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Legal Literacy Change Project

Standards for organisational legal literacy

Dartington Trust

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Standards for organisational legal literacy

Drawing on learning from **safeguarding adult reviews** (SARs), research, government guidance and standards and the discussions of the Legal Literacy: Change Project development group, this resource identifies ten standards of a legally literate organisation. Organisations can use these to evaluate their legal literacy and identify areas where they might have scope to improve. These reflections may then be used to complete an action plan using the template provided in the ***Evaluating organisational legal literacy tool***.

Senior leaders are responsible for ensuring that they, and operational managers and practitioners, understand the relationship between organisation procedures and the law. All need to think critically about the legal context of their work by:

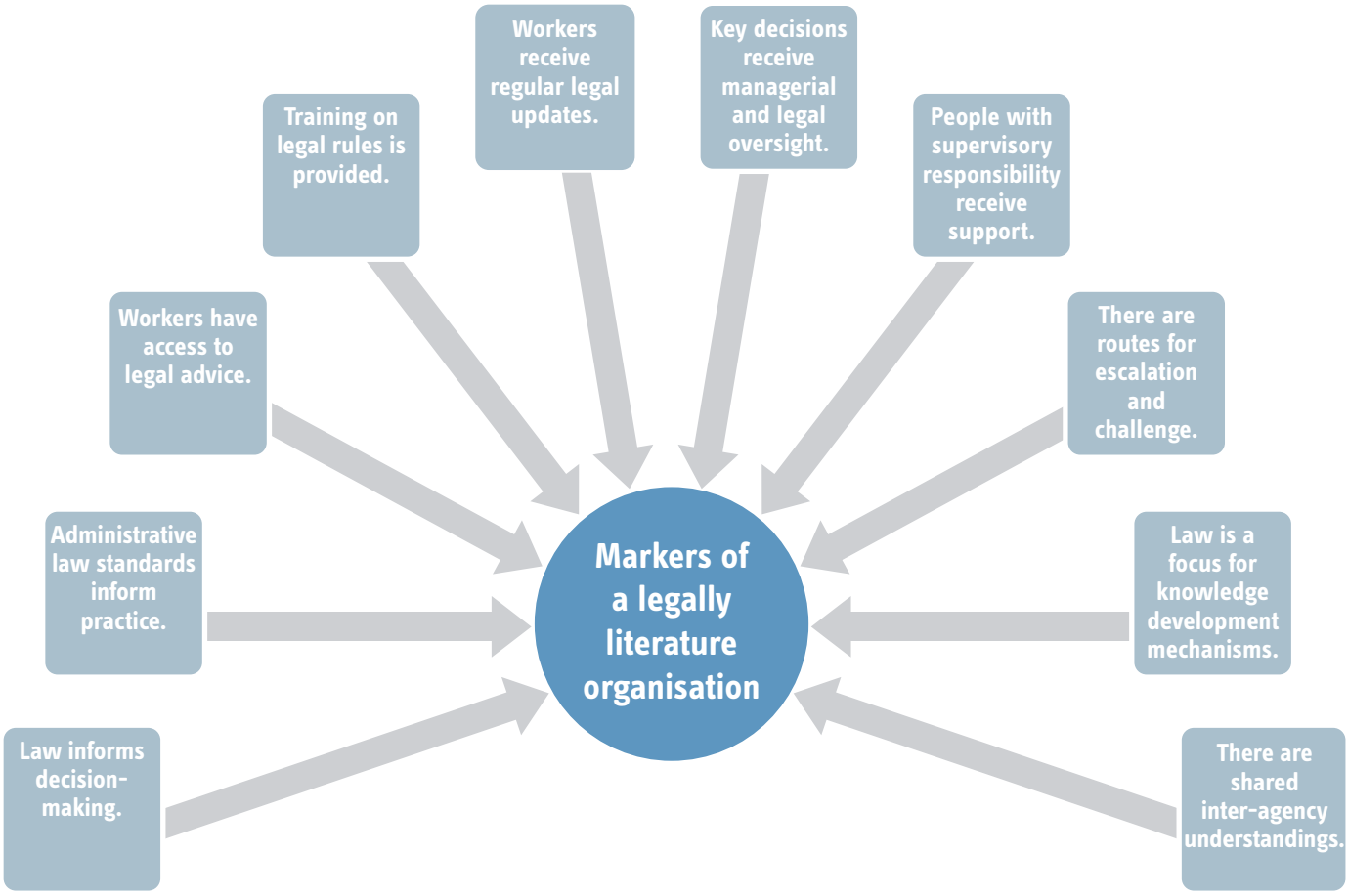
- knowing when statutory **powers** and **duties** should be used to prevent or to protect people from harm
- recognising how legal rules help to ensure people's entitlements are met and their rights promoted
- ensuring sufficient knowledge, confidence and skills to make complex decisions.

