Promoting dignity within the law
The Social Care Institute for Excellence (SCIE) was established by Government in 2001 to improve social care services for adults and children in the United Kingdom.

We achieve this by identifying good practice and helping to embed it in everyday social care provision.

SCIE works to:
- disseminate knowledge-based good practice guidance
- involve service users, carers, practitioners, providers and policy makers in advancing and promoting good practice in social care
- enhance the skills and professionalism of social care workers through our tailored, targeted and user-friendly resources.
PROMOTING DIGNITY WITHIN THE LAW

Introduction

This is a brief introduction to the legislation which supports the rights of people, adults in the main, to dignity and respect when using health and social care services. It describes the workings of the Human Rights Act 1998 and some key legal provisions in the areas of discrimination, mental capacity, sexual offences, information legislation and health and safety. It also suggests ways in which apparent conflicts between the legal responsibilities placed upon practitioners and commissioners and the human rights of service users may be resolved. The requirements of the legislation promoting dignity in care may seem intimidating but it is important to recognise that many of the principles now enshrined in law embrace current best practice.

Who is it for?

It is aimed at practitioners and commissioners within health and social care in England and Wales, but will also be relevant to people using services and their carers. It should be helpful to anyone who wishes to understand the way legislation protects service users’ rights, in particular, their rights to be treated with dignity and their right to autonomy – that is, their right to have their wishes respected.

This guide is at an introductory level, but provides suggestions for further reading and websites for more specific information.

Note: As a result of devolution there is increasing divergence in the regulation of social care and therefore practitioners should consult local guidance for detailed information.

Dignity in Care
To view the full version of SCIE’s Dignity in Care practice guide please go to www.scie.org.uk/publications/practiceguides
Section 1: Sources of law

This gives a very brief introduction to the basic workings of the English legal system. It explains the sources of law and the functions of the courts, as starting points for understanding the relationship between human rights legislation (guarding the rights and freedoms of individuals that have been agreed as fundamentally important in maintaining a fair society) and the care and treatment of adults using care services.

The rule of law
The rule of law, in simple terms, means that neither an individual nor the state is above the law. The rule of law is a crucial element of democracy. People cannot take action in connection with another person if the law prevents them from doing so. For example, organisations such as local councils cannot take action unless the law gives them the authority to do so. This applies even where the action is for the person’s own good.

The role of the courts
Courts are both bound by and uphold the rule of law. Their function is twofold. They must decide what principles of common law and/or equity are relevant to the issues in front of them. They also have a crucial role to play in the interpretation of the will of Parliament as expressed in statute law.

Common law and equity
Common law is most simply explained as law that is established by the courts and developed from precedents (judicial decisions in earlier comparable cases). It is judge-made law. It is distinct from statute law, which is legislation passed by Parliament.

Equity describes the principles of fairness developed by the courts to mitigate or reduce the harsh impact of certain common law rules. For example, common law remedies are limited to damages (financial compensation), whereas equitable remedies can extend to specific performance (insistence that a party performs its obligations) and injunctions (orders preventing certain behaviour such as harassment).

Statute law
Statute law is law that has been passed by Parliament. As society has become more complex the role of common law has diminished and an ever-increasing number of statutes – Acts of Parliament – have been passed, dealing with more and more areas of behaviour within society.

Statutes start life as Bills. These may be sponsored by government ministers or be private members' Bills, and are debated and voted for in Parliament. They go on the statute book as an Act of Parliament when they receive the Royal Assent. Note: an Act does not necessarily come into force when it receives Royal Assent. Different Acts have different implementation schedules, which are either contained in the statute itself or announced later (the Mental Capacity Act 2005, for example, was not implemented until 2007, and then in two parts).
Delegated (secondary) legislation
No matter how long Parliament sits, it would not be able to pass sufficient legislation in the detail that the running of a sophisticated democracy requires. As its name implies, delegated legislation gives the power to some person or body to pass legislation, and many Acts of Parliament (which are primary legislation) contain a provision which gives ministers and other executive bodies, such as the Welsh Assembly Government, power to produce detailed regulations which are not debated by Parliament but have statutory force.

Delegated legislation, also known as secondary legislation, or statutory instruments, has the same effect as if it had been passed by Parliament through its normal process. However, the courts may overrule a decision based on secondary legislation, but not primary legislation.

Guidance
Guidance provides advice and assistance on the procedures for putting into action provisions of statute. It may be statutory or non-statutory. Statutory guidance – that is, guidance authorised by statute – is more authoritative than non-statutory guidance. The Code of Practice under the Mental Capacity Act 2005 is an example of statutory guidance. Non-statutory guidance might be, for example, in the form of local authority circulars.

As a general rule, all guidance should be followed unless there are powerful and justifiable reasons not to do so. In the field of social care and health services, guidance issued by the relevant Secretary of State or government department can be taken to be the clearest expression of the government’s intention, although it remains the function of the court to decide what the legislation actually means should a particular guidance be questioned.

Good practice
Good practice is quite distinct from delegated legislation or guidance. It can be very helpful, and can provide principles for making decisions. It is not, however, statute law, and much of what does amount to good practice is not issued in the form of either regulations or statutory guidance. Therefore, good practice must always give way to the requirements of statute, regulations and guidance, if the requirements conflict.

Statutory interpretation
When courts have had to decide what a statute says, there develops a series of so called ‘rules’ that guide the courts. Their effect is to set out the approach that should be adopted by the courts. There are three main rules: first, the ‘literal rule’, which says that the words in a statute are taken to have their literal meaning unless such an interpretation produces a nonsensical result. In that case the ‘golden rule’ applies, which says that if the literal meaning produces an absurd result then it should be looked at in the overall context of the statute. If these two rules do not help then the ‘mischief rule’ is applied. This rule states that meaning is interpreted in the light of the problem or ‘mischief’ that the statute was passed to deal with.
Declaration of incompatibility
The Human Rights Act 1998 has an impact on statutory interpretation, in that courts must strive to interpret legislation in a way which is compatible with the European Convention on Human Rights and the intention of Parliament. When it is not possible to interpret the legislation in this way, the courts may strike down delegated legislation but not primary legislation, although they may make a declaration of incompatibility.

A declaration of incompatibility is the means by which courts inform Parliament that primary legislation may be in breach of the UK’s obligations under the Convention. This should prompt Parliament to act, although it is not obliged to change the law.

Public law and private law
Public law cases are cases that involve the actions of public bodies, such as local authorities. Private law cases are concerned with actions between private individuals. The actions of public bodies, because they involve them intervening with the way individuals live their lives, are required to conform to certain standards. Those standards are achieved through the operation of the law. The particular area of the law that performs this function is administrative law.

Administrative law
The state is very powerful and well resourced in comparison with an individual. Administrative law attempts to ensure that justice is done between the state and the individual by embracing particular principles that operate to restrain arbitrary or wrong decision-making by the state. These principles are openness (often described as transparency in cases), fairness, rationality (including giving reasons for decisions), impartiality (which means that decision-makers should be independent), accountability, the control of discretion, consistency, participation, efficiency, equity, and equal treatment. Public bodies must also take account of service users’ legitimate expectations (which means strong indications that the user can rely on public provision). These principles can be collectively described as the requirements necessary for fairness, and are often referred to as the requirements of 'natural justice'. Sometimes these principles conflict, and then the decision-maker must weigh up the various principles and make the best decision he or she can in the circumstances (see box).

A home for life
When the local health authority decided to close the residential home in which she lived, Mrs Coughlin applied for a judicial review of the decision since, she had been promised the residence would provide her with a home for life. The court ruled that the closure decision was unfair, particularly in the light of the promise made to Mrs Coughlin, and could not be justified by an overriding public interest. [R. v North & East Devon Health Authority ex parte Coughlin (2001) QB 213]

Further information
For more information on the operation of the law see ‘e-Learning: law and social work.'
Section 2: Brief summary of key legislation

The Human Rights Act 1998 (HRA)
The HRA came into force on 2 October 2000. It enables individuals in the United Kingdom to enforce – in British courts – 16 of the fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR). This makes Parliament and public bodies more accountable to UK citizens through the courts. The fundamental rights include rights which impact directly on service provision in the health and social care sector, such as the right to life, the right not to be subjected to inhuman or degrading treatment, and the right to family life.

The HRA builds on the mechanisms in the ECHR which recognise that a balance has to be reached between rights and responsibilities. Not all rights are absolute and frequently practitioners are required to balance competing rights.

Further information
The Act can be found on the web at www.opsi.gov.uk/ACTS/acts1998/19980042.htm
Click here for explanations of articles of the Act particularly relevant to health and social care workers, with practical examples [Section 5 of this doc]
Click here for more on the balance of rights and responsibilities, with examples relating to health and social care [Convention rights in Section 4 of this doc]


Anti-discrimination legislation
Anti-discrimination legislation (sometimes known as equalities legislation) is designed to eliminate unjustifiable discrimination on legally specific grounds. It is constantly evolving, as society recognises new areas of inequality, and over the last 30 years a number of laws have been passed in response to changing public perceptions and the development of human rights law. The scope of the legislation is set out below. (*Regulations* rather than *‘Acts’* denote that they were passed as secondary (delegated) legislation.)

