘is the configuration of discourse conventions that go into its production’ (p. 271). Thus, with this distinction in mind and based upon my choice to focus on formal policy documents surrounding looked after children in Scotland, horizontal intertextuality will help to situate each policy document within the wider policy sphere. This is particularly in consideration that there is scant research that has conducted a policy analysis around a particular concept within a single system at one point in time. Previous research tends to focus on a single policy (Brown & Wincup, 2020) or examine similar policies from a cross-country perspective (Alfrey et al., 2021). I have further based my approach to intertextuality upon Fairclough’s (1992) approach where I will selectively utilise both manifest intertextuality and interdiscursivity in appropriate instances where for instance certain terms are defined in prior

policies and in considering where certain phrases repeated in policies (such as ‘reasonably practicable’) originate, respectively.

3.3.3.2 Linking the WPR approach to this Ph.D. project and analysis

Table 3. Linking the WPR approach to the Ph.D. project and analysis overall

WPR Question	Legislation and/or policy documents to which it is applied	Approach for project
1. What is the problem represented to be?’	I started with the legislative sections identified for the first part of the analysis and then added in guidance and adjacent relevant documents (This applied for all the WPR questions).	For this question, I started by re-reading the policies that I had selected. I wrote notes in different colours to my initial notes from the first part of analysis so that it was clear where the points were from and so that I had a layering effect of the notes and thus was able to build on previous insights and comments as necessary.
2. What presuppositions or assumptions underlie this representation of the ‘problem’?	For this question, I focussed more upon the explanatory notes, guidance documents and adjacent relevant documents to gain a better understanding of the surrounding context and assumptions beyond a single document or concept, particularly in relation to binaries present (including public and private).	I read through all the documents and identified sections again, writing notes as I progressed and thus elaborated upon my previous notes.
3. ‘How has this representation of the ‘problem’ come about?’		As this question presumes a focus on how the policy has evolved, I used it in specific instances as proved pertinent based on the first

		<p>part of analysis. For instance, in my first part of analysis, it became clear that in later legislation (most notably the 2011 Act), in reference to giving children the opportunity to have their views heard, there was often a qualifier of ‘taking account of their age and maturity’. However, in earlier acts of legislation (see 3.3.3 on intertextuality), it specifies that children over the age of twelve are presumed to be capable of being involved with decision-making unless they demonstrate otherwise. Previous research has also discussed the reiterations of aspects such as this from Article 12 of the UNCRC (Tisdall, 2015). Thus, in instances such as the above and as they relate to the problem representation(s) that I have identified, I mapped out how such concepts appear across legislation and/or relevant policy documents. While the focus of this Ph.D. project is not on the historical evolution of a concept or concepts, it does seem that this could be translated not only across time but regarding how a concept such as children’s participation can be illustrated across different care</p>
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		<p>pathways. Moreover, while there has been research that has examined policy from a historical perspective, little research has analysed how concepts, such as participation, exist within policies. Thus, this would allow the focus of the analysis to switch from what has emerged to how children and young people's participation diverges and converges across the different care pathways. Bacchi and Goodwin (2016) in particular elaborate that this third question is focussed not just on the history of a concept, but where it might go or evolve in the future. This question is based around Foucault's genealogies to 'unsettle our illusions of inevitability regarding our present systems of thought and forms of practice' (Yates & Hiles, 2010, p.72). My focus is on this present snapshot of the policies and how it may evolve rather than where it came from. Thus, unpacking how concepts within policies might evolve and not only have, also can help to 'unsettle our illusions of inevitability' (Yates & Hiles, 2010, p.72).</p>
4. 'What is left unproblematic in this		In conducting a close reading with this question in mind, to help

<p>representation of the ‘problem’? Where are the silences? Can the ‘problem’ be thought about differently?’</p>		<p>identify areas where there may be silences, I based my focus upon what I had identified in the first part of analysis. For instance, in certain pieces of legislation and surrounding some care orders, the strength of the language pertaining to children’s participation varied. For CPOs as compared to the other three care orders, most of the references to aspects of participation were in relation to informing children and young people in some capacity. Thus, this may lead to a discussion about the variance in weight given to different aspects of participation depending on what is elaborated upon and what is not.</p>
<p>5. ‘What effects are produced by this representation of this problem?’</p>		<p>For this question, I furthered the aspects discerned from the analysis up until this point and considered how children and young people’s participation was presented across the policies (and care orders) and thus the effects that follow with those lines of thinking. Additionally, I considered how children’s participation was presented as having potentially positive and/or negative effects on the problem representation, depending on characteristics of the</p>

		children (including age and ability) or the circumstances (including if it is an emergency or urgent case).
6. 'How or where is this representation of the 'problem' produced, disseminated and defended? How could it be questioned, disrupted and replaced?'		For this question, I broke down my approach based on the core components of the question (these being: produced, disseminated, and defended). This was based upon the problem representation(s) that I identified earlier in my analysis and the further points that I elaborated upon (as indicated in my notes in the documents). For 'produced', I examined the language and placement of the points where children and young people's participation was or was not mentioned. For 'disseminated' and 'defended', I examined how the language used helped to contribute to the problem representation(s) and how it served to argue against alternative problem representations. The latter question regarding how the problem representation could be questioned, disrupted, and replaced, was based upon what emerged in the former component of this question. Thus, I concluded with what and how aspects of the language and context may be altered to suit alternative problem

		representations and the implications such alterations would have (See Section 3.3.3: Selecting policies for analysis) above in relation to my decision to exclude third-order policies).
Apply the list of questions of the WPR approach to your own problem representations: the need for reflexivity.		For this final point of the WPR approach, I conducted a close reading of all the previously identified documents with consideration to the biases and interpretations that I am bringing as a researcher and an individual. For instance, I am a strong proponent of children's rights and of children and young people's right to participation in particular and that influenced how I chose to focus. Furthermore, considering that I did and do not have any direct experience nor involvement with any child welfare system, this also likely served to influence on what and how I chose to focus.

3.4 Using the CELCIS map to situate children's participation

Upon starting this Ph.D. research and in examining the child protection and permanence system in Scotland as a whole, I found that many of the diagrams and/or maps of the system did not provide enough detail nor were sufficiently expansive for this research. I was planning to create my own diagram when I found the CELCIS map which breaks down the care and permanence system into five system areas (the child protection system, the children's reporter decision-making, the children's hearings system, legal permanence away from home and permanence decision-making). These system areas provide more specific components of the system beyond the broader institutional tripartite system presented earlier

(See Chapter 2.8: Tripartite System Institutional Actors). Across these system areas, it is noted which decisions are optional and mandatory and where the care orders are situated, (CELCIS, 2018). These five care orders are specified as child protection orders, compulsory supervision orders, section 25 orders, permanence orders and permanence orders with authority to adopt, with all being a potential entry to or exit from the system. This diagram was created and supported by scholars and professionals in the field (CELCIS, 2018) and is thus as backed by research and policy as could be hoped. I decided to utilise this map so that it may help me and the reader to keep track of the complex system and orders.

3.4.1 Mapping the Scottish Child Protection and Permanence System Decisions

Following my close readings of the policies in line with the WPR approach and mapping how and where children and young people's participation is present and absent, I organised the policies around several facets to assist with data management and policy selection in addition to making the subsequent findings clearer. The first facet comprises the four areas of the child protection and permanence system map (i.e., CPS, CHS, permanence decision-making or legal permanence away from home). It is rather simplistic to consider each of the areas of the protection and permanence system in the order that they might occur as there are numerous entry and exit points that are dependent on various decisions and contexts. The decisions that comprise the CPS are primarily stipulated within the 2011 Act (and its related documents), the 1995 Act, 2009 regulations, 2011 Guidance, the National Guidance on Child Protection document 2014, and the UNCRC and GIRFEC policy documents. Two care orders (CPOs and Section 25 orders) can be considered to occupy the CPS, especially as based off the CELCIS (2018) diagram. Three of the care orders (CSOs, CPOs, POs) can be thought of as part of the CHS, mainly due to that area likely preceding or following the decision-making of the orders. However, the primary orders implemented *within* the CHS are the CSOs (and Interim CSOs). The primary policies that legislate and guide the decisions within the CHS are within the 2011 Act (and related documents), the 2013 Children's Hearing Procedure Rules, 2009 regulations, and the 2011 Guidance. The third area of permanence decision-making occupies a more peculiar and intermediary part of both the system map and my Ph.D. This third area does not include any of the care orders and acts more as a potential mediator between CPOs or Section 25 orders and permanence, whether through POs or in another capacity. The main policies guiding and stipulating this area are the 2011 Act (and related documents), 2009 regulations, and the 2011 Guidance. The fourth and final care order (POs) (as relevant to this Ph.D. project) occupies the legal

permanence away from home realm which can result from any of the other three systems (directly or indirectly). This final area of the system's decisions is legislated through the 2007 Act (and related documents), 2011 Act (and related documents), the 2013 Children's Hearing Procedure Rules, and the 2011 Guidance.

The second organisational facet is the type of policy document (or part of the policy document) where the decisions that comprise that area of the system map are located. I have divided these policy documents from levels one to five depending on their legislative strength and the relevance to my overall project (see Table 8 in Appendix B for further clarification), with level one being primary legislation (these encompass the 1995 Act, 2007 Act and 2011 Act) and level five being the least legislative (the two GIRFEC documents). This is so that I (as the researcher) and the reader can better differentiate between the types of policies throughout my discussion of the findings. The decisions that I discuss below in relation to each of the system areas are in relation to the decisions that are present in the CELCIS map of the Scottish Child Protection and Permanence System. I will use the level of policies less as a rule and more as a guide to help differentiate the language that is more typically used in certain types of legislation or policy documents compared to others.

The third facet is the type of and how participation is present (or absent) within the policies and particularly the decisions that precede, include, and follow the four care orders that classify children or young people as being looked after. I have adapted the classification of the four categories of participation (see Table 10 in Appendix C) put forth by Bouma et al., 2018 and I have added a fifth component of if and how children are regarded. As discussed previously (see [Chapter 2.3.1: Operationalising participation](#)), I am aware of the limitations this classification holds as a framework for children and young people's participation but am utilising Bouma and colleagues' (2018) categorisation more based on the similarities of our research projects and approaches in how I am identifying participation and not as the comprehensive standard for children's participation. Alongside this categorisation, I am additionally considering the presence and absence of the nine processes (See Table 1 in [Chapter 2.3.1: Operationalising participation](#) for a review of the processes) highlighted in the UN General Comments for Article 12 of the UNCRC to help evaluate how the participation is written and/or presented when I have determined participation to be present or absent. However, since including fourteen points to look for and discuss within the policies could quickly become unwieldy, I am going to keep the five categorisations based upon Bouma and colleagues (2018) to pinpoint aspects of participation within the policies and keep the remaining nine processes put forth in the UN General Comments to further evaluate

subsequent discussions of how participation is present and absent. Moreover, considering that the UNCRC (2009) General Comments puts forward a series of *processes* of participation rather than components, the nine processes can often help to realise Bouma et al.'s (2018) four components of participation in addition to my added fifth one.

I would additionally like to problematise considering children and young people's participation as either present or absent, as it has the potential to conceptualise participation as a binary (which would be a far oversimplification and is not my intention). Rather, I am using the idea of the 'presence' and 'absence' of participation and/or participatory opportunities more as a way to acknowledge where any type or gradation of participation is not present so that I may better problematise 'silences' within the policies in relation to participation.

In the child protection system area, the goal is primarily the immediate safety and protection of the children and young people. This can be through voluntary or involuntary means on the part of the parent(s) or guardian(s). The possible placements here include foster care, kinship care and residential care. The decisions within level one policy documents are the care orders themselves (Section 25 orders) and CPOs as encompassed within the 1995 Act and 2011 Act, respectively, while the level two policy documents are primarily to provide further explanation of the decisions of the two care orders (through their respective explanatory notes and policy memoranda). For level three policy documents, the 2009 regulations are the primary policy document pertaining to the case discussion and child's plan meeting; recurring three- or six-monthly reviews; and child protection registration and developing the child's plan. For level four policy documents, the 2014 National Guidance on Child Protection document is the main policy that overviews monthly core group meetings, child protection investigations, initial or pre-birth conferences, and child protection registration. For the fifth level of policy documents, the GIRFEC and UNCRC document discuss child protection decisions and has sections concerning case discussion, the child's plan meeting and child protection registration.

In the children's reporter decision-making and children's hearings system areas (as evident in the CELCIS [2018] diagram), the possible placements here include foster care, kinship care, residential care, secure care, and being looked after at home (2009 regulations; 2011 Act; Macfarlane, Driscoll, Kearney, & Anderson, 2018). The decisions encompassed in this area of the system are localised up until policy level four but are primarily within the first two levels (legislation and explanatory notes or policy memoranda, respectively). These decisions include referral to reporter; optional pre-hearing panel; considering the likelihood

of CSOs with secure accommodation; grounds hearings; making, varying, or continuing a CSO; being looked after at home or away from home; annual reviews and contact review hearings, among other decisions. In this area, the primary care order and of concern in most of the preceding, including, and proceeding decisions, is the CSO. I have collapsed these two system areas into just the 'children's hearings system' for ease of understanding and especially considering how small it is compared to the other four system areas.

Permanence decision-making can involve the decisions that follow CPOs and Section 25 orders. Thus, it can involve placements including foster care, kinship care and residential care, but can precede placements of being looked after at home or POs. However, there are no care orders made within this area of the system. The goal of this area has shifted from the previous area, to preventing (or at least addressing) impermanence and uncertainty for children and their families. The decisions in this area include: 'the decision not to pursue permanence away from birth parents', 'post-placement meeting within three days', looked after children reviews at three different intervals and the recommendation and local authority decision to 'pursue permanence away from birth family' (2007 Act, Scottish Government, 2011). Compared to the previous two sections of the protection and permanence system, permanence decision-making as the penultimate area occupies an intermediary space between protection and permanence. The policies overseeing the permanence decision-making area are primarily held within the higher policy levels (three and four) with some references in the earlier levels.

In this final area of the protection and permanence system, the legal permanence away from home system area, the possible placements through POs can include foster care, kinship care and being looked after at home. This latter possible placement becomes rather paradoxically included in this section of the protection and permanence system (based on the CELCIS [2018] diagram), but there is the option that children and young people under a PO can be placed with their birth parents while still being considered looked after (Scottish Government, 2011). The decisions in this area include a permanence panel, 'pursing POs', preliminary hearings, a 'children's hearings advice and review', an 'appeal against decision' and, potentially, a pre-proof hearing. This system area can also result in adoption through POs where the authority to adopt is included. However, since I have chosen to focus on children who are or are risk of becoming looked after, adoption presents an alternative perspective, where children or young people would no longer be considered looked after. Likewise, POs with the authority to adopt present a route to no longer becoming looked after (Scottish Government, 2011). Thus, I will be focussing only on POs without the authority to

adopt. The decisions situated across the care and permanence system are one way to differentiate where and how participatory opportunities are present and/or absent within the legislation and policies at the different levels.

3.5 Data management

Data management is an all-encompassing term which can include the ethicality of utilising data, the type of data under study, the use of software in the analytical and/or management processes and data storage and/or back up (Van den Eynden, Bishop, Horton, & Corti, 2010). I will overview the pertinence of each to my Ph.D. project before delving into the rationale for related decisions based on the literature and relevance to my project.

Researchers have utilised software to assist with analysing policies (Bergin, 2011; Farrugia, Seear, & Fraser, 2018; Maher, Hadfield, Hutchings, & de Eyto, 2018) to varying degrees of success, but frequently this seems to be used in conjunction with other methods or primarily to help with the organisation of data. I am hesitant to rely solely on a qualitative software with the potential risk of engaging with the data on a more surface level to fit within the constraints of the software. Maher and colleagues (2018) discuss how they found a combination of data management techniques of a more analogue nature (such as colourful pens and sticky notes) and digital techniques (via NVivo, the qualitative analysis software) helpful. The researchers found this more ‘hybrid’ approach allowed them not to be constrained by the limitations of the software while still benefiting from the organisational aptitude of such programmes. Furthermore, some researchers have conducted a review of published articles that have utilised a form of qualitative data analysis, including NVivo (Woods, Paulus, Atkins, & Macklin, 2016). They found that of the 763 articles reviewed, a very small number used such software to specifically examine policies and in expanding that scope further to include all documents, approximately 13% of the reviewed studies used the software. These studies indicate that qualitative software does allow for greater efficiency and the ability to complete more complex analyses on larger swathes of data than would be able to be accomplished manually (Woods et al., 2016). Several researchers (Humble, 2012; Le Blanc, 2017; Robins & Eisen, 2017) have argued for a critical approach when researchers are considering using and/or throughout the process of using software analysis programmes such as NVivo. More specifically, researchers (Humble, 2012; Robins & Eisen, 2017) have argued that such software programmes should not drive the analysis, but rather assist in the already established research plan and that regardless of how the software is meant to help complete the analysis, it is the researcher not the programme who undertakes the analysis. Following in line with this research, my Ph.D. project would benefit from software that can

assist with qualitative analysis, but in a limited capacity. I utilised the qualitative analytical software, NVivo, primarily for organisation of my policy documents and to complete an initial inter-policy analysis, as proposed by Bracken-Roche and colleagues (2017) so that comparison might be done more easily between the policy documents. This allowed me to become properly immersed in the data through my chosen WPR poststructuralist approach which I completed through more analogue techniques such as with colourful pens and sticky notes (Maher et al., 2018). In terms of the downloaded documents, I downloaded the official and most recent versions from the Westlaw database, so that amendments are included. All data was stored on my password-protected personal computer, and I completed back-ups of the data at regular intervals.

3.5.1 Analytical Procedures

The analysis of this project was divided into several phases: familiarisation, policy analysis, case law selection and sense-checking. The importance of comparison in analysis has been highlighted (Bacchi & Goodwin, 2016; Widding, 2011) and is applicable to the comparison of the presence of regulations and policies pertaining to children and young people's participation as compared across the care orders and the placements of children and young people who are looked after in Scotland. First, I read through the documents based on the presence and absence of concepts of participation and then went through each of Bacchi's six WPR questions to further examine the problem representation. Previous research has stated that, 'most commonly, discursive power is studied as it manifests in the language used, i.e. how an issue is talked about. Discourse analysis is usually employed to reveal positive and negative presentations of distinct social groups' (Deckert, 2014, p. 41) and moreover that language is one way in which this power can manifest and be examined (Lessa, 2006). Part of the beauty of the WPR approach is how it assists in probing and operationalising aspects present and absent in the policies that might otherwise go undetected or unquestioned. Thus, through my many and targeted readings of the policies, I have read through the policies based upon how children and young people are oriented and discussed within the policies. I have used the six WPR questions to probe these potential mentions (via the language and place within the policy and wider system of policies).

I started by uploading all policy documents to NVivo to keep the analysis organised and all in one place. I then completed a search of key words of the documents that I uploaded to NVivo (including variations of participation, involvement, looked after). Following completion of the WPR portion of analysis, I made a summary memo of each of the documents. Throughout this analytical process, I compared my notes from prior analysed

policies and their summary memos to ensure that I was frequently reminded of the policy documents existence within a wider web of policy and context (Strauss, 2010). I repeated this process for each of the policy and/or legislative documents and created a growing web of summary and linking memos to accompany my notes within each document (See Table 9 in the Appendix B for the 'Interview' Schedule of Policies).

Following these multiple close readings, I used case law to assist with the emerging findings from the WPR approach rather than providing further documentation for analysis. More specifically, I used case law to help strengthen and critique my findings that were emerging from my analysis especially in relation to rules of law and interpretation of legislation and policies (see Section 3.5.1.1.2: incorporating case law for further details on how I incorporated case law in my research project). I completed a combination of digital and analogue methods to assist with the analysis, by first reading through each document for each of the WPR questions and making notes on the printed documents. Within the documents selected, I followed Bacchi's WPR approach by fully reading the policies for levels and mechanisms of participation for children and young people. At this stage, no sampling was undertaken of the contents, but a full reading was undertaken. This is like previous studies that have utilised Bacchi's WPR approach (including Komai, 2021; Liasidou, 2008) and discussion of policy analysis more generally (Browne et al., 2019). I focussed especially on the sections in the legislative documents for each care order, while still considering cross references or other sections which applied specific requirements to the care order provisions. In this first step of analysis, I applied this approach to all the relevant sections of legislation that I have identified in the table below (sections 37 to 59 and 191 to 192 of the 2011 Act for CPOs, Chapter 1 of the 1995 Act for S.25 Orders, sections 60 to 181 and 191 to 192 of the 2011 Act for CSOs and finally sections 80 to 121 of the 2007 Act for POs) (see Table 9 in Appendix B for the 'Interview' Schedule of Policies). A primary premise underlying the WPR approach is the inherent flexibility (Bacchi, 2009). I incorporated this flexibility such that while I completed the entire analysis for each of the documents, not all of Bacchi's questions proved relevant to the emerging findings. I organised my discussion of the themes and subthemes that emerged through my analysis based upon the relevance that the policies held to my analysis and focus of my project. Moreover, I tested my emerging analysis through consideration of case law and my 'sense-checking' seminars with policy and social work professionals as will be subsequently discussed (including critiquing and updating my analysis, as necessary). To support discussion of findings, I frequently included excerpts from the policies in the findings chapters. These excerpts were selected on one or more grounds.

Most often, they were the only relevant excerpt (e.g., the relevant legislation section, for that particular order). Other excerpts were selected because they were typical or, in a few examples, because they provided a minority but alternative view. These later selection decisions were considered in light of the thorough analysis by looking across the data systematically.

I organised my findings based on the CELCIS (2018) diagram (as discussed in Section 3.4.1), and the different system areas present in addition to dividing the policies into the different levels to ensure that my method of selecting the policy excerpts was thorough and cohesive. However, because of this technique, multiple excerpts repeatedly emerged as relevant across different sections of my thesis in both different key findings and in different system areas, since there is significant overlap in the policies that govern these areas. The child care, protection and permanence system is complex, and so the way I have organised my analysis and findings are to ensure accuracy and are meant to be considered incrementally. Thus, the way children's participation is represented and considered may shift depending on the level of policy (including when considering general mechanisms of participation).

I additionally conducted a search of key terms (including *capab** and *vulnerab**) in NVivo following readings of the policies to determine where and how participatory opportunities for children and young people were present and absent with the policies. I completed this text search to gain a better grasp of where and how the key themes exist explicitly within the policies before furthering the analysis to implicit mentions. This will be discussed in more detail in the respective theme sections of the findings chapters.

3.5.1.1 Analysis support

3.5.1.1.1 Trustworthiness in Research

Previous research has discussed 'trustworthiness' to examine validity in qualitative research (Connelly, 2016; Dominguez-Cancino, Palmieri, & Martinez-Gutierrez, 2020; Lincoln & Guba, 1985; Polit & Beck, 2014). Among other criteria, Lincoln and Guba (1985; 1994) present five facets to determine a study's 'trustworthiness': credibility, dependability, confirmability, transferability and authenticity. By contrast, other researchers focus more on how 'trustworthiness' can be incorporated into research in practice, such as through peer debriefing and member-checking (Dominguez-Cancino et al., 2020) and multiple close readings (Connelly, 2016). Moreover, Connelly (2016) helpfully summarises that most broadly, 'trustworthiness' for 'qualitative researchers can demonstrate how data analysis has been conducted through recording, systematizing, and disclosing the methods of analysis

with enough detail to enable the reader to determine whether the process is credible’ (p. 2). Thus, as I introduced above, to ensure the ‘trustworthiness’ and process of credibility, I have endeavoured to ‘check’ the credibility of my findings through select case law and with policy professionals and senior practitioners. The latter served as way for me to enhance the credibility of my findings while also detailing my research process to the professionals I consulted to illustrate the trustworthiness of my research project.

3.5.1.1.2 Incorporating case law

To help complement the policy analysis and to aid in the interpretation of the findings, I have interwoven relevant case law into the discussion of my findings, particularly where it would seem to provide further information and/or context to an interpretation of legislation and/or policies. First, I read recent law textbooks, the annotated notes of relevant legislation (i.e., for the 1995 Act, 2007 Act, and 2011 Act) and looked up recent case law summaries on the Child Clan Law Website. Child Clan Law is ‘is Scotland's law centre for children and young people. We exist to protect and strengthen children’s rights and improve their lives’ (Clan Child Law, 2022). Thus, Child Clan Law are experts in the law surrounding children and young people in Scotland and are a reputable and additional way to ensure I have included (and understood) relevant case law. I made note of all the potentially relevant case law and subsequently looked them up in the Westlaw database. I additionally conducted a search in Westlaw by the relevant provisions (See Table 8 in Appendix B). When I searched for each of the cases in the Westlaw database, I read through the judgements and checked if there were any associated commentaries on the case. If there were commentaries (articles in legal journals), I checked if any were particularly relevant for my research (i.e., if it included a relevant part of an act that I was planning to discuss in my chapter or if it had discussed the connotations and/or meaning behind a specific phrase reiterated throughout the legislation [such as ‘significant’, or ‘as far as reasonably practicable’]). Furthermore, for each of the cases, I also checked the level of court (i.e., Supreme Court, Sheriff court etc.) as cases from more ‘senior’ courts (i.e., the Supreme Court) would give more weight to the decision. Following all of this, I compiled a total of eleven potential cases that I might use, of which I determined five to be the most pertinent to the discussion sections within my main findings’ chapters (see Table 11 in Appendix D for a summary of the cases selected). I am not using case law to ‘extend’ the policies, but rather to help in my interpretation of the policies and legislation.

3.5.1.1.3 ‘Sense-checking’ with professionals

Member checking has frequently been employed to help enhance the trustworthiness of findings from qualitative research (Crombag, et al., 2014; Moore & Wiley, 2015). Yet,

member checking is not without its critiques; namely, ‘the changing nature of interpretations of phenomena over time...the dilemma of anticipating and assimilating the disconfirming voices and deciding who has ultimate responsibility for the overall interpretation’ (Birt, Scott, Cavers, Campbell, & Walter, 2016, p. 1802). Yet, considering that I used ‘member checking’ to enhance the trustworthiness of findings following analysis of policies and the ontology that grounds this research, there was not a single interpretation that I was hoping to access. Rather, I utilised member checking more to ensure the legal accuracy of my findings and how it fits in within the professionals’ knowledge of policy and practice.

Considering the policy-based approach of this Ph.D. project, an adaptation would be needed. Researchers who have conducted documentary analysis of policies and the like have adapted their approach to member checking by following up their analysis with interviews with expert stakeholders (Crombag et al., 2014; Moore & Wiley, 2015). Moore and Wiley (2015) note that ‘In order to investigate top-down policies, the research may want to interview...those actors who have to execute the policy’ (p. 158). Thus, like Crombag and colleagues (2014), I have undertaken purposive sampling and snowball sampling, wherein I have selected and recruited specific policy professionals and senior social practitioners who are knowledgeable of and/or have implemented looked after children’s policies in Scotland.

To further clarify, by policy professionals, I am referring to professionals involved with interpreting and policy research, rather than those who have developed the policies. More specifically, the policy professionals have a job title and description that focusses on the research and/or implementation of policies relating to children and young people who are looked after in Scotland. I additionally chose snowball sampling since Crombag and colleagues (2014) additionally noted that, ‘Snowball sampling is commonly used where expert knowledge is the prerequisite for inclusion in a sample’ (p. 3) as is the case for my inclusion criteria. I selected and recruited two policy professionals and one senior social work manager, who then assisted in snowballing recruitment for two more policy professionals and two senior social work practitioners. I selected the initial two policy professionals and senior social work manager based on purposive and snowball sampling where, ‘the research starts with a small number of known stakeholders who then identify other important stakeholders...’ (Crombag, et al., 2014, p. 3). Moreover, individuals were considered knowledgeable and/or involved with policy research and/or implementation based on their position within a relevant organisation which includes holding authority and having knowledge on policies pertaining to children and young people who are looked after in Scotland (Crombag et al., 2014).

Overall, I recruited a total of seven participants to assist me in my ‘sense-checking’. I intended to conduct a series of focus groups so that a discussion of my findings could be fostered between professionals. However, due to issues with scheduling I conducted one focus group with three policy professionals and the rest were conducted as one-on-one interviews with myself and the remaining professionals. I completed the ‘sense-checking’ focus groups and/or interviews on Microsoft Teams, where I utilised automatic transcriptions, with the participants’ permission, which I then checked for accuracy. This process of ‘sense-checking’ proceeded in tandem with my dissemination efforts, as I will elaborate upon. It should be noted that online group interviews and/or focus groups are not without weaknesses. At the level of practicability, this is particularly regarding the potential for ‘our honed skills of communication and empathy [to be] dulled’ (Meskell, Houghton, & Biesty, 2021) and with there being potential issues surrounding stable internet connections and ensuring privacy should the topic be of a more sensitive and/or personal nature (Dodds & Hess, 2021). Yet, the advantages of not relying solely on either documentary analysis nor online group interviews helped to mitigate any weakness and thus allowed for the advantages to outweigh the disadvantages. Additionally, all meetings were conducted online rather than in-person to ease any potential scheduling issues so that it would be as easy as possible for participants to efficiently join. For practical reasons, in-person meetings would have added an extra obstacle of time and travel for myself as a researcher. Moreover, many individuals (including some of my participants) are still quite accustomed to online meetings that have lingered from the COVID pandemic and are still working from home (at least in part), making online meetings the best and easiest option.

The ‘sense-checking’ was primarily aimed to support my analysis, the potential implications of my research and dissemination. For both groups of professionals, I first presented the main findings from my Ph.D. research before delving into a series of discussion questions. For the social workers, I first checked on the participants’ general thoughts on what I had shared, including asking, ‘Have you noticed any differences or similarities in how children’s participation is considered across placement types?’ in relation to their own practice regarding how children’s participation is considered across placement types and care orders. I additionally asked, ‘What do you think the future directions should be for children’s participation research more generally?’ and ‘What future policy developments do you think could take participation further for looked after children?’. By contrast, in speaking with the policy professionals, I focussed more on my themes that emerged from my analysis including asking, ‘In your experience, where do you feel there are (or are not) spaces for participation

in practice in the policies?’ and ‘In your experience, what do you think would help make participation more of a reality across the care pathways?’. For both groups, I additionally asked if any of my participants had any questions or comments that they would like to add to ensure that everything was said that they had hoped.

3.6 Ethical Considerations

A final component of this chapter appears last only in sequence, but I have considered ethicality continuously throughout this research project. In this section, I will review my reflexivity and positionality as a researcher, the prevention of harm (both generally and in relation to the COVID-19 pandemic) for this Ph.D. project. Additionally, I will consider informed consent and confidentiality, anonymity, and privacy specifically for the ‘sense-checking’ and dissemination components. I have been approved for level one ethics through the University of Edinburgh SSPS (School of Social and Political Science) Research Ethics Committee.

3.6.1 *Researcher reflexivity and positionality*

Reflexivity is one way in which I checked throughout the research process that all formal and informal ethical considerations were being appropriately and frequently contemplated and addressed. Reflexivity is a mental exercise that allows one to recognise the limitations and biases in one’s own perspectives (Whitaker & Atkinson, 2021). Furthermore, reflexivity is an important aspect of Bacchi’s WPR approach (Bacchi, 2009) and one that other researchers have noted as being a particularly useful aspect of the analytical approach (Marshall, 2012). Following the six questions that Bacchi (2009) offers to frame the analysis, she includes the suggestion that one could ‘apply this list of questions to your own problem representations’ (Bacchi, 2009, p. 19); thus, lending towards a more self-reflexive lens. I do not have any direct involvement with children who are or are becoming looked after in any capacity nor the policies that are created to regulate the practices. Thus, I have sought to demonstrate a diligence to reflexivity through an approach that Berger (2015) advocates by, ‘embracing humbly the standpoint of the uninformed and actively seeking guidance and feedback from [individuals] and from peers who are familiar with the study topic and population’ (p. 231). Additionally, through my Ph.D. research I have engaged in further checks and practices of reflexivity through writing regularly in a reflexive research diary (Darling, 2014; Ryan, 2011) and reflecting with my Ph.D. supervisors through our regular meetings.

3.6.2 Conducting and amending research in a pandemic

At the forefront of my ethical considerations is that no one who participates in or assists with this research will be harmed or affected detrimentally in any way, including myself as the researcher. Conducting research amidst a global crisis (COVID-19) can lead to some amendments having to be made to reduce the risk to potential participants, the researcher(s) and to be in accordance with governmental and health and safety guidelines. In consideration of the justification of my choice of methodology, the ethicality of how I could conduct research in a pandemic played a consistent role since the start of the pandemic. Prior to the pandemic, I had started data collection with a local authority's social work office in Scotland, which had to be put on hold when the pandemic began. Ultimately, local authorities were overwhelmed and did not have the capacity to assist me in my research. Furthermore, I did not consider it appropriate to be persistent in this regard, which raises questions about the ethicality of conducting research in emergency situations (Fink, 2020). Thus, beyond the methodologically sound decision of choosing to focus on the policies and legislation surrounding children and young people who are looked after in Scotland, my decision to primarily focus on policy analysis was also very much guided by the potential ethicality of the research. I did not want to further inundate already overwhelmed social workers (and thus going against the goal of prevention of harm). However, I still wanted to ensure that I completed my Ph.D. research in both a timely manner and in a way that would still address an adjacent research gap to the one I had initially proposed to fill. It would be dismissive not to note the lack of guidance from those with lived experience and this will likely remain a limitation of this research project and was necessitated by the COVID-19 pandemic and associated responses (i.e., lockdown) at the time of initial data collection. Furthermore, as I noted in Table 3 in section 3.3.2.1: Linking the WPR approach to this Ph.D. project and analysis, I am a proponent of children and young people's rights, particularly their rights to participation, which has inevitably led to biases in how I have organised, analysed, and reported the findings throughout this Ph.D. project. All my research decisions were made following much reflection (both individually and with the help of my supervisors) and review of previous research. This helps to illustrate the ongoing importance of reflexivity in research, especially in ensuring ethical and flexible practice. Other researchers have also been faced with similar ethical musings and dilemmas (Crivello & Favara, 2021; Dodds & Hess, 2021; Meskell et al., 2021; Surmiak, Bielska, & Kalinowska, 2022). Surmiak and colleagues (2022) noted the different approaches to ethics that researchers adopted amid the pandemic, namely that, 'nothing has changed, opportunity-oriented and precautionary' (p. 213). The

researchers found that in their review of the research conducted in the pandemic, ‘some researchers wondered whether it was justified to undertake or continue qualitative research during the aggravation of COVID-19’ (Surmiak et al., 2022, p. 218). Moreover, the researchers found that considering the greater amount of effort on both the part of the researcher and the participants in qualitative research, this raised further questions of the ethicality of conducting research in a global crisis (Surmiak et al., 2022). This latter point further builds upon previous research (Crivello & Favara, 2021), where it is noted that, ‘maintaining data quality and high ethical standards is still paramount when conducting social research in a climate of emergency, and just because new data collection is possible does not make it justified’ (p. 2). This is a key point and one that illustrates the importance of being critically reflexive of all research decisions, especially amidst a global pandemic. Moreover, this leads to questions of how one balances high data quality and ethical standards without sacrificing either, particularly when there are wider ongoing emergencies at play.

3.6.3 Ethics in conducting policy research

Considering that the primary sources of data under review in my Ph.D. project are policies of varying levels of governmentality, all of which are publicly available, the ethical risks involved are low. Ethics relating to policy-based research are often more theoretical but do nevertheless necessitate careful thought and reflexivity on the matter. As my research project is primarily focussing on policy documents pertaining to looked after children and children’s participation in Scotland, the subject matter concerns individuals who are viewed as inherently ‘vulnerable’ (Bracken-Roche et al., 2017). The data in this research project will include policies, guidance and related governmental documentation concerning looked after children in Scotland. My primary concern would be to ensure that I am analysing the policies in a way that does not further marginalise children who are looked after and to ensure reflexivity of my own use of language throughout the analytical process (Walt et al., 2008). Furthermore, a central ethical consideration of this project has been how looked after children and young people (and their families) are represented throughout and ensuring that my language would not further marginalise any individual populations.

3.6.4 Ethics in undertaking ‘sense-checking’ with professionals

3.6.4.1 Informed Consent

Informed consent is a cornerstone of ethical research, and all research participants were required to be informed of the research before being given the option to consent. I view informed consent as an ongoing process (Kustatscher, 2014; Mirfin-Veitch, Conder, Treharne, Hale, & Richardson, 2018). All participants were given explicit and repeated

reminders that they could discontinue their participation at any point during or after the ‘sense-checking’ prior to my writing up the findings. Moreover, considering the types of individuals that I spoke with (senior practitioners and policy professionals), I considered them to be in a more privileged and likely less vulnerable position in society compared to service users and/or children, for example. This is reflected in the information sheets and consent forms, accordingly, by assuming that my participants had previous knowledge of the protection and permanence system in Scotland.

I sought the informed and ongoing consent of all stakeholders, where all the adults were viewed as capable of providing consent for their own participation. Moreover, accommodations were made (such as further time to review the information sheet, providing a combination of verbal and visual information, Mirfin-Veitch et al., 2018), so that all interested selected participants might be ethically informed regardless of ability. Loue (2018) overviews the components of informed consent as encompassing ‘respect for persons’ and ‘beneficence and nonmaleficence’, of which I have been reflexive throughout and after the interviews and/or focus group. Considering that these group interviews would be for ‘sense-checking’ my findings rather than looking for new findings, inviting the individuals to the dissemination event for knowledge exchange seemed to serve as sufficient form of compensation for their assistance.

