The Law and the Midwife

Second Edition

Shirley R. Jones and Rosemary Jenkins

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Contents

Preface *x*
Introduction *xi*

Chapter 1 The Legal Framework **1**
What is law? 1
Statutory law 1
Green Paper 2
White Paper 2
Development of primary legislation 3
The first reading 3
The second reading 3
The committee stage 3
The report stage 4
The third reading 4
The House of Lords 4
Royal Assent 4
Secondary legislation 5
Other parliamentary processes 6
Parliamentary select committees 6
Specific parliamentary enquiries 6
Parliamentary questions and early-day motions 7
The Private Members' Bill 7
Common law (case law) 7
European law 9
Treaties 9
Secondary legislation 9
European Court of Justice 10
European Court of Human Rights 10
EU Advisory Committee on the Training of Midwives 10
Natural justice 11
The structure of the law in England, Wales and Northern Ireland 11
Civil law 12
The structure of the civil courts 13
Public law 13
The criminal court system 13
Constitutional law 14
The Coroner's Court 14

Other resolution systems 15
The legal profession 16
Solicitors 16
Barristers 16
The Lord High Chancellor 17
The legal system in Scotland 17
The civil system 17
The criminal system 18
Using the legal processes 18
The system of government 18
Lobbying for change 19
Changing maternity policy 20
Background 20
A change in policy 20
The results 21
The current situation 21
Summary 22
Reader activity 22
References 22
Statutes/SIs 23
Cases 24

Chapter 2 The Statutory Profession of Midwifery 25
The Midwives Act 1902 25
The Midwives Rules – early versions 27
Subsequent legislation and review 28
Midwives Act 1936 28
Midwives Act 1951 28
Report of the Committee on Nursing (Briggs Report) 29
Sex Discrimination Act 1975 29
The Nurses, Midwives and Health Visitors Act 1979 30
The Nurses, Midwives and Health Visitors Act 1992 31
The Nurses, Midwives and Health Visitors Act 1997 32
Health Act 1999 32
Nursing and Midwifery Order 2001 (SI 2002 No. 253) 33
National Health Service Reform and Health Care Professions Act 2002 33
The Nursing and Midwifery Council 34
The *Code of Professional Conduct* 35
The Midwives Rules 35
Rule 36: Notification of Intention to Practice 36
Rule 37: Post-Registration Education and Practice (PREP) 37
Rule 38, Suspension from Practice by an LSA 38
Rule 39: The Duty to be Medically Examined 39
Rule 40: Responsibility and Sphere of Practice 39
Rule 41: Administration of Medicines and Other Forms of Pain Relief 40
Rule 42: Records 42
Rule 43: Inspection of Premises and Equipment 42

Rule 44: Supervision of Midwives 43
Rule 45: Discharge of Statutory Functions by a Local Supervising Authority 43
A Midwife's Code of Practice 43
Summary 45
Reader activity 45
References 45
Statutes/SIs 46

Chapter 3 The Statutory Regulation of Midwifery 48
The supervision of midwives 48
Alleged misconduct 54
The Investigating Committee 57
The Conduct and Competence Committee 59
Restoration to the Register 60
Summary 62
Reader activity 62
References 62
Statutes/SIs 63

Chapter 4 Accountability within the NHS 64
Clinical governance 64
The Commission for Health Care Audit and Inspection 67
Risk management 68
National Institute for Clinical Excellence 71
Complaints 72
The Health Service Commissioner (Ombudsman) 74
Summary 82
Reader activity 83
References 83
Statutes 84

Chapter 5 Negligence in Midwifery Practice 85
Negligence 86
The duty of care 86
Breach of the duty of care 89
Expert witnesses 96
Causation 97
Clinical issues in labour associated with causation 99
Compensation 99
Vicarious liability 100
Clinical Negligence Scheme for Trusts (CNST) 102
Rights and limitations 104
Withholding and withdrawing treatment 106
Wrongful birth and wrongful life 108
The compensation system 109
Summary 109