<table>
<thead>
<tr>
<th>Statute</th>
<th>Scope</th>
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<tbody>
<tr>
<td>Sex Discrimination Act 1975</td>
<td>• prohibits discrimination on the basis of sex or marital status</td>
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<td></td>
<td>• applies equally to discrimination against men and women</td>
</tr>
<tr>
<td></td>
<td>• also prohibits discrimination against a person on the basis of</td>
</tr>
<tr>
<td></td>
<td>gender reassignment</td>
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<tr>
<td>Race Relations Act 1976</td>
<td>• prohibits discrimination on the basis of race, colour, nationality</td>
</tr>
<tr>
<td></td>
<td>(including citizenship) national or ethnic origin</td>
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| Disability Discrimination Acts 1995 and 2005 | • prohibits discrimination against a disabled person – i.e. someone who has a disability as defined in Section 1 and Schedule 1 of the DDA  
• from December 2006 all public bodies have a duty to promote a duty disability equality |
<table>
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<tbody>
<tr>
<td>The Race Relations (Amendment) Act 2000</td>
<td>• places a duty on public bodies in carrying out their functions to have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups.</td>
</tr>
</tbody>
</table>
| Employment Equality (Sexual Orientation) Regulations 2003 | • prohibits discrimination on grounds of sexual orientation  
• the definition covers lesbians and gay men, heterosexuals and bisexuals  
• can include discrimination based on perception of a person’s sexual orientation or association with individuals of a particular sexual orientation |
| Employment Equality (Religion or Belief) Regulations 2003 | • prohibits discrimination on the grounds of religion or belief  
• no definition of religion or belief although the explanatory note to the regulations states that ‘courts and tribunals may consider a number of factors when deciding what is a ‘religion or belief’ (e.g. collective worship, clear belief system, profound belief affecting way of life or view of the world). |
| The Employment Equality (Age) Regulations 2006 | • prohibits discrimination on grounds of age  
• it is irrelevant whether the discrimination is because you are young or old |

**Anti-discrimination and public bodies**

Originally, protection against unjustifiable discrimination was provided to individual victims. More recently, public bodies (for instance, central or local government, state schools, health trusts and emergency services) have been given strategic duties to eliminate unlawful discrimination. The Race Relations (Amendment) Act 2000, for example, extends the original 1976 Act by placing a duty on public bodies to promote racial equality as well as eliminate discrimination. The Equality Act 2006 amended the Sex Discrimination Act 1975 in a similar way. Public bodies must publish race, disability and gender equality schemes, which are their action plans for implementing their statutory duties.

**Anti-discrimination in care**

Anti-discriminatory practice is fundamental to the ethical basis of care provision, and equalities legislation is critical to the protection of service users’ dignity. It imposes particular responsibilities on public bodies and service providers to avoid stereotyping and to respect service users’ diverse needs and cultural diversity. Providers of health and social care also have equivalent responsibilities to their employees.
Dignity in care

The legislation is designed to promote the dignity of citizens by ensuring that they are treated with respect. Together, these laws and regulations help to:
- prevent direct discrimination on the legally prohibited grounds
- prevent indirect discrimination unless it can be justified.

Direct discrimination occurs when someone is treated less favourably than someone else in similar circumstances on the grounds of their gender/marital status/race/disability/age and the treatment was detrimental.

Indirect discrimination occurs when a condition or requirement is applied equally to everyone but in practice the proportion of one race or gender who can comply is considerably smaller than other groups and an employee is unable to comply because of their race or gender and the employer cannot show the condition or requirement is objectively justifiable.

Further information
For more details see the website of the Equality and Human Rights Commission (EHRC) [link:www.equalityhumanrights.com]. This is a non-departmental public body (accountable for its public funds, but independent of government) which oversees equality and human rights law and practice. It has taken over the functions of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, as well as oversight of the workings of the Human Rights Act 1998.

Mental health and mental capacity legislation

Mental Capacity Act 2005 (MCA)
The MCA provides a statutory framework to protect and empower adults who may lack capacity (ability) to make all or some decisions about their lives. It also governs the way decisions can be made for an individual who lacks capacity to make specific decisions at specific times.

Section 1 of the MCA sets out five principles to support decision-making either by or on behalf of a person who may lack capacity. In brief:
- There is a presumption of capacity – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise.
- Individuals should be supported to make their own decisions.
- People have the right to make unwise decisions and making an unwise decision does not mean they lack capacity to make that decision.
- If someone lacks capacity then an act done or a decision made for them under the Act must be done in their best interests.
- Anything done for or on behalf of a person who lacks capacity should be the less restrictive option.

These principles promote the human rights of people who may lack capacity because they enshrine respect for individual autonomy and make it clear that we should always presume that a person has the capacity to make decisions unless it is established otherwise.
The government has published a Code of Practice to the Act, which provides guidance and information on how the Act will work on a day-to-day basis for anyone who works with or cares for people who lack capacity to make decisions, including family, friends and unpaid carers. Certain categories of people are legally required to ‘have regard to’ relevant guidance in the Code of Practice. That means they must be aware of the Code of Practice when acting or making decisions on behalf of someone who lacks capacity to make a decision for themselves, and they should be able to explain how they have had regard to the Code when acting or making decisions. Those categories include people acting in a professional capacity for, or in relation to, a person who lacks capacity and people being paid for ‘acts’ for or in relation to a person who lacks capacity. These categories include a variety of healthcare staff, social care staff (social workers, care managers, support workers) and others who may occasionally be involved in caring for people who lack capacity, such as ambulance crew, housing workers or police officers. They will often include care assistants in a care home and home-care workers.

Further information

For more details see the DH core training sets on the Mental Capacity Act www.dh.gov.uk/publicationsmentalcapacityact2005

Mental Health Act 2007 (MHA)
The Mental Health Act 2007 amended the MCA to respond to what has been known as the ‘Bournewood gap’ (see box). This refers to the lack of a procedure to challenge the deprivation of liberty of a person resident in a hospital or care home who lacks capacity to consent to that deprivation.

Mr L and Bournewood Hospital
Mr L, a 49-year-old man with learning difficulties and autism, was detained under common law powers as an informal patient in Bournewood Hospital for a period during 1997, on the grounds that he required treatment for a mental disorder. He did not have capacity to consent to or to refuse admission and treatment. In 2004 the European Court of Human Rights held that Mr L’s detention under common law was incompatible with Article 5 of the Human Rights Act (which is concerned with the right to liberty), because it was arbitrary and lacked appropriate safeguards. The European Court ruled that judicial review – which was the only way that Mr L had been able to challenge his detention at Bournewood – did not provide the kind of rigorous challenge that was required by human rights provision. [HL v United Kingdom (2004) ECHR]

The result of the Bournewood case meant that compliance with the European Convention on Human Rights required the process of detention in such circumstances to be formalised. It needed to be clear, for instance, who could propose deprivation of liberty for people like Mr L and for what purpose. There
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needed to be procedures for review of the detention and formal mechanisms – such as an appeal – by which detention could be challenged.

The Mental Health Act 2007 introduced the ‘Deprivation of Liberty’ or ‘Bournewood’ safeguards. These protect against illegitimate deprivation of liberty for people who do not have the capacity to consent to arrangements made for their care that would deprive them of liberty. Deprivation of liberty is to be avoided wherever possible and is only authorised if it is identified by independent assessment as a necessary and proportionate course of action to protect the person from harm. The MCA principles of supporting a person to make a decision when possible, and acting at all times in the person's best interests and in the least restrictive manner, apply to all decision-making in operating these safeguards.

The Mental Health Act also enhances the human rights of people who have a mental disorder. It requires the Code of Practice that is to be published in connection with the Mental Health Act 2007 to include a statement of the principles informing decisions made under the Act, which addresses the following matters:

- respect for patients' past and present wishes and feelings
- respect for diversity generally including, in particular, diversity of religion, culture and sexual orientation
- minimisation of restrictions on liberty
- involvement of patients or service users in planning, developing and delivering care and treatment appropriate to them
- avoidance of unlawful discrimination
- consideration of the effectiveness of treatment
- account taken of the views of carers and other interested parties
- respect for patients' well-being and safety
- account taken of public safety.

Further information
The Code of Practice for the Deprivation of Liberty Safeguards and training materials to support the implementation of this part of the Act are being developed at the time of writing this guide. Details of these will be put on the Department of Health and SCIE websites.
For the practical implications of the Deprivation of Liberty (Bournewood) safeguards, see [link to Section 5, Art 5 of this doc]

Legislation protecting vulnerable people from abuse
One important part of the drive to promote respect for and dignity of people using services is the recognition of their particular vulnerability to abuse. Part of the Dignity in Care initiative is zero tolerance of abuse. The need to safeguard service users from some of the risks they face has led to a range of statutory developments.

The Sexual Offences Act 2003 (SOA)
This Act modernised the law on sexual offences. In the past there had been difficulties in bringing prosecutions against individuals who committed sexual offences against people with mental disorders. Under the Act, any sexual
activity between a care worker and a person with a mental disorder is prohibited while that relationship of care continues. A 'relationship of care' exists where one person has a mental disorder and another person provides or may provide face-to-face care, where that care arises from the mental disorder. It applies to people working both on a paid and an unpaid basis and includes doctors, nurses, care workers in homes, workers providing services in clinics or hospital, volunteers and so on.

The offences in the Act relating to care workers apply whether or not the victim appears to consent, and whether or not they have the legal capacity to consent. Examples include the intentional sexual touching by a care worker of a service user who does not have the capacity to consent to that touching and a care worker causing or persuading someone with a mental disorder to engage in any sexual activity. Note that intentionality is important here. If a care worker follows the normal procedures for bathing and toileting this would be strong evidence that the behaviour was not intended to be sexual. In addition, the Act is not intended to interfere with the right of people with a mental disorder who have the capacity to consent to engage in sexual activity.

The SOA also attempts to make the prosecution of rape easier by clarifying the meaning of consent. Section 74 of the Act provides that someone consents to a sexual act if and only if he or she agrees by choice and has the freedom and capacity to make that choice.

