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Why I wrote this book

I have taught law to postgraduate and undergraduate social work students for almost five years. During that period I had become increasingly frustrated by the lack of texts which assisted students to contextualise the law. There are comprehensive social work law books which provide considerable technical detail in a sequential fashion. Others focus on the value base of social work, but are deficient in the technical detail crucial to practising lawfully. As a lecturer I wanted a text which thoroughly integrated technical detail of the law with the value base of social work. I also wanted to move beyond the restriction of paragraph-sized scenarios to longer and more expansive explorations of the complexity of real-world social work activity within a legal context. But more than anything else, I wanted to write a text which would engage students in the narrative accounts of users, carers, parents, children and social workers caught up in the midst of legal action. In short, I wanted to make the law an interesting, stimulating and sometimes moving read for social work students. It is for this reason that my book centres on Serious Case Reviews, Public Inquiry Reports, Ombudsman Reports and judgements handed down by the courts to explore the realities of social work practice and the law which frames it.

Conventions used in this book

There has been a tendency in official documents to note the ethnicity of individuals if they are from ethnic minority communities and not if they are from the majority white community. Unfortunately this has meant that in many instances the ethnicity of parties to a court case has not been explicitly stated. However, it can be assumed that in most instances these people are in fact from the white majority community. As ethnicity has simply not been recorded in many of the documents upon which this book is based, regrettably I have been forced to adopt the same convention.

As a large number of the cases and inquiries cited in this text involve children or vulnerable adults, often anonymity was granted to these individuals and preserved by replacing their real names by letters in judgements and inquiry reports. In all the Local Government Ombudsman Reports, as required by statute, the ombudsman had already substituted pseudonyms for each of the complainants. Where Ombudsman cases are used, I have simply adopted the same pseudonyms as were assigned in the original ombudsman’s report. As regards Public Inquiry Reports, where the names of people were not used in the original version, I have observed the anonymity this gave. I have done so even when those names have subsequently come into the public domain. Where real names have been used in court reports or inquiries I have also used them. Each case commences with a list of key people, some of whom will be denoted by letters, pseudonyms or their real names.
Preface

There are frequent quotations from the court judgements, inquiries and ombudsman reports which are the basis of discussion of about professional practice. These are referenced according to paragraph or page number depending on the format used in the original documentation. These references appear without authors’ names and are easily distinguishable from citations of the research literature.

How to read this book

Chapter One brings together all the background detail necessary to comprehend the rest of the book and as such it is crucial to begin by reading this. Subsequent chapters bring together government guidance, national minimum standards, service standards and codes of practice to bear upon the workings of different areas of social work law. Precisely because this textbook draws upon real-life cases it illustrates the complexity of social work practice within a legal framework including the inter-relationships between different areas of legislation and practice. Consequently, the later chapters in the book build cumulatively upon the knowledge base of the early ones. So, for example, a court case in Chapter Nine concerning a parent’s mental health examines this in relation to child protection which refers back to knowledge contained in Chapter Three. Ideally this book should be read sequentially from start to finish.

Siobhan Laird
LEGISLATIVE FRAMEWORK

**Fact file**

- Number of qualified social workers in England and Wales GSCC (General Social Care Council) registered - 92,000
- MPs in House of Commons - 519 men, 126 women and 15 from ethnic minorities
- Primary legislation passed by Parliament annually - 50
- Secondary legislation passed by Parliament annually - 3,500
- Judges in House of Lords (Supreme Court) - 11 white men and 1 white woman
- Judges in Court of Appeal - 33 white men and 2 white women
- Judges in High Court - 94 men, 16 women and 3 from ethnic minorities
- District Judges (County Court) - 302 white male, 80 white female and 20 from ethnic minorities
- Circuit Judges (Crown Court) - 501 white male, 70 white female and 20 from ethnic minorities
- Lay Magistrates - 14,500 white male, 14,800 white female and 2,200 from ethnic minorities, 1,500 disabled and 25,000 over 50 years of age
- Practising solicitors - 100,000 of which 40% are women and 11% from ethnic minorities
- Practising barristers - 14,000 of which 33% are women and 11% from ethnic minorities
- Number of different types of tribunal - 80


**Overview of chapter**

Many of you will find law one of the most demanding and challenging aspects of your training as social workers. Some of you may not have encountered it before and those who have will almost certainly not have been required to study it in the detail necessary to qualify as social workers. Law can be a daunting subject because it cannot be fudged. It requires a comprehensive grasp of foundational concepts, an extensive knowledge of
legislation and precision in its application. Moreover, practitioners can use knowledge of the law in ways which further oppress and disempower service-users, or exercise it in a manner which informs service-users of their entitlements, protects their rights and enhances their quality of life.

This chapter sets out the legal framework within which social work practice takes place. It describes statute law and case law and then explains the relationship between them. Also detailed are the different kinds of government-issued guidance which direct management and assist frontline professionals to implement new legislation. These are often neglected aspects of the law in mainstream text books, but are crucial documents for understanding the practice implications of legislation and case law. Moreover, Policy Guidance, Practice Guidance, Codes of Practice, Local Government Circulars and National Service Frameworks often articulate the guiding principles and purposes of legislation. In addition they commonly set out the standards and quality of professional work and service delivery. For these reasons government guidance is frequently referred to throughout this book.

Social workers as employees should be aware of the legal obligations owed to them by employers in terms of ensuring their health and safety. The GSCC Code of Practice for Employers of Social Care Workers imposes additional responsibilities upon organisations which employ social workers. The obligations of employers and the rights of social care professionals as employees are considered in this chapter. Without knowing their own rights as workers, practitioners will be unable to ensure that they operate in a safe environment.

Social workers have a legal duty of care towards service users and carers. This means that practitioners and their employers can be required to pay damages by those who avail of their services and suffer loss or distress as a result. If users or carers receive incorrect advice from professionals, or experience adverse consequences because of social work intervention, they may be entitled to sue in negligence. At the same time the law prevents social workers being sued when carrying out certain statutory functions, such as safeguarding children. Obviously practitioners need to know the circumstances under which they and their employers may be liable in negligence and when they are not.

Social workers not only assist users or carers to avail of services, but commonly are involved in helping them to assert their rights. In order to do this, social workers themselves have to be aware of the raft of legislation which protects people from discrimination on the grounds of their gender, sexual orientation, disability, age, religion or ethnicity. These domestic laws are complemented by the European Convention on Human Rights. This gives everyone in the United Kingdom basic protections against unjustified interference in their lives by the State. Parents, children, service users and carers are sometimes on the receiving end of interventions that they do not want by health and social care professionals. A resort to human rights law can often be an important means whereby individuals and families can protect their privacy and autonomy. Social workers need to be aware of the rights granted under the European Convention in order both to avoid violating them and to help individuals whose rights have been contravened to obtain justice.

Computerisation and the growing use of information technology in social work make it crucial for practitioners to understand the legislation which governs the use of personal information relating to users and carers. Much of contemporary social work consists of collecting information from different sources and using it to complete assessments. These may form the basis of a Child Protection Plan, a Community Care Plan or a risk assessment compiled as part of a wide-ranging multidisciplinary care plan. People about whom
information is being gathered and processed have legal protections as to how that data is used. Social workers need to be aware of data protection legislation to ensure that they handle information correctly. They also need to be in a position to offer advice to users and carers when inaccurate or damaging information about them is being used to inform care plans or other professional activities.

Social workers are not lawyers and are not required to give legal advice to those they work with. However, social workers, regardless of whether they practise with adults or children, operate daily within a set of legal frameworks. They need to understand those frameworks in order to practise lawfully. But they also need to understand them if they are to assist parents, children, users and carers to protect their rights or to obtain redress when these have been violated. The law is at the heart of social work and a thorough working knowledge of relevant legislation supplemented by case law is at the heart of best practice. Reading this chapter provides all the background information that is necessary to be able to understand and engage with the discussion of real-life cases and professional decision making in the rest of the book.

**Why law matters for social workers**

Essentially the law comprises a set of rules that can be enforced by the police and courts through means of sanctions such as a prison sentence, compulsory community work, fine or injunction (court order preventing an action). However, the law is not the same as morality, which may or may not coincide with legal rules. For example, some people in Britain believe that abortion is immoral, but the Abortion Act 1967 permits abortion to be carried out in a number of circumstances, such as when pregnancy threatens the mother’s life or is the result of a rape. Conversely, a section of the population believe that it is morally justified to help someone to die in certain circumstances, such as when they are experiencing severe chronic pain or a complete loss of dignity as the result of serious illness. Yet, the law in the United Kingdom makes euthanasia illegal and a number of people have been found guilty in court of either murder or manslaughter for assisting a suicide. On the other hand, almost all moral belief systems have sanctions against the taking of human life and this is also true of English law, with the handing down of long custodial sentences for murder and occasionally for manslaughter.

Consider the case study below and try to imagine how you would intervene in this situation if you had no knowledge of the law and only had your GSCC Code of Practice for Care Workers to guide your decisions and actions.

**Case study**

For the last five years Barbara aged 7 has lived with her father Luke, who is of African Caribbean heritage, and his partner Debbie who is white and six months pregnant with Luke’s child. Debbie’s two children, Sheila aged 10 years and David age 12 years, also live with them. Both Luke and Debbie are unemployed. They rent a two-bedroom terraced house with one small living room and kitchen downstairs from a local housing association. The roof has leaked for the last eight months and there is rising damp in the kitchen.

A year ago Barbara was admitted to Borough Hospital with a broken arm after what her father tells the doctor was ‘a fall down the stairs at home’. No concerns are raised by hospital staff although medical notes describe Barbara as being underweight for her age. A month ago
This scenario raises a number of issues which you cannot effectively address without a working knowledge of the law. Consider the following in the light of the GSCC Code of Practice for Social Care Workers:

- Luke and Debbie are living in overcrowded social housing which is also in disrepair. Such circumstances are likely to detrimentally affect the welfare of their children and indeed their own health. Paragraph 3.1 of the Code requires social workers to promote the independence of service users by ‘assisting them to understand and exercise their rights’. To help this family with their housing you would need to know: what their rights are in relation to housing; how they go about exercising their rights; and what you can do as a social worker to improve their housing situation.

- Debbie is convinced that Central hospital is giving her family a poorer service because they are of African-Caribbean heritage. Paragraph 3.2 of the Code obliges social workers to challenge and report discriminatory practice alongside enabling service-users to exercise their rights. To assist Luke you would need to know: what law exists to protect people from racial discrimination; how Luke can use this to take action against the hospital for an act of discrimination; and what sources of funding or free legal advice are available to enable him to pursue his claim.

- Barbara and David have been treated in hospital and it is possible that their injuries are caused by physical abuse. Equally their injuries may be due to accidents and Barbara could have a medical condition which results in her being underweight for her age.
Why law matters for social workers

How can you establish which is true? Can you simply walk into people’s homes because you are a social worker and demand to interview their children? Can parents simply refuse to let you speak to their children? In short, what are your powers as a social worker and what rights do parents have when they disagree with you? Paragraph 6.1 of the Code obliges social workers to work in a ‘lawful, safe and effective way’.

- If you interview Luke and Debbie about the injuries to their children and they insist they do not want any further social work contact does that mean you should just end work with this family? To answer this question you would need to know what your legal duties are as a social worker as regards children’s welfare. Paragraph 6.1 of the Code is again directly relevant in this situation as are paragraphs 4.2 and 4.3 which oblige social workers to conduct assessments and minimise the risk of harm to service users.

- Barbara’s birth mother has demanded to be given immediate custody of Barbara. What would be your response as a social worker if Luke and Debbie want to continue to look after Barbara and refuse to let her birth mother see Barbara again? How can you help to resolve this dispute as a social worker and what advice can you give to those involved? Paragraphs 1.2 and 2.2 of the Code oblige social care workers to respect and promote the views and wishes of service users while ‘communicating in an appropriate, open, accurate and straightforward way’. Putting this into practice would require knowledge of both relevant legislation and government guidance.

- It takes three weeks for a social worker to make a home visit after the referral for Barbara and a month for the referral for David to even be allocated to a practitioner. Paragraphs 2.4 and 2.5 of the Code require social care workers to be reliable and to honour work commitments. What might be an acceptable timescale for a social work response in these circumstances? To answer this you would need to be familiar with government guidance.

- What if Luke and Debbie were waiting for urgent assistance from Social Services which they only received after months of delay? How would they go about getting any kind of redress and what would be your responsibility to assist them? To answer this you would need to know the options for service-users wanting to make complaints and what responses they are entitled to. Paragraph 3.7 makes it clear that social care workers must be in a position to: help service users and carers to make complaints, ensure that they are taken seriously, passed to the correct person, and receive a proper response.

- A number of professionals have treated Barbara and David and it will be important to obtain information from them about the health of the two children. Paragraphs 6.5 and 6.7 require social care workers to collaborate with other professionals. What will you do if the doctors tell you the information is confidential or that they are too busy to speak to you? To answer this you would need to know what are the legal obligations of other agencies and professionals to work with you. This is set out both in legislation and government guidance.

- Colleagues who have gone off on sick leave have not been replaced by management and now you are yourself starting to experience illness. Paragraph 3.4 of the Code obliges workers to bring to the attention of their employers any ‘resource or operational difficulties that might get in the way of the delivery of safe care’. Concomitantly, paragraphs 4.5 and 4.6 of the GSCC Code for Employers require them to ‘promote staff welfare’ and provide ‘appropriate assistance to social care workers whose work is affected by ill health’. What rights do you have as an employee to work in a less stressful environment, and how can you enforce these rights? Once again the answer to this lies in knowing the relevant law and the legal responsibilities employers have towards their employees.
To summarise, it is not enough to have a working knowledge of the GSCC Code of Practice in order to address the issues and dilemmas raised by the case study. Knowledge of the law is necessary because it instructs practitioners as to:

- The rights and entitlements of service-users, carers, parents and children.
- How the rights and entitlements of service-users, carers, parents and children can be enforced.
- The rights and obligations of parents, guardians, partners, carers and others in relation to children and service-users.
- The legal responsibilities of social workers.
- The nature and limits of social workers’ legal powers.
- The legal obligations of different agencies and professionals.
- The accountability of social workers to their service-users, employers and professional bodies.
- The legal responsibilities of employers to social workers as employees.

While the law relating to social work is extensive, it still leaves social workers with considerable discretion when making decisions and intervening. The circumstances which social workers encounter during their practice are simply too varied and numerous for the systematic application of prescriptive legal formulas. It is for this reason that the GSCC Code of Practice for Care Workers and professional judgement developed through post-qualifying practice are critical to good social work within the legal framework.

**Statute law**

This section details how law is actually created in the United Kingdom and how it is enforced. It also examines the impact of international legal frameworks which have an important and sometimes central role in the making and implementation of law in Britain.

**Primary legislation**

The United Kingdom has an unwritten constitution which means that Parliament, which comprises the House of Commons and the House of Lords (known together as the Houses of Parliament), can make any law it wishes. The House of Commons at any point in time tends to be dominated by just one political party which has the most Members of Parliament. The party with the majority of MPs forms the government and this means that normally it can successfully introduce laws by mustering the majority of votes from its own MPs to pass a new law. The majority of peers in the House of Lords also have to vote in favour for a government proposal to become law. But because the House of Commons has primacy in law making, even if the majority of peers reject a proposal they can only temporarily prevent it from becoming law. For this reason the House of Lords rarely votes against something which the majority of MPs in the House of Commons have voted to accept. A law created by Parliament is known as a statute or act and is referred to as a piece of legislation.

