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## INTRODUCTION

### WHY THE CHILDREN ACT IS DIFFERENT

About 50 Acts of Parliament are passed in this country each year. There are, in total, several thousand Acts currently in force. The majority of these measures make at most only a transient impact on the public consciousness, either because of their extreme technicality or because of the mundane nature of their subject matter. The Children Act 1989 stands out from this generally unmemorable mass of legislation. After it was passed, a government minister responsible for its implementation stated (at one of the many launches of training materials) that 'the Act creates a whole code of law about the upbringing of children which aims to bring about the very best we can achieve within the bounds of legislation for children whether they are living within their families, or in need of local authority services or in want of protection from abuse'.

The statement just mentioned contains two important messages. First, it emphasizes the *codifying function* of the Act, that is to say, it was designed to recast the existing law – with appropriate amendments – in a single coherent instrument. The previous law relating to children, scattered across numerous Acts and judicial rulings, was notoriously complex and inconsistent. Second, the statement acknowledges *the limits of the law* in the field of family relations. The Children Act was without doubt a landmark development in English law but it contains no magic cure for family problems. Rather, it aims to create an enlightened and practical framework for decision-making, whether the decision is taken in the family home, in a local authority office, in a health centre or in a courtroom. The object of the Act is to provide the necessary legal tools to parents, relatives, foster carers, child minders, child care professionals and judges, so as to further the best interests of children in their care. Which tools are selected, and how exactly they are used, tends to be left to the discretion of the parties using their judgement. No cast-iron guarantees of children's welfare or safety are given in the Children Act and none could reasonably be demanded. No law can force an absent parent to see their child regularly, nor

can separated parents be made to co-operate over their child's upbringing. No law can ensure that a child at risk is removed (or is not removed) from the family home at exactly the right time for exactly the right period. What we *can* reasonably demand of the law in this field is that it is clear, consistent and fair, and that it properly reflects the values to which our society subscribes. Judged by these criteria, the Children Act has scored highly since it was introduced in October 1991. It has succeeded in making its mark on the public consciousness, partly through its exceptional clarity – enabling people actually to understand what the law is trying to do – and partly through its sheer timeliness, arriving as it has during a period in which public and political interest in 'the family' has been intense.

In this book I intend to look at the provisions of the 1989 Act, together with the accompanying rules, regulations and guidance, and consider their effects and implications, especially for those working in the social and welfare services. I shall also be looking at the way in which the courts have reacted to the legislation. The Children Act presented a major challenge to the judiciary and to court staff and with the experience of over ten years of its operation we can reflect on what has been achieved and what remains to be done.

### **PUBLIC AND PRIVATE CHILD LAW**

During the reform phase leading up to the Children Act, it became fashionable to discuss children's legislation by reference to two organizing labels: public law and private law. These labels have remained quite important – indeed, they feature prominently in the official government guidance on the Act and are widely used in the courts – and so they deserve a mention here, but it is worth bearing in mind that they have no legal force. They do not appear in any legislation, for example, not even the Children Act itself. Nor have any official definitions been supplied. They are simply loose shorthand expressions which are used to describe different sets of statutory provisions. The names of the labels provide clues to their meaning.

'The public law relating to children' essentially means all the legislation concerning intervention in children's cases by public authorities. The work done by local authorities in the exercise of social services functions obviously falls within this, but so does the work of voluntary organizations, even though these bodies are not statutory ones. The other label – 'the private law relating to children' – is really a residual one. It is taken to refer to the legislation which is primarily designed to deal with children's cases which, initially at any rate, do *not* involve public authorities. These two categories of public and private law are not completely self-contained (there are, for example, provisions in the Children Act which apply to both areas), but as a means of breaking up

the legislation into reasonably distinct blocks for the purposes of discussion and debate, they have a useful role to play. Remember, however, that they have no legal force.