3.6.4.2 Confidentiality, Privacy and Anonymity

Confidentiality, privacy, and anonymity are essential but precarious ethical issues that exist when conducting research particularly with more ‘sensitive’ topics. I assured my participants that except in cases of disclosures that indicated that either the participant or someone else was at risk of significant harm, all three would be upheld. I additionally informed them that another exception to confidentiality would be for disclosures or concerns of professional negligence. I have audio and written records of all interviews (with the permission of each participant) and potentially related documents; these tangible items may have identifiable information of the participants. Thus, all data collected that may identify participants in any way has been kept on a password-protected encrypted laptop and once a transcription was made and identities were anonymised with pseudonyms, all original recordings were destroyed to ensure that anonymity and confidentiality were not breached without just cause. Moreover, this anonymity and confidentiality will remain constant beyond the data collection stage and persist throughout the rest of the research project with all identities anonymised in any subsequent writing and/or dissemination. Since I conducted the interviews and focus group online, there were added potential issues of confidentiality

(Carter, Shih, Williams, Degeling, & Mooney-Somers, 2021). To help alleviate this, I conducted the interviews through Microsoft Teams, where only the invited individual(s) would have access to the link and anyone not part of the University of Edinburgh would have to be admitted by me as a guest. Furthermore, even though it was stated in my information and consent forms, I still double-checked that each participant would be fine with my video and audio recording of the interview or focus group for my own records and to ensure accuracy. Additionally, I gave feedback to my participants along with the appropriate thesis chapters, for their interest.

3.7 Writing Procedures

I wrote and updated sections of my thesis from the start of my Ph.D. research. As I had to shift my Ph.D. research quite substantially at the start of my data collection, much of what I had written during the first year and a half of my Ph.D. was no longer relevant. Once I determined (with the help of my supervisors) the new direction for my Ph.D. research, I started by writing a research proposal of the intended project. Following this, I proceeded in writing smaller sections of my literature review and analytical plan. I started writing parts of my findings' chapters following feedback and guidance from my supervisors before organising my emerging findings around three primary themes. Then I wrote each of the three main findings' chapters separately before drafting an updated version with the three chapters together. I then wrote my literature review and methodological chapters before writing my initial findings and discussion chapters. My supervisors commented on each of my chapters and writing sections I sent them and I incorporated and/or considered each of their comments at each updated writing stage. Finally, I wrote a full draft of my thesis without the introductory chapter, which I wrote last.

3.8 Conclusion

Overall, I have reviewed the methodological, data management, analytical and ethical considerations that underpin this Ph.D. project. I have adopted a childhood studies informed poststructuralist approach to policy analysis through Bacchi's WPR approach. Additionally, I have utilised 'sense-checking' group or individual interviews with select expert stakeholders and incorporated case law to further strengthen the 'trustworthiness' and interpretation of my findings.

Most generally, this chapter is meant to illustrate the balance between high ethicality, data quality and degree of reflexivity that I have endeavoured to practice through this Ph.D. research project. The research gap that this Ph.D. project is intended to fill is also meant to illustrate the space for future research in this area. As I will discuss in subsequent chapters,

this Ph.D.'s findings will be extensively presented and discussed. I will start with mapping out where and how the participation of children and young people occupies space (or not) within the policies examined.

Chapter 4: Initial Findings: Map of Participation in Scottish Child Protection and Permanence System Decision-Making

4.1 Introduction

This chapter is the first in my quartet of findings' chapters. It provides a map for the remaining three findings' chapters, by clarifying where and how children and young people's participation is present and absent in the policies. This chapter and my findings will be organised around the child protection and permanence system map produced by CELCIS (2018) (see Figure 2 in Appendix A). This diagram helps to pinpoint the possible decisions leading up to, including and following each of the care orders that can designate children and young people as being looked after.

This chapter is primarily intended to pinpoint rather than explain, with the latter three findings' chapters meant to elucidate and extrapolate on answers to the research questions. Additionally, this chapter provides a reference for the latter findings' chapters so that the reader can be reminded of where and how participation is present and absent within the policies. I wish to emphasise that my analysis is of policy and not of practice. As suggested by the research literature in Chapter 2, it is possible that participation opportunities are specified and/or required in policy but are not realised in practice or that practitioners facilitate using their discretion, and children participate in practice. I will first present how risk and vulnerability are presented across the policies. I will do this by more specifically examining how and where children and young people's participation is present in the broader policy environment (beyond the policies that I have specifically examined), the system areas, care orders and placement types. Finally, I will reach initial conclusions to lead into more in-depth explorations of the themes that emerged in the subsequent trio of findings' chapters.

To help situate this chapter with the remaining three findings' chapters and discussion and concluding chapters, each of the main finding chapters will look at the emerging themes more closely across the system areas, care orders and placement types and how these themes can potentially help to elucidate and probe the patterns that have emerged in this initial findings' chapter.

4.2 How vulnerability and risk are represented within the policies

As mentioned in my literature review chapter (see [Chapter 2.5.2: vulnerability and risk](#)) and as corroborated in my analysis, I made note of the key themes that seemed to be

emerging so that I might consider them in more depth for future findings' chapters. These emerging themes varied from more general to specific, with one of the primary ones being related to vulnerability and risk. Previous research has also focussed on vulnerability and risk in relation to children and young people's participation within a child protection system (Daley, 2015). Moreover, considering how explicitly and frequently 'vulnerability' and 'risk' are mentioned within the policies in relation to children and young people in the context of participation within the child protection system, it seemed that starting with what was explicit and what was discussed within the literature as a barrier and/or lever to participation would be a strong foundation for the rest of the analysis. In addition, both concepts underlie many of the other emerging themes (such as conceptualisations of family within the binaries of public and private and passive and active, wherein vulnerability and risk seem to serve as ways to recognise differences in the vulnerability and risk attached to different conceptualisations of family, for instance).

As discussed in my methodology chapter (See [Chapter 3.5.1: Analytical Procedures](#)), after my readings of the policies, I additionally completed a text search in NVivo to gain a better understanding of the number and type of mentions of key terms explicitly before delving more into the implicit mentions. For 'vulnerable' (including vulnerab* to include all words with that root), the word was mentioned in all the documents except the 1995 and 2007 acts for a total of 168 times, with most mentions being confined to the 2014 National Guidance on Child Protection document (65 times), followed by the 2011 Act (49 times), the Guidance for the 2009 regulations and 2007 Act (26 times) and the policy memorandum of the 2011 Act (21 times). Many of the references appear to be based on the view that there are different degrees of 'vulnerability' present (Brown, 2013). For instance, in paragraph two of the 2014 National Guidance for Child Protection document it states, regarding the document's purpose, that it is, '...to promote, support and safeguard the wellbeing of all children, including those who are most vulnerable'. In this excerpt, there is a presumption that all children have a degree of vulnerability, but that some are more vulnerable than others (Appell, 2009; Braken-Roche et al., 2017). By contrast, 'vulnerability' is mentioned 21 times across all the documents. In the 2014 National Guidance for Child Protection, it is mentioned in the context of 'under-age sexual issues, learning disability or any other condition that would heighten the young person's vulnerability' (paragraph 626). Moreover, within the 2014 National Guidance for Child Protection, a definition for vulnerability is presented based on the Resilience Matrix by Daniel and Wassell (2002), where it states that vulnerability concerns, 'characteristics of the child, the family circle and wider community which might

threaten or challenge healthy development’ (Scottish Government, 2014, p. 82). In this excerpt, the use of ‘vulnerability’ seems to be considered as less inherent to an individual (Wendler, 2017). The sparse mentions of ‘vulnerability’ as compared to ‘vulnerable’ seem to highlight the preferred way it is viewed explicitly within the policies, as being inherent to the individual and not something that can be removed or minimised (See [Chapter 2: Literature Review](#) for a further discussion of the literature surrounding vulnerability and then [Chapter 5: Vulnerability and Power](#) for how these conceptualisations of vulnerability can help to further elucidate these findings).

Within the policies that I have examined, there is often a mention (via the range of terms that I searched) of the potential ‘risk of harm’ in the future. For instance, in the 2011 Act, section 73 (child’s duty to attend children’s hearing), in subsection (3)(b), it states that, ‘the [exception to the] attendance of the child at the hearing, would place the child’s physical, mental or moral welfare at risk’. In the policy memorandum for the Children’s Hearing (Scotland) Bill it states that the latter order, ‘...expressly empowered the sheriff to remove a child to a place of safety where it was believed that they were at risk of significant harm, irrespective of whether an offence was known to have been committed’ (Section 183). The latter may be considered as the legal definition of risk. The language in the latter excerpt appears to clarify what the presumption of ‘risk’ encompasses. For instance, in the 2011 Act, in the ten times that risk is mentioned, it is regarding an action (e.g., the child’s attendance or potential for absconding) that, ‘...would place the child’s physical, mental or moral welfare at risk’ (Section 103, subsection 3[b]). Moreover, as I have previously discussed in the literature review (see [Chapter 2.5.2: Vulnerability and Risk](#)), vulnerability and risk are closely linked concepts such that risk factors can make an individual more vulnerable and/or individuals who are already vulnerable are more likely to be at risk. Thus, it seems that often one being designated in a ‘vulnerable’ categorisation (e.g., a child and potentiality of becoming looked after) helps to justify the likelihood of and the necessary response to risk.

For the remainder of this chapter, I will be discussing the mentions or presence of participation in various respects. I have operationalised such ‘mentions’ of participation based upon the language and context used (alongside considering what is *not* mentioned and/or if participation is mentioned in the negative [i.e., it is explicitly noted that participation is not utilised]).

4.3 Presence and absence of children and young people's participation across the system areas

4.3.1 Presence

The presence of language pertaining to participatory opportunities for children and young people varies across the four different system areas (the child protection system area, the children's hearing system area, the permanence system decision-making area, and the legal permanence away from home decision-making area). Most generally, the different types of individual participation as adapted from Bouma and colleagues' (2018) categorisation⁵ (See [Chapter 2.3.1: Operationalising participation](#) for a more extensive discussion) appear across the four system areas. There often only appear to be mentions of if and how children and young people are regarded in relation to more general discussions within the child protection system area including as relates to decisions pertaining to the:

- case discussion,
- child's plan meeting,
- monthly core group meetings,
- recurring three- and six-monthly reviews,
- the child protection investigation,
- child protection case conferences, and
- the development of the child's plan.

In the children's hearing system area, participation can be identified based on my adaptation of Bouma et al's (2018) categorisation and is present in the:

- reviews of the child's case for a 'child cared for by parents or persons with parental responsibilities' [Regulation 44 of the 2009 Regulations],
- children looked after away from home in terms of the plan for a child looked after at home on page 54 and subsequent reviews specified on page 134 of the 2010 Guidance document for the 2007 Act and 2009 Regulations,
- and reviews of approval and/or placements and/or the child's case).

This is alongside the general principles which includes section 27 (views of the child), where it specifies in the 2011 Act explanatory notes in paragraph 29 that, 'This section is based on section 16(2) of the 1995 Act and provides that the children's hearing or sheriff must, so far

⁵ Whether and how the following were described within the policies:

1. The topics children and young people should be informed about,
2. how children and young people are heard,
3. the aspects of involving children and young people in decision-making,
4. participation as an ongoing process, and
5. if and how children are seriously regarded (Bouma et al., 2018).

as is practicable, give the child the opportunity to express their views, and take those views into account in coming to those decisions'. Thus, even though there may be minimal specific mentions of participation in the CHS area, the broader principles of participation nevertheless carry through.

In the permanence decision-making system, participation is mentioned particularly as relates to:

- reviews of the child's case regarding the 'recommendation for permanence away from birth parents' and
- the 'local authority decision to pursue permanence away from birth family' (CELCIS, 2018, see Figure 2 in Appendix A).

Finally, the legal permanence away from home system includes mentions of participation only in relation to the children's hearing advice and review. There are additionally mentions of gaining children and young people's consent in the 2007 Act through section 84. In considering this alongside the nine processes presented in the UNCRC (2009) General Comments for Article 12, all nine processes are present at some point in the policies, but it is interesting how they seem to manifest in different areas of the system. For instance, the transparent and informative (1), child friendly (5), inclusive (6) and supported by training (7) processes seem to appear more frequently (and in the case of legislation, support by training is not stated) in guidance compared to legislation. Yet perhaps it is too simplistic to place participation on a scale of passive to active rather than considering how each component is necessary for participation. It is not enough for children and young people to be seriously considered and regarded if it is not ongoing, nor only to include informing children and young people of necessary and relevant proceedings. Furthermore, the mentions of this fifth level of participation (of considering if and how children and young people are seriously regarded) are primarily confined to the 2009 regulations, 2013 Children's Hearing Procedures, Guidance documents and GIRFEC and UNCRC document. Thus, this makes the most 'active' component of participation primarily confined to more discretionary levels of policies and is not a statutory requirement. Beyond this, it is important to note that children and young people's participation is supported in the policies analysed including through advocacy, legal advice, the right to have an accompanying person and the ability of a panel to exclude someone from the children's hearing (2011 Act).

4.3.2 Absence

In consideration of the presence (and absence) of mentions of children and young people's participation within the policies more generally for the child protection system area,

some form of participation is mentioned regarding all the decisions confined to that system area. These ‘absences’ are outside of any overarching principles around participation and are more meant to be indicative of the lack of *targeted* participatory opportunities within the child protection and permanence system specifically for children and young people who are or are at risk of becoming looked after. I am careful not to be reductive of viewing participation as present or absent, as the nature of participation as ongoing points towards viewing participation across the system areas and broader policy environment in Scotland. Yet, it is interesting to note that many of the mentions of children and young people’s participatory opportunities, especially at the furthest level of participation (being regarded and taken seriously) are only mentioned across the legislative documents analysed regarding the child protection system and section 25 orders (see next [Section 4.4](#) on care orders), specifically. However, there are mentions of participatory opportunities still being a requirement of the panel through the more general statements of section 17 of the 1995 Act and section 27 of the 2011 Act (which covers many aspects of the children’s hearing) that are meant to imbue the other decisions.

4.3.2.1 Potential underlying presumptions

Part of the WPR approach involves critiquing the underlying presumptions present within the policies. In the above examinations of where participation is present and absent, there seem to be underlying presumptions about where and how participation for children and young people is most appropriate and/or ‘practicable’ across the system areas. For instance, one point of exploration for a later findings’ chapter will be how this ‘practicability’ and propriety shift across the system areas and seem to depend based on the perceived risk that is created based on characteristics of the children or young people (their age, ability status) and the system area in which the decisions reside.

4.4. Presence and absence of children and young people’s participation across the care orders

I would like to make two distinctions that have emerged through my analysis concerning care orders. While I acknowledge that identifying such distinctions may seem to oversimplify the complexity of the system, the help that such distinctions can provide in identifying specific points of complexity has aided in overriding my initial trepidation. Across the four care orders, trends have emerged through my analysis in terms of if and how participatory opportunities are present and represented for children and young people who are looked after. For one, a distinction can be made across the care orders for *when a decision is being made* (i.e., before a decision is made, when a decision is being made and reviewing

after a decision has been made). The second point of interest that I identified is making note of the *different goals of the care orders* (see Table 4 below).

Table 4. Care Orders and Associated Goals.

Care Order	Goal
CPO	Emergency protection
Section 25 Order	Temporary and voluntary assistance
CSO	Longer term protection
PO	Permanence

These distinctions and points of decision-making have been corroborated in the literature (Roesch-Marsh et al., 2017; Storhaug, Kojan, & Fjellvikås, 2019) but for research examining child welfare decision-making more broadly (Berrick, Dickens, Pösö, & Skivenes, 2015) such distinctions are often overlooked.

4.4.1 Presence

Most notably, for section 25 orders (the only voluntary order of the four care orders), there appear to be a lack of consistency within the policies for the participatory opportunities that are expected and legislated compared to the other three types of care orders. This is particularly in how specific participatory opportunities are discussed for section 25 orders. For instance, in section 25 (Provision of accommodation for children, etc.) of the 1995 Act regarding section 25 orders, in subsection (5) it states,

Before providing a child with accommodation under this section, a local authority shall have regard, so far as practicable, to his views (if he wishes to express them), taking account of his age and maturity; and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.

However, it is important to acknowledge that in subsection 5 in the above quotation, that the inclusion of ‘...a local authority shall have regard, so far as practicable, to his views (if he wishes to express them), taking account of his age and maturity’, children under the age of twelve may still have their views regarded. Moreover, twelve years of age creates a legal presumption that when a child is twelve years of age, they would *usually* be able to form a view, but that does not exclude children younger than twelve who may also have their views considered. However, in similar provisions in family law, the presumption has not worked as planned and very frequently younger children have not been invited to participate (see Tisdall 2018) and, for these reasons, the presumption was deleted by the Children (Scotland) Act

2020 in certain proceedings. Additionally, this excerpt should also be considered in light of subsection 7a of Section 25 of the 1995 Act, wherein ‘any child who, at being least sixteen years of age, agrees to be provided with accommodation under this section’. For the other three care orders, children and young people’s views are also mentioned within the legislation. For instance, regarding permanence orders, in section 84 (Conditions and considerations applicable to making of order) of the 2007 Act but more in the realm of consent than only listening to their views in section 84 it states,

- (1) Except where subsection (2) applies, a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents.
- (2) This subsection applies where the court is satisfied that the child is capable of consenting to the order.

Participatory opportunities are also discussed in relation to CSOs and other matters (but not CPOs) in section 27 (views of the child) of the 2011 Act [include subsection 1-4].

Participation seems to be present in varying ways across the care orders, as will be discussed in more detail in subsequent chapters. By contrast, for the other three care orders, there is sparser mention regarding children and young people’s views within the legislation.

4.4.2 Absence

One of the biggest distinctions for participatory opportunities within the policies across the care orders seems to exist in the timing of participatory opportunities and also seems to vary depending on the care order, with there often being fewer mentions of participatory opportunities *before* a CPO or Section 25 order is made compared to the other two care orders. Moreover, there is explicit mention of participatory opportunities not being considered for CPOs as included in the excerpt above in section 27 of the 2011 Act. In addition to the ‘silences’ of where participation or components of participation are not mentioned, this ‘absence’ can likewise be examined through negative mentions of participation (i.e., where it is noted that participation or ‘consulting with children’ is not possible). These negative mentions are stated sparingly and only seemingly in relation to ‘very young children’ and/or before emergency orders including CPOs.

4.4.2.1 Potential underlying presumptions

The potential underlying presumptions that result from considering the presence and absence of participation for children and young people across the care orders are that participation seems to occupy a different role depending on the goal of the care order. For instance, as noted in Table 4 on the page prior in summarising the goals of the care orders, as many of the absences and negative mentions of participation seem to be particularly within emergency care orders including CPOs, there seems to be an assumption that participation is

viewed as being distinct from protection rather than being able to help tailor protection procedures as has been argued within the literature (Heimer et al., 2018). The reasons for the distinction between children and young people's rights to participation and protection, particularly in relation to emergency care orders, are likely due, at least in part, to the concern of ensuring the immediate safety of the child or young person where there would be tight time constraints in addition to more structural factors such as increasing caseloads where participatory opportunities would be considered less possible and/or feasible (Bruce, 2014; Williams & Parry, 2023).

4.5 Presence and absence of children and young people's participation across placement types

4.5.1 Presence

Across the placement types, trends do emerge in if and how opportunities for children and young people's participation are present and represented within the policies. The first distinction can be made between placements and whether children and/or young people are looked after at home or away from home. There seems to be more explicit guidance for participatory opportunities for children and young people who are looked after away from home compared to at home, especially in policies that hold less statutory gravitas. For instance, there are not as many mentions within the policies of participatory opportunities for children and young people who are looked after at home, compared to other types of placements away from home and beyond the opportunities for participation that would be in the children's hearings system. One of the mentions is on page 46 of the 2011 Guidance, where it states, 'The social worker should seek to reach a position of agreement with the child and family on as many of the objectives of the home supervision requirement as he or she can, although the welfare of the child should remain the paramount consideration throughout'. Similarly, for placements away from home, there are minimal mentions of participatory opportunities specifically for kinship care. One of these mentions is in the 2009 Regulations, in regulation 5, regarding 'preparing the child's plan' which can be related to kinship care among other placement types. Many of the more specific references to participatory opportunities that encompass kinship care are mentioned in relation to reviews (2009 Regulations; Scottish Government, 2011).

Participatory opportunities highlighted in the policies specific to foster care seem to primarily be about informing children and young people rather than including them in the decision-making. One example of this is on page 101 of the 2011 Guidance where it states,

At the point at which a foster placement is planned and sought, it should be assumed that the alternatives of a child remaining at home under supervision or moving to kinship carers have been explored and are not appropriate. The alternatives [of being looked after at home and in kinship care] should be re-stated here as the child moves into foster care, so that the carers know how the need for foster placement has been explained to the child and **help the child understand the plan that is in place** (emphasis added in original).

Children and young people additionally have the right to request a review of their CSO after a certain period such as is specified in section 132 (Right of child or relevant person to require review) of the 2011 Act. By contrast, for residential care, participation seems to be placed as a more inherent part of the practice, as on page 106 of the 2011 Guidance in relation to regulation 35 of the 2009 regulations, it states, ‘Given that it tends to be older children in residential care, the child’s views and understanding of the aims of the placement should form a central part of planning’. Thus, in building upon the points about ‘very young age’ being an obstacle for participation within the last section (4.4.2: Absence), the opposite also seems to be true: that participation for older children and young people tends to be a more ‘central part of planning’ even though children and young people being granted a CPO can be placed in residential care (2009 Regulations; 2011 Guidance). This seems to illustrate the tension between children and young people’s rights to participation and protection, as it states in section 27 of the 2011 Act that children and young people’s views will not be considered for CPOs, even though participation for older children and young people (as is more likely the case for residential care) is meant to be a more ‘central part of planning’ (2009 Regulations; 2011 Guidance). Nearly a quarter of children on CPOs were less than 20 days old according to the 2021-2 statistics offered by the Scottish Children’s Report Administration (SCRA). Moreover, these statistics further specify that approximately 40% of children on CPOs are less than a year old and just fewer than 50% are less than two years old. The statistics likewise specify that, ‘Proportionately, more child protection orders are granted for very young children (especially new-born babies), than any other age, reflecting their high risk and vulnerability and requirement for immediate protection’ (SCRA, 2022, p.7). Thus, how participatory opportunities are present across care orders and placement types does not seem to be a wholly consistent picture.

4.5.2 Absence

By contrast, within the 2009 Regulations in regulation 8 (Arrangements for children to be cared for by parents or persons with parental rights and parental responsibilities [i.e., being looked after at home]), there are no mentions of participatory opportunities. However, children and young people will have had opportunities for participation within the children’s

hearings, such as through sections 16 and 17 of the 1995 Act and section 27 of the 2011 Act. There seems to be a greater focus on creating a distinction between the family and state and thus on the state only intervening, when necessary, particularly for children and young people being looked after at home. This also seems to corroborate the distinction discussed in the literature (see [Chapter 2.9.1.1: Looked after at home](#)). This is especially pertinent considering the ‘minimum necessary intervention’ proposed by the Scottish Government such that ‘the more significant and long lasting the intervention, the greater the onus to establish the necessity for that decision’ (Scottish Government, 2010a, p. 12). This division of the public and private spheres will be a focus of discussion in a later findings’ chapter (6). For secure care, there seems to be a greater degree of vulnerability associated with the placement type, such as in the policy memorandum for the 2011 Act, where it states in paragraph 325 that, ‘We recognise the important role that secure care must play in providing the intensive support and safe boundaries that enable these highly vulnerable young people to re-engage and move forward positively in their communities’. Furthermore, there are minimal references to participation specifically for children and young people in secure care, perhaps suggesting that their ‘high vulnerability’ has overridden their right to participate. There are overarching statements that can apply to children and young people in secure care (including section 27 [views of the child] of the 2011 Act). It is interesting that considering that the status of vulnerability can be to highlight points where further support might be needed (Lundy et al., 2013), there are more often only basic references to children and young people’s participation (i.e., in relation to the topics children and young people could and should be informed about), when participation is mentioned at all.

4.5.2.2 Potential underlying presumptions

In building upon the previous two sections (of system areas and care orders) with placement types, there are evidently several moving parts for a child or young person involved with the child protection and permanence system at any moment in time. This can most explicitly be seen in how system area, care order and placement type intersect when considering the age and/or ‘perceived capability’ of the child and/or young person in question. As discussed in the above sections in relation to ‘very young children’ (see [Section 4.4.2: Absence \[of children and young people’s participation across the care orders\]](#)) and in relation to ‘older children and young people’ (see [Section 4.5.1: Presence \[of children and young people’s participation across placement types\]](#)), age frequently seems to act as an intermediary to how participation is viewed (whether as not appropriate or ‘central’, respectively). Thus, this leads to an assumption that age is an important component,

regardless of the system area, care order and placement type. It may be, admittedly, more difficult to provide very young children opportunities to participate, but several researchers have highlighted the ways participation could still be incorporated and adapted to very young children (Kustatscher, 2014; Percy-Smith & Thomas, 2009; Tisdall, 2015). However, it should be noted that many child protection cases concern children who are just born (Raab, Soraghan, Macintyre, McGhee, & Troncoso, 2023) or not yet born (Critchley, 2018), making it not possible for these infants to participate in the decision-making. This will be explored in greater depth in the subsequent finding chapters but does lead to questions of how the age of the child and or young person can contribute to varying practices and views of participation across the system generally. Moreover, the frequent mentions of practicability and capability seem to indicate an underlying presumption in relation to the child and/or young person's ability status and how this is either presented as an excuse not to offer participatory opportunities (including regulation 5[4]: Child's plan of the 2009 Regulations) or as a reason to *adapt* participatory opportunities (including p.130-1 of the 2011 Guidance). Both of these points will be discussed in more depth in the next chapter (5).

Throughout this initial analysis of where participatory opportunities of children and young people being looked after are present and absent, several key themes have emerged. These key themes are relating to the perceived vulnerability of the children and/or circumstances, the power of who and how this is determined, particularly in how time and capability and agency play into this discussion, conceptualisations of family and children as passive or active and as existing within public or private spheres and finally, the discretion and regulation in how opportunities for participation are regulated or not within the different levels of policy. Each of these themes will be explored in more depth in the subsequent three findings' chapters.

4.6 Conclusion

Overall, as I discussed in each section of 'potential underlying presumptions', age, and perceived capability (i.e., ability status) seem to be points of interest that will be critically examined in subsequent findings' chapters. Moreover, the characteristic of age likewise leads to the question of how other personal characteristics of children and young people (including ability status, race, socio-economic status) can contribute to the overall view and practice of participation within the policies analysed across the system.

This initial findings' chapter can be considered in light of previous research pertaining to children's participation and protection in Scotland (Griffiths & Kandel, 2000; Kendrick & Mapstone, 1991, 1992). This is particularly in relation to age, where this prior

literature highlighted that younger children tended to have fewer opportunities for participation compared to older children including by way of lower attendance in reviews (Kendrick & Mapstone, 1991, 1992). Other barriers may also exist that may contribute to this (as I discuss on page 114) such as having limited time in protection settings to provide further support and/or preparation (Woodman, Roche, & McArthur, 2023).

Thus, considering the four different factors of system areas, care orders, placement and types, the answer to how and where children and young people's participation is represented within policies as concerns children who are looked after must be equally nuanced to address the complexities of the systems and the policies. As I have focussed on analysing the policies rather than the practice, the complexities within the policies may be better parsed and lay the foundation in which practice may be better understood. As has been discussed throughout this chapter, the differences and similarities regarding how participatory opportunities are present and/or absent for children and young people who are or are at risk of becoming looked after, vary across these multiple axes, and create the starting point for further contemplative and elucidative discussion in the proceeding findings' chapters.

Chapter 5: Vulnerability and Power

5.1 Introduction

This chapter is the second in my quartet of findings' chapters. It will focus on the presence and absence of participation across the policies analysed. I will examine this through the themes of vulnerability (encompassing the subthemes of time and timings) and power (encompassing the subthemes of agency and capability). These subthemes emerged in tandem from the multiple close readings through conducting the analysis and based on suggestions of their importance in previous research (Appell, 2009; Fernandez, 2014; Pösö & Eronen, 2015; Storhaug et al., 2019). Moreover, the themes and subthemes in this and the subsequent findings chapters followed from my initial analysis of pinpointing where participation was present and absent in the previous chapter (see [Chapter 4](#)). The goal for this chapter is to examine how the presence and absence of participation as overviewed in the previous chapter may be partially explained through discussions and literature pertaining to vulnerability and power.

To start, I will overview the definitions of key terms pertaining to the themes and subthemes that have emerged through this area of my analysis (particularly for vulnerability and power). Following this, I will present evidence from each of the four areas of the child protection and permanence system, in turn. Finally, I will conclude with a more general

discussion and conclusion regarding how these themes and subthemes fit into the findings more broadly.

5.2 Situating vulnerability and power to explain the presence and absence of participation within the policies

5.2.1 Vulnerability

5.2.1.1 Vulnerability as expressed through discourses of time⁶

Following the review of vulnerability and ‘vulnerable’ within the literature (see [Chapter 2.5: Vulnerability](#)) and as augmented by my analysis of the policies (particularly in the previous chapter on the initial analysis), conceptualisations of vulnerability have frequently been twinned with caveats and discussions of time. Researchers have discussed the relationship between time and vulnerability (Knezevic, 2020) and examined the temporal component of child welfare critically (Pösö & Eronen, 2015; Roberts, 2017). Within the policies, time and timings seem to exist in several ways including: timings within the system, timings as conditions for participation and vulnerability, and timings of ‘childhood’, each of which will be expanded upon next.

Numerous researchers have examined time in social work settings, including as related to the trajectories of care pathways in child welfare (Pösö & Eronen, 2015), as a way to consider the presumptions surrounding time across different social work roles (Roberts, 2017) and the ‘bureaucratisation of time’ (Andersen & Bengtsson, 2019). Andersen and Bengtsson (2019) discuss the ‘bureaucratisation of time’ based on how time frames and limits are dictated within policies regarding how long it should take for a decision to be made, how long a care order lasts and balancing practice across a practitioner’s caseload. The timings within the system both create and limit the perceptions of how vulnerability manifests for children and young people. For instance, Andersen and Bengtsson (2019) specify that while needs for all individuals can be related to timings, ‘...the care needs of vulnerable youth often present as acute (e.g., a homeless youth’s need for protection), which highlights the link between time and care. These needs emerge in the here and now and carry the implication that the consequences of postponing care could come at great cost’ (p. 1511). Moreover, researchers have frequently reported that factors of timing and time are major factors in practice, both in terms of timeliness or the speed in which decisions and processes are made and the order in which decisions and/or processes must be done in a system (Knezevic, 2020; Munro, 2011) such as the Scottish child protection and permanence system. For instance,

⁶ This includes timings with the system, timings as conditions for participation and vulnerability and timings of childhood.

previous research discussed the consequences of drift and delay of care because of bureaucratic systems (Masson, Dickens, Bader, Garside, & Young, 2017). This can be specifically linked to the practice of participation: if time and resources are viewed to be limited in terms of making decisions, then this can negatively impact whether and how participatory opportunities for children and young people in protection settings happen (Woodman, Roche, & McArthur, 2023). More specifically, Masson and colleagues (2017) discuss that while quicker decisions can be beneficial for children and young people to find permanence sooner, ‘shorter proceedings do not benefit children whose proceedings end with the wrong order’ (p. 411). Thus, there is ample previous research examining the relationship between vulnerability and timing within the child protection and permanence system. Relatedly, there has been some research examining the impact that the timing may have on children’s participation and vulnerability.

Conditionality and vulnerability in relation to child protection practices have been discussed in the literature (Brown, 2014b; Hand, Katz, Gray, & Bray, 2016). This can particularly be seen through the decision-making processes surrounding emergency care orders (Lerum, 2018; Storhaug et al., 2019). More specifically, timing as conditions for participation and vulnerability indicates how time impacts perceptions of vulnerability and opportunities for participation (and so is distinct from the overall timings present *within* the system). For instance, research in other jurisdictions, including Norway (Storhaug et al., 2019), also places similar conditions on children and young people’s participation in child protection decision-making, in that children are seemingly rarely given opportunities to participate *before* emergency removals. While this seems to be a small area of research (perhaps giving further suggestion of the consensus that children and young people have few opportunities to participate in emergency care orders), it does give an indication that this view of vulnerability exists on a spectrum and in response to conceptualisations of protection. Therefore, risk (or the possibility of risk) and embedded time limits exacerbate each other in such situations to create the conditions in which opportunities for children and young people’s participation are overridden. In consideration of childhood studies and poststructuralist viewpoints, critically examining established presumptions and approaches can help to ensure that respect to children and young people equally match and query the unquestioned tendencies towards decisions made based on minimizing risk. Moreover, this balance between participation and protection can also be considered in discussions of power through conceptualisations of agency and capability.

Temporality has frequently been linked with discussions of childhood and children (Appell, 2009; Pösö & Eronen, 2015; Roberts, 2017), often particularly so for children and young people involved with a child welfare system, where temporal elements (including: timeliness and development) add an additional component of complexity (Andersen & Bengtsson, 2019; Roberts, 2017). For instance, from a traditional, developmental perspective, Appell (2009) notes that, ‘Childhood is primarily a time-limited development category that contains children until they become adults’ (p. 708). This idea of time as a tool of ‘containment’ to protect children, seems to be echoed particularly in the timeliness of children involved with social work services (such as those who are or are at risk of being looked after by the state). Moreover, the inherency of time and timing to childhood very much embodies elements of vulnerability as has been discussed in research particularly relating to childhood studies (Andresen, 2014). Andresen (2014) argues that ‘...childhood is shaped as a social phenomenon and the socially determined risks associated with growing up in society’ (p. 711) and moreover that,

...one central challenge for childhood studies continues to be to carry out research analy[s]ing social inequality and its effects on children and social groups of children. This offers the possibility of systematically linking vulnerability as an analytical category to the identification of children at risk. (p.711)

Thus, this research indicates the contentious nature between vulnerability and childhood, particularly in the realm of childhood studies. Yet, there can be value in breaking down the categorisation further to better differentiate how it can be useful as an analytical concept and where it can become more problematic (Hollomotz; 2011; Lundy et al., 2013). I have divided each of the four systems areas into sections on vulnerability and power, with vulnerability further divided into the three sections (timings within the system, timings as conditions for vulnerability and participation and timings of childhood) and power further divided into two sections (capability and agency). However, I would like to note that for some of the system areas, I have collapsed the subcategories into the same section (as indicated in the title of that section), when there was not enough evidence for each of the subcategories to fill a full section.

5.2.1.1.1 Temporality in legislative writing conventions

Policy and legislative texts are rife with writing conventions, especially in considering how the language (through the word choices and tenses) has evolved and is used (Williams, 2013a; 2013b). Williams (2013a) notes that in English law, ‘compared with most other genres, the language of the law contains relatively few references to the past, whether it be the recent or the distant past. And of these comparatively rare occurrences of simple past,

present perfect and pluperfect tenses, many refer to hypothetical situations’ (p. 357), even for legal documents that concern present and/or future conditions. This note of frequently referring to ‘hypothetical situations’ is an interesting one and one that leads to questions of how the situating of vulnerability and time may pervade from the hypothetical and into an assumed scenario. Examples in the policies I have analysed include hypothetical situations. For instance, in subsection 4 of section 30 (Children’s hearing: duty to consider appointing safeguarder) of the 2011 Act, it states, ‘If a children's hearing appoints a safeguarder, it must give reasons for its decision’. In the above excerpt, hypothetical situations are included primarily by the possibility of certain aspects being relevant or not (in this case, of giving reasons for appointing a safeguarder) depending on the specific situation (if a safeguarder is appointed or not).

5.2.1.2 ‘Urgency’ and vulnerability

One oft-twinning term and concept with time and timings, especially in social work research, is that of urgency (Grimwood, 2022). However, more often, ‘urgency’ is alluded to in relation to social work services or as a descriptor for potential associated risk for service users (Lerum, 2018). Grimwood (2022) explicates that, ‘...urgency is not simply the absence of time, but also a mode of decision-making, ...a sense of insecurity derived from complexities of neoliberal care systems...and a particular form of self-creating discipline’ (p. 17). This more expansive definition of urgency is particularly useful in considering ‘urgency’ more conceptually. Urgency can closely be linked to protection in child welfare and/or protection systems, particularly in how it frequently can ignite a focus on protecting due to perceptions of increased vulnerability (Storhaug et al., 2019). Moreover, there seems to be an underlying presumption that protection in the context of urgency in child welfare and/or protection scenarios (in which children and young people would be more likely to be viewed as more vulnerable than in less urgent situations), implies non-participation. This is in addition to the practical implication of there being less time for participatory opportunities on the part of the children and young people (Leeson, 2007). Yet, this is creating a binary of participation and protection that does not exist, or rather does not *need* to exist, as increasingly research has illustrated how protection and participation can be helped to realise the other rather than being thought of as distinct goals (Tisdall, Morrison, & Warburton, 2021).

Within the policies that I have analysed, ‘urgency’ is frequently used to justify conceptualisations of vulnerability. This will be explored in more depth shortly, but ‘urgent’ and ‘urgency’ are mentioned throughout the policies (particularly in the 2011 Act [16 times],

the 2007 Act [5 times], the 2011 Act Explanatory notes [19 times], the 2011 Act Policy Memorandum [5 times], the 2014 National Guidance on Child Protection [9 times], and in the 2011 Guidance for the 2007 Act and 2009 Regulations [6 times]. For instance, in section 38 (Consideration by sheriff: application by local authority only) of the 2011 Act in subsection 2, it states that, ‘the sheriff may make the order if the sheriff is satisfied that – ... (d) the local authority has reasonable cause to believe that access is required as a matter of urgency’ (Scottish Government, 2011). This ‘urgency’ is again reiterated in section 143 (Transfers in cases of urgent necessity) of the 2011 Act and ‘necessary as a matter of urgency’ is mentioned ten times within the 2011 Act to justify a more expedited and/or more protective immediate response. This link between vulnerability and urgency is further strengthened in an excerpt from the 2014 National Guidance, where it states in paragraph 310 that, ‘In some child protection circumstances, urgent action is needed to protect the child from any further harm and the immediate safety of the child is the priority consideration’ (Scottish Government, 2014). In this excerpt, ‘urgency’ is present because of the priority being the ‘immediate safety of the child’. Further, this is elaborated upon in section 79 of the 2014 Guidance, in relation to the statements that ‘Professionals ensure children are listened to and respected’ and that ‘Children and their carers should also be able to expect honesty and to be given explanations for actions or decisions taken. In some instances, urgent, immediate action will be needed to ensure the child’s protection’ (Scottish Government, 2014). Thus, this latter excerpt more explicitly links how a sense of ‘urgency’ can shift the focus from ‘participation’ to ‘protection’ and thus how ‘vulnerable’ children or young people are perceived to be based on the circumstances. Closely linked to notions of urgency and vulnerability, is that of power and how power manifests in different ways throughout the policies.

