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Legal Literacy Change Project:

Setting the context: Introducing legal literacy

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Setting the context: Introducing legal literacy

Legal literacy has been identified by practitioners and managers as a key contributor to successful practice (Braye et al., 2014). Efforts to embed legal literacy are most likely to be effective within the context of a whole system approach (Preston-Shoot, 2019). As such, these resources are designed to support legal literacy across adult social care. Readers will gain an understanding of:

- legal literacy
- the role and value of strategic initiatives in supporting the development of legal literacy
- the role of supervision in supporting practitioners to engage in critical thinking and other activities to develop legal literacy.

This section provides a framework for deciding how the wider suite of resources might be used across all tiers of an organisation to support legal literacy.

1. Defining legal literacy

Legal literacy in the adult social care context can be defined as **the ability to connect relevant legal rules with the professional priorities and objectives of ethical practice** (Braye and Preston-Shoot, 2016b).

Legal literacy begins with sound knowledge of relevant legal rules. These include **powers** and **duties** given by primary and secondary legislation and amplified by statutory guidance, alongside principles for decision-making drawn from administrative law. However, skilled application of **legal knowledge** requires consideration of other factors that influence decision-making, such as **human rights** and **professional ethics**, which need to be weighed in the balance as practitioners consider different possible legal courses of action (Braye and Preston-Shoot, 2016a).

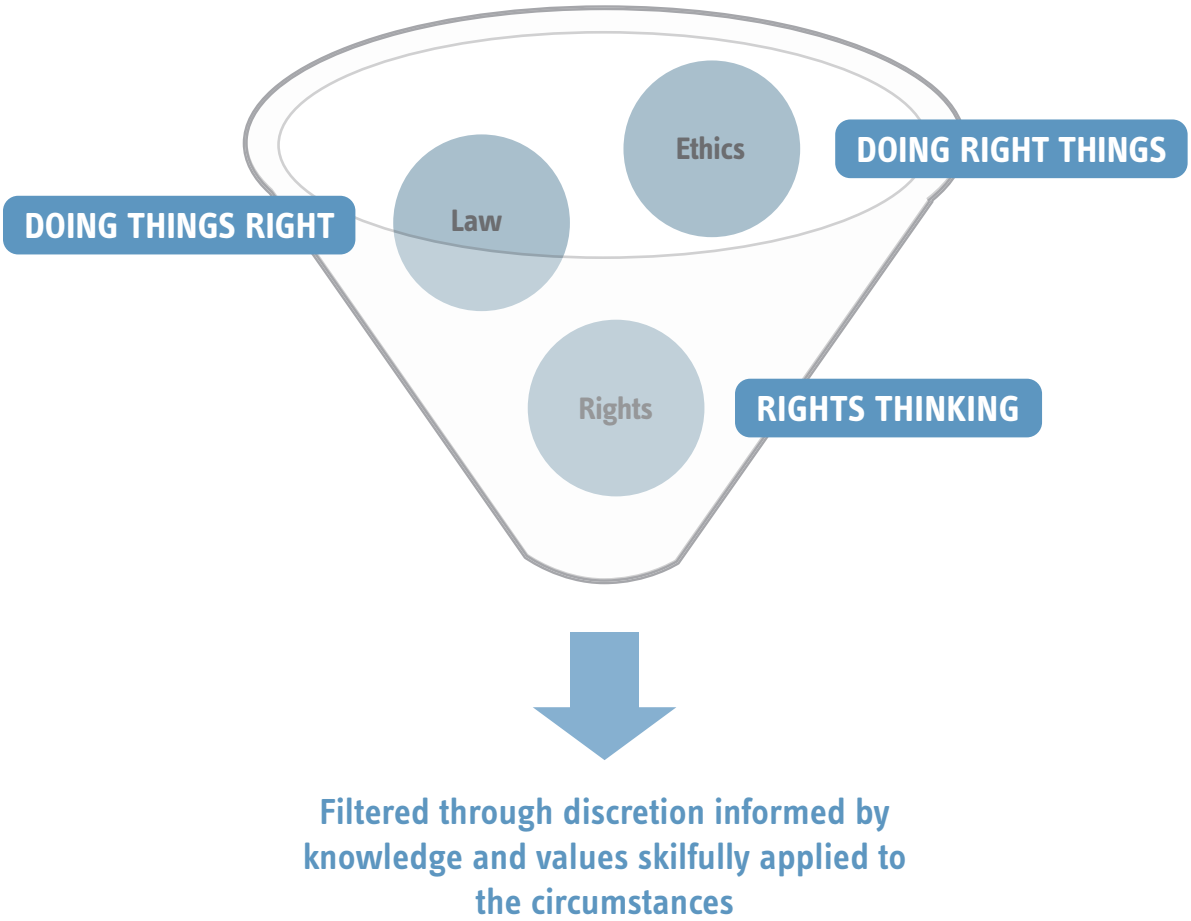
Applying the law frequently involves the use of discretion in complex situations where the right intervention might not be immediately apparent. For example, many **statutory duties** are **discretionary**, requiring someone to determine that, in this particular instance, the duty should be implemented. Statutory powers similarly require discretion to be exercised in relation to their use in any given situation. Legal literacy, therefore, requires use of other knowledge and skill domains that can contribute to decision-making.