## BACKGROUND TO THE ACT

One of the many problematic aspects of the law as it stood before the Children Act was its chaotic nature. The main features of child law had not been deliberately planned; rather, they had emerged over a period of years. Successive governments got into the habit of producing an Act here and an Act there, each one designed to tackle a particularly pressing problem but seemingly without any real connection to what had gone before. This piecemeal development – which is by no means unknown in other branches of English law – caused immense frustration for practitioners in the field, who found it difficult to acquire a command of statutory provisions which were supposed to be guiding their professional work. The general public, needless to say, were left far behind in this process.

In 1984 the decision was taken to attempt a comprehensive restatement of the law. Prompted by a highly critical report from a House of Commons Select Committee, the Department of Health (DH) established an inter-departmental working party with the job of examining the so-called public law relating to children. The recommendations of this working party were contained in a report published in 1985 under the title *Review of Child Care Law*. This formed the basis of a government White Paper, *The Law on Child Care and Family Services*, published in 1987. The White Paper stated that the Government's proposals would involve 'a major overhaul of child care law intended to provide a clearer and fairer framework for the provision of child care services to families and for the protection of children at risk' [1].

Alongside the examination of the public aspects of child law, there took place an in-depth review of the private law. This was undertaken by the Law Commission (the standing law reform agency in this country) over the period 1984–88 and involved the publication of four discussion papers followed by the issue of a report (*Review of Child Law: Guardianship and Custody*). Annexed to the report was a draft Bill designed to encapsulate both the Commission's own proposals and many of those contained in the government White Paper. The Children Act is based on this draft.

The process described above shows that the Children Act was a very carefully constructed measure, which is more than can be said for much of the legislation that it replaced. The particular method of reform which was employed, though time-consuming, is by far the most satisfactory for this branch of the law and is undoubtedly one of the main factors behind the very favourable reception which the Act has had.

## THE SCHEME AND STYLE OF THE CHILDREN ACT

### Sections and Schedules

The Children Act consists of over 100 sections, which makes it a relatively large piece of legislation. This should not occasion surprise, however, in view of its objectives: to restate both the public and private law relating to children. In addition to the sections, there are a number of schedules at the back of the Act. Schedules of statutes can cause confusion among non-lawyers, there sometimes being a feeling that they do not have quite the same legal significance as the sections. This is a misconception: sections and schedules have an identical effect in law. Whether a provision goes into a section or a schedule is very much a matter of judgement and there can often be disagreement as to which is appropriate. There is a good example of this within the Children Act, in the collection of provisions concerning children in need (discussed in Chapter 5).

### The Twelve Parts of the Act

In large statutes, it is usual for the sections to be arranged into Parts, each Part dealing with a particular subject. This obviously facilitates a better understanding. The sections of the Children Act are arranged into twelve Parts. These Parts are not completely self-contained, but arranged in this way they do give a fairly good idea of the overall effect of the Act. Part II of the Act is the one which is devoted to the reform of the private law, while Parts III–XI are concerned with the public law. Parts I and XII contain provisions affecting both areas. As indicated earlier, the schedules at the back of the Act supplement some of the sections.

### The Style of Drafting

Mention was made earlier of the convoluted style of drafting which tended to infect the pre-1989 children's legislation. The steady stream of complaints about this obviously hit home because the framers of the Children Act went out of their way to make their product intelligible to a wide range of individuals. The DH, in its own *Introduction to the Children Act*, was fully entitled to state that the Act 'has been drafted in a clear style which should make it accessible to non-lawyers' [2]. This was very welcome news to child care practitioners. It enabled them to refer directly to the text of the Act when

considering their position and advising (or challenging) others. Nor should parents, relatives and other carers be left out of the discussion of this aspect of the new law. They are, after all, principal consumers in this context and for too long their interests were undervalued by those who put statutes together. A conscious effort was made to make the law relating to children more accessible to them.

All this is not to suggest, of course, that the Children Act is plain sailing. It would be unreasonable to expect a statute of such breadth and importance not to contain any points of difficulty or complexity and the cases decided in the superior courts continue to bring out unforeseen consequences flowing from the use of a particular word or phrase (see, for example, the difficult case law surrounding the meaning of the threshold criteria in section 31 of the Act, discussed in Chapter 10). And it has to be said that, during its journey through Parliament, numerous amendments were made which had the effect of spoiling the initial veneer of simplicity, a process which has indeed continued over the years since 1989 (see below).