5.2.2 Power

5.2.2.1 Power as expressed through discourses of agency and capability

Power can be considered in numerable ways particularly in how power can be associated with constraining and facilitating opportunities for children’s participation. Two key concepts related to power include how agency exists, particularly for children and how it is controlled often through presumptions of children and young people’s capability. Two ways in which power is expressed within the policies are through discourses of agency and capability, each of which will be examined before delving more explicitly into evidence from the policies in the different system areas. As I discussed in my literature review (See [Chapter 2.4: Power](#)), researchers have frequently considered policies and how themes of power are

embedded in them through poststructuralist policy analyses (Bacchi & Goodwin, 2016), but adding children and young people's participation into this formula has been much less researched (Bouma et al., 2018).

5.2.2.1.1 Capability

Through my analysis, the theme of capability, emerged almost in tandem, with notions of vulnerability and power. Like vulnerability, there are numerable discourses around capability (Sen, 1992; Biggeri, Ballet, & Comim, 2011; Nussbaum, 2011). Sen (1992) defines capability in his capability approach as, '...a set of vectors of functionings, reflecting the person's freedom to lead one type of life or another...to choose from possible livings' (p. 40). In building on these ideas, Nussbaum (2011) offers a more specific categorisation by differentiating between three types of classifications (basic, internal, and combined) and continues with this elaboration by creating a list of ten central capabilities. She defines basic capabilities as, '...the innate faculties of the person that make later development and training possible' (p. 24) and internal capabilities as, 'characteristics of a person (personality traits, intellectual and emotional capacities, states of bodily fitness and health, internationalised learning, skills of perception and movement)' (Nussbaum, 2011, p. 21). Finally, Nussbaum (2011) defines combined capabilities as, '...not just abilities residing inside of a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social and economic environment' (p. 20).

In these latter definitions, echoes of Sen's definition of capability can be more explicitly seen (as evidenced through their collaborations, including Nussbaum & Sen, 1993). Furthermore, Nussbaum (2011) identifies ten central capabilities including: life, imagination and thought and control over one's environment (political and material), with the latter being perhaps most relevant to how children's participation can be considered within this context. In contrast to this viewpoint, capability has also often been discussed in the context of developmental psychology as related to children (Dahmen, 2014; Fernandez, 2014; Peleg, 2013). Dahmen (2014) discusses that in the capability approach which Nussbaum puts forth, 'Children are not able to have freedom of choice because of their insufficient cognitive development to decide for themselves' (p. 187). This point has frequently emerged as a point of contention within the literature, where many developmental psychology theorists frequently support the view proposed by Piaget of 'stage-based and sequential cognitive development' but hold the view that children's cognitive abilities have often been underestimated and/or their shortcomings focussed on more than their potential capabilities (Fernandez, 2014, p. 1633). Likewise, critiques have frequently emerged in how children's

capability is conceptualised within developmental psychology for assuming uniformity in how children develop regardless of the impact of family and society more broadly (Fernandez, 2014). Thus, to help address this caveat, I will also be focussing on how representations of agency and capability within the policies help to illustrate the ways in which power is presented. With these discourses in mind, I will be adopting an amended version of Nussbaum's (2011) categorisation of capability. Primarily, I found the breadth of Nussbaum's (2011) categorisation of capability beneficial but that an added caveat that children and young people are 'complete' in terms of how 'capable' children and young people can be to participate regardless of their age and perceived 'abilities' would further cement it with the stance I am adopting towards capability in this thesis. Since Nussbaum (2011) adopts a more developmental approach, which can presume that children are not capable or lack capacity because of their younger age, this amendment of 'completeness' would imbue more of a children's rights approach to the consideration of capacity. Thus, it would instead be presumed that children have the capacity, and this would be based on individualised assessment to determine how best this capacity could be supported. This caveat further helps to link to the other themes in this section of capability (including perceived abilities) and power (such as how perceived abilities are determined within the policies). Additionally, this distinction can likewise be utilised along the discussions of vulnerability and time as all the themes seem to overlap in this regard in several ways, including age.

Moreover, like the distinction I made between 'vulnerable' and 'vulnerability' (See the NVivo search for 'vulnerable' and 'vulnerability' in [Chapter 4.2](#)), the same can be made for 'capable' and 'capability', such that capable, as an adjective, is viewed as inherent to what it is describing, while 'capability' can be more easily separated from the individual person or circumstance (Wendler, 2017). Within the policies, the notion of 'capability' is frequently put forth as a condition for children's participation, as can be noted throughout the 2011 Act, explanatory notes of the 2011 Act, 2009 regulations, Guidance on the 2009 regulations and 2007 Act, 2013 Rules of Procedures for the Children's Hearings. As these policies (that utilise these terms) concern care orders primarily relating to CPOs and CSOs, it is not especially surprising considering that the policies concerning these care orders represent the problem to be as a more potentially urgent risk.

5.2.2.1.2 Agency

Children's agency has been the focus of much research and discussion within the domain of childhood studies (Valentine, 2011; James & James, 2012; Mayall, 2002). Mayall

(2002) explains how children's agency can be considered regarding how children may, '[make] a difference to a relationship or to a decision to the workings of a set of social assumptions or constraints' (p. 21). Theoretical writings of structure and agency within society and individuals have been written upon and contemplated extensively (Giddens, 1984). Several researchers (among many) have examined the relationship between power and agency (Giddens, 1984; Dobson, 2015). Giddens (1984) emphasises the relationship between the two concepts and states that, 'action depends on the capability of the individual to ["] make a difference ["] to a pre-existing state of affairs or course of events. An agent ceases to be such if he or she loses the capability to ["] make a difference ["]', this is, to exercise some sort of power' (p. 14). Dobson (2015) offers an expansion of this idea in stating that, 'post-structural theorisations of power, when coupled with constructionist and interpretive analyses, understand power's exercise as dispersed and networked via human agency, social relations and interactions' (p.694). These discussions help to highlight the oft close relationship between power, agency, and capability, frequently in ways that mirror the interwoven yet frequently imbalanced relationship between participation and protection.

Baraldi and Iervese (2014) summarise three ways in which agency may be considered; namely, that in viewing agency more broadly than an individual's capabilities, it can be conceptualised as being a component of social processes. Second, that agency can be linked to individual capabilities and societal structures that enable such capabilities, and finally, that agency can be used to examine how adaptations and amendments can be promoted within society. More recent research has offered an alternative perspective to children's agency, particularly in critiquing it as a concept (Spyrou, 2018; Sutterlüty & Tisdall, 2019). Spyrou (2018) calls for further critiquing of presenting children's agency as a panacea without acknowledging the wider structures and mechanisms that are likely in play in situations where children may have 'agency'. However, I will be defining 'agency' based on Baraldi and Iervese's (2014) definition due to its explicit focus on children's agency and capabilities while still being associated with making changes more widely in society compared to the other definitions of agency. This would create a more generalised focus than is needed for this section, but still allows for links to conceptualisations of power.

5.3 Child Protection and Permanence System

5.3.1 CPS

5.3.1.1 Vulnerability

5.3.1.1.1 Timings within the system

Through my analysis, the theme of vulnerability seemed to be very much linked to notions of timings, most explicitly within the child protection sphere (through CPOs and

section 25 orders). By first examining level one policies (the 1995 and 2011 Acts), vulnerability and opportunities for participation appear linked to the purpose of the placement as became clear when and if opportunities for participation were considered.

For instance, in section 43 of the 2011 Act in reference to CPOs, ‘the child in respect of whom it is made [must be notified as soon as practicable]’. In section 48 of the 2011 Act, ‘(1) An application may be made by any of the following persons to the sheriff to vary a child protection order – (a) the child in respect of whom the order is made...’. As is dictated by the ‘bureaucratisation of time’ (Andersen & Bengtsson, 2019), the time constraints surrounding emergency care orders such as CPOs are one way in which vulnerability manifests. More explicitly, the more vulnerable to risk and harm a child is, the more warranted quick action is at the potential expense of participation.

Thus, the placement of the orders *within the policies* is dictated not only by their purpose but also by the representation of the problem. This representation serves to cement the solution of the problem, with participation included in that solution in only specific instances. More specifically, this depends on what issue is the most pertinent and/or ‘urgent’ which would lead to the proposed solution. In consideration of the other care orders, particularly section 25 orders, in section 17(3) of the 1995 Act, it states that,

‘Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the views of –
(a) The child’.

This care order temporally would likely take place earlier in the possible care journey of a child or young person who is looked after and is pursued with the permission of the parents (or those with parental responsibility). This appears consistent with the rationale behind this type of care order (of temporary and voluntary assistance), that participation is rather explicitly mentioned. The ‘vulnerability’ of children and young people is frequently alluded to in relation to the child protection sphere, including in section 310 of the 2014 Guidance (as had previously been discussed in the literature and in my above section on urgency and vulnerability, see [Section 5.2.1.2: ‘Urgency’ and vulnerability](#)). As concerning the risk assessment of a single event, it states that, ‘In some child protection circumstances, urgent action is needed to protect the child from any further harm and the immediate safety of the child is the priority consideration’. Previous research has noted there is not ‘a clear understanding of the when, for whom, and in what circumstances [Section 25] orders are used, of what support and outcomes are achieved through their use’ (Anderson, Dennell, & Porter, 2020, p. 13). Thus, it seems this lack of understanding creates an ambiguity of the

vulnerability associated with children and young people on Section 25 orders. This point can be considered in light of Herring's (2018) research on vulnerability and particularly the role of voluntariness and 'the legal self', and that,

Our right to be able to make our own choices over how to act; to only be subject to those responsibilities we choose to take, are seen as central pillars of the economic, social, and legal structures. The role for the law in such a model is to protect the individual from unwanted intrusions and to protect liberty to pursue one's goal for one's life. Anyone who falls outside the paradigm are described as 'vulnerable'. (p. 48)

Although the 'voluntariness' of section 25 orders is afforded to parents and guardians, there still seems to be a difference in presentations of vulnerability for the children and young people in question as well. In expanding this point to linking vulnerability to time, there are several examples present within this system area, particularly for policies pertaining to CPOs compared to Section 25 orders. For instance, the sections pertaining to children and young people's right to participation do not appear to apply consistently prior to a CPO being made, but they are reinstated after or once the order is made.

5.3.1.1.2 Timings as conditions for participation and vulnerability

Through my analysis, many conceptualisations of vulnerability and participation are related to conditions of when participation would prove appropriate. Or if the conditions for participation were not met, that the children and young people's vulnerability was exacerbated enough to warrant a focus on only protection. In section 27 (views of the child) of the 2011 Act, subsection two, it states that, 'This section does not apply where the sheriff is deciding whether to make a child protection order in relation to a child'. This consideration is expanded upon by examining level two documents as the explanatory notes of the 2011 Act, section 27 (views of the child), and states, 'This section does not apply where the sheriff is deciding whether to make a child protection order (CPO) in relation to a child. As an emergency protection measure, it would not be possible to seek the child's views before making a CPO'. Protection overrides participation in such circumstances, such that the notions of capability are not of issue in periods of enhanced vulnerability and that it becomes an issue of possibility, and particularly of time and emergency, rather than comprehension. Moreover, in such emergency contexts protection and participation are often considered as in tension rather than ones that work in tandem.

In level three to five policies (statutory instruments to national framework documents), time is also mentioned or at the very least is a concept underlying the text. In the 2009 regulations, distinctions are made between the *immediate* and *long-term* needs of children in the assessment process, such as stated in regulation 4, '-(1) The local authority

must make an assessment of – (a) the child’s immediate needs and how those needs can be met; (b) the child’s long term needs and how those needs can be met’. In this above excerpt, time appears to serve less to justify vulnerability and more to help explain differences in how the perceived vulnerability of the children and young people can manifest (i.e., through consideration of their short- and long-term needs). By level four documents, in the 2014 National Guidance of Child Protection, these considerations of time are used to justify and differentiate vulnerability in paragraph 351 (Emergency legal measures to protect children at risk), where it states, ‘In some cases urgent action may be required to protect a child from actual or likely significant harm or until compulsory measures of supervision can be put in place by the Children’s Hearing System’. While these are very different contexts from the previous excerpt in relation to assessments, it does point to multiple contexts in which time is used as justification. This point is further illustrated through level five documents, where in Aldgate’s (2013) GIRFEC document, there is frequent emphasis on being *early* (early engagement and early permanence) and on the children’s future (‘For children to reach their full potential, they must individually reach the best outcome of each of the *Well-being indicators*, as appropriate to their age and stage of development’, UNCRC: The Foundation for GIRFEC, 2013, p. 7). Thus, time (in the different ways it is presented) can be conceptualised both as the problem (i.e., *urgent, emergency measures*) and the solution (i.e., *early engagement and permanence*).

5.3.1.1.3 Timings of ‘childhood’

Beyond the ways vulnerability manifests through time already discussed (timings within the system and timings as conditions for participation and vulnerability), one further way time can be considered is in its inherent link to childhood. For instance, in relation to section 25 orders, in the 1995 Act, in section 6 (views of children), it states,

(1) A person, shall in reaching any major decision which involves –

...

(b) his exercising a parental right or giving consent by virtue of that section, have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.

The Children (Scotland) Act 2020 amends the 1995 legislation, but the amendments had not become law at the time of writing, so my comments here will be based on this original stated above. This excerpt seems to point towards a view that ‘sufficient age and maturity’ is needed ‘to form a view’. This is one of the amendments put forth in the Children (Scotland)

Act 2020, but still in the current legislation in place, vulnerability is perceived based upon the age of the child or young person, with vulnerability being more often attributed to younger children in literature (Zeijlmans et al., 2019). However, it is important to note this excerpt is in relation to family law since this would be a major decision of parental responsibilities, wherein parent(s) should consider a child's views if a child is to be cared for under a section 25 order.

In terms of timings of 'childhood', section 191 of the 2011 Act Policy Memorandum states that, 'Proportionately, more of [CPOs] are granted for very young children, with approximately 40% of all child protection order referrals received by SCRA relating to children aged under two years'. It has been well established in the literature that younger children are given fewer opportunities for participation in child protection settings (Winter, 2011; Toros & Falch-Eriksen, 2021), painting a picture of compounded vulnerability (Bracken-Roche et al., 2017). It would be more challenging to facilitate participation for children under the age of two and this remains one of the more challenging aspects of children's participation, which other researchers are likewise considering critically (Barblett, Bobongie-Harris, Cartmel, Hadley, Harrison, Irvine, & Lavina, 2023; Palaiologou, 2014). Yet, perhaps it more speaks to the way processes can be adapted depending on the age of the child (for those older than two years of age) and/young person rather than fitting children and young people into more rigid processes (Stålberg, Sandberg, Larsson, Coyne, & Söderbäck, 2018), such as also might be expected for children and/or young people with a disability in terms of impacting their understanding.

5.3.1.2 Power

5.3.1.2.1 Power as expressed through discourses of agency and capability

Adjacent to vulnerability and time, conceptions of power likewise emerged throughout my analysis. In the 2011 act, in section 73 (child's duty to attend children's hearing), in subsection (3), it states that, 'A children's hearing may excuse the child from attending all or part of the children's hearing if the children's hearing is satisfied that - ... (b) the attendance of the child at the hearing, would place the child's physical, mental or moral welfare at risk'. In this instance, the potentiality for enhanced risk and/or vulnerability of the child seems to dictate the agency granted to the child by the policy. This can be further illustrated in level two documents, where in section 98 of the explanatory notes of the 2011 Act for section 73 it states that, 'The hearing has a general power to excuse a child from a Children's Hearing either which has been or is to be arranged...'. Through this excerpt, it

becomes clearer that power is placed with the Children's Hearing to allow or excuse children's attendance in their hearing more than a way for children and young people to exercise their power. Moreover, this excerpt can be considered in light of the case of *G v. Children's Reporter* (2016) in the Glasgow Sheriff Court. It is not a seminal case, but it does offer insight into the text present within section 77 of the 2011 Act that would likely be noteworthy for the above excerpt regarding the power to exclude someone from a children's hearing, so that a child's view could be heard. The case can be summarised as,

The decision by a children's hearing to exclude the legal representatives of relevant persons was not justified where adequate reasons had not been given and there was no adequate evidential basis upon which the hearing could properly exercise its power of exclusion under the Children's Hearings (Scotland) Act 2011 s.77. (*G v. Children's Reporter*, 2016, p. 1)

In this case, this discourse of power is further cemented beyond the children and young people in that the children at the centre of the case had expressed their wish for their mother and grandfather to be excluded from the children's hearing so that they would have an easier time expressing their views. Both their mother and grandfather appealed the decision that both be excluded from the hearing. Ultimately the judge upheld their appeal by stating that there was a 'failure to provide adequate reasons' including in paragraph 38, wherein Sheriff Reid states that, 'A child may well have expressed a *preference* – even a strong and unambiguous preference – to speak to the hearing in private, but that does not, by itself, establish the statutory prerequisite that the presence of any particular person (the representative) is actually *preventing* the hearing from obtaining the child's views'. Thus, this helps to capture the crux of power through participation in that children and young people's participation is not about utilising power to *make* decisions, but to be *seriously regarded*, so the power would always remain with the implementing body (i.e., the panel) even when there are opportunities for participation. Furthermore, in level three documents, in regulation 5 (child's plan) of the 2009 regulations, the link to the child's capability and opportunity to participate is further highlighted. In subsection 4, it states that, 'The local authority must provide a copy of the child's plan to- (a) the child where, taking account of the child's age and maturity, the local authority consider that the child is capable of understanding the purpose and effect of the child's plan'. This determination of capability of the child is closely linked to discussions of practicability. More explicitly, when there is a presumption of a lack of practicability when the child is viewed as incapable of understanding and when there is a presumption of a child's incapability due to their age, obtaining their views is not seemingly 'practicable'.

By levels four (Guidance documents) and level five (UNCRC: Foundation of GIRFEC and Getting it Right for Looked After Children and Young People documents) there are few to no mentions of children’s capability outside of the sphere of adoption. Yet, in the 2014 National Guidance, in paragraph 403, there is a clear contrast in how capability is conceptualised for adults, where it states that ‘[Child Protection Case Conferences] will be chaired by senior staff members, experienced in child protection, who are competent, confident and capable.... The chair should be able to access suitable training and peer support’. Compared to the earlier excerpts concerning how ‘capable’ children are perceived, there are few to no mentions to support granted in a similar vein to that of adults: that capability can be nurtured and developed, not something that either exists or not. In level five documents, there is no mention of capable or capability which is perhaps illustrative of how this is not a concern in the GIRFEC documents or thus the national framework, which seems to exist in contradiction to the earlier policy levels. Overall, ‘capability’ appears to be an undercurrent for many of the decisions within the CPS area, especially as relates to presumptions of children’s vulnerability either as perceived through their age and maturity and/or through the timing of the order. This use of ‘capability’ seems to indicate the power imbued by the policies of when and if that is relevant for children and young people’s participation.

5.3.2 CHS⁷

5.3.2.1 Vulnerability

5.3.2.1.1 Timings within the system, timings as conditions for participation and vulnerability and timings of ‘childhood’

For CSOs, conditions of participation were alluded to in the previous subsection of timing and vulnerability such that if explicit opportunities for children and young people’s participation were to be stated, there could not be circumstances of ‘urgent necessity’. For instance, in section 143 (transfers in cases of urgent necessity) of the 2011 Act, it states that,

- (1) Subsection (2) applies where a child is residing at a particular place by virtue of a CSO or interim CSO containing a measure of the type mentioned in section 83(2)(a)
- (2) If it is in the interests of the child or another child in the place that the child be moved out of the place as a matter of *urgent necessity* then, despite the order, the chief social work officer may transfer the child to another place [*italicised emphasis added*].

⁷ Some points in the discussion may be viewed as repetitive due to the overlap across the systems, yet perhaps considering that there is an overlap across the systems, repetitive patterns may be viewed less as unnecessary and more as an inevitability of trying to understand and grapple with a complex system.

This is likewise echoed in the explanatory notes of section 143 of the 2011 Act and in paragraph 276 of the 2011 Act Policy memorandum. In paragraph 207 of the 2011 explanatory notes for section 143 it states that, ‘This would apply where there is an immediate necessity that cannot wait until a hearing has been arranged’. Moreover, in paragraph 276 of the policy memorandum of the 2011 Act it states that, ‘Before making an interim compulsory supervision order, the hearing will need to be satisfied that the child’s circumstances are so urgent that it is necessary to make the order for the protection, guidance, treatment or control of the child’. In the above excerpts, ‘urgency’ is being very closely tied to ‘vulnerability’ and is frequently placed as a condition for if and when participation would be allowable and practical. Urgency here is closely tied to protection and control through the way it is employed to justify the lack of participatory opportunities. This lack of participatory opportunities due to different types of urgency additionally serves to justify children and young people involved in more ‘urgent’ situations as being designated as more ‘vulnerable’ than if the situation had been less or not urgent.

In subsection 2, section 18 (Notification and provision of information to a young child) of the 2013 Rules of Procedure in Children’s Hearings document it states that, ‘The Reporter need not so notify the child or provide the information, confirmation, report or other document where, taking account of the child’s age and maturity, the child would not be capable of understanding the notification, information, confirmation, report or other document’. In this excerpt, the child’s vulnerability as dictated by their age and maturity determines if participatory opportunities of informing the child will proceed. Thus, components of temporality (including age of the child and timing of the decision) are often used as conditions to allow (or disallow) children and young people’s participation in the Children’s Hearing System area in addition to the CPS area.

In level four documents, in the 2014 National Child Protection Guidance, like in the prior child protection section, time again is presented in opposing ways. In paragraph 12, it states that, ‘It must be remembered that early intervention and Compulsory Measures are not mutually exclusive, early use of Compulsory Measures of Supervision may help to ensure compliance and prevent concerns from escalating’. In this excerpt, the earliness of the intervention alongside compulsory measures of supervisions are linked to greater compliance and preventing future more urgent and/or worse concerns. Thus, time appears to be presented as both the problem and the solution adding to the complexity of how opportunities for children and young people’s participation manifest in this complex and often contradictory policy environment. In expanding on this point further, when there is a level of ‘urgency’ and

there is a quick need to act to protect children and young people, there seems to be little time for participation, particularly *before* an order is made. Moreover, when there is not such a level of ‘urgency’, participation seems more likely to be viewed as helpful and a necessary component of decision-making.

5.3.2.2 Power

5.3.2.2.1 Power as expressed through discourses of agency and capability

The notions of power and capability continue to persist in the children’s hearing system area, where for instance in level one documents, in section 73 (child’s duty to attend children’s hearing) of the 2011 Act, it states that,

A children’s hearing may excuse the child from attending all or part of the children’s hearing if the children’s hearing is satisfied that-...

(c) taking account of the child’s age and maturity, the child would not be capable of understanding...

This can be linked to my earlier discussion on the power to excuse (See Section 5.3.1.2.1: Power as expressed through discourses of agency and capability in regard to *G v Children’s Reporter* 2016). Like in the child protection system area, viewing children as capable or not is frequently used to justify the opportunity (or lack thereof) for their participation.

In level three documents, in regulation 5 (child’s plan) of the 2009 regulations, the idea of capability as existing or not, as I discussed in the child protection system area, appears again, when it states, ‘(4) The local authority must provide a copy of the child’s plan to-

(a) the child where, taking account of the child’s age and maturity, the local authority consider that the child is capable of understanding the purpose and effect of the child’s plan.

In the above excerpt, children’s ‘age and maturity’ serves as a litmus test for whether ‘the child would be capable of understand[ing]’. Thus, their opportunity for participation and their potential for power and agency are dependent on their age and perceived maturity. In linking this point more explicitly to the themes of vulnerability and power, how capability is employed seems to be a way to illustrate how each co-exist with the other. For instance, since capability (especially within the policies) is based on determinations made by ‘officials’, there seems to be a view that as this power is used to dictate who is viewed as capable, this likewise determines who is vulnerable, with power and vulnerability being very much part of the same conversation.

In level four documents, in the 2014 Guidance document, paragraph 45 states that, ‘The reactions, perceptions, wishes and feelings of the child must also be considered, with account taken of their age and level of understanding...to bear in mind that children may

experience a strong desire to be loyal to their parents/carers (who may also hold some power over the child)'. This excerpt helps to identify the crux of the discussion of power as relating to the third 'face' of power (Lukes, 2005). Children's perceived capability may be viewed as being tainted by the power of their parents and thus potentially 'undermining' the children and young people's own exercise of power. Thus, this perhaps helps to illustrate that even when children and young people are granted opportunities for participation, it is not necessarily regarded as independent of their own power outside of their family. In expanding on this further, the independent right of children and young people to participate in not only private but public proceedings (as will be discussed in Chapter 6), is one that seems to be a point of contention that persists in different spaces across the policies. Compared to the remaining two system areas, these former two system areas (the child protection system area and children's hearing system area) are intended for shorter-term care plans when the risk is perceived as more potentially immediate and/or imminent.

5.3.3 Permanence Decision-Making

5.3.3.1 Vulnerability

5.3.3.1.1 Timings within the system

The permanence decision-making system area is very much linked to the preceding and proceeding system areas, particularly in recognising that there is no separate care order, but often acts to review the care orders currently in or about to be in place. For instance, in level one and two documents (legislation and their accompanying documents), in the 2011 Act, in section 143 (transfers in cases of urgent necessity) and the explanatory notes for that section, vulnerability seems to exist in the same way. However, should these transfers take place in the area of permanence decision-making, the timing within the overall care journey shifts. For level three documents, in the 2009 regulations in regulation 45 (Review of the child's case: child placed with kinship carer, foster carer or in a residential establishment), the timing and purpose of reviews of being after a placement and care order decision indicate a potential shift in vulnerability since the 'immediate danger' or sense of urgency is no longer as much of a concern in this part of the system.

5.3.3.1.2 Timings as conditions for participation and vulnerability

In building upon the previous section on how timings within the system both create and echo the perception of vulnerability present within the policies, these timings can further be examined as conditions for participation and vulnerability. This timing of 'permanence decision-making' within the broader child protection and permanence system creates both conditions for vulnerability and participation in different ways from the previous two system areas. For instance, in the 2011 Guidance for the 2007 Act and 2009 Regulations, regarding

‘Reviews when planning for permanence’ on page 130 it states that, ‘Where a child is placed by the local authority and he or she has not returned home by this stage or if significant progress towards that has not been achieved, then the review should consider whether a plan for permanence away from birth parents is required’. This is subsequently expanded upon, where it states that this should include,

Explaining to the child in an age-appropriate way, that returning home is no longer planned; and providing opportunities for the child to express his or her views, or if too young to do this verbally, observing and also asking the carers to look out for any reactions. **Consideration should be given to offering the child access to a child advocacy service or other provision to support him or her in expressing views** (Scottish Government, 2011, p. 131) (emphasis in original).

In this excerpt, there is an explicit mention of children’s views in relation to permanency decision-making. There is evidence of the processes of participation put forth in the UNCRC (2009) General Comments for Article 12, particularly as relates to it being ‘child-friendly’, ‘inclusive’ and ‘transparent and informative’. Thus, this greater expansion of participation for children and young people at this stage of the system seems associated with there being a lower immediate associate risk compared to the child protection and children’s hearing system areas. Moreover, this likewise leads to questions of how the above statement can be considered through a lens of intersectionality. For instance, for children who have a disability or impairment that may impact their understanding of decisions and proceedings, does their ‘enhanced’ vulnerability detract from their opportunities for participation until this point in the system when there is no worry of ‘urgent necessity’ anymore? It is also interesting that this point of ‘adapting’ to gain the child or young person’s views are outlined in the guidance and not primary legislation, which is perhaps illustrative that regardless of these strides, it is still recommended and not required in primary legislation.

5.3.3.1.3 Timings of ‘childhood’

Just as conditions for vulnerability and participation are imbued throughout the system area, so too is vulnerability expressed through timings related to childhood. This can particularly be examined through the same excerpt above from page 131 of the 2011 Guidance in relation to ‘Core elements of the Early Preparation for Permanence’, particularly with the phrase, ‘...or if too young to do this verbally, observing and also asking the carers to look out for any reactions’ (Scottish Government, 2011, p. 131). In this excerpt, compared to phrases from policies in the prior two system areas, being ‘too young’ is not used as an excuse not to gain the child or young person’s view (see [Chapter 4.4.2: Absence \[of children and young people’s participation across the care orders\]](#)). It instead calls for those facilitating participation to *adapt* their methods. Despite age frequently appearing as a condition of

participation, there are few explicit mentions within the child protection and children's hearing system areas of there being a shift towards adaptation to additionally facilitate participation rather than to default only to protective measures. Thus, the way this adaptation shapes vulnerability suggests a different perspective to vulnerability compared to the prior system areas.

5.3.3.2 Power

5.3.3.2.1 Power as expressed through discourses of agency and capability

Like the prior theme of vulnerability, many of the illustrations in relation to the permanence decision-making area are confined to the third and fourth levels of policy (regulations and guidance, respectively). In level three documents, in the 2009 regulations, regulation 45(5), it states that for reviewing the child's case, 'The requirements are –

(a) to consult and take into account the views of –

(i) the child, taking account of the child's age and maturity'.

Linking to the prior system areas, the capability of the children and young people are considered through, 'taking account of the child's age and maturity'. In the 2011 Guidance, in relation to core elements of the early preparation for permanence, on page 131 (the same excerpt as I have discussed above, but restated here for convenience) it states that,

Explaining to the child in an age-appropriate way, that returning home is no longer planned; and providing opportunities for the child to express his or her views, or if too young to do this verbally, observing and also asking the carers to look out for any reactions. Considerations should be given to offering the child access to a child advocacy service or other provision to support him [or] her in expressing views.

In building on the examination of this excerpt from my previous point (see section 5.3.3.1.2: Timings as conditions for participation and vulnerability), children and young people's capability seems to be expressed less as an onus on the children and young people and instead on the state and local authority to provide support *based* on their capability to *allow* the children and young people to participate as they wish. This likewise can be linked back to my previous discussion of children and young people with disabilities from a perspective of power and capability. There seems to be a presumption that within these policies (as directly pertaining to the protection and permanence system) there are minimal specific supports for children and young people with disabilities or impairments to participate in the decision-making. As previous research has pointed towards how a lack of participation can result in more harm than if there had been opportunities to participate (Heimer et al., 2018), this suggests that there is an apparent lack of support for children and young people with disabilities to participate as specified in this guidance.

5.3.4 *Legal Permanence away from home*

5.3.4.1 Vulnerability

5.3.4.1.1 Timings within the system

In the fourth and final system area, the timing and goal of the care order and placements has shifted to that of legal permanence. For POs, these considerations are reiterated in the level one document in section 84 (Conditions and considerations applicable to making of order) in the 2007 Act, where it states,

- (1) Except where subsection (2) applies, a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents.
- (2) This subsection applies where the court is satisfied that the child is incapable of consenting to the order.

The timing of this system area presents a different view of vulnerability, particularly for children over the age of twelve. In this excerpt, the age and perceived capability of the child appear linked to the level of vulnerability attached to the specific child(ren). The above excerpt, stating that, ‘a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents’, except, ‘where the court is satisfied that the child is incapable of consenting to the order’ (2007 Act), seems to indicate a differing approach to vulnerability. Here instead of considering all children and young people who are or are at risk of becoming looked after to be vulnerable, this vulnerability seems more confined to young children and those who are ‘incapable of consenting’ to the order.

5.3.4.1.2 Timings as conditions for participation and vulnerability

In the 2013 Children’s Hearing Rules of Procedure document, in section 65 (Procedure where report required under section 141 (preparation of report in circumstances relating to permanence order or adoption) of the Act, it states that,

- ‘...The chairing member must –
- (a) explain to the child and each relevant person the purpose of the report to be prepared.’

In addition to using timing to consider where the ‘legal permanence system area’ is situated within the broader child protection and permanence system, timing can also be used to consider whether the participatory opportunities are present before or after a decision. Timing seems to feature in different ways compared to the earlier system areas in that the purpose of the report that is *going* to be prepared *must* be explained to the children and relevant persons rather than only reviewing it with them after the fact. In level four documents, in the 2011 Guidance, the lower degree of vulnerability associated with reviews is especially illustrative through the flexibility present. This ‘flexibility’ seems rather in contrast to the cases of ‘urgent necessity’ where a strict protocol is mandated and where it is not possible for children and young people to share their views *before* a decision (particularly for CPOs, within the

child protection system area). For instance, on page 125 of the 2011 Guidance regarding ‘Children subject to a Permanence Order when carers have some parental responsibilities’, it states that, ‘However, arrangements for reviews should allow as much flexibility as possible, particularly about whether the child attends, how his or her views are obtained and the venue’. This ‘flexibility’ appears to indicate a flexibility in the timing (among other factors) for the review arrangements. Overall, ‘timings’ as conditions for participation and vulnerability pervade the policies in different ways and contexts.

5.3.4.1.3 Timings of ‘childhood’

In the explanatory notes of the 2007 Act, it states in section 303 in relation to section 84 (Conditions and considerations applicable to making of order) that, ‘By virtue of subsection (4), when considering whether or not to make a permanence order and what provision the order should make, the court’s need to safeguard and promote the welfare of the child throughout childhood must be its paramount consideration’. In this excerpt, the timing of childhood is mentioned again, alongside subsection 5 of section 84, where it states,

Before making a permanence order, the court must—

(a) after taking account of the child’s age and maturity, so far as is reasonably practicable—

(i) give the child the opportunity to indicate whether the child wishes to express any views, and

(ii) if the child does so wish, give the child the opportunity to express them,

(b) have regard to—

(i) any such views the child may express. (Scottish Government, 2007)

This excerpt is relatively procedural for Scottish legislation instead of simply stating the principle and leaving the steps for guidance or related documents. Thus, considering these two excerpts together, timings within childhood as an indicator of vulnerability seem to be present in different ways. First, despite the earlier declarations in the 2011 Guidance (See section 5.3.3.1.2: Timings as conditions for participation and vulnerability), age does still seem to be an indicator of how vulnerable a child or young person is perceived to be particularly at the level of primary legislation) with younger children being considered more likely to be vulnerable than older children or young people. Second, compared to the earlier adaptation in regard to the opportunities for participation based on a child or young person’s capability (see section 5.3.3.1.2: Timings as conditions for participation and vulnerability in regard to page 130-1 of the 2011 Guidance), the above excerpts seem to indicate that the child or young person’s ‘age and maturity’ is related to whether they have ‘the opportunity to indicate whether the child wishes to express any views’ (Scottish Government, 2007). Overall, timing of and across childhood as related to perceived vulnerability seems to

manifest in similar ways (with younger children being viewed as more likely to be less capable and to hold less agency) to earlier system areas examined (CPS, CHS, permanence decision-making).

5.3.4.2 Power

5.3.4.2.1 Power as expressed through discourses of agency and capability

In subsection two of section 84 of the 2007 Act, it states that, ‘this subsection applies where the court is satisfied that the child is incapable of consenting to this order’. In this excerpt, the view of capability is switched from the earlier system areas to the ‘incapability’ needed to be demonstrated rather than their ‘capability’. This is expanded upon in the explanatory notes of the 2007 Act in paragraph 303 where it states, ‘...that a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents, except where the court is satisfied that the child is incapable of consenting to the order’. These two excerpts illustrate a shift in how capability is viewed such that, like the previous mention of adults’ capability in paragraph 403 of the 2014 National Guidance (see [Section 5.3.1.2](#) about supporting adult’s capabilities), adults and children 12 years of age and older seemed to be presumed capable unless they demonstrated otherwise. In level three documents, in the 2013 Children’s Hearing Rules of Procedure document, in section 65, there is no mention of capability and thus it does not seem to be a factor. In the level four documents, in the 2011 Guidance on page 123, flexibility seems additionally to be how capability is determined.

5.4 General Discussion and Conclusion

Overall, across the four care orders, children and young people’s vulnerability seems to be perceived in different ways. For instance, one of the few mentions of excluding children and young people from participating in the decision-making is based on the discretion of the local authority and/or children’s hearings *or* if there is ‘urgent necessity’ in the child protection system area. The timings of the decisions and care orders within the policies are further emphasised with the repeated mentions of the presumed age or ‘maturity’ of children and young people. This serves to emphasise how children and young people’s vulnerability is linked not only to timings *within the system*, but also to notions of children and young people’s own growth and time. I will amalgamate the discussions from each section and system area within three concluding themes: time as both a consequence and cause of vulnerability; vulnerability, age, (dis)ability status and systemic power and opportunities for individual power.

