



PRACTICE TOOL

Legal literacy

Introduction

The purpose of this Practice Tool is to support adult social care practitioners in developing legal literacy, and using it in their practice. It provides information and resources that aim to:

- > promote understanding about the nature of legal literacy in adult social care
- > provide tools and exercises to support the integration of legal literacy within professional practice.

It is designed as an overview of the topic of legal literacy, not as a detailed account of adult social care law. Its focus is to:

- > identify why legal literacy is important in adult social care
- > provide opportunities to test knowledge and understanding
- > show how different approaches to the law/practice relationship help decision-making
- > demonstrate how legally literate thinking can support professional reasoning
- > offer signposts to further detailed resources to help practitioners keep up-to-date.

Individual practitioners, teams or staff groups will find it useful in continuing professional development. It complements the Research in Practice for Adults *Legal literacy in adult social care: Strategic Briefing* (Braye and Preston-Shoot, 2016a), which supports senior leaders and managers in promoting legal literacy within their organisations.

Terms in bold are defined in the glossary on page 29.

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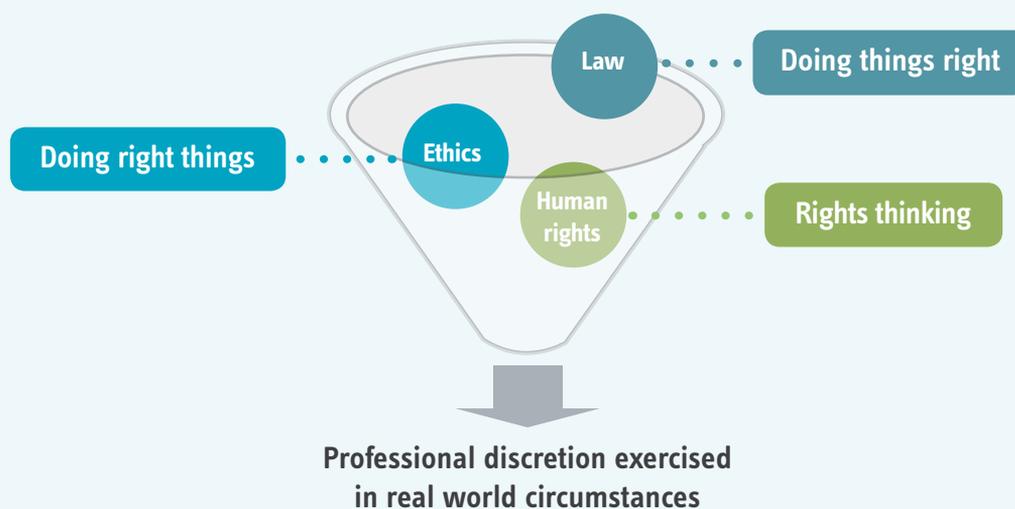
What is legal literacy?

Legal literacy is the ability to connect relevant legal rules with the professional priorities and objectives of ethical practice.

It originates in debates about whether legal rules or an ethical duty of care lie at the heart of practice¹. In reality, neither alone is sufficient; both must influence decision-making, which must also be informed by rights-based principles.

Legal literacy has three key components:

1. Sound knowledge of the legal rules and understanding of their relevance to practice.
2. Strong engagement with professional ethics.
3. Respect for principles of human rights, equality and social justice.



These core components must be integrated and applied in the context of each and every unique set of circumstances, requiring skilled exercise of professional judgement. So, legal literacy is about identifying how real world situations fit with the grounds for legal intervention, pursuing ethical goals, and taking account of key principles such as human rights and equalities. It is about demonstrating confidence in using the full range of legal options available (Preston-Shoot, 2014), 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.

¹ See Braye and Preston-Shoot, 2016b for further detail.

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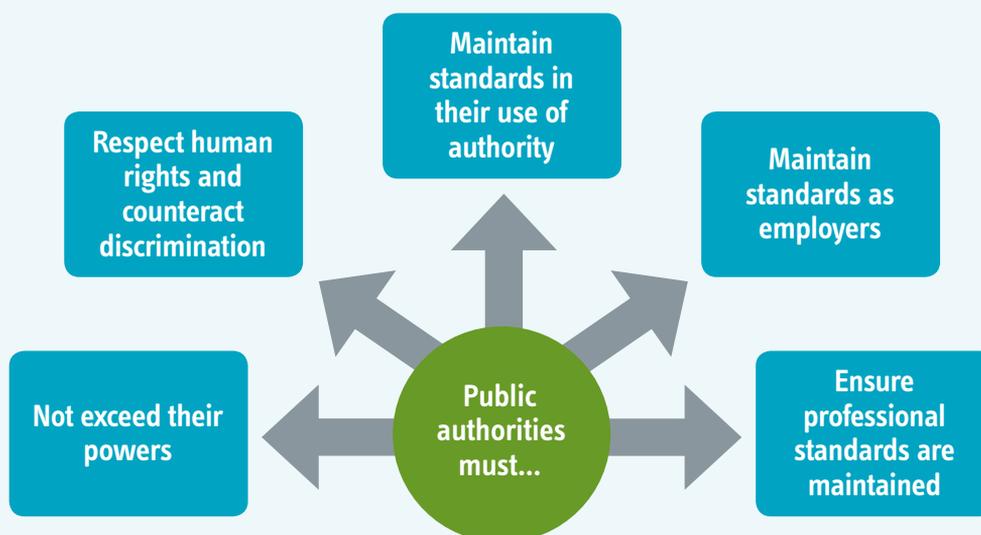
Why does legal literacy matter?

Consider this case example:

Two sisters with profound physical and learning disabilities, living with their parents in a specially adapted house, required lifting for all physical movement, including getting in/out of bed and bath, and recreation outside the home (shopping, swimming, riding). The council had a 'no manual lifting' policy for care staff, arising from health and safety considerations. This resulted in the use of equipment that was not always appropriate for the sisters' needs or situation, and curtailed their activities when such equipment wasn't available or practical to use.

Before reading further, think about why legal literacy would be important in this case? Was the local authority's (LA's) position lawful? Was it ethical? Were rights breached?

Legal literacy matters because legal rules determine how and when the state may intervene in the lives of individual citizens and administrative law sets out requirements for how decisions are made:



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 to LAs, is unlawful. 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 and 8 of the **European Convention on Human Rights** are central to decisions about care and support, risk, safeguarding, best interests and deprivation of liberty.