Reader activity 110
References 110
Statutes/SIs 111
Cases 111

Chapter 6 Consent and Refusal 113
Adults 114
Minors 121
The choice of home birth 125
Research 127
Summary 127
Reader activity 128
References 128
Statutes/SIs 129
Cases 129

Chapter 7 Use and Abuse of Information 131
Record keeping in practice 131
Data Protection Act 1984 134
Access to Health Records Act 1990 134
Data Protection Act 1998 135
Disclosure of confidential information 139
Writing a statement 140
Writing reports 141
Introduction 141
Body of the report 141
Appendix 142
Summary 142
Reader activity 142
References 143
Statutes/SIs 143

Chapter 8 Aspects of Law Related to Reproduction and Child Protection 144
Assisted conception and artificial reproduction 144
Human Fertilisation and Embryology Act 1990 147
Abortion 149
Adoption 153
Child protection 157
Summary 158
Reader activity 159
References 159
Statutes 160
Cases 160

Chapter 9 Aspects of Employment Law 161
The contract of employment 161

Statutory Dispute Resolution Procedure 163
Wrongful dismissal 164
Unfair dismissal 165
Discrimination in employment 166
Movement towards gender equality 166
Discrimination on grounds of race 167
Discrimination on grounds of disability 167
Rights to leave and pay in parenting situations 168
Maternity leave and pay (Employment Act 2002, Ch 2) 168
Paternity leave and pay (Employment Act 2002, Ch 1) 169
Public Interest Disclosure Act 1998 169
Summary 170
Reader activity 171
References 171
Statutes 171

Chapter 10 Application to Midwifery Practice 172
Kay 172
Professional conduct 173
Aspects of law 178
Employment 179
Susan 180
Professional conduct 181
Civil law 184
Employment 186
Daniel 187
Professional conduct 188
Civil law 190
Employment 193
Summary 194
Reader activity 195
References 195
Statutes 195
Cases 195

Glossary 197
Table of Bills/Statutes/SIs 199
Table of Cases 201
Index 203

Preface

The first edition of *The Law and the Midwife* was written by a midwife, Rosemary Jenkins, and published in 1995. It was a welcome inclusion to midwifery literature, particularly as it was written with a full understanding of the needs of practising midwives. It also served to educate non-midwives with regard to the role and accountability of the midwife. When the time came to revise the book, Rosemary felt that she had been out of midwifery too long to do justice to it. I was then contracted to undertake the revision. Although there had been many changes in certain aspects of the law, some areas remained the same, or with minor change only, particularly in the first section on the legal framework. For this reason, some of Rosemary's original work remains in the book, hence her co-authorship.

This second edition is intended to inform and update midwives on certain aspects of law pertinent to their practice and employment. A number of topics have been expanded, with the inclusion of newer areas, such as aspects of clinical governance, as they were at the time of writing. This point is important, as some aspects of the law move on apace and the full influence of the Human Rights Act 1998 is yet to be seen. In general, legislation and civil cases have been referred to directly, rather than relying on second and third hand opinions. Where possible, consideration is given to the differences in law in Scotland and Northern Ireland, from that in England and Wales.

The changes in professional regulation have been incorporated and my intention was to utilise the new Midwives Rules, which were originally intended to be published in March 2003. However, they will not be published until April 2004, therefore, where reference is made to the rules, readers will need to check for differences after that date.

In this edition, each chapter has 'Reader Activity' at the end, which is designed to help the reader to develop their knowledge further and to assist in the application of this knowledge into practice. I hope that you find these sections, and the book as a whole, helpful in your professional development.

Shirley R. Jones

Introduction

Until the late 1980s to early 1990s, ethics and law were not overtly evident in most midwifery curricula, apart from the professional rules and codes of the day. The inclusion of these subjects in midwifery programmes was gradual and varied, often inextricably linked because of the essential ethical basis for much of common law. The initial inclusion was also linked to the interest and personal study of some midwife teachers. When midwifery became part of higher education, from 1995, and modular diploma and degree programmes were developed, the inclusion of ethics and law became more widespread. In some cases the two disciplines were taught together in one module, in others they were separated. While it is important to understand the essential link between them, it is also important to be able to separate them, in order to recognise the difference between reasonably defined legal boundaries and the more flexible boundaries within different ethical beliefs.