Senior leaders and strategic managers have a responsibility to ensure that managers and practitioners are enabled to work within legal frameworks in a way that satisfies the requirements of professional ethics, and that organisational barriers to legal literacy are removed. As one experienced judge has commented, to promote a caring society based on shared concern, formal legal structures must be infused with grace and compassion (Sachs, 2009). And, as one person with lived experience who was involved in research on legal literacy, said:

> *Sound use of law is one step on the way to getting things right for people.*
> (Braye and Preston-Shoot, 2005)

Senior leaders and strategic managers have an important contribution to make in creating an organisational infrastructure in which legal literacy can flourish. The scope of such a strategic initiative needs to include measures to promote legally literate decision-making in direct work with people, but also measures to ensure that those responsible for commissioning and structuring services are well-versed in the prevention, integration, information and advice, and market-shaping duties set out in sections 2-5 of the ***Care Act 2014***.

The components set out in the diagram below can be viewed as a set of standards against which to measure legal literacy within organisations and used to guide action planning to support its further development.



Reflection point:

What evidence is available to you about how your organisation meets these standards?

Some ideas on sources of evidence are provided below, but these are only examples. Each authority will have access to its own sources of evidence from within its own management and audit mechanisms.
The ***Evaluating organisational legal literacy tool*** may be used to record observations and any associated actions necessary to achieve development in the organisational infrastructure for legal literacy. The ***Examples of organisational initiatives to support legal literacy tool*** outlines initiatives already implemented or planned in a range of organisations.

1. Law visibly informs decision-making.

Adult social care law mainly comprises discretionary duties and powers. Discretionary duties **require** practitioners to act in a particular way where they believe it is necessary to do so. Powers **enable** practitioners to do something where it appears necessary. In other words, practitioners must consider individual people's circumstances and decide whether they meet the threshold to require action under certain duties and powers.

Practitioners should consider statute law, namely: Acts of Parliament, secondary legislation in the form of regulations, statutory guidance, codes of practice and judicial decisions when deciding whether to exercise discretion. Failure to appreciate what the legal rules require can lead to decision-making being successfully challenged in complaints procedures, local government ombudsman applications or judicial review. As well as the organisation, this is bad for the individual concerned too.

Evidence for meeting this standard could include:

- record keeping
- supervision records
- reports submitted to inform decision-making / panels within the authority
- court reports and court judgments involving the authority.

2. The standards for lawful decision-making from administrative law inform supervision and practice.

Administrative law provides a set of principles for policy and practice explored in the following resources:

- ***Setting the context: Introducing legal literacy***
- ***Using case law and ombudsman reports***
- ***Show your workings: Making good decisions***

These principles are in addition to the requirements of the legal rules contained within legislation that mandates adult social care practice, such as the ***Care Act 2014***, the ***Equality Act 2010***, ***Data Protection Act 2018***, and the ***Human Rights Act 1998***. When responding to referrals or reviewing particular decisions, practitioners, their supervisors and managers need to consider the degree to which what they are proposing:

- is lawful
- is reasonable and rational
- is timely
- takes account of all relevant considerations
- does not fetter discretion
- offers meaningful involvement for those who might expect to be consulted
- provides reasons for what is decided
- is reasonable and rational.