Practitioners must also observe 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.

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At the level of individual practice, regulatory bodies such as the Health and Care Professions Council (Health and Care Professions Council, 2016) require registered practitioners to act within their profession's legal powers. *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.

Standards for employers in adult social care (Local Government Association, 2014), while without statutory force, codifies good practice on workload management, continuing professional development, supervision, and tools and support to do the job, including access to legal advisers. In healthcare, practitioners must adhere to the principles within the NHS Constitution, including the duty of candour, which has statutory force (*Health Act 2009*).

Returning to our case example:

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

The judge ruled that a blanket policy on manual lifting **fettered discretion** and would therefore be unlawful (although the LA had changed its policy by the time the case came to court). Manual assistance might sometimes be essential.

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. Human rights were engaged, particularly the right to protection from inhuman and degrading treatment, and the right to respect for private and family life. The judge also addressed the question of conflicting imperatives and practice dilemmas: “*The conflict between competing interests has to be resolved by the device conventionally... referred to as a balancing exercise.*”

Thus 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 intervention, and the exercise of professional judgement was crucial in identifying where priorities should lie in the face of apparently conflicting principles.

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Attitudes towards law

Despite its importance, practitioners have mixed feelings about the law. The following quotations express disquiet about its place within practice: practitioners respect yet fear it, lack confidence in its use, do not trust the currency of their knowledge, and are unclear about its relationship with agency procedures (Braye, Preston-Shoot and Thorpe, 2007; Braye, Preston-Shoot and Wigley, 2013).

It's coercive ... agencies often use legislation in an oppressive way.

It's just a big stick to beat us with if something goes wrong

It gives you the authority to do things, and protects you and the people you're working with.

For me it is part of the skill of a practitioner – to know sufficiently what people are entitled to under the Act.

I've often said to students, when you're qualified you really can't go out there and change the world, you can only work within the requirements that your LA allows you to.

Learning and practice, however, can shift attitudes towards the law (Preston-Shoot and McKimm, 2012). So, one element of legal literacy is reflection upon our own views of the law. Thinking about your attitudes towards the law, retrospectively and currently, to what degree would you say that:

	Yes	No	It all depends
Law can be used by practitioners to achieve social change. <i>What's the reason for your answer?</i>			
Law can resolve welfare issues. <i>What's the reason for your answer?</i>			
Law protects adults at risk and meets their needs. <i>What's the reason for your answer?</i>			
Law enables service users and carers to challenge decisions. <i>What's the reason for your answer?</i>			
Law promotes practitioners' accountability for their practice <i>What's the reason for your answer?</i>			
Keeping up-to-date with legal knowledge is daunting. <i>What's the reason for your answer?</i>			
Law promotes equality. <i>What's the reason for your answer?</i>			

Perceptions about the law, whether positive or negative, will shape attitudes towards statutory authority and confidence when using it. The degree to which practitioners see law as supporting social work values and helpful in challenging inequality, promoting human rights, meeting needs and offering protection may change following training, continuing professional development and practice experience. Ongoing critical reflection is, therefore, essential to legally literate practice.

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Knowing the legal rules

Legally literate practice will comply with **primary** and **secondary legislation**, and with **statutory guidance**, so technical legal knowledge is essential.

Auditing your knowledge

A wide range of legal rules may shape practice: the relevant powers and duties on care and support, and their interface with health care, mental health and mental capacity law, as well as law on social work practice, human rights and equality. To audit your knowledge and confidence in understanding the powers and duties potentially applicable, first make a list of all those you believe may be relevant in your work. Now, look at the following tables, rating your own confidence in, first, your knowledge of the legal rules and, then, your skills:

Self-audit: How confident are you in your knowledge of these legal rules?	Not at all	Not very	Fairly	Very
<i>Human Rights Act 1998</i>				
<i>Equality Act 2010</i>				
<i>Data Protection Act 1998</i>				
<i>Care Act 2014: Core principles</i>				
<i>Care Act 2014: Integration</i>				
<i>Care Act 2014: Prevention</i>				
<i>Care Act 2014: Market shaping</i>				
<i>Care Act 2014: Assessment, eligibility</i>				
<i>Care Act 2014: Personal budgets, care planning</i>				
<i>Care Act 2014: Adult safeguarding</i>				
<i>Care Act 2014: Advocacy</i>				
<i>Mental Health Act 1983</i>				
<i>Mental Capacity Act 2005: Core principles</i>				
<i>Mental Capacity Act 2005: Assessing capacity</i>				
<i>Mental Capacity Act 2005: Best interests decisions</i>				
Deprivation of Liberty Safeguards (DoLS)				
Role and remit of the Court of Protection				
Inherent jurisdiction of the High Court				
The legal rules on Health and Wellbeing Boards				
<i>Modern Slavery Act 2015</i>				
The legal rules for work with self-neglect				
The legal rules for work with sexual exploitation				
The legal rules for work with hate crime				
The legal rules for work with domestic violence				
<i>Counter-Terrorism and Security Act 2015</i>				
The legal rules for work with asylum seekers				

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Now, focusing on skills for legal literacy, rate how difficult you find the following:

Skills for legal literacy: How difficult do you find these activities?	Very difficult	A little difficult	Fairly easy	Very easy
Identifying and applying relevant legal rules to cases that come to my attention.				
Making decisions about when, why and how to use legal powers and discretionary duties.				
Consulting and instructing lawyers.				
Matching needs and risks against eligibility criteria.				
Challenging colleagues' interpretation of legal rules and options.				
Challenging other agencies' interpretation of legal rules and options.				
Preparing or reviewing evidence for a court case.				
Explaining legal powers and duties to service users and carers and involving them when statutory mandates are being used.				
Drawing on legal mandates to secure good inter-agency collaboration.				

If you have scored in the two lowest bands of confidence or difficulty, you have identified a need to develop knowledge or confidence in particular areas. A template for planning your continuing professional development is included on page 26.

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Test yourself on the legal rules

One way of testing knowledge and building confidence is to explore specific questions. Some examples are provided below. In response to each, which of the four options is the right answer and why? Commentary on these questions is included on page 23.

A practitioner's ultimate accountability is to:	Q1
Their employer	A
Their code of conduct	B
Their professional association	C
The people who use their services	D
What is the reason for your answer?	