5.4.1 Main Themes

5.4.1.1 Time as both a consequence and cause of vulnerability

CSOs are decided at a children's hearing and POs may take place after a children's hearing, making the timing within the care pathway different from CPOs and Section 25 Orders. One way this particularly seems to manifest is how time is considered both the problem and solution, particularly in the areas of CPS and the CHS. By contrast, vulnerability seems to become a pressing concern again in cases of 'urgent necessity' such as in section 143 (transfers in cases of urgent necessity) and in section 207 of the explanatory notes of the 2011 Act. Such specifications are likewise replicated in the 2011 Act policy memorandum, where in section 276, it states that, 'Before making an interim compulsory supervision order, the hearing will need to be satisfied that the child's circumstances are so urgent that it is necessary to make the order for the protection, guidance, treatment or control of the child'. This caveat of 'urgent necessity' appears to primarily apply to interim CSOs – for CPOs, the 'urgency' is inherent to the order itself so does not need to be added as a caveat. By contrast, both section 25 orders and POs are meant to happen when situations are not urgent or are no longer urgent, as can be primarily inferred based on the lack of discussion of urgency and/or emergency and the 'voluntariness' of section 25 orders and the long-term focus of POs (Anderson et al., 2020; SCRA, 2011). This caveat of urgency is only mentioned in the 2011 Guidance of the remaining policies that I examined. In these instances, the *urgency* of time is placed as a problem that exacerbates the child and/or young person's vulnerability that features in both the CPS and CHS, compared to the latter two system areas. This can be considered based on earlier discussions inextricably linking vulnerability and urgency (see [Section 5.2.1.2: 'Urgency' and vulnerability](#)).

Yet, notions of timing and vulnerability appear in other respects in the 2009 regulations, as seen in regulation 38 (review of emergency placement under regulation 36). Like the timing of participation for CPOs, there is only a stated opportunity for participation *after* the emergency placement has occurred. This discrepancy appears to highlight that, in the 2009 regulations, it is not always 'practicable' that there are participatory opportunities before emergency placements. In this instance, timing is seen as the solution to the perceived vulnerability of the children and/or young people in that, once the 'urgency' has passed, their perceived vulnerability has considered to ease enough for them to be granted participatory opportunities. In the 2013 Rules of Procedure there are numerous mentions of offering children the opportunities to participate but often with the stipulation of 'informing' or 'notifying' rather than including language that would highlight the weight given to their

views. For level five documents (national framework documents), the documents often read as an ideal with the balance between protection and participation seemingly presented in diplomatic ways regardless of the type of care order or time placement within the care journey. For instance, in section 72 of the Getting it Right for Looked After Children and Young People document, it states that,

Families should be supported to provide that home wherever possible. Where a child cannot remain with their family they should achieve a permanent home as quickly as possible with the minimum number of placements, taking account of their individual needs and views. (Scottish Government, 2015)

Thus, this balance of participation and protection seems to vary depending on the type of policy in question and whether or not the care order is or can become an emergency order. Yet, based on what seems to be emerging from this analysis, this idea of protection and participation as concepts to be balanced seems to be a flawed dichotomy as it places protection and participation as opposing, rather than intertwined concepts.

While notions of vulnerability seem very much inherent to CPOs, it seems to be much more situational for the other three care orders, particularly in cases of ‘urgent necessity’. This declaration of ‘urgent necessity’ adds a temporal component to the discussion of vulnerability, such that when time has become restricted by external (or internal) circumstances, the focus appears to shift from considering both protection and participation to one that instead prioritises protection and delays participation until these time constraints ease. Moreover, the time available and sense of urgency appear to add to the ‘situational vulnerability’ of the children and young people that the policies are concerning. The temporal component of vulnerability seems to echo in the notion of the simultaneity of participation and protection that appears in related discussions and as supported by the literature (Daniel, 2010; East, Heaslip, & Jackson, 2020; Ellis, 2018). Ellis (2018) argues that designating all children and young people as vulnerable can serve to hinder their other rights, namely their right to participation. This research in conjunction with the findings from my analysis seems to suggest that the policies have the potential to balance children and young people’s rights to participation with conceptualisations of protection and vulnerability, which can illustrate the care being taken for the children and young people. As discussed in the prior subsection (see Section 5.3.1.1.1: Timings within the system), these caveats of ‘urgency’ do not seem as explicitly present for section 25 orders nor POs, likely as related to their differing purposes and placements within a possible care journey. In conclusion, conceptualisations of vulnerability vary and ebb across the care orders and depending on when a decision is being made in relation to a care order and the purpose of each of the care orders. Based on my

analysis, it has become clear that several different types of conceptualisations of time have all served as ways to temper and amplify vulnerabilities most clearly exemplified by the differences in children's participation between CPOs and the other three care orders.

5.4.1.1.1 Vulnerability, age, and (dis)ability status

Vulnerability and age are frequently paired concepts in the policies and the associated presentation of my findings. In first examining level one (legislation) policies, the age of children and young people is frequently put forth as an illustration of their vulnerability and as a justification for how capable they are viewed. It becomes evident that the notion of capability has shifted across the policies analysed, but also depends on the type of care order. Despite 'capability' and like terms being used since the 2007 Act, in the 2011 Act, they are only employed in association with CSOs, but not CPOs. In building upon what I discussed in the earlier section of this chapter of vulnerability and time, the question of capability does not appear to be of concern in 'emergency' situations, where the children and young people's vulnerability can be viewed as placing the focus solely on protection, leaving little to no room for participation. In the 1995 Act, where 'capability' is not explicitly employed, I have inferred two possible explanations. One possible explanation is that the threshold for considering children and young people's participation shifted from primarily focusing on their 'age and maturity' and being of 'sufficient age and maturity to form a view' of utilising 'age and maturity' as a barometer for how capable the child and/or young person is of understanding. Thus, this pairs vulnerability with capability such that the more vulnerable that one is viewed, the less capable one is likely to be considered. The second possible explanation relates to the complexity of factors (i.e., the type of care order it relates to, the types of possible placements and the time placement that the care order can occupy within a care journey [for example, as relates to emergency scenarios or permanency]). Neither explanation would be sufficient alone as that would overlook the inherent complexity of the policies and policy sphere. In further consideration of the second explanation, certain placements are more likely or more common for certain care orders, depending on several factors including the age of the child or young person (as mentioned prior in section 5.4.1.1).

In the explanatory notes of the 2007 Act, in section 303 in explanation of subsections one and two of section 84 (conditions and considerations applicable to making of order), it reiterates what was stated within that section of the 2007 Act. In the explanatory notes of the 2011 Act, in section 99 in explanation of section 73 (child's duty to attend children's hearing), there is a slight shift in the phrasing to, 'Subsection (3)(c) provides for the hearing to excuse the child where the hearing considers that the child would not be able to understand

the process'. The primary discrepancy between the explanatory notes and the 2011 Act, is the change from 'capable' to 'able', both of which hold different connotations. Researchers have examined the difference between the two concepts (Brando, 2020; Hart & Brando, 2018), by discussing how 'ability' and 'inability' are often used as ways to warrant the lack of opportunities for children's participation. This can be linked to my prior mentions of the role of intersectionality in examining the relationship between vulnerability and age (see section 5.3.3.1.2: Timings as conditions for participation and vulnerability), particularly in considering how children and young people's ability status may add to this discussion. For instance, as I discussed previously (see section 5.3.3.2.1: Power as expressed through discourses of agency and capability), many of the mentions of capability place the onus on the child and/or young person to understand rather than the state to adapt. Moreover, where there are mentions of 'adapting' processes to allow opportunities for children and/or young people to participate, they seem to be in guidance rather than primary legislation, suggesting that even at its best, such progress is still confined to a *potential* rather than mandatory approach. More explicitly, this leads to questions about the extent to which young people, but especially children with disabilities are granted opportunities to participate especially in an ongoing manner, since much of the discussion of 'flexibility' seems to be confined to permanence and legal permanence decision-making (see Sections 5.3.3.1.2 and 5.3.4.1.2: Timings as conditions for participation and vulnerability).

By levels three and four, there are again some (but minimal) references to children's capability and their age. Alongside the discrepancy between the type of placements and age, there is an additional layer of complexity in considering how all four care orders may result in a placement in foster care, kinship care, residential care and/or secure care (2009 Regulations; Scottish Government, 2011).

The final possible placement of children and young people being looked after at home can only result from CSOs (without a residence requirement) or POs (Scottish Government, 2011). As mentioned earlier in this chapter, almost half of the CPO referrals are for children less than two years of age (2011 Act Policy Memorandum), while those who are in residential care tend to be older (Guidance on Looked after Children (Scotland) Regulations 2009 and Adoption and Children (Scotland) Act 2007, 2011). This latter point is stated in the guidance documents, 'As such placements are frequently of older children and young people, the child's views and understanding of the aims of the placement will form a central part of planning' (p. 115). This excerpt represents a crux of the argument of this section: that the age of the child or young person very much dictates perceptions of vulnerability and capability

and can possibly serve to *override* the lack of opportunities that would typically be granted in cases of emergency to create a possibility where previously it was stated to be ‘impossible’ in the case of CPOs. The lack of specification about the *type* of care order suggests that there is potentially room for discretion by the decision-maker based on perceived capability and age. As I presented above (see Section 5.4.1.1.1: Vulnerability, age and [dis]ability status), this thus presents an interesting conundrum of vulnerability. Since for residential care, ‘as such placements are frequently of older children and young people, the child’s views and understanding of the aims of the placement will form a central part of planning’ (Scottish Government, 2011, p. 106) could it be possible to consider children’s views before an emergency order such as a CPO? This is especially in consideration that residential care *can* result from CPOs and that participation prior to a CPO being issued is reported not to be possible (see Section 5.3.1.1.2 in regard to section 27 (views of the child) of the 2011 Act). Thus, it seems potentially up to the discretion of whomever is implementing the policy which ‘characteristic’ of vulnerability (i.e., age, disability, timing within system, timing of care order) would reign here, if there were this apparent mismatch in vulnerability.

5.4.1.2 Systemic Power and opportunities for individual power

Power seems to exist in contradictory positions within the policies depending on the care order, placement, and individual in question. Power seems to exist in *who* determines what qualifies as capable and able, even if children and/or young people are considered capable and/or able to participate. Both ‘capable’ and ‘able’ still connote that the power and agency are not with the children and young people, but with those who decide if they are ‘capable’ or ‘able’ (Brando, 2020). Valentine (2011) supports such interpretations in her research by stating that, ‘Rather than a space in which children can act autonomously, agency is inflected with power, constituted by the social...’ (p. 354). In the level three (regulations and statutory instruments) policy excerpts, in a similar way to how agency is presumed, capability is presented as something that is determined of the child or young person. This builds upon my point in the previous section (see Section 5.4.1.1.1: Vulnerability, age and [dis]ability status). Thus, there appears to be a shift in the view of vulnerability by way of the power granted to the courts and children and/or young people. Here the onus of responsibility seems to be on the children and young people to ‘prove’ they are capable, while the opposite seems to be true for the legal permanence away from home system area. Moreover, quite an interesting finding was how ‘capability’ was viewed as either existing or not for children accommodated through the CPS and/or the CHS, but that from the permanence decision-making system area and legal permanence away from home system area, capability for

children aged 12 and older is viewed in the same way as how it is presented for adults (see Section 5.3.4.2.1: Power as expressed through discourses of agency and capability) (of incapability rather than capability needing to be demonstrated). This can be linked to Lukes' (2005) third 'face' of power (as presented in section 5.3.2.2.1), such that the power is evident in how opportunities for children and young people's participation are situated and structured throughout the policies and thus the protection and permanence system. For most of the policies that I have analysed, a child and/or young person must demonstrate that they are capable, yet in the legal permanence away from home system area, there is a shift onto the court having to determine if the child is *incapable*, rather than capable. On page 27 of the UNCRC: The foundation of GIRFEC document, it states that, 'As children grow and develop, they become able to act responsibly in relation to others'. This supports the focus on a more traditionally developmental approach, placing the power and agency not with the children and young people, but those who decide when they have 'grown' enough to contribute their views. Thus, a spectrum seems to exist for how vulnerability and capability can be related to participatory opportunities (see Figure 1 below).

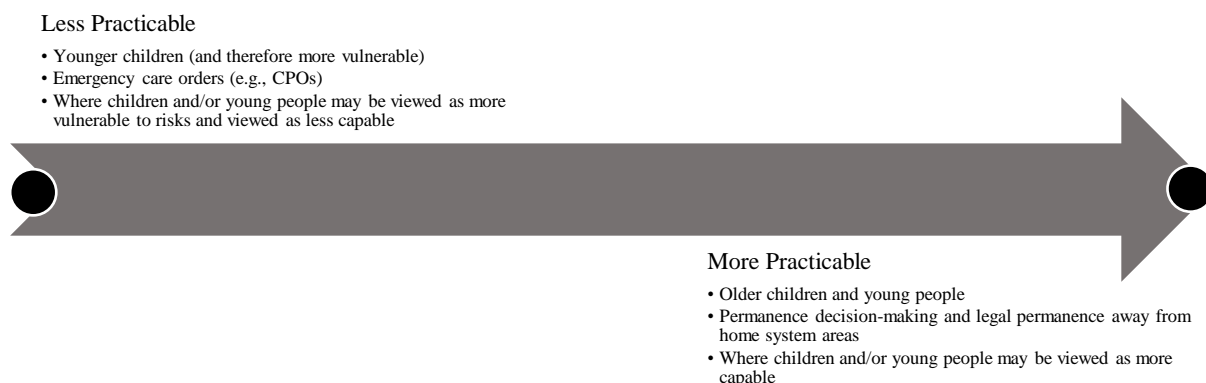


Figure 1. Practicability of Participatory Opportunities Based on Vulnerability and Capability

In this simple diagram, vulnerability and capability are pictured alongside how practicability can be considered in its association to children and young people's participatory opportunities. Overall, through my analysis, it has become clear that power has been closely linked with practicability in the legislation and adjacent policy documents, and seems to vary depending on the care order, placement, age and (dis)ability status of the individual in question. Moreover, this follows from previous research examining practicability, age, and vulnerability in family law (Morrison, Tisdall, Warburton, Reid, & Jones, 2020b; Tisdall, 2018). Previous research has oft reported that, as summarised by Morrison and colleagues,

‘Age is frequently used as a reason not to include a child’s views; this is despite the emphasis in *Shields v Shields* that ‘practicability’ sets a low threshold’ (Morrison et al., 2020b, p. 34). Particularly, Morrison and colleagues (2020b) note that, ‘Concerns about children’s vulnerability can mean that children’s [participation] rights...are constrained [and]...In practice this risks children’s participation rights not [being] upheld, in order to protect them from the consequences of participation’ (p. 43). Thus, this ‘practicability’ surrounding participation is present through power relations that are embedded throughout the policies and are often located in discretionary decisions with power being given to the front-line workers interpreting and implementing the policies.

5.5 Conclusion

This chapter concludes that following this critical examination of protection and participation as operationalised by representations of vulnerability and power across the four system areas, four care orders and five placement options, I have reached three more general concluding themes. These concluding themes are time as both a consequence and cause of vulnerability, the conceptual relationship between vulnerability and age and systemic power along with opportunities for individual power. Each and all of these themes and subthemes help to illustrate how participation and protection exist within the policies examined.

Many of the themes and subthemes discussed in this chapter are interwoven with each other, serving to illustrate both the complexity and nuance that surrounds the care orders for children and young people who are looked after and the policies that recognise and organise them in law and practice. Through my analysis, it has become clear that vulnerability and power are two central and overlapping themes that help to clarify how participation and protection exist within the policies depending on the care order and placement type (among other factors including age and (dis)ability status which can enhance or diminish perceived vulnerability). For instance, as I discussed in my section on urgency (see [Section 5.4.1.1](#)) younger children in more urgent situations are placed as more vulnerable and are subject to less flexibility by front-line workers compared to older children or those in less urgent situations. Ultimately, the goal across the protection and permanence system is that the children and young people involved are and continue to become whomever they want to be in as stable and loving an environment as possible, which can only be achieved through a greater understanding of the nuances surrounding their participation and protection.

Overall, vulnerability and power are both part of the same discussion, and it would be detrimental to consider one without the other. Through my analysis, it has become clear that

both vulnerability and power exist in complex and nuanced ways as would warrant such a complex and nuanced system as the Scottish child protection and permanence system.

Chapter 6: The public-private and active-passive conceptualisations of family and children

6.1 Introduction

This chapter is the third in my quartet of findings' chapters. I will focus on the public-private and active-passive conceptualisations of family and children. This will build upon the previous chapter's themes of vulnerability and power to provide further explanation of the presence and absence of children and young people's participation. Moreover, I will be particularly focussing on bridging the discussions of participation and protection in policy in regards the decision-making in the child protection and permanence system.

To start, I will overview the definitions of key terms pertaining to the themes that have emerged through my analysis (public and private and active and passive and conceptualisations relating to children and young people and family). Following this, I will present evidence from each of the four areas of the child protection and participation system, in turn, and incorporate relevant case law throughout. Finally, I will conclude with a more general discussion and conclusion of how this theme and subthemes fit into the findings more broadly.

6.2 Public and private conceptualisations of children and family

6.2.1 *Previous research*

Several researchers have noted how the role that 'family' and the private-public debate play varies between countries as associated with their overall approach to welfare (Thévenon, 2011; Oltedal & Nygren, 2019). The researchers have particularly considered the private and public spheres of family based around the role of regulation for different family types (i.e., biological families, families formed through adoption, foster families) (Riggs et al., 2016). The researchers noted that biological families, 'were the least regulated and scrutinised' (Riggs et al., 2016, p. 1), while 'foster families were the most scrutinised and negatively impacted by government policies' (p.1). This latter research does not explicitly mention kinship care within their discussion, but this does lead to questions about how it potentially intersects with the biological and foster family forms. Thus, these varying roles of regulation in the different types of families seem to indicate how 'the public' and 'private' interact in different ways for different types of families.

Additionally, an insightful area of research has examined the apparent public-private divide in how families are and have been viewed, based around the language of 'parental

responsibilities' (Wyness, 2014). The language surrounding 'parental responsibilities' has been noted to focus on the parent(s) as the one(s) responsible for the child or as being what is at risk when the state becomes involved in children and young people's care (Wyness, 2014). Yet, Wyness (2014) criticises this 'public/private dichotomy' by highlighting the changes to how children and family have been conceptualised and thus how this complicates this supposed dichotomy. More specifically, Wyness (2014) argues that there has been a change in the child's role in the state and family such as through the increasing ways that children were and are viewed as having agency and power in their own family and welfare. Thus, within the literature, there is a divide in discussions of the private and public debate for family with some researchers utilising the private-public divide to distinguish between and examine those differences across varying types of families (Oltedal & Nygren, 2019; Riggs & Peel, 2016; Thévenon, 2011). By contrast, other researchers have focussed on the limitations of using the public-private divide in examining and researching families, instead preferring to consider families in less dichotomous ways (Wyness, 2014).

This builds upon critical kinship studies wherein biological families are the norm and thus there is a greater presumption of responsibility on the private family over the public state. Such literature and topics likewise are more often discussed in relation to certain placements as compared to others, including kinship care as it often appears to be on the threshold between public and private spheres (Pitcher, 2014; Munro & Gilligan, 2013). Critical kinship studies (which examines who and why ones are included and/or excluded as kin) offer an interesting addition to this discussion. In this latter area of research, social norms are frequently included in discussions. For instance, Riggs and colleagues (2016) note that they contemplated, 'the differential ways in which social norms shape how certain families are afforded the 'freedom' of privacy, whilst others are pushed into the public sphere' (p. 15).

6.2.2 Operationalising public and private spheres

In overviewing the traditional binary approach to the public and private, Wyness (2014) states that 'the public/private dichotomy had been a powerful structuring frame, subsuming the child within the family, and locating the family at a distance from a range of agencies with an interest in children's welfare' (p. 62). This connotes the family with the private (Wyness, 2014). Public and private spheres are discussed in a more abstract way in how spaces are conceptually occupied and influenced by institutions as can be illustrated through kinship care (Pitcher, 2014; Munro & Gilligan, 2013) and through the family more generally (Oltedal & Nygren, 2019; Riggs, Bartholomaeus, & Due, 2016; Thévenon, 2011;

Walsh & Mason, 2018; Wyness, 2014). Pitcher (2014) particularly points towards how kinship care seems to straddle the line between the public and private spheres, while Munro and Gilligan (2013) extend this to how ‘regulations’ and ‘relationships’ are often in an ongoing ‘dance’ in kinship care. More explicitly, the type of formality that kinship care occupies (i.e., formal or informal kinship care) would likewise shift how public and private spheres would be conceptualised. Informal kinship care would be (potentially) the most private as it can exist between family members and outside of state involvement or through the provision of kinship care orders through the Children and Young People (Scotland) Act 2014 as elaborating upon in section 11 of the 1995 Act (Currie, 2022) where children and young people would not be considered looked after. By contrast, in formal kinship care, children and young people are considered looked after by the state and placed on a care order that would classify them as looked after while they are placed with kin (Currie, 2022). Thus, how the state is involved in kinship care would shift how ‘private’ the family and kin are viewed depending on the formality of the placement (in the case of kinship care).

To unpack this further, the arguments for public versus private spheres of care relate to the way the private sphere of the family creates a sense of belonging and identity (Burgess et al., 2010), while state care (or public) is put forward when intervention or support is needed within the family. Thus, public and private spheres can be considered alongside passive conceptualisations of children and the family such that children and family are considered in different ways depending on the degree of state (or public) support or intervention.

Moreover, an additional point that can help to elucidate the understanding of this point is that this also leads to more general questions about who should pay for care and if the state should intervene in families. For the latter, researchers and states have increasingly advocated for and declared state intervention in families only when absolutely necessary (such as the Scottish Government puts forward, see 2.10.5: Children and Young People (Scotland) Act 2014 in relation to Scottish Government, 2022a). Additionally, when there does need to be state intervention, it should be as minimal as possible.

6.3 Passive and active conceptualisations of children and family

6.3.1 Previous research

6.3.1.1 Children and young people as passive and active

Conceptualisations of children and young people as active and/or passive has been an oft discussed topic within the literature, especially within childhood studies research (Qvortrup, 1994; James & Prout, 1997; Jenks, 2005; James, 2009) and particularly in

conjunction with research of more ‘vulnerable’ children including those with disabilities (Tisdall, 2012) and those who are looked after (Welch, 2018). This examination and promotion of children and young people as active agents in their lives can be seen as being in response to the more traditional views put forth through developmental psychology theorists (Appell, 2009). While developmental psychology has often been critiqued by childhood studies theorists (Qvortrup, 1994), more recent developments in the literature, have attempted to critique these critiques (Tatlow-Golden & Montgomery, 2021).

Most broadly, Jenks (2005), overviews that, ‘a dominant modern discourse of childhood continues to mark out ‘the child’ as innately innocent, confirming its cultural identity as a passive and unknowing dependant...’ (p.143). However, more active conceptualisations of children and young people place them not as solely being recipients of care but as ones who can determine and play a role in the happenings in their own lives (James & Prout, 1997). Researchers within childhood studies have focussed on the distinction between children as ‘beings’ and ‘becomings’ (Qvortrup, 1994), and putting forth that children’s present (beings) are just as important as who they might become (becomings). This idea can be linked to conceptualisations of passivity and activity such that ideas of growth or ‘becoming’ can very much be associated with children as being passive as one cannot influence the fact *that* they do grow and change. This binary of beings and becomings has also been critiqued. For instance, Lee (1999, 2001) argues for children to be considered both ‘beings’ and ‘becoming’ to conceptualise ambiguity. More specifically, Lee (2001) argues that ‘the more certain one is that children belong in the category ‘being’, the less likely one is to notice either the erosion of that category, or that being and becoming can overlap in children’s lives to produce childhood ambiguity’ (p. 128). Conceptualisations and problematisations of children and young people being active, or passive can be associated with broader connotations for how children are viewed and valued within society as can be gleaned from policies and other documentation. An adjacent area of interest expands the view from children and young people to include that of family.

6.3.1.2 Family as passive and active

This discussion of children and young people as passive and active can be considered and contrasted with discussions of conceptualisations of the family as passive and active. However, the conceptualisations of passive and active can be considered in different ways for children and young people and for family, such that rather than the elements discussed above regarding children being viewed as active or passive agents in their lives, conceptualisations of passive and active in relation to the family focus on the *choice* of determining who counts

as family. For instance, when considering the element of choice that accompanies ‘chosen families’ (Weeks et al., 2001) compared to the more biologically driven traditional iterations of family (Carsten, 2004), the former can be associated with active conceptualisations through the ‘choice’ that individuals make to create these families. This notion of ‘choice’ is one that is central to understanding children’s participation (Moore, 2017; Punch et al., 2012; Skauge et al., 2021), particularly in how participatory opportunities allow for choices made by adults to be explained to children and for the children and young people’s preferences and choices to be understood and potentially considered. By comparison, the more traditional iterations of family (Carsten, 2004) seem to connote a degree of passivity in who is family and who is not based on prescriptions of biology with seemingly little choice involved. Moreover, in building off the earlier discussion of critical kinship studies (see Chapter 6.2.1), who and what is considered ‘family’ and ‘kin’ and why, is critically examined (Riggs & Peel, 2016). Riggs and Peel (2016) stipulate that there are two central components of critical kinship studies, with the first being of relevance: ‘to examine which humans are central to understandings of human kinship, through which practices such understandings developed, and how boundaries are drawn in terms of what constitutes human kinship’ (p. 12). Thus, how and who is determined to be family are imbued with passive and active elements depending on the perspective taken. Moreover, considering how family is considered passive and/or active within the realm of child welfare where the public of the state veers into the private of the family to varying degrees, further examination is warranted. More specifically, considering ‘family’ in a passive way adopts a presumption that ‘family’ is something that an individual is part of beyond their choice (i.e., through biology and/or traditional kinship practices). By contrast, considering ‘family’ in a more active way adopts a view that individuals can take an active role in how they consider family, with choice being a key element (Mason & Tipper, 2008). For instance, despite residential care being considered potentially distinct from family and family-like placements (Morris, White, Doherty, & Warwick, 2017; Shaw & Frost, 2013), research has noted that children and young people often describe their experiences in residential care as akin to family and ‘refer to care staff using kin terms, such as ‘dad’ or ‘sister’’ (Kendrick, 2013, p. 77), which corroborates the necessity of ‘choice’ in determining who or what is a family, rather than presumptions based on traditional iterations of family (Carsten, 2004; Mason & Tipper, 2008).

From a more conceptual perspective, Riggs and Peel (2016) adopt a more active conceptualisation of family and kinship by critiquing and breaking down how these passive conceptualisations are constructed and why. This idea of passive and active

conceptualisations of family can be linked to children's participation based on the shared element of choice. Understanding where and how a choice exists and how children's participation contributes to discern who or what is family could likely play an important role in determining its success (particularly in more potentially temporary forms of family via placements when children and young people are looked after).

6.3.2 Operationalising passive and active conceptualisations

The WPR approach is not meant to focus on the language exactly (Bacchi & Goodwin, 2016). More specifically, Bacchi and Goodwin (2016) clarify that the WPR approach is meant to examine, '...the deep-seated presuppositions and assumptions that underpin policies and that ways in which policies actively produce, or constitute "problems", "subjects", "objects" and "places" in specific contexts' (p. 107-8). With this consideration in mind, I have operationalised passive and active conceptualisations based less around the language or word choice (i.e., passive or active language) within the policies, and more on the different concepts of passive/active and public/private alongside conceptualisations of vulnerability. More explicitly, I am operationalising passive conceptualisations of family and children or young people based on the presence of a lack of choice or the absence of choice being considered with the children and young people. By contrast, I am conceptualising active conceptualisations of family and children or young people based on family being viewed and presented as not something to be presumed (i.e., only by biology) and based on it being conceptualised by various family members, including children and young people, where relevant (Mason & Tipper, 2008; Riggs & Peel, 2016). I am conceptualising active conceptualisations of children and young people based on the apparent agency and power prescribed to them (Jenks, 2005; James & Prout, 1997).

6.4 Child Protection and Permanence System

6.4.1 CPS

6.4.1.1 Public and Private

For both level one documents, for section 25 orders, in section 17 (Duty of local authority to a child looked after by them), in subsection 4 of the 1995 Act and section 37 (child protection order) of the 2011 act, the state's responsibility is delegated to the local authority. The LA now would have the power to intervene in the private lives of families, thus placing the power with the 'public', with the same holding true for the level two and three documents.

In level four documents, in the 2011 Guidance, it states in regard to 'Transparency' being an 'underpinning principle', 'Making the basis for decisions clear to all parties,

including the children and young people concerned, their families and those with responsibility for overseeing care planning' (p. 8). In this excerpt, the 'private' nature of the family is situated as distinct from 'those with responsibility for overseeing care planning' or more of the public (state-based care) (depending on whether 'and' is read as a separator or connector of the two), thus emphasising the nuance surrounding the public and private 'dichotomy' discussed in the above section (See [Section 6.2.2](#)). Moreover, the 2014 National Child Protection guidance expands on this distinction between the public and private in paragraph 31, where it states that, 'Private fostering refers to children placed by private arrangements with persons who are not close relatives'. Thus, there is a further distinction between the private arrangements within the family and private arrangements via private fostering.

For level five documents, in the 2013 UNCRC and GIRFEC document, the discussion surrounding public and private spheres and family seems to become more prominent. For example, on page 29 of the 2013 GIRFEC document, it states that, 'The explicit aim of positively including children and families in any decision-making, as well as being a mark of respecting rights, is in itself an act of inclusion'. This excerpt seems to refer to the public-private spheres through the mention of the 'children and families' and 'inclusion' in a similar way to the third aspect of the public-private divide described by Boyd (1997) in that the family, '...should be protected from the public eye and from scrutiny by state and law' (p. 9). This idea of including the children and families seems to illustrate a transition from the 'private' family to the 'public' via state regulations and inclusion in decision-making. Moreover, in this excerpt, the language is generalised and follows with this being a guidance document. Moreover, the mention of 'including children and families in any decision-making...' inherently creates a divide between the 'public' as the ones guiding the decisions and the 'private' as the microcosm of the children and their families in being the ones on the receiving end of said rules and guidance. The pronoun 'we' and possessive pronoun 'our' are frequently used, seemingly indicating that those responsible for implementing such an approach are more numerous than the other policies seem to indicate. For instance, it states, 'We want Scotland to be the best place for all our children to grow up' (p. 2) and that is expanded upon in the UNCRC and GIRFEC document, where it states, 'That is a high aspiration and one that will require all of us – politicians, parents, public services and the public – to play their part' (Aldgate, 2013, p. 2). This is diffusing the responsibility of child welfare to everyone, not only the state and the local authority, but with any person in society. Overall, across the policies within the CPS area, family exists as distinct from the public (see

Section 6.2.1: Previous research), particularly in the policies with more statutory weight (levels one to three), while for policies that present the guidance and national framework, the public and private spheres are considered less as a way to consider family and more as a way to diffuse the responsibility from solely the family or the state to include all of society.

6.4.1.2 Active and/or passive conceptualisations of family

Conceptualisations of family within the child protection area of the protection and permanence system vary across the placements pursued which can precede and include CPOs. Considering the possible placements (foster care, kinship care and residential care) (Scottish Government, 2010a) within this first area of the broader system (and depending on the order being pursued – Section 25 orders or CPOs), family can be considered differently. In level one policies, in section 25 (provision of accommodation for children, etc.) of the 1995 Act in relation to Section 25 orders, ‘parental responsibilities’ and ‘parental rights are mentioned in lieu of family in section 2(1) (a) and (b) of this Act’. However, in section 37 (child protection orders) of the 2011 Act, family is conceptualised as something children and young people might need to be removed from with no mention of parental rights or responsibilities. There is no mention of family or kin either, but in subsection two of section 37 of the 2011 Act, it states that,

A child protection order is an order doing one or more of the following - ...

(b) authorising the removal of the child by the specified person to a place of safety and the keeping of the child in that place.

In this latter excerpt, there is no mention of parents, family, or any other network beyond that of the child and the ‘specified person’, but inferences to family can be made as the ones who children were removed from. This is written generally enough so that the police and other first emergency responders may intervene when deemed necessary.

Moreover, for level two policies, in the policy memorandum of the 2011 Act, in section 186, it states that,

At the same time as considering any application for a child protection order, the sheriff will also consider contact directions between specified individuals (usually including parents) and the child that is the subject of the application. Consideration will also be given to the fulfillment of specific parental rights and responsibilities in respect of the child.

In the above policy excerpt, conceptualisations of family within CPOs are written to include parents and/or those with parental rights and responsibilities, as was stated in the legislation pertaining to Section 25 orders. Considering the likely timing of CPOs and/or Section 25 orders within the broader protection and permanence system, it seems to make sense that most mentions of ‘family’ are confined to parents and parental figures. Thus, in this excerpt,

only ‘parents, not ‘family’ are mentioned. This limited view of ‘family’ can be viewed in consideration of the case *ABC v. Principal Reporter* (2020) through the Supreme Court in Scotland and the associated case commentary (Trainer, 2021). This case focussed on relevant person status in pre-hearings as presented in section 81(3) of the 2011 Act. This case can be summarised as follows,

In two appeals by the siblings of young children, about whom child supervision orders had been made by the children's hearing, the Supreme Court required to determine whether the lack of opportunity for a sibling to be afforded relevant person status was a violation of ECHR art.8 [Right to respect for private and family life] (*ABC v. Principal Reporter*, 2020).

The judgement of the case highlighted the importance of siblings’ right to participation in children’s hearings and to be considered as ‘relevant persons’. In a commentary of the case, Trainer (2021), notes that in the resources given to children’s hearing panel members, that ‘... a “sibling-like” relationship was mentioned in the criteria for participation’ and further expands that, ‘it is indicated that a sibling-like relationship may include children who lived together in a foster placement and developed a strong and enduring sibling-like bond’ (p. 7). Thus, there is an increasingly wide view of ‘family’, particularly in the way it is intra-generational rather than only across generations within a family as being considered through the case law and is being taken forth to be placed more firmly in legislation that goes beyond the time reaches of this Ph.D. research (i.e., The Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Amendment Rules 2021; The Looked After Children (Scotland) Amendment Regulations 2021; and Children (Scotland) Act 2020). Overall, in the policies, ‘family’ seems to be considered in active or passive ways depending on the context and including the placement and timing within the protection and permanence system, with the consideration of ‘relevant persons’ within the children’s hearing system area and typically beyond the scope of decision-making pertaining to more ‘urgent’ situations.

In linking this to practice, previous research has considered the views of children in kinship care in Scotland and their perspectives of kinship care (Burgess et al., 2010) and the value of this active way of viewing family is echoed here. Burgess and colleagues (2010) state that, ‘most felt they belonged within their new family and had no wish to return to their parents. They did not see themselves as different from their peers and all felt that living with relatives was infinitely preferable to being in foster care’ (p. 303). By contrast, for foster care, in a study conducted in England examining meanings of family of children in foster care (Biehal, 2014), the researchers found that the children’s views of family as more tenuous and shifting depending on the ‘... day-to-day family practices in foster families, the actions

and commitment of foster and birth parents, children's mental representations of their past and current experiences in these families and the meaning that children ascribed to blood and non-blood relationship' (p. 955). Moreover, research in residential care in Scotland has discussed how children and young people in residential care consider residential care alongside a 'family metaphor' and how it is 'like-family' (Kendrick, 2013), suggesting more active ways of conceptualising family.

Research examining children looked after at home in Scotland (Gadda & Fitzpatrick, 2012) and placed in secure care (Roesch-Marsh, 2014) consider children and young people's conceptualisations of family as potentially more passive in practice. For children and young people looked after at home, Gadda and Fitzpatrick (2012) note that, 'Young people often do not understand the intent behind, or the implications of, [a Home Supervision Requirement], highlighting a need for advocacy and effective communication and engagement with young people' (p. 6) which could potentially extend to their views of family more generally. Thus, in practice, there do seem to be discrepancies in how family is viewed and conceptualised by children and young people in different placement types yet seem to be related to the extent that they are involved in decision-making.

For level three (regulations and/or statutory instruments) to five (national framework documents) policy documents, the focus shifts to expanding more on different types of possible placements. For instance, in regulation 45 (Review of the child's case: child placed with kinship carer, foster carer or in a residential establishment) of the 2009 regulations, subsection 5, it states that,

The requirements are –

- (a) to consult and to take into account the views of
 - (i) the child, taking account of the child's age and maturity;
 - (ii) the kinship carer, foster carer or manager of any residential establishment where the child has been placed; and
 - (iii) any person with any parental responsibilities or parental rights in respect of the child.

I examined this excerpt in the previous chapter in relation to capability (see Section 5.3.3.2.1: Power as expressed through discourses of agency and capability) within the permanence decision-making system area. In the above excerpt, conceptualisations of family seem primarily to be considered in two ways. The first is *the* family of the child or young person and the second is more general to the idea of *a* family. In subsection (iii) of this excerpt, the focus is on the child's own parents or those with parental rights, while in subsection (ii), the focus is on providing the child or young person in question with an alternative care placement, but not necessarily their own family. This distinction in the meaning of 'family'

(between the child's family and that of the alternative care placement) also raises questions about how participation more broadly fits into these differing connotations of families and how children and young people feel they can participate and contribute to their own ideas of family. Likewise in level four (guidance) policy documents, in section 79 of the 2014 National Guidance on Child Protection in relation to child protection investigations as concerning that 'Professionals ensure children are listened to and respected', it states,

Children and their carers should also be able to expect honesty and to be given explanations for actions of decisions taken. In some instances urgent, immediate action will be needed to ensure the child's protection. In most cases, however, the child will be able to remain in the care of their family.

The language at the start of this excerpt focusses on the idea of a family-like environment with mention of 'children and their carers', while the last sentence shifts to viewing family as the children's own. However, there is some ambiguity surrounding the term 'carer' as it can refer to different types of carers and, in Section 80, parent and carers are considered the same. This idea of a 'family-like' environment seems to contrast to Weeks and colleagues' (2001) notion of 'like-family' suggesting that the former phrase is one that exists regardless of one's sense of how family is conceptualised, while the latter is solely based on one's feelings of how family can be conceptualised. With these distinctions in mind, 'family-like' and 'like-family' help to showcase the 'greyer' area between active and passive conceptualisations of family at either end of a spectrum. Each (like-family and family-like) offers a view similar to what Riggs and Peel (2016) present in regard to critical kinship studies, that kinship cannot only be conceptualised in one way but in a multitude of ways. Moreover, this distinction between 'family-like' and 'like-family' likewise points toward the value of considering family and kinship from more active rather than passive conceptualisations as could be made more explicit within policies across the levels of statutory power.

