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Legal Literacy Change Project

Show your workings: Making good decisions

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This resource provides a good decision-making model and guidance – decisions that are legally literate because they:

- apply the legal rules appropriately
- take account of ethical principles
- observe human rights and equalities.

Legally literate decisions will be defensible if challenged where practitioners can 'show their workings' – demonstrate how they have weighed all relevant considerations in the balance and come to a reasoned judgement about what should / should not be done.

This resource provides:

- explanations of the decision-making model
- exercises to apply the model to a case study
- an exercise requiring the model to be applied to a current complex situation.

Readers will gain:

- an understanding of the key components of a legally literate decision-making process
- an understanding of the implications of these on decision-making in complex situations
- confidence in ensuring that future decision-making is legally literate.

1. Decision-making

The integration of law, ethics and rights and the exercise of professional judgement are at the heart of legal literacy (Braye and Preston-Shoot, 2016). However, the **process** of decision-making is as important as the outcome. The process must reflect principles from administrative law, which provide standards that have been discussed within section two of the ***Setting the context: introducing legal literacy*** resource and section three of the ***Using case law and local government & social care ombudsman reports tool***. A brief reminder follows here:

Administrative law: Decision-making standards

- **Lawfulness:** Performing statutory duties, abiding by regulations and statutory guidance, respecting human rights and equalities, not exceeding the limits of statutory authority and abiding by the principles of administrative law.
- **Rationality and reasonableness:** Avoiding a decision so outrageous in its defiance of logic or accepted standards that no sensible person could have reached it, and avoiding a decision so extreme that no reasonable authority could have reached it. Decisions must also be fair.
- **Timeliness:** Avoidance of delay.
- **Full examination of all relevant considerations**: Making detailed enquiries, considering all the facts, avoiding bias, weighing up all relevant factors.
- **Not fettering discretion**: Ensuring that blanket policies do not restrain how discretion is exercised in practice, for example, by prohibiting exceptions to the rule.
- **Participation and information-giving**: Providing sufficient information to ensure meaningful participation in decision-making.
- **Giving reasons for decisions**: Ensuring reasons are explained and can be justified with reference to the evidence on which they are based.

Decisions can be subject to **judicial review** or investigation by the **Local Government & Social Care Ombudsman (LGSCO)**. The LGSCO can uphold complaints and the courts can find practice unlawful through where it:

- fails to perform a statutory **duty,** or
- is in breach of the state's **duty of care** towards its citizens.

This encompasses both protection from harm and positive promotion of human rights. Particularly high standards are expected of practitioners and managers with professional expertise and statutory obligations when intervening (or choosing not to intervene) in people's lives. Liability could arise in negligence where practice is **unlawful** because it has departed from professional standards, including those in the policy frameworks. These concepts are explored further in the ***Setting the context: Introducing legal literacy resource***.

Practitioners making decisions need to **provide evidence of meeting administrative law requirements**. This is achieved through 'showing their workings' (and also recording them). Explicit 'workings' may also be useful when practitioners need to argue a perspective that is challenged in multi-disciplinary contexts, where opposing views can emerge as a result of different value systems or expectations about the extent of legal powers.

The following exercise introduces a map to guide practitioners in a legally literate decision-making process.

Stage 1: Preparing for a review

You are preparing for a review of a care and support plan made under the *Care Act 2014* in respect of Samir, a woman with physical disabilities and a history of mental health difficulties. You did not do the initial assessment or set up the plan.

- What legal rules would you expect to see having underpinned the initial assessment and decision-making? Consider **powers and duties** found in statute but also **policy guidance** and **practice guidance**.
- What principles would you expect to see having been used?
- What decision-making processes would you expect to see documented in the records and why?

Make a list of your responses

Stage 2: During the review

You are thinking about your own approach to the review. You understand from the care and support provider staff that Samir's needs may have changed, and that her partner may be finding it challenging to meet her emotional and practical support needs. During the review:

- What legal rules will guide your practice? Consider **powers and duties** found in statute but also **policy guidance** and **practice guidance**.
- What principles will underpin your practice? Consider both those derived from law and those derived from ethics.
- What factors will you need to take account of to inform your decision-making?

Make a list of your responses

Stage 3: Just as you are leaving

As Samir's partner is showing you out, he mentions that she has decided to travel abroad, with his assistance, to seek assisted suicide.

- What will you need to consider here?