Further information
More information on the SOA is available in a series of leaflets published by the Home Office which can be found at www.homeoffice.gov.uk/documents/adults-safe-fr-sex-harm-leaflet

Safeguarding Vulnerable Groups Act 2006 (SVG)
This Act sets out a new scheme which aims to help avoid harm, or risk of harm, to children and vulnerable adults by preventing people who are deemed unsuitable to work with children and vulnerable adults from gaining access to them through their work. The scheme will be introduced from autumn 2008 and replaces the Protection of Vulnerable Adults (POVA) List set up under the Care Standards Act 2000. It will

- provide employers with a more effective and streamlined vetting service for potential employees
- bar unsuitable individuals from working, or seeking to work, with children and vulnerable adults at the earliest opportunity.

The potential for enhancing the dignity of people using services is that the new Act will allow for more effective checking of staff, including workers in healthcare settings who are not covered under the POVA List. People receiving direct payments or individual budgets will also be able to access the scheme to make checks.

Further information
For further information and training on the new Act see (link to Home Office’s Safeguarding Vulnerable Groups Act site).
Information legislation

Information legislation is overseen by the Information Commissioner’s Office, an independent official body whose role is to promote access to official information and to protect personal information. All public and private organisations are legally obliged to protect any personal information they hold. Public bodies are also obliged to provide public access to official information. Specific obligations are set out in two important statutes.

The Data Protection Act 1998 (DPA)

Information held by public bodies is governed by the requirements of the Data Protection Act 1998 which requires data controllers who process personal information to comply with a range of data protection principles. In essence, this Act supports the importance of sharing information with people using services. There are very few exceptions to this. Enhancing the dignity of people using services demands that practitioners pay attention to confidentiality. There are some limits on confidentiality and these apply where there is a risk of harm to other people.

Data controllers are people, including organisations, who decide how and why personal data are processed. ‘Personal data’ refers to information relating to an identified or identifiable living individual which is processed automatically (including information processed on a computer) or recorded manually as part of a filing system or part of an accessible record. This will include records such as social services files. Processing covers anything done in relation to such data, including collecting them, holding them, disclosing them and destroying them. The eight data protection principles are key to understanding the Act:

<table>
<thead>
<tr>
<th>Data protection principles</th>
<th>Comment</th>
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<tr>
<td>Fairly and lawfully processed</td>
<td>Lawfully refers to the requirements found in the common law of confidentiality, administrative law (the processing must not be ‘ultra vires’, i.e., outside the authority of the organisation or contrary to statutory provisions) and with the provision of Article 8 of the European Convention on Human Rights.</td>
</tr>
<tr>
<td>Processed for limited purposes</td>
<td>Information is held for a purpose. You should be clear what that purpose is and the information should only be used for that purpose.</td>
</tr>
<tr>
<td>Adequate, relevant, and not excessive</td>
<td>Only necessary information should be held.</td>
</tr>
<tr>
<td>Accurate</td>
<td>You have a responsibility to ensure that the information is accurate and you should have systems in place for checking the accuracy, for instance confirming details with your service user.</td>
</tr>
<tr>
<td>Not kept longer than necessary</td>
<td>Once the reason for holding the information is past then the information should be destroyed.</td>
</tr>
</tbody>
</table>
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Processed in accordance with the data subject’s rights: should be destroyed. There should be a system in place for checking regularly the continuing relevance of information held. These are set out in Schedules 2 & 3 of the Act.

Secure: Non-authorised people should not be able to get access to the information. You should be clear who has authority to access information and who does not.

Not transferred to other countries without adequate protection: Information should not automatically be sent to other countries when the service user moves abroad. The new country may not have similar standards of protection of information.

Further information

For Department of Health guidance on data protection, see [web link to Data Protection (Subject Access Modification) (Social Work) Order 2000]]

The Freedom of Information Act 2000 (FoIA)
This provides statutory rights for members of the public requesting information. Under the Act any member of the public is able to apply for access to information (unless that information is covered by exemptions) held by a wide range of public bodies, including local authorities and hospitals. The FoIA imposes a duty on public bodies to adopt schemes for the publication of information which must be approved by the Information Commissioner.

Information legislation protects the human rights of service users by:
• ensuring that information held about someone is held only with a person’s consent and is held securely
• ensuring that personal information is only shared on a ‘need to know’ basis
• enabling service users in certain circumstances to have access to the information that is held about them.

Further information
Further advice on handling personal information can be found on the Information Commissioner’s website (link: www.ico.gov.uk)
Section 3: Dignity in Care’s relationship to human rights and equalities legislation

The government’s Dignity in Care initiative highlights that ‘High quality health and social care services should be delivered in a person-centred way that respects the dignity of the individual receiving them’. One crucial element of achieving dignity is for providers to understand the significance of human rights legislation.

The legal framework of human rights and anti-discrimination law requires that health and social care workers, alongside other providers of public services, respect the dignity of people using services. As the Department of Health points out in ‘Human Rights in Healthcare – A Framework for Local Action 2007’ [link to www.bihr.org/downloads/Health_framework.pdf], a human rights ethos is an important way to improve services:

Quite simply we cannot hope to improve people’s health and well-being if we are not ensuring that their human rights are respected. Human rights are not just about avoiding getting it wrong, they are an opportunity to make real improvements to people’s lives. Human rights can provide a practical way of making the common sense principles that we have as a society a reality.

Human rights principles are very closely related to other principles of good professional practice that have underpinned public service provision for a long time. Human rights and health and social care practice share an ethical basis of concern with the autonomy, privacy and dignity of people using services. So, even before the vocabulary of human rights was developed, good practice in the delivery of social and healthcare recognised needs for privacy and dignity, and also recognised the tensions between these requirements and the need sometimes to protect people in vulnerable situations from harm.

However, the introduction of the Human Rights Act provided a real opportunity to look at traditional practices in social care and health services. It puts the focus on the person using services and so is different from a paternalistic culture where assumptions are made by professionals about what is best for the people in their care. Instead it gives us a way by which individuals or their advocates can articulate demands on services. A judge, His Honour Justice Munby, emphasised the importance of human dignity in a case that concerned health and safety regulations. He said:

The recognition and protection of human dignity is one of the core values – in truth, the core value – of our society and, indeed, of all societies which are part of the European family of nations and which have embraced the principles of the Convention...The other important concept embraced in the ‘physical and psychological integrity’ protected by Article 8 [of the Convention] is the right of the disabled to participate in the life of the community...This is matched by the positive obligation of the State to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not ‘so circumscribed and so isolated as to be
Challenges to providers of care
One special feature of human rights requirements is that they may be enforced, or made to work, through legal action by people using services or their representatives. However, human rights cannot work solely through individual enforcement. The government takes responsibility for the enforcement of standards through guidance, inspection and regulation. In addition, organisations and individuals that deliver care and treatment need to understand human rights principles, accept challenges to the traditional way of doing things and adapt their practices in response. It is not only organisational policies or paperwork which must respond to positive participation in service delivery; everyday practices such as providing support with personal hygiene, eating and the discussion of confidential information with other people may be challenged by people using services and their advocates and will require responses from frontline workers.

This does not mean that every assertion of human rights must be complied with. Health and social care workers have a number of other legal responsibilities imposed on them, for instance through health and safety laws, through ‘common law’ duties of care, through legal requirements that personal information should be treated as confidential and processed in accordance with the principles of the Data Protection Act 1998 (see [add link to DPA above]) or through their contracts of employment, which may at times or in some circumstances appear to conflict with the necessity to respect human rights.

Particular dilemmas may face staff when there is a conflict between their legal responsibility to protect someone and that person’s human right to self-expression, for example, of their sexuality. Moreover, people work in organisations that impose a whole range of demands and targets on them and it can be hard to see the relevance of human rights to these targets, never mind their central importance. What is often required is a careful consideration of the human rights issues involved, which need to be weighed against the other duties imposed on provision. Depending on the nature of the right asserted the right should only be infringed if it is legitimate, necessary and proportionate to do so. The different types of rights understood by the Human Rights Act are explained in Section 4 [add link to section 4]

Whistle-blowing
Dignity also requires providers of care to challenge practices in their own workplaces, to make it clear when service users’ rights are being infringed. In extreme circumstances workers may have to contact external agencies such as local authorities or regulators to advise on possible malpractice. While this is essential for the protection of service users and organisations it can be a very risky step for individuals to take.

Some protection is given to employees who disclose malpractice, commonly described as whistle-blowing, by the Public Interest Disclosure Act 1998. This Act gives protection to those acting in good faith and with reasonable suspicion that malpractice has, is, or may be, occurring and who disclose this to a
manager or an employer. It protects employees from victimisation and dismissal. The Act is designed to ensure that organisations respond by addressing the message rather than the messenger and resist the temptation to cover up serious malpractice.

Families and friends may also find it difficult to raise concerns, and of course, people who are dependent on services may be very reluctant for fear of making things worse. Helplines (see below) may be useful sources of advice and support for anyone concerned.

Further information
Further information and support in connection with whistle-blowing are provided by the charity Public Concern at Work (www.pcaw.co.uk). See also [link to Whistleblowers section of DiC site]

National helplines include: Action on Elder Abuse (tel 0808 808 8141); Respond Helpline (0808 808 0700) and Voice (0845 122 8695). Others are run locally and details of them will be available from the local council.