Comparatively, for level five policy documents, in the 2013 GIRFEC document linking to the UNCRC and the child's plan, it states that, 'The way the planning process is carried out, by fully involving children and families, respects both their need for the best possible assistance and, above all, promotes their rights' (p. 35). This is one excerpt of many that highlights the preferred term of 'family' in reference to the child's wider network within this level of documents. This preferential term is perhaps indicative of the more 'ideal' approach presented in the GIRFEC documents, that there is a preference for a child's immediate family over their wider network, the idea of which seems rather to ebb and flow across the earlier policies depending on the care orders and type of placement.

6.4.1.3 Active and/or passive conceptualisations of children and young people

Within the child protection sphere of the broader system, children and young people are more often considered in passive ways, particularly when there is a higher likelihood of urgency compared to potentially more active ways where there is a lower likelihood of ‘urgent necessity’ in later areas of the system. For instance, in level one policies, in section 37 (child protection orders) of the 2011 Act, it states in subsection 2, that,

- A child protection order is an order doing one or more of the following –
- (a) requiring any person in a position to do so to produce the child to a specified person,
 - (b) authorising the removal of the child by the specified person to a place of safety and the keeping of the child in that place.

For instance, in this excerpt as relates to CPOs, verbs such as ‘produce’, and ‘keeping’ are used, helping to situate children as passive beings (James & Prout, 1997; Jenks, 2005). Researchers have elucidated this traditional and more ‘mainstream’ view of children as being ‘innately innocent, confirming [their] cultural identity as a passive and unknowing dependant’ (Jenks, 2005, p. 125) and that ‘the logical extension of the image of the innately passive child and the refusal to recognise children’s resistance strategies is to rely totally on adult protection to prevent, or interrupt, abuse’ (Kitzinger, 1997, p. 169). Similarly, this does not lend itself well to how children and young people are involved in the decisions as pertaining to this ‘producing’ and ‘keeping’.

By contrast, in section 25 (Provision of accommodation for children, etc.) of the 1995 act, subsection 6, it states,

- (a) a local authority shall not provide accommodation under this section for a child if any person who –
 - (i) has parental responsibilities in relation to him and the parental rights mentioned in section 2(1)(a) and (b) of this Act; and
 - (ii) is willing and able either to provide, or to arrange to have provided accommodation for him,

Section 25 orders occupy a comparatively different position from CPOs even though they both can be considered as within the child protection portion of the wider system. The key difference is that Section 25 orders are a voluntary measure where parents (or guardians), by choice, admit their children into the care of the state or children are admitted into care following abandonment. Moreover, Section 25 conceptualises children’s participation in more active ways, especially for young people who are sixteen years old and older. For instance, in subsection 5 of Section 25 of the 1995 Act, which is that, ‘a local authority shall have regard, so far as practicable, to his views (if he wishes to express them) taking account of his age and maturity...’ and subsection 7(a) which ‘...as respects any child who, being at least sixteen years of age, agrees to be provided with accommodation under this section’. As

a note, young people under Section 25 have more autonomous decision-making, in light of virtually all parental responsibilities and rights ceasing at the age of 16, except the parental responsibility for guidance up to the age of 18, under Sections 1 and 2 of the 1995 Act. Yet, while these latter two excerpts present children and young people in more active ways, these active ways seem limited to older young people as in the case of subsection 7(a) and/or based on the discretion of the local authority, if it is deemed ‘practicable’ to regard the child or young person’s views. Both of these were and will be discussed further in the preceding and proceeding findings’ chapters.

In the latter excerpt as relating to Section 25 orders, the ‘willing’-ness discussed exclusively pertains to the parent or guardian in question and the child or young person is placed solely as the object of concern and care. This only applies to children under the age of 16, because of the interactions between sections 25(6) and (7). Again, this perpetuates the notion of children at the centre of the policies as passive and as ones to protect (James & Prout, 1997; Jenks, 2005) as opposed to ones with whom to collaborate. It should be noted that section 17 of the 1995 Act applies to section 25 of the 1995 Act and thus requires consideration of children and young people’s views, which seems to be placed in contradiction to the language used.

These conceptualisations shift as one expands the scope of the policies. In the level two (explanatory notes and policy memoranda) through five (national framework documents) policies, the conceptualisations of children and young people seem to change from concerning the child themselves, to concerning aspects of the child or their care plan. Thus, designating children and young people as more or less passive and/or active depends on how they are situated. For instance, for level two of the policy documents, in relation to the decision-making of child protection orders, paragraph 188 of the 2011 Act policy memorandum states that,

An application for variation or termination of child protection orders can be made to the sheriff by certain specified individuals, including the child that is the subject of the order, their parent, or the initial applicant in respect of the order.

This excerpt conceptualises children as the subject of the order rather than them only being part of the order. More explicitly, in this excerpt the child is situated as not only a descriptor of the order, ‘*child* protection order’ but also that they are ‘the *subject* of the order’. Previous research has examined children and young people’s roles as ‘subjects’ to orders, particularly in family law proceedings (Tisdall, 2016; Morrison et al., 2020b) and whether children and young people are seen as subjects with or without agency (Tisdall, 2016). For level three

policy documents (statutory instruments), one excerpt that I will examine more closely is that of regulation 5 (Child's plan) of the 2009 Regulations which states that,

- (2) Before preparing the child's plan the local authority must, so far as is reasonably practicable and consistent with best interests of the child, consult with –
 - (a) the child, taking account of their age and maturity;

...

- (d) any person who ordinarily has charge of or control over the child;

This builds upon my discussion in the chapter prior for this excerpt in relation to children and young people's capability (see section 5.2.2.1.1: Capability). In the excerpt for level two policies, the focus becomes the order itself, with the child being discussed in relation to the order of which they are the 'subject'. Thus, this seems to further cement the view of their 'capability' as a subject rather than an actor. Moreover, the child's capability seems entirely linked to the order in question and not as existing regardless of the order or plan being pursued. However, when adopting an even wider policy lens as offered by the latter excerpt above, the language has shifted to placing the problem on the children as they have become the ones to be 'controlled' as is stated earlier in the 2011 Act in section 5 (Child's plan) and in the 2011 Guidance as ones to be 'in charge of' and 'controlled' (page 16) in relation to the Child's plan alongside the above mention of 'consult[ing] with – the child'.

By level four (guidance) policies, one illustration of passivity within the guidance for those decisions is in section 58 as relates to child protection registration (Scottish Government, 2014), where it states that,

The decision to place a child's name on the register should be taken following a Child Protection Case Conference where there are reasonable grounds to believe or suspect that a child has suffered or will suffer significant harm from abuse or neglect...

Compared to the previous excerpt, children here are positioned less as ones to be controlled and more as ones to be protected from suffering. The emotive phrase 'a child has suffered' emphasises their passivity twice over – through it happening *to* children and the word choice as 'disseminating' (Bacchi, 2009) the problem representation of children needing protection.

For the final level of policy documents, one excerpt discusses the connection between the UNCRC and the child's plan and states that, 'The manner in which the planning is done should fully support **Article 12**. Children have the right to be afforded respect by being allowed to say what they think should happen' (Aldgate, 2013, p. 35). Like the excerpts from the previous policies, the language here is passive and contradictory, placing participation as something to be allowed for children rather than something that exists regardless of permission which is an inherent component of any right (Invernizzi & Williams, 2016). This is especially emphasised by stating that, 'children have the right to be afforded respect'.

Thus, by this phrasing, it does not seem to be a right that children have if it must be allowed for them (Scottish Government, 2015). Overall, children and young people are conceptualised in primarily passive ways in the CPO of the child protection system area decision-making which follows from the CPS often being utilised in emergency and/or more urgent situations compared to the other system areas (See previous chapter on urgency, [Chapter 5.2.1.2: ‘Urgency’ and vulnerability](#)). In such instances, there might be perceived to be less time to have participatory opportunities for children and young people going through the CPS. However, for other aspects of the child protection system (including the child’s plan and section 25 orders), there are more active conceptualisations of children and young people’s participation.

Overall, through the excerpts I presented and examined in the above sections as pertaining to the child protection area of the system, it has become clear that conceptualisations of ‘family’ and of children and young people as active and/or passive further complicate and explicate the link between the participation of children and young people who are looked after.

6.4.2 CHS

6.4.2.1 Public and Private

Compared to the previous section on the CPS, the relationship between the ‘public’ and the ‘private’ appears to be a more harmonious one. For instance, Part VI (Fostering Panels) of the 2009 regulations seems to presume discretion that this *might* include kinship care, but also that the public-private divide may take kinship care beyond the realm of standardised panels. This can be gleaned particularly from the specific regulations pertaining to ‘fostering panels’ and ‘fostering’ without the equivalent explicitly stated for kinship care. Thus, considering the space kinship care occupies within both the public and private spheres, it follows that there are fewer specific regulations since some types of kinship care are less regulated than other placement types such as foster care, residential care, and/or secure care. That is not to say kinship care is completely at the discretion of the social worker and/or front-line worker implementing the policies, only that there appear to be fewer specific regulations governing kinship care. However, the regulations will depend on the legal status of the kinship care arrangement. This echoes Munro and Gilligan’s (2013) research examining the delicate balance between discretion and regulations in kinship care (see [Section 6.2.2: Previous research for a further discussion on the topic](#)).

In Scotland, while kinship care and foster care are considered two types of placements in instances such as this, there has been persistent ambiguity surrounding kinship care and

foster care. Kinship care seems to be presented as a type of foster care despite its contradictory and inconsistent categorisation in other areas of policy (Looked after Children Regulations 2009). Thus, this places the discretion on the local authority and is based in part on how the local authority conceptualises private and public and the role of regulation and discretion in the different types of placements. The Scottish Government (2010b) specifies that in relation to the 2014 National Child Protection Guidance, ‘Private fostering is where a parent is making an arrangement to have their child cared for by someone who is not an approved foster or kinship carer or guardian of the child and who is not a close relative of the child (i.e., not a grandparent, brother, sister, uncle or aunt whether by blood or by affinity (i.e., by marriage)), for more than 28 days’ (p. 5). This private fostering can be considered in contrast to the children’s hearing system and can be considered as an interesting contrast to informal kinship care, wherein children may be living with kin under quite similar circumstances as may exist for children in private foster care. Thus, this ‘private’ designation is based upon Boyd’s (1997) distinction as it is private. The arrangement is made privately by the family, but it is still regulated by the state through the Foster Children (Private Fostering) (Scotland) Regulations 1985.

Private fostering likewise brings its own connotations, particularly in the way it veers into the private family sphere (Ross & Crow, 2010). Researchers have noted that, ‘Professionals were reluctant to interfere with private and informal parental decision-making when parents believed they were acting in their child’s best interests by placing the care of their child’s best interests in the hands of those considered suitable’ (Ross & Crow, 2010, p. 41). With less ‘interference’ from professionals, there is no state support for children to participate in decisions about their best interests within private or informal parental decision-making. (Although to note that Section 6 of the 1995 Act does require those with parental responsibilities and/or rights or a carer under Section 5, to have regard to the child’s views, when making any major decision in relation to parental responsibilities and/or rights). Overall, across the CHS area, public and private conceptualisations of family and children or young people are manifested in part based on the presence and/or absence of regulation and discretion (as will be discussed in more detail in the next findings chapter) and can particularly be differentiated across placement types (residential care, secure care and foster care being more regulated and more in the public or state realm of care compared to the more private and discretionary nature of kinship care and being looked after at home).

6.4.2.2 Active and/or passive conceptualisations of family

One area of decision-making that is particularly relevant to conceptualisations of family is the pre-hearing relevant person determination (Section 81, 2011 Act). In particular, the pre-hearing relevant person determination differentiates between who and what is a relevant person and part of one's family. For instance, in section 81 (Determination of claim that person be deemed a relevant person), subsection three of the 2011 Act, it states, 'The pre-hearing panel must deem the individual to be a relevant person if it considers that the individual has (or recently had) a significant involvement in the upbringing of the child'. This is especially pertinent as concerning the respective child or young person's view of 'relevancy' in their own upbringing. In addition, this decision is 'discretionary' on the panel's decision-making which also leads to the presumptions that 'relevant persons' can be based upon pre-conceived notions of who is relevant (for example, immediate family members or guardians). The definition for relevant persons can be found in section 200 of the 2011 Act, where it states,

- 1) In this Act, "relevant person", in relation to a child means -
 - (a) a parent or guardian having parental responsibilities or parental rights in relation to the child under Part 1 of the 1995 Act, [and other sections of the 1995 Act, Children Act 1989, the Adoption and Children Act 2002 and the Adoption and Children (Scotland) Act 2007]

In the explanatory notes of the 2011 Act, a level two document, this decision becomes further elucidated where it states in section 114 that, 'Only if the Pre-Hearing Panel or hearing determines that the person is a relevant person, can the person then take part in the discussions on any other issue referred'. This addition of 'relevant persons' can lead to questions of how that fits into conceptualisations of family and whether family is always relevant and/or if those relevant are always family. Moreover, compared to 'relevant persons', 'family' can be more often associated with a *lack* of choice in that one cannot choose who they are related to, but *can* choose who is 'relevant' in their lives. Yet this distinction in terminology highlights that they are not necessarily the same; thus, suggesting that just because one is considered 'family', is not enough to qualify as 'relevant persons' within this legislation. This can be considered in light of case law, *CM v. MF* (2017) and regarding the case discussed previously, *ABC v. Principal Reporter* (2020 (see Section 6.4.1.2: Active and/or passive conceptualisations of family). The case of *CM v. MF* (2017) was through the Court of Session (Inner House, Extra Division) in relation to section 81(3) of the 2011 Act. The summary of the case states,

A child, aged 14, appealed by stated case against a decision of the sheriff upholding an appeal by her maternal grandparents against a decision of a pre-hearing panel that they ought no longer to be deemed relevant persons in terms of s.81(3) of the

Children's Hearings (Scotland) Act 2011, quashing the panel's decision and making an order deeming them to be relevant persons. Moreover, in commentary of the case, Driscoll (2017) states that, 'This case demonstrates the importance and impact of the child's right to appeal' (p.6). Both *ABC v. Principal Reporter* (2020) and *CM v. MF* (2017) highlight the importance of children and young people's participation in their own conceptualisations of family and relevancy. This is highlighted in *ABC v. Principal Reporter* (2020) concerning the issue of whether siblings of the child could be considered relevant persons in children's hearings and in *CM v. MF* (2017) in regard to a child appealing against family members' status of relevant person. Thus, in both cases, the *choice* of children and young people to whom should be 'relevant' as family members in their children's hearing is considered. Furthermore, both cases can be linked to the 'chosen family' literature discussed previously (Weeks et al., 2001; Mason & Tipper, 2008).

For level three (regulatory and statutory instruments) documents, the rules for 'deem[ing] of a relevant person' are further detailed in the 2013 Rules of Procedure in the Children's Hearing policy. In section 48 (Procedure at pre-hearing panel determination of whether to deem an individual to be a relevant person), it states, that

- (4) Where the pre-hearing panel is to consider the matter of whether any individual should be deemed to be a relevant person, the chairing member-
 - (a) must invite any of the persons mentioned in paragraph (5), who is in attendance, to give to the pre-hearing panel any representations (orally or in writing) or any other documents or information in addition to any given under these Rules that the person wishes to give for the consideration of the pre-hearing panel...
- (5) Those persons are –
 - (a) the child;
 - (b) any relevant person;
 - (c) any individual in relation to whom the determination is sought.

Through this excerpt, how this 'relevancy' is decided becomes clearer. In addition, *who* is involved in this decision is defined, such that this idea of 'relevancy' can be considered alongside discussions of passive and active conceptualisations of family (Mahar et al., 2013; Weeks et al., 2001). In considering this further, if 'family' is considered in passive ways, who would be considered relevant would be based upon who is presumed to be a part of the family (e.g., based on biology). However, considering family from a more active perspective allows for children and family members to have an element of choice of who should be considered a 'relevant' person and not necessarily dependent on *who* is expected to be considered relevant (i.e., biological family members).

Moreover, from the opposite perspective, one can consider that having a more active role in conceptualising one's family might contribute to how capable and safe children and

young people feel in motivating them to participate. For instance, if children and young people are able to be part of the discussion of who they consider ‘family’ this likewise segues into how children and young people are able to be a part of the rest of the pertinent decision-making. In addition, if children and young people have an active role in conceptualising their family (in and out of child welfare situations) this would likely help to motivate children and young people to want to participate in any further decision-making. Determining who is family and who is not is a part of framing the problem to be solved. Heimer and colleagues (2018) argue that when children and young people are not involved with ‘reframing the problem’, the plan for protection and permanence tends to be incompatible compared to if they had been involved with ‘framing the problem’. While ‘family’ may not be the problem exactly, they are a crucial part of setting the child’s overall context and circumstances which are central to achieving permanence and safety.

Within level four (guidance) policies, decisions are primarily related to children who are looked after at home and/or looked after away from home, where family is conceptualised in differing ways. For instance, on page 44 the 2011 Guidance, in relation to regulation 5 (Child’s plan) of the 2009 regulation, it states that for children looked after at home,

Some children and families may resist the drawing up of the plan as part of resisting the need for compulsory measures of supervision. Some children may be too young. It should be recorded if it was not possible to obtain agreement to the plan from the child or his or her family.

This can be considered alongside my earlier discussion in this chapter (see Section 6.4.1.3 in relation to passive and active conceptualisations) in the CPS area and in the previous chapter in relation to capability (see Chapter 5.2.2.1.1: Capability). By contrast, in relation to children who are looked after away from home, in section 597 of the level four 2014 National Guidance on Child Protection, it states that, ‘As with investigations into children living in the community, any looked after children voicing a concern must be listened to and taken seriously’. For both, ‘home’ is conceptualised as primarily a physical place, but also leads to questions about the feelings and emotions associated with notions of ‘home’ and ‘family’. While both terms are often associated with each other, both are distinct in that ‘home’ is more often considered alongside its physical and emotional dimensions, while family is more often considered alongside its relational and emotional dimensions (Yuval-Davis, 2006; 2016).

Research examining adopting ecological perspectives (such as Bronfenbrenner’s ecological model) (Bronfenbrenner, 1992) presents increasingly wider spheres of influence around an individual from the family, school, and the wider community and the policies in

place, for instance. Thus, by placing ‘home’ and family as what children and young people need to be protected from, the focus can be argued to shift to the wider sphere of the community beyond the family surrounding the child (kinship care). If there are no feasible wider community members, one is likely to move on to professional foster carers not previously known to the child.

6.4.2.3 Active and/or passive conceptualisations of children and young people

Most of the decisions pertaining to CSOs are made within the children’s reporter decision making and CHS areas and are stipulated through level one policies. For instance, in Section 90 (Grounds to be put to child and relevant person) of the 2011 Act, in relation to the grounds hearing, it states that,

(1A) In relation to each ground that a person accepts applies in relation to the child, the chairing member must ask the person whether the person accepts each of the supporting facts.

In this excerpt, conceptualisations of passivity are particularly emphasised by phrases such as ‘put to’ and ‘in relation to the child’ where children and young people are situated as the object of the sentence. However, this is just one aspect of children’s hearings and is a specific technical procedure. Further, the individual child need not accept the supporting facts. For level two policy documents, in paragraph 292 (in relation to ‘expediting the establishment of grounds for referral’) of the policy memorandum of the 2011 Act, it states that, ‘At present when a child is too young, not sufficiently mature or does not understand the grounds for referral, but the parents accept them, it is necessary for a proof hearing to be arranged at the Sheriff Court’. This seems to connote a binary but active role where the child can be considered ‘sufficiently mature’ and to have enough understanding to accept the referral grounds when queried (however should a parent of the child not accept the grounds, they would still proceed to proof). By contrast, when a child is considered ‘too young’, ‘not sufficiently mature or does not understand the grounds’, this choice of accepting the grounds (or not) is no longer present and instead proceeds to proof. This latter option considers the child more passively compared to the first alternative. In linking this to my previous discussion of capability (see Chapter 5.2.2.1.1: Capability), this raises questions about the opportunities present for children and young people of varying abilities to take an active role (should they choose) in the decision-making and whether processes are adapted to their ability so that they might participate or if they are not able to understand, for processes to go ahead without their participation necessarily.

By level four policies, the 2011 Guidance helps to contrast the language surrounding children in foster care and residential care. For instance, in explication of regulation 25

(reviews and termination of approval [for foster carers]) in the 2009 regulations, it states that regarding who should be consulted prior to any review, ‘Consideration should be given to how the views of children in foster care are gathered and who should do this in relation to their view of their particular foster home’ (p. 89). Regarding this excerpt, despite the careful phrasing of this point, it is ultimately the professionals who would determine how and who should gather the child’s views and it is not up to the child in question. However, there is still a presumption that the child’s views would be gathered. By contrast, passivity is conceptualised in different ways in relation to residential care. For instance, in explication of regulation 36 (emergency placement with carer) of the 2009 regulations, the 2011 Guidance on page 109 expands that,

There is a requirement in regulation 36(5) for the local authorities to give information about the child to the carer. A residential establishment will need similar information to provide appropriate care for the child **and this should be provided as soon as possible**. If an emergency residential placement continues after the three day review, regulation 41(4) imposes various duties on the local authority, including providing information in terms of regulation 35 [emphasis in original].

The language in both excerpts seems to paint children and young people as passive participants in these particular situations (i.e., using words such as ‘placed’ and consideration to how the ‘views of children in foster care are gathered’ rather than consideration of the children themselves).

Yet, for the latter excerpt, children are viewed as ones to be provided information about. Considering the difference between foster care and care in residential establishments, both in the goals of each and regarding the age of children more likely to be placed in each, it serves to both obfuscate and clarify this shift in language. Children and young people in residential establishments are more likely to be older compared to those in foster care placements (Scottish Government, 2011) and the placement is more likely to be pursued in cases of necessity or where other placements (such as in kinship care or foster care) are not available or feasible (Scottish Government, 2010a). Moreover, research has reported children and young people in residential care to be considered more vulnerable and are less involved in the decision-making compared to young people in foster care (Lausten & Kloppenborg, 2022) in the Danish context. Comparable findings have additionally been found in the Scottish context (as discussed in Section 2.9.1.4 Looked after away from home: Residential Care) where researchers have noted there to be a lack of involvement of children and young people in residential care in the decision-making pertaining to their care (Skinner, 1992). This serves to illustrate how this perception of vulnerability overrides other factors (such as age of the child or young person) to the extent that participatory options are available. The

temporal element ('emergency placement') additionally enhances the perception of vulnerability and risk, thus likely further emphasising the child or young person's passivity.

Overall, the Children's Hearings decision-making areas (as designated in the CELCIS [2018] diagram) specify different components of decision-making and thus conceptualisations of family and of children and young people as active and/or passive are utilised in and for different ways and reasons. The idea of participating and taking a more active role in conceptualising family can be considered in parallel to the different ways 'home', 'relevancy' and 'family' are construed. Family is conceptualised through both system areas (CPS and CHS) as being something that children and young people may have to be protected from, thus connoting a rather passive view of the family. However, this would depend on the placement being pursued (kinship care, foster care, or residential care). Thus, this more passive view of family would vary depending on whether this is localised to the parents or guardians from whom the children were removed, the wider network of family and friends surrounding the child or the family environment.

6.4.3 Permanence Decision-making

6.4.3.1 Public and Private

The discussion of 'transferring' in section 143 of the 2011 Act and section 207 in the explanatory notes for section 143 of the 2011 Act excerpts, (see [Chapter 5.4.1.1](#), included here again for convenience)⁸ seems to consider moving children and young people between or to placements as more bureaucratic and thus as existing in a more public sphere. This is likewise mirrored in the level two excerpt but is perhaps more indicative of the area of law in that there is state involvement compared to private family law. By level three (regulatory and/or statutory instruments), regulation 45 (5a) places the children's views as a standard of public procedures, placing them beyond the private sphere. This can be gleaned in the way requirements to consult with children and young people are sprinkled throughout the policies and placed as a responsibility of the state through its inclusion in policies such as in the 2009 regulations and not left as a presumption to be dealt with solely within the private sphere of the family. Moreover, this area of permanence decision-making also appears to bridge the 'private' and 'public' spheres. The permanence decision-making system area serves to confirm or reject the need for continued (more permanent) local authority or 'public'

⁸ Section 143 (Transfers in cases of urgent necessity) of the 2011 Act includes,

(1) Subsection (2) applies where a child is residing at a particular place by virtue of a CSO or interim CSO containing a measure of the type mentioned in section 83(2)(a)

(2) If it is in the interests of the child or another child in the place that the child be moved out of the place as a matter of urgent necessity then, despite the order, the chief social work officer may transfer the child to another place.

involvement in the family. It follows initial interventions and precedes any legal permanence decisions, but also helps to illustrate the spectrum of how the ‘public’ and ‘private’ are and can be conceptualised at different parts of the system and in relation to different decision-making points.

By level four (guidance) documents, these ideas of public and private can be further considered in the 2011 Guidance. For instance, on page 111, it states that the main functions for three-day working reviews in relation to regulations 38(2) and (3) and 41(2) and (3) of the 2009 regulations are,

Where the placement is with a carer who is not an approved one, ensuring that the initial checks have been made and information gathered for the review. This is crucial because the local authority is unlikely to have detailed information on the carer in the same way as they would for an approved one.

For instance, in kinship care compared to other types of care placements, approval of a kinship carer often follows a child and/or young person already living with or being placed with kin (Calder, 2006). This idea of ‘approval’ again situates care from the private into the public space in that care becomes measurable in what and how it is permitted by the state.

6.4.3.2 Active and/or passive conceptualisations of family

As discussed in the section prior about passive and active conceptualisations, there are few relevant discussions within the policies at levels one and two, which perhaps highlight where the silences rather than the words lie. Moreover, since the decisions that take place in this area are not within level one (legislation) policies, it follows that there would likewise be few mentions within level two (explanatory notes and policy memoranda) policies. In considering the space that permanence decision-making occupies within the wider protection and permanence system and that it does not *directly* contain any of the four care orders, it does make sense that there is little focus on elaboration here.

By level three policies, regarding the same point as discussed in the previous section, regulation 45 (review of the child’s case: child placed with kinship carer, foster carer or in a residential establishment), 5(a) of the 2009 regulations highlights that there is a requirement to consult not only with the child, but also with,

- (ii) the kinship carer, foster carer or manager of any residential establishment where the child has been placed; and
- (iii) any person with any parental responsibilities or parental rights in respect of the child.

Through this excerpt, it is specified in (ii) that the person ‘in charge’ (i.e., the foster carer, the kinship carer, residential manager) is required to be consulted and can include kin, if they have parental responsibilities or rights. However, this would exclude the wider family (i.e., children of kinship or foster carers). This suggests a rather passive perspective of family

with designated people being consulted but not, for instance, asking the child or young person who else they might like to consult to adopt a more active perspective of family. Despite this, there seems to be less of a distinction between placement types with this more ‘narrower’ view of family being adopted across the placement types.

By level four policies, in the 2011 Guidance regarding ‘suitability of placement in longer-term planning’ on page 113, it states that,

Emergency placements are at the other end of the spectrum from careful matching in adoption or permanent placements.... Where children are placed with kinship carers, one of the key themes throughout is intertwining the threads of the children’s needs with the ability of kinship carers to respond to those needs. For children who are placed by local authorities, there are also the annual reviews of foster carers or inspections of residential establishments.

Similar to the points I made previously (see [Section 6.2.1: Previous research](#)), kinship care appears to be at the crux of how family is conceptualised within the policies and for children and young people who are looked after. The language, regarding children in kinship care, evokes images of inclusion with phrases such as ‘...intertwining the threads of children’s needs with the ability of kinship carers’ compared to the often less evocative wording regarding the other two placements. For instance, for foster care and residential care in the same excerpt above, ‘annual reviews’ are mentioned in relation to foster carers and ‘inspections’ in relation to residential establishments. Thus, compared to the language used along with kinship care, the language for foster care and residential care seems to signal a more regulatory approach to foster care and residential care. This leads to questions about if and how this impacts the participatory opportunities offered to children and young people. Yet, the mention of ‘there are also the annual reviews of foster carers or inspections of residential establishments’ in the excerpt above indicates that beyond being about regulations, they also serve as further opportunities to gain information about the child’s situation and how their needs may be best met. For instance, since foster care and residential care seem to have a more regulatory approach and/or more opportunities for information to be gathered formally, might there be more mandated opportunities for children and young people to participate compared to kinship care? However, would this necessarily result in more participatory opportunities? Or might the more potentially discretionary space surrounding kinship care allow opportunities of participation to emerge more spontaneously as previous research has discussed in consideration of social workers’ discretion more generally (Carey, 2008; Hyslop, 2012)? Moreover, as I mentioned in reviewing the key concepts at the start of this chapter (see [Section 6.2.2: Operationalising public and private spheres](#)), this more ‘regulatory’ way that residential care seems to operate in, seems to be in

tension with the way children and young people have described their experiences with it (Kendrick, 2013). This is most notably by way of ‘the family metaphor’ and how researchers have advocated for ‘understanding children’s and young people’s centrality in the complex mesh of relations, relatedness and relationships that residential care must find its true potential’ (Kendrick, 2013, p. 83). This contrast seems to suggest that that this ‘true potential’ is not being realised for residential care.

Overall, examining this third and intermediary area of the system offers both differences and similarities across the placements. For instance, the more passive view of family in regulation 45, subsection 5(a) of the 2009 regulations does not especially differentiate between placement types but there does often appear to be more illustrative wording surrounding kinship care (particularly in guidance documents) compared to the other placement types. Yet, even in the more illustrative wording surrounding kinship care there is still a focus on the kinship carer and not on the wider family.

6.4.3.3 Active and/or passive conceptualisations of children, young people, and childhood

In level one policies, the only decision discussed is in regard to the ‘Transfers in cases of urgent necessity’ in the 2011 Act, exemplified in section 143 (as discussed previously in section 6.4.3.1). This is further clarified at level two in section 207 of the 2011 Act explanatory notes, where it states that (in relation to transfer in cases of urgent necessity), ‘This section applies when a child is required to stay in a specified place as a condition of their compulsory supervision order or interim compulsory supervision order’. The language changes here from the focus on ‘placing children’ (as seen in the previous section regarding foster care in the children’s hearings system) to the noun ‘place’, which appears to conceptualise children as being ones who ‘stay’ (through the verb ‘stay’) rather than are ‘placed’. Thus, there seem to be connotations that children are conceptualised more passively here compared to the previous section.

By level three (regulatory and statutory instruments) documents, in section 45 (Review of the child’s case: child placed with kinship carer, foster carer or in a residential establishment) of the 2009 regulations, it states that,

- (5) The requirements are –
 - (a) to consult and take into account the views of –
 - (i) the child, taking account of the child’s age and maturity;
 - (ii) the kinship carer, foster carer or manager of any residential establishment where the child has been placed...

This builds upon my previous discussion of this section from earlier in this chapter in relation to the CPS area (see [Section 6.4.1](#)) and the prior chapter regarding capability in the

permanence decision-making system area (see Chapter 5.3.3.2.1). In this excerpt (among some of the others that I have presented), ‘the child’ is placed first in who is to be consulted. This does not present any legal hierarchy but does illustrate a recognition of children and young people at least in that primary placement. In level four policy (guidance) documents, in the 2011 Guidance, for the first looked after children review within six weeks, it states that, ‘If the child continues to be looked after and placed after the six-week review...’ (p. 112). As in the points that I have discussed above, the shift to using the verb ‘placed’ to describe children who are looked after again appears to highlight their apparent passivity, both as ones to be ‘looked after’ and as ones to be ‘placed’, seemingly placing children in the traditional iteration of ‘passive beings’ as has been critiqued and unraveled within childhood studies (Prout, 2011). Thus, these more passive conceptualisations of family seem to suggest quite a narrow view of family is being adopted and that children and young people are seemingly not given opportunities to be actively involved in who they would like to consult (yet ‘relevant person’ offers an interesting addition to this discussion as was examined (see Section 6.4.2.2: Active and/or passive conceptualisations of family).

6.4.4 Legal permanence away from home

6.4.4.1 Public and Private

Considering that legal permanence away from home is making the public situation of ‘state’ care more private, section 80 (POs) is the most explicit and legislative way this is achieved. In the 2007 Act policy memorandum, the background to POs and thus the appeals process becomes clearer with context. For instance, within the policy objectives of the 2007 Act in paragraph 2 of the 2007 Act policy memorandum, it frequently states the focus as being on ‘modernising’, ‘improving’ and ‘creat[ing] a modern, child-centred adoption and permanence service...’. Furthermore, Norrie (2020), when discussing the history of Scottish child protection law, overviews how,

...by the 1990s [fostering] had become one of the range of mechanisms by which a child could be looked after by a non-parental carer, and could itself cover a range of temporary, long-term or even permanent placements. The language of ‘carer’ instead of parent was also consistent with the professionalis[ation] of the fostering role (p.222).

The idea of ‘professionalization’ (Wilson & Evetts, 2006) appears to mirror and corroborate these notions of modernity.

In section 40 of the level three document, 2013 Rules of Procedures, this idea of ‘notify[ing]’ relevant persons of when and where the hearing is is perhaps indicative of the way the state (public) commingles with foster care – such as through its ‘professionalisation’ (Wilson & Evetts, 2006), but still ‘family-like’ environment (Scottish Government, 2010a).

In addition to kinship care existing in both public and private spheres, in a similar way so too does foster care, except kinship care focusses on the child's family and/or wider network, while foster care focusses on the 'family-like' environment. Thus, instead of more 'institutional' placements such as in residential care and/or secure care, foster care appears to serve as a compromise for both children being in as 'family-like' an environment as possible while still upholding 'pre-approved' standards of care and protection.

For level four documents, the discussion of the permanence panel in relation to kinship care from page 151 of the 2011 Guidance states that,

In most instances now, however, adoption by kinship carers, who are frequently grandparents, is not the first choice as it can distort family relationships – but at times this may reflect the wishes of grandparents and children. Other forms of securing the placement may be preferable and the agency may direct these to the adoption and permanence panel but other similar independent [placements] may be considered, depending on whether the local authority has other arrangements for overseeing kinship care.

This excerpt seems to illustrate a more complex relationship based upon the public and private nature of kinship care in the context of permanence, mostly notably in how there seems to be ample room for discretion, as will be the focus of the next and final findings' chapter.

6.4.4.2 Active and/or passive conceptualisations of family

Conceptualisations of family within the legal permanence away from home system area focus on a determination that the respective child or young person did or would have encountered problems with family in their original living situation. In level one policies (legislation), there are few direct references to 'family' within this area of the broader protection and permanence system. One of the few mentions builds upon my previous points about 'relevant persons' in the above CHS subsection (6.4.2). In section 154 (Appeal to sheriff against decision of children's hearing) of the 2011 Act, it states that,

- (1) A person mentioned in subsection (2) may appeal to the sheriff against a relevant decision of a children's hearing in relation to a child.
- (2) The persons are –
 - (a) the child,
 - (b) the relevant person in relation to the child,
 - (c) a safeguarder appointed in relation to the child by virtue of section 30.

As discussed in the CHS section (6.4.2), how family is conceptualised shifts to ideas of relevancy and whether relatedness is always relevant. This idea of 'relevant persons' is particularly interesting when considering the way individuals construct their ideas of family and how outside of the sphere of children and young people who are looked after, relevancy is likely more often to be considered synonymous with members of one's immediate family

(Mason & Tipper, 2008). This makes sense considering that this area is meant to ascertain and support children and families who are transitioning through legal permanence. In level two policies, in the 2007 Act policy memorandum, in section 29, it states that,

Where a local authority does not consider adoption to be an appropriate option for a child, a permanence order can [be] made without the measure authorising adoption of the child...In practice this situation may be similar to long-term fostering: a child will live with a family, with the intention that the placement is permanent.

In this excerpt, ‘family’ is considered by the more general connotation of *a* family, rather than the child’s own family. Moreover, this perhaps relates to familial relationships not being terminated by adoption proceedings.

By level three policies, in section 72 (Procedure where hearing held by virtue of section 50 [children’s hearing to provide advice to sheriff in relation to application] of the Act) of the 2013 Rules of Procedure in Children’s Hearings, it states that,

- (1) This rule applies where a children’s hearing is held by virtue of section 50 of the Act.
- (2) The chairing member –
 - (a) must inform those present at the hearing of the substance of any relevant report or other relevant document;
 - (b) must take all reasonable steps to obtain the views of the child, each relevant person and any appointed safeguard...

While for the fourth level of policies, in the 2011 Guidance, it states that,

Once a Children’s Hearing has made the decision to make a home supervision requirement, the social worker allocated by the local authority should ...

- work with the family and the child to complete and write up the child’s plan, specifying the frequency, location and nature of contact with the social worker. (p. 45.)

In these latter two excerpts, ‘family’ is conceptualised differently than the more generalised view presented in the level two document excerpt above. Yet, all the conceptualisations (general and specific) have the potential to play a role in the way children and young people are conceptualised as being part of *a* family or still their own family and how this could impact the placement being pursued. ‘Family’ can be created for oneself, but also prescribed by others and/or systems or institutions (Jones, Dean, Dunhill, Hope, & Shaw, 2020). This often seems to be the case throughout the system areas, perhaps indicative of where the power lies in deciding how family can be conceptualised (see [Chapter 5.2.2](#) on Power). The way in which these conceptualisations of family can meld or contend with the other would be dependent on each family and children and young people’s situation and circumstances.

