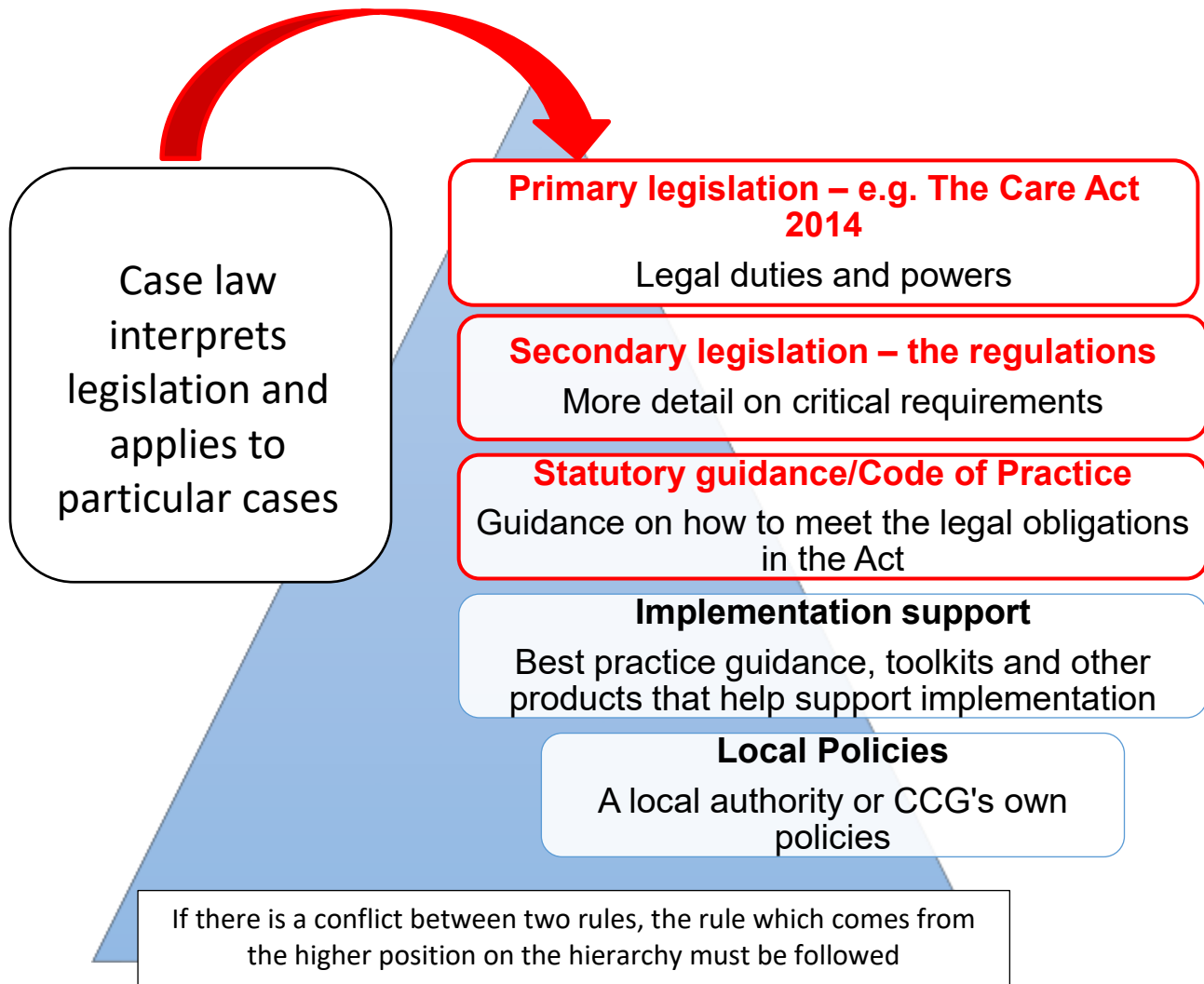


## Quick Guide: Legal Literacy

### The hierarchy of law



### Do we have to? Can we?

- “Must” means: this is LAW. The public body has to do it (whether or not it has the resources to do so and whether or not there are other obstacles to doing so). It is a **duty** in the Act or in the regulations.
- “Should” means: there isn’t a specific legal duty in the Act or regulations. BUT the government really wants the public body to do this and they have to unless they’ve got a really sound legal reason why not (not just “We don’t want to”)
- “May” means: the public body can do it if they want to (has the **power** to), but they don’t have to

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- “Should not” or “must not” means: that something would be unlawful and the public body is not allowed to do it

### **Specific vs General duties**

A **specific** duty is where the law says a particular organisation must do something for particular identifiable individuals:

e.g. s.18 Care Act “A local authority, having made a determination under section 13(1), **must meet the adult’s needs** for care and support which meet the eligibility criteria”

*A specific duty can potentially be enforced on behalf of a relevant individual (via Judicial Review)*

A **general** duty is where the law says one or more organisations must (or often only should) do something for people generally

e.g. s.2 Care Act “A local authority must provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will—

(a) contribute towards preventing or delaying the development by adults in its area of needs for care and support;”

*General duties cannot usually be enforced on behalf of a specific individual, provided there is some evidence of compliance overall by the public body*

## **Public Law Principles**

- Act **lawfully**: public bodies must comply with all laws (including human rights) and not fetter their discretion

Have you complied with all relevant law?