The legal mechanisms for enforcing human rights
Generally, when someone has been the victim of a potential breach by a public body of their rights under the European Convention on Human Rights, the appropriate legal action will be judicial review of the public body’s action by the High Court. Such cases usually have to be taken within one year of the action that is the subject of the complaint. When the court considers the human rights issue raised it will review the law to see if the public body had any choice about the action it took. It will try to interpret the legislative basis of the public body’s action to see if it can be interpreted in a way which is compatible with Convention rights. If the legislation can be interpreted compatibly and the public body is found to have acted in breach then the court can remedy that breach using its usual powers.

The Human Rights Act also gives the courts a power to grant damages for breach of Convention rights. However, the courts are reluctant to do this and where they have made an award, the levels of damages have been quite small.

The greater political significance of the Human Rights Act lies in the actions the courts can take if the legislation cannot be interpreted compatibly. The courts’ powers depend on the type of legislation that forms the basis of the public body’s action. If the legislation was secondary legislation then the court may quash or disapply that legislation. However, if the breach arises out of primary legislation – an Act of Parliament – then the court cannot quash the legislation. This is because the Human Rights Act maintains the supremacy of Parliament, which must be recognised by the courts. Instead, what the courts can do is to make a declaration of incompatibility. Such a declaration will not make that Act invalid and the public body involved will not be acting unlawfully in applying the legislation. However, any declaration of incompatibility makes it clear to the government that there is a problem with the legislation and provides support for the victim in taking his or her challenge to the European Court of Human Rights in Strasbourg. This court hears cases brought against those states who are
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parties to the European Convention, and acts as a final decision-maker on allegations of non-compliance.

The burden of proof

One early example of a declaration of incompatibility arose in the case of Mr H. Under the Mental Health Act 1983 the burden of proof rested on the patient to show that he no longer suffered from a mental disorder that warranted his detention. The Act did not require a tribunal to discharge a patient who could not be shown to be suffering from a mental disorder warranting detention, and the courts found the lack of such a requirement amounted to unlawful detention and infringed a person's right to liberty. The court therefore declared sections 72 and 73 of the Mental Health Act 1983 incompatible with Article 5 of the Human Rights Act, which protects the right of liberty. The government acted quickly and reversed the burden of proof. [R. (on the application of H) v Mental Health Review Tribunal (2001)]

There is another mechanism built into the Human Rights Act, which is designed to ensure that all new legislation takes the European Convention into account. A minister who is introducing a Bill into Parliament has to make a statement as to whether or not the Bill is compatible with Convention rights and to highlight those provisions of the Bill which are relevant. All Bills are scrutinised by the Joint Parliamentary Committee on Human Rights. This is a committee of both Houses of Parliament which has considerable expertise in human rights law and is able to make proposals as to how a Bill can be made more compatible with Convention rights. It also carries out inquiries into problematic areas such as human rights and terrorism, and human rights and vulnerable people.

The legal mechanisms for enforcing equalities law

Discrimination arising out of employment is dealt with by employment tribunals. The time limit for starting the case is normally three months from the date of the last discriminatory act.

If the discrimination takes place outside the employment field (for instance in connection with the provision of care services), the case is brought in the county court. Proceedings have to be started within six months of the last act complained of, or eight months in the case of discrimination in education. The court can order damages to be paid, including compensation for distress to feelings, and an injunction requiring the discriminator to do or stop doing certain acts.

Service users (and employees) who wish to complain about discrimination can contact the Equality and Human Rights Commission (link to: www.equityhumanrights.com) for advice and support.
Section 4: Adhering to human rights law

This section
• provides a brief history of the Human Rights Act
• explains the features and terms of the Act relevant to dignity in care
• explores some of the potential and limitations of the Act
• provides examples of grey areas of interpretation relevant to health and social care.

The origins of the HRA

The primary purposes of the HRA are
• to enable the rights set out in the European Convention on Human Rights 1950 (ECHR) to be enforced through the UK courts
• to provide a check on the activities of Parliament and public bodies.


The most significant force behind the ECHR was the Second World War and its aftermath. The ECHR was designed to prevent a repeat of the rise of fascism and totalitarianism and to restrict the oppression of individual rights in the name of the state and in the name of the majority. As Lord Justice Sedley put it in a lecture to the Legal Action Group:

The Convention is a child of its time – the post-war years when the states of western Europe tried to set their faces both against the devastation of the recent past and against any new form of totalitarianism. So the Convention says many important things about due process, personal integrity and free speech and ideas; but nothing directly about the most elementary of all human needs, a right to enough food and shelter to keep body and soul together.’ [Lord Justice Sedley, ‘Legal Action’, December 2003, p.19]

British lawyers were actively involved in the drafting of the ECHR; the UK signed it in 1951 and the ECHR became binding upon its signatories in 1953. However, the UK for many years refused to incorporate the Convention into its domestic law. This meant that, prior to the implementation of the Human Rights Act in 2000, enforcement of the Convention’s provisions was through the European Court of Human Rights in Strasbourg and not through the British courts.

Since 2000 many people have relied on the Act to assert their individual rights under the Convention. Perhaps more importantly, public services have reviewed their provision to ensure that they comply with the legislation. However, a rights-based culture is not achieved only by individuals saying what their rights should be or asserting their rights or by organisational policy and practice documents. It requires people who are in the front line of service delivery to understand the requirements of the law.

This is a much more subtle demand than simply giving people their rights when they demand them; it requires an understanding of the law and the balancing
acts that are inevitable in society. Nonetheless, if frontline workers understand that there is a legal duty on them to avoid some of the routine indignities imposed on people using services, then the circumstances of many people’s lives will be improved. The case of Mrs Bernard (see box) illustrates the potential of human rights.

**Respect for family life**
Mrs Bernard, a severely disabled woman, lived with her family in inappropriate local authority accommodation. Despite the social services department having assessed her needs and recommended special adaptations so that, for instance, Mrs Bernard could access the bathroom, the High Court found that the local authority had failed to respond to the family’s needs. The court said that the local authority had positive obligations to enable the family to live as normal a life as possible and to secure Mrs Bernard’s physical integrity and human dignity. The lack of action by the local authority was a breach of Mrs Bernard’s right to respect for family life, under Article 8 of the Convention. [R. (Bernard) v Enfield LBC (2002) EWHC 2282]

**Explanation of some technical terms**
Before describing the nature of rights enshrined in the Convention, it is necessary to explain some of the technicalities about the ways in which they operate and summarise some important aspects of the Convention that frontline practitioners may find helpful when trying to make sense of this complicated area.

**Public bodies**
While the courts have to consider the Convention rights in all cases, even if they do not involve a public body, a person can only bring a case under the Act if the act or decision in question is one made by a public body.

A public body is best understood as a body carrying out a governmental or public function, although the exact remit of public body is still being worked out by the courts. Examples of organisations which are definitely public bodies include local authorities such as councils, central government departments, NHS trusts, and state-run schools, hospitals and prisons. It also extends to private companies that exercise public functions, such as companies that run private prisons. There are, however, grey areas. Some bodies have mixed public and private functions – for the purposes of the Human Rights Act they are described as ‘hybrid’ authorities. The question of which bodies are ‘hybrid’ has turned out to be complex. Many housing associations, for instance, carry out functions which courts may decide are public functions. However, other functions would clearly be private functions.

It is difficult to provide clear guidelines on whether a housing association is or is not a public body. In one important case (Donaghue v Poplar Housing and Regeneration [2002] EWHC 2559), the court decided that because the housing association concerned had a particularly close relationship with and was performing very similar functions to a local authority, then it was a public body. However, in another case heard the same year (Heather v Leonard Cheshire
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Foundation [2002] 2 All ER 936) the Leonard Cheshire Foundation, a charity providing residential care for disabled people, was held by the court not to be a public body.

A decision in this area made by the House of Lords in June 2007 highlighted the scope and limits of the Human Rights Act. It concerned the private provision of care in a care home to a woman who was publicly funded (see box).

**Public or private?**
A woman with Alzheimer’s disease, aged 84 years, was threatened with eviction from the private care home where she was living, because of what was said to be the bad behaviour of her family when they visited her. Medical opinion was that the woman, known as YL to protect her privacy, would be put at considerable risk if she were moved. Lawyers for YL argued that it was a breach of her human rights under Article 8 of the Convention (which covers respect for an individual’s home) if she were evicted. They argued in the House of Lords that the private care home was exercising the functions of a public body because the local authority had funded YL’s placement there after assessing that she was in need of care because of her condition. The private care home argued that it was not carrying out public functions but was a private body, and it said that the funding source of any individual service user is irrelevant. [YL. v Birmingham City Council [2007] UKHL 27]

The House of Lords, on a majority decision, found in favour of the care home. It decided that the provision of care services by a private body did not engage the provisions of the Human Rights Act, even in circumstances where a public body was paying the fees of the service user.

Where a service is provided by a private organisation, even though the provision is publicly funded, individual victims of bad treatment cannot claim the protection of the European Convention. They are limited to private law remedies such as breach of contract or proving wrongdoing.

There are three points to note here.
- Local authority care workers and support workers or nurses in the NHS and other employees of public bodies are bound by the provisions of the Act.
- The law may change. The decision in the case of YL was not unanimous: there is the possibility of a different decision in the European Court of Human Rights, and the Joint Parliamentary Committee on Human Rights has recommended changing the HRA to specifically cover publicly funded residents of private residential care homes.
- Finally, even if an organisation is not a public body, it is very useful for staff to be aware of the implications of the HRA. The Convention provides a sound framework for ensuring that service users’ dignity is preserved.

**Living instrument**
This is an important feature of the Convention. The Convention is a living instrument, which is designed to be interpreted in the light of current social and
cultural conditions. It is not ‘frozen’ in the 1950s when it was first drafted. So the fact that a challenge under the Convention has failed in the past does not mean that it will not succeed in the future.