Legal literacy has three key components:

1. Sound knowledge of the legal rules and understanding of their relevance to practice - this enables people to '**do things right**'.
2. Strong engagement with professional ethics - this enables people to '**do right things**'.
3. Respect for principles of human rights, equality and social justice - this enables people to bring '**rights thinking**' to decision-making.

(Braye and Preston-Shoot, 2016b)

These core components need to be integrated and applied in the context of every unique set of circumstances, requiring skilled exercise of professional judgement. Legal literacy is about identifying how real-world situations fit with the grounds for legal intervention, using professional ethics to help decide what should happen and to what end, and taking account of key principles such as human rights and social justice. It is about demonstrating confidence in using the full range of legal options available, applying ethical and rights-based scrutiny to different courses of action, and being able to collate, analyse and present the evidence and reasoning that underpin decisions.



(Braye & Preston-Shoot, 2016a)

A legal literacy example

The integration between the three components of legal literacy is well illustrated in the following:

R (A and B and X and Y) v East Sussex County Council and the Disability Rights Commission (Interested Party) [2003] EWHC 167 (Admin)

Two sisters with complex physical and learning disabilities, living with their parents in a specially adapted house, were supported by the local authority. They required lifting for all physical movement, including getting in/out of bed and the bath, and recreation outside the home (shopping, swimming, riding). The council had a health and safety policy that barred practitioners from manual lifting. This resulted in practitioners using equipment when it wasn't necessary or appropriate and in a curtailment of their recreational activities outside the home, when the equipment was not available or practical to use.

Before reading further, think about:

Why legal literacy would be important in this scenario.

Whether the local authority's position was lawful.

Whether the council policy was ethical.

Whether rights were breached.

Applying the three components of legal literacy to the judgment:

There is no universally accepted term to describe 'disability' and individuals may prefer different definitions or descriptions. In line with the social model of disability, which places the emphasis on disabling social and environmental barriers, rather than disability being attributed to an individual's impairment or condition, the term 'disabled people' is used here (Barnes and Mercer, 2004, p. 3). When working with disabled people, practitioners may also find the **definition of disability** under the ***Equalities Act 2010*** helpful.

Law:

Although the local authority had changed its policy by the time the court became involved, the judge ruled that a blanket policy on manual lifting **fettered discretion** and would therefore be unlawful as manual assistance might sometimes be essential.

Ethics:

The judge also gave a strong moral statement: that **"human empathy and humane concern"** were required and provision for disabled people must not impair human dignity.

Rights:

The judge noted that human rights were involved here, particularly the right to protection from inhuman and degrading treatment (article 3), and the right to respect for private and family life (article 8) under the **European Convention on Human Rights**.