The ability to create a statute which can repeal or supersede previous legislation is known as Parliamentary Sovereignty. In effect it means that one government can undo the Acts passed by a previous government. For instance the Conservative Government under Margaret Thatcher passed the Local Government Act 1988 of which section 28 prohibited Local Education Authorities from using material in schools which could be
interpreted as promoting homosexuality. In the meantime homophobic bullying of school children continued unabated (Rivers, 2000, 2001). The Labour Government under Tony Blair passed a statute entitled the Local Government Act 2003 which repealed (cancelled) section 28 of the earlier legislation. Since this change in the law the Department for Education and Skills and the Department of Health (2004) have been able to produce clear policies to tackle the high incidence of homophobic bullying in schools.

There are a number of reasons why a government might introduce a particular piece of legislation. These are identified in the diagram below.

Political parties stand for election on a programme of what they consider to be improvements for the country. They achieve these improvements or changes through legislation. For example, the Conservative Party which won the general election in 1987 had an election manifesto entitled ‘The Next Moves Forward’ which promised to raise education standards. The Education Act 1988 fulfilled this undertaking by introducing into state schools the National Curriculum which outlined the knowledge and standards pupils should attain by the ages of 7, 11, 14 and 16 years of age. This was accompanied by a programme of national tests for pupils, performance indicators for education, and the creation of public league tables for schools. The Labour Party in their 1997 manifesto entitled ‘New Labour because Britain Deserves Better’ promised to introduce a welfare-to-work programme to get young people and the long-term unemployed into work. On being elected to office the Labour Government subsequently introduced a raft of legislation which reduced the welfare benefit entitlements of people who were not actively looking for work.

An influential report can also result in a government creating a new statute. For instance the Conservative Government asked Sir Roy Griffiths to chair a committee with terms of reference ‘to review the way in which public funds are used to support community care policy’. In 1988 the Griffiths Report entitled Community Care: Agenda for Action set out a number of recommendations. These were to underpin the subsequent NHS and Community Care Act 1990 which introduced: care management; the mixed economy of care; needs-led service provision and the relocation of large numbers of vulnerable people from institutional settings to the community.

Scandals and public inquiries, often followed by a public outcry, can also be a key factor in a government’s decision to introduce a new piece of legislation. For instance, newspapers
widely reported the murder of 8-year-old Victoria Climbié at the hands of her great aunt and her partner during 2000. The adverse publicity surrounding Victoria’s death, which largely blamed the tragedy on social workers and other professionals, prompted the Government to set up a public enquiry which reported in 2003. This investigation revealed that Victoria was known to: four social work departments; three housing authorities; two child protection teams of the Metropolitan Police; one NSPCC centre; and two hospitals which suspected Victoria’s injuries where due to deliberate harm (Laming, 2003). All of these agencies failed to share vital information with each other that could have saved Victoria’s life. These findings led Parliament to pass the Children Act 2004 which places legal duties on social services, housing authorities, health authorities and the police to cooperate with each other and share information to protect children.

Special interest or pressure groups may also lobby the government or try to sway public opinion to bring about legislative change. For example, the Joseph Rowntree Foundation and the Child Action Poverty Group are independent organisations which conduct research and campaign on poverty in the United Kingdom. They frequently lobby MPs to make legislative changes which improve poor people’s lives. Based on their research, both groups campaigned for social policies to reduce the incidence of social exclusion through increasing benefits and childcare support to low income families generally and lone parents in particular. The Labour Government responded by passing legislation which introduced the Working Families Tax Credit and the minimum wage.

Finally, the government may respond to a change of circumstances. The Adoption Act 1976 was passed at a time when there were around 20,000 children adopted each year, a majority of whom were very young. Changes in morality have meant that most unmarried parents, particularly mothers, no longer experience stigma, and therefore bring up their own children rather than put them up for adoption. Consequently, there are now considerably fewer, and often only older children available for adoption. Currently half of all children adopted have been looked after by Social Services. Many of them want to have continued contact with their parents even though they can no longer live with their family because of abuse or neglect. The Children and Adoption Act 2002, which repealed the Adoption Act 1976, recognised this and created a new category of Special Guardianship which enables older children to acquire an additional legal relationship with an adult who has parental responsibility for them, without the children having to sever their legal or social ties with their birth parents.

Critical questions

Look back at the Fact File at the very beginning of this chapter and notice the under-representation of women and people from ethnic minority communities in the House of Commons. In addition, there are only a handful of openly gay or disabled MPs and no trans-gendered Members of Parliament. How might the under-representation of these various minority groups influence what statute law is passed by the House of Commons?

Process for creating statute law

When a government wants to bring about changes it first engages in a process of consultation, often publishing what is known as a Green Paper which outlines its plans for new legislation. For example, in 2003 in the wake of the Climbié public inquiry the Labour Government issued a Green Paper entitled Every Child Matters which set out proposals for a new statute (to become the Children Act 2004) to ensure greater cooperation between
Statute law

agencies working closely with children. This Green Paper invited responses from a cross-section of interest groups and professional bodies which would be affected by planned changes to the law on inter-agency collaboration concerning child welfare and protection. After completing a consultation process the government often proceeds to develop and publish a White Paper which explains its proposed legislation.

White Papers are much more comprehensive than Green Papers and detail the legislation which the government intends to lay before Parliament. For example, the Department of Health (1989) published a White Paper entitled Caring for People which explained the rationale, objectives, underlying principles and organisational changes necessary for the reform of service delivery by the NHS and Social Services. This White Paper was the precursor to the NHS and Community Care Act 1990. Similarly, the White Paper entitled Modernising Social Services detailed the Labour Government’s intention to introduce registration of the social care workforce alongside national minimum standards for social care provision. This was given legal expression in the Care Standards Act 2000. The publication of a White Paper is a further opportunity for interested parties to lobby MPs and the government on the proposed changes to the law. Both Green and White Papers are usually written in layman’s terms. They are an important resource if you are trying to understand the reasoning and intentions behind a particular statute.

After the publication of a White Paper, specialists draft the associated legislation so that it can be put before Parliament for MPs and peers to vote on. During its passage through Parliament a piece of legislation is known as a bill because it has not yet become law. It is important to bear in mind that a bill may be rejected by Parliament if a majority of MPs vote against it. Recent mental health legislation was referred to as the Mental Health Bill during 2006 when it was being debated in Parliament and only became the Mental Health Act 2007 after it satisfactorily completed the parliamentary process. A bill is normally introduced into the House of Commons and goes through a number of stages which provide opportunities for MPs to debate and amend it. If the bill successfully passes these stages without being voted down, it then moves to the House of Lords where it goes through a similar process. Once agreed by the majority of peers, it passes to the monarch to receive her agreement, known as the Royal Assent. In practice the Queen as a constitutional head of state never refuses her consent to a bill becoming law.

It is essential to remember that even after receiving the Royal Assent and becoming an Act, different sections or provisions of the Act may come into force at different times. A statute cannot be enforced by the courts until it has been enacted. For example the Mental Health Act 2007 received the Royal Assent on 19 July 2007, but most of its legal provisions did not come into force until October 2008 and others not until April 2009. So there can be different dates for various provisions of the same Act to come into force. This may be because the changes produced by the Act require for example: money to be made available; organisational changes; or training for personnel implementing the new statute. All these were required for agencies and social workers administering the Children Act 1989, which received the Royal Assent in 1989, but did not come into force until 1992.

For recently created statutes, it will be necessary to double check which sections of the Act are currently in force and which will come into force at a later date. Occasionally even quite long-standing statutes can have provisions which were never enacted. For example, the Family Law Act 1996 received Royal Assent on 4 July 1996 and made provision under Part II for no-fault divorces, scheduled for implementation in 2000. In fact Part II was never enacted due in part to adverse media coverage which portrayed the new provisions as a quick faultless way to divorce, thus perpetuating family breakdown (Herring, 2007:117). The box below guides you through the different stages of a government
Chapter 1 Legislative framework

Proposal for new legislation, from its inception to completion of the parliamentary process and becoming legally binding statute law.

## Background information

<table>
<thead>
<tr>
<th>Typical process for creating statute law</th>
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<td><strong>Green Paper</strong></td>
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<td><strong>Act</strong></td>
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### Secondary legislation

Approximately 50 Acts of Parliament are created each year, many of them requiring extremely technical knowledge and/or detailed procedures to ensure that they are effectively implemented. For this reason many Acts delegate powers to a particular government minister who is tasked to instruct civil servants, assisted by experts and consultants, to produce a comprehensive set of regulations. Regulations created in this way are referred to as statutory instruments, secondary legislation or delegated legislation. These regulations have the same legal force as primary legislation, and in the region of 3,500 pieces of secondary legislation are generated each year. For example, the Care Standards Act 2000 s.22 delegates power to ‘the appropriate Minister’, meaning the head of a government department, to make detailed rules in relation to the management and standards of service for residential provision. The statutory instrument created under section 22 is the Care Homes Regulations 2001 SI No. 3965. Primary legislation which delegates power in this way is sometimes referred to as the Parent Act.
Critical questions

Go to www.opsi.gov.uk which is the website of the Office of Public Sector Information and provides full texts of statutes and statutory instruments. Download the Mental Capacity Act 2005. What do you notice about how this primary legislation is structured? How easy or difficult is it to understand the wording of the Act or to comprehend what it would mean in your day-to-day practice as a qualified social worker? Describe the user group to which this Act would apply to.

Go back to www.opsi.gov.uk and download The Children’s Homes Regulations SI2001/3967. This is secondary legislation. What specific areas of the care of children does this statutory instrument cover? How easy or difficult is this document to understand?

Government guidance

In addition to the production of detailed regulations through the use of statutory instruments the government also issues a variety of guidance documents. These instruct local authority social services departments, agencies and/or professionals on the day-to-day implementation of the law.

Policy guidance

The Local Authority Social Services Act 1970 established the framework for local authority social work functions. Section 7 of this Act states that Local Authority Social Services functions must be exercised under the general guidance of the Secretary of State. Policy guidance is therefore formal guidance issued by the Secretary of State under Local Authority Social Services Act 1970 s.7. This means that although the guidance is not legally binding (i.e. it is not legislation) it must be followed unless there are exceptional and justifiable reasons for departing from it. Government-issued guidelines will state in the introduction if they are issued under s.7 of the Local Authority Social Services Act 1970.

Department of Health and Department for Education and Skills (2005) Carers and Disabled Children Act 2000 and Carers (Equal Opportunities) Act 2004 Combined Policy Guidance, which concerns services for carers, and Department of Health (2000a) No Secrets, which sets out procedures for protecting vulnerable adults, are both issued under this section. This type of guidance is directed at frontline staff and those with managerial and decision-making responsibilities. Although policy guidance is often very detailed it is also written in plain English and not technical legal jargon. It is an indispensable resource for understanding how to apply a piece of legislation in social work practice and ensuring that as a qualified professional you are acting correctly within the legal framework.

Critical questions

Go to www.dh.gov.uk which is the Department of Health website and download No Secrets: Guidance on Developing and Implementing Multi-agency Policies and Procedures to Protect Vulnerable Adults from Abuse. Compare the language in this to the language in the primary and secondary legislation you previously downloaded, what do you notice about this? If you were a qualified social worker how might you use this document to guide your practice?
Practice guidance

Practice guidance is *general guidance* which advises a local authority on how to go about implementing statutory provisions. The Local Authority does not have to follow the guidance to the letter but should have regard to it when reaching any decision. For example, Department of Health (2001a) *A Practitioner’s Guide to Carers’ Assessments under the Carers and Disabled Children Act 2000* directs social care professionals as to how to conduct the assessment of a carer. Similarly, Department of Health (2000b) *Assessing Children in Need and their Families: Practice guidance* provides guidance to social workers safeguarding and promoting the welfare of children from ethnic minority backgrounds and children with disabilities. These guidance documents are written for frontline staff and provide easy-to-follow explanations and instructions on performing social work roles and tasks. Social workers must endeavour to follow practice guidance unless there are very exceptional reasons for doing otherwise. It is important to appreciate that failure to follow practice guidance without justification is likely to result in a successful complaint by a service-user, or a court judgement against Social Services.

Critical questions

Go to [www.ecm.gov.uk](http://www.ecm.gov.uk) and download *The Common Assessment Framework for Children and Young People: Practitioner’s Guide*. What are the main differences between this practice guidance and the *No Secrets* policy guidance you downloaded earlier? How easy or difficult would it be to use this document to guide your professional work with children?

Local authority circulars

Local authority circulars are issued by various government departments to local authorities giving them more detailed instructions on how to implement a piece of legislation. They may also be issued after a court judgement which alters the existing law, or because of a change in circumstances of some sort. For instance, many local authority circulars will be issued under the Local Authority Social Services Act 1970, s.7 and are therefore *formal guidance*. LAC(2002)13 *Fair Access to Care Services* which instructs Local Authority Social Services on arrangements for prioritising service delivery to people with social care needs is issued under s.7. Not all circulars are issued under s.7, but they still constitute a form of government instruction and must be carefully adhered to unless there are compelling reasons for departing from them. While local authority circulars are essentially addressed to decision-makers and senior managers within a local authority they often have a direct bearing on the day-to-day work of frontline staff.

Critical questions

Go to [www.dh.gov.uk](http://www.dh.gov.uk) and download LAC (2002) 13: *Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care*. What are the main implications of this local authority circular for social workers in Adult Social Services?

Codes of practice

Codes of practice are not legislation and do not have the force of law, but they are guidance as to good practice and are usually issued in relation to a specific statute. For example, the Mental Health Act 1983, s.118 provides a code of practice which directs
practitioners in their work with service-users who have a mental disorder. Likewise, a code of practice has been issued under s.42 of the Mental Capacity Act 2005 to guide professionals working with mentally incapacitated adults. The Care Standards Act 2000 s.62 gives the General Social Care Council the legal authority to issue the Code of Practice for Social Care Workers by which all registered social work students and qualified practitioners are bound. Whilst breaching a code of practice is not an illegal act, doing so is likely to have adverse consequences for the service-user or patient, the professional involved in the breach and their employing agency. In particular, acting contrary to the Code of Practice for Social Care Workers may lead to de-registration as a social worker by the General Social Care Council. Where an incident involving a service-user reaches the courts, a breach of a code of practice by a social worker is likely to constitute evidence that the agency has failed in its statutory duties to the service-user.

Critical questions
Go to www.publicguardian.gov.uk and download Mental Capacity Act 2005: Code of Practice. In what ways does the language and structure of the Code differ from the Act? How easy or difficult is it to follow the Code of Practice? What are the main areas covered by the Code of Practice? How does the Code define the ‘best interests’ of people who lack mental capacity?