6.4.4.3 Active and/or passive conceptualisations of children and young people

There are both passive and active conceptualisations of children and young people here but considering the more explicit role that children and young people are meant to play

in the decisions relating to permanency, this appears to be primarily in the final decision and appeals of POs. Considering that this area of decision-making concerns *legal* permanence away from home, many of the decisions are prescribed through level one policies (the 2007 Act and the 2011 Act). Regarding the legislation backing POs, Section 80(1) of the 2007 Act, states that, ‘the appropriate court may, on the application of a local authority, make a permanence order in respect of the child’. In this excerpt, ‘the child’ seems to be considered as a passive object rather than an active participant in the process (despite there being quite explicit participatory opportunity procedures for children and young people surrounding POs).

By level three policies, the verb choices appear to be more demonstrative of active conceptualisations of children and young people. In the 2013 Rules of Children’s Hearings Procedure, phrases include, ‘explain to the child’, ‘inform the child’, ‘discuss the case with the child’, ‘seek the views of the child’ and are mentioned in section 65 (procedure where report required under section 141 (preparation of report in circumstances relating to permanence order or adoption) of the Act). I additionally discussed this in the prior chapter in section 5.3.4.1 regarding representations of vulnerability and time in the legal permanence away from home system area. This passive inclusion of the child has been explored by Tisdall and Morrison (2012) who noted that in family law, decisions are about children and young people, but they are not the *parties* in the court cases. This thus means that children and young people’s views can be included as evidence in court cases, but they are not considered to be the party nor have the status that would follow. This leads well from my previous discussions of passive and/or active conceptualisations of children and young people, as children are not the ones making the court case, they are what or who the case is about.

These more active conceptualisations of children and young people are likely in part due to the possible timing within the broader protection and permanence system. In the system of legal permanence, the level of risk is likely to have remained high enough that legal permanence is necessary but that the risk is no longer urgent or imminent. Furthermore, considering the choice of verbs: ‘explain’, ‘inform’, ‘discuss’ and ‘seek’, the first two seem more indicative of the more basic levels of participation (i.e., to inform children and how children are listened to). The latter two verbs are indicative of more collaborative practices between professionals and children but still do not mention how and if children’s views are regarded.

By level four policies, in the 2011 Guidance, regarding pursuing a permanence order, a subtitle is ‘Children subject to a permanence order when carers have some parental responsibilities’ (p. 125). I previously discussed this excerpt in the context of vulnerability and temporality in the legal permanence system in the previous chapter (see [Chapter 5.3.4.1](#)). Language such as this helps to reinforce the problem representation of impermanence and that the remedy of this problem is outside of the children and young people’s control. Overall, examining the final area of the protection and permanence system offers insight into what can potentially result from the earlier areas and how the conceptualisations from each can combine to complicate or rectify the problem representations within the policies.

6.5 General Discussion and Conclusion

This expands on the conceptualisations of vulnerability and time from the previous chapter, with conceptualisations of passive and active alongside the public and private, adding layers of complexity to how children and young people are viewed. Further to this point, children and young people may be viewed as vulnerable but that does not necessarily mean that they are also viewed as passive, helping to solidify the distinctiveness between passivity and vulnerability. Thus, this appears to illustrate the potentially wide gap in how children and young people’s participation is viewed alongside the varying perspectives of private and public spheres of children and families across the policies and areas of the system. I have reached the concluding theme of considering public and private spheres alongside active and passive conceptualisations. Finally, I have also included a small section more explicitly connecting this theme to children and young people’s participation, which I will now overview.

6.5.1 Main Themes

6.5.1.1 Considering public and private spheres alongside active and passive conceptualisations

There is a further distinction by the CHS offered across the available placements such that age and type of placement are often associated with older children being more likely to be placed in residential care compared to other placement types (Scottish Government, 2011). Furthermore, the conceptualisations of passivity shift depending on whether the situation is viewed as an ‘urgent necessity’ or not, with the ‘urgency’ likely enhancing the risk and thus perceived passivity of the child or young person. Furthermore, this shift in presumptions of passivity and/or activity seem to vary depending on whether the child or young person is in the CPS or CHS areas. There likewise seem to be varied perspectives of active and passive conceptualisations depending on if they are older or younger than 12 years old in the permanence decision-making or legal permanence away from home system areas. Adults and

young people over 12 years of age are more likely to be viewed as active participants, especially prior to the 2020 Act amendments (including as a presumption of ‘capability’, (Tisdall, 2018) where age 12 is frequently used as an age where participatory opportunities are more likely or expected.

Comparatively, in the CHS area, the focus shifts from ‘family’ and ‘parents’ (or those with parental responsibilities and/or rights) to that of relevancy (see Section 6.4.2.2: Active and/or passive conceptualisations of family). For the permanence decision-making and legal permanence away from home system areas, the language surrounding the different types of placements as relating to families varies from the more bureaucratic and standardised (for residential care) to the more symbolic (for kinship care) and in the conceptualisations of passivity. Professionalism seems very much to be a way in which ‘private’ and ‘public’ are justified and situated within the policies in terms of the regulation and discretion as will be expanded upon in the next and final findings chapter. For instance, since kinship care often appears to span both public and private, it seems that a valid assumption would be that ‘professionalism’ is not as frequently used as justification for discretion compared to other more definitively ‘private’ or ‘public’ placement options. Moreover, there has been frequent discussion of the ‘professionalisation’ of foster care (Wilson & Evetts, 2006), offering a further way to consider the differing goals and motivations underlying different placements (i.e., foster care versus kinship care). This builds upon Wyness’ (2014) discussion of the public and private spheres and the binary approach often adopted tends to overlook the complexity and nuance inherent to what is and who determines the ‘public’ and ‘private’. The notion of professionalisation connects these points further to formalise the distinction between public and private spheres depending on the perspective adopted (see [Section 6.4.4.1](#)). For instance, just as the state (public) interweaves with foster care through professionalisation (Wilson & Evetts, 2006), so does the privatisation of services (Boyd, 1997) when a task or responsibility for social protection ‘once held by the government, is relegated to the private sector’ (Caplan & Ricciardelli, 2016, p. 28).

Furthermore, this can likewise be considered from a bottom-up perspective in that children, young people and their families create their own conceptualisations of what or who is family and kin (Holland & Crowley, 2013; Kendrick, 2013; Mason & Tipper, 2008). I would argue this can carry over in conceptualising what falls within the ‘public’ and ‘private’ spheres. This can also lead into discussions of who or which families are granted this ‘freedom’ of privacy especially considering that children and their families of certain minority ethnicities and/or lower socio-economic statuses are much more likely to be

involved with child welfare services compared to white and/or more affluent families (Dettlaff et al., 2011). Thus, this leads to questions of bias that can easily infiltrate into such systems rendering ‘privacy’ as a privilege that is only afforded to some. The difference between views of family becomes more pronounced at the legal permanence away from home system area as it indicates a potentially permanent separation from a child’s family to a new family, regardless of the child’s view of ‘family’. Thus, this helps to indicate the importance of children and young people participating in the decisions relating to how they conceptualise family and how it would reverberate into their conceptualisation and acceptance of a new family (potentially).

6.5.1.2 Implications for conceptualising participatory practices

The considerations of public-private and passive-active help to add further depth to the overall understanding of the absences and presence of participation within the policies. This is particularly so in building upon the discussions surrounding vulnerability and power in the previous chapter (Chapter 5). For instance, as I mentioned earlier in this chapter (see Section 6.4.4.2: Active and/or passive conceptualisations of family), if the type of placement can be considered on a spectrum from *the* family to *a* family to a residential establishment (Welch, 2018) though this distinction has been disputed in the literature (Kendrick, 2013), the connotations of vulnerability can likewise be considered alongside public and private spheres, and passive and active conceptualisations of children and family. Within the literature, there seem to be opportunities to consider kinship care, foster care, and residential care in more active ways (Biehal, 2014; Burgess et al., 2010; Kendrick, 2013; Welch, 2018), while for secure care (Roesch-Marsh, 2014) and being looked after at home (Gadda & Fitzpatrick, 2012) there seem to be fewer and more inconsistent opportunities for children and young people to conceptualise ‘family’ actively. My analysis of the policies provides some support for this, including that there may then be fewer explicit opportunities for both children and young people and their families to be viewed in more active ways (i.e., through explicit opportunities for participation and/or in conceptualising who children and young people consider to be family) compared to more ‘public’ placements such as foster care or residential care, potentially. This can be particularly linked to my discussion in my previous findings’ chapter (see [Chapter 5.2.1: Vulnerability](#)), especially related to timings (including the age of the child in question, the timing of the placement [i.e., if it is an emergency placement] and the timing within the overall system). The considerations of the public and private can likewise add to how passive and/or vulnerable a child is perceived, particularly in

how they are being supported by the broader child protection and permanence system (especially as influenced by the placement type and care order).

In another instance, this chapter's discussions can be linked to my previous chapter's discussions of power and capability (see [Chapter 5.2.2: Power](#)). As there appears to be an onus on the child and/or young person to demonstrate that they are capable of participating, there appears to be a presumption of passivity (unless demonstrated otherwise) (see [Chapter 5.4.1.1.1](#)). For many of the policies (except in sections of the guidance for the permanence decision-making and legal permanence away from home areas), children and young people are meant to illustrate their capability to participate, rather than have the processes of participation adapted to them (see [Chapter 5.4.1.1.1: Vulnerability, age, and \[dis\]ability status](#)). This leads to questions about how the responsibility of the public and/or private spheres plays into these more active or passive conceptualisations of children and young people. If the situation were not viewed as the state's responsibility but rather as private, would adaptation or 'flexibility' of methods be considered? Alternatively, if the situation were viewed as the state's responsibility (public), but the situation and or children were viewed as more vulnerable (i.e., younger children where a CPO is being pursued), what role do each of these conceptualisations occupy in how participation is ultimately viewed?

6.5.2 Conclusion

A main tenet of Bacchi's poststructuralist approach is to question presumptions as relates to the problem represented. Through the discussion of my findings as relates to the public-private and active-passive conceptualisations of family and children across each of the four system areas, it has become clear that the concepts are very much interwoven. I have explored this in the policies and more inherently in how each is conceptualised alongside participation for children and young people who are or are becoming looked after.

I have endeavoured to unravel the relationships between how considering the private and public spheres and active and passive conceptualisations of children and young people and family can help to elucidate the themes of vulnerability and power from my previous findings' chapter (see [Chapter 5](#)). Considering the complexity of both the child protection and permanence system and participation as a concept, the findings that have emerged from my analysis should not be considered independently of each other nor should they be over-relied upon to offer complete explanations. Regulation and discretion can particularly be considered in the context of policies, as will be explored next.

Chapter 7: Regulation and Discretion surrounding participation

7.1 Introduction

This chapter is the final in my quartet of findings' chapters. It will focus on how the ideas of regulation and discretion are and can be used to examine further how participation is present (and absent) across the policies. Finally, this will all be examined alongside children and young people's participation and the overall link to regulation and discretion across the child protection and permanence system, care orders and placements.

To start, I will overview the definitions of the discourses of regulation-discretion as related to child welfare and more broadly within the literature. Then, I will present how each is realised within the policies examined (as divided around the four areas of decision-making). Following this, I will present evidence from the policies and corroborate my findings with evidence from the literature.

7.2 Regulation and Discretion

7.2.1 Operationalising regulation and discretion

Within the literature, the notions of regulation and discretion are often discussed in relation to policy-making generally (Hupe & Buffat, 2014; Lavee, Cohen, & Nouman, 2018; Levi-Faur, 2014), and regarding specific areas of policy such as child welfare (Munro & Gilligan, 2013). Furthermore, much of the discussion surrounding discretion is based around theories concerning policymaking, especially Lipsky's 'street-level bureaucrats'. Regulation and discretion (or similar concepts) are frequently put forth as opposing concepts (Munro & Gilligan, 2013). Regulation and discretion can be considered opposing but complementary concepts such that regulations establish the structure in which discretion may be realised or alternatively, the space for discretion dictates how regulations are or can be structured. Thus, while regulation is based on the policies present, discretion can often be gleaned based on what is absent, and thus there is room for the frontline professionals (and others such as, social work managers and members of the children's panel) to make the final decision based on their own professional judgement.

In the area of policy implementation, there are both top-down and bottom-up decision-making perspectives. For the former, the decisions are perceived as and should be made within the higher echelons of governments and put in place by those at the frontline based on those decisions (i.e., based on the regulations set out in policies) (Cairney, 2012). In contrast, the latter, considers the role of discretion of frontline workers in the implementation of policy. One such theory, the street-level bureaucrats (Lipsky, 1980, 2010), explains how policies are greatly impacted by frontline implementation in practice by the practitioners. In this theory, Lipsky (2010) proposes that 'street-level bureaucrats' are 'public service workers

who interact directly with citizens in the course of their jobs and who have substantial discretion in the execution of their work' (p. 3) and include social workers, nurses, and teachers. Relatedly, within the realm of child welfare, research has examined this theory as being an important way to identify what promotes and hinders policy implementation (Akin, Brook, Byers, & Lloyd, 2016; Akin et al., 2014).

However, Lipsky's street-level bureaucrat's theory (1980, 2010) is not without its critiques (Evans, 2011; Kjaerulff, 2018). Evans (2011) argues that Lipsky's theory overlooks the notion of professionalism in the discretion of social workers and calls for an updated theory that incorporates such additional variables. Professionalism has multiple definitions including that it places the professional above any resource limitations and that a certain extent of authority remains for each social worker regardless of the situation (Freidson, 2001). Moreover, professionalism and professionalisation (Wilson & Evetts, 2006) can likewise be considered through not only the social workers but through how foster care has become 'professional', thus shifting ideas of care and work (Kirton, 2013) (see [Chapter 6.4.4.1](#) in the previous chapter for a further discussion of professionalism).

An adjacent concept to professionalism is the role of frontline professionals' discretion in implementing policy into practice. Moreover, in terms of professionalism, this, 'certain extent of authority' is often manifested through the discretion they hold in the decision-making. This discretion (or lack thereof) has emerged as a key concept in relation to policy implementation theories (Tummers & Bekkers, 2013) including Lipsky's (2010) theory of street-level bureaucrats and the power this discretion wields in the overall implementation of the policies. Professionalism and discretion can further be extrapolated to how children's participation is situated and realised (as is of interest to this Ph.D. research).

Researchers have distinguished between the varying ways in which discretion may be conceptualised in bottom-up compared to top-down approaches to policy implementation, in that,

On one hand, discretion stands for the ways freedom is being used (discretion as used). The focus then is on behaviour in a given setting. An alternative meaning of discretion refers to the ways this freedom has been granted (discretion as granted). This 'granting' takes the form of prescriptions formulated by rule makers. (Hupe & Buffat, 2014, p. 551).

Beyond these definitions of discretion, through my use of Bacchi's WPR approach, it seems that much of discretion, while having to do with phrasings within the policies, also has to do with what is not stated. By recognising what and where regulation and/or discretion are stated or not, one can more explicitly probe why this may be the case. Moreover, while researchers

have frequently commented upon the benefits of front-line professionals using their discretion (Nothdurfter & Hermans, 2018), other researchers have presented a more critical lens of discretion (Koven, 2019). In the latter, Koven (2019) has highlighted the potential for the lack of clarity and consistency in practice as potentially disproportionately negatively and/or positively impacting certain groups of individuals over others. This can be evidenced more clearly in cases of research examining the relationship between the ethnicity of children and young people and the amount in allowances granted to their foster and/or kinship carer (Xu et al., 2020). In this latter study, children and young people, who were ethnicities other than white, were more likely to receive less financial support as kinship carers than are typically granted to foster carers (Xu et al., 2020). Previous research has also examined the role and presence of bias in discretion, particularly in the domain of social work (Bradt, Roets, Roose, Rosseel, & Bouverne-De Bie, 2015). Such research highlights the potential negative effects of discretion such that, those who benefit from discretion praise the “flexibility” of officials, while those harmed by discretion are not favorably disposed (Bradt et al., 2015). This can be considered in light of the professionalism literature, such as the way bias can be considered alongside professionalism for education policies (Malandrino & Sager, 2021). This research can particularly be linked to my discussion in Chapter 5 (see section 5.4.1.1.1: Vulnerability, age, and [dis]ability status) in relation to the flexibility granted or not to social workers regarding the timings of decision-making.

Thus, it is helpful to be critical of discretion and to carefully consider interpretations of it and/or to corroborate such interpretations by reading through the different levels of policy and the relevant case law (both of which can help to guide and substantiate interpretations). Furthermore, research has illustrated that there is discretion and variance present in social workers’ fostering of children’s participation (Shemmings, 2000). For the remainder of this chapter, I will be adopting both a bottom-up and top-down approach to discretion as expressed through Hupe and Buffat’s (2014) definition as it offers room for how discretion can be conceptualised within the policies rather than prescribing a single approach.

By contrast, regulation or ‘regulatory standards’ (Munro & Gilligan, 2013) can often be viewed in contrast to discretion, where when there is more freedom, there are fewer specifications about what *must* be followed. However, similar to Hupe and Buffat’s (2014) definition of discretion, regulation can likewise be somewhat considered from a top-down and/or bottom-up approach to policy. Regulation can be viewed as something that policymakers dictate to control discretion or alternatively how street-level bureaucrats’ discretion shapes what and how policies are and can be regulated in that the amount of

discretion can guide what and how regulation can occur in practice. Regulation and discretion can be considered opposing but complementary in that each needs the other to exist, yet they do often work in contrast to the other. Thus, I will be adopting a definition of regulation that can be considered from a top-down and bottom-up perspective (Hupe and Buffat, 2014) and that can be considered the opposite of discretion (Munro & Gilligan, 2013). Furthermore, this discussion builds upon the discussion from Chapter 6 about the public-private divide such that matters that fall more within the public sphere are more regulated compared to matters that fall within the private sphere (Riggs et al., 2016). Discretion would exist in both the public and private spheres but likely more so in the private sphere where there are less likely to be strict regulations (Benish, Halevy, & Spiro, 2018; Riggs et al., 2016).

7.2.1.1 The legal language of regulation and discretion

Regulation and discretion are likewise examined frequently in legal-linguistic research (Garzone, 2013; John, 1999; Kimble, 1992; Samuels, 2020; Williams, 2013a; Williams, 2013b). Much of the discussion in legal research dissects the legal writing conventions that have emerged to indicate regulation and/or discretion (Garzone, 2013; Kimble, 1992; Samuels, 2020; Williams, 2013b). Several researchers have examined the use of ‘must’, ‘may’, ‘shall’ (Garzone, 2013; Kimble, 1992; Samuels, 2020), and ‘as reasonably practicable’ (Maguire, 2006), while others still have examined the tenses and verbs used in legislative texts (Williams, 2013a; Williams, 2013b). Researchers have overviewed that, ‘must’, ‘imposes an obligation of an agent to which completion of action is entrusted’ (Garzone, 2013, p. 75) thus presenting a ‘duty’, while ‘may’ has ‘...an inherent ambiguity...in one sense, it indicates a permission to do something: in another a duty’ (Samuels, 2020, p. 91). Samuels (2020) expands on this point by arguing that ‘may’, while expressing discretion, could also be considered to ‘impose a duty’ (p. 95). Further to this point, ‘may’ could likely serve as a word that could alter legal interpretation. Yet, ‘may’ can be interpreted based on a duty, if it places ‘a duty to exercise the power, the discretion’ (Samuels, 2020, p. 93). Thus, there is the potential that ‘may’ can offer a choice between alternatives (e.g., court orders) but not if the order is to be made at all (Samuels, 2020).

By contrast, more research has seemed to focus on the use of ‘shall’ in legislation, particularly that shall, ‘suggests the future, no more. But ‘shall’ may go further, [and] may suggest in the future a duty...’ (Samuels, 2020, p. 91) that, ‘inherent in the general meaning of shall that it does not only formulate an obligation, but carries with it the presumption that fulfilment of action is guaranteed’ (Garzone, 2013, p. 78). Samuels’ (2020) discussion of legal interpretation is specifically in relation to English law and Garzone’s (2013) is in

reference to UK legislation. An example from Scottish law of ‘shall’ creating a duty would be subsection four of section 17 (Duty of local authority to child looked after by them) in the 1995 Act. This is in relation to that ‘the local authority shall have regard so far as practicable’ such that the local authority has a duty to consider all who are listed to have regard to but are only required to do ‘so far as is practicable’.

Moreover, the use of ‘shall’ has been criticised as being subject to ‘misuse’ (Kimble, 1992) and/or having potential ambiguity in indicating a duty when there is ‘no obligative force’ present (Williams, 2013a, p. 359) such as in the case of definition provisions. Section 17(4) of the 1995 Act is an example of a general duty, that has a ‘get out clause’ that means it will not necessarily be applied. In the case of Section 17(4), the phrasing is ‘so far as is practicable’. In the sub-section just above, Section 17(3) uses a slightly different phrase ‘so far as is reasonably practicable’ in relation to the earlier process of ascertaining views. Both of these are examples where a duty is qualified, so it does not have the strength of an absolute requirement, although typically has been included to recognise particular circumstances and to allow for certain discretion.

I will present this case in examination of a policy excerpt (see [Section 7.3.2.1](#)), but like ‘must’, ‘may’ and ‘shall’, ‘so far as is reasonably practicable’ is another way (that is of relevance to this chapter’s discussion) in which regulation and discretion can be expressed but with the noted caveat of the underlying legal writing conventions that pervade throughout. ‘So far as is reasonably practicable’ presents another point in which regulation and discretion emerge in the legal language. This has been clarified by Lord Reed in the case of *West Lothian v. B* in relation to section 84(5) of the 2007 Act, where it states,

- ‘Before making a permanence order, the court must –
- (a) after taking accounts of the child’s age and maturity, so far as is reasonably practicable –
 - ...
 - (b) have regard to –
 - (i) any such views the child may express’

Lord Reed clarifies that, ‘Subsections (a) and (b) (i) impose duties in respect of ascertaining and considering the views of the child, so far as is reasonably practicable. In the present case, given the very young age of the child, those duties did not arise’ (p. 3). Thus, the duty and obligation of ascertaining and considering the child’s views is dependent on the discretion of the one implementing the policy or law in whether it is practicable.

7.2.2 Participatory Opportunities

Regulation and discretion can likewise be considered in the context of children’s participation. Much of the research in this area has considered discretion on the part of

professionals facilitating children's participation (Berrick, Dickens, Pösö, & Skivenes, 2017; Berrick et al., 2015; Pinkney, 2011; Polkki, Vornanen, Pursiainen, & Riikonen, 2012; van Bijleveld et al., 2015). Yet, this research particularly in social work practice, often mentions discretion quite fleetingly and not often in relation to how it is regulated (Berrick et al., 2015). Other research has likewise discussed the role in mandating participation within legislation (Lundy et al., 2013). This relationship between regulation and discretion of participatory opportunities and practices is particularly interesting considering other frequent discussions alongside regulatory and discretionary practices. This consideration will be examined across the four system areas and placement types and care orders next.

7.3 Child Protection and Permanence System

7.3.1 CPS

7.3.1.1 Regulation and Discretion

Regulation and discretion differ across the system areas that the policies encompass, with the legislative level one documents of the 2011 Act and 1995 Act offering the most regulated approach, yet this varies specifically depending on the care order. For level one documents, for section 25 orders, in section 17 (Duty of local authority to a child looked after by them), in subsection 4 of the 1995 Act, it states that,

In making any such decisions a local authority shall have regard so far as practicable—
 (a) to the views (if he wishes to express them) of the child concerned, taking account of his age and maturity;
 (b) to such views of any person mentioned in subsection (3)(b) to (d) above as they have been able to ascertain;

In this excerpt, discretion can be noted through phrases such as, '...a local authority shall have regard so far as practicable...', can be considered comparable to Lord Reed's interpretation of the phrasing of Section 84(5) of the 2007 Act (as discussed earlier, see [Section 7.2.1.1: The legal language of regulation and discretion](#)), the addition of 'shall' ahead of this phrasing cements this as a duty dependent on the local authority's discretion of (a) and (b).

In extrapolating on this point, in the seminal case of *Shields v. Shields* (2002) through the Court of Session (Inner House, Extra Division), I can further examine this idea of what practicable means in relation to children and young people's participation and where there is room for discretion. This is a family law case but can still help in potential interpretations. One of the most important determinations from this latter case is in relation to *how* children should be granted participatory opportunities, rather than *if*. For instance, the decision states in relation to section 11 (Court orders relating to parental responsibilities etc.), subsection 7 of the 1995 Act that,

But, if, by one method or another, it is ‘practicable’ to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that method. What weight is thereafter given to such views as may be expressed is, of course, an entirely different matter. (Paragraph 11, Law Report 246)

Moreover, section 11(7)(b) of the 1995 Act states that,

Taking account of the child’s age and maturity, shall so far as practicable-

- (i) give him an opportunity to indicate whether he wishes to express his view;
- (ii) if he does so wish, give him an opportunity to express them; and
- (iii) have regard to such views as he may express.

Shields v Shields is an authoritative case, in interpreting what is ‘practicable’ in ascertaining children’s views. It sets a low threshold for practicability – any one method would give the child the opportunity to express their views. Discretion for an individual practitioner is less about whether a child should be supported to express their views, but the way that support is given. I would additionally like to note that the phrasing in other parts of the 1995 Act, relevant to my analysis, sometimes uses the phrase ‘so far as reasonably practicable’. It is possible that the inclusion of ‘reasonably’ raises the threshold somewhat, in such methods needing to be ‘reasonable’ (e.g., feasible, not too costly or time consuming). The difference between ‘practicable’ and ‘so far as is reasonably practicable’ has not been authoritatively decided in reported Scottish case law.

By contrast, for CPOs, in section 27 (views of the child) of the 2011 act, in subsection 2, it states that, ‘This section does not apply where the sheriff is deciding whether to make a child protection order in relation to a child’. This is expanded upon in the level two document of the explanatory notes of the 2011 Act, where in paragraph 29 as concerning section 27 (views of the child) of the 2011 Act, it states that, ‘This section does not apply where the sheriff is deciding whether to make a child protection order (CPO) in relation to a child. As an emergency protection measure, it would not be possible to seek the child’s views before making a CPO’ (as I discussed in chapter five). In these above excerpts, compared to section 25 orders, there is a removal of discretion in relation to CPOs. The removal of discretion becomes especially evident through the lack of room for rebuttal since it is not saying ‘*if it would be possible*’, it is saying it *will not be possible*, taking away room for the professional’s discretion.

Moreover, in the above excerpt in Section 27 (2) of the 2011 Act, the language is quite staunch, with little room for flexibility, particularly through phrases such as, ‘This section does not apply...’. Thus, there appear to be various presumptions associated with regulation and discretion and particularly when discretion is allowable and when it is not.

For level three documents, in the 2009 regulations, in regulation 4 (Assessment), subsection 2, it states that,

In making an assessment under paragraph (1) the local authority must, where appropriate, seek and take into account the views of-

- (a) the child, taking into account of their age and maturity;
- (b) the child's parents;
- (c) any person with parental responsibilities or parental rights in respect of the child; and
- (d) any other person as the authority consider appropriate.

In this excerpt, discretion (of individuals and/or local authority) can be found through the various addenda sprinkled throughout (including 'where appropriate...', 'taking into account of their age and maturity' and 'as the authority considers appropriate'). This mention of 'appropriate' offers a degree of discretion by the local authority, raising questions about how this 'appropriateness' is determined. This discretionary use of what the local authority determines to be appropriate can build upon my earlier discussion in relation to this excerpt concerning vulnerability and timing in the CPS area. More explicitly, the 'timings of childhood' as personified through the age of the child can be related to how the child's views are weighted and thus deemed to be appropriate by the local authority. Younger children are more likely to be perceived as more vulnerable (Zeijlmans et al., 2019) and thus their views would be more likely to be considered as having a lower weight and to be less appropriate to be acquired than older children and young people.

For level four documents, to illustrate a different decision within this area of the protection system, in relation to Child Protection Case Conferences (CPCC), in section 387 of the 2014 National Child Protection Guidance, it states that,

The function of all CPCCs is to share information in order to identify risks to the child collectively and the actions by which those risks can be reduced. The participants should maintain an outcome-focused approach...

This excerpt from the 2014 National Child Protection Guidance, though not about children's views, is expanded upon in section 415 of the 2014 National Child Protection Guidance in relation to CPCCs,

It is crucial that the child's or young person's views are obtained, presented, considered and recorded during the meeting, regardless of whether or not they are present. Where the child is disabled, consideration should be given to whether they will need support to express their views.

The language alternates in the first excerpt from decisive ('The function of *all* CPCCs') to more discretionary even with stronger language such as 'should' (The participants *should* maintain an outcome-focused approach') (italicised emphasis added). This suggests that the level of discretionary space would influence all the CPCCs and thus the potential for

participatory opportunities for children and young people. However in the second excerpt, the language at the start is decisive with statements like, ‘It is crucial that the child’s or young person’s views are obtained...’ and continues with mandatory language such as ‘should’ (Where the child is disabled, consideration *should* be given to whether they will need support to express their views), suggesting that the discretionary space exists such that consideration needs to be given in relation to children and young people with disabilities and not to children and young people more generally.

In level five documents, in the GIRFEC and UNCRC document (Aldgate, 2013), on page four, it states that, ‘[GIRFEC] is an approach that aims to improve outcomes for all children and young people, in line with the Scottish Government’s policy aims for children’. Much of the discretion throughout this system area is underpinned by these aims. For level five documents, in the 2013 UNCRC and GIRFEC document, regulation and discretion are not as noticeable (which is perhaps notable in itself) but is likely more indicative of the change in language between legislative and guidance documents.

7.3.2 CHS

7.3.2.1 Regulation and Discretion

For level one documents, in section 27 (views of the child) of the 2011 Act, subsection 3, it states that,

The children’s hearing [, pre-hearing panel] or the sheriff must, so far as practicable and taking account of the age and maturity of the child-

- (a) give the child an opportunity to indicate whether the child wishes to express the child’s views,
- (b) if the child wishes to do so, give the child an opportunity to express them, and
- (c) have regard to any views expressed by the child.

The language in this excerpt is regulated by using phrases such as ‘the sheriff must’, and ‘so far as practicable and yet it is more discretionary through the phrase of ‘taking account of the age and maturity of the child’, making the discretion surrounding opportunities for children and young people’s participation, regulated and thus qualifying the ‘duty’ (Williams, 2012).

For level two documents, this point is elaborated upon in the 2011 Act explanatory notes, in section 29 as concerning section 27 (views of the child) where it states that,

This section is based on section 16(2) of the 1995 Act and provides that the Children’s Hearing or sheriff must, so far as is practicable, give the child the opportunity to express their views, and take those views into [account] in coming to decisions.

In this excerpt, the discretion is not to grant such opportunities (i.e., to give the child the opportunity to express their views), but rather that exceptions are permitted (i.e., so far as is

practicable...[to] take those views into [account] in coming to decisions’). These ‘exceptions’ introduce the discretionary element for the professional and/or local authority. This can be seen particularly through the use of ‘must’ alongside ‘so far as is practicable’, yet the removal of ‘reasonably’ from the latter seems to indicate the threshold has less room for discretion than previous iterations.

Many more of the decisions in this area are confined to the latter levels, which is perhaps indicative of where the evidence of discretion is most likely to be found. For instance, level three (regulatory and/or statutory instruments) and four (guidance) documents in this area primarily dictate the regulations and guidance as relating to specific types of placements (e.g., being looked after at home and being looked after away from home). In regulation 34 of the 2009 regulations, it states that,

- (1) Where a local authority place a child who is looked after by them in terms of section 17(6) of the 1995 Act in a residential establishment they must, as soon as reasonably practicable, provide notification of the placement to-
- (a) the local authority for the area in which the residential establishment is located if different from the authority making the placement;
 - ...
 - (c) each parent of the child; and
 - (d) any person with any parental responsibilities or parental rights in relation to the child.

By level four documents, in the 2011 Guidance, regarding the Child’s plan in relation to children’s hearings as specified in regulation 5 of the 2009 regulations, it states that, ‘The plan should, wherever reasonably practicable, be based on agreement between the child (where of sufficient age and maturity), the parents, the local authority and any other relevant parties...’ (p. 46). This notion of ‘reasonably practicable’ echoes from the excerpt from regulation 34 of the 2009 regulations and again establishes the low threshold that is placed for discretion (see [Section 7.2.1.1](#)). Lord Reed clarifies this in *West Lothian v. B*, yet there is a difference with the addition of ‘as soon as reasonably practicable’ rather than ‘so far as is reasonably practicable’; namely, here the discretion is not a matter of *if* the individuals listed are notified but *when* they are. This is especially interesting considering it is not in relation to notifying children but the various adults in their life. Thus, there seem to be different types of discretion being permitted depending on who it is concerning. Moreover, since the adults listed are not presumed to be vulnerable as children and young people would be in an equivalent situation, the vulnerability is attached to the *timing* of the situation rather than the individual in question.

7.3.3 Permanence Decision-making

7.3.3.1 Regulation and Discretion

In this area of decision-making, many of the decisions are confined to guidance rather than legislative documents. For permanence decision-making, most of the decisions are confined to level three and four (i.e., regulatory and statutory instruments and guidance, respectively) documents. However, the ‘Post-placement meeting within three days’ is overviewed in the 2011 Act and elaborated upon in the associated explanatory notes (level one and two documents, respectively). In section 137 (duty to arrange children’s hearing), subsection three of the 2011 Act, it states that,

If the review is initiated under section 136 [duty to initiate review when child transferred]⁹, the children’s hearing must be arranged to take place before the expiry period of 3 working days beginning with the day on which the child is transferred’. As discussed in the previous section, this more ‘regulated’ language is paired with discretion through conditions. In this excerpt, the language of ‘must’ leaves little room for discretion, *if* the review is initiated under section 136. By level two documents, in the 2011 Act explanatory notes, in paragraph 207 in elaboration of section 143 (Transfers in cases of urgent necessity) similarly regulated language is used when it states, ‘A hearing to review the compulsory supervision order must be held within 3 days’. In the third and fourth level documents, where most of the decisions within this section are confined, all the decisions are dictated and elaborated upon within the 2009 regulations and the 2011 Guidance. For level three documents, in regulation 45 (review of the child’s case: child placed with kinship carer, foster carer or in a residential establishment) of the 2009 regulations, as concerning the first, second and third (as indicated through subsections a, b, and c, respectively in the excerpt below) looked after children reviews, it states in subsection 2 that,

Subject to paragraphs (3) and (4) the local authority must, by complying with the requirements in paragraph (5), carry out the following reviews of the child’s case:-

- (a) a first review within 6 weeks of the placement;
- (b) a second review within 3 months from the date of the first review; and
- (c) thereafter subsequent reviews within 6 months from the date of the previous review.

Yet, the more discretionary language appears as related to the requirement in subsection 5 of regulation 45 of the 2009 regulations, where it states that,

The requirements are-

- (a) to consult and take into account the views of-
 - (i) the child, taking into account of the child’s age and maturity.

⁹ There are often slightly different wordings for the same ‘post-placement meeting within three days’ as included in the CELCIS (2018) diagram that structures much of my analysis and associated writing.

Like the level one policy excerpts from the CHS section as concerns children and young people's participation, the regulations are used to dictate the discretion to give opportunities for participation as reviews take place after an initial decision has already been made. In this above excerpt, regulatory rather than discretionary language is used with words such as 'must' being employed bringing connotations of 'duty'. I previously considered this excerpt in chapters five and six in relation to vulnerability and temporality (see Chapter 5.3.3.1.1), and capability (see [Chapter 5.3.3.2.1](#)), and active and/or passive conceptualisations of family and public-private spheres (see Chapter 6.4.1.2 and 6.4.3.1), respectively. However, it is likewise useful to discuss in the context of regulation and discretion as exceptions to what is otherwise mandatory practice, such as children and young people's participation, are based primarily on the decision-makers' discretion by 'taking into account of the child's age and maturity' as discussed earlier in this chapter (see Section [7.2.1.1](#): The legal language of regulation and discretion). This distinction between what is regulated and what is up to decision-makers' discretion, within and across policies, leaves much room for discussion. In level four documents, in the 2011 Guidance, on page 111 (in regard to three working day reviews), it states the purpose as being to, '[Obtain] the views of all concerned about the impact on the child of the placement, and in particular to establish the child's views'. In this excerpt, there is no room for discretion with the duty to '[obtain] the views of all concerned' carrying through from the earlier policy levels. Thus, between the two excerpts from subsection 5 of regulation 45 of the 2009 regulations and page 111 of the 2011 Guidance, discussions and mentions of children and young people's participation are regulated and/or discretionary depending on the type of policy (regulations versus guidance). However, guidance documents are also more discretionary by nature than regulations or other legislation due to the fact that they hold less statutory weight.

7.3.4 Legal Permanence away from home

7.3.4.1 Regulation and Discretion

For this section, I will focus on the presence and use of regulation and discretion within the legal permanence away from home area of the broader system. In this area, participatory opportunities appear to be regulated alongside care within the policies rather than solely dependent on the discretion of the decision-maker.

One of the primary decisions as dictated within level one documents within this area of the system, is the decision to pursue POs as stipulated in section 80 and 84 of the 2007 Act. Section 80 (Permanence orders) states that,

- (1) The appropriate court may, on the application of a local authority, make a permanence order in respect of a child.
- (2) A permanence order is an order consisting of-
 - (a) The mandatory provision,
 - (b) Such of the ancillary provisions as the court thinks fits...
- (3) In making a permanence order in respect of a child, the appropriate court must secure that each parental responsibility and parental right in respect of the child vests in a person.

In this excerpt, the language is comparatively more discretionary compared to the more regulated language surrounding the previous system area. This more discretionary language can particularly be seen through the use of ‘may’ at the start. This can further be noticed in recognising that compared to CPOs and section 25 orders and even CSOs, POs are not necessarily an inevitable part of a care journey, but a possible option should an alternative and formalised option for legal permanence be needed.