The idea of rights as things that evolve as we become more aware of the impact of certain practices is particularly relevant to how people are treated in social care and health settings. For instance, what were once often seen as normal institutional practices in some care homes, such as putting residents to bed or providing meals at times that suited staff rather than residents, are now generally and rightly seen as unacceptable.

**Margin of appreciation**
This is a technical term that has lost some clarity in its translation from French. What it means is that the European Court of Human Rights will allow domestic courts (e.g. in the UK) some space to make decisions which reflect their national domestic concerns, rather than impose its interpretation on the way the rights laid out in the Convention should operate. This is particularly relevant when the domestic courts have to weigh up competing priorities, for instance the individual liberty of the service user and the reduction of risk to workers providing the service. Of course, the margin of appreciation can only go so far; the European Court of Human Rights does ensure some consistency in the interpretation of the Convention.

**Victims**
Only ‘victims’ can take action under the Act. What this means is that only people who have been directly affected by an act or omission of a public body can take action using the Act. This means that a patient pressure group, for instance, could not take action to enforce patients’ human rights. It could, however, be involved in any action taken by a person directly affected, providing support, expertise, evidence and so on.

Victims do not have to be UK citizens.

**Rights under the Convention**

The rights in the HRA are taken straight from the European Convention on Human Rights. Rights are formulated in different ways under the Convention, and are categorised as absolute, limited or qualified.

**Absolute rights**
Some rights are so fundamental that they are absolute. These rights include the right to protection from torture, inhuman or degrading treatment, and the prohibition on slavery. What this means is that if a practice – for instance toileting in full public view with no recognition of the need for privacy – is found to be inhuman and degrading, it cannot be justified because of necessity or public interest.

**Limited rights**
Other rights are limited, but can be breached only in the explicit and finite circumstances set out in the ECHR. In other words, the Convention itself provides exceptions to the general right.
One example is Article 5: the right to liberty and security. Exceptions include the power of the state to arrest and detain people suspected or convicted of crimes and the detention of people with ‘unsound’ mind. Article 5 also states: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ This has enabled people admitted to hospital under compulsion or ‘sectioned’ under mental health legislation to challenge the operation of mental health review tribunals for not being speedy enough and for failing to ensure that patients are discharged quickly if the criteria for detention are not met.

Qualified rights
Certain rights are qualified, which means that interference with them (i.e. action which limits someone’s freedom under a qualified right) is permissible only if:
- there is a clear legal justification for the interference
- the action is necessary to achieve a legitimate aim – legitimate aims are set out in each article of the Convention
- the action is necessary in a democratic society; in other words, there must be both a pressing social need and the action taken must be proportionate to and no greater than the problem it seeks to resolve.

Examples of qualified rights are the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10). The wording of Article 8 illustrates what is meant by a qualified right.

Paragraph 1 of Article 8 sets out the right:
Everyone has the right to respect for his private and family life, his home and his correspondence.
(When ‘he’ is written in a law it includes ‘she’.)

Paragraph 2 sets out the limits:
There shall be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

So, in certain carefully defined circumstances Article 8 rights can be interfered with.

This Article is particularly important in connection with the provision of personal care services and with the handling of confidential information. The limits on Article 8 that are particularly relevant for care workers are where an action that would interfere with someone’s Article 8 rights is necessary for the protection of health or morals or for the protection of the rights and freedoms of others. This does not mean that the right can be overruled in all circumstances, for example, where the practitioner considers that the health of the service user is at risk. It is also necessary that the acts which make up the interference with a person’s
human rights are proportionate to the aim of the interference. The examples below explain what this means.

Proportionality is a particularly important requirement. Interference with rights is not justified if the means used to justify the aim are disproportionate. For instance, a care worker may be concerned that a service user is at risk from traffic if she or he goes out alone. It would be disproportionate to the risk to lock the person in their room to ensure they were not injured in traffic. Medical treatment without consent poses particular problems. It cannot be imposed on someone except in very limited and statutorily defined circumstances that are supervised by the courts.

A more straightforward example is that the state can interfere with a person’s right to a family life if a child will suffer significant harm by remaining with the family, but not because the child will have a better standard of living if taken away from the family.

The qualifications on Article 8 mean that an individual’s freedoms must always be balanced against public safety – and remember that the state has a responsibility which is set out in Article 2, the right to life, to protect the safety of its citizens. So, as long as the interference with the person’s private life is legitimate and proportionate, the rights of individuals can be breached.
Section 5: Relevant articles in the Convention of the Human Rights Act

All the articles of the Convention covered in the HRA may relate to people who use services and their carers in certain circumstances, and practitioners should be aware of them. Those highlighted here are of particular relevance: click on them for further explanation, practice points and practice examples.

- Article 2: establishes a right to life
- Article 3: is the right not to be subjected to torture, inhuman or degrading treatment
- Article 5: provides a right to liberty and security
- Article 6: ensures the right to a fair trial and to innocence until proved guilty
- Article 8: provides the right to respect for private and family life, for home and for correspondence
- Article 10: provides the right to freedom of expression
- Article 14: prohibits discrimination in the ‘enjoyment’ of Convention rights

Further information
For further discussion of these articles see the Ministry of Justice study guide www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf

The full text of the Convention rights included within the Human Rights Act, can be found in http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm

Five training packs for frontline workers are available at www.dh.gov.uk/publicationsMental Capacity Act 2005

There is very useful guidance to the Act in SCIE’s e-learning tools: [link to http://www.scie.org.uk/publications/elearning/law/index.asp]

Article 2: a right to life

Individuals have the right to have their life protected by law. There are only certain very limited circumstances where it is acceptable for the state to take away someone’s life, and in certain circumstances the state has positive duties to protect life. One example is where someone is a prosecution witness whose life is under threat (see box).
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**Witness for the prosecution**

Mr Van Colle, who was to have been a witness against a former employee charged with theft, was shot dead by the accused before the trial. Van Colle had received threats against his life, and the Court of Appeal ruled that the state had breached Article 2 in failing to take the measures within the scope of their powers that, judged reasonably, might have been expected to protect their witness’s life. The court made it clear that, where it was established that the state authorities knew or ought to have known of the existence of a real and immediate risk to the life of an individual as a result of the criminal acts of a third party, the state had a positive obligation under Article 2 to take preventive, operational measures to protect that individual. [Van Colle v Chief Constable for Hertfordshire (2007)]

The positive obligations on public bodies to protect life mean that failure to take necessary precautions may be a breach of Article 2. Cases where breaches of Article 2 have been claimed include destitute asylum seekers who could not access healthcare or subsistence and prisoners forced to share cells with violent cellmates who may place their life in jeopardy.

Examples of potential breaches of particular relevance to organisations in the field of health and social care might include:

- failure to observe necessary procedures to reduce the risk of infections in hospital and care settings
- failure to protect a vulnerable person in a residential care home who was killed by an abusive relative, or a failure to investigate any such death properly
- failure to assess and treat someone in care who was at risk of suicide
- a decision to move frail or vulnerable people from a residential care home resulting in illness or death
- a day centre user dying as a result of the administration of drugs by unqualified staff
- staff in a care home failing to follow a doctor’s recommendation to check hourly on a resident during the night

**Practice points**

Organisations should have:

- regimes which ensure that the health and safety of service users, such as patients, residents or users of day care services, are prioritised
- regular risk assessments of the premises and of routine practices so that all risks are identified and managed
- strategies for identifying, minimising and managing the risks of transfers of service users from one residential home to another location
- appropriate management to check that health and safety requirements are adhered to by all staff
- training on health and safety so that all staff understand the importance of these procedures.
**Practice example**

Miriam is very frail and unable to feed herself while in hospital. The catering staff place her meal out of reach, and the nursing staff neglect to assist her with eating. As a result the catering staff remove untouched food and Miriam's lack of food intake goes unnoticed. Food and drink are basic requirements of life, and failure to have a system in place to provide help with eating or drinking where required could potentially be a breach of Article 2. Miriam should alert a member of staff and later on, she or her family might wish to make a complaint to the hospital, through the Patient Advice and Liaison Service (England) or Hospital Complaints Service (Wales).

The closure of a residential care home where the residents are frail poses particular challenges. Policies should be in place to ensure that the risks to residents are minimised and managed. They should, for instance, include a medical assessment of the risk of transfer when assessing residents’ needs, consideration should be given to moving staff along with residents to new or refurbished homes, and transfers should be postponed until a time when any risk is minimised. For instance, moving vulnerable people during the winter months may increase the risk of fatal illness.

**Further information**

For more details of human rights implications, see the Age Concern Information sheet [link to: www.ageconcern.org.uk/AgeConcern/Documents/IS10_0404.pdf]

**Article 3: the right not to be subjected to torture, inhuman or degrading treatment**

Inhuman and degrading treatment can arise as a result of failure to assess an individual's need for services and a failure to provide necessary services in a timely manner and at an appropriate level. Article 3 could be relevant to failures by public services to protect vulnerable adults from abuse or neglect. In social or healthcare settings practices such as tying residents of a care home into chairs would almost certainly be inhuman, and it could be argued that failure to prevent and treat bedsores could be a breach of Article 3.

Under the National Health Service and Community Care Act 1990, local authorities have a duty to provide information, a duty to assess (section 47) and a duty to promote equality under the Race Relations Amendment Act 2000.