National Service Frameworks
National Service Frameworks have been introduced by the Labour Government and are issued by the Department of Health. These cover the provision of health and social services to children, young people, older people and those with mental health problems or neurological long-term conditions. They are non-statutory in nature and while each framework sets out quality standards for service provision to a specific service-user group, these are not legally enforceable benchmarks. However, many of the objectives detailed in these National Frameworks are complemented by legislation, such as the Mental Health Act 1983 and the Care Standards Act 2000. Essentially, the frameworks are strategy documents which set out the Labour Government’s aspirations for service delivery over a 10-year period. There are presently four National Service Frameworks in place which both care providers and inspection agencies are required to take into consideration in planning and inspecting services:

- National Service Framework for Mental Health.
- National Service Framework for Older People.
- National Service Framework for Long-Term Conditions.

Although these Frameworks are ultimately addressed to those who commission, inspect and deliver services, they set out important performance standards which frontline health and social care workers are expected to follow.

European Union law
The Treaty of Rome 1957 established the European Economic Community (EEC) on the basis that there would be freedom of movement for goods, services, people and capital between the countries (referred to as Member States) who signed the treaty. Under the
Chapter 1 Legislative framework

European Communities Act 1972 the United Kingdom joined what is now known as the European Union and agreed to abide by the Treaty of Rome and all subsequent law created by the European Institutions. Under the European Communities Act 1972 s.2(4), Acts of Parliament are subject to the provisions of the European Community Treaties. This means that any legislation passed by the Westminster Parliament cannot contravene European Community law. Where there is a conflict between European Community Law and national legislation it is European Community law which prevails. It is important to realise that the supremacy of European Community law compromises the principle of Parliamentary Sovereignty. In other words the Houses of Parliament can no longer simply pass any law they want, it must comply with European Community law.

The European Union (EU) currently consists of 27 Member States, with the result that most countries of Europe operate within the same broad overarching legal framework. For example, article 141 (previously art.119) of the Treaty of Rome 1957 provides that men and women must receive equal pay for equal work. Thus in every EU Member State women are legally entitled to receive the same pay as men for similar work. They have this right even if the Member State in question has no equal pay legislation in force or introduces legislation which seeks to deprive women of this right. Since the first treaty was signed in 1957, subsequent ones have increased the social, political and economic integration of the European Union. Many of these more recent treaties contain provisions which expand the rights of citizens of Member States, particularly in relation to employment and protection from discrimination. Indeed, much socially progressive legislation introduced into the United Kingdom originates from the European Union. The different types of European Union law are described in the box below.

Background Information

Sources of European Union Law

**Treaties** - Legislation introduced by national governments must be compliant with the articles of European Union Treaties. Member States which fail to abide by all the provisions of the treaties they sign can be taken to the European Court of Justice by other Member States and forced to meet their obligations under the treaty articles.

**Regulations** - These can be enforced in Member States as if they were national law. They are *directly applicable* and immediately become part of national law which can be enforced in British courts. For example, Regulation 1612/68 requires Member States to grant workers from other Member States the same rights as their own nationals. So an Italian man who comes to work in Britain is entitled to the same rights as a British worker. Therefore EU citizens living in the United Kingdom will have different rights and entitlements from nationals who come from outside the European Union.

**Directives** - These are binding on each Member State but are less detailed than regulations and are not *directly applicable*. Instead they require Parliament to develop legislation which will implement the directive. For example, the Equal Treatment at Work Directive 2000/78/EC required Member States to introduce legislation which protected people from discrimination in the workplace. The British Government passed secondary legislation in the form of statutory instruments which now protect employees against discrimination on the grounds of their age, sexuality or religion.
It is important to appreciate that the European Convention on Human Rights is not part of the European Union and in fact pre-dates its creation. The Convention was actually signed in Rome in 1950 and ratified by the UK Government in 1951. The European Convention grants rights to individual citizens to protect them from the excessive, unwarranted or arbitrary exercise of state power. This is because the government of any country has control, to a greater or lesser extent, over all the security forces and public agencies which provide services to citizens. To take the United Kingdom as an example, it has no written constitution, so Parliament can pass oppressive or discriminatory legislation. For instance, the Immigration and Asylum Act 1999 and the Nationality Immigration and Asylum Act 2002 severely limited asylum seekers’ rights to appeal against a refusal of asylum, and removed their rights to welfare benefits and social housing. On the other hand, public sector employees exercising their legal powers or duties can act in ways which result in oppression, harassment or discrimination against ordinary citizens. For example, a public inquiry concluded that the police had failed to properly investigate the murder of Stephen Lawrence, a black youth stabbed to death in 1993, due to institutional racism (Macpherson, 1999).

Action can only be taken under the European Convention on Human Rights if the State, meaning a public body (or a private or voluntary body carrying out public functions, such as a private security firm employed to staff a prison) infringes or violates the Convention Rights of an individual. Generally, the European Convention cannot be used by individuals who believe their rights have been violated by other citizens. For example, it would not be possible for a father to call upon the European Convention if a neighbour kidnapped his 10-year-old daughter and imprisoned her. This would be a matter for the police and the Crown Prosecution Service to proceed with a criminal charge and arraignment of the abductor before a court. But, if a police officer arrested his daughter and put her in a police cell without explanation or charge, the father could use the European Convention to take the police authority to court and to argue that one of its officers was acting in violation of Convention articles 5 and 6, and thus acting illegally. The box below lists the rights granted to the citizens of all signatory countries to the European Convention on Human Rights.

### European Convention on Human Rights

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<thead>
<tr>
<th>Article</th>
<th>Description</th>
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<tr>
<td>Article 2</td>
<td>Right to life - Everyone’s right to life shall be protected by law.</td>
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<tr>
<td>Article 3</td>
<td>Prohibition of torture - No one shall be subjected to torture or to inhuman or degrading treatment or punishment.</td>
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<tr>
<td>Article 4</td>
<td>Prohibition of slavery and forced labour - No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour (excludes those imprisoned).</td>
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<tr>
<td>Article 5</td>
<td>Right to liberty and security - Everyone has the right to liberty and security of person (excludes lawful detention).</td>
</tr>
<tr>
<td>Article 6</td>
<td>Right to a fair trial - Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.</td>
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Most Convention rights are qualified or limited in some way rather than absolute. To take article 8, the right to respect for private and family life is subject to justified intervention by the State ‘for the protection of health or morals, or for the protection of the rights and freedoms of others’. This exception permits social workers to intervene in extreme and persistent instances of abuse or neglect to remove children from their birth parents and into the care of the State. But it is important to appreciate that the presumption under the European Convention is against interference in family life, and the State has to present evidence in a court of law to justify its intervention.

In the past any citizen wishing to enforce their rights under the European Convention had to go to the European Court of Human Rights (ECHR), which is located in Strasbourg. This inevitably involved considerable time and costs to citizens trying to bring legal actions against their governments for violation of their Convention rights. However, the Human Rights Act 1998 incorporated the European Convention on Human Rights into national law and since this legislation came into force British citizens have been able to take their cases through the domestic courts. This means that they can have their case heard in a British court and are no longer forced to travel to Strasbourg to attend the ECHR. The Human Rights Act 1998 also made it unlawful for public authorities or their employees to act in a way which is incompatible with Convention rights.

The Human Rights Act 1998 also obliges Parliament to introduce legislation which is compatible with the European Convention. If the Government does pass a statute which is inconsistent with the Convention then a judge in a British court could make a Declaration of Incompatibility and so the Government would be under considerable pressure to amend or repeal the statute. Arguably this is another instance in which law from a source outside of the United Kingdom has eroded Parliamentary Sovereignty. Of course a future government could decide to repeal the Human Rights Act 1998, but this would have adverse consequences for the British Government’s relations with its own citizens and with other European nations. In other words, as with withdrawal from the European Union, a government could in theory do it, but in practice the repercussions would be so grave that few would attempt it.

**Article 7** No punishment without law – No one shall be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed.

**Article 8** Right to respect for private and family life – Everyone has the right to respect for his private and family life, his home and his correspondence.

**Article 9** Freedom of thought, conscience and religion – Everyone has the right to freedom of thought, conscience and religion including the freedom to change religion or belief.

**Article 10** Freedom of expression – Everyone has the right to freedom of expression. Includes freedom to hold opinions and to receive and impart information and ideas without interference by public authorities.

**Article 11** Freedom of assembly and association – Everyone has the right to freedom of peaceful assembly and to freedom of association with others.

**Article 12** Right to marry – Men and women of marriageable age have the right to marry and to found a family.

**Article 14** – Provides that Convention rights ‘shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’
Critical questions

Find the Council of Europe website and download a copy of the Convention for the Protection of Human Rights and Fundamental Freedoms. Look at article 9 and list the circumstances under which it is lawfully permitted for the State to interfere with a person’s freedom of thought, conscience or religion. Under what circumstances might it be justifiable to interfere in a person’s freedom of thought, conscience or religion? Can you think of any instances in which the police, education authorities or social services have interfered in a person’s article 9 rights in the United Kingdom? Did you agree or disagree with this action and why?

International law

When the UK Government enters into treaties with other countries or groups of countries these impose obligations on the part of the State in its relationship with those other states and sometimes in relation to its own citizens. Signing the European Convention in 1950 is a clear example. However, when the Government signs a treaty usually this does not automatically make it law and instead legislation has to be enacted to ensure that the UK complies with its treaty obligations. For example, the United Nations Convention on the Rights of the Child which the UK Government ratified in 1991 is reflected in national law by ensuring that statutes relating to children are consistent with this UN Convention and do not contravene any of its articles. The Children Act 1989 and the Adoption and Children Act 2002 were both drafted to comply with the UN Convention. A number of other international treaties have direct relevance to social work, such as the Hague Convention on Protection of Children and Cooperation in Respect of inter-country Adoption, which was formally ratified by the British government in 2003. The Hague Convention is given legal effect by the Adoption (Inter-country Aspects) Act 1999. This statute ensures that prospective adopters of children from abroad are subject to similar assessments as are those adopting British children and gives preference to children remaining in their country of origin with kin.

Critical questions

Go to www.unhchr.ch which is the Office of the High Commissioner for Human Rights at the United Nations and download the Convention on the Rights of the Child. How does this convention actually define a child? What might be some of the advantages and disadvantages of having a universal charter of children’s rights which the countries of the world are expected to abide by?

Common law

Common law is also known as case law or judge-made law. It consists of the reported judgements of cases coming before the courts. Parliamentary Sovereignty means that primary legislation cannot be dismissed, ignored or challenged by the courts. If there is conflict between a statute and common law, it is the Act of Parliament which will prevail and must be followed by the courts. The court system is crucial to the administration of justice for a number of reasons. First, the drafters who write statutes and the parliamentarians who pass them cannot foresee every possible circumstance which might fall under the provisions of
Chapter 1 Legislative framework

the Act. Therefore, a system of enforcing statutes is needed which also accommodates new situations. This is known as statutory interpretation and it means that during the court case the judge decides how the statute is meant to apply in the unique circumstances.

The court case Royal College of Nursing v. Department of Health and Social Security [1981] 1 AER 545 involved a dispute over the interpretation of the Abortion Act 1967 which provided that abortions are only legal if performed by a ‘registered medical practitioner’. However, by the late 1970s medical advances meant that qualified nurses were also able to assist in performing abortions. The court decided that the provision relating to a ‘registered medical practitioner’ should be interpreted so as to apply to a qualified nurse. In other words the judge sought to identify the true intention of Parliament in passing the Abortion Act 1967, which was to offer women safe and legal abortions under certain conditions. In this case statutory interpretation extended the classes of medical personnel to whom the provision could apply. Plainly this means that older legislation can be updated and applied to contemporary circumstances without Parliament having to pass new legislation every time there is a technological advance or some other kind of change.

Likewise Parliament cannot legislate for every single situation and consequently there are some unique situations in which there is actually no relevant legislation and therefore the courts have to make a decision. For instance in Gillick v. West Norfolk and Wisbech Area Health Authority [1986] 3 ALL ER 402 a mother went to court to object to her daughter, who was then under 16 years of age, being given contraceptive advice by her GP without the knowledge or consent of her parents. In the absence of a specific statutory provision the judge decided that if a child is of sufficient understanding they can receive medical treatment without parental knowledge or consent. The judgement stated that ‘a minor's capacity to make his or her own decisions depends on the minor having sufficient understanding and intelligence to make the decisions and is not to be determined by reference to any judicially fixed age limit’. This became known as the ‘mature minor principle’. The judgement was to have wide implications for social work as a ‘Gillick competent’ child is one of ‘sufficient understanding’ to make decisions independently of those with parental responsibility.

Common law comprises a collection of judgements based on the principle of stare decisis (stand by what has been decided) also referred to as judicial precedent. The box below outlines the main aspects of stare decisis and how it affects judgements by the courts.

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<td><strong>Judicial precedent (stare decisis)</strong></td>
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<tr>
<td>- Judicial precedent is a system of law-making by judges rather than Parliament.</td>
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<td>- Future cases have to be decided in the same way as earlier ones if the facts before the court are similar.</td>
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<td>- The part of the judgement which is binding on other courts is the legal reasoning for the decision, which is referred to as the ratio decidendi.</td>
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<td>- Lower courts have to follow the decisions of higher courts because these have precedent-making powers, the House of Lords being the highest court and the Magistrates’ Court the lowest.</td>
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<tr>
<td>- Where parties to a court case disagree with the verdict they may have an automatic right of appeal to a higher court or they may require permission of the higher court to hear the appeal.</td>
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<tr>
<td>- Precedent depends on the accurate reporting of judgements, these are contained in volumes of Law Reports which are now available on-line.</td>
</tr>
<tr>
<td>- Precedent is based on a recognised hierarchy of courts.</td>
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Most court cases are concerned with disputes over the facts, that is, did Mr X sexually abuse child Z. But, the courts also have a vital role in creating law through statutory interpretation and giving judgement in circumstances where there are no directly relevant statutory provisions. The system of judicial precedent ensures that like cases are decide alike, as this is the essence of justice. Judicial precedent also ensures consistency in decision-making between the different levels of courts. The court structure is diagrammatically represented below.

The diagram above illustrates the hierarchal relationships between the courts, with the lowest courts at the bottom and the highest courts at the top. These are connected through both a system of appeals from lower courts to higher courts and a system of...
precedent which requires lower courts in the system to follow the judicial decisions of higher courts. However, it needs to be appreciated that a party to a court case dissatisfied with a judgement often does not have an automatic right of appeal and has to obtain the permission of the higher court before their appeal can be heard.

It is possible therefore if permission is granted by each of the higher courts in succession to appeal a case from the Magistrates’ Court to the High Court and from there to the Court of Appeal and then the House of Lords. In 2009 the Appellate Committee of the House of Lords was re-designated the Supreme Court, and the Law Lords who presided over appeal cases moved out of the House of Lords in order to increase their independence. Given that the House of Lords hears only around 60 cases a year, it becomes obvious that very few cases indeed are actually appealed up through the whole court system. Most cases which are successfully appealed are likely to be heard by just one appellate court before permission is refused by higher courts for any further hearings.

Critical questions

Go to the Fact File at the very start of this chapter and examine the composition of judges in the different courts. How might the under-representation of certain social groups influence the rulings made by judges at each level in the court system?