The decision to reverse a PO is stipulated within the level one document of the 2007 Act and the level two documents of the associated explanatory notes and policy memorandum. For instance, section 104 (Permanence orders: rules of procedure) of the 2007 Act, states that,

- (1) Provision may be made by rules of court in respect of-
 - (a) applications for permanence orders,
 - (b) applications for variation, or revocation, of permanence orders,
 - (c) applications for leave to apply for such variation or revocation.

In the 2007 Act explanatory notes, these points are elaborated upon, particularly in section 347, where it states,

These people must be notified that the application has been made; of the date on which and the place at which the application will be heard; that the person is entitled to be heard on the application; and that the person does not need to attend the hearing if they do not wish to do so, unless required by the court...

In these two excerpts, the language varies depending upon the aspect of the appeal process such that while provisions *can* be made, if they are made, certain individuals must be notified of that fact. This appears to indicate how the discretion in one component of policies can stipulate stricter regulations in adjacent and/or later respects, particularly by dictating who must be informed (and thus be granted a basic level of participation).

By level three documents, the 2013 Children’s Hearing Procedures is the main source of regulation in this regard. Regarding the children’s hearings advice and review (which is compulsory when subject to a CSO), the presence of more regulated language, as opposed to one with more discretionary space, offers insights into what is viewed as part of the ‘public’ representation of the problem. For instance, in section 40 (Arranging a children’s hearing

under section 50 [children's hearing to provide advice to sheriff in relation to application] of the Act), it states that,

- (1) Where a hearing is to be arranged under section 50 of the Act, as soon as practicable after determining to arrange the hearing the Reporter must notify the persons mentioned in paragraph (2) [including the child and relevant persons] of the date, time and place of the children's hearing.

In this excerpt, the relationship between regulation and discretion has again shifted; here the opportunity for participation ('notify[ing] the persons mentioned...') is regulated and not based on the Reporter's discretion, particularly through the duty associated with 'must' (Samuels, 2020). Instead, the discretion is based around the timing of notifying (e.g., 'as soon as practicable'), which seems to offer a different type of discretion compared to the earlier mentioned 'as soon as reasonably practicable', where the latter seems to imply a greater degree of discretion. In building upon this excerpt, section 72 of the 2013 Children's Hearing Procedures (Procedure where hearing held by virtue of section 50 [children's hearing to provide advice to sheriff in relation to application] of the Act, states that,

- (2) The chairing member-
 - (a) must inform those present at the beginning of the hearing of the substance of any relevant report or other relevant document;
 - (b) must take all reasonable steps to obtain the views of the child, each relevant person and any appointed safeguarder in relation to-
 - (i) any report, document or matter being considered by the hearing; and
 - (ii) what, if any, advice would be in the best interests of the child;

Similar to the prior excerpt from section 40, the relationship between regulation and discretion appears to be continuing in a similar thread compared to excerpts from other areas of the system. Compared to the two excerpts above, section 65 of the 2013 Children's Hearing Procedures (Procedure where report required under section 141 [preparation of report in circumstances relating to permanence order or adoption] of the Act, there appears to be a shift in language to a more regulated approach, particularly as relates to how the procedures are or can be explained to the children and young people involved. It states that,

- (1) ...the chairing member must-
 - (a) explain to the child and each relevant person the purpose of the report to be prepared;
 - (b) inform the child and each relevant person of the substance of any document or information which is material to the advice to be contained in the report to be prepared by the children's hearing.
- (2) Before preparing the report the children's hearing must subject to sections 73, 74, 75 and 79 of the Act-
 - (a) discuss the case with the child and each relevant person and any safeguarder appointed;

(b) seek the views of the child, each relevant person and the safeguarder on the arrangements which would be in the best interests of the child; Again, in this excerpt, the opportunities for children and young people's participation are regulated rather than discretionary by the word 'must' and not just to 'inform' the child but also in 'seek[ing] the views of the child'. This latter point is based on the conditions of sections 73, 74, 75 and 79 of the 2011 Act (related in part to the Child's duty to attend children's hearing) but still presents a more regulated approach to children and young people's participation compared to the other system areas.

By level four documents, the 2011 Guidance provides elaboration on most of the decisions confined to this area of the system. For instance, regarding the decision-making underlying the permanence panel in relation to kinship care, on page 151 of the 2011 Guidance (as I stated in the chapter prior), it states that,

In most instances now, however, adoption by kinship carers, who are frequently grandparents, is not the first choice as it can distort family relationships - but at times this may reflect the wishes of grandparents and children. Other forms of securing the placement may be preferable and the agency may direct these to the adoption and permanence panel but other similar independent [fora] may be considered, depending on whether the local authority has other arrangements for overseeing kinship care. This excerpt seems to offer similar insight as to what is stated about fostering panels potentially covering kinship care placements. For instance, the permanence panel is clarified in this guidance to be for permanence and adoption. Thus, it seems that a similar broader interpretation may be applied to fostering panels. This can particularly be seen in the parallels in how each of the panels is presented and the lack of explicit reference to separate and/or distinct kinship care panels.

Moreover, the use of words such as 'should' and 'recommended' seems to imply an element of discretion is expected. For both instances, adoption and permanence and fostering and kinship care do have similarities (including the more permanent state of the former two and the fact that the latter two often emerge from the same care orders). Yet, they are still distinct enough (such as the regulations and supports available to each) to lead to questions of how flexible regulations are or can be to apply to a wider range of matters than is initially declared. If any regulated participatory opportunity is not also specified to be for kinship care, it seems as if it would hold weight more akin to guidance than regulations and would thus seem to occupy varying discretionary and/or regulatory roles depending on the placement.

The 2017 Judgment for the case of *West Lothian v. B* (2017), regarding the appeal process for a PO with authority to adopt focusses on the interpretations of the language

present in section 84(3) to (5) of the 2007 Act as I presented previously (see Chapter 5.4.1.1.1: Vulnerability, age, and [dis]ability). More specifically, in the judgement for the 2017 case stated above, Lord Reed states that ‘section 84(5) is particularly complex. Subsection (a) and (b)(i) impose duties in respect of ascertaining and considering the views of the child, so far as reasonably practicable. In the present case, given the very young age of the child, those duties did not arise’ (Paragraph 10). Thus, this point of ‘reasonably practicable’ is clarified in this instance as primarily centred around the young age of the child, offering insight that early childhood is being situated as an ‘impractical’ age to gain the child’s views. The judge seems to emphasise this by using the adjective ‘very’ ahead of this declaration. Black’s (2017) commentary of the *West Lothian v. B* (2017) case clarifies this apparent discrepancy. Black (2017) distinguishes between consent and obtaining their views, such that in section 84(1) of the 2007 Act, consent of children aged 12 and older is required when pursuing a PO, but that the latter subsections of section 84 concern obtaining the views of children and young people. Specifically, Black (2017) notes that, ‘the views of a child under 12 may also be relevant, depending on the age and maturity of the child: but there is no need to obtain consent from a child under the age of 12’ (p. 173). Thus, while obtaining *consent* of children and young people over the age of 12 is required, obtaining the *views* of the child or young person is more discretionary in *how* it is achieved. Despite this being a likely later area that a child and/or young person could experience in their care journey in the broader child protection and permanence system, it is interesting to note that this condition of age carries throughout the entire system as a way to justify the discretion to include or exclude a child or young person in decision-making. Furthermore, it likewise leads to questions of whether age is a qualifier for ‘certain’ children as presented for the level one and two documents (legislation and explanatory notes and policy memoranda, respectively) and more specifically whether age is a qualifier for participatory opportunities specifically for young children (less than 12 years of age).

7.4 General Discussion and Conclusion

Overall, grounding the themes of this chapter around regulation and discretion offers a way to examine the policies with more critical technicality. In this section, I will consolidate the concluding themes based on what I have already discussed for each system area. There is one primary conclusion that has emerged through my analyses and initial discussion to the policies in each section prior. The theme is: the discourse surrounding age and practicability.

7.4.1 Conclusion and Main Theme

7.4.1.1 Age and ‘practicability’ as a discretionary tool for participation

In building upon my discussion in the fifth chapter about how age and ‘capability’ are conceptualised alongside participation, both age and the notion of ‘practicability’ appear to serve another way in which discretion and/or regulation can be justified as concerns how they offer participatory opportunities for children and young people. This is evident in the policies surrounding all the care orders except for CPOs, where there is little to no mention for any participatory opportunities prior to the order being made. I examined this consideration further by scrutinising how this theme emerged within level one (legislation) (for Section 25 orders) and level two (explanatory notes and/or policy memoranda) documents for the remaining three orders. In this context, discretion appears to be given the status of a privilege and thus seems to reflect more of the ‘discretion as granted’ of Hupe and Buffat’s (2014) conceptualisations of discretion. There still appear to be some more subtle differences even where discretion is evident as dependent on the age and ‘practicability’ for the remaining three care orders as emerged in my analysis. For instance, as discussed in 7.3.4.1: Regulation and discretion, the primary distinction for the remaining three care orders appears to exist between POs and the remaining two orders of Section 25 orders and CSOs. For POs, the participatory opportunities are particularly specified in section 84 (Conditions and considerations applicable to making of order) of the 2007 Act where it states in subsection (1) that, ‘Except where subsection (2) applies, a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents’. Discretion appears in subsection two where it states that, ‘...unless the court is satisfied that the child is incapable of consenting to the order’.

In this latter area, discretion is presented as a reason *not* to offer participatory opportunities compared to CSOs and Section 25 orders where discretion is presented as a reason *to* offer participatory opportunities. Age and ‘practicability’ as discretionary tools for participation also appear very much dependent on the type of placement and the area of the system where the decisions are currently being made. For instance, these discretionary tools seem primarily to be confined to Section 25 orders and CSOs, where the caveat of ‘taking account of his [the] age and maturity [of the child]’ in sections 17 of the 1995 Act regarding section 25 orders and section 27 of the 2011 Act in regard to CSOs, respectively, appears to help demonstrate how discretion is employed in this regard. By contrast, there is no discretion as related to age and practicability for CPOs, while for POs, age and discretion appear to occupy different roles. Depending on the section concerning POs, the language

surrounding children and young people's participation tends to be more regulated, with discretion being restricted to *when* (for the child but not necessarily the procedures) rather than *if* the opportunities would occur but seemingly only for older children. In the case of *West Lothian Council v. B* (2017), the child's 'very young age' is used as a reason within the judgement for discretion not to obtain their views. Thus, age and practicability are often employed as discretionary tools (except in cases where no participation is allowed prior to a care order in the case of CPOs) even in situations where participatory opportunities seem more regulated (in the case of POs).

7.4.1.2 Conclusion

In conclusion, as I have illustrated and discussed throughout this chapter, regulation and discretion are utilised and present throughout the policies, system areas, care orders and placements. Such an examination offers another way to consider how participation and protection are and can exist within the policies. By utilising Bacchi's analytical approach, especially in consideration of the underlying assumptions and the importance of what is not stated, I was guided to explore critically how regulation and discretion can be examined within policies through both their presence and absence. The main concluding theme that I highlighted across the four system areas is: age and 'practicability' as discretionary tools for participation.

Overall, the theme of age and 'practicability' as discretionary tools for participation incorporates the themes from the previous chapters of vulnerability and timings of childhood, active and passive conceptualisations of children alongside 'practicability' and discretion of participation. There are likewise implications from this theme of how this might intersect with other intersectional characteristics of children and young people that might conflate the practicability associated with age. This can include the ability or disability status of the child or young person.

Chapter 8: Discussion

8.1. Introduction

This chapter summarises my findings by specifically answering each of this Ph.D. project's research questions and providing a space for a more general discussion. Moreover, this summary lays the foundation for the concluding chapter (Chapter 9) wherein implications relating to future policy and practice, research and theory will be presented and discussed. More specifically, there is one main research aim and three main research

questions that drive this Ph.D. project, each of which I will answer in this chapter (with references to where further details can be found in the findings' chapters).

Overall, my thesis' topic is a rich one that encompasses several contested concepts (that were reflected both in my own readings and analysis, but also in the 'sense-checking' seminars that I conducted) and so my findings and conclusions reflect this contestation. I will be incorporating excerpts from the 'sense-checking' seminars throughout this and the concluding chapter.

8.2 Summarising findings to answer research questions

8.2.1 *Research Aim*

First and foremost, for clarity and convenience, the research aim of this Ph.D. project is as follows:

This Ph.D. project aims to investigate and explain the presence and absence of children and young people's participation (as a concept) in policies across the care pathways of being looked after in Scotland. This Ph.D. project's research questions are:

1. What are the legislative requirements for children and young people's participation, from initial referral to permanence (while still being considered looked after)?
2. How are these requirements related to how children and young people being or becoming looked after are conceptualised and problematised within policy?
3. Considering the policies and their wider context, how are the conceptualisations of children and young people's participation impacted by the type of care order and placement?

8.2.2 *First Research Question*

I sought to answer the first research question by mapping if and how participation exists across the policies examined. As I have noted and as was mentioned in my 'sense-checking' seminars, looked after children and young people's participation is often discussed in general and encompassing terms. This is evident in the child care, protection and permanence system in Scotland where children's participation is frequently presented as an overarching principle. For example, Section 16 and 17 of the 1995 Act and Section 27 of the 2011 Act provide general requirements for participation that persist regardless of the care pathway. Overall, in summarising my discussion from Chapter 4 (Initial Findings), opportunities for children and young people's participation exist across the protection and permanence system in Scotland.

In answering this research question, through my analysis, it has become clear that certain *specific* requirements (what they are and where they exist) for children and young

people's participation are very much related to where in the 'looked after' care pathway a child or young person might be. For instance, there are different goals for the different system areas. In these system areas, children or young people who are or are at risk of becoming looked after are treated as particularly vulnerable, whether due to their younger age or perceived imminent risk, within particular areas in the system areas (i.e., CPS, CHS) over others (permanence decision-making and legal permanence away from home). Thus, understanding the specific details surrounding the pathways (via the system areas, care orders and pathways) and participation is necessary. These opportunities vary in both extent and type, depending on if and how vulnerability, capability, passive and/or active conceptualisations of family and notions of public and private spheres are incorporated into the considerations surrounding these participatory opportunities. I have summarised the legislative requirements for children's participation across the system areas, care orders and placement types in their respective tables below.

Table 5. Legislative Requirements of Children and Young People's Participation Across System Areas.

System Area	Legislative Requirements (where participatory opportunities are present) ¹⁰
CPS	<p>This is in relation to decisions pertaining to the:</p> <ul style="list-style-type: none"> • case discussion, • child’s plan meeting, • monthly core group meetings, • recurring three- and six-monthly reviews, • child protection investigation, • child protection case conference meetings, • development of the child’s plan (see Chapter 4.3). <p>Across this system area, children’s and young people’s participation (defined as how children are seriously regarded in decision-making in addition to earlier ‘levels’ of participation, including that they are informed, and that the participation is an ongoing process) is discussed for all these primary decisions within the policies.</p>
CHS	This is in relation to decisions pertaining to the:

¹⁰ For a reminder, I have previously defined participation in Chapter 2.4.1.

	<ul style="list-style-type: none"> • reviews of the child’s case for a ‘child cared for by parents or persons with parental responsibilities’ [Regulation 44 of the 2009 Regulations], • children looked after away from home, in terms of the plan for a child looked after at home on page 54 and subsequent reviews specified on page 134 of the 2010 Guidance document for the 2007 Act and 2009 Regulations, • compulsory measures of supervision, • Pre-hearing panel (including section 48 of the 2013 Rules of Procedure) • grounds hearings (including section 90: Grounds to be put to child and relevant person(s) of the 2011 Act), • reviews of approval of foster carers and/or placements and/or the child’s case. <p>- Beyond this, there are general principles (including section 27 of the 2011 Act based upon section 16(2) of the 1995 Act regarding children’s participation) [see Chapter 4.3.1].</p>
<p>Permanence Decision-Making</p>	<p>- Children and young people’s participation is mentioned particularly in relation to:</p>

	<ul style="list-style-type: none"> • reviews of the child’s case regarding the ‘recommendation for permanence away from birth parents’ and • the ‘local authority decision to pursue permanence away from birth family’. <p>- Participation is mentioned minimally compared to CPS (see <u>Chapter 4.3</u>).</p>
Legal Permanence Away from Home	<p>- There are few specific mentions of children’s participation with there being only mentions in relation to the children’s hearing advice and review. There are also mentions of children and young people’s consent in section 84 of the 2007 Act (See <u>Chapter 4.3</u> for further details).</p>

Table 6. Legislative Requirements of Children and Young People's Participation Across Care Orders¹¹.

Care Order	Legislative Requirements
CPO (with the goal of emergency protection)	There are few mentions of participatory opportunities prior to a CPO being made.
Section 25 Orders (with the goal of temporary and voluntary assistance)	There are inconsistent mentions of participation and there is a lack of mentions prior to a Section 25 order being issued.
CSOs (with the goal of longer-term protection)	Within the legislation, there are fewer explicit mentions of participatory opportunities compared to Section 25 orders, but they are mentioned in section 27 (views of the child) of the 2011 Act.
POs (with the goal of permanence)	<p>Within the legislation, there are few mentions of participatory opportunities.</p> <ul style="list-style-type: none"> - There are mentions in section 84 of the 2007 Act but related to children and young people's consent as opposed to only listening to their views.

Table 7. Legislative Requirements of Children and Young People's Participation Across Placement Types¹².

Placement Types	Legislative and adjacent policy requirements
Looked after at home	There are few mentions of participation within the legislation, but there is some mention within the Guidance documents, including in the 2011 Guidance regarding 'the objectives of the home supervision

¹¹ This is beyond the general considerations for participation that apply to all looked after children.

¹² As above, this is beyond the general considerations for participation that apply to all looked after children.

	requirement'. Children or young people looked after at home are also be covered by requirements relating to participation in the children's hearing system (see Scottish Government, 2011; SCRA, 2019).
Foster Care	There are more mentions of participation compared to looked after at home placements, but often in relation to informing children and young people and/or in relation to reviews.
Kinship Care	There are fewer explicit mentions of participatory opportunities compared to foster care.
Residential Care	There are more mentions of participation (compared to kinship care), particularly within the guidance.
Secure Care	There are minimal references to participation specifically for secure care.

These findings present a nuanced view of participation, in that opportunities for participation are not applied consistently across the policies. These findings likewise echo research conducted by Marshall et al., (2002) in their mapping of the 1995 Act, in that despite the general considerations of children's participation that exist,

The overarching principle of due regard to a 'looked-after' child's views is determined by the definition of a 'decision'. A 'decision' presumably covers making care plans and placements, reviewing care plans and terminations of placement – but how comprehensively? (p.19)

Moreover, the same researchers likewise specify that while the general considerations for children's participation apply to all children and young people who are looked after, it suggests that when children and young people are 'in emergency protection situations [they] will fall outside the definition of 'looked after'' (Marshall et al., 2002, p. 18) as the emergency protection situations may exist prior to a care order that can designate a child or young person as being looked after (such as prior to a CPO being made).

I explored this nuance within my sense-checking seminars, such that, I found that different professionals use and engage with policy in different ways, and for different

purposes. These insights start to bridge the differences between policy as stated and how it is implemented and practiced. Policy professionals often focus on the necessity of participation, while social workers view participation as an ideal but not always practical in practice. For instance, one social worker, Madeleine¹³, succinctly noted this point by stating that,

I think it's quite interesting about what you're saying and I think that sometimes within legislation, do you know we have this guidance and stuff like that and we all we would ideally like to get every child's views and stuff like that, but very much as kind of you were speaking about like the age appropriateness of the child but it depends on a child's kind of development, all their trauma or that kind of things.

Three main points can be gleaned from this quotation. The first, is the complexity associated with children and young people's participation in proceedings, in practice, that is mirrored in the literature (Dillon, 2021; D'Cruz & Gillingham, 2017; Healy & Darlington, 2009), such that a response related to children's and young people's participation does not always seem realistic in practice to front-line workers. The second, is the mention of children and/or young people's 'trauma' in the above excerpt which can be linked to conceptualisations of vulnerability (see [Chapters 2 and 5](#)) and how the mention of development can be linked to the age of the child or young person and err towards prioritising protection, rather than balancing it with participation. This point regarding trauma echoes the literature of the 're-traumatisation' of child protection systems (Strand & Sprang, 2018) and suggests the focus as being on protection (Kosher & Ben-Arieh, 2020b) as distinct from participation rather than each helping the other (van Bijleveld et al., 2015). Moreover, this 're-traumatisation' focusses on the children and/or young people's potential for enhanced vulnerability by being part of the child protection and/or permanence system, while still potentially being vulnerable and/or traumatised from the experiences that led the children and young people to being looked after. The third point is the implications for practice, such that many factors contribute in practice to how participation can proceed.

In another 'sense-checking' seminar, a different social worker, Marie, offered an adjacent view and expanded on it, by stating that,

...and in an emergency situation. You're right. How often do we stop in that situation and say to the young people or how often are we able to when you're taking a child protection order because you then got to be careful...I always just felt that might create further risk. Therefore, you might not be able to speak to the young person in that way. However, I would also hope that social worker would know the young person well enough. Maybe to already have known what their views [are].

Despite these potential constraints surrounding situations where these decisions would arise, this seems to point more toward the ongoing nature of participation, as can be illustrated by

¹³ All names of participants are pseudonyms.

the broader policies about participation (including the general considerations of participation that are present in Section 27 of the 2011 Act and Section 16 of the 1995 Act). Yet, this excerpt also seems to indicate that it is not always clear if children and young people are given opportunities to participate and the social workers' discretion plays an important role in whether they view it to be appropriate for a child or young person who is or has already been at risk. Thus, even though it may be difficult and is not necessarily stipulated within policies, there could very well be participatory opportunities for children and young people prior to the emergency order being issued (such as in the child protection investigation or in the case discussion and child's plan meeting). This leads to more thorny questions of how it can be determined that one decision is complete and another one has begun (and whether decisions should be distinguished in such a way). Previous literature has engaged with this concern (Tisdall, Marshall, Cleland, & Plumtree, 2002) regarding 'what counts as a decision?' (p. 396) in practice, particularly in relation to the general considerations for children's participation that are present in the 1995 Act (as discussed earlier in this section). Moreover, previous research has additionally considered decision-making in practice at specific points, including in child care reviews (Roesch-Marsh, Gillies, & Green, 2017; Kendrick & Mapstone, 1989; 1991), children's hearings (McGhee & Waterhouse, 2002; Waterhouse & McGhee, 2002) and child protection case conferences (Bruce, 2014). Yet, despite considering that in practice, it seems that there is not further clarity of 'what counts as a decision' in the context of the 1995 Act and beyond.

As legislation and policy documents must operationalise decisions to lay out what is expected and not, they set a standard of attaining views and engaging in decision-making at specific times. However, these decisions are less concrete in practice and more part of an ongoing process and relationship with the child or young person and their family (as was mentioned and/or alluded to throughout my 'sense-checking' seminars). This excerpt also helps to link my points of urgency and vulnerability of how social workers are very (justifiably) wary of offering participatory opportunities to children and young people in more urgent situations. In such urgent situations, the child and young people are more likely to be particularly vulnerable, especially indicated by the mention of 'creat[ing] further risk' by speaking with the children and young people. Thus, perhaps viewing participation as not the opposite of protection, but an important part of it, could help to remedy its ongoing nature (Morrison, Tisdall, & Callaghan, 2020a; Tisdall et al., 2021).

Furthermore, in response to my comment that there seem to be few mentions of opportunities for children and young people's participation when they are looked after at

home or otherwise with family, one of the policy professionals, Owen, took a similar view, in stating that,

So, there's clearly some sort of issues happening and to what extent is that child's voice centred or grounded and encouraged...But nobody spells it out and says considering it's in the family it's ok...it's assumed, and I think it's really exactly what you've done is really interesting it raised up these things that I think are really worth saying. Oh well, shouting out and say, you know, actually...maybe that's not OK maybe that's not right. And we do tend to, I mean being Scotland, we kind of pat ourselves on the back all the time about doing things great and the Scottish way. But it's not always necessarily the best thing that we do.

Thus, this supports the presumption surrounding children and young people's opportunities for participation within the family in that it might not be viewed as necessary for children and young people to have legislated opportunities for participation when things are going well, except when it is not going well, there is a lack of monitoring in how these opportunities are proceeding. This also links back to my previous discussion of the state being wary of overstepping into the private sphere of the family. In contrast to the point above about potentially placing children and young people at further risk by speaking with them, this parallels the point in Chapter 5 that participation is viewed as more unnecessary and/or less appropriate when children and young people are perceived as less vulnerable and still in the care of their parents. Yet, there is a requirement through the UNCRC that children and young people's views must be considered in *all* matters that affect them; however, this requirement seems to be unevenly applied across the child protection and permanence system. Moreover, one of the other policy professionals, Annie, likewise noted this challenge of creating an 'ideal scenario' for participatory opportunities in stating that,

...it's a balance, isn't it? Nothing is an ideal scenario, but I think that's a really helpful point as we move into a place where we might be creating more legislation around this area and how important it is to get the framing around a child's autonomy and about an ability to participate right at that early stage.

One of the policy professionals, Owen, noted in one of my 'sense-checking' seminars,

We have to be mindful of the extent to which we can do this in policy and legislation, because participation is an ongoing process, it can't be a - you do it here and great, you know you've done participation obviously that's not participation almost inherently. And so, it has to be an ongoing process.

These two excerpts suggest the importance of not only situating the policies that I have selected within the broader policy environment, but also in thinking about participation from a wider lens; the ongoing nature should apply not only to how participation is considered for a single situation, but also how one can think about and place participation within the wider system as being a necessary component alongside protection and permanence. Moreover, this

has important implications for practice in thinking about how children's participation exists beyond formal mechanisms such as can be legislated in policies. Yet, as previous research has noted, the formal mechanisms for participation are important components of ensuring its adherence (Berrick et al., 2015) and that, at every level, from legislation to case law and policy development to service provision for children, effective implementation was contingent upon awareness of children's rights' (Lundy et al., 2013, p.456).

The social work manager, Marie, noted that, 'It's about early intervention to stop us get into crisis or so when we get to crisis, we've already got a good relationship. That means that participation is ongoing and has been ongoing'. Thus, it is perhaps indicative of trying to include children and young people earlier so there may not be a need for further, more permanent interventions (as is supported by the GIRFEC documents regarding early intervention, Aldgate, 2013; Scottish Government, 2015). That way, if social work needs to become involved, children and young people and their families would be more expectant of participatory opportunities and so social workers would perhaps be more inclined to use their discretion towards incorporating such participatory opportunities.

Thus, in presenting my findings to a series of professionals, many lamented the difference between the ideal and the actual, pointing towards the value of early intervention and/or ongoing participatory practice. Yet perhaps this focus on participation at an early stage helps to corroborate my points of the value of specific mentions of participation within the policies for children and young people who are looked after. Similar to conversations surrounding informed consent (Mirfin-Veitch et al., 2018, see [Chapter 3.6.4.1: Informed consent](#)), for participation to be truly ongoing, children and young people must have opportunities to participate *throughout*. This would mean having participatory opportunities not only at an early or late stage so that they can clarify when and how children and young people would like to participate at each stage and not just as a general principle.

In summary, in this first research question, I established where and how children and young people's participation can be argued to be present and absent within the policies that I analysed. I considered and answered this question particularly based upon the system area, care order and placement types that relate to a child or young person being or becoming looked after. The complexity of the answers has become especially apparent when considering how these three aspects can and do intersect for children and young people. For instance, while there appear to be more explicit mentions of participation with the child protection system area, when considering that the care orders that exist in these system areas are CPOs and Section 25 Orders, there are more often mentions of participation *after* the

orders are made, rather than before. When considering the potential placements (including kinship care, foster care, residential care, and secure care) that can result from CPOs or Section 25 orders, how participation is presented becomes further muddled when considering that participation exists in different ways across these placements. The next two research questions endeavour to better understand this complexity and messiness in how participation is present and absent across this protection and permanence system.

8.2.3 *Second Research Question*

The answer to this research question permeates throughout my three main findings' chapters, primarily by how the designation of 'looked after' is accompanied by notions of vulnerability and capability (as discussed in [Chapter 5](#)). Moreover, I have examined how conceptualisations of 'looked after' and participation differ depending on the conceptualisation of family (as discussed in [Chapter 6](#)) and how being and/or becoming looked after straddles the divide between the public and private spheres (as discussed in [Chapter 7](#)). This second research question has helped to probe into how the wider conceptual terms as laid out in the policies likewise are related to the legislative requirements and how one can consider conceptualisations of children and young people's participation alongside cross-sectional elements (such as the type of care order and placement type). The notion of being or becoming looked after is a central topic to this Ph.D. and one that provides further limitations on the policies that I selected. This designation of 'looked after' appears to frequently justify the type (or lack thereof) of participatory opportunities that are legislated for children and young people. In summary, to answer this research question, the status (or *potential* of gaining the status) of 'looked after' appears very much related to the vulnerability, power, passive and/or active conceptualisations of family and notions of public and private spheres and the regulation and discretion of participation that are imbued throughout the policies. This (potential) status of becoming looked after appears to serve as an intermediary between these conceptualisations. The policies stipulating decisions that take place surrounding the decisions that lead up to and encompass a child and/or young person as being looked after compared to decisions surrounding potential exits from being looked after are presented in differing ways. More specifically, within the policies there are differences where the requirements for participation exist (whether they are required within the primary legislation or advisable in guidance). There are likewise presumptions surrounding the discourse and propriety of requiring participatory opportunities before an emergency order or CPO is granted (which have limited to no participatory opportunities in the immediate steps of a local authority application for them).

One of the social workers, Emily, whom I spoke with in my ‘sense-checking’ seminars, made note of this wider consideration of looked after children by noting that,

Why should it be called contact¹⁴ with family? Why can't it be called family time? You know, to make it more, should we say in line with children that are not in the care system? And there's other things like, you know, LAC, looked after, you know, looked after child. And they say how it's shortened to ‘lack’ and your child might think, OK, what am I lacking?

This above quotation speaks to the underlying tensions that encompass what being looked after means for both social workers and the children and/or young people in question.

Moreover, it mirrors my earlier discussion in Chapter 2.2 (Operationalising ‘Looked After’ Children) wherein children and young people who are looked after are noted not to like the acronym ‘LAC’ as it connotes that they are lacking something and are instead in favour of the term ‘care-experienced’. This points towards policies needing to use more sensitive language (particularly in relation to family, where policies often include phrases such as ‘contact with birth family’ rather than ‘family time’) so that it may trickle down to become standardised in front-line practice. This quotation also points toward how formal systems such as the child protection and permanence system disrupt how children and young people’s participation exists more innately in family settings where terminology such as ‘contact with family’ is not used. This seems to point toward a risk of ‘over-regulating’ children’s participation to the point that the children and young people’s participation that may naturally exist in a family could be negatively affected (for instance the public and private nature of protection and participation are discussed in the context of family group conferences, see Connolly & Masson, 2014). This observation by Emily points toward the different ways family can be viewed depending on the public and/or private sphere in which the placements and care orders exist and moreover how participation may fit in these different spaces. The public and private spheres exist on a spectrum from private to public where it could be argued that being looked after at home is the placement that exists most firmly in the private sphere (as the most distant from being within the power and control of the state) and that secure care is the placement that exists more firmly in the public sphere (as being the placement that is the most controlled and in the power of the state). Such a spectrum can be considered along the other spectrum I presented in Figure 1 in Chapter 5 in relation to practicability, vulnerability, and capability. All these elements (the care order, placement

¹⁴ ‘Contact’ here is in relation to children and young people looked after away from home still maintaining contact with their birth family via formalised means as prescribed and suggested through legislation and guidance, respectively.

type, private and/or public sphere, being viewed as more or less practicable) are encompassed within this ‘looked after’ designation. Yet, *how* participation is considered varies widely. In considering these findings alongside my discussions from my ‘sense-checking’ seminars, the complexity and nuance surrounding children and young people’s participation is highlighted, particularly in considering the limits of what social workers can do but also where there are opportunities to incorporate participatory opportunities outwith what is written within the policies.

One of the social workers, Marie, discussed this nuance by stating that,

There's, you know, there's children's hearings, there's certain things we can't do. There's, you know there's things we can't bend and negotiate or change. But actually, in order to make their participation more meaningful we've got to make it right for them. So don't take them out of a subject, though, they're worried about missing at school or don't take them out of school if they don't want their friends to know they are looked after.

This latter excerpt points towards the value of regulation and discretion of participatory practices and participation in addition to the practicalities of addressing participatory opportunities. Moreover, it helps to raise the important question of what *should* be regulated and what *should* be up to the discretion of the social worker. This is particular in the way flexibility or freedom that is often associated with discretionary practices (Hupe & Buffat, 2014), can perhaps lend itself more easily towards having participatory practice that allows for adaptation to best suit the child and their needs and preferences (Stålberg et al., 2018, – see Chapter 5.3.1.1.3: Timings of ‘childhood’). Thus, the findings that I presented as relating to this question in my earlier findings’ chapter are further supported from the discussions in my ‘sense-checking’ seminars. The answer to this second research question serves as a catalyst to my third and final research question as will be examined next.

In summary, in this second research question, I focussed on understanding more of the complexities that emerged from the first research question, particularly in relation to the presumptions surrounding being or becoming looked after through these different avenues (via the different system areas, care orders and placement types). Overall, there are different degrees of state involvement depending on how and why a child or young person becomes or is at risk of becoming looked after, which ultimately is related to the types and extent participatory opportunities are present and absent within the policies. Moreover, the amount of state involvement is also related to how vulnerable a child or young people is perceived to be which additionally influences the types of and extent to which participatory opportunities are present and absent as will discussed more critically in the final research question.

8.2.4 Third Research Question

Overall, five main findings that answer this third research question emerged from my analysis concerning the differing ways participation is conceptualised across the care orders, and placement types. These main findings are that:

- (1) *when* children and young people are afforded opportunities for participation depends on how vulnerable they are perceived to be and how dangerous the level of risk is associated with their current situation,
- (2) more participatory opportunities are granted to children and young people considered capable,
- (3) policies sometimes frame family and children as more active and/or passive depending on several factors (including the timing within the system, timings as conditions of participation [particularly how time affects perceptions of vulnerability and the ‘appropriateness’ of participation – see Chapter 5.4.1.1: Time are both a consequence and cause of vulnerability] and the age of the child), and
- (4) there are differences in how the state views the family and children in public and private spheres,
- (5) the policies allow discretion (by social workers and others implementing the policies), which can be exercised based on children and young people’s age and children and young people’s perceived vulnerability and practicability.
 - a. This is specific to Section 25 orders and CSOs, but much less so for CPOs. POs have some discretion but not in relation to a child aged 12 and over and the need for young people over the age of 12 years to consent to a PO.

The first main finding is that the question of capability is not considered in ‘emergency’ situations, where the children and young people’s perceived vulnerability shifts the focus away from participation regardless of how capable a child or young person is viewed. CSOs and POs may take place after a children’s hearing (i.e., wherein a CSO is decided at the hearing), making the timing within the care pathway different from CPOs and Section 25 Orders. Thus, the element of timing both for where in the care pathway the order can exist and whether it is in relation to a situation of ‘urgent necessity’ (Section 143 of the 2011 Act) illustrates the complexity of vulnerability when it is considered alongside system timings. Moreover, this utilisation of vulnerability as a concept within the policies appears to be used as a reason to delay participatory opportunities or leave them to the discretion of the practitioner.

The second main finding is that how children and young people's capability is perceived often serves either to undermine or promote children and young people's power and/or agency. This can be particularly gleaned through the language used in the policy documents (such as on page 27 of the UNCRC: The foundation of GIRFEC document, where it states that, 'As children grow and develop, they become able to act responsibly in relation to others'). This language tends to advocate for an approach that focusses on developmentally traditional considerations that often further highlight the passivity of children and young people that can only be alleviated with age and maturity. As I discussed in my findings chapters (see Chapter 5.3.3.2.1: Power as expressed through discourses of agency and capability) such a view of capability and participation primarily places the onus on the child and/or young person to understand and not on the professionals implementing the policies to adjust depending on the children and young people's perceived capabilities. This leads to questions of what this suggests for children and young people with disabilities and particularly in all the system areas other than permanence decision-making and legal permanence away from home and POs where there is little mention of adapting methods for participatory opportunities based on the children and young people's capabilities. More explicitly, this appears to indicate that children and young people are not being adequately supported to participate in all areas of the Scottish child protection and permanence system (particularly for CPOs, Section 25 orders and CSOs).

The third main finding is that across the system areas of the care and permanence system, within the policies, children and young people are presented in varying active and passive ways. Thus, children and young people seem to be considered more passive if they are involved with the CPS area, while, in the CHS area, passivity seems to be more associated with the age of the children or young people and the type of placement, such that some placements are more likely for certain age groups.

Research on practice supports this point about the age of the child or young person being related to their participation (Griffiths & Kandel, 2000; Kendrick & Mapstone, 1991, 1992; Tisdall, 2018). Younger children, especially those under the age of 12, were noted to attend few child care reviews (Kendrick & Mapstone, 1991, 1992) or were found to be 'too young to understand what was going on [at a children's hearing]' (Griffiths & Kandel, 2000, p. 289). Additionally, some researchers have noted that for younger children who are looked after in Scotland more generally, social workers found the assessment 'language too complex for working with young children' (Wheelaghan, Hill, Borland, Lambert, & Triseliotis, 1999), suggesting a degree of passivity assigned to younger children due to their language and

communication skills still developing. Moreover, Tisdall (2018) and Morrison and colleagues (2020a) both highlight that in a family law context in Scotland, that age of the child is frequently, ‘...used as a shorthand to deny children’s capacity and their competence to participate’ (Tisdall, 2018, p. 170). While this latter research is in a family law context, it seems that the same might carry through in a child care, protection and permanence context, if not more so due to the extent that children and young people who are looked after are considered ‘vulnerable’ (including Punch et al., 2012).