When asked for information by the police, practitioners must:	Q2
Never provide it	A
Always provide it	B
Provide it if it helps to prevent or detect a crime	C
Provide it if it seems reasonable to do so	D
What is the reason for your answer?	

Which of these is <i>not</i> required by the <i>Human Rights Act 1998</i>?	Q3
Positive promotion of the <i>European Convention on Human Rights</i>	A
A proportionate response when limiting rights under the Convention	B
Interpretation of Convention rights according to the time and social trends	C
Prioritisation of Convention rights above duties in primary legislation	D
What is the reason for your answer?	

In relation to carers, the LA must:	Q4
Assess a carer's needs even if the needs of the person they are caring for are not being assessed	A
Assess a carer's needs if the needs of the person they are caring for are being assessed	B
Decide whether a carer's assessment is necessary	C
Decide whether to inform carers that they can request assessment	D
What is the reason for your answer?	

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In determining which needs are eligible to be met following a care and support needs assessment, the LA can disregard:	Q5
Needs expressed by the service user but not endorsed by the assessor	A
Future needs	B
Psychological needs	C
Needs that do not arise from physical or mental impairment or illness	D
What is the reason for your answer?	

Adult asylum seekers can have their eligibility for services assessed by the LA if:	Q6
They need care and attention because they are destitute	A
They need care and attention because they are sick or disabled	B
They need care and attention because their claim for asylum has failed	C
They are accompanied by children	D
What is the reason for your answer?	

In relation to an adult with care and support needs at risk of abuse and neglect and unable to protect themselves, section 42, <i>Care Act 2014</i>, requires the LA to:	Q7
Put immediate measures in place to ensure the adult receives appropriate protection	A
Make an assessment of the adult's care and support needs	B
Make any necessary enquiries to enable it to decide what action should be taken	C
Alert the Safeguarding Adults Board that an enquiry is necessary	D
What is the reason for your answer?	

Advance decisions to refuse treatment under the <i>Mental Capacity Act 2005</i> must be:	Q8
Respected provided they apply to the treatment or action being proposed	A
Respected except in life-threatening circumstances	B
Respected provided they are written, signed and witnessed	C
Respected if considered to be in the person's best interests by the responsible clinician	D
What is the reason for your answer?	

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A person who is assessed as needing admission to psychiatric hospital, but lacks capacity to consent:	Q9
May be admitted under sections 5/6 of the <i>Mental Capacity Act 2005</i> provided they don't object and it is in their best interests	A
May be admitted under the <i>Mental Capacity Act 2005</i> even if they object, provided the DoLS are used to authorise the admission	B
Must be admitted under the <i>Mental Capacity Act 2005</i> even if the grounds for admission under the <i>Mental Health Act 1983</i> are met	C
Must always be admitted using the <i>Mental Health Act 1983</i>	D
What is the reason for your answer?	

In relation to an adult at risk who has capacity to make relevant decisions, the High Court's inherent jurisdiction allows the court to:	Q10
Order a local authority to provide a service	A
Authorise a local authority to act in the best interests of the adult	B
Authorise a medical practitioner to act in the best interests of the adult	C
Order specific protective measures to be taken	D
What is the reason for your answer?	

Reviewing the answers to these questions on page 23 will show you how accurate your knowledge of these key topics is. If you want to fine-tune your understanding, you can build this into your development plan on the template provided on page 26. The list of legal resources at the end of this briefing will help to identify useful sources of information.

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Orientations in legal literacy: Combining law, ethics and rights in case decisions

Technical legal knowledge (doing things right) is only one component of legal literacy. Legally literate practitioners will negotiate between the legal rules and other influences on decision-making - ethics (doing right things) and rights (a rights-based perspective). Equally, where they act under the powers and duties delegated by Parliament to their LA, they must respect the employer’s policies, procedures and guidance, provided these are lawful and do not compromise their professional registration. How they manage these responsibilities will be influenced by how they interpret the law/practice relationship and the reference points they use when negotiating tricky situations or practice dilemmas.

Three examples below illustrate the influence of different orientations to practice. Consider each scenario and decide, as a practitioner in an adult social care team, which of the arguments listed (A-D) you would be most drawn to using. Place a 1 in the adjacent column, then number the rest in order of preference. There is no right or wrong order, just different ways of approaching the situation. Each scenario does, however, also contain a technical legal question to which you will answer True or False (with answers provided on page 25).

Tricky situation number one

You have reviewed the care and support plan for an older woman who has increasingly high support needs but lives at home and wishes to continue to do so. You put your request for enhanced services to the resource panel and receive this response:

“The service user has been supported with a care and support package at the ceiling allowed by the LA. The services you are now requesting exceed the financial limit allowed. We cannot breach our resource allocation model. You must either consider residential care or propose an alternative plan.”

Would you:

Argue that prioritising the LA’s resource position is unlawful because it imposes an arbitrary ceiling, in breach of statutory guidance, and fetters discretion?	A	
Argue that the LA should support your client in her own home because this promotes her self-determination and respects her autonomy?	B	
Follow the panel’s request because the LA has to be fair and consistent in its decision-making in complex cases, and resource constraints make some limits necessary?	C	
Argue that your client should remain at home because to do otherwise would interfere with her right to private and family life under the ECHR?	D	
<p>Before you move on, consider the technical legal point:</p> <p><i>When supporting someone in the community, it is unlawful to propose residential care instead because of the client’s Article 8 right to privacy and family life.</i></p>	True	False

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Tricky situation number two

You are undertaking a care and support assessment with a couple who have been married for forty years and have never spent any time apart. The wife has complex needs due to a degenerative health condition and the husband has dementia. You and they have concluded that residential care is necessary. They want a shared room but none are available in the homes the LA accesses. Your line manager comments:

“While I understand your concern, you are being unrealistic in advocating for a shared room. There are very few such rooms within our current contracted arrangements with residential homes in our fee band. In any event the LA does not have to agree to provide what you as the assessor recommends and it sounds as if they require different forms of care. An alternative plan will be necessary.”

Would you:

Urge caution about resource-driven decision-making, arguing that to base the decision on resources alone could be challenged in law?	A	
Argue that your recommendation is based on a thorough assessment conducted with the couple, and that separation would be damaging to them?	B	
Remind your manager that the LA’s decision-making should not undermine the couple’s right to maintain their family life?	C	
Accept that the LA does not have the resources to provide what you have recommended and investigate an alternative care package?	D	
Before you move on, consider the technical legal point: <i>The LA does not have to agree to the assessor’s recommended care package.</i>	True	False

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Tricky situation number three

A community police officer has made a safeguarding referral about an older woman living in extreme self-neglect. Her health is frail and she eats very little; she lives in squalid conditions, surrounded by an accumulation of hoarded materials, which pose considerable fire risk given her drinking and smoking habits. She has told the officer she doesn't need help.