Criminal law

There are two different kinds of law, which is why the Court of Appeal in the diagram above has a civil and criminal division. Each division hears different types of cases on appeal from lower courts. In fact the court system comprises both the Civil Justice System and the Criminal Justice System. These have distinct functions in law enforcement. Criminal law concerns a category of offences which are considered so serious that if left unchecked they would constitute a threat to the very stability of the State and even the viability of society itself. Theft, arson, maiming and killing are plainly acts which if left unpunished would result in the collapse of the social, economic and political fabric of the nation. It is for this reason that any individual or organisation engaging in these types of offences is regarded as committing a crime against the State. Hence, the State, in the form of the police and the Crown Prosecution Service take action to bring the offender to court on behalf of the victim. This means that the decision whether to prosecute or not is taken out of the hands of the victim. So for instance a service-user who is sexually assaulted by a care worker in a residential home for older people cannot decide against pursuing a court case against the care worker. This decision is entirely taken out of the hands of the service-user and rests with the Crown Prosecution Service. But if the victim of a crime, in this instance a service-user, is unwilling to provide evidence in court against the care worker, it may be very difficult for the Crown Prosecution Service to succeed in obtaining a conviction.

The person accused of committing the crime is known as the defendant, while the prosecutor is always the State represented in court by solicitors and barristers of the Crown Prosecution Service. These kinds of cases are heard through the Criminal Justice System. With the exception of minor offences, such as petty theft or common assault, which are heard before a Magistrates’ Court, there is normally a jury present in criminal cases. Given that criminal acts can undermine the social and economic foundations of society, criminal offences are punishable by a custodial sentence, a community sentence and/or a fine. They can also be accompanied by a curfew or requirement to undertake a
course of instruction or rehabilitation, for example attendance at a drug treatment centre. Since the punishment for a criminal offence can be the deprivation of liberty, sometimes for many years, a criminal court will require the Crown Prosecution Service to prove *beyond a reasonable doubt* that the defendant is guilty of the crime alleged.

**Civil law**

Civil law deals with breaches of the law that are regarded as less serious by the State and do not directly endanger the peace and stability of the nation. These types of breaches are regarded as essentially legal disputes between individuals or organisations. Therefore the law is enforced by the person who thinks they have suffered a harm or injury. In such instances the claimant (the injured party or victim) sues the defendant by taking him or her to court and demonstrating through the presentation of evidence that the defendant has caused the claimant some kind of detriment. No jury is present in a civil court except where an action concerns defamation (libel and slander) or fraud. In practice a jury sits in only 1 per cent of civil cases, the vast majority of them concerning defamation. A civil court is instead presided over by a judge or a bench of three judges who then make a decision based on the evidence before them. There are whole classes of actions which fall under the civil rather than the criminal law, some of which are listed below:

- **Law of contract** – concerns contracts between individuals or organisations relating to the provision of goods and services. It includes employment and property transactions as they are essentially agreements between parties to the transfer of goods or services. Where there has been a breach of contract the injured party sues the defendant for compensation. For example, the contract of employment between a social worker and a local authority or private residential home falls within the civil law.

- **Law of tort** – this has been developed through common law and has created a series of rights and corresponding duties between legal persons (people or corporations). A tort is an action which causes another party harm. It is based on the premise that people are not required actively to look after each other, only to avoid doing each other harm. When a tort is committed the law allows the victim to claim money, known as damages, to compensate for the commission of that tort. This is paid by the person who committed the tort (defendant) to the injured party (claimant). Damages are intended as far as possible to put the person who has suffered the harm back in the position they would have been in had the tort not occurred. While damages are the most common form of remedy in civil law the court may also issue an injunction which requires the defendant to refrain from a specified action, for instance to stop playing loud music during the night. There are a number of different types of torts, such as that of defamation and nuisance, but the tort of negligence is the subject of most litigation and is discussed in more detail later in this chapter.

- **Legislation creating civil law** – for example, divorce under the Matrimonial Causes Act 1973 or dissolution of a same-sex partnership under the Civil Partnership Act 2004 are civil matters. Under both statutes if a person deserts their partner for a continuous period of at least two years this is a ground for the legal termination of their marriage or civil partnership. However, this is dependent on one party deciding to take the other party to court. The police are not going to arrest a person for deserting his or her partner for two years. Nor will the Crown Prosecution Service take them to court. This is because desertion is not a criminal offence in the United Kingdom. Similarly, the Race Relations Act 1976 makes it illegal to discriminate against people on the grounds of their ethnic origins or colour in the provision of goods and services.
But if the owner of a restaurant refuses to serve food to an African Caribbean couple he or she will not be arrested because this is a breach of civil law. In other words, the owner of the restaurant will get away with discrimination unless the couple who suffered it decide to take the proprietor to court for a breach of the Race Relations Act 1976. If the couple do take the proprietor to court they will be suing him or her for monetary compensation.

Critical questions

Go to Westlaw on the internet, which is a database containing all the judgements of higher courts. In the field for ‘parties to the case’ type in *R (on the application of S) v. Plymouth City Council*, or in the field for ‘citation’ type in [2002] EWCA Civ 388. What is this judgement about? Who are the parties to this court case and how are they represented at the Court of Appeal hearing? Which statutes cited in the case are directly relevant to your practice as a social worker? What were the main arguments put forward by the local authority and the mother of C during the hearing? How might the judge’s ruling in this case affect your own practice?

It should be clear from the examples above that civil law concerns acts between individuals or organisations which remain private matters and which the State will not step in to resolve. It is for the individuals or organisations affected to take legal action. Furthermore, the outcome of the court case will not be imprisonment or community service for the defendant who is found guilty, but the payment of compensation by the defendant to the claimant who is the victim of the breach of civil law. Since the consequences for a breach of civil law do not threaten the liberty of the defendant the standard of proof is set lower than that in criminal cases and only requires the claimant to prove the breach of law by the defendant on the *balance of probabilities*.

Summary of civil and criminal justice systems

<table>
<thead>
<tr>
<th>Civil law</th>
<th>Criminal law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parties to the case</strong></td>
<td>Claimant and defendant or applicant and respondent, appellant and respondent if appealed</td>
</tr>
<tr>
<td><strong>Courts involved</strong></td>
<td>Magistrates’ Court, County Court, High Court, Court of Appeal, Civil Division, House of Lords</td>
</tr>
<tr>
<td><strong>Composition of court</strong></td>
<td>Usually judge only or a bench of judges</td>
</tr>
<tr>
<td><strong>Standard of proof</strong></td>
<td>Balance of probabilities</td>
</tr>
<tr>
<td><strong>Remedies</strong></td>
<td>Monetary compensation and/or court order to refrain from or implement a course of action</td>
</tr>
</tbody>
</table>
Understanding the difference between the civil and criminal justice systems is essential for social workers. Many of their activities fall under one or other system or sometimes straddle both. For instance, family proceedings fall under the civil justice system. Family proceedings include court actions taken under the: Matrimonial Causes Act 1973; Civil Partnership Act 2004; Children Act 1989; and the Adoption and Children Act 2002. Care proceedings (court action to take children into the care of the State) under the Children Act 1989 are also within the civil justice system. In effect this means that when dealing with child abuse, social workers are taking court action under civil law. Consequently, when social workers seek an Emergency Protection Order to remove a child temporarily from his or her parent they have to prove that ‘there is reasonable cause to believe that the child is likely to suffer significant harm’. But because this is a civil action they only have to prove this on the balance of probabilities and not beyond a reasonable doubt. Since the standard of proof is different as between the civil and criminal justice systems this can lead to the paradoxical situation whereby social workers are able to provide sufficient evidence of child sexual abuse to obtain an Emergency Protection Order, but not sufficient to convict the perpetrator in the Crown Court of a criminal offence. For, of course, within the Criminal Justice System social workers would have to prove beyond a reasonable doubt that the perpetrator sexually abused the child.

On the other hand, social workers may be either members of a Youth Offending Team or working closely with one in connection with a young offender. Plainly the contact of a social worker in this instance will be mainly with the criminal justice system and normally with the Magistrates’ court sitting as a Youth Court. In this role the social worker could be required to produce a pre-sentence report, supervise a community sentence or appear as a witness. The passing into law of the Crime and Disorder Act 1998 has created an additional raft of court orders, such as Parenting Orders and Anti-Social Behaviour Orders, which are granted under the civil law, but fall under the criminal justice system if breached. So a social worker with responsibility for a young person engaging in anti-social behaviour will have to move between civil and criminal jurisdictions. Social workers initially involved in care proceedings can then find themselves acting as witnesses in a criminal case taking place in a Magistrates’ Court or Crown Court if a crime against a child is suspected.

Even in instances where social workers are not directly involved in civil and criminal cases they are often working with vulnerable individuals who are subject to discrimination or violence. It is crucial that social workers who come into contact with service-users and carers who are experiencing discrimination or suffering harassment or violence are sufficiently conversant with the civil and criminal justice systems to be able to recognise when an offence or breach of the law is being committed. They also need to know the range of possible remedies and to advise the service-user or carer accordingly. Social workers are not qualified to give legal advice, but they are required under the GSCC Code of Practice 3.1 to assist those they work with to ‘understand and exercise their rights’. The rights and entitlements of service-users, carers, parents and children are enshrined in legislation and common law. Social workers must have a working knowledge of them if they are to inform and empower the vulnerable people they assist.
also a form of Family Proceedings. All the parties to the court case (with the exception of the child) are normally present together with their legal representatives. Documents and witness statements are exchanged prior to the hearing so that the facts agreed and those in dispute can be identified. Evidence will only be heard on those matters on which there is disagreement, these are referred to as the facts in issue. The box below outlines the procedures involved in starting a court case and proceeding with it in court.

### Outline of procedures in Family Law Proceedings

#### Pre-hearing

1. Initial application outlines case – there are a number of standard pro forma which will differ depending on the civil case being pursued. This is lodged with the court.

2. Filing of witness statements – those who are to give evidence complete written statements of what they intend to say in court.

3. Filing of relevant documentation - other forms of evidence, for example copies of letters sent by a social worker to a parent, the photograph of an injury, correspondence exchanged between a divorcing couple.

4. Filing of reports – often specialists such as clinical psychologists or occupational therapists are commissioned to provide expert reports.

5. Exchange of statements and reports – the evidence above is exchanged between all the parties to the court case so everyone is aware of the evidence to be presented at the actual court hearing.

#### During hearing

6. Applicant’s lawyer outlines case – for example in care proceedings the solicitor for the local authority will commence by explaining the local authority’s reason for seeking to remove a child into care.

7. Evidence-in-chief – each party to the court case will have the opportunity to present their evidence, which normally involves highlighting the points they have already made in their witness statement.

8. Cross-examination – each party to the case can be cross-examined by the legal representative of another party. This consists of a close questioning of the evidence-in-chief and identifying any inconsistencies or requesting fuller explanations of particular points.

9. Re-examination – each party can then be re-examined by their own legal representative, who obviously is likely to be more sympathetic in their line of questioning.

10. Judgement – as Family Law Proceedings are within the Civil Justice System there is no jury and it is for the judge or bench of judges to weigh the evidence and make a ruling.

### Youth Court

Youth Courts, which are part of the Magistrates’ Court, try those aged 10–17 years. They deliberate on less serious criminal offences such as petty theft and minor physical assaults. Young people accused of more serious crimes, such as rape or murder, are committed to
the Crown Court for trial. Youth Courts have no jury and so magistrates are required both to decide the guilt or innocence of a defendant and their sentence if found guilty. Parents are often required to attend court alongside the child who is accused of a crime. Where young people have an allocated social worker, he or she will normally attend court as well. The box below outlines the way in which a criminal case is instigated and how it proceeds once the matter comes before a Youth Court.

<table>
<thead>
<tr>
<th><strong>Outline of procedures in Youth Court</strong></th>
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<tbody>
<tr>
<td><strong>Pre-hearing</strong></td>
</tr>
<tr>
<td>1. Arrest for a criminal offence – person is arrested by the police for a criminal offence.</td>
</tr>
<tr>
<td>2. Charged with a criminal offence – the Crown Prosecution Service decides if there is sufficient evidence to pursue a successful prosecution and if this is in the public interest.</td>
</tr>
<tr>
<td>3. Committal hearing - Magistrates’ Court decides whether the case will be tried in the Youth Court or the Crown Court.</td>
</tr>
<tr>
<td>4. Filing of evidence with the court.</td>
</tr>
<tr>
<td>5. Evidence is exchanged between the prosecution and the defence.</td>
</tr>
</tbody>
</table>

| **During hearing**                          |
| 6. Prosecution lawyer outlines case – a solicitor or barrister from the Crown Prosecution Service summarises the case against the defendant. |
| 7. Examination-in-chief – the prosecution calls witnesses and questions them about their evidence. |
| 8. Cross-examination – the defence questions the evidence presented by the prosecution’s witnesses. |
| 9. Re-examination - the prosecution asks further questions of the witnesses it has called. |
| 10. Defence presents case – the defence presents evidence to rebut that of the prosecution. The defence may also call witnesses including the testimony of the accused person. |
| 11. Cross-examination and re-examination of defence witnesses. |
| 12. Summing up by defence lawyer – the defence highlights the main points in the defence case. |
| 13. Verdict – magistrates make a determination on guilt or innocence and decide the sentence if the accused is found guilty. |

**Tribunals**

Tribunals are created by legislation and enable citizens to enforce many of their rights and entitlements without having to go to court. They are designed as alternatives to the enforcement of law through the court system and generally permit easy access to a prompt hearing at low cost. There are almost one hundred different types of tribunal, which collectively deal with more cases than the courts. Each tribunal is tailored to hear
disputes in relation to specific legal rights and duties. The tribunal system is used to address an extremely wide range of matters. For example, the Mental Health Act 1983 set up a tribunal which has powers to review the compulsory detention of mental health patients in hospital. Employment Tribunals were created under the Employment Tribunals Act 1996 to settle disputes between employers and employees. The cases coming before an Employment Tribunal can include matters relating to discrimination at work as well as breaches of employment contracts in relation to conditions of service.

The make-up of tribunals differs depending on its statutory regulation and functions. For example the panel of an Employment Tribunal consists of three people: a chairperson, who must be a barrister or solicitor of seven years experience, and two lay people, one representing employer interests and the other employee interests. Appeal is to the Employment Appeal Tribunal and from there further appeals are to the civil courts. Normally people represent themselves at tribunals and public funds are not available to meet costs. Exceptionally, for some tribunals state funding is available to the parties. For example, because the tribunal established under the Mental Health Act 1983 deals with the detention of people in hospital against their will, a specialist solicitor represents mental health patients appearing before it. Originally appeal from what used to be called the Mental Health Review Tribunal was by way of a civil action in the High Court.

Tribunals make a range of decisions which may involve reversing an earlier decision if the tribunal is a form of appeal. For instance, the Housing Benefit Review Board hears appeals regarding the award of Housing Benefit. The Exclusion Appeal Panel hears appeals against the exclusion of a pupil from school. A number of tribunals have the power to award compensation to those wrongfully treated. For example, the Employment Tribunal can award damages, which have to be paid by the employer, to an employee who has suffered discrimination in the workplace. The function and powers of each tribunal depend on the primary or secondary legislation which established it and regulates its remit.