The threshold for breach of the Article is high, and not all treatment that we might consider being undignified would breach the Article. So, for instance, neither of the following was considered to breach Article 3:

- the restraint of a prisoner, including the use of handcuffs, during medical treatment and the presence of security officers during medical consultations and treatments, as any interference was proportionate to the risk the prisoner posed [R. (on the application of Botmeh) v GSL UK Ltd (2007)].
- the strip-searching of the mother and half-brother of a prisoner awaiting trial for drugs offences, given the suspicions with regard to the prisoner and the fact that there was an endemic drugs problem in the prison. However, it was noted that the procedures were lax and had been
conducted with a regrettable lack of courtesy. Also, the strip-searching was found to be a breach of Article 8 rights, because the interference was not proportionate to the legitimate aim [Wainwright v United Kingdom (2006)].

Despite the high threshold it is important to understand that its purpose is to ensure that everyone is treated with dignity, and the approach of a good service ought to be aimed at preserving dignity, rather than on what level of indignity the law is prepared to tolerate. The focus should be on the dignity of people using services. Dignity means treating each person as an individual and with the same respect as we would want for ourselves or members of our own family. (For more on the meaning of dignity, see [link to Dignity in Care intro page - definition]).

Further information
For more detailed guidance on aspects of dignity linked to abuse, see [Link to Abuse section in guide]
The Mental Capacity Act 2005 [add link to Section 2] offers another route to challenge wilful neglect and mistreatment because it made these criminal offences when looking after a person who lacks mental capacity. For details of a set of useful information booklets for the public and for people working in health and social care see: http://www.justice.gov.uk/guidance/mca-info-booklets.htm).

Practice points
• Local authorities have a responsibility to ensure that any care home in which they place residents has adult protection or safeguarding services that will help practitioners, families and friends as well as residents take up their concerns about inhuman and degrading treatment.
• Every local authority and healthcare organisation should have policies and procedures in place to protect vulnerable adults from abuse or neglect and to provide redress should abuse occur. Relevant to this would be a robust complaints procedure and a whistle-blowing procedure.
• Staff’s rights to whistle-blowing may be important to remember when they feel that they are witnessing inhuman or degrading treatment. [add link to Whistle-blowing in previous section]
• Local policies about adult protection or safeguarding give details of local contacts.

Practice example
In a decision relevant to social and healthcare, the Court of Appeal ruled that the denial of state benefits to late applicants for asylum was incompatible with Article 3 [CA 18 March 2003].

Most degradations occurring in the realm of health and social services, however, arise from a lack of thought rather than malice or intended inhumanity. For example, a regime where food is given at the same time as a person is using the toilet may be explained – but not excused – by understaffing and lack of training. Staff need to be alerted to the unacceptability of such degrading behaviour and a new regime implemented that restores dignity to the service user.
Article 5: a right to liberty and security

This means that a person can be detained only in certain circumstances, following a proper, lawful procedure that provides the detainee with opportunities to challenge their detention.

Tribunals and courts that hear challenges to detention must conform to a high standard of procedural protection. When three prisoners challenged the operation of the parole board, the court found that the structure of the parole board and the way that it was controlled by the Secretary of State were such that it did not enjoy the independence from the executive necessary for a court under Article 5. [R. (on the application of Brooke) v Parole Board (2007)]

The significance of Article 5 was illustrated by what has become known as the Bournewood case (see [link to: Mental Health Act 2007 in Section 2]). The European Court of Human Rights held that the routine detention of incapacitated adults in the UK was in breach of their Article 5 rights. In its judgment the European Court said that:

the key factor in the present case [is] that the healthcare professionals treating and managing the applicant exercised complete and effective control over his care and movements.

and

the applicant was under continuous supervision and control and was not free to leave.

As a result, the government introduced the Deprivation of Liberty safeguards (under the Mental Health Act 2007).

Understanding the Deprivation of Liberty (Bournewood) safeguards

Briefly, the managers of care homes or hospitals who identify that a person who lacks capacity is being (or risks being) deprived of their liberty, must apply to a ‘supervisory body’ for authorisation of the deprivation of liberty, unless it would be appropriate to detain the person under the Mental Health Act 1983 or 2007.

When a person in this position is staying in a care home the supervisory body will be the relevant local authority. Where the person is in a hospital it will be the relevant primary care trust, or, in Wales, the National Assembly for Wales. In an emergency, the care home or hospital management can itself provide an urgent authorisation supported by written reasons for a maximum of seven days.

The safeguards are explained in more detail in the forthcoming Code of Practice (link to http://www.justice.gov.uk/docs/mca-cp.pdf). This is an essential read for practitioners working with people with ‘mental disorders’ in care homes and hospitals.

Practice points
- It may be difficult for care homes or hospitals to recognise that someone is being deprived of their liberty. Organisations must ensure that they have systems in place to consider whether care plans deprive an ‘incapacitated’ adult of his or her liberty. Staff must keep these cases under review and
ask the question about deprivation of liberty explicitly whenever a change is made to the care plan. This should be recorded in the person’s health and care records.

- Indications that liberty has been deprived could include: sedating a patient who is resisting admission, any decision that the person would be prevented from leaving if they made a meaningful attempt to do so and refusals of requests by carers for the person to be discharged to their care.
- The Code of Practice to the Deprivation of Liberty safeguards will be invaluable and should be easily accessible to staff in care homes and hospitals, and training should be taken up as soon as it is available.

**Further information**

**Practice example**
Mrs Bailey made arrangements to enter a care home when she could no longer walk and needed a lot of help looking after herself. Over the past months she has become increasingly confused and has been diagnosed with vascular dementia. She often tries to leave the home to ‘go to school’ and staff persuade her to come back. This seems to be the sensible thing to do, but at a care review, her key worker raises with the home’s manager the question of their right to do this: might this be construed as depriving Mrs Bailey of her liberty? They decide to contact the local office of adult services and ask to have the legal position clarified.

**Article 6: the right to a fair trial and innocence until proved guilty**

This concerns the requirement for civil rights to be fairly determined, and for criminal trials to contain full procedural safeguards. Article 6 has been the most litigated of the Convention articles, particularly in the criminal sphere. Cases have made it clear that Article 6 rights arise when, for instance, a care worker is placed (even temporarily) on a list of people prevented from working with vulnerable adults (the Protection of Vulnerable Adults, or POVA, List, introduced by the Care Standards Act 2000).

The basic right is to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and each of these elements of the right is important. Article 6 does not only apply to court hearings. Decisions by public bodies which deprive people of their rights should comply with the Article. The Charity Commission has produced principles for fair decision-making. These set out, for example, that decisions and decision-making processes should be open, fair, timely and impartial, that decisions should be communicated in a way that will not overawe or confuse the recipient, that the decision is, and can be seen to be, free from personal prejudice or bias and making sure that case files or other records demonstrate a clear trail of the
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decision-making process and never expressing biased or unsubstantiated opinions.

Further information
For more on the Charity Commission's guidelines, see http://www.charity-commission.gov.uk/supportingcharities/ogs

Practice points
• Ensure that service users have information about their legal rights.
• Maintain a list of local services that are experienced in working with people who may have communication difficulties or other needs (translators, for example).
• Provide service users’ legal representatives with advocates and communication specialists where this is necessary.
• Provide staff with practical training on legal developments when this is appropriate to their role and responsibilities.
• Develop procedures that make decision-making involving an individual’s rights transparent and fair, and ensure there is sufficient opportunity for individuals to put their case to the decision-maker.

Practice example
Mrs Turner says Mr Brown touched her inappropriately and, as part of the safeguarding adults procedure, the matter is being investigated and the police have been called. The situation is unclear, because Mrs Turner has dementia and has accused other men of having touched her but the allegations have never been substantiated. On the other hand, although Mr Brown denies having touched Mrs Turner, he has been known to display inappropriate sexual behaviour. Safeguarding procedures must ensure that Mr Brown is not labelled as a sexual offender and that he has access to independent legal advice.

Article 8: the right to respect for privacy, home and family life

All rights of citizenship are relevant to private and family life under Article 8. A few examples of its wide range of influence include:
• the right to respect for one’s house and belongings
• the right to choice in personal relationships
• the right to confidentiality of personal data.

Article 8 limits the state’s interference with individual and family autonomy except in certain circumstances, such as taking a child into care or replacing the ‘nearest relative’ under mental health law. However, normal social and healthcare practices relate to an individual’s health and private life, and practitioners need to have a regard for the right to respect in many different areas. Below are just a few examples.

Article 8 and respect for the person
If the rules of somewhere such as a group or residential home prevent residents from forming and maintaining friendships or personal relationships with other people (such as partners, parents and children) they may be in breach of Article 8. Failure to provide community support which leads to someone being admitted
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to hospital under a section of the Mental Health Act 1983 or 2007 may well be a breach of Article 8. Indeed, in future, courts may decide that there are positive obligations on the government to enable people with learning disabilities or mental health problems to take part in the life of their local community.

Another aspect of respect for the individual arises with regard to assessments for social care services. Local authorities and other public bodies should ensure that assessments are carried out without avoidable delay, and that individuals are provided promptly with the social care they have been assessed to need (as required under the NHS and Community Care Act 1990). It is not good enough to say, for example, that a person need not be assessed under because they would be likely to have to pay for any services.