The safeguarding team, who usually conduct initial enquiries under s.42, *Care Act 2014*, have determined that the situation “*does not meet the threshold for a s.42 because it is self-neglect and it's clear she may well have care and support needs*”, and has sent the referral to adult social care, where it is added to the list of referrals awaiting assessment (currently a waiting time of several weeks).

Would you:

Argue that self-neglect cannot be excluded from s.42 duties, and that an enquiry should proceed, as it appears she is unable to take appropriate self-protective steps?	A	
Decide that the risks inherent in the situation mean that early assessment should take place, moving the referral up the priority list?	B	
Argue for balance between her right to privacy and the state's duty of care, and that assistance should be proactively offered, even if her refusal is then respected?	C	
Look for guidance in the Safeguarding Adults Board's policies and procedures?	D	
Before you move on, consider the technical legal points: (a) Self-neglect is a form of abuse and neglect. (b) The LA can exercise its discretion about whether self-neglect triggers a section 42 enquiry.	True	False

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Ordering the arguments might have proved difficult. In many situations there may not be an obvious front-runner and each argument has something to offer, because orientations are not automatically right or wrong. Each offers a different contribution to the task of practising securely within the legal framework and need to be combined in a holistic approach. Your reflections may allow you to identify the balance between your dominant orientation(s) and others, providing pointers to how you might develop particular aspects of your legal literacy.

Here is what the orientations signify:

Selecting option A reflects a technical orientation wherein practitioners:

- > pay close attention to technical legal knowledge and its relevance for situations encountered
- > ensure they regularly update the detail of their knowledge and understanding
- > ask their employer to ensure access to the latest guidance and influential case law
- > underpin and justify their arguments by reference to accurate legal knowledge and sound reasoning.

Selecting option B reflects an ethics orientation wherein practitioners:

- > engage openly with ethical dilemmas posed, both within the situation and in the context of organisational policies
- > seek to understand the individual's own perspective and support them to achieve goals that are personally important
- > pay close attention to the requirements of their professional code of conduct
- > underpin and justify their arguments by reference to the obligations a society owes those needing care and support.

Selecting option C reflects a rights orientation wherein practitioners:

- > ensure they understand how the law confers or limits rights for people who use services
- > seek to promote people's rights in relation to their own and their agency's practice and support them to secure their rights in other areas of their lives
- > prioritise service user rights as the guiding principle of decision-making
- > underpin and justify their arguments by reference to the rights held by individuals and groups in society.

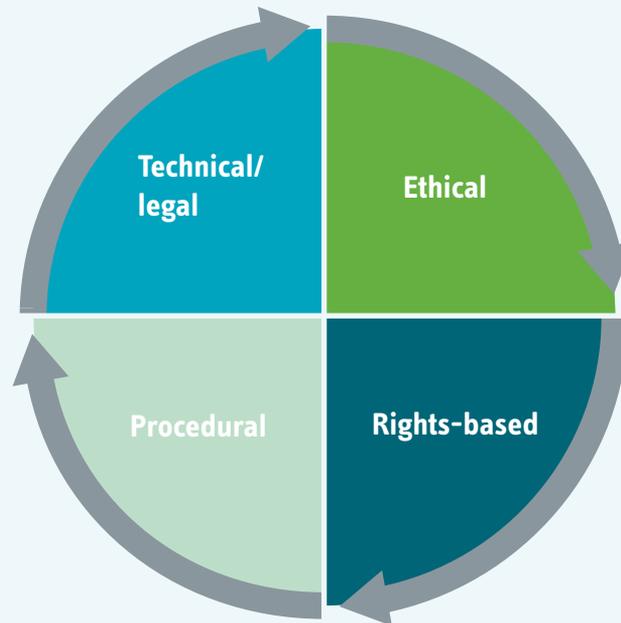
Selecting option D reflects a procedural orientation wherein practitioners:

- > ensure they understand their employer's policies and procedures for implementing the legal rules
- > seek guidance from their employer on any matters not covered by policy and procedure
- > seek advice from, and abide by, the decisions of their manager
- > underpin and justify their arguments by reference to their employer's expectations and the trust that their employer places in them to pursue the organisation's legitimate aims.

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Legally literate practitioners will move with ease between different orientations, drawing on what each has to offer in the balancing exercise that characterises professional judgement.



Such a balancing exercise is exemplified in *Westminster CC v Sykes* [2014], where the question was whether to authorise a return home from nursing care of an older person with severe dementia, balancing the known risks with the benefits of a plan that more closely met her known wishes, feelings and values. Arriving at a holistic and multi-faceted evaluation of her welfare required the negatives and positives and the pros and cons of each option to be taken into account.

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Making good decisions and 'showing your workings'

The integration of law, ethics and rights and the exercise of professional judgement are at the heart of legal literacy. However, the *process* of decision-making is as important as the outcome. The process must reflect principles from administrative law, set out in the 'Why Legal Literacy Matters' section on page 3. Decisions can be subject to **judicial review** or investigation by the **Local Government Ombudsman**.

This means that practitioners making decisions need to be able to 'show their workings' (and also to record them), to show evidence of meeting administrative law requirements. Explicit 'workings' are also useful when practitioners need to argue a perspective that is challenged in multi-disciplinary contexts, where opposing views can emerge as a result of divergent value systems or expectations about the extent of legal powers.

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

Stage 1: Preparing for a case review

You are preparing for a review of a care and support plan made under the *Care Act 2014* in respect of a disabled woman. You did not do the initial assessment or set up the plan. You first consult the records.

- > What legal rules would you expect to see having underpinned the initial assessment and decision-making?
- > What principles would you expect to see having been used?
- > What decision-making processes would you expect to find 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 her needs may have changed, and that her partner may be finding it challenging to meet her needs for emotional and practical support. During the review:

- > What legal rules will guide your practice?
- > What principles will underpin your practice?
- > 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 the woman's partner is showing you out, he mentions that she has decided to travel abroad, with his assistance, to seek assisted suicide.

