Law for Social Workers

13th edition

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The legal system in England and Wales

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OVERVIEW AND OBJECTIVES

Lawyers talk of the Rule of Law. This is the principle that we are all equal before the law; none of us above it, particularly not the government or those who work for the government, whether police, civil servants, Inland Revenue staff, or social workers. So even when these people are doing the work required of them by law or under the orders of government, they must do that work within the law.

Courts are required to administer the law without bias towards the government, the powerful, or anyone else. In our democracy, law-makers in Parliament are expected to make laws balancing the wishes of the electorate, the good of the country, and the need to protect the vulnerable. These are then interpreted by judges on the basis of the real-world cases that come before them. Neither Parliaments nor the courts and tribunals always get things right, but you are required to follow the law even if you think they have got it wrong.

The state in many cases establishes public institutions or makes use of private bodies to act on its policies, delivering services that the law says must or may be made available to people. They include the police, education authorities, health authorities under the National Health Service (NHS), and, of course, social services departments within local authorities.

Parliament has also passed laws to establish what powers and obligations social workers have and what limitations are placed on their work. It is important to note that social workers are also governed by the general law of the land. They cannot break the law by restraining people or breaching their privacy, for example, even if it is to achieve the duties placed on them by Parliament, unless Parliament has given them specific powers to do so. Social workers are not above the law any more than police officers or government ministers.

This book is designed to make the law familiar to you. We therefore use extracts from statutes and case studies to illustrate our points. No one can possibly know or describe all the laws, but each professional person needs to know the core elements of the law that dictate how they carry out their profession, and then, through their own research or knowing whom to ask, to know how to find out more when the need arises. As a social worker you need to know enough about the law to ensure that your decisions are lawful. When decisions are particularly complex you need to know that you should consult lawyers to help you to make those decisions.

In order to practise successfully you must go beyond what we provide in this book, which is based on what we think you must understand. We provide some further

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reading suggestions at the end of each chapter. We try to remind you at all stages that the principles we are dealing with derive, above all, from statute and from court and tribunal cases, so we quote directly from the important statutory materials and we mention important or illustrative cases throughout. We refer to other materials, such as the findings of inquiries, where useful.

We also, after this chapter, give you a case study as your route into each topic at the beginning of the chapter. If you have to think about a real-life issue, and how the law dealt with it, you then have a context for the issues you will be looking at yourself. We hope to expose you to the full range of materials that are relevant to law for social workers, so even if you do not always agree with our interpretation, you will know where we got our information.

Our own thinking on how to approach the law can be summarized as follows:

- law must be obeyed, by individuals and professionals, including law you may consider to be wrong;
- law indicates what social workers *must* do and what they *may* do (areas of work that are discretionary and may depend on the policies of your local authority);
- law tells social workers how they should go about their work, including what powers they have. You should *know* this part of the law, not just be able to look it up;
- other laws affect the lives of service users including their rights in relation to social workers. It is essential at least to know the broad principles of these laws;
- lawyers, particularly those employed by the authority for which you work, are paid to know the rest (or to find it), so know your limits and use the lawyers when you reach that limit.

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Sources of law in England and Wales

Common law

Common law is most simply explained as the law that has been established by the law courts over centuries to solve the problems brought before them. Principles are developed by looking at previous decisions by judges, known as precedents, and trying to arrive at new decisions that are consistent with the precedents, or at least with the principles that appear to underpin them. Fairness and pragmatism dictate that principles used to decide cases in the past should apply in the present in similar cases. Common law has evolved (and continues to evolve) slowly, sometimes too slowly to deal with new problems and certainly in a way that cannot create entirely new rights and obligations.

Common law is still very relevant in England and Wales. Much criminal law, such as the law against murder, is derived from the common law. Common law is also the foundation of civil law, in which monetary claims are made against individuals, companies, or state agencies. Social workers could face negligence cases, for example where a person or organization is sued for compensation because they failed to act with sufficient care.

Equity

This developed centuries ago as a branch of law in which judges could use discretion, within certain limits and according to certain long-standing rules, to remedy unfairness in the rigidity of the common law, particularly in financial disputes. Equity is still important in family law work. It is principles derived from equity, for instance, that decide how the family home of an unmarried couple is divided when the house is in the man's name, but both partners have contributed to it. The principles of equity are used in certain legal remedies, such as injunctions—a temporary ban at the judge's discretion on one person acting to the detriment of another prior to a court hearing on the issue—thus freezing the status quo until one side or the other wins a subsequent court case. For example, if a tenant alleges harassment against a landlord, a judge might, at his or her discretion, grant an injunction to prevent further acts of harassment. That would be temporary pending a full court case at which the claims against the landlord are heard and dealt with. Equitable principles also underlie domestic violence injunctions (non-molestation orders), though judges have statutory powers to issue these under the Family Law Act 1996 and Domestic Violence, Crime and Victims Act 2004. If an allegation of assault or some form of harassment is made, an order might be issued against, say, the accused husband (or cohabiting partner—the law calls spouses of cohabitees in this context 'associated persons'). But it is at the discretion of the judge and temporary (though renewable).

Statute law

This is law that has been passed by Parliament. Almost every aspect of child protection, assisting children in need, and community care is based on detailed statutory provisions. According to legal theory, statute law is supreme. Parliament is able to create any new laws or amend or repeal previous statutes—however modern or ancient they may be. It can also enshrine in statute legal principles established by judges under the common law system—and also change, redefine, or abolish those principles. It does so by passing statutes, or Acts of Parliament. These set out mandatory legal provisions, which must be followed by everyone, including the judges. The judges' role is to work out what the words in a statute actually mean (or what the intention of Parliament was) and how the statutes apply in particular cases. Often judges disagree. Lawyers may appeal against a judgment to a higher court such as the Court of Appeal or the Supreme Court. It is the judgment of the higher courts that trump the lower courts and is taken as the correct interpretation of the statute or any legal principle involved.

It is therefore often necessary to look at court case decisions to establish the meaning of a law. If Parliament does not like the way judges are interpreting the law or Members of Parliament (MPs) decide the law is wrong after all, they can change it through new statutes. We discuss how you locate, read, and understand statutes in the next chapter.

International law

Rulers have always made agreements with other rulers. This system of agreement, or treaties, between different states has evolved into what is known as international

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law. The UK has agreed to be bound by many international treaties agreed with other states. These are agreements between governments and so require governments to enforce them. The pressure is moral, political, or economic—and sometimes military.

Parliament can, however, pass legislation saying that an international treaty is law and must be applied directly in the UK courts. Most significantly for social workers, Parliament decided that the European Convention on Human Rights would have legal force in the UK. It gives people in the many nations signing up to it (all of the European Union (EU) but other European and non-European nations as well) rights against their governments. The Convention was established in 1952. It starts by asserting that 'everyone's right to life shall be protected by law' then lists many rights—against torture and slavery, in favour of liberty, privacy, and a right to a family life, for example. Although the intention was to try to avoid a renewed rise in totalitarian states after the Second World War, many of these rights have a day-to-day application in quite ordinary circumstances. Social workers, for example, since they are 'agents' of the state (set up by the state and given powers and direction by the state) have to abide by the Convention. One can imagine cases in which social workers or those setting policy in a social work department might restrict people's liberty or intervene in family life or put someone's privacy at risk.

Convention court cases are heard by judges in Strasbourg who are drawn from all the signatory nations. For years it was a complex and costly process to pursue rights in Strasbourg. The Human Rights Act 1998 embeds all Convention rights in UK law and allows people to use UK courts to pursue these rights. The law also required all parliamentary legislation to be 'Convention-compliant'—always adhering to the Convention's principles. In this way, European human rights law has become part of the UK law with the Strasbourg court becoming a final court of appeal.

(Note that the European Convention on Human Rights and the Strasbourg court are not European Union entities; the EU has its own Court of Justice in Luxembourg regulating legal relations between the EU nations.)

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Procedural rules

These are rules that cover court and tribunal processes—how cases are dealt with, the documentation required, and what must happen at each stage before, during, and after the hearing. For example, if a local authority intends to take a child into care, this requires a court order which must be applied for. Certain requirements will have to be met before the court will issue the order. Procedural rules are derived from the principles underpinning natural justice and due process.

Is 'good practice' a form of law?

Good practice describes the ideal way that social work principles should be put into day-to-day practice. It is not law, and much of what amounts to good practice is not issued in the form of either regulations ('secondary' legislation issued by ministers usually setting out practical details of the statute) or statutory guidance (which expands on the legalistic words of statutes, explaining how, for example, particular powers or responsibilities given to social workers should be acted on in practice). Therefore, good

practice must always give way to the requirements of statute, regulations, guidance, and case law on the rare occasions when the requirements conflict.

We have now completed our overview of the sources of law. See **Box 1.1** for a summary, and some additional terms you may come across.

BOX 1.1 Overview of sources of law

Law	Sources	Comment
Common law	Legal precedents set by judges hearing court cases	The advantage of flexibility and expertise but uncertain and lacks the democratic authority of Parliament
Procedural law	The Rule Committee (the judiciary) and in statute, for instance, the Supreme Courts Act 1981	Often overlooked, but critical to the effective implementation of the law
Statutes	UK Parliament, National Assembly of Wales	Has democratic authority but may be slow to enact. The government may be reluctant to legislate on controversial matters. The courts have a role in interpreting statutes
Secondary legislation	Government ministers (in both Westminster and Cardiff) given powers in particular statutes to fill out details of the legislation after it is passed	Contains the critical detail of legislation. Can be changed relatively easily, but is not extensively scrutinized by Parliament
Guidance	Parliament or government departments, or the National Assembly of Wales	Not binding, but authoritative
International law	Treaty obligations, judgments in international court cases	

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Some conceptual issues relevant to law for social workers

All law, to be valid in England and Wales, will derive from one of the sources listed in **Box 1.1**. Now we need to explore some legal concepts that do not depend on where the law comes from. The exploration will provide a framework for understanding the areas of law relevant to social workers.