**Article 8 and respect for an individual’s home**
Service users’ rights to live in the home of their choice are an obvious example of a right protected by Article 8, and there has been important litigation on this issue. The decision of the health authority in the case of Mrs Coughlin (see [link to box in Section 2]), for instance, was successfully judicially reviewed because her needs had not been properly considered. The commitment made by local authority that the home would be permanent had not been properly taken into account, and there had been no demonstration of public interest in the closure. Not all commitments made to a service user will lead to a successful judicial review, however. In the case of Mr Lindley, the court found that he had not relied on the assurances made to him, to his detriment. Moreover, the local authority's knowledge of Mr Lindley’s needs had developed since it made the assurances, and it was right for it to have changed its conclusions as to how his needs were to be met. Further, even if there was an enforceable expectation, it was contrary to Mr Lindley’s welfare needs for the local authority to be required to move him to a new care facility. [R. (on the application of Lindley) v Tameside MBC (2006)]

**Article 8 and personal autonomy**
Article 8 also protects personal autonomy to a greater extent than care workers might expect. It means staff of public bodies, such as nurses or care assistants, must respect individual decisions unless interventions are legally sanctioned and required. This would include, for instance, the right of a person to behave against medical advice. This may be counter-intuitive to health and social care workers, because that behaviour might lead to a fatal outcome.

**Article 8 and privacy**
This Article also has an impact on in the ways in which we obtain and keep confidential information – asking someone for details of their medical condition in the hearing of other people, for example, may be a breach of the privacy protected by Article 8. In certain circumstances, it might be necessary and proportionate to share confidential information, but disclosure of confidential information has to be proportionate, which means people should only be given the information on a ‘need to know’ basis. What is required is an assessment of the reasons for disclosing information and a balance must be reached between those reasons and the common law duty of confidentiality and a service user’s rights to privacy.
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Further information

For healthcare see http://www.dh.gov.uk/en/Policyandguidance/Informationpolicy/Patientconfidentialityandcaldicottguardians/index.htm

And for social services see http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Actsandbills/DH_4015584

Department of Health guidance on rights and risks is available to download from [link to: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PoliciesAndGuidance/DH_074773]

Article 8 is the most open to interpretation and prompts particular dilemmas, because a service user’s assertion of Article 8 rights might conflict with professional and legal duties. A court has to balance society’s interests against those of the individual, between the rights enshrined in Article 8 and the rights and responsibilities of other people. (For more on these possible conflicts, see next section [link to Section 6].) What should be kept in mind for now is that this Article is qualified and not absolute. What this means is that the right can be interfered with, but only where that interference is necessary, legitimate and proportionate.

Particular difficulties may arise when a service user lacks the capacity to make decisions or consent to care or treatment.

Practice points
- Local authorities should take into account both the individual service user’s wishes and, where appropriate, those of his or her family and friends when making decisions about residential care and similar major moves. If it is hard to work out what a person’s wishes may be, in some circumstances an advocate may be appointable (see IMCA provisions of the Mental Capacity Act 2005 in the Code of Practice and the Department of Health training materials.
- Assessments for social care and other services should be carried out without due delay and appropriate services should be provided so that care and support are adapted to the needs and preferences of the individual as far as possible.
- Assessments should take into account all risks of service provision, including the risk of closure of a service. Something such as the closure of a care home or closing down a service may by itself seem to be only an organisational matter, but its loss may impinge on service users’ human rights.
- Service providers should record the decision-making process, ensuring that every effort is made to determine the service user’s preferences. This
is particularly important when service users do not have the capacity to make specific decisions for themselves

- Personal information should be stored securely and should only be accessed by people with authority to have it.
- Organisations should provide training for staff on the importance of confidentiality, pointing out the ease with which an individual’s rights to privacy can be breached and how this can be prevented.
- Effective complaints procedures need to be in place. These include organisations that are contracted to supply social or healthcare services under service level agreements; and should let people know how to take complaints about maladministration further, to the relevant Ombudsman system.

**Practice examples**
Mrs Jones worries that she has to disclose information about her medical condition to her community nurse in circumstances where other people can overhear. This is possibly in breach of her Article 8 rights to privacy. However, there is a notice in the waiting area of the health centre saying that patients are welcome to talk to the practice manager if they have any comments about the service. Mrs Jones does this and the health centre makes better arrangements about privacy.

Miss Sharma reports her distress to the Commission for Social Care Inspection when she has observed that care workers often shout across the corridor to one another details of the continence status of residents in which her aunt lives. She feels that this does not show respect for the residents’ privacy and dignity. The inspector takes this up with the home manager and the matter is resolved. Practices in care homes concerning matters such as this raise particular issues about the respect for human rights. Age Concern, with a number of other organisations, has produced an excellent leaflet, ‘Behind Closed Doors: Using the toilet in private’, which provides useful information on best practice. The leaflet is available on http://www.bgs.org.uk/Publications/dignity/BehindClosedDoors.pdf

**Article 8 and mental capacity**
The Mental Capacity Act 2005, which is built on human rights principles, helps resolve difficulties that arise through impaired mental ability. It protects and empowers people who lack capacity to make decisions or to consent to care and treatment in a variety of ways. Two particular aspects are that of acting in the best interests of the individual concerned, and that of restraint.

**Acting in a person’s best interests**
The Mental Capacity Act 2005 (sections 1–4) supports the common law principle that any decision or action taken on behalf of a person who lacks capacity to make this decision or consent must be in his or her best interests. What actually is in someone’s best interests depends on the circumstances of each individual case. Interventions, such as medical treatment, will be lawful where there is both a necessity to act, and any action is in the best interests of the incapacitated adult as long as
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- you abide by the law and Code of Practice, respecting people’s wishes and any advance decisions
- any action is proportionate
- when you have a choice of actions you choose the alternative which is the least restrictive of the service user’s freedom.

The MCA’s Code of Practice (http://www.justice.gov.uk/guidance/mca-code-of-practice.htm) is a key document for practitioners, who must have regard to it. It also applies to people who have been granted lasting power of attorney or who have been made court-appointed deputies.

**Restraint**
In the rare circumstances that restraint needs to be used, staff will be protected from liability (for example, criminal charges) if certain conditions are met. There are specific rules on the use of restraint, both verbal and physical, and the restriction of liberty, and these are outlined in Section 6 of the MCA Code of Practice, which notes that restraint should only be used as a last resort, or in exceptional circumstances.

If restraint is used, staff must reasonably believe:
- the person lacks capacity to consent to the act in question
- that it needs to be done in his or her best interests
- that restraint is necessary to protect the person from harm
- that it is a proportionate or reasonable response to the likelihood of the person suffering harm and the seriousness of that harm.

Restraint can include physical restraint, locking a door and verbal warnings to stop someone going somewhere or doing something but cannot extend to depriving someone of their liberty. Staff must be trained in this area, and they must record when and why they have restrained a person.

Restraint may also be used under common law (as distinct from the Mental Capacity Act 2005) in the rare circumstances where there is a risk that the person lacking capacity may harm someone else. Again, staff must make a record when and why they used restraint. The Code of Practice for the new Deprivation of Liberty safeguards, when it is issued, this will cover areas that might relate to issues of restraint.

Services users, or other people on their behalf, can complain if they think restraint has been wrongly used. Frontline practitioners are advised to seek advice about the legal position of people who they think are possibly being detained without legal safeguards. Whistle-blowing under the Public Interest Disclosure Act 1998 is an option for staff who feel that their concerns are not being addressed.

**Further information**

**Practice examples**
Samantha and Ben, who live in a group home for people with learning disabilities, start a sexual relationship. Samantha’s social worker talks to her independently about this decision and about the risks. Ben’s community nurse has a similar conversation with him. The practitioners ensure as far as possible that both have consented to the relationship and see their role as supportive. The rights of Samantha and Ben have been respected because the practitioners have worked with them to try to ensure that their best interests are considered but also that they have retained autonomy. The practitioners will record their discussions in the case records.

Carla, who has lived in a supported housing project since leaving care, has put her health at risk by eating an excessive amount of cakes and biscuits. The project workers decide, as they owe her a duty of care, that they should restrict her spending money so that she cannot binge on sweet things. In this example, Carla’s rights have been infringed. She has the capacity to make decisions; it is just that the staff think that what she is doing is not right for her. They may feel strongly that they are acting in her best interests, but they are overlooking her right to autonomy: her Article 8 rights mean that Carla has a right to her money and to make decisions about how to spend it. The project workers should tell Carla about why they are concerned, and put those concerns in writing; they should also ask for advice for themselves about the best way to progress, for example, from the local health promotion service.

**Article 10: the right to freedom of expression**

Everyone has the right to hold opinions and to express their views on their own or in a group. This applies even if these views are unpopular or disturbing.

The Article makes it clear that it is legitimate for the state to impose restrictions on freedom of expression in certain circumstances. These constraints must be prescribed by law and be necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This Article can cause difficulties because different people have different levels of tolerance. One person may see it as a freedom to express him or herself by listening to loud rock music; another may find the noise intrusive.

**Practice points**

- Work alongside residents and their advocates to develop a policy on freedom of expression and keep the policy under review.
- It is appropriate to allow people to display posters, for example, in their own room that may not be tolerated within communal areas.

**Practice example**

Some of the staff working in a group home are very upset by anti-abortion publicity material to which two of the home’s residents subscribe. The
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atmosphere of the home is tense. Everyone can see that people have the right
to self-expression in theory but it is hard for both groups to manage this in
practice. There is no legal answer to this problem, but the manager is likely to
have to exercise her skills at people management, and to provide opportunities
to listen to everyone who is concerned. She might suggest that the residents
make certain rules about what is best for communal areas of the home and
what might be best kept in people’s bedrooms.

**Article 14: prohibition of discrimination in the ‘enjoyment’ of
Convention rights**

This is not a freestanding article – it can only be claimed if the discrimination
affects an area which falls under another article of the Convention.

The grounds for discrimination are very broad; the article forbids discrimination
on any ground such as sex, race, colour, language, religion, political or other
opinion, national or social origin, association with a national minority, property,
birth or other status. Remember the important limit: it can only be invoked when
another article of the Convention has been engaged. In effect, it piggybacks on
the other articles of the Convention.