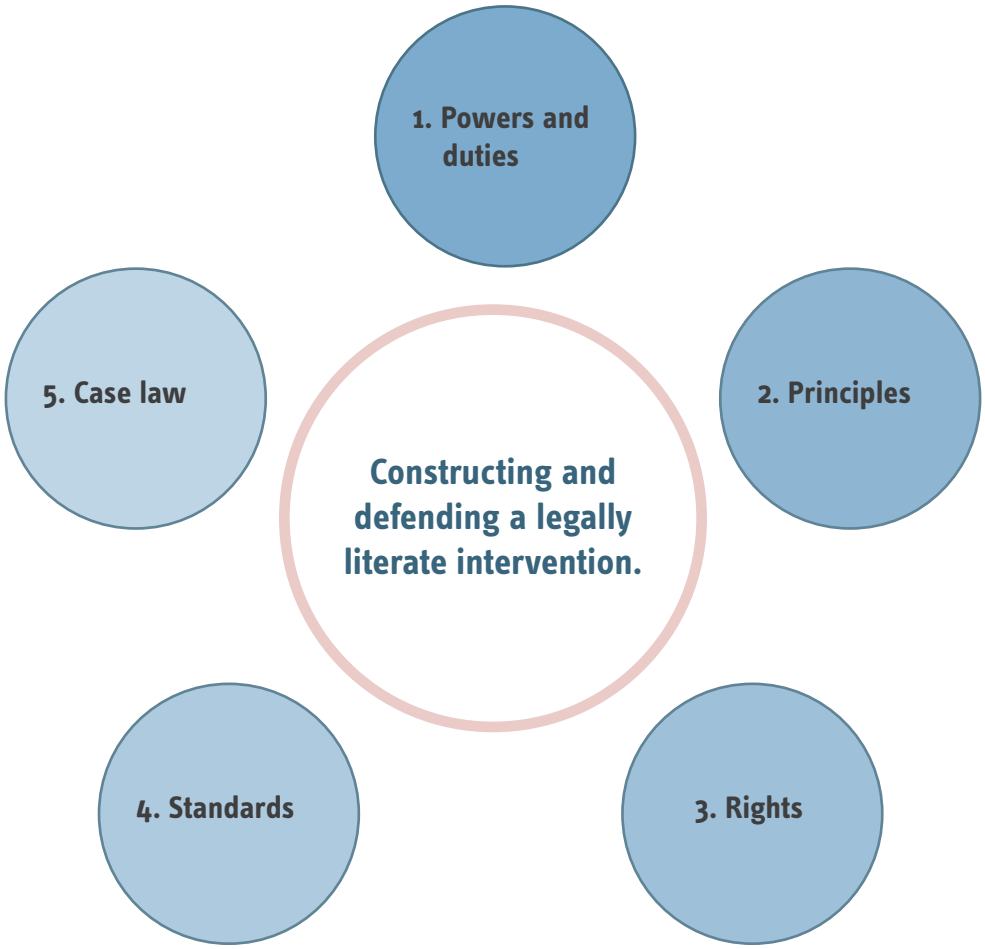
Make a list of your responses

2. A legally literate decision-making model

You will have considered a range of matters:

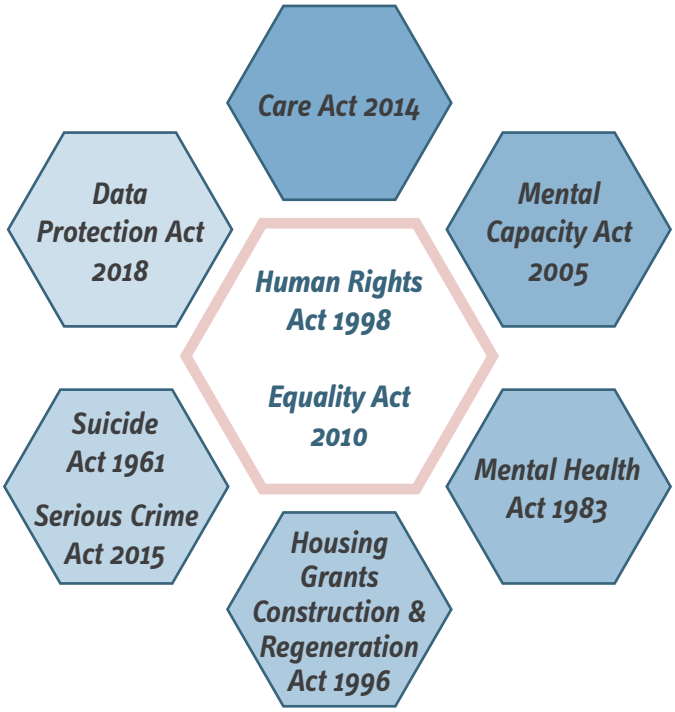
- the applicable powers and duties
- relevant guidance
- the values underpinning your approach
- the moral dimension of what is being planned
- the rights that need to be promoted.