The distinction between private and public law

We have already highlighted the distinction between courts and Parliament, between common law and statute, and between common law and equity. There is another distinction which is important for your work, the distinction between public law and private law. Private law cases involve private disputes between private individuals or between organizations or between individuals and organizations. Private law, perhaps through a civil case in the County Court, might assist in a dispute between a car owner and a garage over the quality of a repair.

Public law regulates the actions of bodies exercising public functions—government, government agencies, local authorities, but also many private organizations tasked with duties by the government such as privately run prisons or care homes.

Because public authorities or their private agents (organizations, sometimes private companies, which the authorities use to do their work) often intervene in people's lives, they are required to conform to certain standards. Care proceedings, for example, are an area of public law. The state must ensure that it has powers to remove children from their parents; establish the circumstances in which it can remove those children; ensure that its agents (those working for the state) follow proper procedures in doing so; and that when it interferes in liberty and family life in this way, it can offer legal justification for doing so if challenged on human rights grounds.

Individuals with a grievance against such bodies may bring a civil law case perhaps through a specialist tribunal or the High Court.

The particular area of the law which performs this function of ensuring that public bodies act according to those standards is administrative law. Sometimes both public law and private law proceedings will arise from a particular situation that has reached the courts. For example, divorce proceedings are private law. However, under the provisions of the Children Act 1989 there are powers during divorce proceedings to require the local authority to carry out an investigation if the court is concerned about the welfare of the children. One outcome of this investigation can be the local authority commencing care proceedings, which as we have stated, are public law.

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Administrative law

The state is very powerful and well resourced in comparison with any individual. Administrative law, in principle, attempts to ensure that justice is done between the state and the individual. It seeks to apply principles that operate to restrain arbitrary or wrong or corrupt decision making by the state. It can also be seen as restraining well-meaning state agents (eg social workers) with power over individuals' lives who might overstep the limits of their lawful powers or threaten an individual's rights or liberties. Administrative law can also be seen as enabling beneficial intervention by the state. For example, if there had been no legislation about rights and protections for children then there would have been no role for social workers in child protection. Thus the Children Act 1948 identified the duties of local authorities over children and in providing for orphans. The Local Authority Social Services Act 1970 makes

provision for 'the organisation, management and administration of local authority social services'.

The principles underlying administrative law have developed in common law cases. They are:

- openness (often described as transparency);
- fairness;
- rationality (including giving reasons for decisions);
- lawfulness (meaning the state and its agents are not above the law);
- impartiality (which means that decision-makers should be independent);
- accountability;
- the control of discretion;
- consistency;
- participation;
- efficiency;
- equity;
- equal treatment.

These principles can be collectively described as the requirements necessary for fairness, and are often referred to as the requirements of 'natural justice'. Sometimes they conflict with one another, and then the decision-maker must weigh up the various principles and make the best decision he or she can in the circumstances. Your understanding of professional ethics may help you at this point. We shall explore some of the guiding principles that exist when decisions under administrative law have to be made.

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Natural justice

Natural justice embodies a set of principles that courts will apply. It is law because courts have consistently described it as governing their decisions, and therefore it forms part of the common law. It means that whatever the law is, citizens are entitled to have the law applied fairly, in accordance with law, and that the courts will uphold that right. These principles informed the work of the British lawyers who did most of the work drafting the European Convention on Human Rights after the Second World War. Many actions of the state have clearly defined avenues for challenging that action in a court: to contest care proceedings, for example.

The mechanism available for people who believe that they have not been treated fairly by the state and who have no right of appeal is to apply for judicial review. Judicial review is the process by which the courts oversee decisions made by public officials to ensure that they have been made fairly and lawfully. You will come across several cases of judicial review in the case studies we use at the beginning of each chapter and elsewhere in the book.

In general, judges will not substitute their decision for the public officials' decisions. The judges' task, as they see it, is not to make fair decisions, but to ensure that the

state agents applied the principles of natural justice when making the decisions. What they will scrutinize, therefore, is the process of decision making. For example, a social worker may fail properly to assess whether someone is potentially eligible for community care services, perhaps because of personal antagonism. The person could seek a judicial review of the decision by stating that natural justice had been infringed since the law was not fairly applied. Facts which were relevant to the decision had not been considered. Facts which were not relevant were considered. The court could make such a ruling and overturn the decision of the local authority, or tell it to make a fresh decision, this time properly. The doctrine of natural justice means that the decision must be arrived at through the correct procedures and be reasonable in the light of facts that the decision-maker has.

The '*Wednesbury* principles'

In establishing what is reasonable, judges will use what are often described by lawyers as 'principles', which were articulated by the judges sitting in a case called *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. The corporation (local council) had the power to permit Sunday cinema opening and impose conditions. In this case it banned the cinema from allowing in children under 15. The cinema challenged the ban as unreasonable but lost. The judge, Lord Greene MR (Master of the Rolls, head of the Court of Appeal), set out the principle that a judge should only find unreasonableness if an administrative decision 'was so unreasonable that no reasonable authority could ever have come to it'. So as long as the council was not acting 'ultra vires'—beyond its powers (which it was not)—what those conditions should be was a matter of its own judgement as long as they were not wholly unreasonable. The fact that you or I or even the judge might think letting children in to see the Sunday pictures would be perfectly reasonable or even *more* reasonable is irrelevant. This is the 'test of reasonableness'.

This test protects local authorities more on issues of policy than day-to-day decisions about individual social work cases—as the next section will show.

Proportionality

Decisions made by public authorities are constrained by the Human Rights Act 1998. One particular requirement is the need for decisions to be proportionate to the outcome which is sought. So, for instance, in *Re C and B (Children) (Care Order: Future Harm)* [2000] 2 FCR 614, the Court of Appeal allowed a mother's appeal against the making of a care order in respect of two of her children with a view to placement for adoption. Two older children had been taken into care on the basis of actual harm. The court accepted that there were reasons for concern about the younger children, one ten months and the other newborn, and that there was evidence to suggest there was a real possibility of future harm. However, there were no long-standing problems preventing the mother caring for her children. Intervention, which inevitably impacts on the European Convention right to respect for family life, had to be proportionate to the degree of risk, and a care order was not justified. Other options should have been looked at to help the mother, and the court decided a supervision order would be the proportionate response.

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What do administrative law principles mean for a social worker making a decision?

These principles are not remote from you, the social worker. When you make a decision about a family or a vulnerable person, if your decision is to be lawful then it must follow these principles. You will ensure that you have followed the requirements of natural justice, you will have found out all the information that is relevant, you will have considered the relevant information carefully, and excluded from your considerations irrelevant matters. You will ensure that evidence which goes against the interests of, for example, the parents of the child about whom you are making a decision, has been put to the parents, and they have had an opportunity to consider it and respond. You will carefully document your decision-making process, so that if there is a dispute in the future you can demonstrate that your decision making was within the bounds of the law.

Law and devolution

In the introduction we talked about English law and the English legal system. Traditionally, the legal system for England and Wales has been described in this way. The National Assembly for Wales was set up in May 1999 with powers and functions determined by the Government of Wales Act 1998. The Government of Wales Act 2006 subsequently empowered the National Assembly for Wales to make its own legislation on devolved matters such as health, education, social services, and local government. Following a 'yes' vote in a referendum in 2011 there is no need for the National Assembly to get permission from Westminster before passing legislation known as Assembly Acts.

Further details of the powers given to the Assembly by various Acts of Parliament can be found on the Assembly website www.assemblywales.org. Inevitably, the National Assembly for Wales will have different priorities from the UK Parliament and be interested in different solutions to problems. There will be interesting opportunities to see how different policies proceed and develop best practice. The most up-to-date information on legislation relating to children in Wales can be found on www.childreninwales.org.uk. We will not describe provisions separately for England and Wales unless the laws do actually differ.

Our book does not cover Scotland, which has always had a separate legal system and separate law (despite sharing much law and legislative institutions).

Sources of law

Statute law

Social workers have 'statutory powers'. This means that their powers and their authority derive from statute—laws made in Parliament. This is not to say that the courts do not have a role. They interpret the meaning of statutes in particular factual situations and their decisions provide authoritative guidance for future decision-makers

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and courts. As time passes, the role of common law diminishes; more and more statutes are passed dealing with more and more areas of behaviour within society.

Primary legislation

Statutes—Acts of Parliament—start life as bills. These may be bills sponsored by government ministers, or private members' bills sponsored by backbench MPs. Most bills are government bills, but within the field of social care there have been some significant Acts that started life as private members' bills, for instance the Homeless Persons Act 1977 and the Disabled Persons (Services, Consultation and Representation) Act 1986.

Often the subject matter of a bill is discussed and consulted upon extensively before it gets to Parliament. The government may publish a Green Paper (originally with green covers) which will set out a number of proposals to change the law and ask for comments. Following this consultation, the government may set out its revised policy objectives in a White Paper. A relatively recent innovation is the draft bill procedure whereby the government publishes a bill in draft form, before it is introduced in Parliament as a formal bill. This enables consultation and pre-legislative scrutiny before it is issued formally. This procedure was used during the reforms to the law on adult social care. A draft bill, the Care and Support Bill, was published in July 2012, at the same time as the government's White Paper *Caring for our Future: Reforming Care and Support*. The government held a public consultation from July to October 2012. It attracted around 1,000 written responses through a variety of channels, including an online comments platform created for clause-by-clause comments. The government also held a number of engagement events with stakeholders, those who use social care services, and their carers. A summary of the responses was published in December 2012. Following consultation, a Joint Committee of Parliament was established to conduct pre-legislative scrutiny. Over three months, the Joint Committee received further written evidence and held ten oral sessions with a range of stakeholders. The Joint Committee's work concluded on 7 March 2013, and their final report was published on 19 March 2013. When the Care Bill was presented to Parliament on 19 May 2013, it reflected the government's responses to the consultation and the pre-legislative scrutiny. The presentation of a bill, generally by the minister responsible for it, marks the beginning of the normal parliamentary process. A bill may commence in either the House of Commons, or the House of Lords. The Care Bill started in the Lords and was presented by Lord Howe, the Parliamentary Under-Secretary of State for Health. There are a series of 'readings' when the bill is first presented in the Commons and the Lords and later debated, with time in between for scrutiny of the bill in committee. Eventually the bill reaches its final form when it is presented to the monarch for signature. Once it receives Royal Assent it becomes an Act of Parliament. Acts of Parliament are also described as primary legislation.