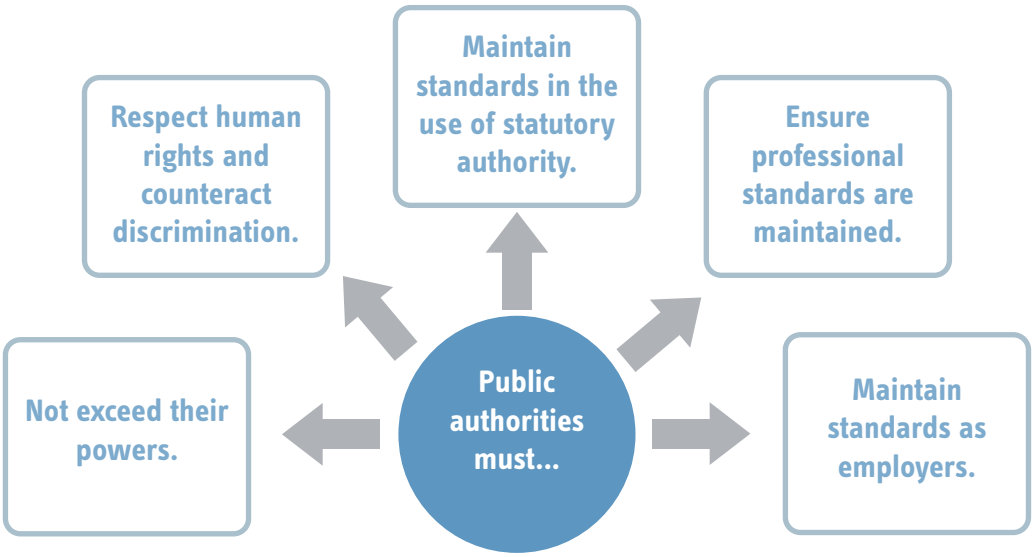
Reconciling dilemmas

The judge also addressed the question of reconciling legal and practice dilemmas that can arise when approaching decisions in which complex and sometimes contradictory considerations are engaged, saying: **"The conflict between competing interests has to be resolved by the device conventionally... referred to as a balancing exercise."**

The rationale for all aspects of legal literacy is well established in this example – **legal rules, ethical considerations** and **human rights** were all essential to crafting an appropriate response, and the exercise of **professional judgement** was crucial in identifying where priorities should lie in the face of conflicting principles.

2. The importance of legal literacy

Research has found practitioners and managers identify legal literacy as a key factor in successful practice (Braye et al., 2014). **Safeguarding Adults Reviews** also commonly find a lack of legal literacy (Braye et al., 2015a, 2015b; Braye and Preston-Shoot, 2017; Preston-Shoot, 2017; Preston-Shoot et al., 2020). Legal literacy matters because legal rules determine how and when the state may 'intervene' in people's lives, and **administrative law** sets out requirements for how decisions to make that intervention are made. This means that public authorities have key responsibilities to fulfil.



(a) Not exceed their powers:
Public authorities must act lawfully. Failing to act when there is a duty to do so, or acting outside or beyond the powers and duties given by Parliament, is unlawful.

(b) Respect human rights and counteract discrimination:
Decisions must take account of requirements to eliminate unlawful discrimination and promote equality (***Equality Act, 2010***) and respect human rights (***Human Rights Act, 1998***). Articles 2, 3, 5, 6, 8 and 9 of the **European Convention on Human Rights** are central to decisions about care and support, risk, safeguarding, best interests and deprivation of liberty.

(c) Maintain standards in the use of statutory authority:

Practitioners and managers are required to observe the following standards in the use of statutory authority:

- make timely decisions
- take account of all relevant considerations
- avoid bias
- share information
- consult and provide a rationale for their exercise of discretion.

Employers are **vicariously liable** for the acts or omissions of their employees when they act in the course of their employment, so legal literacy matters to organisations too.

(d) Ensure professional standards are maintained:

Regulatory bodies require registered practitioners to keep up-to-date with law and follow its requirements (Health and Care Professions Council, 2016).

Social workers: Social Work England **professional standards (2019)** require social workers to work within legal and ethical frameworks, using their professional authority and judgement appropriately. They must:

- Know the law and comply with legal frameworks relevant to their work and obligations to protect and promote people's rights.
- Respect human rights using power and authority responsibly, and recognising the statutory limits to privacy.
- Handle confidential information in line with the law, disclosing it only when permitted in law.
- Raise concerns about organisational wrongdoing and cultures of inappropriate and unsafe practice.
- Carry out all actions responding to harm, neglect or abuse within the law.