In current practice, midwives are more aware of the increase and impact of litigation in midwifery and obstetrics, which often leads to fearful or defensive practice. In many cases this fear is born of insufficient or outdated knowledge or a lack of understanding. There have been radical changes in the statutory regulation of the National Health Service (NHS) and of the various health professionals working within the NHS and in private arenas. The aim of this book is to describe the legal background to health care practice and apply it to midwifery.

The first chapter considers the legal framework as it exists in England, Wales and, in general, Northern Ireland, with some consideration of the different structure in Scotland. Throughout the book, where there are differences in Scottish law they are indicated. The chapter considers the different sources and systems of law and the legal personnel involved and some developments in midwifery have been used to indicate how policy changes can be made. Where possible examples used to illustrate a point are those likely to be of interest to midwives. The full effects of the Human Rights Act 1998 will not be seen for some years. However, having been introduced in this chapter, it is applied as appropriate throughout the book. Also throughout the book, reference has been made to and quotations taken from other current legislation and actual legal cases, with explanations that are intended to assist you in your understanding.

Chapter 2 looks at the development of midwifery as a regulated profession, from 1902 to 2003, when a new version of the Midwives Rules is awaiting publication. Chapter 3 continues with statutory regulation by considering statutory supervision of midwives and dealing with alleged misconduct. Having considered the professional accountability of midwives, Chapter 4 reviews the accountability of the NHS. Clinical governance, risk management and CNST are discussed, along with

complaints and the work of the Health Service Ombudsman. Midwifery cases have been used to give insight into the types of issue that arise and the process that is followed.

Accountability in law is covered in Chapters 5 and 6 with consideration of negligence and battery in midwifery. In Chapter 5, the duty of care and negligence is discussed. Classic cases have been used to explain and illustrate the major principles and there is also discussion about withholding and withdrawing treatment. In Chapter 6, consent is the focus, for adults, minors and incompetents. The consequences of failing to uphold the principles surrounding consent are discussed, again with the aid of appropriate legal cases. The position with regard to home birth is also discussed in this chapter, as consent inherently involves the matter of choice.

Chapter 7 covers aspects of patient/client information: legislation regarding recording and disclosing of information, plus practical aspects of record keeping, statement and report writing. In Chapter 8 the law related to various aspects of child bearing is considered, from assisted conception to adoption. This chapter also considers the protection of the children once they have been born. Chapter 9 looks at aspects of employment law, including the new procedures for discipline and grievance. It also includes the current situation with regard to maternity, paternity and parental leave. This information is important for you as employees but also for the women for whom you care. Also included are aspects of discrimination in employment and the legislation regarding 'whistle blowing'.

The final chapter, Chapter 10, is about application to practice. Three midwifery cases are analysed with regard to the accountability of the midwives concerned, from the perspectives of professional, civil and employment law. They bring to life the practical application of the major principles discussed earlier in the book. For this reason, it is important that you read at least Chapters 3–6 and 9 before accessing these cases, as the discussions were written with this prior reading in mind.

At the end of each chapter there are suggested activities to further develop your knowledge and interest related to the content of that chapter. Undertaking these activities could form part of your PREP development. Write up what you have done, along with your reflection on what you have learned and how it will affect your future practice; indicate the time that you spent on the whole process. In addition, references, statutes and legal cases used have been included at the end of each chapter for ease of access. Further access to specific cases or Acts of Parliament can be gained by use of the relevant tables at the end of the book, rather than the general index. A short glossary of terms has also been included.