- Mental Capacity Act
- Equality Act
- Human Rights Act
- Care Act

No breach of duty of care breach i.e. not negligent

Other laws e.g. GDPR, criminal law

Avoid fettering discretion – where the local authority has discretion, it must be possible for a decision to be made on individual circumstances.

e.g. Act says “May” or requires LAs (or other public body) to make a **decision**

Local authorities must **decide** (would be fettering if all decisions pre-decided on a blanket policy regardless of evidence)

- Act **reasonably**: this only means **rationally** (i.e. a decision that a reasonable person could reach on the basis of evidence) that does NOT necessarily mean a decision you agree with

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That means not taking decisions which are so unreasonable that no professionally competent person would take them. Generally, courts do not like to second guess professionals **but** this will apply if the decision is really unreasonable/unrealistic. e.g. proposing to meet a continence need by providing one toileting visit a week e.g. **really serious** delays (how long depends on consequences)

- Act **fairly**: not making assumptions, due process, avoiding conflicts of interest, consulting properly, giving people a fair hearing

This means procedural fairness, not necessarily always giving people what they want

## Duty of Care

'Duty of Care' concept comes from the law of negligence. So, requires not being negligent, rather than eliminating all risks.

- Where harm is **reasonably foreseeable**
- Take actions **within your lawful power**
- Which are **proportionate** to the likelihood and severity of harm

## Human Rights balance

Duty of care must be balanced with an adult's right to self-determination



"When Steven, a young man with autism and a severe learning disability, went into a local authority support unit for a few days whilst his father was unwell, it took over a year for him to be returned home, against his and his father's wishes. A legal case decided that his right to liberty had been breached because of the delay in obtaining a Deprivation of Liberty (DoL) order, which also lacked proper review. Additionally, the authority's DoL assessment was flawed, including because it had not taken into account Steven's and his father's wishes. "The Human Rights Act saved Steven's life. If we hadn't used the Act, Steven would have faced a life in public care he didn't want or need."

Mark Neary, Steven's father, interviewed for BIHR's Human Writes, 2015.

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(Case: *Hillingdon London Borough Council v Neary* 2011)

Actions must:

- Be lawful
- Take appropriate account of the adult's capacity to make relevant decisions
- Be in line with the adult's wishes and feelings or explain clearly why they are not
- Balance the adults' rights against those of others, considering likelihood as well as severity of risks
- Balance professional's duty of care towards the adult with the adult's right to self-determination (whether or not the adult has capacity)
- Balance the importance of physical safety and wellbeing with emotional wellbeing, autonomy, privacy and family life.
- Be discussed with the adult and/or their representative

## Funding disputes

It is well established that **it is unlawful for disputes about funding responsibility to delay the provision of appropriate care and support**. Immediate funding must be provided to meet needs appropriately, if necessary, on a 'without prejudice' basis whilst any dispute between public bodies is resolved.

“The determination of ordinary residence must not delay the process of meeting needs. In cases where ordinary residence is not certain, the local authority should meet the individual's needs first, and then resolve the question of ordinary residence subsequently. This is particularly the case where there may be a dispute between 2 or more local authorities.” [Care Act Statutory Guidance 19.11](#) (applies to care and support provided under the Care Act)

“The safety and well-being of patients is paramount. No necessary assessment, care or treatment should be refused or delayed because of uncertainty or ambiguity as to which NHS commissioner is responsible for funding an individual's healthcare provision. As explained in the new arrangements for resolving disputes (Appendix 1), where substantive disagreements do arise, and they cannot be resolved swiftly at local level, the commissioners involved must agree a) that one of them will make arrangements for the patient to be assessed and to receive necessary care or treatment and b) that they will share the costs equally between them, on a “without prejudice” basis, pending resolution of the disagreement. That way, the patient's assessment, care and treatment will not be delayed, and the provider will be paid promptly”

[Who Pays? guidance \(updated 2020\)](#) 1.4-1.5 (applies to care and support provided via CHC, FNC and s.117 aftercare under the Mental Health Act)

See also: [R \(on the application of Raja & Hussain\) v LB Redbridge \[2020\]](#)

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## Where to find more information

### On Legally Literate Social Work with Autistic People

- [Social Work with Autistic People](#)

### On the Care Act

- [Care Act Guidance](#)
- Mandelstam, M (2017) Care Act 2014: An A-Z of Law and Practice. London: Jessica Kingsley
- Community Care articles such as:  
<https://www.communitycare.co.uk/2019/12/04/councils-risk-payouts-failing-meet-care-act-duties/>

### On Mental Capacity Law

- [Mental Capacity Act Code of Practice](#)
- [DoLS Code of Practice](#)
- [Capacity Assessment Guide](#)
- [Best Interests Assessment Guide](#)
- [Mental Capacity Law Guidance notes](#)
- Brown, R, Barber, P & Martin, D (2015) The Mental Capacity Act 2005: A Guide for Practice (3<sup>rd</sup> Edition). London: Sage
- [Law Society DOLS A Practical Guide](#)
- [Mental Capacity Law and Policy](#)
- Wills-Goldingham et al. (2016) Court of Protection Made Clear Bath: Bath Publishing

### On Mental Health Law

- [Mental Health Act Code of Practice](#)
- Hale, B (2017) Mental Health Law. Croydon: Sweet & Maxwell
- National Autistic Society - [Autism Inpatient Mental Health casework service](#)

### On Human Rights

- [British Institute of Human Rights Practitioner Guides](#)

### On Public Law

- [Public Law Project \(2018\) An Introduction to Public Law](#)

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