In order to construct and defend a legally literate intervention, you will need to consider, and record your thinking on, all of the following domains of decision-making, which are then further explored in the analysis that follows:



2.1 Powers and duties

Practitioners need to be able to identify adult social care **powers and duties**, as well as **other relevant legal rules**. Some will apply in most circumstances, for example the *Care Act 2014*. Others will depend on the specific situation. In working with Samir you would expect to consider:



From primary legislation, statutory guidance and practice guidance, practitioners should be able to identify the legal requirements on:

- assessment (care and support needs and carers' support)
- eligibility
- personal budgets
- capacity assessment (and best interests decisions if capacity is lacking)
- enquiry into abuse or neglect
- care and support planning
- reviews.

The *Care Act 2014* and the *Mental Capacity Act 2005* provide the core mandates here, amplified by the Care Act 2014 statutory guidance and the Mental Capacity Act 2005 Code of Practice.

Depending on the circumstances, mental health assessment and disabled facilities grants may also provide relevant means of meeting needs. Criminal law may be engaged: the *Suicide Act 1961* decriminalised suicide, but encouraging or assisting suicide remains a criminal offence. The *Serious Crime Act 2015* introduced a new offence of controlling and coercive behaviour in intimate or family relationships. The *Data Protection Act 2018* sets out the circumstances in which confidential information may lawfully be shared with others. This Practice Guide (2020) explores section 117 aftercare services under the *Mental Health Act 1983*.

Review your answers to the three stages of Samir's scenario on the previous page and, if you feel unsure about your knowledge and understanding of any aspect of this legal jigsaw, use the Additional Resources to clarify your understanding.

In mapping the legal rules in any particular scenario, there may be circumstances in which:

- legal rules from one practice domain apply in another, or
- where multiple mandates exist, and the boundaries between them must be considered.

Some examples follow.

Where different statutes provide different but complementary powers and duties, **all of which must be observed** in any individual practice, for example:		Where different statutes provide options that are **exclusive of each other**, requiring choice between alternatives, for example:	Where legal rules **clarify roles and relationships between agencies**, for example:
Transitions for disabled children	**Young care leavers**	**Admission to a mental health hospital where a person lacks capacity to consent**	**Determining responsibility for funding continuing health care (NHS Clinical Commission Group or the local authority?)**
> *Children Act 1989* > *Children & Families Act 2014* > *Care Act 2014*	> *Children (Leaving Care) Act 2000* > *Children and Young Persons Act 2008* > *Children and Families Act 2014* > *Care Act 2014*	> *Mental Capacity Act 2005* > *Mental Health Act 1983* If both apply, the **least restrictive option** must be taken.	> Case law: (*R v North & East Devon Health Authority ex parte Coughlan* [1999] EWCA Civ 1871) > DHSC (2018) *National Framework for NHS Continuing Healthcare and NHS-Funded Nursing Care.* London: Department of Health & Social Care.

The *National Health Service Continuing Health Care: Practice Guidance* (2019) includes resources to support practical, fair and effective decision-making.

2.2 Principles

The core statutes identify principles that must underpin ***how*** powers and duties are fulfilled. For example, the *Care Act 2014* (section 1) emphasises the **wellbeing principle**, and the *Mental Capacity Act 2005* provides, amongst others, that a person must be **assumed to have capacity** unless it is established that they do not (section 1(2), and a person is not to be treated as unable to make a decision merely because he or she makes an **unwise decision** (section 1(3).

Equally, ethical principles underpin professional decision-making. Central to professional codes of conduct are:

- promoting and protecting the interests of people with care and support needs and carers
- respecting confidentiality
- managing risk
- being open and trustworthy.

For this reason, the second feature on the legal literacy map is to consider how practice can work to principles that apply in the circumstances.

Review your answers to the three stages of Samir's scenario above and consider whether you identified the key principles that should underpin your practice:

- How have you supported Samir so that she is best placed to judge her own wellbeing?
- How have you ascertained her views, wishes, feelings and beliefs?
- How has she participated in decision-making?
- What measures have you put in place to prevent or delay development of her needs for care and support?
- How have you balanced her wellbeing with that of her partner?