Even when the Act receives the Royal Assent there is often a long delay before particular sections are brought into effect, either on a date stated in the statute or by a Commencement Order issued by a minister under delegated powers (ie Parliament gives the minister the power to bring the Act into effect). If you would like to learn

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more about the legislative process, the Parliament website on www.parliament.uk contains user-friendly guidance. The various stages of the Care Bill are available on the Parliament website at http://services.parliament.uk/bills/2013-14/care.

Delegated legislation

Most Acts of Parliament contain only the essential principles of the new law. The details may be brought in later, usually by a minister or another body authorized by the Act to do so. This is delegated legislation or secondary legislation. It is generally done by issuing statutory instruments in the form of Regulations or Orders. It is not important to distinguish between these. For the delegated legislation to come into force, normally it must be 'laid before Parliament'. This requires a copy of the proposed delegated legislation to be placed (or laid) in the House of Commons and the House of Lords for a specified number of days. After that, the legislation comes into force. It may require a vote without a debate or, alternatively, it may come into effect by 'negative resolution'. This means that it will come into force unless sufficient MPs demand a vote be taken.

A good deal of the law that concerns social workers will be found in statutory instruments which can contain more of the practical details of how the law should be followed than is possible in primary legislation. Such statutory instruments can be updated more quickly than a new statute.

Guidance, directions, and intervention issued under statutory powers

We include this source of law (or authority, since we shall see that guidance is not law) under the section dealing with statutes, because in social work law the power of government to issue guidance or directions is created by statute.

Local authority social services functions are defined by the Local Authority Social Services Act 1970 (LASSA). We cover this in more detail in **chapter 2**. Under s. 7 these functions must be exercised under the general guidance of the Secretary of State. Where guidance is issued to local authorities under s. 7, it is not, in law, mandatory. Such guidance, nevertheless, must be followed unless there are justifiable reasons for not doing so. An explanation of the role of such guidance is to be found in the following quotation where Sedley J (the 'J' means a High Court judge: in this case Mr Justice Sedley) stated that local authorities have:

> to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.
>
> (*R v Islington LBC, ex p Rixon* (1997))

It is also worth noting that although local authorities have to follow guidance, it cannot be guaranteed that by doing so they will be acting within the law. It remains the function of the court actually to decide what the legislation means. As the foreword to *An Introduction to the Children Act 1989* (Department of Health, 1989) says: 'The Government is not entitled to give an authoritative interpretation of the law and ultimately any interpretation is a matter for the courts.'

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Examples of guidance issued under statutory powers

Although guidance can be linked to a particular Act (eg the Children Act 1989), sometimes it can stand alone. One example is the *IRO Handbook: Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked-after children 2010* which seeks to improve outcomes for looked-after children by providing guidance to independent reviewing officers about how they should discharge their distinct responsibilities to looked-after children. It can be found at www.education.gov.uk/publications/eOrderingDownload/DCSF-00184-2010.pdf.

Directions may be published in the form of circulars and other documents issued under s. 7B of LASSA. If a local authority does not follow a non-statutory direction, it is in breach of the law because s. 7B says it must be followed. The social worker should always check whether the document they are using is issued under s. 7B of LASSA. If it is, this is indicated clearly in the preface to the document.

In extreme circumstances, a Secretary of State (the chief minister of the main government departments) has powers to intervene to direct a local authority to take a particular course of action. This form of direction is what happened when the Secretary of State for Children, Schools and Families, Ed Balls, intervened to have Sharon Shoesmith, director of education and social services at Haringey Council, London, sacked following the high-profile death of 'Baby Peter' in 2007. In the event, Balls was later found by a judge to have overstepped the mark. Ms Shoesmith took the government to court alleging proper procedures were not followed in her sacking. The judicial review in 2011 found in her favour.

The Children Act 1989—an example of statute law and law derived from it

Later in the book we consider the effect of the Children Act 1989. The Act sets out in detail how the courts, local authorities and others are to deal with the care and welfare of children. There are 108 sections in this particular Act and 15 schedules (additional material appended to the Act), and the bill which became the Act spent almost a year being debated in the House of Lords and the House of Commons. Despite all this, the Act could not come into force as soon as it was passed, and it has had to be amended many times since it was first enacted. Moreover, about 30 sets of regulations have been issued under the Act. Together with these go ten books of guidance. Merely looking at the Act will not give the full picture of what it is about. So detailed are the regulations and guidance that there is even a separate index published. We refer to these books of regulations and guidance throughout the relevant chapters. To help you to understand these books, the government has issued a book of guidance on *The Care of Children: Principles and Practice in Regulations and Guidance*. What the Act means in practice is also the subject of numerous reported court decisions (meaning reported in professional law reports), which will crop up throughout the first three parts of the book.

Finding statutes

You may need to read appropriate statutory provisions. Statutes are available in law libraries and on the internet, and are summarized and commented on in secondary sources (such as this book). It is important that you read the up-to-date version of any

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statute. This is not easy without the resources of a full law library or access to a commercial database. Our best advice is for you to talk to your legal department to find out what resources it has available for you to use. In a law library, a good source of up-to-date statute law can be the loose-leaf encyclopaedia. There is usually one for practitioners in major areas of law, and social workers should look out in particular for the online legal databases including up-to-date versions of statutes together with indicators of proposed changes—very useful in this fast-moving area of law.

Reading statutes

We think it is important that you feel confident enough to read some statutory materials for yourself and not rely solely on lawyers to do that for you. This book aims to provide you with a great deal of support in doing just that. If you find a particular word or phrase difficult, then ask your lawyer what he or she thinks it means. The chances are that it is genuinely a difficult word which could be interpreted in several different ways. Your opinion may be correct, or the lawyer's opinion may be better. Often we do not know what a word means in law until it has been interpreted by the courts. Once a court of record (one of the more important courts such as the Court of Appeal or Supreme Court) declares what a word or phrase means in a statute, that is in law what it means, unless and until a higher court explains why that was the wrong approach—either by considering the same case appealed from the lower court or a later case that involved similar facts and the same principles. In exceptional circumstances, a court of the same level considering a later similar case may also retrospectively declare a previous interpretation of the statutory phrase incorrect—in effect the court overrules itself. Normally, though, the earlier case remains the precedent that is followed. The courts use a variety of techniques to enable them to interpret statutes in a manner that is intended to be rational, objective, and consistent. These are the rules of statutory interpretation. Before we go on to discuss these, we provide some general guidance on reading a statute.

The Adoption and Children Act 2002 as an example

The date 2002 is the year that the Act received Royal Assent. It is not necessarily the year when the statute comes into force. Many statutes contain complex provisions which need to be prepared for. The delegated legislation is published after the Act.

In the case of a complex piece of legislation such as the Adoption and Children Act different parts of the Act will have different commencement dates.

The front cover of the statute has the Royal Coat of Arms, the name of the statute, and the words 'Chapter 38'—it is the 38th statute of this parliamentary session. You can ignore the chapter number. There is also a note to say that explanatory notes have been produced to assist in the understanding of this Act and are available separately. This is a relatively recent innovation. If an Act is one which you frequently use, the explanatory notes provide a really useful source of information about its provisions.

The contents of the statute

Turning the page you will see the contents of the statute. This particular Act is divided into three Parts and then each Part has a number of chapters. Part 1, adoption, is the

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largest part. It has seven chapters. Each chapter is subdivided. Chapter 2 is subdivided into sections on the adoption service, regulations, and supplemental provisions. In each of the subdivisions there are numbers. These relate to the section numbers of the Act. The contents page therefore provides you with a very useful navigation tool for the whole of the statute. If you are looking to find out how adoption orders are made under the legislation you can very quickly find out which are the relevant sections. A subdivision of Chapter 3 of Part 1 is headed 'The making of adoption orders', and we can see that the relevant section numbers are ss. 46–51.

Sections and subsections

If we look at one of those sections, say s. 47, we can see the typical layout for a section of an Act. The section has a heading, in this case 'Conditions for making adoption orders'. It is then divided into subsections which are numbered in brackets. If you want to refer to a particular subsection then you would say 'section forty-seven, subsection one'. In writing you would refer to s. 47(1). There may be further subdivisions indicated by letters and Roman numerals as here: s. 47(4)(a)(i). There is generally no need to refer to Parts or to Chapters when directing someone to a section of an Act.

Schedules

Not everything is contained in the body of the statute. Most Acts have schedules attached which contain further material, usually of a more detailed kind. The Adoption and Children Act 2002 has six schedules. They are listed after the contents of the Act. Schedules are set out slightly differently from the main body of the Act. If you turn to Schedule 1 you will see its title, 'Registration of Adoptions'. In small script to the right of the title there is a section number, s. 77(6). This is the section in the Act which gives legal effect to the schedule. The schedule is then set out in paragraphs and subparagraphs (rather than sections and subsections). If you wish to refer to a paragraph within a schedule then you refer to it as paragraph 1(2) of Schedule 1 to the Act. We say 'to' the Act rather than 'of' the Act because the schedule is attached to the Act.

Amendments

Frequently statutes contain provisions which amend the provisions of earlier statutes. The Adoption and Children Act 2002 is no exception. So, for instance, s. 113 of the Act provides:

> In section 9 of the 1989 Act (restrictions on making section 8 orders)—
> (a) in subsection (3)(c), for 'three years' there is substituted 'one year', and
> (b) subsection (4) is omitted.