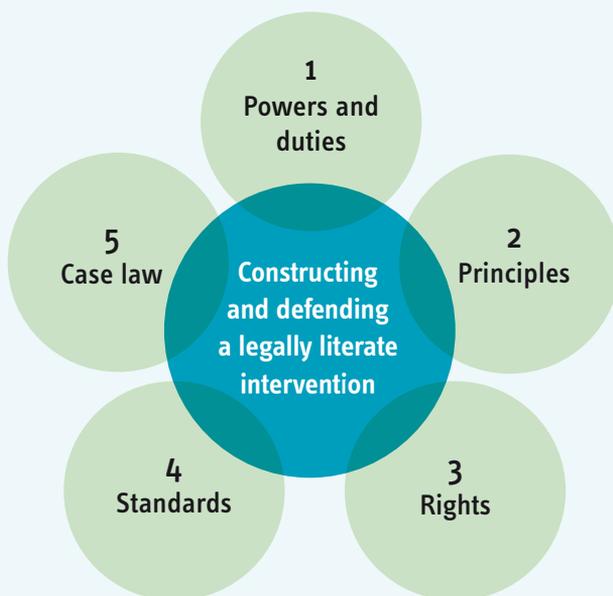
- > What will you need to consider here, as a legally literate practitioner?

Make a list of your responses

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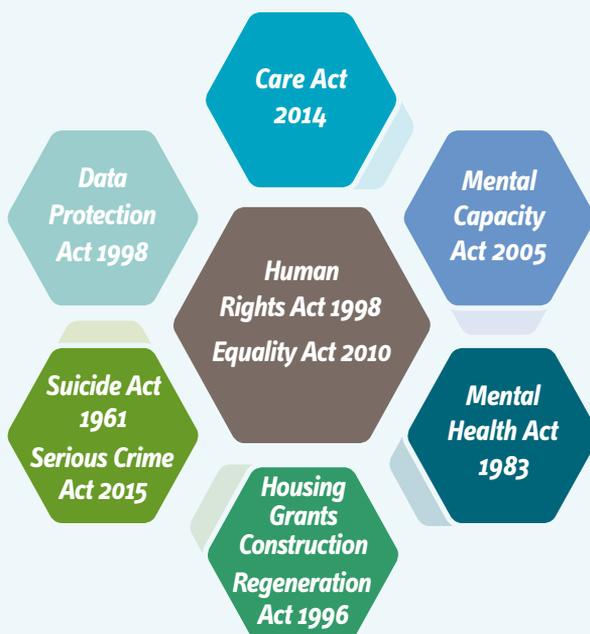
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You will have considered a range of matters: the applicable powers and duties, the values underpinning your approach, the moral dimension of what is being planned and the rights that need to be promoted. In order to construct and defend a legally literate intervention, you will need to consider, and record your thinking on, all of the following domains:



1. Powers and duties

In all cases, practitioners will need to identify adult social care powers and duties, as well as other relevant legal rules. Some will apply in most cases: the *Care Act 2014* and *Mental Capacity Act 2005* are examples. Others will depend on the specific circumstances. In our case example, you would expect to consider:



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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 on specific questions)
- > enquiry into abuse or neglect
- > care and support planning
- > reviews.

Thus, the *Care Act 2014* and the *Mental Capacity Act 2005* provide the core mandates here. 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 1998* sets out the circumstances in which confidential information may lawfully be shared with others.

Review your answers to the three stages of the case example above, and if you feel unsure about your knowledge and understanding of any aspect of this legal jigsaw, use the resources listed at the back of this Practice Tool to clarify your understanding. You may also find chapter 4 of Braye and Preston-Shoot (2016b) helpful for legal detail.

In mapping the legal rules in any particular case, remember 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 appear below:

Where different statutes provide different but complementary powers and duties, all of which must be observed in any individual case, 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:
A: Transitions for disabled children	B: Young care leavers	Admission to psychiatric hospital where a person lacks capacity to consent	Determining responsibility for funding continuing health care (NHS Clinical Commission Group or LA?)
<ul style="list-style-type: none"> > <i>Children Act 1989</i> > <i>Children & Families Act 2014</i> > <i>Care Act 2014</i> 	<ul style="list-style-type: none"> > <i>Children (Leaving Care) Act 2000</i> > <i>Children and Young Persons Act 2008</i> > <i>Children and Families Act 2014</i> > <i>Care Act 2014</i> 	<ul style="list-style-type: none"> > <i>Mental Capacity Act 2005</i> > <i>Mental Health Act 1983</i> <p>If both apply, the least restrictive option must be taken.</p>	<ul style="list-style-type: none"> > Case law: (<i>R v North & East Devon Health Authority ex parte Coughlan</i> [1999]) > National framework (Department of Health, 2012): Funding to meet ongoing 'primary health need' remains a CCG responsibility.

Further detail on how all these 'boundary issues' affect decision-making in cases can be found in Braye and Preston-Shoot (2016b, chapters 4 and 5).

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2. Principles

The core statutes identify principles that must underpin *how* powers and duties are fulfilled. For example, the *Care Act 2014* 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, and that making an unwise decision does not equate to a lack of capacity.

Equally, ethical principles underpin professional decision-making; requirements such as promoting and protecting the interests of service users and carers, respecting confidentiality, managing risk, and being open and trustworthy are central to professional codes of conduct (for example, Health and Care Professions Council, 2016). Thus, the second feature on the legal literacy map is to consider how practice can abide by principles that apply in the case circumstances.

Review your answers to the three stages of the case example above and consider whether you identified the key principles that should underpin your practice:

- > How have you supported the service user 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, and how have you balanced her wellbeing with that of her partner?

3. Rights

Practitioners must show 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 and Fundamental Freedoms***. 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, therefore, key features on the map. Equally relevant, though 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 the case example 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?

4. Standards

Administrative law sets standards for decision-making - whether the LA and its employees:

- > acted lawfully and **proportionately**
- > met standards of rationality and reasonableness, using discretion that was not fettered
- > shared information and consulted
- > fully examined the facts and took account of all relevant considerations
- > reached their decision in a timely way, avoiding bias and giving reasons
- > met an acceptable standard of professional competence
- > positively promoted human rights under the ECHR and, where these rights conflict, can account for how they struck the balance between them
- > fulfilled their public sector equality duty (*Equality Act 2010*) to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity and to foster good relations with groups with protected characteristics.