### **AMENDMENTS TO THE ACT SINCE 1989**

Many Acts of Parliament are the subject of later amendment. This can occur for a number of reasons. In some cases, the legislation is found to be simply unworkable; in others, gaps or ambiguities are discovered (often through the litigation process in the courts). Many amendments are purely technical and come about because other statutes referred to in the legislation are themselves changed, thereby necessitating a substitution of references. In the case of the Children Act, numerous amendments have been made. During the early years of the Act's implementation, amendments tended to be minor and technical but in due course rather more significant changes were introduced. One particular reform should be noted in this connection. Although the Adoption and Children Act 2002 was primarily designed to recast the law of adoption, Part 2 of that Act contained important amendments of the 1989 Act. Some of these had been planned since the mid-1990s but others were drafted in response to more recent developments. They included provisions on:

- parental responsibility
- special guardianship orders (aimed largely at local authority foster carers)
- local authority care plans
- local authority complaints procedures.

All these amendments are due to be implemented by December 2005.

## **RULES, REGULATIONS AND ORDERS MADE UNDER THE ACT**

A striking feature of the Children Act is its frequent reference to rules or regulations to be made by central government. There is nothing particularly objectionable in this sort of practice, provided always that the really fundamental matters are covered by the statute. In other words, the proper object of subordinate legislation is to deal with detailed, supplementary issues, mention of which in the Act itself would only serve to confuse the reader. As with the sections/schedules division, it is ultimately a matter of judgement as to whether a particular subject should be dealt with in the statute or in regulations, and reasonable people can differ over the appropriateness of the end result.

By 14 October 1991, when the Children Act came fully into operation, 48 sets of subordinate legislation (or 'statutory instruments' to use the technical legal term) had been made. All of this has the full force of law and should be regarded in much the same way as the provisions of the Act themselves. Nothing turns on an instrument being entitled 'rules' as opposed to 'regulations' or 'order'. Although it covers a wide range of matters, this legislation can conveniently be classified according to two distinct categories. The first category consists of predominantly court-oriented material. The biggest items here are the rules of court, which seek to regulate legal procedures under the Act, including the use of appropriate application forms. The second category is a residual one, consisting of everything else, and it is here that one will find the regulations imposing detailed obligations on local authorities.

The effect of the numerous provisions in these two categories will be discussed in appropriate sections of this book. It should be remembered, however, that subordinate legislation, like primary legislation, undergoes amendment from time to time and so the position set out in the text will not necessarily endure. Indeed, various amending rules, regulations and orders have accumulated in the years since 1991. Taken with the amendments to the Children Act itself, these have rendered the law rather less accessible than used to be the case.

## **THE CHILDREN ACT GUIDANCE**

In addition to completing the legislative framework by making rules, regulations and orders, the Government issued a series of guidance documents covering various topics. One purpose of these was to explain (in official, un-critical terms, of course) relevant provisions of the Act and any accompanying rules or regulations. Another purpose, however, was to give an indication of what central government expected from local authorities in terms of practical

implementation of the law. The preface to the first volume of guidance, issued in March 1991, set the pattern for the others. It stated that:

this guidance is issued under section 7 of the Local Authority Social Services Act 1970. It is the first in a series designed to bring to managers and practitioners an understanding of the principles of the Children Act and associated regulations, to identify areas of change and to discuss the implications for policies, procedures and practice. [3]

The significance of the reference to the 1970 Act, which is perhaps not obvious, was explained by the DH in the following way:

Guidance documents are usually issued as general guidance of the Secretary of State as described in section 7(1) of the Local Authority Social Services Act 1970. Local authorities are required to act in accordance with such guidance which is intended to be a statement of what is held to be good practice. Though they are not in themselves law in the way that regulations are law, guidance documents are likely to be quoted or used in court proceedings as well as in local authority policy and practice papers. They could provide the basis for a legal challenge of an authority's action or inaction, including (in extreme cases) default action by the Secretary of State. [4]