What this means is that from the commencement date of this provision of the 2002 Act, that particular section of the Children Act 1989 has to be read in the new way. The earlier Act is nowadays reissued online in its amended, up-to-date, form but the printed version is not.

Acts can do more than amend particular sections. They can introduce whole new sections into other Acts. In the Adoption and Children Act 2002 new provisions are introduced to the Children Act 1989 to provide for special guardianship. The new sections are

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introduced by s. 115 of the Adoption and Children Act but they have become ss. 14A–14G of the Children Act 1989. You will always recognize sections of legislation which have been introduced by subsequent legislation because of the use of the capital letter.

Acts are also amended by subsequent legislation. You will not find these amendments in a hard copy of the Act, but they can easily be found on web versions and in loose-leaf encyclopedias. The Adoption and Children Act 2002 has been amended by the Children and Families Act 2014. For instance, that Act has added a new section—s. 3A—to the Adoption and Children Act 2002. The section concerns the recruitment, assessment, and approval of prospective adopters. A reference to another new section, s. 51A headed 'Post-adoption contact'—also inserted by the Children and Families Act 2014—is inserted into s. 1 of the Adoption and Children Act 2002.

Reading statutes—principles of statutory interpretation

Because the words of statutes are not necessarily clear and unambiguous judges have developed a series of so-called 'rules' to guide the courts. Traditionally, there are said to be three main 'rules':

- the 'literal rule', which says that the words in a statute are taken to have their literal meaning;
- the 'golden rule', which says that if the literal meaning produces an absurd result then you look at it in the overall context of the statute;
- the 'mischief rule' is applied when the first two rules do not help. This rule states that you interpret the meaning of the words in the light of what the problem or 'mischief' was that the statute was supposed to deal with.

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For centuries no judge would deign to look at what ministers or parliamentarians may have said about the purpose of the Act under consideration. Now they may take such a purposive approach by looking at White Papers, statements to Parliament reported in Hansard, Law Commission reports, and any other documentation giving clues to the intention of the legislators. Individual judges may use any of the 'rules' or all of them, perhaps combining them into what is called a 'unified common approach'. This would say: use the literal meaning of the Act unless the words are unclear or a manifest absurdity would result; in which case look at the purpose of the Act—using official material to do so if necessary.

The Human Rights Act 1998 has an impact on statutory interpretation, in that it requires courts to interpret legislation in a way which is compatible with the European Convention on Human Rights (see **chapter 3**). Where it is not possible to interpret the legislation in this way, the courts may strike down delegated (secondary) legislation. If they find primary legislation to be incompatible they cannot strike it down, but they may make a declaration of incompatibility, which should prompt government action to change the law.

Reading statutes—powers and duties

Something else that you will need to check when you read statutes concerning social services is whether the statute provides you with a duty to act or a power to act. The distinction is relatively straightforward. Where a statute imposes a duty on a person or a body then they have to carry out that duty if the situation described in the statute occurs. There is no choice, however hard the carrying out of the duty may be. Lack of

finance, for instance, is not an acceptable reason for not carrying out the duty. Where a statute gives a person or a body a power to do something, the person or the body may exercise that power but they are not obliged to do so.

The distinction is important for a number of reasons. First, it sets your priorities as a social worker. If Parliament has considered that carrying out a particular action is so significant that it should be a duty upon a social services department then it is a course of action which must be given priority. Second, it is significant when a person is unhappy with the behaviour of a statutory person or body. If there is a duty then in general the person will be able to take court action to enforce that duty. If there is only a power, then it is unlikely that there will be any legal redress—though, if the person can show that the way in which the decision to exercise or not exercise the power was made was unreasonable, that could be challenged by a judicial review.

It is important to read the scope of the duty in the statute carefully. The law has distinguished between general or target duties and personal or particular duties. General or target duties are expressed in broad terms, leaving the public authority with a wide measure of discretion over the steps to be taken to perform the duty owed to the relevant section of the public. Personal or particular duties are specific and precise and are owed to each individual member of a relevant section of the public. Target duties must be performed, notwithstanding their general nature, in accordance with the principles of public law and they can be enforced like powers through judicial review. However, the public authority has discretion on how it delivers services under the duty and individuals have no personal right of action. One particular general duty we will discuss in **chapter 6** is s. 17 of the Children Act 1989—the duty to safeguard and promote the welfare of children in need. The local authority must decide what services it thinks are appropriate to meet this duty. Personal duties provide no discretion to the public authority and are actionable (ie court proceedings can be taken) by the individual who can sue for breach of statutory duty.

Whatever you are doing as a social worker, you should be clear in your own mind whether you are acting under a personal duty, a general duty, or a power, and regulate your actions accordingly.

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Case law

When we want to know what the law in a statute is, we first read the relevant part of that statute. As we explained earlier (**Reading statutes—powers and duties**, p 18), this is not always the whole solution. Often it is necessary for the courts to interpret what the words of the statute mean. Similarly, judges will interpret common law, where there is no statute, according to the circumstances of each case—and each new case becomes part of the common law. Whether we are concerned with statutory interpretation or the common law, to find out what the courts have declared the law to be we need to look at the law reports.

Reading and finding cases

Cases, like statutes, follow a standard format. They are referred to by their name (usually of the main people or organizations involved on each side) and a reference to a law report. You will notice that when we tell you about a case we provide the name of the

case and a date. The full citation to the case is found in the table of cases at the beginning of the book. Take *F v Lambeth LBC, also known as F (Children: Care Planning), Re* as an example. If you want to find that case yourself you will first need to check the full reference. It is [2002] 2 FR 512, Fam Div.

The law reports

These are produced by private firms using specialist legal reporters. They are taken as accurate reflections of what went on in court and are referred to by judges when making their decisions since they contain legal precedents and the reasoning of judges in the earlier cases. They also contain references to previous related cases so the decisions on a particular issue of law can be tracked all the way back. Frequently used series of general law reports are:

The Law Reports, currently issued in four series:

- Appeal Cases (AC)
- Chancery Division (Ch)
- Queen's Bench (QB)
- Family Division (Fam)

The Weekly Law Reports (WLR)

The All England Law Reports (abbreviated to All ER)

Family Law Reports (FLR)

Summaries of recent cases can be found in *The Times* and the *Financial Times*, and in professional journals such as the *Solicitors Journal*, the *New Law Journal*, *Family Law*, and the *Law Society Gazette*.

Note that some citations use round brackets instead of square brackets around the date of the report. Round brackets indicate that it is the volume number, and not the date of the report, which is essential if you are to locate it on the shelves. The use of round and square brackets can be summarized as:

[2010] Date is essential. The volumes are arranged on the shelves by year, and the volume number is used only to distinguish between different volumes published in the same year, for example [1999] 1 FLR 40.

(1989) Date is not essential, but volume number is essential; that is, the arrangement on the shelves is by volume number, not by date, for example (1980) 70 Cr App R 193.

Most cases are now being published on the internet. A citation system which is more suitable for publication on the web has been introduced for all Supreme Court/House of Lords, Court of Appeal, and High Court (Administrative Division) judgments decided since 11 January 2001 and all High Court decisions since 14 January 2002. The citation should appear in front of the familiar citations set out above. The citation is media neutral, as page numbers are irrelevant on the internet.

The neutral forms of citation are shown in **Table 1.1**.

This system fits in with international practice and makes it easier to find cases electronically. Here is an example: *Re O (Supervision Order)* [2001] 1 FLR 923 is a Court of

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TABLE 1.1 Forms of neutral citations

Supreme Court	[2010] UKSC 1, 2, 3 etc
House of Lords (functions taken over in October 2009 by the Supreme Court)	[2008] UKHL 1, 2, 3 etc
Court of Appeal (Civil Division)	[2005] EWCA Civ 1, 2, 3, etc
Court of Appeal (Criminal Division)	[2004] EWCA Crim 1, 2, 3, etc
Administrative Court	[2010] EWHC Admin 1, 2, 3, etc

Appeal decision published in the Family Law Reports. It should be cited as: [2001] EWCA Civ 16; [2001] 1 FLR 923. The '16' means that it was the sixteenth case heard in the Court of Appeal Civil Division in 2001. 'EW' stands for England and Wales. (The House of Lords had UK as a prefix because it was the highest court for the whole UK; it is now replaced by a Supreme Court, which is supreme in the UK apart from criminal matters in Scotland, which cannot be appealed to the UK Supreme Court.)

Note that the internet version of a case may have in apparently random places an asterisk and number that indicates the page of the case in the print version. These page references are used when quoting from the case.

Legal databases and non-subscription web sources

Cases are available from legal electronic databases. Lawyers subscribe to services such as Lexis@library and Westlaw and can search for and find cases and up-to-date versions of statutes relevant to the area of law they are researching extremely quickly. The databases may not offer all the cases you want but official transcripts produced by the courts are often available on the internet and are offered by the legal services too.

The best free website for accessing judgments (including tribunals such as the Asylum and Immigration Tribunal, and including European Court cases) is www.bailii.org. Reports of decisions of the House of Lords are also available on the Parliament website (www.publications.parliament.uk/pa/ld/ldjudgmt.htm); and those of the Supreme Court (which started in October 2009) on www.supremecourt.gov.uk.

Courts and tribunals

We are now moving from the law itself to look at the legal system which administers the law.

When a dispute cannot be resolved by agreement between the people involved, the legal system provides for decisions to be made at a judicial hearing. Sometimes there is a need for a judicial hearing even if there is total agreement between the persons involved; for example, if a couple agree to get divorced, they must get a decree of divorce at a judicial hearing. At some time, every social worker is going to have to attend some form of judicial hearing.

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We use the term 'judicial hearing' since it is somewhat wider than just 'court'. For example, apart from courts there are tribunals dealing with mental health detentions which a social worker may be required to attend. From now on, where we use the term 'court', it is intended to include these other forms of judicial hearing. What we mean by the term 'court' in this chapter is 'court and tribunal hearings in England and Wales'.