These principles have been amplified by case law and are used by the **Local Government and Social Care Ombudsman** (LGSCO) and in judicial review where policy and practice are challenged.

Evidence for meeting this standard could include:

- record keeping
- supervision records
- reports submitted to inform decision-making / panels within the authority
- court reports and court judgments involving the authority.

3. Practitioners and their supervisors have access to legal advice.

It may not always be clear whether practitioners should use their discretion to intervene in a situation and/or how to do so. It is also clear from **Safeguarding adult reviews** that certain pieces of legislation are challenging to understand and/or to implement. The law relating to mental capacity assessments ***(Mental Capacity Act 2005)*** and information-sharing ***(Data Protection Act 2018)*** are examples. Legal services will be able to provide:

- advice as to whether what is proposed complies with the legal rules
- advice as to the degree to which the standards outlined in administrative law have been met
- an assessment of where the local authority's decision-making is (or is not) defensible (this may be particularly useful where decision-making may, or is being, challenged by way of judicial review or inquiry by the LGSCO).

For these reasons systems should enable effective communication between practitioners and supervisors and local authority legal practitioners.

Evidence for meeting this standard could include:

- the degree to which practitioners are able to access legal consultation
- whether lawyers are visible in team offices and attend case conferences and strategy meetings
- whether the authority's legal section circulates briefings on new legislation and case law
- whether lawyers are involved in providing training to practitioners.

4. Strategic and operational managers and supervisors receive training on the legal rules so that they know when statutory powers and duties should be used.

The legal rules are not static. They evolve over time. Sometimes Acts of Parliament significantly amend parts of the law. For example, the ***Care Act 2014*** repealed a range of dated legislation to streamline and simplify adult social care law and provide greater rights to carers - and place a duty on local authorities to prevent, reduce and delay people's needs from developing. The ***Mental Capacity (Amendment) Act 2019*** is a more recent amendment that replaces the Deprivation of Liberty Safeguards with the Liberty Protection Safeguards in April 2022.

Sometimes, statutory guidance is updated, as in the Department of Health & Social Care's 2020 update of the ***Care and support statutory guidance***. Codes of practice are also updated, for example the ***MHA Code of Practice*** which relates to practice under the ***Mental Health Act 1983***.

Sometimes, judicial decisions interpret what the legal rules mean or require, as when the Supreme Court sought to clarify the definition of ordinary residence (***R (Cornwall CC) v Secretary of State for Health*** [2015] UKSC 46). Sometimes judicial decisions, in ruling on the lawfulness of a local authority's approach to assessment, care planning and reviews, lay out what practitioners should do in particular situations and the standards expected of their practice. An example would be when practitioners review and reassess packages of care and support (***R (Davey) v Oxfordshire CC [2017]*** EWCA Civ 1308).

Managers and supervisors need to feel confident they can recognise situations where particular legal rules might have relevance and respond appropriately. This could be through access to legal advice, and opportunities for continuing professional development. Learning and development strategies need to include consideration of what legal literacy training is mandatory for different roles across the organisation, and ensure that time to pursue it is built into workloads.

Evidence for meeting this standard could include:

- the authority's training strategy and stated priorities
- briefings and training for managers and supervisors potentially focusing on the practice implications of key legal judgments, and procedural guidance.

5. All workers are supported to gain, maintain and be confident in the legal literacy their role requires of them.

Learning, development and training have a role to play in supporting practitioners to understand significant practice implications arising from changes in primary legislation, such as the introduction of Liberty Protection Safeguards (coming into force in 2022) by the ***Mental Capacity (Amendment) Act 2019***, and in statutory guidance, such as the evolving role for principal social workers in the ***Care and support statutory guidance***. Learning and development includes supervision, discussion, reflection, and engaging with briefings and updates.