Review your answers to the three stages of the case example above:

- > Did the processes logged in the case record at stage 1 give a transparent account of how decisions on the care and support plan had been made?
- > At stages 2 and 3 have you demonstrated that you met the standards of lawful decision-making?

5. Case law

Finally, case law offers instructive guidance; familiarity with leading cases is important. For example, in *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] it was established once again that LAs are not obliged to make provision in line with a person's wishes. They 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 case example featured in this 'Making Good Decisions and Showing Your Workings' section is partly drawn from *Re Z (an adult: capacity)* [2004]. Here, the LA had obtained an injunction (through the inherent jurisdiction of the High Court) restraining Mr Z from taking his wife abroad. In lifting the injunction, the judge set out the duties of a LA when it learns that an individual's welfare is seriously threatened by their own decision. The LA 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*)
- > 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 article 2, article 3 and article 8 rights engaged, 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 (de Cruz, 2005).

These requirements remain among the clearest guidance available on the extent (and limits) of the LA'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.

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Other cases illustrate both good and poor practice points:

Redbridge LBC v G and Others [2014]: The use of inherent jurisdiction to safeguard	
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 LA, 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 its inherent jurisdiction as it was uncertain whether she had capacity to decide her living arrangements. The High Court determined that she did not have capacity and, as 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 v MK [2014]: 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 LA 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 LA for failing to competently complete a safeguarding enquiry and assessment, and for unlawfully using Deprivation of Liberty Safeguards to prevent her return home.
RF v Essex County Council [2015]: Unlawful deprivation of liberty	
A 91 year old man, with dementia and other health needs, was living alone. He was assessed as lacking capacity to decide about his care, finances and living arrangements. His family wished him to live in a dementia care home, a move opposed by his friends and neighbours. He expressed a wish 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 LA'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).

Thus, legal literacy involves recognising the role of the courts. Practitioners and their employers do 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 cases; 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 (see *DL v A Local Authority* [2012] in which it was determined that the court could, using its inherent jurisdiction, take steps to protect an adult with mental capacity who was subject to abuse and coercion by another person).

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Legal literacy

Quiz answers

Q1.

B

Social workers must register with a regulatory body in order to practise (a requirement introduced under the *Care Standards Act 2000* and updated under the *Health & Social Care Act 2012*). Registered social workers are committed to upholding the code of conduct and can be struck off the register if found to have breached it. Professional associations and trade unions may have advice and representation services and codes of ethics to which members subscribe but social workers do not have to belong to either. Employers cannot require social workers to act unlawfully or in contravention of the knowledge, values and skills that are required for the post held.

Q2.

C

The common law duty of confidence means that personal information should not be disclosed without consent. However, *Data Protection Act 1998* guidance lists exceptions as disclosure to: staff involved in the case, and their managers; another agency caring for an individual; other departments and agencies; students and trainees; police, courts, tribunals, statutory enquiries and others with power to require disclosure. Disclosure could breach Article 8, European Court of Human Rights (EHCR). However, the right to respect for private and family life, as a qualified right, may be breached in the interests of public safety, prevention of disorder and crime, protection of health or morals, or protection of the rights and freedoms of others. Disclosure, therefore, should be proportionate i.e. only to the extent necessary to achieve the objective.

Q3.

D

Where there is a potential conflict between the *Human Rights Act 1998* and another piece of legislation, practitioners must adhere to that other statute. If a court finds a conflict between the two, it may declare part of the statute to be incompatible with Convention rights. This is a clear signal to Parliament to rectify the incompatibility by bringing the law in line with the Convention. Organisations performing a public function must positively promote Convention rights. When they limit an individual's Convention rights, that action should be proportionate - just sufficient in order to achieve the desired outcome.

Q4.

A

The duty to undertake a carer's assessment under s.10, *Care Act 2014*, is engaged when it appears to the LA that a carer may have needs for support (now or in the future) whether or not the cared-for person is undergoing assessment. Carers' eligibility for services is also independent of any eligibility decision in relation to the care and support needs of the cared for person.

Q5.

D

The eligibility regulations set out a three-step process for determining that needs are eligible to be met, the first of which is that they must arise from physical or mental impairment or illness (which does not have to be formally diagnosed). (The individual must also be unable, as a result, to achieve two or more relevant outcomes, with a resultant significant impact on their wellbeing.)

Both future needs and psychological needs should be taken into account. While needs expressed by the service user may not be disregarded, in the context of self-assessment the LA retains responsibility for checking that the self-assessment accurately reflects the individual's needs.

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Q6.

B

The Home Office's National Asylum Support Service is responsible for asylum seekers who are destitute (do not have adequate accommodation or the means to obtain it, or are unable to meet essential living needs) unless they have additional needs not related to the destitution. In that case, the LA is responsible, using provision under the *Care Act 2014*. The *Nationality, Immigration and Asylum Act 2002* prevents the LA from providing care and support to a failed asylum seeker unless not to do so would breach human rights, i.e. article 3, by exposing them to 'intense physical or mental suffering and/or humiliation of a degree that breaks moral and physical resistance' (*R (Limbuella and others) v Secretary of State for the Home Department* [2006]).

Q7.

C

Where a LA has reasonable cause to suspect that an adult who has needs for care and support needs is experiencing, or is at risk of, abuse or neglect, and as a result of their needs is unable to protect himself or herself, the LA must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case and, if so, what and by whom. The *Care Act* does not require specific protective measures to be taken, nor does it provide any specific powers to facilitate safeguarding intervention. Assessment of care and support needs may follow the initial enquiries, provided the grounds for assessment set out in s.9 are met. The LA has a duty (s.43) to establish a Safeguarding Adults Board, but not to notify the board about individual cases.

Q8.

A

Advance decisions not to receive treatment must be specific to the treatment in question. These wishes must be respected by those proposing treatment, who will not be liable for the consequences of withholding treatment. To be applicable in life-threatening circumstances, the advance decision must also be written, signed and witnessed, and contain the words 'even if life is at risk'.

Q9.

A

They may be admitted using the permissions in sections 5/6 *Mental Capacity Act 2005* (though the degree of restriction in hospital must be carefully scrutinised against the acid test for DoL). Where DoL is envisaged and the person does not object, either the *Mental Capacity Act* with DoLS or the *Mental Health Act* may be used (but *Mental Health Act* with DoLS only when it is in their best interests). The least restrictive option must be taken. If they are objecting to admission, or their capacity is likely to fluctuate, or if the admission is primarily for the protection of others, or restricted treatments are envisaged, then the *Mental Health Act* must be used.