The first edition of this book was written by a midwife, Rosemary Jenkins, not by a lawyer. It is appropriate, therefore, that this second edition is also written by a midwife for the benefit of other midwives. It is important for midwives to have sufficient understanding in order to make sense of the legal principles that affect our day-to-day practice. The intention of this book, in part, is to provide knowledge, which provides power and confidence. However, it is also to allay many of the anxieties that midwives express about the constraints that they feel the law imposes on their practice. In fact, the law frequently operates in such a way as to enable midwives to extend and develop their practice. If nothing else, it is hoped

that midwives will realise that as long as they uphold their duty of care within acceptable standards, respect their clients' wishes and ensure a good standard of record keeping, then they have very little to fear from any aspect of the law. I hope that you will find the book interesting and useful, particularly in your professional lives.

Throughout the book the midwife has been referred to as female, purely for ease of writing, but I wish to acknowledge that there are male midwives in practice in the UK and the contents of this book are also relevant to them.

Chapter 1
The Legal Framework

What is law?

Law is a mechanism by which a society determines control and order of its subjects. It is a formal means of regulating a stable functioning of society, within an ethical framework, but under political influence (Slapper & Kelly 2000: 1). Law formulates rules by which all members of a society are expected to abide. These rules are intended to prevent or deal with conflict, prohibit and prosecute unacceptable behaviour to safeguard us from harm; they may be national 'laws of the land', which apply to the whole country, or local 'by-laws' (Rivlin 1999: 17). Law determines what constitutes a criminal offence and how it should be punished and it provides a framework for the settlement of disputes. It is not difficult to imagine what the absence of law would create – criminality, anarchy, fear. Law is also enabling, in that it promotes equal opportunities for all, including those with disabilities, while also seeking to protect all members of society, for instance, by regulating health care professions. Laws provide us with rights and duties: rights should be respected and duties obeyed. If this formula is followed by all citizens then it creates fairness in society.

One way of understanding English law, which generally includes Wales, except with regard to the organisation of the health service (Montgomery 2002: 6), is to look first at how it is developing and then to examine how the legal system administers the law on behalf of the people. White (1999: 14) argues that our legal system is not systematic, as much of it is '... the result of historical accretion rather than logical plan'. However, some logical steps have been taken with the passage of consolidating Acts, such as the Midwives Act 1951 (long since removed from statute) and the Children Act 1989, where, in each case, numerous pieces of legislation were brought together into one, more coherent document.

English law has developed from three main sources – statute, common law and European law – within which there are various categories, with some degree of overlap (Slapper & Kelly 2000: 2–8).

Statutory law

Statutes are Acts of Parliament and are the most important sources of law. They have to be interpreted by judges but can overrule previous decisions made in common law. In terms of sheer volume, they also represent the major source of

new law during the twentieth century and to date. The functions fulfilled by statutes are:

- creation of new law – for example, the Congenital Disabilities (Civil Liability) Act 1976. This Act is often thought to give rights to the fetus whereas its actual function is to give rights to the live-born child to claim against harm caused to it while *in utero*;
- amendment of existing statutory law – the Human Fertilisation and Embryology Act 1990 amended the Abortion Act 1967 and the Surrogacy Arrangements Act 1985;
- amendment, clarification or confirmation of case law;
- the repeal of existing law – the Health Act 1999 repealed the Nurses, Midwives, Health Visitors Act 1997, among others related to other health care professionals;
- consolidation of a number of disparate laws into one – the Children Act 1989 consolidated all existing legislation relating to the care of children, except adoption, into one document, as well as introducing new legal principles;
- enablement – the primary legislation, i.e. the Act, allows for secondary legislation, or subsequent regulations, to fill in the detail of the law without being subject to a full debate in Parliament. The Nursing and Midwifery Order 2001 (SI 2002 No. 253) and the Health Professions Order 2001 (SI 2002 No. 254), for allied health care professionals, provide the detail of the professional regulation outlined in the Health Act 1999.

An Act of Parliament is confirmed by Royal Assent, having passed through a number of stages of scrutiny and debate. When a government is contemplating new legislation it may choose to proceed in various ways. It can bring the matter directly to Parliament but it may choose to seek public opinion first, an action that is very important in a democratic state. It may do this with the publication of a Green or White Paper.