Make a list of your responses:

2.3 Rights

Practitioners must show that they have given explicit consideration to protected characteristics under the *Equality Act 2010* and to human rights as captured in the European Convention on Human Rights. European Convention rights are integrated within UK law through the *Human Rights Act 1998*, meaning that infringement may be argued in UK courts. They are key features on the decision-making map. Equally relevant, although without the same status in UK law, are the rights set out in UN Conventions, such as the UN Convention on the Rights of Persons with Disabilities.

Review your answers to the three stages of Samir's scenario above:

- What rights did you identify as important, and for whom?
- Were there any tensions between different rights, or between the rights of one party as opposed to the other?
- How would you negotiate the balance between them?

Make a list of your responses:

2.4 Standards for decision-making

Administrative law sets standards for decision-making - whether, in any given situation, the local authority and its employees:

- acted lawfully and proportionately
- met standards of rationality and reasonableness
- reached their decision in a timely way
- fully examined the facts and all relevant considerations
- did not fetter their discretion in making decisions
- shared information and consulted about the decisions being made
- ensured they gave reasons that could be justified with reference to the evidence.

They must have positively promoted human rights under the European Convention on Human Rights and, where these rights conflict, be able to account for how they struck the balance between them. Equally, they must have fulfilled their **public sector equality duty:**

- to eliminate unlawful discrimination, harassment and victimisation
- to advance equality of opportunity
- to foster good relations with groups with protected characteristics.
  (Equality Act 2010)

Examples of breaches of a person's human rights include **unlawful deprivation of liberty** (*Hillingdon LBC v Neary* [2011] EWCOP 1377) and **unreasonable delays** in meeting assessed needs, resulting in a **failure to promote the right to private and family life** (article 8) (*R (Bernard and Another) v Enfield LBC* [2002] EWHC 2282 (Admin)).

Practice may be found **unreasonable** where decisions are so extreme that no reasonable person would have reached that conclusion (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223).

In *JF, R v The London Borough of Merton* [2017] EWHC 1519 (Admin) proposing to move a man with complex needs from one residential care facility to another without considering his need for an on-site multi-disciplinary team (which wouldn't be available at the new residential facility) was unreasonable. More positively, other case law provides examples of where actions *have not* been unreasonable. For example, in *R (Nassery) v Brent LBC* [2010] EWHC 2326 (Admin) a decision not to provide residential accommodation had recognised and carefully considered a person's mental health needs, including the help and support network available to them.

Practitioners and managers must always consider whether their practice meets the quality expected of someone with their professional knowledge and skills.

Review your answers to the three stages of working with Samir above:

- Did the processes recorded at stage one give a transparent account of how decisions on the care and support plan had been made?
- At stages two and three have you demonstrated that you met the standards of lawful decision-making?

Make a list of your responses:

2.5 Case law

Case law offers **instructive guidance,** so familiarity with leading cases is important. For example, in *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33 it was established that local authorities:

- are not obliged to make provision in line with a person's wishes, and
- may take resources into account when deciding what care and support to provide, provided any package has a reasonable chance of meeting the needs identified.

The example of working with Samir is partly drawn from *Re Z (An Adult: Capacity)* [2004] EWHC 2817 (Fam). Here, the local authority had obtained an injunction restraining Mr Z from taking his wife abroad. In lifting the injunction, the judge set out the duties of a local authority when it learns that an individual's welfare is seriously threatened by their own decision. The local authority must:

- investigate the person's **position and intention** (now using the enquiry and assessment duties in s.42 and s.9 of the *Care Act 2014*)
- where there is a concern that the person lacks mental capacity, assess their **mental capacity** to make the decision in question
- consider whether they are **acting under any influence**
- ensure they have all **relevant information** and know the **available options**
- **apply to Court if capacity is uncertain or disputed**
- if capacity is lacking, determine and give effect to her **best interests**, or (if capacity is present) allow her to **give effect to her decision** (this does not preclude giving advice or assistance in accordance with what are believed to be her best interests)
- notify the police if it is believed a **criminal act** is involved
- in exceptional circumstances, invoke the **inherent jurisdiction** of the High Court.

In achieving a balance between the rights engaged – the right to life, the prohibition of torture, and the right to a private and family life (article 2, article 3 and article 8), the judge stated:

> **"It seems to me that in the context of a person of full capacity, whilst the right to life is engaged, it does not assume primacy (at the hands of another especially) over rights of autonomy and self-determination."**

In this case, the sanctity of life gave way to a competent person's right to self-determination.