For instance, residential care is more likely to be considered for older children compared to younger ones (2011 Guidance) and very young children (less than two years old) are proportionately more often issued child protection orders (2011 Act Policy Memorandum). This additionally builds on the points in the previous main finding chapter (see Chapter 6.4.2.3: Active and/or passive conceptualisations of children and young people) that children and young people with disabilities are seemingly also considered more passive compared to non-disabled children and young people. This leads to questions of how these factors can intersect (e.g., a young child with a disability in the CPS) to exacerbate their perceived passivity and thus greatly decrease the likelihood of such children being supported to participate throughout. Moreover, how passive or active family is viewed depends on the type of placement and system area where sometimes only the parent or primary carer is consulted and not the wider family (see Chapter 6.4.3.2: Active and/or passive conceptualisations of family). In the CHS area there is a greater focus on ‘relevancy’ compared to the CPS area. By contrast, for the permanence decision-making and legal permanence away from home areas, family is presented in more bureaucratic ways (for residential care and likely secure care) compared to the more floral language frequently surrounding kinship care. This is due in part to the state trying to strengthen assurances for the children and their families that they will both be prescribed formal opportunities to participate. Moreover, the latter seems to indicate that since children and young people in residential and/or secure care may be viewed as more vulnerable, they consequently may not be consulted on their view of family (Mason & Tipper, 2008). The link between allowing children and young people to participate in how they view and construct family seems to be an overlooked area within the policies. Based on previous research (Mason & Tipper, 2008), this would likely enhance how ‘well-matched’ the placement is and how to contribute to ‘defining the problem’ that is rooted within the family (Heimer et al., 2018).

The fourth main finding is that, by viewing placement types on a spectrum - from with family, to family-like as possible, from residential to secure care - there is likewise a

spectrum of how involved the state (public) is with the family (private). For the most private settings (i.e., being looked after at home) and kinship care potentially falling into both public and private spheres, there are often fewer explicit mentions of participatory opportunities especially in primary legislation prior to placements decisions being made compared to more 'public' care settings such as foster care or residential care. While this categorisation of public and private may be argued to be too simplistic, as with any model of a complex policy and practice area such as this, it can be helpful in setting the foundation for initial understanding on which further complexity and nuances can then be more clearly elucidated. Interestingly, for secure care placements, this does not seem to be the case, suggesting that a comparable level of 'vulnerability' exists to what is present in emergency placements (especially considering that for secure care there may also a risk that there is a danger to the public, depending on the child or young person in question).

The fifth main finding is that for the policies at the legislative level (i.e., the 1995 Act, 2007 Act and 2011 Act), the age and maturity of children and young people are frequently used as proxies for their vulnerability and as qualifiers for how capable they are viewed. 'Capability' is primarily considered in relation to CSOs, but not CPOs. The discretion and/or regulation surrounding participatory opportunities for children and young people within the policies is used in a similar way to how practicability and age are used to legitimatise the presence and/or absence of these opportunities. For instance, this discretionary tool of age and practicability is primarily confined to Section 25 orders and CSOs, where the caveat of 'taking account of [the] age and maturity [of the child]' in sections 17 of the 1995 Act regarding Section 25 orders and section 27 of the 2011 Act regarding CSOs, respectively, demonstrates how discretion is employed in this regard. By contrast, there is minimal discretion as related to age and practicability for CPOs and for POs, particularly in the sections specifying that children who are 12 years of age and older must consent before the order can be issued, leaving little room for discretion. This includes section 84 of the 2007 Act where it states '...a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents'. Moreover, this indicates that POs take the opposite extreme compared to CPOs. There is little room for children over 12 years of age *not* to participate in decision-making pertaining to POs, while for CPOs, non-participation is regulated with little room for discretion prior to emergency or urgent situations preceding CPOs.

Through my 'sense-checking' seminars, this research question was particularly pertinent in thinking about the wider context not only of the policies, but also of the topics

and themes of participation and protection. One social worker (Emily) brought up an interesting point in relation to participation in foster care that, ‘It’s the unknown, isn’t it? The child generally doesn’t know the foster carer or where they’re going. So, the child gets less of a say’. In this excerpt, Emily is referring to the fact that compared to kinship care, where children and young people would likely specifically know with whom they would be placed, for foster care, beyond perhaps the general preference for foster care, the specifics of *which* foster carer they would be placed with would likely not be discussed with the child. Thus, there are different opportunities for participation depending on the type of placement. I additionally asked about if and how (the social workers) noted any differences in their own practices across the four care orders and one of them (Marie) noted,

But more of a to-ing and fro-ing and so I think there is in terms of participation because I think power comes into this, doesn't it? And as much as we would not want it to, it's about that power imbalance, balance of relationships we are in you know section 25 a parent has more power, where for a CSO that power comes away from the parents to more of an extent and that's not an ideal in how I think it should be practiced.

This excerpt highlights the power that is imbued in different ways across the care orders and moreover where and how the power might be placed and co-exist (i.e., with the social workers, parents and/or children and young people). This can be contextualised in the practice in Scotland (Emond, 2007; Kendrick & Mapstone, 1992), such that in terms of child care reviews, Kendrick and Mapstone (1992) note that ‘...active participation for young people and their parents is a created space. The boundaries and parameters of that space are controlled by social work staff and this space can be removed at their discretion’ (p. 168-9). For residential care, Emond (2007) discusses the power of adults ‘to include or exclude children from participation...’ (p. 189). Moreover, there has been discussion within the literature pertaining to the movement of children and young people between placements, which has often been a point of criticism included in more recent research conducted pertaining to placement stability of looked after children in Scotland amidst the COVID-19 pandemic (Soraghan, Raab, Troncoso, Treanor, & Porter, 2023). Across all the ‘sense-checking’ seminars that I hosted; all my participants resonated with their reflections from practice in the discussions of my findings. Many of my participants seemed to find it a useful reflective exercise, particularly for the social workers, in thinking about participation from a certain perspective which they might not usually have had the time to do.

Overall, the five main findings in answer to this third research question culminate to illustrate the complexity and nuance evident throughout the policies analysed in this Ph.D. research project. In summary, this third research question, built on my prior two research

questions to help better understand *why* children and young people's participation was present and absent across the policies (based on the system area, care order and placement type) in different ways. I found that the presence and absence of participation across the policies was based, in part, on conceptualisations of vulnerability, power, passive and/or active conceptualisations of family, notions of public and private spheres and the role of regulation and discretion.

8.3 Conclusion

Overall, in this chapter, I explicitly aimed to link my research aim and questions to this project's findings as supported and critiqued by my 'sense-checking' seminars. The addition of considerations from my 'sense-checking' seminars to help answer and critique this Ph.D. project's research questions aided in providing further confirmation and context to both the policies that I analysed and the findings that emerged. Thus, in answering this project's research questions, it became clear that the research aim and questions exist in a complex microcosm of policy and practice and illustrate the value and rich potential of further varied and more in-depth policy research in similar and adjacent policy spheres. In the next and final chapter of this thesis, I will be considering the future directions and limitations that underscore and which are heralded by this Ph.D. research. More specifically, I will be discussing the further implications for policy and practice, research and for theory (as supported by excerpts from my interviews and focus group through my 'sense-checking' seminars).

Chapter 9: Conclusion

9.1 Introduction

This chapter is the culmination of this Ph.D. research and thesis. However, rather than being an ending to the research, I would like it to be a beginning to how this topic of the presence and absence of participation in policies for looked after children in Scotland may be critiqued and examined in more and varied ways in the future. This chapter will present the implications for future practice and policy, theoretical considerations, and research before discussing the limitations of this Ph.D. research. In particular, the implications of this research will be considered in conjunction with excerpts from the discussions in my sense-checking seminars, this research project's findings, and previous literature.

9.2 Implications for future practice and policy

There are several key implications that can be gleaned for future practice and policy, supported through asking the social workers and policy professionals in my sense-checking seminars for their thoughts on the topic and implications. One implication for future practice

and policy that emerged through my analysis is regarding more specific components of participation being more clearly codified within legislation (including advocacy). One of the policy professionals (Annie) with whom I spoke focussed predominantly on the importance of independent advocacy for children and young people who are looked after and particularly stated that,

I think there are developments around how policy frames access to independent advocacy and how it talks about [it] and guides... But there's a fear of advocacy. There's a fear of participation generally, because as soon as you empower a child to know their rights and to feel like they have a voice to be heard, whether it's theirs or their advocates, you create delays in decision making. You create challenges to decision makings of social workers and other professionals, and that should be OK and that lots of social workers get that and they're totally game for that. But others finds it a threat. And I think there's something for policy to start to frame and be able to kind of balance that that power dynamic a little bit more that would be really helpful.

This above excerpt discusses the way independent advocacy can particularly be of help in realising participatory opportunities. For instance, policies including the 2014 Child Protection Guidance discusses advocacy for children and young people, in addition to a large focus in practice on the importance of independent advocacy for children and young people who are looked after (including Dalrymple, 2003; Pithouse & Crowley, 2007). In particular, there are two key points: the first is in regard to specifying participation throughout policies and the second is in regard to independent advocacy. This first point furthers the argument that I have made throughout my thesis that there is great value in specific legislation and guidance pertaining to certain aspects of the ongoing nature of participation at different points in decision-making (including before, during and after a decision is being and has been made). This second point offers an illustration of this in how independent advocacy is utilised within policies as a potential opportunity for participation, but that it is often presented as an avenue for participation more generally as opposed to being used for specific circumstances. However, it should be noted that the lack of focus on independent advocacy more often has to do with a lack of financial resources (Oliver & Dalrymple, 2008) which points toward there being a risk that independent advocacy is less of a priority within the wider system in terms of achieving participation.

In one of my other sense-checking seminars, one of the social workers, Madeleine, took a reflective view on future policy developments by stating that,

And I think we can always do better in this field, but that's just that's gonna be forever. Do you know, I think we'll never get it exactly right because within social work or dealing with children and young people, you're reflective. You're constantly learning. So, we will never get 100% right because it's fluid. It changes all the time.

This excerpt builds on my previous point about the importance of more specificity in policies, as relates to the implementation gap between policy and practice. Research has frequently discussed how there needs to be more of a dialogue between policy and practice, (van Breda et al., 2020), particularly in regard to this fluidity of practice that policy often does not adequately consider. Overall, this seems to point towards reflexivity and criticality (especially as related to children's participation) being more intrinsic parts of policies for looked after children and how more ongoing dialogue between policymakers and front-line professionals could help to achieve this. Through the completion of this research and 'sense-checking' seminars, it seems that presumptions surrounding looked after children and young people regarding vulnerability and power can negatively affect the opportunities for participation as presented within the policies. This suggests that policymakers must critically consider why and how the participatory opportunities are present and absent within policies (as I have examined in this thesis). Bringing together previous research, the findings from this thesis and the discussions from the sense-checking seminars, it seems that the primary policy implications from this research are that children and young people's participation should be more critically considered across the different lenses I have considered in this thesis (i.e., care order, placement, system area) and how there must be greater consistency in how participation is considered. Moreover, policymakers should evaluate their presumptions and assumptions surrounding the relationship between participation and protection (as I have begun in this thesis), so that the interdependence between the two concepts is better understood and elucidated within the policies. Additionally, further attention to the role of timing and temporality should be considered by policymakers particularly in its relationship to vulnerability within the child protection and permanence system. It would be beneficial for policymakers to consider how participation as an ongoing process can be achieved, as participation is not considered consistently across the child protection and permanence system, particularly prior to emergency orders being made. I would argue that the answer is not necessarily stricter legislation, as discretion and flexibility exist often for good reason (Tummers & Bekkers, 2014), but that there should be a greater emphasis on the importance of children and young people's participation across care orders, placement types and system areas in realising protection and permanence. Likewise, a greater focus on training and participatory opportunities when implementing policies pertaining to looked after children and young people is essential to ensure that participation is equally valued and recognised throughout the Scottish Child Protection and Permanence System. Finally, it seems that policies pertaining to looked after children should more greatly consider how children and

young people involved with the system could participate to share how they view family and kin to help with ‘defining the problem’ as is supported by previous research (Heimer et al., 2018) and as I have illustrated through my approach to policy discourse in this thesis.

From a practice perspective, the social work manager (Marie) I spoke with, adopted my subtheme of time as both the solution and problem,

You know it’s about people having time. It’s about people having the time to be able to take a step. Not even a step, but it’s not focusing on the meetings [with] the participants. Focus it. Yeah. It’s developing these relationships isn’t it, and it’s about relationship – relationship based practice. Because actually you know in protection is all often, it is often emergency, you’re talking about child protection orders. But even things have to have happened in emergency. How do we then ensure participation after or at the early stages?

There is increasing focus pertaining to how such children and young people’s participation in policies concerning looked after children in Scotland is implemented in practice (including the Promise by the Independent Care Review and research conducted by Whincup [2017]). Additionally, from a wider perspective on the culture of social work, it seems that there needs to be a shift in how the relationship between children and young people’s participation and protection is viewed – such that they are not opposing or contradictory concepts, but that they each should be considered as helping the other be realised. For instance, in the quotation above by Marie, there is a concern about time, and how more participation with children and young people could potentially alleviate time pressures by ‘framing the problem’ more clearly from the start (Heimer et al., 2018). Moreover, this thesis highlights the importance of the necessity of social workers being knowledgeable of policies, particularly in how there appear to be limited opportunities for social work practitioners to reflect on policy discourses and what impact this may have on their overall practice. This suggests that more opportunities to ‘sense check’ how policies are understood by social workers could be incredibly beneficial to both policymakers and social workers.

This research also supports the recent policy developments pertaining to children’s participation (including the Promise, the 2021 Child Protection Guidance and UNCRC incorporation). Considering that these recent policy developments encompass policies across different levels of statutory weight, it supports the value of children’s participation being considered across these different levels of policies so that participation may be of an ongoing nature through regulated and discretionary means.

9.3 Implications for theoretical considerations

Considering the number and depth of theoretical considerations present throughout this thesis, there are numerous related implications, particularly in how participation and protection are considered theoretically and practically. This relationship seems to be mediated to a degree by the regulation and/or discretion that are associated within the policies that seem to depend on the type of care order and placement the child and family are afforded. Moreover, policies also address issues of practice pertaining to the relationship between participation and practice from a range of sources (including social workers and other stakeholders [Scottish Government, 2021b]) (see the discussion of private and public spheres in Chapter 6.2: Public and private conceptualisations of children and family). Moreover, as became abundantly clear through my analysis, time and the various elements of timing imbued throughout the policies in conjunction with children's participation warrant further theoretical consideration and study. The findings from this thesis indicate how children and young people's participation is frequently understood within the child protection and welfare field, as the opposite of protection and that when children and young people are viewed as vulnerable, participation will only seem to exacerbate this vulnerability. Yet, instead of viewing children and young people's participation and protection as concepts to be balanced or rivaled as opposing concepts, it seems that, especially within the policies, there must be a shift in the understanding of what children and young people's participation is and is not. The opposite of participation is not protection; it would be non-participation and so protection does not need to mean non-participation as it frequently does within the policies analysed in this thesis. Instead, the relationship between participation and protection should build upon previous research in the childhood studies field (Heimer et al., 2018; Spyrou, 2019) to understand better how participation and protection can work in tandem in achieving stability and satisfaction for children, young people, and their families alike.

9.4 Implications for future research

One of the main benefits from this research is that it highlights the gaps for future research to fill. One of the last questions that I asked in my sense-checking seminars was on the interviewees' thoughts on the future direction of research relating to children's participation. For instance, one of the policy professionals, Annie, made an important distinction between group and individual participation in stating that,

People immediately think group-based participation and so participating and influencing policy change or service design or whatever it might be consulting on a policy and a group based format and actually I think we need to remember that

participation is a much broader concept of which that is one component part of how you deliver it. And I think it would be really interesting to do some real scoping on the importance of individual, that individualized participation notion...such as through advocacy and because I think sometimes again the word participation has just been pulled into a space, that's about let's have fun and I love all that stuff. That's great and you know policy, I'm all up for people being involved in, in helping us influence policy. But sometimes we forget that there is a spectrum of participation, and especially for care experienced children and children in the child protection sphere, that individual right to participation is so, so important. And I think often overlooked.

This above excerpt helps to highlight the need for diversity in the *substantive focus* of research examining children's individual participation especially considering how broad of a concept it is and can be. On a similar note, the social workers that I spoke with frequently mentioned a distinction between the ideal and the practical, particularly in future research. For instance, one of the social workers (Emily) said,

Maybe more on practically what happens rather than what idealistically should happen... I mean, like you look at the Promise, sorry, I just keep going back to that. But it says, you know, like siblings should be kept together and everything else like that. But then I've had quite a few families where the sibling groups of seven sibling groups of 10, you know, they're large sibling groups and the practicality of placing them together in one foster care placement. None. Absolutely none.

In building on the previous discussion of the theoretical implications, there needs to be a better understanding how the relationship between participation and protection is viewed in practice in *different* areas of a single child protection and permanence system and/or across state systems. Other social workers, with whom I spoke, called for a greater focus on research pertaining to kinship care (which when considering the oft reported lack of research relating to kinship care [[Chapter 2.10.1.3: Looked after away from home: Kinship Care](#)] is very warranted). In relation to kin, the social work manager, Marie, discussed children's participation on a case-by-case basis and how,

We shouldn't assume who, then there might be somebody they're really close to that isn't actually, and you know the perfect parent or their guidance teacher who would best represent them in the meeting, who would make them feel that they're able to participate more freely in a meeting. So it's about how do we have that conversation with that young person to identify, actually, what allows them to participate.

Moreover, I asked a follow-up question of, 'Do you think there are particular kinds of care pathways where this sort of research would be especially useful? Or through particular placements or care orders? And the same social work manager (Marie) focussed on the need to understand happenings at the start of intervention,

I think it has to be right from the beginning. I think it has to be right from the voluntary, the section 25, because actually. If we get it right there, we may not have to

progress to the other path, the other care orders. So, it has to be right at the beginning and I think it's about how, as a profession we embrace that.

This future research could focus on how children and young people who are looked after may perceive the concepts central to the policies particularly in relation to their participation and/or how participation is realised in practice for children and young people among other key stakeholders involved. This research project helps to highlight the need for more methodological diversity pertaining to children's participation, but also raises questions about why more diverse methodologies seem more expected and accepted for other types of research pertaining to participation (including for children and young people where adaptation of methodology [as necessary] would be expected, including Tisdall, 2012). My choice of methodology was a rather unusual one in examining children and young people's participation within policies by focussing predominantly on legislation (which had troublesome elements such as repetitive language and cross referencing to other policies beyond the scope of my analysis and project). Yet, I think because of this, it helped to demonstrate that more avenues of policy research are possible and needed, especially in relation to considering children's participation more critically.

Additionally, I considered children's participation across care orders in two respects: *when a decision is being made* (i.e., before a decision is made, when a decision is being made and reviewing after a decision has been made) and the *goal of the care order* (as summarised in Table 4). Such a distinction is especially important in the discussion of children's participation for children and young people who are looked after and could be a helpful way to identify the gaps of where participatory opportunities and/or research is lacking. Moreover, considering that neglect is a significant component of child protection (Scottish Government, 2014) and that it is often perceived to be less 'urgent' than cases of explicit abuse this does lead to implications that this perception of 'enhanced vulnerability' prior to emergency placements such as CPOs may overlook the nuance in protection between cases of neglect and/or abuse. This is not to point out that considering a wider swathe of children and young people as more vulnerable would be more helpful but rather that the relationship between different kinds of maltreatment and children and young people's participation within a specific system warrants further study.

One final point of future research that I would like to note is that while this research is confined quite tightly to specific policies within the Scottish Child Protection and Permanence System, I do think it supports researchers to consider equivalent policies in other

States and contexts from a more critical and nuanced perspective, particularly in relation to other child protection and welfare systems.

9.5 Limitations

This Ph.D. research has several limitations, not the least being that children and young people who are or were looked after, were not involved in any capacity in this research. Yet as has been critiqued by childhood studies' theorists adopting a poststructuralist lens (Spyrou, 2016, 2019), researchers should be wary of supposing that simply including children's voices and gaining their perspectives is enough and/or necessarily sufficient to be purported as a 'gold-standard' in research focussing on children and young people's participation. It was my initial intention at the start of this Ph.D. to focus on how children and young people could participate in my research project, but the COVID pandemic made that aspiration increasingly unfeasible and difficult. Despite this wrench in my initial plans, the shift towards focussing on the policies themselves allowed me to reflect quite extensively on how children's participation is critiqued and examined within research, more generally. For one, there is a notable lack of research examining children's participation *within* policies themselves and moreover there seem to be quite narrow research methodologies in which it is put forward as appropriate to study 'children and young people's participation' (Horgan, 2017; Todd, 2012, 2018). While I do agree in the value and beneficence of involving children and young people in the research process especially in research pertaining to children's participation, I think it does potentially suggest a limit in *what* is being examined and researched. More specifically, I think having to shift my research project and having to think quite critically about what participation is has led me to also question the ways in which research is being potentially limited by following the status quo. Rather than advocating for exclusively including children and young people in research, I would instead argue that this research project (among others see Todd, 2012, 2018) helps to illustrate the value of thinking about how research projects (while self-contained) do not automatically have to lose value if children's 'voices' are not imbued through every aspect of research relating to children's participation. Moreover, this research project while not including children's 'voices' does identify where future research that *could* include children and young people's views and how opinions may proceed (i.e., in respect to specific care orders or placements).

A related limitation is that I chose to exclude policies that included children and young people's views and perspectives of how their participation is codified (or not) within policies (such as is discussed in some Parliamentary Debates see [Chapter 3.3.1: Selecting policies for analysis](#)). Such a focus could have added a valuable perspective since I was

unable to directly speak with children and young people, but as in my above point, would have shifted the focus of this project away from how participation is present and absent within legislation and associated policies that I analysed. More specifically, including such policies would shift the focus of my research project towards how children's participation *should* be codified rather than how it *is*, which while a potentially important area of research, was not the focus of this research project.

Another potential limitation is the exclusion of certain policies (i.e., the 1968 Act, the 2014 Act, 2020 Act) and the focus on policies with more statutory 'weight' compared to policies at the local level that may be argued to influence how policies are implemented in practice (Ellis, 2011). Yet, in previous research (as highlighted previously, see [Chapter 7.2.2: Participatory opportunities](#)), states with national legislation that have incorporated the UNCRC are noted to have greater adherence to what is put forward in the UNCRC than if it was incorporated at a guidance or local level (Berrick et al., 2015). However, regarding these last two 'limitations', I do not consider them to be limitations but rather an initiative of this research through my chosen methodology of poststructural policy analysis. It seems interesting that when conducting policy research in the realm of children and young people's participation, there is a presumption that there will be a focus on documents that include the children and young people's perspectives on the policies and not on the policies themselves. Yet, as in my above reflections on how having to shift my research focus in the middle of my Ph.D. made me consider why *only* gaining children and young people's perspectives is a valid methodological choice in childhood studies, particularly in relation to children and young people's participation, (as I was asked in some of my 'sense-checking' seminars) why I have chosen not to include consultation papers with children and young people has given me similar pause. The focus on statutory legislation and policy does not preclude the need for research to focus and gain children and young people's perspectives; instead, it allows for there to be a stronger foundation to direct future research critically in the realm of children and young people's participation.

I would argue that despite these limitations my research project leads the way for future research, in part, by helping to identify where those gaps in research are. Perhaps most surprisingly, having to shift my research project rather abruptly has had the unexpected benefit of allowing me to consider critically why I had chosen my initial iteration of this research in the first place. I had chosen it, in part, because I was interested in the research gap that I had identified but also because there seemed to be a presumption of the type of research that I *should* conduct for a Ph.D. relating to children's participation.

9.6 Concluding thoughts

To conclude, this research project has been a feat and exercise in patience and criticality. Children and young people's participation, particularly within child welfare and protection decision-making, is often a topic that feels like walking along a balance beam of ensuring that one has appropriately avoided making a misstep while still making necessary progress in the research (as can likely be said for most research projects). The themes that I identified in my findings, particularly relating to vulnerability, power, capability, practicability, and the public and private spheres of family, highlight how the topic of children and young people's participation and the policies themselves offer valuable avenues for research and further thought for policy, practice, and theory.

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*Case Law Cited*¹⁵

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G v. Children's Reporter (2016), [2016] S.L.T. (Sh Ct) 293.

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LRK v. AG (2021), SAC (Civ) 1, [2021] S.L.T. (Sh Ct) 107.

M v. Locality Reporter Manager (2014), C.S.I.H. 62

Scottish Borders Council v. SRZ (2020) SAC (CIV) 21, [2021] Fam. L.R. 13.

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West Lothian Council v. B (2017), [2017] UKSC 15

¹⁵ Unmentioned case law here will be included in the appendix to give the full scope of the case law that were included in my narrowing down process.

Appendix A

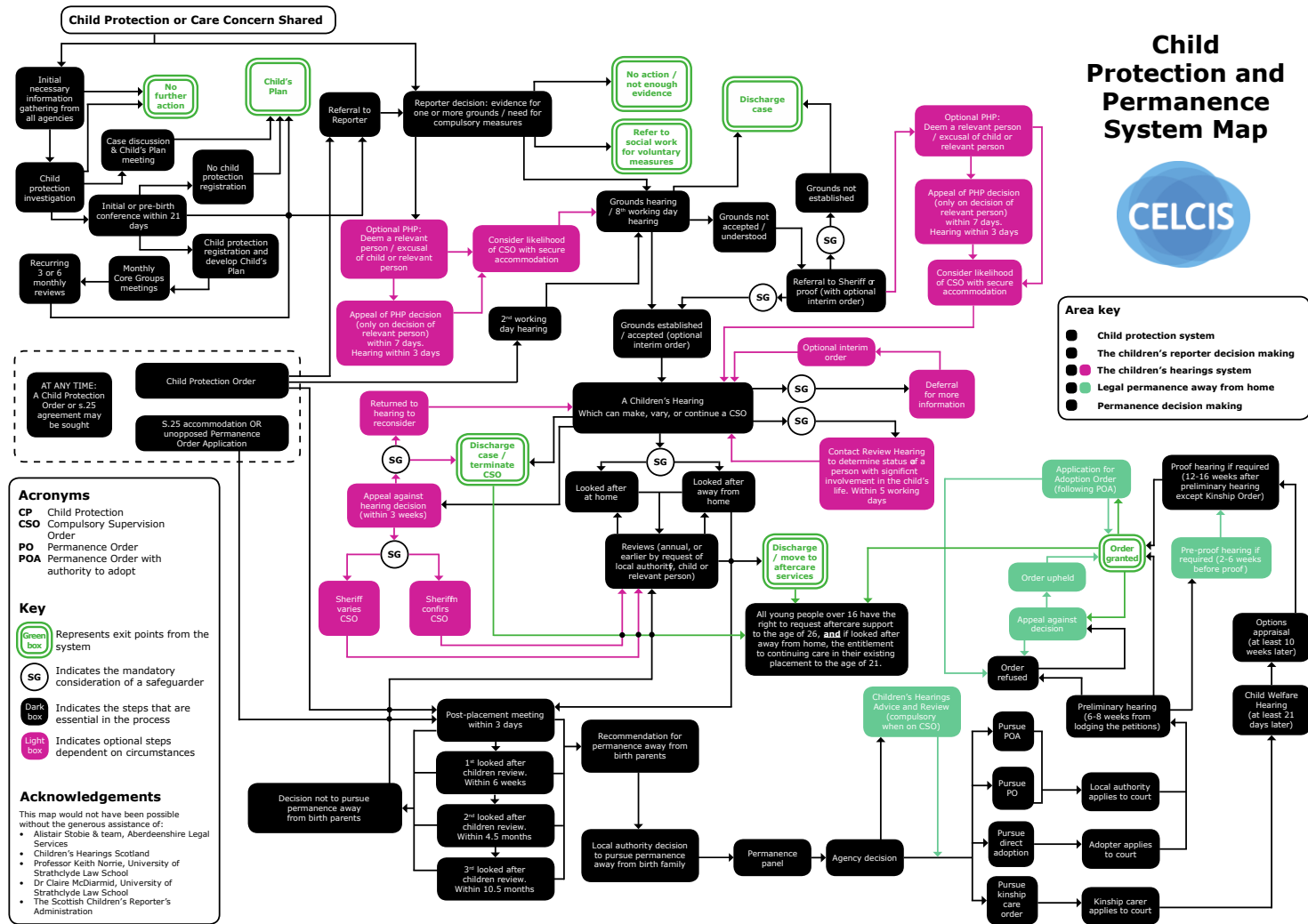


Figure 2. CELCIS (2018) Child Protection and Permanence System Map.

Appendix B*Table 8. List of Policies Analysed and Legislative Level Assigned.*

Document Name/Summary	Parts relevant to PhD project	Designated Level ¹⁶
Children (Scotland) Act 1995	Chapter 1 of the 1995 Act (in relation to S.25 orders)	1
Children's Hearings (Scotland) Act 2011	Child Protection Orders - Sections 37-59, 191-192 Compulsory Supervision Orders - Sections 60-181, 191-192	1
2011 Act explanatory notes and policy memoranda		2
Adoption and Children (Scotland) Act 2007	Permanence Order (Sections 80-121)	1
2007 Act explanatory notes and policy memoranda		2
2013 No. 194 Children and Young Persons Social Work: The Children's Hearings (Scotland) Act		3

¹⁶ Where Level 1 policies are policies with the highest statutory power (legislation) and Level 5 policies are those with the lowest statutory power (of those analysed) (national framework documents)

2011 (Rules of Procedure in Children's Hearings) Rules 2013		
2009 No. 210 Children and Young Persons Social Work: The Looked After Children (Scotland) Regulations 2009 (including explanatory notes)		3
<i>Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007 (2011 version primarily)</i>		4
GIRFEC – Original and Kinship UNCRC: The Foundation of		5

<p>Getting it Right for Every Child (As of 2013,– commissioned by the Scottish Government to illustrate how the UNCRC underpins GIRFEC)</p>		
<p>Getting it Right for Looked After Children and Young People Strategy (2015)</p>		5
<p>National Guidance for Child Protection in Scotland (2014) (as necessary for understanding context and background information)</p>		4

Table 9. 'Interview' Schedule for Policies.

Order analysed	Level of Policies	Specific Policies
1	Levels 1 and 2, starting with each of the three legislative documents (level 1) and then explanatory notes and policy memoranda (level 2)	<ul style="list-style-type: none"> - 1995 Act - 2007 Act (then explanatory notes and

		<p>policy memoranda)</p> <ul style="list-style-type: none"> - 2011 Act (then explanatory notes and policy memoranda)
2	Level 3	<ul style="list-style-type: none"> - 2009 Regulations - Rules 2013 CH Procedures
3	Level 4	<ul style="list-style-type: none"> - National Guidance of Child Protection in Scotland 2014 - 2010 Guidance on 2009 Regulations and 2007 Act
4	Level 5	<ul style="list-style-type: none"> - UNCRC: Foundation of GIRFEC - Getting it Right for Looked After Children and Young People

Appendix C

Table 10. Categorisation of participation adapted from Bouma et al. (2018)

Whether and how the following are stated or alluded to:	Categorisation Level (1 to 5)
The topics children and young people should be informed about	1
How children and/or young people are heard	2
The aspects of involving children in the decision-making	3
Participation as an ongoing process	4
If and how children are regarded	5

Appendix D

Table 11. Case Law Selection Process.

Case Law	Level of Court	Legislative Reference	Used
CM v MF 2017 SLT 945	Court of Session (Inner House, Extra Division)	2011 Act, Section 81 (3)	Yes
ABC v. Principal Reporter 2020 UKSC 26	Supreme Court (Scotland)	2011 Act, Section 81 (3)	Yes
Havrila v. Secretary of State for the Home Department 2019 CSOH 108	Court of Session (Outer House)	Court of Session Act 1988, Section 27A (1)	No
LRK v. AG 2021 SAC (Civ) 1	Sheriff Appeal Court	1995 Act, Section 11 (7) (b)	No
Shields v. Shields 2002 S.C. 246	Court of Session (Inner House, Extra Division)	1995 Act, Section 11 (2) (e)	Yes
West Lothian Council v. MB, EV 2017 S.C.L.R. 304	Court of Session (Inner House, Second Division)	2007 Act Sections 80 and 84 (5)(c)	Yes
G v. Children's Reporter 2016 S.L.T. (Sh Ct) 293	Sheriff Court (Glasgow and Strathkelvin)	2011 Act Section 77 (Power of Exclusion)	Yes
M v. Locality Reporter	Court of Session (Inner House, Extra Division)	ECHR Article 8; 2011 Act Section 25 (Sheriff's duty to	No

Manager 2014 C.S.I.H. 62 (JM v. Taylor)		safeguard and promote welfare of children)	
JT v. Stirling Council 2007 CSIH 52, 2007 S.C. 783.	Court of Session (Inner House, Extra Division)	'Significance' in the Education (Additional Support for Learning) (Scotland) Act 2004 Section 2(1)(d)	No
Scottish Borders Council v. Z 2020 SAC (CIV) 21, 2021 Fam. L.R. 13.	Sheriff Appeal Court	2007 Act, Section 84(5)	No

In the above table, the colours of the boxes indicate the type of law, with purple for child welfare/protection cases, blue for family law cases and green for other.

Appendix E*Table 12. List of 'sense-checking' participants.*

Participant Number	Type of Participant	Pseudonym
1	Social Worker	Marie
2	Policy Professional	Owen
3	Policy Professional	Iris
4	Policy Professional	Orla
5	Social Worker	Madeleine
6	Social Worker	Emily
7	Policy Professional	Annie

Appendix F: ‘Sense-checking’ information sheet and consent form

Representations of Children’s Participation and Protection in Looked After Children Policies Participant Information Sheet

You are invited to take part in ‘sense-checking’ of my PhD research project pertaining to an examination to representations of children and young people’s participation and protection in policies for looked after children in Scotland.

The research

My name is Alexandra Jundler, and I am a fourth-year PhD Student in Social Work at the University of Edinburgh. My PhD project aims to investigate the requirements or lack thereof for children’s participation and how it is balanced with children’s right to protection in the different pathways for being looked after in Scotland. Furthermore, this PhD project aims to explore what these differences and/or similarities suggest about the state of children’s participation for looked after children in Scotland based upon the care order, type of placement and level of perceived risk.

Why take part in the research?

Any and all participation in this research project is voluntary. Following reading and understanding this information sheet, you would be asked to formally consent via your signature on a Consent Form and email it back to me (Alexandra Jundler). You will be free to withdraw at any time with no further explanation needed throughout the research process.

I have already completed my analysis of policies for looked after children in Scotland but would like to ‘sense-check’ my findings with a small number of policy professionals and senior practitioners. I would like to ensure the accuracy of my findings and to utilise points of discussion in considering future implications of this research.

What will happen next?

You will be asked to take part in a group interview and/or seminar discussion, where I would first share my findings and then I would ask a series of discussion question where I would ask participants to share their views on a series of questions. I would be happy to send my discussion questions ahead of time. I would like to audio and video record your responses, with your permission. The group interview/event would be expected to run for approximately one hour and take place online on Microsoft Teams. The audio/video recordings will be used for automatic transcription purposes through teams, which will then be checked by the lead researcher. The recordings will be retained for the duration of data collection and analysis and then will be destroyed.

Risks

No significant risks are associated with participation.

Withdrawal

Agreeing to participate in this study does not oblige you to remain in the study nor have any further obligation to this study. If at any stage you no longer want to be part of the study, please inform Alexandra Jundler. You should note that your data may be used in the production of formal research outputs prior to withdrawal so you are advised to contact the research team at the earliest opportunity should you wish to withdraw.

Data Protection and confidentiality

Your data will be processed in accordance with Data Protection Law. All information collected will be kept strictly confidential. Your data will be anonymised in our records. If you consent to be recorded, all recordings will be destroyed once they have been transcribed. Your data will only be viewed by the Lead Researcher (Alexandra Jundler) and potentially her two supervisors. All electronic data and paper data will be stored safely and securely. Your consent information will be kept separately.

What will happen with the results?

After initial data collection, I intend to hold sessions with all interested participants about the results and what they may imply. The results of this study may be summarised in published articles, reports and presentations. Quotations or key findings will be made anonymous in any formal outputs. Anonymised data may be kept for future research.

Contact

If you have any further questions about the study, please contact me via email at:

s1566736@ed.ac.uk

For general information about how we use your data please go to:

<http://www.ed.ac.uk/records-management/privacy-notice-research>

Consent to participate in research form

Who is conducting this study? My name is Alexandra Jundler and I am a PhD student in Social Work at the University of Edinburgh. If you wish to learn more about this study or have any further questions, please feel free to contact me at: s1566736@sms.ed.ac.uk .

I would like to ask you to participate in an interview:

Please tick the box if you agree

	Please tick box to agree
I have read and understood the information provided about this project.	
I wish to take part in the research.	
I understand that I can decide not to answer questions or leave the discussion at any time.	
I understand that, if I agree, the discussion may be audio and video recorded, for automatic transcription purposes.	
I understand that all information I give will be confidential and securely stored.	
I understand that research findings might be shared publicly through presentations, publication, and other outputs. I will be anonymised in these outputs.	

I _____, acknowledge that I have read and understand what this research study involves and hereby give my informed consent to participate in this study. I am aware that by signing this, I am consenting to participate voluntarily and that my consent can withdraw at any point in before, during or after this study with no repercussions and no questions asked.

I _____, give permission for my interview(s) pertaining to this research project may be audio and video-recorded in order to retain accuracy. I am aware that by signing this, I can withdraw this permission with no repercussions or questions asked at any point prior to data analysis and that the data will only be used and retained for the purposes outlined in the information sheet before being destroyed.

Signature _____

Date _____

Thank you.