Green Paper

A Green Paper is a government consultative document, issued when a wide range of views is required before drafting potential legislation. This consultation encourages comment from ministers, civil servants and the general public, through organisations, pressure groups, charities and individual members of the public. Not every Bill will be preceded by such a paper and not every Green Paper will progress to legislation; it may become the basis of a national policy document. *Our Healthier Nation* was a Green Paper produced in 1998; it formed a background to the White Paper *Saving Lives: Our Healthier Nation*, presented to Parliament on 5 July 1999.

White Paper

Whereas a Green Paper is consultative, a White Paper sets out a government's intended policy in a form that enables people to understand it. It may or may not follow the response to a Green Paper. It uses everyday language to describe the

contents of an intended Bill, i.e. proposed legislation. *Adoption: A New Approach* was a White Paper presented to Parliament on 29 December 2000; the subsequent Bill, entitled the Adoption and Children Bill 2001, has since progressed through the process, becoming the Adoption and Children Act 2002.

Although a White Paper is not a consultation document, it is possible to use the parliamentary process as the subsequent Bill passes through its stages to influence and possibly alter the policy.

Development of primary legislation

Primary legislation consists of Acts of Parliament that start the formal process in the form of Bills. The Bill is usually presented to the House of Commons (HoC) but occasionally to the House of Lords (HoL). It then passes through five stages.

The first reading

This formality includes the introduction of the Bill, whereby the long and short titles are read, a date is set for the second reading and the printing of the Bill is ordered.

The second reading

This critical stage consists of extensive debate on the principles of the proposed legislation, usually by the Whole House. However, some non-controversial Bills may be debated by a 'second reading committee', set up for that purpose (Silk & Walters 1998: 121). If it is approved at the end of the debate it moves to the next stage, with a good chance of eventually becoming law.

The committee stage

It used to be that most Bills were considered by the Whole House examining the provisions of the Bill in detail, clause by clause. Today, however, Bills considered by the Whole House are those that are uncomplicated and those where there is extreme urgency; in both cases this method saves time. In addition, it would consider major constitutional Bills, such as those that dealt with devolution for Scotland and Wales (Silk & Walters 1998: 123).

In all other cases, an all-party standing committee of the HoC, whose membership reflects the composition of the full House, deals with this detailed scrutiny and debate. It has the power to make amendments to ensure that the detail conforms to the overall approval given in the HoC debate. As part of the process, the committee may receive representations from interested parties or expert advice. As the committee has the same proportions of government and Opposition membership as the full House, it is not easy for Opposition members to achieve amendments, unless they are in line with government policy or a significant number of government backbenchers are persuaded to oppose their own party.

The report stage

Where a committee has been used, it reports back to the Whole House with its recommendations, including any suggested amendments. Proposed amendments, from the committee or other MPs, are then debated by all members.

The third reading

This is the opportunity, often following immediately after the report, for further debate on the content of the amended Bill, but no further discussion on the principles can take place. Following this debate, the Bill is then passed to the HoL.

The House of Lords

Similar stages of consideration occur here, but the Whole House forms the committee. The Bill then returns to the HoC for consideration of any further amendments and recommendations made. Some Bills start in the HoL, rather than in the HoC, but the whole process must be achieved in both Houses before a Bill can become law.

Royal Assent

Once the Bill is passed by the two Houses it is presented to the monarch for signing. Convention requires that the monarch should give assent; any disapproval can be expressed privately but the constitutional duty is to give assent (Rivlin 1999: 72). Immediately following the signing, the Bill is sent to the HoL for pronouncement and at this point it becomes enacted, with immediate effect, unless provision for a later date was specifically made in the Act.