Standard 4 relates to social workers' responsibility to maintain their continuing professional development. Guidance emphasises that, although formal training can be an important aspect of learning, learning can in fact be derived from a wide range of activities, including supervision (Social Work England, 2019). Social workers are required to record how the learning affects their practice and what changes they may need to make to ensure they continue to practise safely and lawfully. Their Continuing Professional Development activities must be reported to **Social Work England.**

The **Professional Capabilities Framework (BASW, 2018)** focuses on the values, knowledge and skills to be expected of social workers at different career stages. It references knowledge and use of legal frameworks at all levels of professional development, with expectations increasing as careers progress.

The **Knowledge and Skills Statement** for Social Workers in Adult Services (Department of Health, 2015) requires practitioners to understand and use legal frameworks, obligations and structures. Particularly emphasised are human rights and equalities legislation, the ***Care Act (2014)***, the ***Mental Capacity Act (2005)***, the ***Mental Health Act (1983)*** and their accompanying guidance and codes of practice, which professionals across adult social care are also required to follow.

Occupational therapists: **The Royal College of Occupational Therapists' professional standards (RCOT, 2019)** require practitioners to:

- be aware of their legal and professional obligations
- ensure they meet their legal responsibilities, their duty of care to people and all Health and Care Professions Council requirements, challenging policies that prevent them from doing this
- be aware of, and comply with, legal requirements on record keeping and on confidentiality and information-sharing.

The **Health & Care Professions Council Standards of Proficiency (2018)** for occupational therapists require that they:

- know about current legislation applicable to their profession
- understand the effect of legislation on the delivery of care
- understand the importance of informed consent and be able to obtain it
- are able to exercise a professional duty of care
- are able to keep and manage accurate, comprehensive and comprehensible records in accordance with applicable legislation, protocols and guidelines.

The Health & Care Professions Council (HCPC) also issues **standards of proficiency** for a range of other practitioners whose roles may be located within local authority Adult Social Care departments. HCPC registered practitioners must:

- maintain standards
- keep a record of continuing professional development activities relevant to their current or future practice
- retain their capacity to practise safely, effectively and legally.
  (HCPC, 2018)

Nurses: The Nursing and Midwifery Council (NMC) is the regulator for nursing. They set out four types of registration for nursing care with different groups:

- adults
- children
- people with learning disabilities
- people experiencing mental health difficulties.

The NMC also set out **Standards for competence** detailing the competencies expected by nurses before they can become registered and **Standards of proficiency.** These reflect the NMCs expectations of newly qualified nurses at the start of their career and are organised under the following domains:

- being an accountable professional
- promoting health and preventing ill health
- assessing needs and planning care
- providing and evaluating care
- leading and managing nursing care and working in teams
- improving safety and quality of care
- coordinating care.

The Royal College of Nursing (RCON, ND) set out eight **principles of nursing practice** that apply to all nurses. Principle B states that 'Nurses and nursing staff take responsibility for the care they provide and answer for their own judgments and actions – they carry out these actions in a way that is agreed with their patients, and the families and carers of their patients, and in a way that meets the requirements of their professional bodies and the law'. The RCON also provide:

- **A guide** for student nurses to support reflection on the principles (2013).
- **A guide** for nursing teams to support them in their duties around accountability and delegation (2017). This guide states:
  - 'Health service providers are accountable to both the criminal and civil courts to ensure that their activities conform to legal requirements. Registered practitioners are also accountable to regulatory bodies in terms of standards of practice and patient care.'
  - 'The law imposes a duty of care on practitioners whether they are health care assistants (HCAs), assistant practitioners (APs), trainee nursing associates, nursing apprentices, students, registered nurses, doctors or others, when it is 'reasonably foreseeable' that they might cause harm to patients (Cox, 2010). The duty of care applies whether they are performing straightforward activities such as bathing patients or undertaking complex surgery'.
  - Supervisors must ensure workers are 'suitably trained', that 'full records of training' are kept, that 'competence assessments' are carried out 'preferably against recognised standards such as **National Occupational Standards** and that ongoing development is provided 'to ensure competency is maintained'.