The difference between criminal and civil courts

Criminal courts are required where the state prosecutes offences and courts impose penalties on those convicted. (In certain circumstances private individuals can take criminal proceedings themselves, but we will not cover these as they are unusual.) People can be convicted only where the evidence points to guilt 'beyond reasonable doubt'. This requirement, for almost a 100 per cent certainty, is known as the criminal standard of proof. The parties to proceedings are the prosecution and the accused or defendant.

Civil courts are used where people can gain remedies for injustices 'proved on the balance of probabilities'. This civil standard of proof means more likely than not, or more than 50 per cent likely. The remedies are normally financial, in the form of damages which compensate someone for loss, or restitutional, putting right the wrong complained of. The courts have a full range of orders that they can issue and the parties are obliged to follow, including orders that someone should do or not do a particular act. The parties to proceedings are described in most cases as the claimant (or plaintiff in cases before 1999), the person or organization asking for a court order, and the defendant, the person who is resisting the order. If a case is appealed to a higher court, the side that appeals is the appellant and the other side becomes the respondent. Social workers are more likely to come across cases where the parties are described as applicant and respondent. In tribunals, parties are called the applicant (rather than claimant) or the appellant (or in mental health cases, 'the patient'), and the government department whose decision is disputed is referred to as the respondent.

Sometimes the same facts can give rise to both a criminal and a civil case. If a person driving hits another car then the person may have committed a criminal offence, for example careless driving, and also be liable to be sued in civil law for damages. The civil case (known as the 'claim') for damages would be separate, unconnected with the careless driving charge. A person may be successfully sued for damages arising out of a road accident, without there being any proceedings for driving offences, or vice versa. Because of the different standard of proof, it is also possible for a case to be unsuccessful in the criminal courts but give rise to successful proceedings in the civil courts.

The court structure

Figure 1.1 gives an overview of the court system. It reflects the fact that courts are arranged in a hierarchical structure. A lower court must follow decisions of any court higher than itself in the judicial 'ladder'; there is also a system of appeals against the decision of one court from one level to another. Cases begun in the lower courts can, normally, work their way up to the highest court, by way of appeal. We will return to the question of appeals at a later stage.

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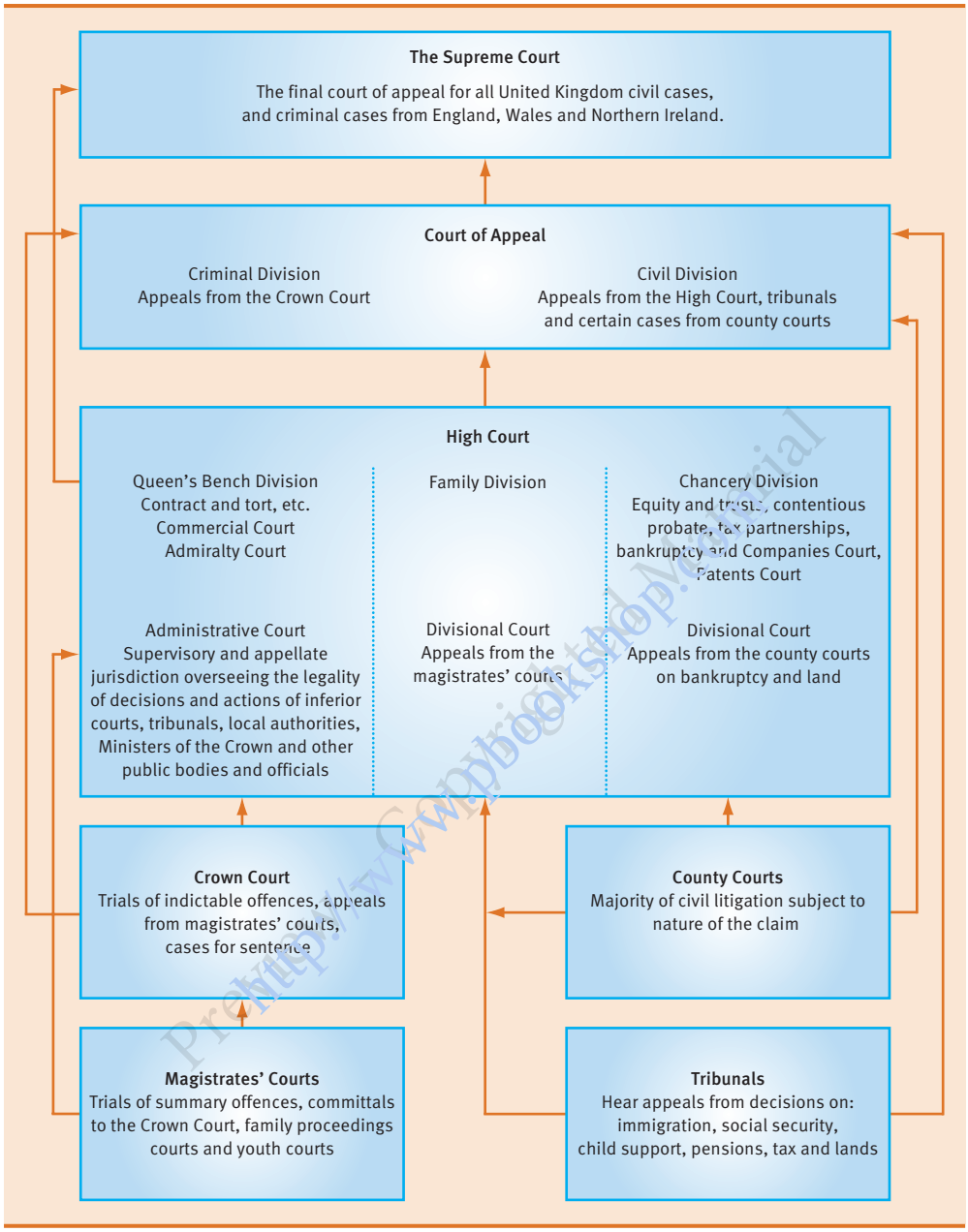

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FIGURE 1.1 **Overview of the court system**

Source: **Figure 1.1** can be found here: www.judiciary.gov.uk/wp-content/uploads/JCO/Images/Layout/courts_structure.pdf.

What happens in the criminal courts?

Social workers, in their official capacity, will mostly appear in these courts when presenting pre-sentence reports on someone who has been convicted of an offence to assist the court in deciding upon appropriate punishment. They may, of course, be called as a witness to an alleged offence, for example if he or she has been assaulted by a service user or the service user's carer, or is able to give evidence in prosecution for abuse of a child. Social workers may also accompany children to provide support in criminal trials: see **chapter 10**.

All criminal cases start in the magistrates' court. There are three types:

(a) summary offences;

(b) indictable-only offences; and

(c) either way offences.

Summary offences are the most numerous. Examples include common assault, less serious criminal damage, and taking a motor vehicle without consent (this offence is known by the acronym 'TWOC'). They can normally be dealt with only in the magistrates' court. Therefore, the court has the limited powers of sentence described later (**Magistrates' courts' powers of sentencing adults**, p. 25).

Indictable-only offences are cases that are processed by the magistrates' court to ensure that they are ready for trial but cannot be tried or sentenced there. They are the serious offences, such as serious burglaries, serious assaults, murder, rape, and arson that, for an adult (over 18), can be dealt with only by the Crown Court. Those cases triable either way may be dealt with in the magistrates' court or sent up to the Crown Court if considered serious enough.

Criminal proceedings in the magistrates' court

All criminal cases begin in the magistrates' court. The vast majority (95 per cent) stay there. Cases are heard either by three lay (non-lawyer) magistrates or one district judge. The lay magistrates, or 'Justices of the Peace', as they are also known, are local people who volunteer their services. They lack formal legal qualifications, but are given legal and procedural advice by qualified clerks. District judges are legally qualified, and salaried.

Cases do not go straight to the Crown Court for historical and practical reasons. The practical reason is that where a person is accused of serious burglaries or murder, for example, it requires a great deal of time for both the prosecution and the defence lawyers to prepare their cases before the trial can take place in the Crown Court. Meanwhile, the question of what is going to happen to the accused person has to be dealt with. The magistrates will decide whether the accused person should be remanded into custody (meaning kept in prison) or be granted bail (which would be rare in serious cases, and those in which the accused might reoffend, abscond, or interfere with witnesses).

The youth court is part of the magistrates' court and is dealt with in **chapter 10**. Usually, an indictable-only offence is dealt with in the youth court if the accused is under 18—see **chapter 10**.

Preview (http://www.pbookshop.com) Trial

'Either way' offences are hybrid offences, because they can be dealt with either by the magistrates' court or by the Crown Court (before a judge and jury). An example of such an offence is theft. What may appear to be the theft of a small amount may be regarded by many as trivial, but for the defendant the consequences of being convicted of such an offence may be extremely serious. Therefore Parliament has decided that the person accused of such an offence can insist on the case being tried before a judge and jury in the Crown Court.

However, if the magistrates consider the case to be not too serious, they can offer the defendant a 'summary' trial. This has the advantage of being dealt with more quickly and sometimes, if the person pleads guilty, on the spot. In an 'either way' case the defendant or the court can insist on a Crown Court trial. A defendant's solicitor might consider that a trial before a jury may give the accused a better chance of being found not guilty; a magistrate or district judge might feel only a Crown Court can offer a punishment fitting the seriousness of the crime. If the magistrates or the defendant insist on a Crown Court trial, or if the case is indictable-only, the defence can require the magistrates' court to consider the written prosecution evidence before committing the case for trial, to see whether there is a case to answer (which is not difficult to prove and most solicitors do not spend time contesting this).

The different hats worn by the magistrates' court

The magistrates' court is divided into different parts. Youth courts are a specialist part of the magistrates' courts and deal with most juveniles accused of crime. For fuller details see **chapter 10**. The magistrates also have important civil functions. Until April 2014, all family proceedings commenced in the family proceedings court which was part of the magistrates' court system. However, the Children and Family Act 2014 abolished family proceedings courts. Instead, all family proceedings, including care proceedings, will take place within a unified family court which is outlined later (**The Family Court**, p 27).