The ever-growing and ad hoc introduction of tribunals under different statutes and with different functions led to a lack of consistency in procedures and the administration of justice. This in turn spurred the government to enact the Tribunals, Courts and Enforcement Act 2007 in an effort to streamline the tribunal system and enforce standards. This statute covers most tribunals and introduces a two level structure of First-Tier Tribunals which will hear matters at first instance and Upper Tribunals to which appeals can be made from First-Tier Tribunals. The new system will generally mean relatively minor administrative changes to existing tribunals and will create some name changes. For instance the Mental Health Review Tribunal becomes the First-Tier for Mental Health Review.
Alternative dispute resolution

There are a number of organisations which assist parties in dispute with each other to resolve their differences or agree to out-of-court settlements without having to access the tribunal or court system. Indeed, recent changes to the law in the administration of civil cases in the courts encourage the parties to consider arbitration or mediation before coming into court. For example, the Advisory, Conciliation and Arbitration Service (ACAS) can mediate between employers and employees during industrial disputes. Where individual workers appear to be the subject of unfair dismissal it can also negotiate between them and their employer before matters reach an Employment Tribunal. In the area of family law there are a number of voluntary sector organisations which offer out-of-court mediation services to divorcing or separating couples to help them resolve differences and agree on financial provision and the care of their children. Indeed, couples seeking a divorce or dissolution to a civil partnership are required to engage in some form of mediation before having their case heard in court. For those requesting public funds through legal aid, it is a mandatory requirement.

Complaints procedures

Service-users, carers, parents and children are on the receiving end of professional decision-making and service provision. Sometimes they may feel that the decisions made in relation to them are wrong or that social and healthcare professionals are ignoring basic facts in arriving at their conclusions. They may discover that the service they are receiving is of poor quality or infringes their dignity or privacy. In these circumstances those who come into contact with social services and social care workers may wish to complain about the treatment they are receiving. Social services and health services have separate routes for complaints.
Complaints against statutory social services by adults

The Health and Social Care (Community Health and Standards) Act 2003 gives the Secretary of State the power to make regulations concerning the complaints procedures set up by local authorities and the Commission for Social Care Inspection. The Local Authority Social Services Complaints (England) Regulations 2006 SI1681 sets out the regulations for complaints procedures for local authority social services. The related guidance issued by the Department of Health (2006) *Learning from Complaints: Social Services Complaints Procedure for Adults* stipulates that:

- The local authority appoint a complaints manager.
- Information on complaints procedures be publicised and available to service-users.
- Complaints can only be made by a person (or their representative) to whom the local authority has the power or the duty to provide services.
- A complaint must be made within twelve months of the matter complained of.
- The local authority investigates the complaint in the first instance.

Complaints may relate to any of the following:

- Disputed decision
- Quality of the service
- Cost of service
- Delay in decision making
- Behaviour of staff

The complaints procedure has three stages:

**Stage one – local resolution**

The complaint may be oral or in writing including electronically. It should be resolved if possible by the frontline manager. The service-user is entitled to take the complaint to the next stage if they do not wish it to be resolved at stage one. Service-users should be supported to make their complaint and advised of independent advocates, self-help groups, etc. Staff should endeavour to address the complaint within 10 working days, but not more than 20 working days. Where the issue is resolved at stage one a letter detailing the resolution should be sent to the service-user/representative.

**Stage two – investigation**

Where resolution cannot be achieved at stage one, or the complainant is dissatisfied with the outcome, or either party decides to skip stage one, then the complaint is dealt with through investigation. At stage two the complaint must be recorded in writing and the complaints manager must be made aware of it. The complaints manager, who should not be part of line management for social services, must arrange for a full investigation. An investigating officer may be appointed to conduct the enquiry, which should be completed within 25 days, or 65 days if there are extenuating circumstances. An investigation report must be produced and the outcome of this report sent in writing to the service-user and/or their representative.

**Stage three – review panel**

Where stage two has been concluded and the complainant is still dissatisfied he or she can ask for a review of the investigation report and the decision reached in stage two. The panel should be made up of three people and allow equal access to all parties to the complaint. No panel member can be an employee or the partner of an employee of the local
Complaints procedures

Complaints against statutory social services by children

Guidance for the complaints procedure for children is provided by Department for Education and Skills (2006) *Getting the Best from Complaints: Social Care Complaints and Representations for Children, Young People and Others*. There are three stages to the complaints procedure which are similar to those for adults. However, the procedure for children combines representations (positive comments on the service or ideas for improvement) which are not criticisms and complaints. All representations are dealt with at stage one.

Complaints may be made about:

- Services delivered to children.
- Decisions made about children.
- Assessments made on children.
- Reports written about children.
- Matters relating to adoption.

Complaints may only be made by:

- Any child or young person (or their parent or person with parental responsibility) looked after by the local authority.
- Any child or young person (or their parent or person with parental responsibility) who is not looked after by the local authority but is in need.
- Any local authority foster carer.
- Children leaving care.
- Special guardians.
- Any child or young person who may be adopted and their parents or guardians.
- Persons waiting to adopt a child.
- Adopted persons, their parents and natural parents.
- Any person which the local authority deems has ‘sufficient interest’ in the child.

Where a complaint is received on behalf of a child, the local authority must check that the child is in agreement and if the person acting for the child is suitable to act in this capacity. A child making a complaint on his or her own behalf will be entitled to advocacy support and should be informed of this and assisted to avail of it.

Users on complaints procedures

The Commission for Social Care Inspection (2005) asked young people about their reactions to the new complaints procedure for children which was being introduced. Many children found it difficult to distinguish between the notion of an informal complaint and a formal procedure. As one child put it to the researchers, ‘What are you asking us about complaining for? We all know how to do that.’ Meaning that children know how to complain on a day-to-day basis about something they do not like.

Young people who were *looked after* by Children’s Services expressed difficulty making more serious complaints because of anxiety about the consequences. One child said, ‘Making a
Complaints against the National Health Service

The National Health Service (Complaints) Regulations 2004 SI No. 1768 lays down the criteria for the NHS complaints procedure. This is available to patients or anyone ‘who is affected by or likely to be affected by the action, omission or decision of the NHS body which is the subject of the complaint’ (reg. 8). Therefore a close relative of a patient may also be entitled to make a complaint. The Department of Health’s (2004) Guidance to support implementation of the National Health Service (Complaints) Regulations, 2004 provides detailed instruction on the implementation of this secondary legislation. The NHS complaints procedure is separate from that of social care. Where part or all of the complaint relates to the actions of Social Services the NHS complaints manager must refer it to Social Services where it will be dealt with under the complaints procedures outlined above. Where a complaint is being dealt with under both the NHS and Social Services’ complaints procedures, both agencies must liaise to ensure a coordinated response. The NHS procedure requires a complaint to be made within six months of the matter being complained about and consists of two stages.

Stage 1 Complaints can be made orally or in writing and must be recorded by the complaints manager. The complaint must be acknowledged and the complainant informed of the Independent Complaints Advocacy Services (ICAS) which help individuals to bring complaints against the NHS. The designated complaints manager in the organisation must thoroughly investigate the matter complained of and inform the complainant of the outcome of the investigation and any subsequent action which the NHS body intends to take.

Stage 2 If the complainant is dissatisfied with the response at Stage 1 he or she can proceed to Stage 2. This is the independent review stage and is conducted by the Healthcare Commission. The request for an independent review must normally be made within two months of completion of Stage 1. On receiving a request the Healthcare Commission can: take no action; refer the matter back to the NHS body for further investigation; conduct a further investigation itself; or refer the matter to the Health Service Ombudsman or the General Medical Council for their deliberations.
Complaints against voluntary and private sector providers

Where the provider is from the private or voluntary sector, service provision is regulated by National Minimum Standards under the Care Standards Act 2000. These stipulate that service providers must have in place a complaints procedure. So, for example, an adult living in a private residential home who was dissatisfied with his or her care would avail of that care home’s complaints procedure. Since putting in place a complaints procedure is a requirement of National Minimum Standards for residential care homes, a manager failing to establish a complaints procedure or to respond to a resident’s complaint would be in breach of these standards. Consequently, the resident could report the care home to the Commission for Social Care Inspection, which ultimately could de-register the home for a breach of National Minimum Standards. The box below details the typical standards for complaints procedures taken from Department of Health (2003b) Care Homes for Adults (18–65) and Supplementary Standards for Care Homes Accommodating Young People Aged 16 and 17: National Minimum Standards.

Key guidance

Care homes for adults (18–65): national minimum standards

Standard 22.1: The registered person ensures that there is a clear and effective complaints procedure, which includes the stages of, and time scales, for the process, and that service users know how and to whom to complain.

Standard 22.2: The registered manager and staff listen to and act on the views and concerns of service users and others, and encourage discussion and action on issues raised by service users before they develop into problems and formal complaints.

Standard 22.3: The home’s complaints procedure has been given and/or explained to each service user in an appropriate language/format, including information for referring a complaint to the [Commission for Social Care Inspection] at any stage should the complainant wish to do so.

Standard 22.4: All complaints are responded to within 28 days.

Standard 22.5: Service users, if they wish, can make a complaint one-to-one with a staff member of their choice, and/or are helped to access local independent advocacy, independent interpreters/communication support workers and/or appropriate training.

Standard 22.7: A record is kept of all issues raised or complaints made by service users, details of any investigation, action taken and outcome; and this record is checked at least three-monthly.

Service-users or carers dissatisfied with the response of a private or voluntary sector service provider to their complaint may then refer this to Social Services. They can only do this if Social Services were responsible for the original assessment of need or arrangement of the service. Otherwise their only recourse is to the Commission for Social Care Inspection. Alternatively, if there has been a breach of contract relating to service provision to the person or the commission of a tort against him or her by the service provider, then the victim has recourse to the civil courts. Where a crime has been committed, such as a sexual assault by a care worker in a residential home, then the victim or their relatives can report this to the police who will investigate.
Local Government Ombudsman

Ombudsmen are commissioners appointed to oversee the proper administration of different aspects of central and local government functions. There are a number of different commissioners who deal with different aspects of the public sector. For example:

- **Prison Ombudsman** – deals with complaints against the prison service.
- **Legal Services Ombudsman** – deals with complaints against legal professionals.
- **Health Services Ombudsman** – deals with complaints concerning GPs, health authorities and trusts.
- **Local Government Ombudsman (Commissioners for Local Administration)** – deals with complaints against local authorities including housing, education and social services.

The Local Government Act 1974 Part III established the Commissioners for Local Administration in England and Wales. They are empowered under s.25 of this Act to investigate any local authority. Under s.29 they have the same powers as the High Court to require documentation, attendance and examination of witnesses. Their services are provided free of charge to the complainant, and the local authority must publicise the ombudsman’s decision. The ombudsman may direct the local authority to put right the matter complained of and where this is not possible, or harm has been caused to the complainant, an amount of compensation may be suggested. The decisions of the Local Government Ombudsman (LGO) are not legally binding on the local authority, but generally local authorities do comply because of the public nature of the decision. Where a local authority fails to comply with the ombudsman’s recommendations the LGO can issue a second report highlighting this failure, which in turn compels a local authority to respond publicly. However, certain statutory requirements must be met regarding the nature of the complaint before the Local Government Ombudsman can pursue an investigation on behalf of a complainant.

Key legislation

**The Local Government Act 1974**

- All complaints must be in writing and made by members of the public who claim to have sustained injustice due to maladministration by or on behalf of an authority (s.26).
- Normally the complaint must be made within 12 months of the incident which is the source of the complaint (s.26(4)). However, the Local Government Ombudsman does have discretion to accept complaints outside of this time limit.
- The ombudsman cannot investigate where there is a right of appeal to a tribunal or court unless it is unreasonable to expect the complainant to resort to such a course of action due to time and expense or for some other reason (s.26(6)).
- The ombudsman cannot investigate a complaint unless it has first been drawn to the attention of the local authority normally by means of an official complaint (s.26(5)).
- The ombudsman cannot investigate or question the decision of a local authority when the power or discretion to make that decision is vested in the local authority (s.34(3)).
Service-users, carers or parents who have pursued a formal complaint through the three stages of the statutory complaints procedure may still be dissatisfied with the outcome or indeed they may have a criticism about the complaints process itself. If an individual in this situation has exhausted the complaints procedure of the agency against which they are complaining they can take their complaint a stage further to the Local Government Ombudsman. In some circumstances, for example a complete breakdown of trust, the LGO will investigate even if a complainant has not gone through all three stages of the complaints procedure provided by Social Services. Complaints to the LGO cannot be solely on the grounds that the service-user, carer, parent or child disagrees with the decision of Adult Social Services or Children’s Services or some other local government department. The ombudsman can only investigate a complaint which concerns how a decision was arrived at, as opposed to the decision itself. Maladministration concerns the manner in which decisions are reached and implemented by the local authority and includes:

- rudeness;
- delay;
- inconsistency;
- disregard of guidance;
- bias or discrimination;
- refusal to answer reasonable questions;
- failure to implement administrative rules and procedures.

Where the Local Government Ombudsman finds the local authority guilty of any of the above practices the LGO can make a number of recommendations. These can include requiring the local authority to change some aspect of its administrative procedures, provided these do not contravene statutory policy and practice guidance. The LGO may also request the local authority to carry out functions which it has failed to do, for example to conduct a carer’s assessment or provide a suitable placement for a child excluded from school. Alternatively, or in conjunction with other recommendations, the LGO can require the local authority to pay compensation to those detrimentally affected by its flawed decision making. Most completed investigations together with the LGO’s recommendations are published and accessible to the public. So although the LGO has no power to compel a local authority to comply with its recommendations, most do so on principle or because of the adverse publicity which a published report can attract (White, 2007: 81).

Critical commentary

The Local Government Ombudsman

The Local Government Ombudsman receives in the region of 18,500 complaints annually and of these half relate to welfare matters such as benefits, social housing, education and social care. Around 10,000 of all complaints received by the LGO are rejected because they fail to comply in some way with the requirements necessary for them to be investigated. A further 5,500 investigations are discontinued due to insufficient evidence of maladministration. This leaves around 3,000 complaints to be fully investigated. Due to the practice of local settlements whereby a local authority can agree to remedial action at an early stage of the investigation very few reports are actually published by the LGO. On average only around 200 investigation reports a year are issued detailing maladministration by a local
Judicial review

Like individuals and organisations, the government itself, at central and local level, is also subject to the rule of law. Government ministers cannot act beyond the powers granted to them by the provisions in a statute enacted by Parliament. For instance, when a Parent Act gives a secretary of state (head of a central government department) the power to make secondary legislation, he or she cannot create additional rules and regulations which are clearly outside the scope of the original legislation and therefore not sanctioned by Parliament. Similarly, at local government level, local authority employees cannot act beyond the powers given to them by legislation. For example, social workers can only remove a child from birth parents without their consent if they have a court order to do so. Local authority employees who act in ways amounting to maladministration are also acting unlawfully.

It is therefore necessary to have a system of justice which enables members of the public to challenge the decision making of local authority departments when these appear to be contrary to the law or made in such a way that they constitute maladministration. As with complaints to the ombudsman, judicial review cannot be used by a service-user, carer, parent or child solely because they disagree with the effect of a decision. An applicant for judicial review must have grounds for challenging the way in which a decision has been arrived at. In other words, a judicial review examines how a decision has been
reached rather than the outcome of the decision. In court the applicant must produce evidence to show that the processes by which the decision was made amounted to maladministration or were unlawful in some way.