There are also lessons to be learned from inquiries by the Local Government and Social Care Ombudsman, and from judicial decisions. For example, reviews of packages of care and support that have endorsed (***R (VI) v Lewisham LBC [2018]*** **EWHC 2180 (Admin)**) or quashed (***R (JF) v Merton LBC [2017]*** **EWHC 1519 (Admin)** local authority decision-making when scrutinised against the requirements of the legal rules. **To ensure practitioners and their managers comply with the legal rules, and that their practice is defensible, it is important that their knowledge is current.**

Evidence for meeting this standard could include:

- The authority's supervision policy and expectations of supervisors and managers.
- The authority's expectations for continuing professional development, and in the resources and training that are provided to promote it.
- Legal updates and briefings on significant changes in the legal rules, including case law, together with analysis of the practice implications. These may be used to inform team discussions, with support from legal teams. Activities may also involve legally literate supervision and discussions about work with people that highlights the legal context of practice. The ***Good Court Craft: Supervisors' Briefing (2019)*** will be helpful here.

6. There is supervisory or management oversight of the legal literacy used to make significant decisions - such as those taken on care and support, mental capacity assessments and safeguarding interventions - and legal advice is sought in complex and high risk circumstances.

Decision-making must comply with the requirements of the legal rules, for example relating to assessment of the need for care and support (***Care Act 2014***) or the assessment of mental capacity (***Mental Capacity Act 2005***). When reviewing whether practice has met these requirements, due regard needs to be given to the ***Care and support statutory guidance*** and the **Code of Practice** relating to mental capacity. There are the standards outlined within administrative law alongside the requirements that practice should counter discrimination and promote equality of opportunity (***Equality Act 2010***) and positively promote people's human rights (***Human Rights Act 1998***). Practitioners and supervisors need to reflect an acceptable standard of professional competence, defined as the skills and knowledge that a competent member of a profession would be expected to demonstrate. Decision-making may need to be scrutinised prior to being finalised.

Evidence for meeting this standard could include:

- the expectations and procedures for ensuring managers' oversight of key decisions in audits of compliance
- the ease of routes for escalating discussion of complex work
- the ease for involvement of legal advisors in decision-making.

7. Supervisors are able to maintain up-to-date working knowledge of the legal framework and support practitioners to make lawful decisions.

Organisations need to be confident they can defend their decision-making if it is challenged by people with care and support needs, carers and/or other organisations. They must be confident their internal policies and procedures are a lawful interpretation of the legal rules and that practice accurately interprets legal requirements. Supervisors have a crucial role here in:

- enabling practitioners to reflect on the approach they have taken and exploring options that have and have not been considered
- asking questions as a critical friend
- expressing and encouraging **professional curiosity.**

Organisations must be mindful of ***Post-Qualifying Standards for Social Work Practice Supervisors***, which require supervisors to:

- support practitioners to work effectively within legal frameworks, such as the ***Human Rights Act 1998*** and the ***Mental Capacity Act 2005***
- reach reasoned conclusions about the situations in which they are involved, such as adult safeguarding and/or mental health.

Supporting, developing and enhancing effective social care practice includes knowledge of, and skills in using, the legal framework. Support for supervisors in maintaining up-to-date working knowledge of the law and in using it in supervision with practitioners is vital to avoid risks related to decision-making.

Evidence for meeting this standard could include the extent to which supervisors have access to legal materials, and whether those are filtered to them by lawyers able to interpret and brief on the implications for decision-making in practice.

8. Practitioners are encouraged to draw attention to the legality of organisation procedures and decision-making.

Organisations with a commitment to learning and a culture supportive of legal literacy:

- Recognise that registered practitioners have a duty to raise concerns about practice, including when they believe that what is being proposed or requested transgresses the legal rules.
- Are open to feedback.
- Recognise and use complaints from people with care and support needs, carers and other organisations as feedback and respond in a manner that models a duty of candour.
- Support registered practitioners to maintain their registration and meet their responsibilities as registrants.
- Provide escalation routes for employee concerns to be heard.
- Welcome scrutiny and challenge, for example from Safeguarding Adults Boards.

Evidence for meeting this standard could include:

- The existence of escalation policies, and the extent to which these are used by practitioners to raise concerns.
- Evidence of the organisational response that such concerns receive once raised, and the extent to which organisational change can result.
- The use of scrutiny processes to cast light on legal literacy.
- How an authority has responded to learning from reviews through action planning and change.
- Evidence of how decisions are communicated to people when a concern/complaint is raised and of how the organisation demonstrates that learning/feedback has been fed back into practice/processes.