Magistrates' courts' powers of sentencing adults

Magistrates have restricted powers in relation to the sentences that they can impose, including a maximum six months' imprisonment for any one offence committed by an adult. Many of the offences dealt with by the magistrates' court carry no power of imprisonment, and the heaviest penalty then can only be a fine or perhaps a community rehabilitation order. The courts are obliged by law to follow sentencing guidelines depending on the seriousness of the case, previous convictions, and whether a guilty plea was entered. If a person has committed more than one offence, each of which is an either way offence and each of which could have a six-month sentence imposed for it, then the total maximum sentence the magistrates could impose is 12 months' imprisonment (ie two six-month sentences to run consecutively). If they do not feel their powers of punishment are sufficient for either way offences, they can commit the offender to the Crown Court for potentially tougher sentencing. (The youth court does not have this power, although its maximum sentencing powers can be two years' custody. If a charge is particularly serious, the youth court may send the case to the Crown Court for trial—see **chapter 10**.)

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Crown Court

By tradition there is deemed to be one Crown Court, which sits (ie is convened) in numerous cities around England and Wales, hence the use of capital letters. In reality they mostly sit daily in specific Crown Court buildings. Among them is the Old Bailey in London where the court is known as the Central Criminal Court. The Crown Court is where more serious criminal cases are heard before a judge and jury. Whereas the magistrates, in their court, decide on the facts of the case (deciding what happened on the basis of the evidence) and also decide the law (whether a law has been broken—after being advised by their clerk), in the Crown Court there is a separation of these functions. The judge, being a professional lawyer (barrister or, less often, solicitor), is the authority on the law. The jury, composed of randomly selected people on the electoral roll, decides the facts based on the evidence.

When sentencing an adult, the powers of sentence of the Crown Court are limited only by the lengths of sentence that are set out either in the statute governing the crime or by common law. The court's powers on sentencing a person under 18 are more limited—see **chapter 10**. The Crown Court can impose a maximum penalty of life imprisonment and almost unlimited financial penalties for some offences. The Crown Court hears some criminal appeals from the magistrates' court.

The civil courts

This section will look at the following courts:

(a) magistrates' courts;

(b) the County Court (this has capital letters because there is a single County Court, although hearings are heard in county court centres throughout England and Wales);

(c) High Court (this has capital letters because, again, there is one single High Court which sits in London but may sit in other places).

Civil functions cover such areas as:

(a) matrimonial cases;

(b) contact with children cases;

(c) child care cases;

(d) contract cases;

(e) personal injuries cases;

(f) administrative law cases.

You are most likely as a social worker to appear in these courts in family matters as:

(a) an applicant and/or witness in applications for an order under the Children Act 1989 or the Adoption and Children Act 2002 (details of the relevant law are dealt with in Part 3);

(b) a 'welfare officer' presenting a report to the court to assist it in deciding what, if any, type of order should be made.

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Rules of court

The procedures of the courts are governed by rules of court. Those issued under the Children Act 1989 will be the ones the social worker will come across most often. They are a form of delegated legislation, as the powers to make these rules come from statute.

The Family Court

In England and Wales, the Family Court deals with most family proceedings including:

- divorce;
- dissolution of civil partnerships;
- child arrangements orders;
- care and supervision orders;
- adoption;
- non-molestation and occupation orders.

The Family Court is made up of High Court judges, circuit judges, recorders, district judges, magistrates, and legal advisers.

Social workers in the Family Court

The majority of the social worker's dealings with the courts will be in the Family Court. The Crime and Courts Act 2013 set up a single Family Court for England and Wales which replaces the three separate tiers of court that, in the past, dealt with family proceedings. It came into force on 22 April 2014 at the same time as provisions of the Children and Family Act 2014 designed to ensure a more effective and speedy system for dealing with cases involving children.

You may appear in the Family Court:

(a) on behalf of your authority when it is applying for a care or supervision order—your role is as an applicant and a witness;

(b) at the request of the court, where it appears during family proceedings that it may be appropriate for a care or supervision application to be made by the local authority (Children Act 1989, s. 37); or

(c) the most frequent, where the court requires a welfare report to assist it to decide what order should be made in family proceedings (Children Act 1989, s. 7).

We look at the work of the social worker in the Family Court more closely in **chapter 8**. We look at the range of tools—such as how to write a court report, how to give evidence, and to survive cross-examination—that social workers need to succeed in the Family Court in the Social Worker's Toolkit. The introduction of a single Family Court means that judges of all different levels will sit in the same building. This will mean that cases can be allocated to a judge of appropriate seniority quickly and it will reduce the delays in the old system caused by cases being transferred between different courts.

County Court divorce proceedings

The County Court is the court where most divorces are processed, and it follows that it is the court in which s. 8 Orders under the Children Act 1989 (see **chapter 5**) will be

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made ancillary to those divorce proceedings. Ancillary relief refers to the powers of the court to make orders related to divorce or other matrimonial proceedings. Section 7 of the Children Act gives the court, in any divorce proceedings, the power to ask either the local authority or the probation service to prepare a report in the course of divorce proceedings.

Civil hearings other than family matters

The magistrates' courts, the County Court, and the High Court exercise a civil jurisdiction other than in family matters. These cover such matters as contract disputes, alcohol licensing, claims for compensation arising from accidents, etc. The High Court hears applications for judicial review. Normally social workers will not deal with these cases in the course of their work. Perhaps the main distinction between these hearings and family hearings is that 'normal' civil hearings will take place in open court and can be openly reported in the press.

Appeal hearings

There are normally provisions for a party unhappy with a decision of a lower court to appeal to a higher court. A dissatisfied party may want to appeal because:

(a) they think the court got the facts of the case wrong;

(b) they think that the court got the law wrong;

(c) they think that the court in exercising its discretion in the case came to the wrong decision.

Most appeal hearings do not involve hearing the case again with the same witnesses. An exception is an appeal to the Crown Court against conviction in the magistrates' court. Normally the appeal court will look at the reasons the lower court gave for arriving at its decision. In some courts the reasons (the judgment) are available in writing. Having heard representations from the parties and having looked at the judgment, the appeal court will give its judgment. Accordingly, it will be difficult to succeed in an appeal on ground (a)—only in exceptional circumstances would a lower court be held to have got the facts wrong, since that court at least has heard the evidence directly.

Most decisions are on ground (b): that the lower court misstated or misunderstood the law. The clarification of the law is an important function of the appeal system. In the field of family matters it is ground (c) that presents the greatest difficulty. When dealing with such family proceedings there can rarely be only one correct decision. The question whether or not to grant a contact order or a residence order will always be a question of balancing a variety of conflicting demands. There will always be a certain amount of discretion as to whether or not an order should be made. The appeal courts, generally, will not interfere in such a case provided that the exercise of that discretion was not unreasonable. Thus an appeal court may say that it would have arrived at a different decision, but if the original decision was within the area of the lower court's discretion then it will not interfere. The case of MA, SA and HA set out in **Box 1.2** illustrates that different judges faced with the same facts may come to different views (just as Wilson and Hedley did), but also the reluctance of appeal courts to substitute their views

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for those of the judge hearing the original case who was presented with the evidence, the testimony of witnesses, and the cross-examination of those involved. All this is only available to appeal courts at second hand, in written submissions or a report of the original case. So, if the original judge has his or her law right, ground (b) for an appeal fails; and if the judge came to a judgment that is not unreasonable on the evidence before the court, ground (c) for an appeal fails. The judgment is then likely to stand since it is difficult to sustain an appeal on ground (a) that the judge got the facts wrong.

BOX 1.2 ***MA, SA and HA (Children By Their Children's Guardian) v MA and HA and the City and Council of Swansea* [2009] EWCA Civ 853**

The Pakistani parents of three children had been found to have physically and sexually abused another child, known as X, living with them. There was also a claim the child had been trafficked illegally from Pakistan. The three siblings were taken into care but a judge found that even though there had also been some physical abuse of one of the children, MA, there was no likelihood of significant harm coming to the three children if they were returned home. The parents were likely to act in a different way towards their own children than to X, who was no longer with them. The 'threshold criteria' between harm and significant harm (see the Children Act 1989, s. 31(2)) had not been crossed, so the judge, Hedley J, dismissed the care proceedings, saying 'society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent . . . It will mean that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability.' The children should be returned to their parents.

The children's guardian (an official figure appointed to protect the interests of the children; see **chapter 5**) took the matter to the Court of Appeal claiming the judge's decision was irrational. The court refused to overturn the original judgment, with Ward LJ saying: 'Although [the father's] treatment of X was to be deplored, the judge had been best placed to decide on the primary facts and was plainly not wrong in declining to find that the threshold of significant harm had been crossed'. He added that it was a 'paradigm case where this court has to respect the findings and conclusions of an experienced judge and uphold his decision'. By 'paradigm case' he means one that fits the standard pattern of cases in which the original trial judge's view of the facts must be accepted.

In this case, however, one of the Court of Appeal judges, Wilson LJ, gave a minority dissenting judgment declaring that the facts before the original trial judge must have given rise to a likelihood that all three of the children were at significant risk of harm if returned to their parents.

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If a court decides that there has been an error of law or failure to exercise discretion properly, it will either replace the decision with the correct decision or, if it cannot do this because the evidence must be looked at again, it will send the case back to a different judge or bench in the court below with instructions as to what matters need to be looked at again.

If you look at the diagram of the court structure (**Figure 1.1**) you will see that the two highest courts are the Court of Appeal (which has separate branches—criminal

and civil) and the Supreme Court. The Supreme Court (formerly 'House of Lords', meaning the 'Judicial Committee of the House of Lords') is the court of final appeal. Even so, it must defer to decisions of the European Court of Justice (the European Union court) and must take account of the rulings of the European Court of Human Rights (the Council of Europe court). To give some understanding of the actual workings of the appeal system: the Court of Appeal will hear about 1,000 cases a year and the Supreme Court (assuming it continues to hear the same number as the old House of Lords) about 50 cases a year. So it will be a rare occasion when you have a case going to either of these courts.