A case for judicial review always starts in the High Court (Divisional Court of Queen’s Bench Division), but can be subsequently appealed to higher courts. When reviewing the lawfulness of decisions made by public bodies such as the police, NHS, local authorities, tribunals and even government ministers, the High Court can compel witnesses to appear before it and has powers to insist on the full disclosure of relevant documentation. Local authorities, like central government, must act reasonably in reaching decisions and since the introduction of the Human Rights Act 1998 they must also act in ways compatible with the European Convention on Human Rights. Thus, aside from maladministration, failure by central or local government to act in accordance with the Convention is also a ground for judicial review. This means in effect that social workers, as local government employees, are bound by the European Convention on Human Rights. Actions which contravene any of its articles leave practitioners and their public sector agencies open to litigation by service-users and carers.

Unlike local authority complaints procedures and appeal to the Local Government Ombudsman, an applicant taking a judicial review has to meet his or her own costs and may have to pay the legal costs of the other side if the applicant loses the case. Applicants on low income may qualify for public assistance with legal costs, but this is not an automatic entitlement and will depend on a number of factors. A court hearing for a judicial review, which must be in the High Court, will cost some tens of thousands of pounds and generally requires the services of a barrister as well as a solicitor. The average case may take up to a year before coming to court, although in very exceptional and urgent circumstances a case may be heard within 24 hours. On deciding in favour of the applicant, the High Court may quash a local authority decision and offer a remedy where it has caused an applicant injustice. These remedies can include ordering the local authority to: cease a particular action; act in a certain way; nullify the local authority’s decision; and/or make a monetary payment for damages to the applicant. Usually when an applicant wins a case against a central or local authority agency or employee, the High Court also awards costs. This means that the government agency also has to pay the applicant’s costs of taking the case to court as well as its own legal costs. Plainly, losing a judicial review could be extremely costly for a local authority. It can have an even more adverse financial impact on a service-user or parent if they lose.

In order to pursue a judicial review an applicant must show that:

- They have sufficient interest, that is that they are directly or indirectly (but substantially) affected by the matter.
- They have already pursued all other avenues to resolve the matter, such as complaints procedure, ombudsman, appeal to relevant tribunal.
- The local authority has acted ‘unreasonably’.

The nature of unreasonableness, and therefore the grounds for a judicial review, were considered at length in Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223. This judgement established the Wednesbury principles, which mean that a decision by a public authority is potentially unlawful if any of its staff in coming to that decision:

- Act beyond the legal powers they have actually been granted.
- Misapply the law because they do not fully understand it.
- Take into consideration irrelevant facts.
Chapter 1 Legislative framework

Judicial review

The number of cases which actually come before the court as judicial reviews is relatively small compared to the total of applications made. Every year on average between 5,000 and 6,000 applications (claims) are made for permission to avail of a judicial review. Of these claims around 50% will be refused permission. Of the remaining 50% only a small fraction actually result in substantive hearings. For example, in 2003–2004 out of 5,500 initial applications only 350 actually made it to a full court hearing (Leyland and Anthony, 2005: 240-1). Ultimately these statistics raise questions regarding the accessibility of judicial review as a form of redress for carers and service-users, many of whom are already vulnerable or managing considerable stress in their lives.

Application for a judicial review must be within three months of the date of the action by the public body which is the subject of the complaint. This is an excessively tight timescale as any prospective claimant is first required to avail of any complaints process, review by a tribunal or investigation by the ombudsman. Consequently, many claims are simply timed out. The delays caused when seeking legal aid and awaiting a decision can also make it difficult to apply for a judicial review on time. Conversely, those on middle-income levels do not qualify for legal aid and simply do not have the funds to conduct a judicial review, which can easily cost £50,000–£100,000. In addition to the costs of their own legal representation, should a claimant lose a case they may be ordered to pay the legal costs of the other party in addition to damages (Mandelstam, 2005: 96). Time constraints in conjunction with the huge financial liability for middle-income earners of taking a case before the High Court act to limit the use of judicial review in practice.

Contravention of the European Convention on Human Rights was made a further ground for judicial review under the Human Rights Act 1998. Judicial review falls under civil law and therefore it is up to the individual to decide to enforce their rights by taking a central government or local government agency, such as Children’s Services, to the High Court. As this form of legal action is taken through the civil justice system the standard of proof will be the balance of probabilities and not beyond a reasonable doubt.

Critical commentary

- Fail to take into consideration relevant facts.
- Act dishonestly or abuse their power.
- Introduce a blanket policy that limits the discretion that staff would normally exercise under the legislation governing their decisions.

A judicial review can only be brought against a public agency. It cannot be brought against voluntary bodies or private sector agencies. For example, it is not possible for a child (or their representative) in a Barnardo children’s home to take a judicial review against Barnardo, although they could against the Children’s Services that arranged the placement. Likewise, it is not possible for a homeless person receiving assistance from Shelter, which is a charity, to take the organisation to judicial review because they refused a particular service to the homeless person. However, there are other protections under the law for individuals receiving assistance from the voluntary sector. To take the example of Citizens Advice Bureaux, which provide welfare rights and legal advice, as a voluntary body it cannot be the subject of a judicial review. Complaints against voluntary sector agencies must be taken under private law rights. So if a worker at a Citizens Advice
Bureau (CAB) gave incorrect advice on a person’s welfare entitlement resulting in the loss of benefits, that person could sue the CAB for negligence. The tort of negligence falls under civil law and therefore nothing will happen unless the affected individual decides to pursue the matter through the civil courts or through an out-of-court settlement under threat of going to court.

An older person placed in a local authority residential home and dissatisfied with their care could potentially opt for a judicial review. While this is not an option for someone in a private residential home, he or she could take a judicial review against the local authority Adult Services Department which was responsible for the care assessment and the arrangement of services. An older person who arranged their own care in the private residential home would obviously not have recourse to judicial review; but such an individual can still avail of other legal solutions. Negligence can be committed by anyone who owes a duty of care to another individual, and a private sector residential home plainly owes a duty of care to its residents. So, for instance, if staff at a private residential home failed to obtain medical assistance for a female resident with dementia, resulting in a further deterioration of her physical health, they could be sued for negligence.

Alternatively, if a private sector residential home failed to provide the standard of accommodation described in the contract, then the resident could sue the proprietor for breach of contract and obtain compensation through the courts if a judge awarded damages in his or her favour. In addition, the same individual could rely on the breach of a specific statutory provision. In this instance private residential homes have to comply with National Minimum Standards under the Care Standards Act 2000. Any residential home failing to meet these standards can be reported to the Commission for Social Care Inspection and subsequently de-registered, thus forcing its closure. Clearly, it depends on the particular circumstances of service-users and their carers as to whether they have recourse to judicial review or not. Where they cannot obtain a judicial review, they may be able to rely on other legal options, for instance breach of contract, the commission of a tort such as that of negligence, or failure to meet a statutory requirement.

Social workers, as non-legal professionals, are not required to know in any detail how court cases are funded. As practitioners concerned with social justice they need to be concerned as to how funding can affect a person’s access to, and experience of, the justice system. Furthermore, as professionals who may be involved in court proceedings, it is important to have an overview of how people obtain advice and representation within the legal system. To access the legal system people need to know:

- about their legal rights and entitlements;
- how the legal system works;
- how to obtain legal advice;
- how to access and arrange legal representation;
- how to obtain funding to obtain legal advice and representation in court.

Most civil disputes are actually settled out of court and often through the exchange of solicitors’ letters and discussion between the parties. It is only a minority of civil disputes that actually go to court. For example, many separating couples come to an agreement about custody of their children and financial arrangements for child maintenance without resort to the courts. Care Proceedings, when a local authority seeks a court order to
safeguard a child, by their very nature involve going to court. Likewise criminal cases always go to court, but a defendant may decide to plead guilty or (as often occurs in a Magistrates’ Court) may not be legally represented.

State-funded legal services

The Access to Justice Act 1999 introduced major changes in the administration and organisation of publicly funded legal assistance. Often people in vulnerable groups are unaware of the financial assistance they might be entitled to or how to access it. Yet access to justice requires access to free or affordable legal assistance.

Legal Services Commission

This is a public body sponsored by the Department for Constitutional Affairs. It administers the Community Legal Services Fund and allocates public funds for the provision of legal services. The Legal Services Commission aims to ensure that the justice system is accessible and to this end it provides information on legal services mainly through www.justask.org.uk.

Community Legal Service

This provides advice and funding to the public on civil law matters. Such funding and advice is available for individuals availing of the courts, some tribunals (e.g. Tribunal for Mental Health Review) and some forms of alternative dispute resolution. A funding assessment is made and claims in the public interest are given priority – for example, human rights, social welfare and family and care proceedings. Funding is only provided to those on low income, and some types of claim will not receive funding at all, such as cases involving commercial transactions or personal injury (e.g. suing the driver of a car for injury to a pedestrian). Funding may be dependent on the applicant having pursued other courses of action. For instance in family proceedings such as divorce, public funding may only be awarded after the spouses have gone to a mediation service and tried to resolve outside of the court any dispute over child custody, maintenance or property. Even if the person is on low income, funding is not automatic and will not be awarded if it appears that the applicant has little chance of winning the case. As a general rule the probability of winning the case needs to be 60–80 per cent, and the potential damages need to be twice the costs of taking the case. In addition the case needs to fall into one of the high priority categories set out below:

- Challenges to the decisions of public bodies.
- Misconduct by the police.
- Housing.
- Social welfare.
- Child welfare.
- Domestic violence.
- Medical negligence.

Criminal Defence Service

This funds legal representation for defendants in criminal cases. Solicitors and barristers in the private sector are contracted by the Criminal Defence Service to provide public defenders in criminal cases. Funding from the Criminal Defence Service also provides duty solicitor schemes which provide free legal advice to people who have been taken to a
Access to justice

police station. Funding of defendants is based on the ‘interests of justice’ and is targeted on criminal cases where there is a likelihood of a custodial sentence. To avail of funding from the Criminal Defence Service a financial assessment is conducted and where defendants are on higher incomes they are required to contribute to the costs of their legal representation. In the Crown Court, which tries the most serious cases, 95 per cent of defendants receive funding from the Criminal Defence Service. By contrast, many of those appearing before Magistrates’ Courts, are either not legally represented or have no entitlement to public funding.

Community Legal Service Partnerships

These are funded by the Community Legal Service. They consist of local networks and one-stop-shops for legal services, which bring together sources of funding, legal service providers and special interest groups. Providers include agencies such as CAB, Law Centres, specialist solicitors and specialist advice centres such as those run by MIND and Shelter. Often the advice and assistance offered is free or at a low charge.

Alternatives to publicly funded legal assistance

Organisations, such as the Citizens Advice Bureaux, provide free legal advice on a wide range of rights and entitlements including those relating to: welfare benefits; special education; health; social care; housing; employment; and instances of discrimination. They also provide information on solicitors and other sources of legal advice or funding. Law centres also enable those who are disadvantaged or on low income to obtain information on their rights. Law centres may specialise in different areas, for example the Refugee Legal Centre provides legal services to asylum seekers, refugees and those with a variety of immigration statuses. Pro bono work may be undertaken by some solicitors, which means they offer free or reduced fees to people on low incomes. They are often accessed through organisations such as the local Citizens Advice Bureau which makes the initial referral.

Despite the existing provision regarding legal funding and free advice, many individuals may not be on sufficiently low income to avail of public legal funding, or they may not qualify for other reasons, for example because the Community Legal Service does not deem they have a high enough chance of winning. Others on average incomes may need more comprehensive legal advice than can normally be provided through a few consultations at a law centre or CAB. The cost of taking legal action is considerable. For instance a solicitor is likely to charge around £100–£200 per hour for work on a personal injury case. Normally a barrister will be required in the High Court (where judicial reviews must start) to present the applicant’s case. He or she is entitled to a ‘brief’ fee to cover preparation of the case and the first day of the trial. For a Queen’s Council (a senior and experienced barrister) this is likely to be in excess of £5,000. Thereafter the barrister is entitled to a ‘refresher’ for every additional day that the case is at court, which for a Queen’s Council will be in excess of £1,000. Even a relatively simple judicial review is likely to cost in the tens of thousands of pounds to take to court. This means that even for those on average income, the costs of a judicial review are likely to be beyond their means.

Due to the excessive costs of taking a case to court some solicitors and barristers offer Conditional Fee Agreements also called ‘no win, no fee’. These can be used in all civil cases except family proceedings, and cater for people whose income is not sufficiently low for them to receive State funding for their legal costs. A Conditional Fee Agreement means that if the client does not win the court case he or she does not have to pay the solicitor anything. However, even if the client does not have to pay his or her own solicitor
he or she may have to pay all the legal costs of the other side if they lose the case. Conversely, under this type of agreement, if the client wins the case a considerable proportion of their award for damages may be claimed by their legal representatives in outstanding legal fees. Typically 25 per cent of any award for damages will be paid to the solicitor and/or barrister if the client wins the court case. It is possible for applicants taking a judicial review, or indeed any court case involving possible damages, to take out an insurance policy so that if they lose the case the insurance policy will pay the legal costs. These insurance premiums can be extremely expensive, sometimes amounting to almost half the total legal costs to the applicant.

Critical questions

Consider the different ways in which funding is provided for criminal and civil cases. How might this affect the access of different groups of people in society to the justice system?

Professional accountability

The Care Standards Act 2000 was introduced to give additional protection to the public after a series of scandals which revealed that social care workers had abused or neglected vulnerable adults and children. This legislation made social worker a protected title, which means that it can only be used by those who have undertaken regulated training and whose names appear on a professional register. The General Social Care Council (GSCC), which was also created under the Care Standards Act 2000, has responsibility for accrediting social work training courses, maintaining a register of social care workers and producing a Code of Practice for Social Care Workers and their employers. A social worker who fails to abide by the Code of Practice for Social Care Workers, which sets out standards for professional conduct and practice, can be de-registered and thus debarred from employment as a social worker. The register is public and employers are required to check it before engaging staff as social workers. The Code of Practice also obliges employers of social care workers to enforce practice standards by disciplining those who fail to meet the requirements set out in the Code. Such disciplinary action may of course fall short of applying to the GSCC for their immediate de-registration.

Critical questions

Go to www.gscc.org.uk and download a copy of the Code of Practice for Social Care Workers. Identify a few requirements of the Code which you personally think would be the most challenging to meet. Identify the kinds of practice situations which would make it more difficult to meet some of these standards. How would you endeavour to resolve these difficulties?

Accountability to the employer

Within local authorities, social workers normally work in teams which are increasingly multidisciplinary. The person responsible for day-to-day management of the quality of work will be the team manager. This could be a senior social worker or, in the case of a multidisciplinary team, a member of a different profession such as a community
psychiatric nurse or occupational therapist. Above the team manager are middle managers of increasing seniority headed by a Director of Adult Services or a Director of Children’s Services. Each of these directors is in turn responsible to a committee of councillors elected to run the local authority. This line of accountability from the frontline social worker up through various levels of management to a committee of elected councillors ensures that ultimately there is democratic accountability to the electorate. This is set out diagrammatically below.