9. The organisation values exchange and development of knowledge and expertise through advice sessions, case study groups, seminars and/or learning sets where implementation of the legal rules features strongly.

Learning organisations can create and maintain a culture of learning by valuing different types of knowledge, including:

- research findings
- feedback from people with lived experience and carers
- practitioner accounts of their practice
- case law decisions
- guidance produced by government departments
- evidence-based guides produced by Research in Practice, the Social Care Institute for Excellence and the National Institute for Health and Care Excellence.

In pressured organisational environments it is difficult, but nonetheless important, to support the development of professional competence. This can be achieved by disseminating and enabling discussion of the implications for practice of different sources of knowledge. Learning organisations establish a culture where:

- people are supported to protect time for engagement with knowledge-exchange resources
- a variety of knowledge-exchange resources are an in-built component of workload management to ensure they are embedded within the working week.

Examples of such initiatives in relation to legal literacy can be found in the ***Using case law and ombudsman reports tool***.

Evidence for meeting this standard could include:

- the existence of sessions in which legal literacy is the focus, and in whether colleagues are able and expected to attend
- mechanisms for monitoring the impact of learning on practice.

10. There is shared understanding across agencies about legal rules applicable in safeguarding and wellbeing.

Practitioners often work alongside multi-disciplinary professionals. Colleagues from different professions may be working within the same legal framework, such as when psychiatrists, general practitioners and approved mental health professionals are using the ***Mental Health Act 1983*** to assess whether someone requires admission to hospital or guardianship under a section of the Act. Sometimes colleagues will be exploring the potential contribution of different legal frameworks to resolve a problem.

Examples

- Housing practitioners primarily draw on the ***Housing Acts 1996***, ***1988*** and ***2004***, or the ***Homelessness Reduction Act 2017***, whilst social workers draw on the ***Care Act 2014***, each making a contribution to meet the needs of a homeless person.
- Occupational therapy and social work colleagues primarily draw on their knowledge of different parts of the ***Care Act 2014*** and the ***Housing Grants, Construction & Regeneration Act 1996***, to create a holistic care and support plan for a disabled person.
- An occupational therapist contributing to an assessment of mental capacity by undertaking a functional assessment through real world observation of a person's ability to carry out stated intentions (as in ***GW v A Local Authority [2014] EWCOP 20)***.

Managers, supervisors and practitioners must understand the roles and responsibilities of colleagues across the system and the legal rules about working together. Colleagues in other organisations must also understand the legal requirements for working together, for instance in relation to information-sharing or participation in assessment. Working together can be complicated when such understanding is missing. Practitioners in different professions may also use the same words but mean different things by them or may use specialist language relating to their own profession or agency, which may mean little to colleagues in different roles – a common language is therefore needed.

Learning organisations promote opportunities for cross-discipline working, for example for housing and social care practitioners, and for those involved in mental health and mental capacity assessments, to share and develop their understanding of different legal frameworks, as a core component of promoting and maintaining effective working together.

Evidence for meeting this standard could include:

- Mechanisms for the involvement of other agencies in decision-making, for example through multi-agency high risk panels and forums, how much they are used and whether attendance from key agencies is consistent.
- The existence of multi-agency legal briefings and training – colleagues need to be clear about data protection rules, be able to share relevant information appropriately and there needs to be clear communications between agencies.

References

Braye, S. and Preston-Shoot, M. (2005). *Knowledge Review: Teaching, Learning and Assessment of Law in Social Work Education*. London: Social Care Institute for Excellence.

Sachs, A. (2009). *The Strange Alchemy of Life and Law*. Oxford: Oxford University Press.

Research in Practice
The Granary Dartington Hall
Totnes Devon TQ9 6EE
tel 01803 869753
email ask@researchinpractice.org.uk

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Registered Office:
The Elmhirst Centre, Dartington Hall, Totnes TQ9 6EL

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