The actual practicalities of appeals are beyond the scope of this book. If you do find yourself in a situation which you think should be the subject of an appeal, you should consult your lawyer immediately. You will need to know about appeal cases, however, because the appeal courts generate the reported cases which are vital to your understanding of the law as they tell you how the law should be understood. By definition, what an appeal court says is treated as correct, both on the facts of the particular case and in respect of the legal principles it sets out, unless a higher court declares it to have been wrong.

Tribunals

A great deal of dispute resolution within the English legal system is carried out by tribunals. Most disputes are between the citizen and the state, such as social security disputes; but they can also hear disputes between tenant and landlord, or employer and employee. Tribunal numbers have dramatically increased over the last 50 years. Currently there are over 80 types. Their purpose is to provide a quicker and less formal forum than the courts and to allow cases to be adjudicated on by judges sitting where appropriate with people with an expertise in the particular jurisdiction. For instance, psychiatrists sit on mental health cases and surveyors on property cases. Tribunals tend to be of particular importance to social work service users as their lives are likely to be more dependent on decisions made by state bodies, such as benefit decisions made by the Department for Work and Pensions.

Tribunals grew up in response to the need to settle particular disputes, and used to be managed by the same government department whose decisions were challenged. This is not now considered to be in accordance with the right to a fair determination, under Article 6 of the European Convention on Human Rights (ECHR). Tribunals now are managed within the HM Courts and Tribunals Service under the Ministry of Justice, and legal members are judges who must swear an oath to try cases without fear or favour, just like court judges. First Tier Tribunals (FTT) are divided in six chambers on the basis of their specialisms. So, for instance, the asylum support tribunal sits within the social entitlement chamber. Appeals from FTTs go the Upper Tribunal which is similarly divided into four chambers.

New jurisdictions for tribunals are created relatively frequently, partly in response to the increasing complexity of society and also stimulated by Article 6 of the ECHR

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which requires the existence of courts or tribunals to determine a person's civil rights. One example relevant to social work practice is the Care Standards Tribunal. This is an FTT within the health education and social care chamber. It considers appeals against a decision made by the Secretary of State to restrict or bar an individual from working with children or vulnerable adults and decisions to cancel, vary, or refuse registration of certain health, child care, and social care provision. Appeals from the Care Standards Tribunal go to the Administrative Appeals Chamber of the Upper Tribunal.

Inquiries

Here we are using the term 'inquiries' to refer to a whole range of investigations/hearings which take place outside the court system. Local authorities may initiate, participate in, or contribute to many types of inquiries. Some are more formal than others. They are a useful mechanism for dealing with complaints or investigating failure and may prove more helpful in finding out facts than the adversarial system used in the courts. We set out here some of those you may come across.

Inquiries ordered by a minister

These are the type of inquiry with which you are probably most familiar. They arise when a minister, acting under powers conferred upon him or her by statute, orders the local authority to conduct an inquiry. The Victoria Climbié Inquiry, which was set up by the Secretary of State for Health and the Secretary of State for the Home Department under the chairmanship of Lord Laming, is a typical example. Inquiries established by statute normally have power to order witness attendance and compel disclosure to the inquiry. The reports of ministerial inquiries are essential learning documents. We will refer to several of them throughout this book.

Inquiries established by the local authority

Local authorities are empowered to carry out inquiries by the Local Government Act 2000. These can cover a variety of different procedures depending upon the reason for the inquiry, and their remit will vary according to time and expense constraints, and whether criminal proceedings are pending. For instance, they can be chaired by an independent chair or by a member of the local authority, such as the chief executive. They can be public or private, though owing to the sensitive nature of many of these inquiries, they tend to be private. Clwyd Council carried out a series of inquiries into allegations of child abuse in its children's homes before the Waterhouse Inquiry ordered by Parliament (launched in 1996 and published in 2000). Clwyd had failed to publish its inquiry for fear of legal action by victims.

Inter-agency inquiries

These can be undertaken by one or more statutory bodies. They may involve local authorities, health authorities, police, or other interested parties. They may be ad hoc in nature or subject to standing procedures. The type of inter-agency inquiry which

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you are most likely to come across is the serious case review coordinated by the Local Safeguarding Children Board (LSCB). A serious case review is appropriate when a child has sustained a potentially life-threatening injury through abuse or neglect, serious sexual abuse, or sustained serious and permanent impairment of health or development through abuse or neglect, and the case gives rise to concerns about the way in which local professionals and services work together to safeguard and promote the welfare of children. Any professional may refer a case to the LSCB if it is believed that there are important lessons for inter-agency working to be learned from the case. In addition, the Secretary of State for Education has powers to demand an inquiry be held under the Inquiries Act 2005.

Ombudsman schemes

Public ombudsman schemes originated in Scandinavia and were imported into the UK in the 1960s. Ombudsman schemes are designed to provide a possible source of redress where private individuals believe they have suffered through the poor administration—maladministration—of a public body, such as a local authority. What the ombudsman looks at is not the failure of the public body to obey the law but its failure to implement the law in a competent way. Ombudsmen are not able to investigate complaints where legal proceedings are possible.

The Parliamentary Ombudsman

The first ombudsman created was the Parliamentary Commissioner for Administration, who deals with allegations of administrative failings by government departments. The public does not have direct access to the ombudsman. Complaints must go first of all to MPs. MPs are not obliged to refer the complaints they receive to the Parliamentary Ombudsman if they consider that they can deal with the matter themselves. This filter was introduced to preserve the primary responsibility of Parliament to call the administration to account.

The Local Government Ombudsman

The Local Government Ombudsman (technically called the Parliamentary Commissioner for Local Government) is the officer you are most likely to have dealings with. Typically, in any year there are 15,000 complaints to the Local Government Ombudsman, 6 per cent of which relate to social services (37 per cent, in contrast, relate to housing departments—mainly the administration of housing benefit). The objective of the Local Government Ombudsman is to provide, where appropriate, satisfactory redress for complainants and assist in the improvement of administration by local government. The Local Government Ombudsman has the power to issue general advice on good local administration.

A complainant must satisfy the ombudsman that all other procedures of internal complaint to the local authority have been tried and exhausted without giving the complainant redress. (While many complaints will be covered by the local authority

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complaints procedures, the ombudsman can investigate delays in hearing complaints or allegations that councils are trying to exclude people from using the complaints process.) The complainant has to approach the ombudsman through a local councillor. If the complainant cannot find a councillor willing to make the application, the complainant may approach the ombudsman direct. The ombudsman then has wide powers of investigation and the ability to look at files and compel people to give information.

More information is available on the Local Government Ombudsman's website www.lgo.org.uk. The site also contains reports of the Local Government Ombudsman's decisions and details on how to make a complaint.

Other Ombudsmen

There are several other examples of ombudsmen which may provide useful redress for your clients. The Health Service Commissioner investigates complaints about the failures of NHS hospitals or community health services and other NHS provision. Any member of the public may refer a complaint direct, though normally only if a full investigation within the NHS complaints system has been carried out first. More recently a range of specialist ombudsman has been created. For instance, the Housing Ombudsman Service deals with complaints against housing associations. An Office for Legal Complaints deals with complaints about lawyers, taking over from the Legal Services Ombudsman, now abolished.

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Complaints

Complaints are an important driver for improvement in services. Complaints may be generally defined as expressions of dissatisfaction or disquiet that require a response. It is important not to define complaints too narrowly since this may prevent service users from having a legitimate outlet for their concerns.

Social services complaints procedure for adults

The procedure set up under the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 enables complaints about health or social care to be made under a single set of guidelines, whether it relates to health or social care. The guiding principles are that each local authority or health care provider must have a procedure which deals with complaints efficiently, courteously, thoroughly, in a timely manner, and which leads to the complainant being properly informed and any appropriate action being taken. The local authority must appoint a complaints manager. Complaints must be in writing and made within 12 months of the problem arising. The complaint may relate to a private carer or accommodation provider or to the authority itself. The local authority must publish an annual report of how it has dealt with complaints.

The Social Services Complaints Procedure (Wales) Regulations 2005 provide similar guidelines for complaints about both adult and children's services. There must be a

publicized procedure, and a complaints officer. However, complaints can be made to any officer of the authority, and need not be in writing. A dissatisfied complainant can ask for a panel to be set up to consider the complaint and how it was dealt with. At the time of writing the Welsh government was considering responses to its consultation on the reform of these regulations.

We look at complaints about adult social care provision in greater detail in **chapter 14**.

The Children Act 1989 complaints procedure

The second procedure is that required by s. 26(3) of the Children Act 1989. Every local authority must establish a procedure for considering representations (complaints) about the exercise of its functions under Part III of the Act, made by or on behalf of any children looked after or in need—we explain these phrases fully in **chapter 5**. The requirements are set out in the Children Act 1989 Representations Procedure (England) Regulations 2006. Local authorities have to give complainants information about the representations procedure when they first make representations and they must also give information about advocacy services where relevant; that is, where the complainant is a looked-after child or a child in need and so is entitled to an advocate under s. 26A of the Act.

Important points to note about the complaints procedure are that it:

- imposes a one-year time limit on the making of representations so that local authorities and voluntary organizations do not have to consider representations that arise from incidents several years ago;
- imposes tight time scales for the handling of representations including a local resolution phase upfront so that issues may be resolved quickly and efficiently;
- requires the involvement of independent persons in the consideration of representations so that the process is fair and transparent for the complainant; and
- requires monitoring of the procedure and the outcome of each representation so that local authorities can learn and improve services as a result.

Figure 1.2 sets out the complaints procedure laid down by the Department for Children, Schools and Families for complaints relating to children's services.