There is much potential for litigation in areas where health and social care
services are concerned. It is, for example, illegal to discriminate against adults
with learning disabilities in connection with any of their Convention rights. This
means, for example, that practitioners should with others to examine the quality
of provision of public services, including healthcare and housing, for people with
learning disabilities and consider their ability to access these services.

**Practice points**

- Staff should be alert to possibilities of discrimination. They should not
  automatically limit people’s experience, for example, because of their
disability. Any limit on activities should be justified, and those limits kept
  under review.
- Staff should receive training in how to avoid discrimination and know
  where to get advice. They should be aware of the services provided by the
  for Equality and Human Rights Commission.

**Practice example**

Daniel, a disabled person who also has a severe mental health problem, is told
he is not going to receive support services which will enable him to remain in
the community. He feels this may be because of his mental health problem. The
refusal of support services, he argues, is in breach of his Article 8 rights. He
additionally claims breach of Article 14. Daniel has the right to ask for an
explanation and if he is not satisfied with this he can seek legal advice. The
Equality and Human Rights Commission will provide advice if practitioners feel
that they are not able to find an easy and independent source of legal expertise
to assist in a position such as Daniel’s.

Remember that this is a summary, for full details see
www.echr.coe.int/convention/webConvenENG.pdf
Section 6: Summary of further legislation that supports Dignity in Care

Care workers in health and social care have a whole range of legal and professional responsibilities both to the people for whom they provide services and to others, such as their fellow workers and unpaid carers. These responsibilities are very important. Human rights should not be used as an excuse for failing to discharge those responsibilities. The Bichard inquiry (www.bichardinquiry.org.uk) into the murders of Jessica Chapman and Holly Wells highlighted concerns that confusions about the operation of human rights and data protection legislation caused failures to record essential information about alleged sex offenders. It was not the Human Rights Act that caused the difficulties but the failure to understand how it operates. The key point is that the human rights of any one individual do not override duties to ensure public safety. The response to this inquiry led to the Safeguarding Vulnerable Groups Act 2006 (link to relevant paras in Section 2)

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Circumstantial influences on dignity, such as the living conditions in care homes or the standards in day centres, are governed by a whole host of regulations.

National minimum standards
The first National Minimum Standards for Care Homes for Older People were published in 2001. They consist of 38 standards, each with an outcome for people using services. They set out a set of requirements to ensure that care is focused on a service user’s needs. The individual standards do not stand on their own, all the standards should be complied with and placed in the context of the Care Standards Act 2000 and its regulations.

National minimum standards in social care are an example of the chain of accountability. The interpretation of the national minimum standards in each care setting in England is the responsibility of inspectors from the Commission for Social Care Inspection. But, as the inspectors take a whole view of the care service and focus on the experience of the users of services, it is not always possible to define the interpretation of an aspect of the national minimum standards in isolation.

It is worth noting that, for employers, a particular lapse in standards can breach more than one area of law. For example, in a care home looking after incontinent residents, allowing pools of urine to lie on the floor would lower the living conditions of the residents to an unacceptably undignified level, but would also contravene the Health and Safety at Work Act (1974) for employees.

Food Safety Act 1990, Food Safety (General Food Hygiene) Regulations 1995 and Food Safety (Temperature Control) Regulations 1995
The Food Safety Act covers the preparation, storage and service of food and requires the registration of food businesses whether they are run for profit or not. A ‘food business’ includes canteens, clubs and care homes.
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For more on guidelines on food quality, nutrition and dignity at mealtimes, see [link to Mealtimes in Dignity in Care site]

Legal responsibilities

The fact that a responsibility is a legal duty generally means that any action that interferes with a qualified right, such as the rights in Article 8, is going to be seen as legitimate and necessary. It does not answer the question about proportionality (whether the action is excessive).

The Manual Handling Operations Regulations 1992 cover the transporting or supporting of a load (including people). While employers are required to ensure that they comply with the regulatory framework, this does not mean that an individual’s human rights can be disregarded. What is required is a balanced approach that reduces risks for workers while at the same time maintaining the dignity, privacy and autonomy of those they are caring for. The problem of lifting an overweight person, for example, must be solved not ignored (see box).

<table>
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<th>Heavy lifting</th>
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<td>The county council, concerned for the health of its employees, imposed a blanket ban on manual lifting of patients and other service users. Unfortunately this resulted in the certain people (known anonymously as A, B, X and Y) not receiving the community care to which they said they were entitled. There are detailed guidelines on manual lifting set out in the Manual Handling Operations Regulations of 1992, but the court held that these did not prohibit manual handling of people, nor operate a cut-off above which they would be too heavy to lift manually. Failure to lift these people could leave them stuck in a bath or on a lavatory, or suffering from bedsores. This created a potential breach of Article 3 of the Human Rights Act (the right not to be subject to inhuman or degrading treatment). Care workers’ rights to a safe working environment must be respected, but these require safe working practices to be devised, not blanket bans that restrict levels of service. [R (on the application of A and B, X and Y) v East Sussex County Council (2003)]</td>
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Responsibilities to carers

Family and friends who act as unpaid carers often play a vital role in maintaining the dignity of service users, particularly when the person they are caring for is incapacitated, either physically or mentally. There are legal responsibilities to carers and some of these are contained in the following Acts: Carers (Recognition and Services) Act 1995 (CRSA) Carers and Disabled Children Act 2000 Carers (Equal Opportunities) Act 2004.

Other responsibilities to carers are contained in the Mental Health Acts 1983 and 2007 and the Mental Capacity Act 2005.

In summary, the responsibilities for practitioners are to assess carers’ needs and to involve them in developing support for service users if that what both wish.
There may be circumstances in which responsibilities to carers appear to conflict with the human rights of service users. If a service user lacks the capacity to make a decision or to consent to care and treatment, then the provider of health or social care services must act in the best interests of that person.

It is generally in the best interests of the service user to have the carer involved in decisions about his or her care (but sometimes it is not). If there is a conflict between the best interests of the carer and the best interests of the service user, then the best practice is to seek advocacy and separate practitioners for both parties. It may be that independent advocacy services should be involved or commissioned to resolve the conflict. In some cases an independent mental capacity advocate (IMCA) might be able to act; the local authority and NHS trust will have details of how to contact this service locally and advise on what services it offers.
Section 7: Further reading

Human Rights
See also the Liberty guide to the Human Rights Act at http://www.yourrights.org.uk/

Discrimination law

Community Care
‘Using the law in social work’, Robert Johns, Learning Matters, 2007
Section 8: Glossary

Capacity – the ability to make a decision about a particular matter at the time the decision needs to be made. The legal definition of a person who lacks capacity is set out in section 2 of the Mental Capacity Act 2005 and elaborated upon in chapter 4 of the Code of Practice.

Common law – so called ‘judge made’ law. A system of law developed by the courts which depends upon judicial application of precedents decided in earlier cases. It is distinct from statute law which is legislation passed by Parliament.

Delegated legislation (or secondary legislation) Many statutes (which are primary legislation) give Ministers and other executive bodies, such as the Welsh Assembly Government, power to produce detailed regulations which are not debated by Parliament but have statutory force.

Declaration of incompatibility – this is a decision of the courts that informs Parliament that primary legislation may be in breach of the UK’s obligations under the ECHR. Parliament is not obliged to change the law as a result of a declaration of incompatibility.


Equity – principles of fairness developed by the courts to mitigate the harsh impact of certain common law rules. For example common law remedies are limited to damages (financial compensation) whereas equitable remedies such as specific performance (insistence that a party performs its obligations) and injunctions (orders preventing certain behaviour such as harassment) can be granted at the discretion of the courts.

European Convention on Human Rights – the document drafted by European nations who were members of the Council of Europe after the Second World War. It sets out the agreed rights and freedoms of individuals.

European Court of Human Rights – this court sits in Strasbourg, France and hears cases brought against those states who are parties to the European Convention. It acts as a final decision maker on allegations of non-compliance.

Guidance - this may be statutory or non statutory. It provides advice and assistance on the procedures for putting into actions provisions of statute. Statutory guidance –that is guidance authorised by statute - is more authoritative than non-statutory guidance. The Code of Practice under the Mental Capacity Act 2005 is an example of statutory guidance. Guidance does not have the force of law, but good reasons, recorded in writing, are needed to justify deviations from guidance.
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Human Rights – these are the rights and freedoms of individuals that have been agreed as fundamentally important in maintaining a fair society.

Human Rights Act 1998 – This Act contains, at Schedule 1, the fundamental rights set out in the European Convention and enables people in the UK to take complaints about human rights to UK courts.

Joint Committee on Human Rights – this is a committee of both Houses of Parliament which scrutinises proposed legislation with a view to determining whether or not human rights are respected. It also carries out inquiries into problematic areas such as human rights and terrorism, and human rights and vulnerable people. The website of the JCHR is (link)

Protocol – there are a number of protocols to the Convention. These are rights which are later additions to the rights under the Convention

Public authority – people who carry out functions of a public nature are likely to fall into the definition of public authority. The exact remit of public authority is still being worked out by the courts. Examples of organisations which are definitely public authorities are

- Central government
- Local government
- Courts and tribunals
- Prisons
- NHS Trusts

Statute – legislation passed by parliament. Statutes start life as Bills which are discussed in parliament. They become statutes – Acts – when they receive Royal Assent. Note an Act does not necessarily come into force when it receives Royal Assent. Different Acts have different implementation schedules which are either contained in the statute itself or announced later in parliament (for example, the Mental Capacity Act 2005 was not implemented until 2007, and then in two parts).