This process may seem to be a complicated way for Acts of Parliament to be passed, particularly as a Bill must complete the process within one parliamentary session or risk total loss (Slapper & Kelly 2000: 24). However, much legislation is not controversial and these stages can be passed over quickly. Indeed, in times of crisis or urgent need, some Bills can be rushed through the whole process in a matter of days. For example, the Landmines Bill 1998 passed from the first reading through all stages and back to the HoC in less than one week (Rivlin 1999: 73). On the other hand, some Bills are extremely controversial, such as the Criminal Justice Bill 1998, where it was intended to reduce the age of consent for homosexual activity to 16 years, as is the case for heterosexual activity. The HoL did not agree with this part of the Bill and the delay threatened to run the whole Bill out of time. The offending provision was removed in order to secure the passage of the rest of the Crime and Disorder Act 1998 (Slapper & Kelly 2000: 24). Some Bills are controversial but are rushed through in an attempt to prevent unethical action or remove an apparent loophole. The Surrogacy Arrangements Act 1985 is one example of this practice, having been a knee-jerk reaction to the Warnock Report (DHSS 1984), long before the eventual legislation regarding infertility issues was passed, in 1990, in the form of the Human Fertilisation and Embryology Act 1990 (Montgomery 2002: 8).

All primary legislation needs parliamentary time and it would be impossible for Parliament to consider every detail of proposed law, especially as much of it is very technical. To deal with the mass of technical law, much primary legislation is enabling. It provides a general framework, delegating authority to a minister to introduce detailed secondary legislation.

Secondary legislation

Secondary or delegated legislation is derived from powers set out in primary legislation and takes the form of Statutory Instruments. The advantage of using secondary legislation is that, with the highly technical nature of some laws, it can be drawn up and approved by experts with delegated powers and, if it requires subsequent amendment, this does not have to wait for parliamentary time. It is often the most important source of law, particularly with regard to professional regulation (Montgomery 2002: 10). An example of how the system works is the Midwives Rules and Code of Practice (UKCC 1998). The primary legislation was the Nurses, Midwives and Health Visitors Act 1997. This Act continued the empowerment of the United Kingdom Central Council for Nursing, Midwifery and Health Visiting (UKCC) to draw up the rules and codes and amend them as necessary. The UKCC, in consultation with the Midwifery Committee, made amendments to the Midwives Rules (1993) and the Midwife's Code of Practice (1994) and amalgamated them into one document, published in 1998. By consultation with the Midwifery Committee, the Council was using the professional expertise of practising midwives to frame the legislation.

More recently, in 2002, the Nursing and Midwifery Council (NMC) replaced the UKCC, following the Nursing and Midwifery Order 2001 (SI 2002 No. 253). This SI is unusual and complicated as it stemmed from section 60 of the Health Act 1999, which allows secondary legislation to amend primary legislation with regard to regulating health care and associated professions. In this case the Nursing and Midwifery Order repealed the Nurses, Midwives and Health Visitors Act 1997, placing all the relevant regulations in the Order (personal communication with Parliament, as a number of midwives felt that the Order was primary legislation). The NMC was then enabled to produce a new *Code of Professional Conduct* (NMC 2002). This version was expanded and replaced the previous *Code of Professional Conduct* (UKCC 1992a), *Scope of Professional Practice* (UKCC 1992b) and *Guidelines for Professional Practice* (UKCC 1996). At the end of 2002, the NMC conducted a consultation in order to update midwifery regulation further, resulting in new Midwives Rules to be published in 2004. The delay in publication is linked to approval for the required changes to the Professional Register. The remaining rules and guidelines were to be updated according to prioritisation of need, through further Statutory Instruments that require the approval of the Privy Council.

Once the framing of the legislation is agreed, the Secretary of State, in this case for Health, endorses the legislation by laying it before both Houses for approval. If neither House has annulled the SI within 40 days of its presentation, then it becomes law (Silk & Walters 1998: 148). Secondary legislation has the same legal power as primary legislation, as long as its content stays within the authority of the parent Act.

Since devolution and the formation of the Welsh Assembly in 1999, the power to make secondary legislation has moved from the Secretary of State for Wales to the Assembly. Such legislation will be made through Assembly Orders, which will be examined by the Subordinate Legislation Scrutiny Committee, to ensure that it is within the Assembly's powers, before being presented to the whole Assembly. Disputes over any perceived abuse of power would be referred to the Privy Council (Silk & Walters 1998: 245).