(e) Maintain standards as employers:

The Local Government Association **Standards for Employers of social workers in England, 2014** sets out core expectations for social work employers around:

- good practice on workload management
- continuing professional development
- supervision, and tools and support to do the job
- including access to legal advisers.

In the NHS, practitioners must adhere to the principles within the NHS Constitution, including the duty of candour, which has statutory force ***(Health and Social Care Act 2009 (Regulated Activities Regulations, 2014).***

Legal literacy plays an important role in supporting organisations to fulfil these expectations, as well as protecting them and their practitioners. Breach of administrative law, as well as failure to fulfil statutory duties or a **duty of care** towards someone to whom it is owed, can result in a statutory authority's decision-making being subject to **judicial review** – at substantial cost not only financially but also in terms of time and reputation. In addition to the benefits for people with care and support needs, embedding legal literacy within practice can have considerable protective benefits - for example, reducing pressures on legal teams and potential liability for the authority.

3. The role and value of supervision

Whilst training has been found to increase practitioner legal literacy, support has also been identified as a necessary component in avoiding poor decision-making (Hubbard, 2018). Similarly, Preston-Shoot (2019) and Stone (2018) highlight the importance of supervision and managerial support in enabling social workers to reflect on how they understand a particular situation, including foreseeable risks - thereby opening up possibilities for consideration.

Supervision and opportunities to discuss complex situations offer opportunities to revisit legal knowledge, explore interpretation of legal rules, share responsibility for risk assessment, and maintain confidence (Manthorpe and Samsi, 2013; McDonald, 2010). To avoid any gains in knowledge and skills acquired through training from deteriorating over time, reinforcement in supervised practice is also necessary (Braye and Preston-Shoot et al., 2005).

In supporting the development of legal literacy, the supervisor's role is two-fold:

> Professional accountability
Supervision plays a vital part of **decision-making in complex situations**, where fundamental questions of risk, safety, wellbeing and liberty must be addressed. The critical reflection that takes place in supervision plays an important role in enabling practitioners to be confident in their decision-making and professionally accountable.

> Organisational accountability
Supervision is a central element in the organisation's **management of practice,** in the fulfilment of its purpose and in ensuring accountability for actions carried out by its employees. Addressing legal literacy through supervision can mitigate the risk of an authority needing to answer, through the judiciary, for the lawfulness of decisions made by practitioners on its behalf.

Resources to support supervision:

> ***Legal literacy: Supervision Work Plan***

> ***Supervision: Change Project***

> ***The Supervisor Development Programme***

> ***The Practice Supervisor Development Programme***

Team development can work alongside supervision to support professional and organisational accountability, it can create a community of practice to promote learning around a particular issue.

(a) Supporting professional accountability

Using the law is an aspect of practice that can leave practitioners feeling exposed and uncertain (Braye and Preston-Shoot, 2005). While recognising that it provides the authority for 'intervention' in people's lives, practitioners may lack confidence in its use, not trust the currency of their knowledge and be unclear about its relationship with agency procedures (Braye, Preston-Shoot and Thorpe, 2006). Equally, although practitioners may be certain about the outcomes they seek, it is often difficult to be certain that their actions will achieve them. This can result in practitioners feeling unsafe in the professional role.

Supervision has a crucial role in bringing underpinning knowledge into the open and exploring what it means for practice. It can support practitioners' move from unsafe certainty or unsafe uncertainty to a position of safe(r) uncertainty (Mason, 2011). A position of safe certainty may eventually be reached but, even where doubt remains, **legal literacy can provide the safety that enables people to be comfortable with the uncertainty**. Putting together an understanding of a situation involves a process of moving towards a decision or recommendation for action. It begins with a process of:

- discovery
- continues with the search for an understanding
- then moves on to considering the strength and balance of evidence
- before constructing and testing out a conclusion.

(Preston-Shoot, 2019)

Such a process, supported through supervision, can ensure organisations fulfil their accountability to practitioners in terms of support and resources to enable them to fulfil professional obligations, particularly where these are spelt out in codes of ethics.

As such, the role of supervision in relation to legal literacy is to:

- support practitioners to use professional curiosity
- enable supervisors to challenge as a critical friend
- make the implicit explicit
- ensure that different ways of seeing a situation are considered.