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Children's Commissioners

The Children's Commissioner for Wales is an independent body which has the role of ensuring that the rights of children and young people are upheld. It was set up following a recommendation in the report of the Waterhouse Tribunal which looked into the abuse of children in care in the former county council areas of Gwynedd and Clwyd (see **Inquiries established by the local authority**, p 31). The office of the Children's Commissioner for Wales was established under the Care Standards Act 2000. The Commissioner's functions include reviewing and monitoring the arrangements

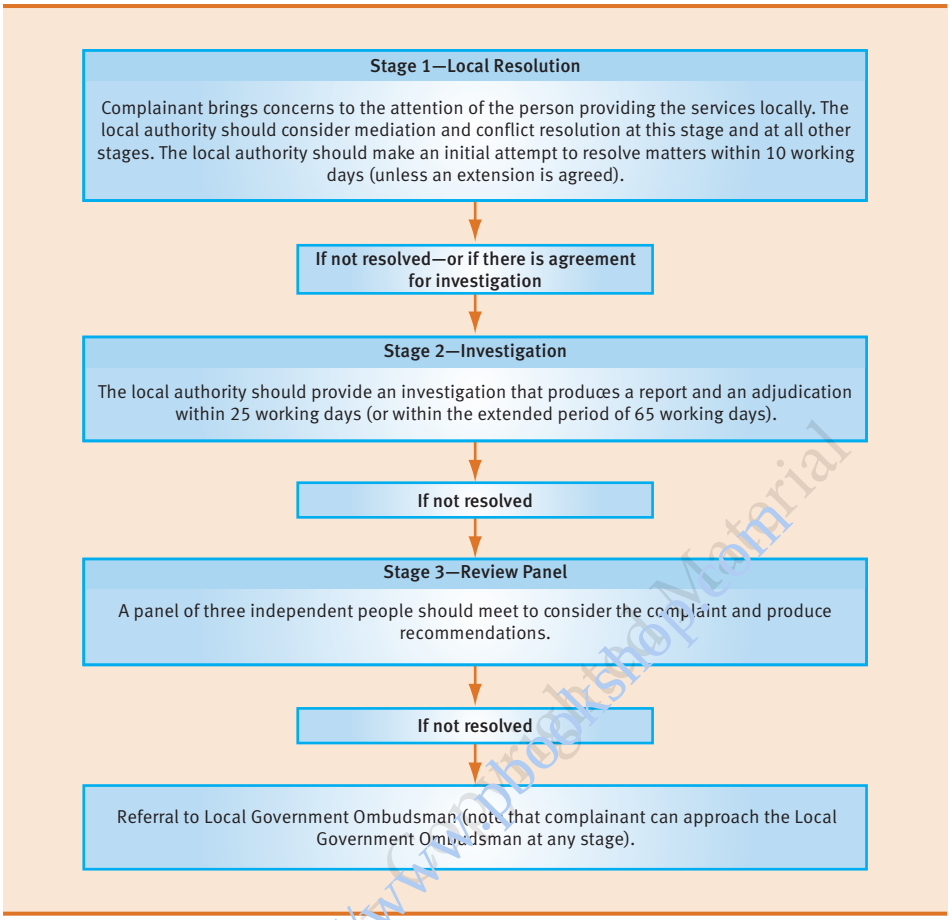

FIGURE 1.2 The procedure for Children Act 1989 complaints

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for complaints made by service providers, whistle-blowing (meaning 'protected disclosures' by staff reporting failings of their management or employer to someone outside the immediate organization such as to a lawyer, the police, or a politician and possibly to the media under certain circumstances), advocacy, the provision of advice and information, the power to examine particular cases, providing other assistance, and making reports. In 2001 the Children's Commissioner for Wales Act extended the Commissioner's role to all children. It also gave him or her the power to review proposed legislation and policy from the National Assembly for Wales considering the potential effect that it might have on children, and to make representations to the National Assembly for Wales about any matter that affects children. The website is www.childcom.org.uk.

The Children Act 2004 establishes the office of Children's Commissioner for England with the function of promoting and safeguarding the rights and interests

of children in England. The website is www.childrenscommissioner.gov.uk. The Commissioner is required to have regard to the United Nations Convention on the Rights of the Child. The role is similar to the Children's Commissioner for Wales but does not include the power to review all proposed legislation to assess its impact upon children. Most significantly, the government has resisted any emphasis on individual children's rights.

Inspection and audit

The government says it is committed to improving the performance of public services. One particular mechanism by which it does this is via inspection and audit. In the health and social care system there are a number of organizations described as regulatory arm's-length bodies that hold services to account. These bodies operate independently of government.

Care Quality Commission

This body registers and monitors the care services of adult health and social care providers in England and protects the interests of people whose rights are restricted under the Mental Health Act. Its responsibilities were set out in the Health and Social Care Act 2008, broadly 'to protect and promote the health, safety and welfare of people who use health and social care services'. Provisions came into force in October 2010 when health and adult social care services in England became legally responsible for meeting new standards of quality and safety. The new system is described as looking at the actual care that people receive rather than simply looking at systems and processes. The intention is to ensure the person being cared for is consulted about their care and to promote their independence.

Where there is failure to register or to abide by legal requirements and conditions of registration in care provision, the Commission can use the enforcement powers listed in the Act. Improvement actions can be set for care providers but ultimately the Commission can use civil and criminal law to protect those being cared for or to punish care providers for causing harm or failing to meet requirements.

For full information on the work of the Commission, see its website www.cqc.org.uk.

Children's services and Ofsted

From April 2007 children's social care services have been regulated by the Office for Standards in Education, Children's Services and Skills—Ofsted.

Achieving public accountability

It is clear that there is a multitude of mechanisms to achieve public accountability. In **Table 1.2** we list them and provide a summary of the advantages and disadvantages they bring.

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TABLE 1.2 A summary of the different forums for public accountability

Forum	Advantages	Disadvantages	Comment
The courts	Prestigious	Expensive and time-consuming	Very few cases that you are involved in will get reported in the law reports. Decisions which are reported tend to arise from very complex factual circumstances which you may feel have little relevance to your day-to-day practice
		Can be very alienating to people unfamiliar with its operations	Extensive expertise and specialist knowledge
Tribunals	Less formal hearings, with greater accessibility and speed	Different tribunals run on different procedural rules. Sometimes the informality can work to the disadvantage of the vulnerable person	You are likely to become increasingly familiar with tribunals because of the influence of the Human Rights Act
		Generally no funded legal help available	
Inquiries	Public inquiries are very influential on subsequent practice	Public inquiries are expensive and time consuming. Other inquiries may be held in private and provide very little public accountability	
Complaints	These provide a speedy informal system of addressing issues of concern to ordinary people	Children and vulnerable people may find it very difficult to complain	
Local Government Ombudsman		Limited compensation	
Children's Commissioner	Provides a service which children need since they find it difficult to complain or influence policy and the law	England's Commissioner has limited role	It will be interesting to see the extent of the added value the Children's Commissioner provides

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Forum	Advantages	Disadvantages	Comment
	It will also provide a useful coordinating role		
Regulators	Can concentrate on improving the quality of services and respond to systemic problems	Do not respond to individual complaints although service users' views are taken into account	

EXERCISES

1 Explain the differences between courts and tribunals.

2 Accountability

A service user is dissatisfied with a decision you have made. Outline the various options open to her and indicate under what circumstances which option is likely to be most appropriate.

3 The Ombudsman

Find the Local Government Ombudsman's site on the web. Find the decisions on complaints about social services. What types of complaint are most common?

4 Reading statutes

Find the Care Standards Act 2000—on the internet or find a paper copy. Now answer the following questions:

(a) How many parts are there to the Act?

(b) What is the title of Part IX and how many chapters does it have?

(c) How many schedules are there to the Act?

(d) Find s. 11 of the Act. Does this impose criminal or civil liability on the person who fails to register?

(e) Find s. 16 of the Act. What is the legal status of regulations made under this section?

(f) Look at s. 23. What powers does the minister have? What statutory duties are imposed upon him?

(g) What section of the Act deals with the title 'social worker'? Write, in your own words, what it provides.

(h) How does the Act define 'vulnerable adults'?

(i) Has s. 81 of the Act come into force?

(j) Is your version of the Act up to date? How do you know?

6 Reading cases

Find *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7 and answer the following questions:

(a) In which court was the case heard?

(b) Name the judges.

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(c) When was the case heard? On what date was the judgment handed down?

(d) Who were the parties to the case?

(e) Set out briefly the legal history of the case.

(f) Is the case one of statutory interpretation, or is it about the common law?

(g) Was the decision of the court unanimous?

(h) Who were the barristers in the case? Who were the solicitors?

(i) Find Lord Scarman's judgment and copy it. If you have time, read it. It is a good decision to read as it has been extremely influential, as you will find out in **chapter 2**.

ONLINE RESOURCE CENTRE

For guidance on how to answer these exercises, visit the Online Resource Centre at: www.oxfordtextbooks.co.uk/orc/socialwork13e/.

WHERE DO WE GO FROM HERE?

This chapter makes it clear that you are operating in a legal arena and provides a very important foundation to your legal studies. The most important message to follow from this chapter is that the law determines what you do. Social workers must be able to account for their decisions. In addition, any correct answer that a social worker can give, when asked why he or she took a particular course of action, must include the statement 'I took the step because that was what appropriate social work practice demanded within the framework of the law'. Without the ability to say that, the professional social worker will have failed themselves and, more importantly, the service user. We now move to **chapter 2** where we look more closely at the regulation of the professional social worker.

ANNOTATED FURTHER READING

The legal system

If you would like to read more about the English and Welsh legal system there are any number of books available. Martin Partington's *Introduction to the English Legal System* (Oxford University Press) is concise, updated annually, and takes a critical as well as a descriptive approach.

Websites of (some of) the bodies mentioned in this chapter:

www.parliament.uk
www.assemblywales.org
www.justice.gov.uk
www.ombudsman.org.uk (covers Parliament and NHS)
www.lgo.org.uk (local government ombudsman)
www.childrenscommissioner.gov.uk (Children's Commissioner for England)
www.cqc.org.uk (Care Quality Commission)

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