Other parliamentary processes

Before moving on to discuss other sources of law, there are some other parliamentary processes that are important, even though they do not in themselves produce legislation.

Parliamentary select committees

These committees consist of parliamentary backbenchers and form a system that reflects the major government departments. For instance, there is a Health Select Committee. Each committee has a Chair, elected by its members, and comprises members from various political parties, although the overall balance would reflect that of the HoC. Therefore, the ruling party will constitute the majority on the committee.

A committee has no statutory function although it can exert influence on policy. It has the power to question ministers regarding past government action, present policy, future government intentions and to scrutinise expenditure. The hearings are public and the evidence that is obtained, both written and verbal, is published.

A committee has complete freedom over the topics to be studied, although it is often influenced by current matters of controversy. When conducting an enquiry, a committee may invite evidence from a wide range of sources or make appropriate visits if the members believe that this will inform their final recommendations. When considering matters of a technical nature, it is usual for a committee to appoint a panel of advisers to assist in the enquiry. There have been a number of influential reports on maternity services from the Health Committee. The Health Committee Second Report on the Maternity Services (DHSS 1992) was undertaken when the committee was chaired by Nicholas Winterton MP. It resulted from a year spent looking at the general provision of maternity services. In 2000, there was the Health Committee Second Report on the Tobacco Industry and the Health Risks of Smoking (DH 2000a).

Specific parliamentary enquiries

Not all parliamentary reports emanate from the select committee process. Ministers may order an enquiry if they believe there is a matter of public interest. For example, following the Winterton Report (DHSS 1992), where the main recommendation of the report was that an expert committee be set up to review the policy on care for child-bearing women. This committee was set up under the chairmanship of Baroness Cumberlege, the Junior Health Minister, and the

resulting *Changing Childbirth: Report of the Expert Maternity Group* was published in 1993. In 2000 the Chief Medical Officer's Expert Group on Cloning published their report – *Stem Cell Research: Medical Progress with Responsibility* (DH 2000b). Another such group, the UK Expert Advisory Group on AIDS, provided guidance on HIV and infant feeding in 2001 (DH 2001).

Parliamentary questions and early-day motions

Government ministers are accountable for their actions to Parliament and to their backbenchers. There are two mechanisms that MPs can use to call ministers to account. Ministers must answer questions put to them by MPs when asked as a 'parliamentary question'. The answers can be given verbally in Parliament or as a written answer. Alternatively, motions can be laid before Parliament. These motions are placed at the Dispatch Box and individual MPs can then sign them if they support the principle. If sufficient MPs sign an 'early-day motion', as it is called, indicating general support of the House, the government may consider legislation to support the principle.

Parliamentary questions and early-day motions on their own are not very influential in shaping government policy and legislation. However, they can be used in conjunction with parliamentary lobbying and other forms of public pressure to influence statutory law. Another small but important use of the parliamentary question is to obtain information that would usually take time to research.

The Private Members' Bill

Ordinary MPs may bring their own Bills before Parliament. This is a difficult procedure as they are allotted parliamentary time on the basis of a ballot. There are occasions when issues of important ethical implication are eventually made law through this process. There are some issues that political parties prefer not to support but which, nevertheless, require statutory support; the Private Members' Bill may be the only way to achieve consideration of that issue. A notable example of this was the Abortion Act 1976, introduced by David Steel. Another Private Members' Bill to create a major national stir, inside the House and out, was Mike Foster's Bill calling for a ban on hunting with hounds.

Although the 'lottery' of a parliamentary ballot means that this type of legislation is not easily achieved, MPs sometimes win parliamentary time first and subsequently choose a subject to put forward. This could be considered to be devious practice but it is an ideal opportunity to lobby that MP to take up a particular cause.

Common law (case law)

Until the twentieth century, the most important source of English law was common law or case law. Although its position has been overtaken by statutory law, it is still of great importance and has made significant contributions to health care