Aside from employment by the local authority, in what are often referred to as statutory social services because the local authority is required by law to provide them, a social worker may work for a private or voluntary sector organisation. Regardless of the size of the agency there will be a line-management structure. This may differ as between small organisations which may have only one line-manager and larger nationwide providers which have several layers of management. Above senior management in a voluntary agency will be a Board or the Trustees to whom management is ultimately accountable. Voluntary and private sector organisations providing social care such as day care, residential care or domiciliary services will be subject to the requirements of National Minimum Standards which include requirements relating to the working environment for social care staff.
Chapter 1 Legislative framework

Quite apart from the GSCC Code of Practice, which applies to all social workers, the contract of employment between an employee (social worker) and his or her employer (which could be a local authority, a private provider or a voluntary body) creates contractual obligations between the two parties. An employee can be disciplined or sacked for breach of his or her contract of employment. For example, persistent absenteeism or failure to complete routine tasks required by the job are likely to be grounds for dismissal. A contract of employment usually also obliges employers to provide some form of supervision, oversight or instruction to their employees.

Critical questions

Go to www.gsc.org.uk and download a copy of the Code of Practice for Employers of Social Care Workers. Identify a requirement that would be particularly important to you as a social worker. If your employer was failing to fulfil this requirement how would you go about addressing this? What might be some of the main challenges or difficulties of bringing this matter to the attention of your employer and ensuring it was rectified?

Supervision in social work

Supervision formalises accountability within an agency and is the point at which agency policy and procedures are communicated by management to workers. It also serves to inform workers as to what level within their organisation various decisions are made. So, for example, in Children’s Services a team working with children at risk might have a frontline worker deciding between high, medium and low risk referrals, but a senior social worker or team leader deciding whether to call a multidisciplinary strategy discussion to decide whether to proceed with a s.47 inquiry into the circumstances of a child deemed to be at risk. In other words, different workers within the hierarchy of an organisation have different competencies and authority regarding which decisions they can make on their own, which in consultation with others, or which decisions they must pass to more senior personnel for a determination. Alongside these broad functions, supervision in a social work context is designed to fulfil a wider range of functions, which are set out in the box below.

<table>
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<th>Background information</th>
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<td><strong>Supervision in social work contexts</strong></td>
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<td><strong>Supervision should:</strong></td>
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<tr>
<td>1 Assist workers to make accurate assessments.</td>
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<tr>
<td>2 Assist workers to balance personal and professional responsibilities against agency requirements.</td>
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<tr>
<td>3 Monitor frontline workers by reviewing their decisions and activities.</td>
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<td>4 Monitor individual workloads and change these when indicated.</td>
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<td>5 Identify individual training needs.</td>
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<td>6 Facilitate the professional development of workers.</td>
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Accountability to service-users and others

Social workers can be held to account by service-users and carers by virtue of the GSCC Code of Practice for Social Care Workers, which can form the basis of a complaint by a user or carer to the General Social Care Council. There are also aspects of common law which frame social work, just as they do for other forms of professional activity or interaction between citizens. In particular, the law relating to negligence can have an important bearing on the working relationship between practitioners and users.

The law of tort

As we saw earlier, a tort is an action by one person, which causes harm to another person. It falls within the civil justice system and is dependent on the injured person deciding to go to court to obtain redress (sue for damages) for commission of the tort. The principle behind tort is that generally people are not legally bound to look after each other, but they are required to avoid doing harm to each other. A person can only be expected to make amends for doing harm to someone if he or she could reasonably have foreseen the harm an action of his or hers might cause and could therefore with forethought have avoided doing the harm. The implication here is that if the harm could have been foreseen and yet the person still commits the tort (or harm) this action is attributable to carelessness. The law obliges each person to be mindful and to act with care towards their ‘neighbour’, which has a specific legal definition (see below). When a tort is committed, the law allows the victim to claim money known as damages to compensate for the commission of the tort. This is paid by the person who committed the tort (defendant) to the injured party (claimant). The amount of damages is based on a monetary equivalent of the harm done to the claimant. This could be physical, psychological or financial harm. It can include compensation for bodily injury, for mental distress or for the loss of employment or a business.

Tort of negligence

Although there are a number of different kinds of torts, for example that of nuisance and defamation, negligence is the tort that social workers are most likely to encounter in their practice and for this reason it is the one discussed in some detail. For a claimant to successfully sue a defendant in negligence he or she must prove.

(a) That the defendant owed the claimant a duty of care.
(b) That the defendant was in breach of this duty.
(c) That such a breach by the defendant caused the harm or injury to the claimant.

Donoghue v. Stevenson [1932] AC 562 550 was a defining judgement which established who owes a duty of care to whom by developing the legal concept of ‘neighbour’ widely known as the neighbour principle. Giving judgement in this case, Lord Atkin asserted that,
'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' At law a neighbour is a person ‘so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when directing my mind to the acts or omissions which are called into question’. The neighbour principle creates a duty of care between the driver of a car and a pedestrian, or between a doctor and a patient, or indeed between a social worker and a service-user. It is because of this special relationship that when a driver is inattentive and injures a pedestrian, a doctor misdiagnoses a patient, or a social worker completes a slipshod assessment of a service-user’s needs, all are potentially liable to be sued in negligence. For any one of these people could have foreseen that their carelessness would result in direct harm to their neighbour. It is now well established at common law that there is a duty of care between a professional and a client and also between an employer and an employee, this plainly includes social care workers and their professional relationships with service-users, carers, parents and children.

Negligence and social work

The application of the tort of negligence to social work is not straightforward and the case law on it can be confusing. Broadly speaking, common law draws a distinction between the duty of care which social workers owe to looked after children and foster carers on the one hand and on the other their statutory duties to investigate allegations of child abuse. For example, in W and Others v. Essex County Council and Another [2000] 2 All ER 237, local authority Social Services placed a child who was known to have sexually abused others with a family of foster carers. The social workers responsible for placing the child withheld this information from the foster carers. The foster child went on to sexually abuse the children of the foster carers. The social workers responsible for placing the child with the foster carers were held liable in negligence for failing to disclose full information about the foster child as it was foreseeable that he might abuse members of his foster family.

A number of judgements also make it clear that social workers can be held liable in negligence for failing to safeguard children in their care. For instance in S v. Gloucestershire County Council [2000] 3 CCLR 294, a child was placed with foster parents who sexually abused the child. The judge found the local authority Social Services liable for negligently placing a child with foster parents who harmed the child. The local authority had to pay money in damages to the victims in both cases.

Conversely in D v. Bury Metropolitan Borough Council [2006] EWCA Civ 1, a four-month-old baby was discovered to have fractured ribs and it was believed that these had been caused by non-accidental injury. As a result the local authority sought and obtained an Interim Care Order which permitted it to remove the baby from the parents. It was later discovered that the baby had in fact brittle bone disease and the injuries were entirely accidental. The baby was returned to the parents and care proceedings against the parents terminated. The parents then sued the local authority in negligence for the psychological harm that they had suffered as a result of the unsubstantiated allegations against them and the removal of their baby. Despite acknowledgement by the court that the parents were entirely innocent of committing any abuse and had indeed suffered psychological harm as a consequence of the allegations, the case was held to be non-actionable in negligence. In other words, social workers where held not to owe a duty of care to the parents and therefore could not be sued.

The decision on whether it is fair, just and reasonable to impose a duty of care is known as judicial policy. This means that in deciding whether a duty of care arises the courts take into account not only the law of tort, but also whether society would benefit from the existence of the duty. In other words, judges are obliged to consider the ‘public
interest’ in coming to their decisions. What distinguishes D v. Bury Metropolitan Borough Council [2006] from the other cases cited above is that social workers were exercising their statutory duties to protect children from neglect and abuse. The courts are reluctant to uphold claims for negligence when local authorities are exercising these statutory duties, because it would adversely affect decisions by social workers. If parents or guardians could sue social workers in negligence for initiating investigations or care proceedings in circumstances where the allegations of abuse later proved unfounded, practitioners would be fearful of taking action in the first place. Social workers would become overly cautious and perhaps even reluctant to intervene to protect children from abusive parents in case they were wrong in their suspicions. It is specifically to avoid this state of affairs that under judicial policy no common law duty of care is owed by Children’s Social Services to parents or guardians and the child’s interests remain paramount in the exercise of statutory duties under the Children Act 1989.

Although they cannot be held liable in negligence, social workers may be liable for their decisions under the European Convention of Human Rights if they fail to protect children who are being abused. In Z and others v. United Kingdom [2001] 2 FLR 612 children were subjected to severe long-term neglect and abuse in their family home. The neglect and abuse had been reported to Social Services on several occasions, but they only reacted four and a half years after the first complaint, when the children were eventually placed in emergency care at the insistence of their mother. The judge concluded that the local authority Social Services had failed to protect the children and art.3 of the European Convention on Human Rights had been violated. The State had failed in its positive obligation under art.3 to protect its citizens from ‘inhuman or degrading treatment or punishment’ of which it has or should have knowledge: in this instance the persistent ill-treatment of children. Damages were awarded to the children, payable by the local authority involved. Under the European Convention it is possible for social workers and their agencies to be sued in exceptional circumstances for failing to protect children within their families as well as children in the care of the local authority.

Employers’ accountability and liability

An employer is considered to be responsible for many of the acts of his or her employees and is therefore held to be vicariously liable for their torts. This means that the employer is held liable for the negligent acts of an employee if these are committed during the course of their employment. To take an example, if a social worker employed by Adult Social Services made an incorrect assessment which resulted in a service-user’s needs not being met culminating in a deterioration in their physical health, the social worker could be held negligent. However, in practice the service-user would actually sue the local authority as the social worker’s employer and it is the local authority who would pay damages if these were awarded to the service-user by the court.

Employers of social care workers are bound by the GSCC Code of Practice for Employers of Social Care Workers. This Code sets out a number of responsibilities which employers have in relation to their staff and the delivery of quality services. The Code applies regardless of whether the employer of social care staff is in the voluntary, private or public sector. This Code can be used by social workers who are being asked to practise in unsafe working environments to report their employer to the General Social Care Council. In other words the GSCC Code of Practice for Employers can be used by social workers to hold their employers to account and to ensure that they meet the requirements of the Code.
Employers also have to meet a number of legislative duties to protect the health and safety of employees. These duties encompass the provision of adequate training and equipment and safe working practices. It includes ensuring that there are a sufficient number of employees to safely undertake the volume of work done by the agency or company. An employer can be held liable for failing to provide adequate supervision for a worker or endangering their health or safety. For example in *Walker v. Northumberland County Council* [1995] 1 All ER 737, Mr Walker, a social worker, was employed to manage four child protection teams. In 1986 he had a nervous breakdown due to stress caused by his work and was on sick leave for three months. Before his return the Local Authority agreed to provide support to reduce his workload, but inadequate assistance was provided and six months later the claimant experienced a second breakdown resulting in his resignation. The court held that the Local Authority, as an employer, had breached its duty of care to provide a safe system of work. The respondent employer had required the claimant to carry a workload which they could reasonably have foreseen would be detrimental to his health. Damages were awarded against the local authority which had to pay compensation to Mr Walker.

### Overarching legislation

There are a number of key statutes which underpin social work practice across different social-care settings and work with all service-user groups. With the exception of the Human Rights Act 1998 and the Freedom of Information Act 2000, they also apply regardless of whether social workers are employed by a public, private or voluntary sector agency. These concern confidentiality, protection against discrimination and the standards of care provision.

#### The Data Protection Act 1998

This statute is designed to protect personal information and it applies to all data controllers, defined as any person who ‘determines the purposes and manner in which personal data are processed’ where ‘processing’ means the:

- organisation or alteration of data;
- retrieval, consultation or use of the data;
- compilation or destruction of data;
- disclosure of data.

The Data Protection Act 1998 is only concerned with information which identifies a living person. Data identifying people who have died or data which has been anonymised are not subject to the provisions of this statute. The 1998 Act covers data held in any medium on living individuals and encompasses electronic databases, microfiche, CCTV footage, audio recordings and information held in paper format. The legislation is equally applicable whether the information held identifies a living person directly, for example by virtue of their name, or indirectly, for example a service-user number. It also applies where information about a living person is held by an organisation in a set of documents which if brought together would identify the person. The Data Protection Act 1998 is an extremely comprehensive piece of legislation which will apply to most instances which involve social workers in handling information relating to service-users,
Overarching legislation

carers, parents and children, including members of their families and wider social networks. The box below details the eight principles set out in the Data Protection Act 1998.

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**Key legislation**

**Data Protection Act 1998**

1. **Data to be processed fairly and lawfully** – the individual giving the information must be informed as to how it will be used and must give their consent. There are exceptions to this where there is a legal requirement to process the data or to protect that individual or another person.

2. **Data only used for specific lawful purposes** – personal data can only be collected for specified lawful purposes and it cannot be further processed in any way that is incompatible with that original purpose.

3. **Data must be adequate and relevant** – personal information must be relevant and required for the purpose for which it is to be processed. Therefore agencies must not collect unnecessary information.

4. **Data must be accurate** – personal data must be correct and updated.

5. **Data must not be retained longer than necessary** – personal information must not be kept for longer than it is required and should be destroyed.

6. **Data must be processed according to the rights of data subjects** – which are:
   - Right of access to a copy of personal data held within 40 days of request (s.7).
   - Right to prevent processing (including disclosure of personal data) likely to cause damage or distress (s.10).
   - Right to prevent sole reliance on automated decision making where this significantly affects the individual (s.12).
   - Right to rectify, block, erase or destroy inaccurate data (s.14).
   - Right to compensation if an individual suffers damage by any breach of the Act (s.13).

7. **Data must be secure** – organisations which handle data must protect it from unauthorised or unlawful processing, accidental loss, or damage, e.g. password protection or storing manual files in locked filing cabinets. Data no longer required must be carefully destroyed.

8. **Data should only be transferred to certain countries** – personal data cannot be transferred to a country outside of the European Economic Area unless that country has a comparable level of data protection. Or unless: the individual concerned consents to the transfer of personal data; it is required by a contract; it is necessary to protect the public interest; it is vital to the safety of the individual concerned.

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The Information Commissioner is responsible for overseeing the implementation of the Data Protection Act including enforcement proceedings and prosecutions if there are breaches of its provisions. Individuals who have been unsuccessful in enforcing any of their rights through application or complaint to an organisation processing their personal data can complain to the Information Commissioner who will take action on their behalf. Individuals who suffer harm as a result of unauthorised disclosure of information may sue the organisation concerned for damages.

Due to the special position which Adult Social Services and Children’s Services occupy given their work with vulnerable groups and duties to safeguard children, secondary
legislation entitled the Data Protection (Subject Access Modification) (Social Work) Order 2000 SI 2000/415 gives Social Services Departments of local authorities some exemption from s.7 of the Data Protection Act 1998. Department of Health (2000c) *Data Protection Act 1998: Guidance to Social Services* explains the implications of this for frontline social work. Broadly it means that Social Services does not have to comply with an individual’s right to obtain a copy of their personal data or prevent processing likely to cause them harm in the following circumstances:

- Prevention or detection of a crime.
- If disclosure would be likely to cause serious harm to the physical or mental health of the individual concerned or another person.

It should be noted that compliance with all the principles set out in the Data Protection Act 1998 is the norm for social workers. It is only in the exceptional circumstances set out above that social workers should avail themselves of the exemptions granted to them under the Data Protection (Subject Access Modification) (Social Work) Order 2000 SI 2000/415.