In spite of these words, the precise legal standing of such government guidance remains unclear. In the highly publicized case of *Davis v London Borough of Sutton* [5], the High Court seemed reluctant to lay down a comprehensive ruling and was able to dispose of the case – which concerned the issue of smacking by child minders – by concentrating on the 1989 Act itself. What is clear, however, is that the guidance documents are capable of being influential in the courts. In 1992, for example, in the case of *Manchester City Council v F* [6], it was stated that care plans submitted to the courts by local authorities in child protection cases should accord with the recommendations contained in Volume 3 of the Guidance; and in *JR v Oxfordshire County Council* [7], the Guidance in Volume 1 concerning secure accommodation orders was described by a judge as 'authoritative' and 'valuable'.

## THE CHILDREN ACT ADVISORY COMMITTEE

The Children Act Advisory Committee was established in March 1991 with the following terms of reference:

To advise the Lord Chancellor, the Home Secretary, the Secretary of State for Health and the President of the Family Division on whether the guiding principles of the Children Act are being achieved and whether the court procedures and the guardian ad litem system are operating satisfactorily.

It is unusual for a single Act of Parliament to have its own monitoring committee and this is yet further evidence of the radical nature of the Children Act reforms and the importance which was attached to them by the various public agencies involved. Some 14 individuals were initially appointed to serve on this committee, which was chaired by Mrs Justice Booth. Membership of the committee fluctuated over subsequent years until it was wound up in June 1997, the Government having come to the conclusion that its primary tasks had been accomplished.

The most obvious manifestation of the committee's work consists of the Annual Reports it produced. These are valuable documents, for two reasons. First, they reveal problems which emerged across the country in the course of the implementation process, particularly in the court system. The committee was clearly regarded (and regarded itself) as a channel through which practical difficulties could be aired and in this way matters which might not otherwise have come to light were exposed. Second, the committee devised a number of best practice statements for use by child care professionals and the courts (the most important of these were brought together in the committee's *Handbook of Best Practice in Children Act Cases*). Since the committee's work was carried out on a wholly non-statutory basis, these statements do not have the force of law but the strength of the committee's membership and its quasi-governmental supporting apparatus have given the statements considerable weight. Nearly five years after the committee's dissolution, it was reported that the *Handbook of Best Practice* 'remains a regular source of reference for many practitioners' [8]. For these reasons, extracts from the committee's reports are included in this book as appropriate.

### **SCOTLAND, NORTHERN IRELAND AND WALES**

There are some provisions in the Children Act which apply to Scotland and Northern Ireland, but not many. Child law in those territories was revised by separate measures (the Children (Scotland) Act 1995 and the Children (Northern Ireland) Order 1995) and therefore this book is concerned only with the law of England and Wales. Even here, however, there is a complication, due to the devolution scheme embodied in the Government of Wales Act 1998. The effect of the 1998 Act is that, while primary legislation (such as the Children Act) continues to apply to Wales, the legal authority to make *secondary* legislation with respect to so-called devolved matters is now in the hands of the National Assembly for Wales. Since social services is a devolved matter, it follows that many of the regulation-making powers created by the 1989 Act are now exercisable – in relation to Wales – by the Assembly. This means that on a number of topics there will be two separate sets of regulations: one for England (made by the Department for Education and Skills (DfES))

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and one for Wales. For reasons of convenience, the focus in this book is on the former.

**NOTES**

1. Cm 62, p. iv.
2. P. iii.
3. *The Children Act 1989 Guidance and Regulations, Volume 1, Court Orders*, p. iii.
4. *The Care of Children* (1989), p. 2.
5. [1994] 2 FCR 1129.
6. [1993] 1 FCR 1000.
7. [1992] 2 FCR 310.
8. *Scoping Study on Delay in Children Act Cases* (Lord Chancellor's Department, 2002), para 30.