These requirements remain among the **clearest guidance available** on the extent (and limits) of the local authority's duties when an individual's own decisions place their welfare at serious risk. Such circumstances, which can also include **domestic abuse** and **self-neglect**, remain among the most challenging in adult social care.

The judgment of the court in *Southend on Sea Borough Council v Meyers* [2019] EWHC 399 (Fam) – a case in which the court exercised its **inherent jurisdiction** - also provides important clarification on the extent of a local authority's duties. The judge made it clear that:

- in the face of **unwise decisions** by someone **with mental capacity**, the local authority cannot necessarily consider its safeguarding obligations discharged
- in circumstances in which the **right to life** is engaged it is under an obligation not only to **investigate** but also to **act**, including placing the matter before the court.

Other cases illustrate important practice points:

***London Borough of Redbridge v G* [2014] EWHC 485** (COP) and **[2014] EWCOP 17: Referring to the Court of Protection for a final decision as to mental capacity in a situation where there were safeguarding concerns**	
A 94-year-old former midwife had been living alone, receiving care and support at home. Two lodgers moved in and concerns were raised about financial abuse, resulting in safeguarding alerts. The older woman made contradictory statements when questioned about the lodgers but she appeared well cared for.	The local authority, correctly, held a **case conference**, which concluded that she was acting under **undue influence**, being intimidated by the lodgers. Again correctly, the local authority approached the **High Court for a final decision as to her mental capacity about her residence and welfare** as it was uncertain whether she had capacity to decide her living arrangements. The High Court determined that she did not have capacity and the **Court of Protection**, acting in her **best interests**, ordered that the lodgers move out. Contact was prohibited and a lasting Power of Attorney arrangement revoked.
***Somerset County Council v MK* [2014] EWCOP B25: Poor safeguarding enquiries and misuse of DoLS**	
Day centre staff observed bruising on the chest of a 19-year-old woman and raised a safeguarding alert. Her parents could not account for the bruising.	The local authority unlawfully prevented the young woman's return home. She was placed in respite care, contact with her family was restricted and her parents were excluded from decision-making. The Court of Protection criticised the local authority for failing to competently complete a safeguarding enquiry and assessment, and for unlawfully using Deprivation of Liberty Safeguards.
***Essex County Council v RF* [2015] EWCOP 1: Unlawful deprivation of liberty**	
A man of 91, with dementia and other health needs, lived alone. He lacked capacity to decide about his care, finances and living arrangements. His family wished him to live in a care home, a move opposed by his friends and neighbours. He wished to remain at home.	He was removed from home against his wishes and without lawful authorisation. He was unlawfully deprived of his liberty and could have continued to live at home with a care and support plan. The judge described the local authority's practice in this case as depressing and inexcusable, breaching Article 5 (the right to liberty) and Article 8 (the right to private and family life).

Legal literacy involves recognising the role of the courts. Practitioners and their employers need not grapple alone with the intricacies of decision-making. Application to the Court of Protection for a determination of capacity, or of best interests where capacity is lacking, may well be required in complex situations. Equally, the High Court may be asked to exercise its inherent jurisdiction, taking protective measures in circumstances that fall outside the jurisdiction of the Court of Protection. Two illustrative inherent jurisdiction cases, both involving safeguarding, are:

> *DL v A Local Authority* [2012] EWCA Civ 253 - see brief details and a commentary here.
> *Southend on Sea Borough Council v Meyers* [2019] EWHC 399 (Fam) - see brief details and a commentary.

3. Using the legally literate decision-making model

Having worked through the explanation of the model above, now explore the components of the decision-making model in relation to a person you are currently supporting.

Decision-making component	Applied to your direct work
Powers and duties that apply.	
Principles that must underpin interventions.	
Rights engaged.	
Decision-making standards - the decision must be: > lawful and proportionate > rational and reasonable > timely > based on full examination of all relevant considerations > the result of unfettered discretion > subject to well-informed consultation > justifiable and explained with reference to the evidence.	
Case law that is relevant to the circumstances.	

Take your notes into supervision or team development sessions and in discussions identify aspects in which:

- you can be confident that your decisions have been legally literate, and
- those in which you may need to take some remedial action.

Once you have worked through any aspects of your decision-making that require further work:

- Imagine you need to justify your decision-making to someone who is reviewing it, or even to a judge.
- Write a short account of your intervention showing explicitly how you have used the five components of the decision-making model.
- Take your written account into supervision and review it with your supervisor.

References

Braye, S. and Preston-Shoot, M. (2016). *Practising Social Work Law, 4th Edition*. Basingstoke: Macmillan.

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