CONTENTS

INTRODUCTION

AT A GLANCE THIS CHAPTER COVERS:

- an historical overview of child care policy and legislation in the twentieth and early twenty-first centuries
- the development of the policy context in which the current law operates
- an outline of the topics included
- Human Rights Act 1998 issues
- challenges of this practice area

Historical overview

From Poor Law to welfare

The state's care of children outside their families changed radically during the twentieth century and continues to develop. In the previous century, apart from some boarding-out initiatives, organized by philanthropic individuals within the Poor Law provisions (George, 1970, ch. 1), little attention was paid to the welfare of the orphaned or abandoned **child**. After years of failed campaigns, in response to the deaths of numerous children looked after for reward by so-called 'baby farmers', the first law regulating the care of children, the Infant Life Protection Act 1872, reached the statute book. Several statutory provisions followed, but none proved effective in terms of improving the lot of the children involved, least of all, under the Prevention of Cruelty to Children Act 1889, the transfer to the Poor Law guardians of **parental responsibility** for children removed from their parents on the grounds of mistreatment or neglect (Hendrick, 1994, ch. 2).

Despite its designation as a 'children's charter', the Children Act 1908 did not address the plight of children in the public care. For most of the first half of the twentieth century, the majority of children deprived of a normal home life were maintained by local authorities under Poor Law provisions as persons in need of relief. They were therefore regarded primarily as a financial burden on their communities. The final Poor Law Act, passed in 1930, consolidated earlier enactments for the relief of the poor and was administered by local authorities, generally acting through public assistance committees. The duty of the local authority in regard to children 'To set to work or put out as apprentices all children whose parents are not, in the opinion of the Council, able to keep and maintain their children' (s. 15) starkly reflected the overall imperative – to reduce the burden on rate payers rather than any consideration for children's welfare.

After the 1939–1945 war, starting with the Children Act 1948, **legislation** (informed by a burgeoning interest in children's welfare and professionalization of child care) increasingly recognized the state's responsibility for the welfare of children and placed a growing body of duties on local authorities to fulfil that responsibility. Symbolically, this is reflected in s. 12(1) Children Act 1948, which, in contrast to the Poor Law duty, required local authorities, through their newly established Children's Committees: 'to exercise their powers

with respect to [the child] so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities'.

This chapter seeks to set the current law, addressed under discrete topics in the rest of the text, in its historical and policy context by exploring two key themes or policy drivers that have emerged from the 1940s until the present day. These are identified as:

- the growth in local authorities' powers and duties to safeguard the welfare of looked after children, now acknowledged in the concept of corporate parenthood; and
- an increasing raft of measures aimed at reducing the gap in lifelong outcomes between children brought up in the public care and the rest of the population.

The chapter concludes with reflection as to the extent to which it is realistic to expect local authorities to properly fulfil these responsibilities within a climate of increased demand and constrained resources.

Growth in local authorities' powers and duties

Post-war reforms

Under the Poor Law provisions administered by public assistance authorities, children could be placed in a wide range of institutions, including many run by voluntary organizations. Certain children, initially orphans and deserted children and those over whom the local authority had assumed parental rights, could also be boarded out in foster homes. During and after the Second World War (1939–1945), the rules regarding eligibility for boarding-out were relaxed and finally abolished. The whole system for placing children away from their homes was one of infinite complexity, involving three government departments and a confusing web of local statutory and voluntary committees. The public outcry that followed the death of Dennis O'Neill at the hands of his foster parents in January 1945 and the publication of the inquiry which followed (Monkton, 1945) together with the campaigning of Lady Allen of Hurtwood and others, exemplified in a letter to *The Times* (5 July 1944), led to the setting up of the interdepartmental Care of Children Committee, chaired by Dame Myra Curtis. Its terms of reference were:

> To inquire into existing methods of providing for children who from loss of parents or from any other cause whatever are deprived of a normal home life with their own parents or **relatives**; and to consider what further measures should be taken to ensure that these children are brought up under conditions best calculated to compensate them for the lack of parental care.
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> *Ministry of Health and Ministry of Education, 1946*

At the time the Curtis Committee was gathering its evidence, 85 per cent of children maintained by public assistance authorities were placed in children's homes, voluntary homes and hospitals (Ministry of Health and Ministry of Education, 1946, table 1). The members of the Curtis Committee worked incredibly hard. They made a large number of mostly unannounced visits to observe conditions in all types of institutions and foster homes across England and Wales, as well as minutely analysing the ways in which the system was administered. The committee's report describes, in measured but graphic terms, observation of 'a picture of administrative chaos and human suffering' (Griffith, 1966, p. 361). In particular, it identified:

- the overlapping responsibilities of several government departments devolved to a confused network of local committees;
- high numbers of children poorly cared for in low-quality, impersonal, institutions;
- a serious lack of child care expertise among those working with children.

The committee was, bravely considering the O'Neill case, clear that, as had been advocated by the Mundella Committee 50 years earlier (George, 1970), the placement of choice should be **foster care** and, for those with no hope of returning to their families, adoption. Based on the evidence from its thorough review, the Curtis Committee made robust recommendations. For the first time the focus was to be on the welfare of the individual child instead of the bleak duty in the Poor Law Act 1930, referred to above. Other recommendations included:

- a single department of state, the Home Office, to have overall responsibility for children cared for away from their homes;
- local authorities to appoint dedicated Children's Committees employing experienced and suitably qualified children's officers to exercise statutory powers and duties in regard to children in their area;

- a determined drive to recruit more foster parents, with the aim of ultimately phasing out institutional care; and
- inspections of all foster homes and institutions.

Most of the Curtis Committee's recommendations were enacted in the Children Act 1948. Within a relatively short time after the Act came into force, the pressure to move children from institutions into foster care, governed by Boarding Out Regulations made under the Act, resulted in a significant increase in the use of foster care (Packman, 1975). Over the next 40 years, a sequence of child care-related legislation impacted on the regulation of all aspects of child care and protection, including fostering.

Local authorities' powers and responsibilities, 1963–1989

The Curtis Committee identified local authority provision of supportive services to prevent the need for children to be removed from their homes as an essential responsibility. Unfortunately, its terms of reference precluded the committee making recommendations to that effect. This was recognized as a significant gap in the reforms introduced by the Children Act 1948 and a sustained campaign for preventative powers ensued (Packman, 1975, ch. 4). Eventually the deficit was remedied when the terms of reference for a Home Office committee under the chairmanship of Lord Ingleby, set up in 1956, included the direction to 'inquire into and make recommendations' on:

> Whether local authorities should … be given new powers and duties to prevent or forestall the suffering of children through neglect in their own homes. (Home Office, 1960: para. 1)

The Committee's recommendations were enacted in s. 1 Children and Young Persons Act 1963:

> It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care.

This power, very much amplified, has its current manifestation in Part III Children Act 1989.

The Local Authority Social Services Act 1970, which came into force prior to the partial implementation of the Children and Young Persons Act 1969, effected the complete reorganization of local authority social

services into generic social work departments, resulting in the loss of much of the social work child care expertise built up in local authority children departments since the 1948 Act (Packman, 1975, ch. 8). The next decade saw frenetic legislative activity: the Children Act 1975, Adoption Act 1976 and Foster Children Act 1980, the combined effect being twofold. Local authorities' responsibilities and discretion as to how their powers were exercised were substantially increased (Packman et al., 1986; Ball, 1998) and, because of the piecemeal amendment of existing legislation, child care law, already complex, became tortuously so.