**Freedom of Information Act 2000**

Members of the public, which obviously includes service-users, can obtain information from public sector organisations relating to policy or practice on request under the Freedom of Information Act 2000. This legislation can only be used to obtain information from public sector bodies and not voluntary or private sector organisations. However, it cannot be used to obtain personal data, for example the contract of employment of a social worker with a local authority or a care plan drawn up by a Community Mental Health Team. An individual must make a written application specifying the information requested. The public body is normally required to provide requested information within 20 days and can charge a fee to cover some of its costs. This means that a service-user or carer or indeed any interested member of the public can obtain information on the procedures or criteria which guide social work practice and decision making for a local authority. There are several grounds which permit a public body to refuse to disclose information which has been requested. These are where the request is for:

- Personal information.
- Documentation relating to an investigation.
- Court records or proceedings conducted by public authorities.
- Information which would prejudice the detection or prevention of a crime.
- Information which would endanger the United Kingdom’s national security.

If a request for information under the Freedom of Information Act 2000 is refused, the applicant can appeal to the Information Tribunal which can investigate the reasons for the refusal and decide whether these fall within the exemptions permitted and listed above. Where a public body fails to comply with the Freedom of Information Act 2000 the Information Commissioner can take enforcement action against it. This has the effect of forcing the public body to disclose the information originally requested by the applicant.

**Protection against discrimination**

The Equality Act 2006 has set up a new single integrated body, the Commission for Equality and Human Rights (CEHR) to address discrimination and the protection of human rights. This body subsumes the functions of the former Equal Opportunities
Overarching legislation

The CEHR is required to:

- Monitor progress on equality, human rights and good relations between communities through publishing a regular ‘state of the nation’ report.
- Consult with all groups and ensure they have an opportunity to participate in its work.
- Promote good relations between and within communities across all sections of society.

Data protection

The Data Protection Act 1998 was introduced as a response to European Union Directive 95/46/EC which sought to protect the personal information of citizens held by organisations in the public, private and voluntary sectors. In the same year Parliament passed the Human Rights Act 1998, which incorporated into domestic law citizens’ right to privacy under art.8 of the European Convention on Human Rights. While apparently strengthening the rights of citizens to control what information is held on them and how it is used, the coming into power of the Labour Government in 1997 also marked a policy commitment to greater data sharing between public sector agencies. This was aimed at stamping out benefit fraud; improving the protection of children; reducing risk of harm to the public; and more broadly improving quality of provision through better integration of services. The National Health Service, Social Services and the Social Security Benefits Agency have been particularly affected by the Labour Government’s initiatives on information sharing.

Social policy under the Labour Government emphasises holistic and inter-agency approaches to welfare and public protection through the creation of Children’s Trusts, integrated health and social-care provision for adults and the introduction of multidisciplinary Youth Offending Teams. Computerisation has also increased the potential for detailed information on large numbers of individuals to be held on national data bases where it can be accessed by many others. The creation of a national database for children under the Children Act 2004 is just one example of the increasing reliance on vast electronic data banks by public sector agencies. In tandem with this development has been the trend for health and social-care professionals to record information electronically as opposed to manually in paper files. The result is wider and easier accessibility of personal information to a greater number of professionals. Information sharing has actually become the means by which Government seeks to: reduce crime; safeguard children; protect the public; and target services. As a consequence much effort has been expended on improving the compatibility of computer systems used by different agencies to facilitate information sharing (Perri, et al., 2005).

The focus of social policy on risk reduction means that information is being shared on individuals even before identifiable problems arise. For example, Youth Offending Teams are required to identify, assess and put in place prevention programmes for young people deemed at risk of offending. This means sharing more information between agencies at an earlier stage (Perri, et al., 2005: 116-7). The Government has tended to use ad hoc statutory provisions and guidance to encourage ever greater sharing of data between agencies. This has been paralleled by governmental resistance to up-dating Data Protection legislation in order to ensure that citizens’ privacy is protected in the face of growing information flows and ease of data sharing. Instead, central government has placed reliance on voluntary codes of practice concerning the sharing and matching of personal data between organisations (Perri, et al., 2005: 120-1).
• Combat prejudice and reduce crime affecting particular communities and to monitor hate crimes.
• Produce codes to guide good practice.
• Assist individuals to bring claims for discrimination.
• Conduct investigations of ‘victimless’ discriminatory activity such as advertisements.
• Issue a non-discriminatory notice against an organisation engaging in persistent discrimination and seek an injunction where there is non-compliance with the notice.

Since the 1970s a variety of primary and secondary legislation has been enacted to outlaw discrimination against an increasing number of social groups, such as women and those who have a disability. From time to time this legislation has been supplemented by case law which has further extended the applicability of anti-discriminatory statutes. The table below summarises this legislation and its key protections.

<table>
<thead>
<tr>
<th>Statute</th>
<th>Groups covered</th>
<th>Type of discrimination outlawed</th>
<th>Contexts of unlawful discrimination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex Discrimination Act 1975</td>
<td>Men, Women, Trans-gendered People</td>
<td>Direct, Indirect, Harassment</td>
<td>Job recruitment, Employment, Housing, Education</td>
</tr>
<tr>
<td>Race Relations Act 1976</td>
<td>Protects people on grounds of ‘colour, race, nationality or ethnic or national origins’</td>
<td>Direct, Indirect, Harassment, Segregation</td>
<td>Job recruitment, Employment, Housing, Education, Provision of goods, facilities and services</td>
</tr>
<tr>
<td>Disability Discrimination Act 1995</td>
<td>People with disabilities</td>
<td>Direct</td>
<td>Job recruitment, Employment, Housing, Education, Provision of goods, facilities and services, Public transport</td>
</tr>
<tr>
<td>Special Education and Disability Act 2001</td>
<td></td>
<td>Requirement to make reasonable adjustment</td>
<td></td>
</tr>
<tr>
<td>Disability Discrimination Act 2005</td>
<td></td>
<td>Direct, Requirement to make reasonable adjustment</td>
<td></td>
</tr>
<tr>
<td>Employment Equality (religion or belief)</td>
<td>Protects people on the grounds of their religion or belief</td>
<td>Direct, Indirect, Harassment</td>
<td>Job recruitment, Employment, Housing, Education, Provision of goods, facilities and services</td>
</tr>
<tr>
<td>Regulations 2003 and Equality Act 2006</td>
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<tr>
<td>Employment Equality (sexual orientation)</td>
<td>Protects people on the grounds of their sexual orientation</td>
<td>Direct, Indirect, Harassment</td>
<td>Job recruitment, Employment, Housing, Education, Provision of goods, facilities and services</td>
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<tr>
<td>Regulations 2003 and Equality Act 2006</td>
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</tr>
<tr>
<td>Employment Equality (Age) Regulations 2006</td>
<td>Protects people on grounds of age</td>
<td>Direct, Indirect, Harassment</td>
<td>Job recruitment, Employment, Education</td>
</tr>
</tbody>
</table>
Direct discrimination occurs if one person is treated more favourably than another merely because they belong to one social group rather than another. For example, s.1(1)(a) of the Sex Discrimination Act 1975 prohibits direct discrimination which occurs if a woman on the grounds of her sex is treated less favourably than a man would be in her circumstances. To illustrate this: a local authority Adult Social Services arranges more services for male partners looking after a severely disabled female partner than for women in the same circumstances, despite similar assessments of need. Here women are being treated ‘less favourably’ as assumptions are made about their ability to care with less support than their male counterparts. This stems from the gendering of the caring role in society and the expectation that women, as opposed to men, provide hands-on care to dependants.

Indirect discrimination which is prohibited by s.1(1)(b) of the Sex Discrimination Act 1975 occurs if requirements or conditions are applied equally to men and women, but affect one group much more than the other. For example, more men than women will be able to comply with the requirement that applicants for a residential social work position undertake night shifts, due to the gendering of childcare responsibilities in the United Kingdom. Indirect discrimination of this kind will only be lawful if the employer can objectively justify the necessity for the condition. In this example, the employer would need to demonstrate that night shifts are an inherent aspect of the job and not a covert form of discrimination against female applicants. Similarly, an unnecessarily high English language requirement for a job could be a form of indirect discrimination against people from ethnic minority communities who may be less able to comply with this requirement than someone of British nationality. Indirect discrimination of this kind on the grounds of nationality or ethnic origins is prohibited by s.1 of the Race Relations Act 1976.

As regards people with disabilities, instead of a provision for indirect discrimination the Disability Discrimination Act 1995 requires employers or those providing goods and services to make a ‘reasonable adjustment’ to minimise the disadvantage caused to people with disabilities relative to those who are able-bodied. For instance, under s.6 of the Disability Discrimination Act 1995 reasonable adjustments mean changes to buildings, equipment, procedures or practices to enable a person with a disability to access employment and promotion opportunities on the same basis as those without that disability. An employer could be required to: construct a ramp between different floor levels within the building; alter working hours; modify equipment; reallocate tasks; or engage an interpreter. Under s.5(2) failure to make reasonable adjustments is defined as a form of discrimination against a person with a disability. Similar provisions apply to those providing goods and services to general public.

The Equality Duty placed on public bodies by the Equality Acts is of particular relevance to social workers in the statutory sector. The introduction of this new duty requires local authorities when exercising their functions to endeavour to:

- Eliminate harassment and unlawful discrimination.
- Promote equality of opportunity.
- Promote positive attitudes towards people vulnerable to discrimination on the grounds of gender, disability, sexual orientation, ethnicity and religion.
Chapter 1  Legislative framework

The provision of quality services

National Minimum Standards

National Minimum Standards constitute the minimum standards for service delivery which are required by law and reflect good practice. They do not comprise ‘best possible’ practice, and many providers may exceed the mandatory criteria codified in the National Minimum Standards. The Care Standards Act 2000 also set up regulatory bodies to police these new provisions, with powers to de-register social care workers and care providers who fail to meet required standards. The regulations and standards introduced in the Department of Health White Paper (1998a) *Modernising Social Services* and legally defined in the Care Standards Act 2000 and associated statutory instruments apply equally to social workers and care providers in the public, private and voluntary sectors. *Modernising Social Services* moves away from concern with who provides care to ensuring the provision of good quality care.

The Care Standards Act 2000 also established the General Social Care Council which is charged to: accredit social work training programmes; register social care workers; and produce codes of practice for social care workers and their employers. It also set up the National Care Standards Commission to ensure that care providers were registered and met the criteria for care provision set out in the National Minimum Standards for service delivery in different care settings, including independent healthcare and nursing agencies, foster care, domiciliary, residential and day-care services. The National Care Standards Commission has now been amalgamated with the Social Services Inspectorate to form the Commission for Social Care Inspection (CSCI). Subsequently, Ofsted took over responsibility for the inspection and quality of services provided for children and the Care Quality Commission has now taken over the work of CSCI, which was abolished in 2009. These inspection agencies have the power to de-register providers who are failing to meet the National Minimum Standards.

Critical questions

Go to [www.dh.gov.uk](http://www.dh.gov.uk) and download *Children’s Homes: National Minimum Standards, Children’s Homes Regulations*. What areas of children’s care does this document cover? Imagine that you are the named social worker for a child who is in a residential home run by a well-known national charity. The child is a wheelchair user and complains to you that residential staff are not taking him on many of the outings that the other children are going on. Which standard is this a contravention of? How would you go about resolving this matter? If there was no improvement in the situation for this child, how would you take the matter further?

Safeguarding adults and children

In addition to improving the quality of services, the Care Standards Act 2000 s.82 also protects adult service-users from abuse by creating a list of individuals considered unsuitable to work with vulnerable adults. This provision has now been superseded by the Safeguarding Vulnerable Groups Act 2006, which creates a single list of individuals barred from working with children and/or vulnerable adults in both social and healthcare settings. Employers of health and social care personnel are required to consult this list
before offering employment to individuals. Individuals may be automatically listed on conviction of certain offences, for example a sexual offence against a mentally incapacitated adult. Others may subsequently be added to the list as the result of dismissal or disciplinary action connected with conduct which either harmed a child or vulnerable adult or put them at risk. The 2006 Act also establishes an Independent Safeguarding Authority which has the power to decide if an individual should be added to the list. The individual concerned has a right to make representations to the Independent Safeguarding Authority as to why they should not be included on the list.

### Learning points

- The two main sources of legislation are statutory and common law. However, membership of the European Union means that law is also created through EU treaties, directives and regulations.
- Parliament creates primary legislation through the report and committee stages of a Bill as it is passed through the House of Commons and House of Lords before receiving the Royal Ascent and being enacted.
- Legislation produced by Parliament is sometimes accompanied by Policy Guidance, Practice Guidance or a Code of Practice which directs managers and professionals as to how to implement the law in day-to-day practice.
- The court system depends on judicial precedent which means that similar cases are decided alike and lower courts have to follow the decisions of higher courts. There is also a system of appeal from lower courts to higher courts against a judge's ruling.
- Common law is divided into criminal and civil law which is administered by the criminal and civil court systems. Criminal law is invoked when a citizen commits more serious acts which potentially could undermine the stability of society. Civil law is invoked when disputes are essentially matters between individuals.
- The European Convention on Human Rights acts to curb and restrict the power and interference of the State in the lives of its citizens. In the United Kingdom this convention is given the force of domestic law through the Human Rights Act 1998.
- A raft of laws outlawing discrimination has been enacted in the United Kingdom and is central to protecting the rights and entitlements of people from minority groups.
- Parents, children, users and carers seeking to protect their rights have access to complaints procedures, the Local Government Ombudsman and the system of Judicial Review. These can be difficult to access for vulnerable individuals.
- The processing of personal information gathered on people by social care professionals during the course of their work is regulated by the Data Protection Act 1998. Social workers must only deviate from the principles set out in this statute in exceptional circumstances.
- National Minimum Standards, which apply to the majority of key service providers, set minimum requirements for the quality of care offered to adults and children in receipt of services.
Chapter 1 Legislative framework

Further reading


Elliott, C. and Quinn, F. (2004) *English Legal System*, Harlow: Pearson. This is an easy-to-follow text which explains how statute and case law is made. It also describes the civil and criminal court systems and discusses aspects of judicial review.


Useful websites

http://www.communitylegaladvice.org.uk is run by the Community Legal Service, which is funded by the government. It provides a wide range of easy-to-follow information on legal assistance for people on low incomes or in vulnerable groups who need to access the justice system.

http://www.direct.gov.uk is run by the government and offers a one-stop shop for information about the work of government. It offers a guide on central and local government work, policies and services. It also explains the workings of Parliament and the court system.

http://www.cehr.org.uk is run by the Commission for Equality and Human Rights and provides comprehensive and easy-to-follow guides on discrimination and the legislation which exists to protect people from it. It also provides a number of downloadable publications on discrimination in the United Kingdom.

http://www.gscc.org.uk is the official website of the General Social Care Council. It provides information on the Codes of Practice and other aspects of social care work. The site also permits access to the register of qualified social workers.

http://europa.eu/index_en.htm is the portal to the European Union and provides access to clear easy-to-read information on the European Union. It provides information on the law-making institutions of the European Union and how these relate to Members States.