Q10.

D

The High Court, acting under its inherent jurisdiction, can set in place protective measures in relation to an individual who, while having mental capacity, cannot exercise that capacity freely because they are:

- > under constraint
- > subject to coercion or undue influence
- > for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

Key judgements: *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006]; *DL v A Local Authority* [2012].

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Tricky situations – technical legal points

No.1:

When supporting someone at home, it is unlawful to propose residential care instead because of the client's Article 8 right to privacy and family life. TRUE OR FALSE?

FALSE

R v Lancashire CC ex parte Ingham & Whalley [1995]: It is lawful to take resources into account when deciding which services to provide to meet assessed needs, and to find an alternative way of meeting needs, providing a reassessment has taken place (see also *R v Gloucestershire CC and another, ex parte Barry* [1997]). However, any proposed care and support package must have a reasonable chance of meeting the assessed needs (*R (McDonald) v Royal London Borough of Kensington and Chelsea* [2011]).

The statutory guidance, however, warns against assuming that a care specific option has to be accepted against a person's will because it is the cheapest (para 11.7) and that a 'one size fits all' approach to resource allocation should not be taken (para 11.23).

No.2:

The LA does not have to agree to the assessor's recommended care package. TRUE OR FALSE?

TRUE

Care and support plans must adequately analyse the needs presented and must not be driven solely by resource considerations; they (and subsequent revisions) must consider Article 8 rights and **proportionality**, choice and responsiveness, and all the facts in a balanced way (*R v Staffordshire CC ex parte Farley* [1997]; *R v Birmingham CC, ex parte Killigrew* [2000]; *R (Goldsmith) v Wandsworth LBC* [2004]).

No.3(a):

Self-neglect is a form of abuse and neglect. TRUE OR FALSE?

TRUE

The statutory guidance (Department of Health, 2016) includes self-neglect within the list of circumstances that constitute abuse and neglect.

No.3(b):

The LA can exercise its discretion about whether self-neglect triggers a section 42 enquiry. TRUE OR FALSE?

TRUE, but with caution

To determine whether the s.42 duty is triggered, the LA must first, *in all cases of abuse and neglect*, determine whether the three-step test is met:

- > The adult has needs for care and support.
- > They are experiencing or at risk of abuse and neglect.
- > As a result of the care and support needs, they are unable to protect themselves.

So, discretion is exercised in every case but, in relation to self-neglect, the statutory guidance (Department of Health, 2016) explicitly states that self-neglect *may not always* prompt a s.42 enquiry; the need for a safeguarding response will depend on 'the adult's ability to protect themselves by controlling their own behaviour'.

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Conclusion

Legal literacy, as defined in this Practice Tool – the exercise of professional judgement using knowledge of legal rules, understanding of ethics and a rights perspective – will always remain a work in progress for adult social care practitioners, and must be a key element of continuing professional development.

The constantly evolving nature of the legal rules requires legal knowledge to be kept up-to-date and the complex nature of decisions calls for finely-tuned moral reasoning. Employers have a key role to play in this, as identified in the *Legal literacy in adult social care: Strategic Briefing* (Braye and Preston-Shoot, 2016a), but practitioners have individual responsibility too. Working through this Practice Tool may have helped identify priorities for individual knowledge development. The resources below provide avenues for further research.

Action planning

Building confidence in legal literacy requires targeted activity, and action planning can assist in setting personal priorities. Consider how you will progress your legal literacy by completing an action plan, using a template like the one below (a worked example follows).

Specific knowledge or skill needing development: First priority	Specific knowledge or skill needing development: Second priority	Specific knowledge or skill needing development: Third priority
Learning or development activities I can undertake		
Resources or people who can help		
Date by which I will have completed this		

Worked example

Development need:

I need a more in-depth understanding of best interests decision-making

Activities I can undertake

- > Read and draw on Court of Protection judgements.
- > Ensure court judgements and commentaries are routinely discussed within teams.
- > Access advice from mental capacity specialists and legal practitioners.
- > Take difficult decisions to a 'complex cases' panel.

Resources I can use

People:

- > Legal section, Best Interests Assessors and Independent Mental Capacity Advocates networks, user and carer groups.

Information:

- > *Making decisions on Capacity and Best Interests: Strategic Briefing*
www.ripfa.org.uk/resources/publications/practice-tools-and-guides/making-decisions-on-capacity-and-best-interests-strategic-briefing-2013
- > England and Wales Court of Protection Decisions
www.bailii.org
- > *Mental Capacity Law Guidance Note: A brief guide to carrying out best interests assessments*
www.39essex.com/resources-and-training/mental-capacity-law
- > Court of Protection Hub
www.courtofprotectionhub.uk

Date for completion

- > Within the next 6 months.

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Resources and useful websites

The following resources provide further detailed information to support legal literacy.