By the early 1980s the state of public child law was seen to be frustrating rather than helping good child care practice. In the words of a group of lawyers and social workers giving evidence to the House of Commons Social Services Committee, which had chosen for its 1982/1983 session the topic of 'children in care':

> The present state of children's legislation can only be described as complex, confusing and unsatisfactory … The effect and implication of this on children is diverse with far-reaching consequences for their welfare. (House of Commons, 1984:118)

The consequences were only too clearly demonstrated by the findings of a substantial body of government-funded research into all aspects of social work decision-making within the existing statutory framework (DHSS, 1985). The poor practice identified in these studies included:

- defensive, ill-planned crisis interventions in families already well known to social services departments, with overuse of statutory provisions rather than voluntary care (Packman et al., 1986); and
- the lack of active work to maintain links between children in care and their birth families, resulting in lengthy care episodes and many children losing all contact with their families (Millham et al., 1986) (see below, page 65).

The separate reform processes in relation to the **public law** and **private law** which culminated in the Children Act 1989 have been well documented (see, for example, Ball, 1990; Masson, 2000; White et al., 2008: ch. 1). The 1989 Act, described by the Lord Chancellor, Lord MacKay, as 'the most comprehensive and far-reaching reform of child law which has come before Parliament in living memory' (HL Deb 1988, vol. 502, col. 488), came into force in 1991. It transformed public and private child law with shared concepts and a single set of principles, administered in

a relatively coherent court structure. The public law cornerstone of the 1989 Act, Part III, which builds on the preventative duty first introduced in 1963, provides for services for children in need, including accommodation of the child, in partnership with families. Parts IV and V provide for court orders and powers to intervene to protect children from significant harm. Although the legal differentiation between public and private law proceedings is clear, Bainham (2013) suggests that in practice many cases are hybrid, containing elements of both public and private law.

The policy context of current legislation and guidance

Many of the post-1991 amendments to Part III reflect a growing recognition of the extent to which children growing up for most or part of their childhood as looked after children in the public care, whether under care orders (Part IV) or on a voluntary basis under Part III, suffer lifelong social and educational disadvantage. In 1998, in response to Sir William Utting's penetrating critique of the care system (Utting, 1997), the government launched its Quality Protects programme as part of a range of initiatives to tackle social exclusion and childhood poverty. The Quality Protects programme, initially scheduled for three years but extended to 2004, linked funding to targets for local authorities to improve outcomes for looked after children in areas such as placement stability and educational attainment (Chase et al., 2006). Nine linked research studies were commissioned as part of the programme (Stein, 2009a).

The death of Victoria Climbié and the introduction of the Every Child Matters agenda

In 2000, Victoria, aged eight, was murdered by her great aunt (by whom she was privately fostered) and her partner. The circumstances surrounding the ill-treatment and death of Victoria and the failure of many involved agencies to protect her were the subject of intense media interest and public outrage. A review into the circumstances surrounding her death, chaired by Lord Laming, followed (2003). Alongside a detailed response to Lord Laming's report, and a report produced by the Social Exclusion Unit (2003) on raising the educational attainment of children in care, the government published the Green Paper *Every Child Matters* (Chief Secretary to the Treasury, 2003) setting out an aspirational agenda to reform and improve the care of all children.

Following detailed consultation, many of the proposals in the Green Paper were enacted in the Children Act 2004, which, as well as many other reforms, including making directors of children's services and lead members directly accountable for children's social care and education, amended the Children Act 1989 to place a new duty on local authorities to promote the educational achievement of looked after children (s. 22(3A)).

Additional support for looked after children

The 2004 Act provided the statutory framework for implementation of the Every Child Matters agenda to improve outcomes with regard to health, staying safe, enjoying and achieving, making a positive contribution and achieving economic well-being for all children. However, when compared to all children, lifelong outcomes for looked after children were recognized to be very poor and in need of further statutory support (DfES, 2006). The Children and Young Persons Act 2008 enacted those proposals in the White Paper *Care Matters: Time for Change* which required legislation (DfES, 2007).