Therefore, supervision contributes to continuing professional development, ensuring legal literacy is embedded within the practitioner's knowledge and skills that continue to build.

(b) Providing organisational accountability

Supervisor and managerial oversight is crucial to ensuring that decision-making is defensible in law (Mason, 2019). As such, supervision can support organisations to fulfil their statutory obligations and the requirements of **administrative law.** Policies and procedures provide some guidance by setting out the structures and mechanisms to be used when making decisions in practice, but they (and indeed the law itself) provide only a map. In the complexity of daily practice, legally literate supervision can support practitioners to think through the legal implications of one course of action over another and to make decisions that are defensible in law.

The ***Knowledge and Skills Statement for Social Workers in Adult Services*** **(Department of Health, 2015)** emphasises that practitioners must have access to regular, good quality supervision and endorses its role in enabling them to reach reasoned conclusions in relation to situations involving mental capacity, mental health and safeguarding. Beyond social work, other practitioners must also have sufficient understanding of law to carry out their own role and to recognise the need for action beyond their own role. ***The professional standards for occupational therapy practice*** **(RCOT, 2017)**, for example, include the requirement that a practitioner receives regular professional supervision and appraisal, using critical reflection to review their practice.

In addition to organisations having responsibility for ensuring the quality of the supervisor and supervision, supervisors themselves are accountable for the quality of the supervision they provide. The **Post Qualifying Standards for Social Work Supervisors** **(Department of Health and Social Care, 2018)**, refer to supervisors playing a key role in:

> **'...implementing a framework for effective social work practice, underpinned by social work values, theory, research, contemporary social work models and methods, and the legislative framework'.**

With respect to legal literacy, the standards specify that this role requires supervisors to:

- 'promote and enable social workers to adopt a positive approach to managing risk, which is underpinned where necessary by relevant legislation
- secure, maintain and model a current and working knowledge of the legislative framework, particularly the ***Care Act 2014***, the ***Mental Capacity Act 2005*** and mental health legislation and its related case law
- ensure that practice is lawful and seek legal advice when required
- provide expertise and support to social workers to exercise statutory or other formal authority where their assessment and analysis indicates that an adult appears to be at risk of abuse or neglect
- ensure practitioners understand the legal, regulatory, procedural and performance framework in which they operate and within which they are held accountable'.

In addition, advanced and strategic level practitioners' capabilities are defined as including legal knowledge and the ability to ensure that social work practice is compliant with the legal rules through the provision of supervision, legal expertise and social work advice. They are expected to:

- respond to changes in legislation
- ensure compliance with health and safety legislation
- provide leadership by developing and using a human rights and ethical framework to support complex decision-making.

  Social Work Professional Capabilities Framework **(BASW, 2018)**

This resonates with the definition of legal literacy, with its focus on the integration of legal knowledge, ethics and rights. It also places supervision centre-stage in its achievement.

Occupational therapy practitioners must support the training and development of colleagues and those they supervise (RCOT, 2017). The Royal College (2015) makes reference to the role of supervision in ensuring legal requirements are met, noting that in one model of supervision -'normative supervision' - the supervisor develops the supervisee's own sense of responsibility but retains ultimate responsibility for ensuring the supervisee's work meets all the legal, ethical and professional requirements or 'norms' of practice.

4. Conclusion

Practitioners in adult social care make complex decisions daily, often in situations where the right thing to do is not necessarily obvious. In making good decisions, law is one component that supports best practice. Practitioners carry particular responsibilities in relation to the implementation of legal **powers** and **duties**, and must be familiar with the legal mandates under which their own specific services are provided. They must also have sufficient understanding of the powers and duties of colleagues across the system, in order to recognise when a broader response may be required.

These legal literacy resources are intended to support practice that incorporates these understandings. They will be helpful to:

- Practitioners who receive supervision, particularly if their supervisor or team manager intends to use the legal literacy resources in supervision or team development sessions.
- Senior leaders who are considering what actions are necessary at strategic level to support the organisation-wide development of legal literacy.
- Team managers, supervisors and those responsible for learning and development who may find it useful to incorporate them within their work as a core component of a legal literacy development strategy across all layers of their organisation.

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

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