- > Legislation and explanatory notes on Acts of Parliament can be found at: www.legislation.gov.uk
- > Searches for policy and practice guidance can be done through: www.gov.uk/government/publications
- > Searches for court judgements (case law) can be done through:
 - The Courts and Tribunals Judiciary database: www.judiciary.gov.uk/judgments
 - The Supreme Court website: www.supremecourt.uk
 - The British and Irish Legal Information Institute database: www.bailii.org with Court of Protection decisions here: www.bailii.org/ew/cases/EWCOP
 - For organisations with a legal department, discussion with your department may enable staff to access subscription-only case law databases such as Westlaw or Lexis Nexis.
- > Community Care Law Reports, published by Legal Action Group, provide **judicial review** case reports and commentary: www.lag.org.uk/cclr.aspx
- > 39 Essex Chambers publish online newsletters and commentary on judgements relating to mental capacity and occasional discussion papers; an online mailing list provides updates: www.39essex.com/resources-and-training/mental-capacity-law
- > Cases and commentary on social care law can be found at: www.careandhealthlaw.com
- > The Social Care Institute for Excellence publishes resources on mental capacity: www.scie.org.uk/mca
- > Mental Health Law Online is an internet resource on mental health and mental capacity law; an online mailing list provides updates: www.mentalhealthlaw.co.uk
- > The Court of Protection Hub provides news and commentary: www.courtofprotectionhub.uk
- > Deprivation of Liberty
 - Law Society (2015) *Identifying a Deprivation of Liberty: A Practical Guide*. London: The Law Society: www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty
 - ADASS (2014) *Guidance for Local Authorities in the light of the Supreme Court Decisions on Deprivation of Liberty Safeguards*. London: Association of Directors of Adult Social Services. www.adass.org.uk/uploadedFiles/adass_content/policy_networks/mental_health/key_documents/DoLS%20Guidance%20note%20November%202014.pdf
 - CQC (2014) *Deprivation of Liberty in Health and Social Care: Briefing for Health and Social Care Providers*. London: Care Quality Commission. www.cqc.org.uk/sites/default/files/20140416_supreme_court_judgment_on_deprivation_of_liberty_briefing_v2.pdf
- > Useful texts:
 - Brammer S (2015) *Social Work Law, 3rd edition*. London: Pearson.
 - Brammer A (2014) *Safeguarding Adults*. Basingstoke: Palgrave.
 - Braye S and Preston-Shoot M (2016) *Practising Social Work Law, 4th edition*. Basingstoke: Palgrave.
 - Johns R (2014) *Capacity and Autonomy*. Basingstoke: Palgrave.
 - Nosowska G and Series L (2013) *Good Decision-Making: Practitioners' Handbook*. Dartington: Research in Practice for Adults.
 - Preston-Shoot M (2014) *Making Good Decisions*. Basingstoke: Palgrave.
 - Ruck-Keene A, Butler-Cole V, Allen N, Bicarregui A and Kohn N (2014) *A Brief Guide to Carrying Out Capacity Assessments*. Available online: www.39essex.com/docs/newsletters/capacityassessmentsguide31mar14.pdf

Glossary

Administrative law:

A set of standards for the exercise of authority that has developed through judicial decision-making.

European Convention on Human Rights:

Setting out civil and political rights, the Convention was drafted in 1950 by the newly formed Council of Europe in the aftermath of World War II, following the UN *Universal Declaration of Human Rights* in 1948. The Convention came into force on 3rd September 1953 but UK citizens had to go to the European Court to claim the rights it enshrined. The *Human Rights Act 1998*, however, incorporated the Convention into domestic law, with the effect that public authorities must positively promote Convention rights, and citizens can defend them in UK courts.

Fettered discretion:

Staff must reach an independent judgement about what decisions and actions are appropriate based on a full assessment and analysis of the facts of the specific case. Their decision-making must not be restricted by being bound to a fixed policy.

Inherent jurisdiction:

A High Court declaration about a person's health and/or welfare, authorising measures that are necessary and proportionate but where the Court of Protection does not have jurisdiction. Declarations may cover, for example, how a third party should act towards the individual (severing contact that is abusive) or where someone should live.

Judicial review:

High Court scrutiny of the lawfulness, reasonableness and rationality of decisions taken by public bodies, which can result in their decisions being quashed.

Local Government Ombudsman:

A quasi-judicial investigation of an individual complaint, which may be critical of LA maladministration. Recommendations are not binding but should not be departed from without good reason.

Practice guidance:

In England and Wales, this guidance is issued by central government departments. It does not have the same force as statutory guidance (policy guidance) but is, in essence, a code of good practice. It itemises what would ordinarily be expected of adult social care practitioners and managers.

Primary legislation:

Acts of Parliament that contain the basic framework of powers and duties given to LAs.

Proportionality:

The principle that, using lawful authority, public authorities should intervene only as much as is necessary to achieve a legitimate goal, sometimes known as the least restrictive alternative.

Secondary legislation:

Provision also known as Statutory Instruments or Regulations that contains powers or duties that elaborate how primary legislation is to be understood and implemented.

Statutory guidance:

In England and Wales, this guidance, also known as policy guidance, is issued by central government departments under section 7, *Local Authority Social Services Act 1970* and must be followed unless there are exceptional reasons to depart from it.

Vicarious liability:

Other than when acting as an Approved Mental Health Professional, it is the employer that is accountable for the actions of staff. In these circumstances an individual practitioner can only be held personally accountable if they have acted in such an unreasonable way that there is no professional justification.

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Table of cases referred to in this Practice Tool

DL v A Local Authority [2012] EWCA Civ 253

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

R (Goldsmith) v Wandsworth LBC [2004] 7 CCLR 472

R (McDonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33

Re Z (an adult: capacity) [2004] EWHC 2817 (Fam)

R v Birmingham CC, ex parte Killigrew [2000] 3 CCLR 109

R v Gloucestershire CC and another, ex parte Barry [1997] 2 All ER 1

R v Lancashire CC ex parte Ingham & Whalley [1995] CO/774/95

R v North & East Devon Health Authority ex parte Coughlan [1999] 2 CCLR 285

R v Staffordshire CC ex parte Farley [1997] 7 CL 186

Redbridge LBC v G and Others (No. 4) [2014] EWCOP 17

RF v Essex County Council [2015] EWCOP 1

Somerset v MK [2014] EWCOP 25

Westminster CC v Sykes [2014] EWHC B 9 (COP)

Understanding case law references

Case law is referenced using the following details:

- > The name(s) of the parties.
- > The date of the judgement.
- > Either:
 - The law report series that has reported the case, and the volume number, or
 - a neutral citation denoting the court and case number.

For example:

- > *R (W) v Birmingham CC* [2011] 14 CCLR 516 (an example using a law report citation):
 - The court action was initiated by the Queen (Regina), acting on the application of the individual named W, against Birmingham City Council. The judgement was made in 2011. It is reported in volume 14 of the *Community Care Law Reports*, page 516.
- > *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33 (an example using a neutral citation):
 - The court action was initiated by the Queen (Regina), acting on the application of the individual named McDonald, against the Royal Borough of Kensington and Chelsea. The judgement was made in 2011 and was case no.33 in the UK Supreme Court.

Further explanation can be found here:

<http://guides.lib.sussex.ac.uk/content.php?pid=72934&sid=544291>

A searchable database of abbreviations can be found at:

www.legalabbrevs.cardiff.ac.uk

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With grateful thanks to

Millie Cummings, Rachel Griffiths, Teresa Halliday, Kim Holmes and Zakia Loughead

Research in Practice for Adults is a programme of The Dartington Hall Trust which is registered in England as a company limited by guarantee and a charity.

Company No. 1485560 Charity No. 279756
VAT No. 402196875

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