Implementation of many of the White Paper proposals was achievable through revision of regulations and statutory guidance rather than primary legislation. This resulted in a raft of new regulations and guidance documents, impacting on all aspects of the care of looked after children, which came into force in 2011 and will be referred to throughout this volume.

The Children and Families Act 2014

The Act enacts a range of government commitments which are aimed at improving services for children in the adoption and care systems, those affected by decisions of the family courts and those with special educational needs. The reforms are noted throughout this text, though at present there is no indication as to when they may be implemented.

Topics included

This book aims to provide its readers with an understanding of the law relating to looked after children which has not before been brought together in this way. Following this introductory chapter, Chapter 1 provides an overview of current legislation and guidance and reference to key research, much more of which is referred to in subsequent chapters.

Chapter 2 examines accommodation under s. 20 Children Act 1989; and Chapter 3 alternative routes to the looked after status. The following three chapters cover local authorities' responsibilities to looked after children: Chapter 4 examines the responsibilities of the local authority as corporate parent in terms of assessment and planning; Chapter 5 addresses the voice of the looked after child and the role of the family in decision-making as well as contact and accountability issues; and the focus of Chapter 6 is on the range of placement options for looked after children. Chapter 7 covers reviews and the role of the independent reviewing officer (IRO), and Chapter 8 alternative legal arrangements. Finally, Chapter 9 addresses local authorities' responsibilities towards care leavers.

On-the-spot questions

1 What are the most significant child care-related legislative milestones of the twentieth and twenty-first centuries?
2 Which of these focus on the particular needs of looked after children?

The European Convention on Human Rights and the Human Rights Act 1998

The European Convention on Human Rights and Fundamental Freedoms (ECHR) was designed to protect all humans at a time before the concept of children having rights received international attention. However, children are persons entitled to claim its protection.

For very many years before the Human Rights Act 1998 came in to force, actions in the European Court of Human Rights against the UK for breaches of the ECHR led to significant piecemeal reforms of several areas of public child law. These included: an end to the administrative procedure whereby local authorities could assume parental rights over children they were looking after, and the provision of limited rights to parents in regard to contact with children in care. The Children Act 1989 was drafted with greater awareness of the need for compliance with the ECHR than previous child care legislation.

The Human Rights Act 1998, which allows individuals to challenge public bodies' actions as being incompatible with Convention rights, came into force in 2000 and has had a profound impact on family law. However, Jane Fortin's powerful critique of judicial failure to separate the

rights of children from those of their parents suggests that in many public and private law cases children's rights may still not be given sufficient attention (Fortin, 2011). In regard to looked after children, the key ECHR articles are Articles 3, 6, 8 and, in conjunction with any of these, 14.

Article 3: the unqualified right not to be subjected to torture or to inhuman or degrading treatment

In terms of social work practice with looked after children, had the 1998 Act been in force when the 'pin-down' regime was being endured by children in Staffordshire (Levy and Kahan, 1991), it would have been open to challenge as being in breach of Article 3, as would any similar disproportionate restraint practice. It has also been invoked where a local authority failed to protect children from abuse (*Z v UK* [2001]) and to challenge the defence of 'reasonable chastisement' of a child where the punishment caused actual bodily harm (*A v UK (Human Rights: Punishment of Child)* [1998]).

Article 5: the right to liberty and security of person

Article 5 is qualified by a list of exceptions which include: '(d) the detention of a minor by lawful order for the purposes of educational supervision or his lawful detention for the purposes of bringing him before the competent legal authority'.

Prior to implementation of the 1998 Act, there was speculation that the **secure accommodation** provisions under the Children Act 1989 (see pages 89–90) might breach Article 5. The Court of Appeal in *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001], a case heard shortly after implementation of the 1998 Act, refused to find any breach, holding that the detention of a child in secure accommodation, following the criteria in s. 25 Children Act 1989 and the requirements in the Children (Secure Accommodation) Regulations 1991, came within the Article 5(d) exception.

Article 6: the right to a fair trial

> In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing … by an impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of

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