



Leading, managing, caring

Understanding leadership and management in health and social care

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Chapter 19 Law, leadership and management

Rod Earle (with acknowledgement to Ann McDonald and Jeanette Henderson)

19.1 Introduction



Figure 19.1 ‘Be you never so high, the law is above you.’ (Sir Thomas Fuller, 18th-century lawyer)

The job of a manager is commonly imbued with ideas about power, hierarchy and authority (Wajcman, 1998). These are also features of law. As Figure 19.1 suggests, law is ‘high and mighty’ – it stands above us. Of course, it would be simplistic to think that either law or management could be reduced to this image, and most of this book is dedicated to demonstrating this. However, this chapter focuses on law and how it works in the context of practice in health and social care.

This chapter develops the building block **contextual awareness** introduced in Chapter 1. This involves some appreciation of quite complex legal frameworks. This chapter will examine the way in which general frameworks of law help to structure management practice and create opportunities to demonstrate leadership. In looking at these

frameworks, law is characterised as a *dynamic* process rather than static rules set in stone. The idea of law explored here is that it is a continuous articulation, combining personal practice and social procedure, belief and aspiration, and is subject to review and revision rather than blind obedience. Legislation does not make decisions: it simply sets the parameters and provides the framework within which leaders, managers and practitioners make decisions. In this characterisation, the law does not just sit above you; it runs through you.

This chapter addresses the following core questions.

- How does the law operate in the workplace in relation to leadership and management?
- What are the legal frameworks for health and social care provision?
- What dilemmas, tensions and conflicts are front-line managers in health and social care likely to encounter with legal issues?
- How does knowledge of the law and legal frameworks give managers in health and social care leadership opportunities?

19.2 The background and context of law

There is some obvious correspondence between the job of management and the way the law works. Management, like law, is often concerned with decision taking and rule making. Law is frequently seen as impersonal and abstract: something ‘out there’ to be obeyed. Law has great authority, enormous power and somehow ‘sits above people’. Perhaps that is also a common experience of (or even aspiration for) some managers but it is not the model endorsed in this book.

The words at the start of this chapter – ‘Be you never so high, the law is above you’ – were used in 1977 by a famous English Law Lord, Lord Denning. He used them in a controversial Appeal Court ruling against the Labour Attorney General, the highest legal authority in the land and a member of the government. The Attorney General had refused to allow a legal action against the plans of the Post Office Workers Union to boycott all communications with the apartheid regime in South Africa. The Union was extending solidarity action to the black South African liberation movement, led by the African National Congress and its imprisoned leader, Nelson Mandela. However, the Union found itself facing a legal challenge from an activist who wanted the courts to rule against its plans. The Labour Attorney General

refused him permission to take his case to court, and the Court of Appeal then overruled the Attorney General in a dramatic ruling in which Lord Denning quoted those words of the 18th-century lawyer Sir Thomas Fuller, on the ultimate reach of law's power. Denning's view was that no one should be refused access to a hearing through the courts and, in refusing the activist, the Attorney General had acted in a manner that was 'ultra vires' – meaning beyond his powers.

As with most issues of this kind, complex and intricate points of law were argued over at great length, but the case is also interesting, now, for the way it reveals wider relationships between law and norms, power and authority, the individual and the state. This story of law is all about history, politics and struggles. The apartheid regime in South Africa, and the formal institutionalisation of racism that it represented, have now been dismantled but, back then and there, it was the norm. It was legitimate because it was established in law and to oppose it was a crime in South Africa and pretty unpopular here in the UK in the 1970s. The law may seem to be 'above the fray' but, as history tends to reveal, it is rarely as neutral as it seems.



Figure 19.2 Dieu et mon droit – 'God and my right' – is the motto on the royal coat of arms. It hangs in every court in the UK, reminding everyone there of the divine source of the supreme power of law held, a little ambiguously these days, by the king or queen.

The authority of law derives from its position at the apex of a social hierarchy (Figure 19.2). But what has law got to do with leadership and management? Is it not just a question of following the rules, obeying the law, or operating within the code of the Health Professions Council (2008) or the Nursing and Midwifery Council (2008)? This aspect of legal power clearly reflects one of Wong's four-part typology of power – 'power-over' (see Chapter 1). However, it is an image that frequently

obscures the active presence of the other three dynamics of power in relation to law – ‘power-with’, ‘power-to’ and ‘power-from-within’.

Laws operate at a high level of abstraction but, in some ways, they are intrinsically linked to ideas about leadership – they provide a framework of rules, codes and conceptual structures that guide social, personal and institutional action. In an organisation, while it might be the ‘head’ or official ‘leader’ who is ultimately held accountable, the person who is most likely to be called upon to make initial judgements about these frameworks, and to be mindful of their local or agency-specific implications, is the front-line manager. Therefore, they will need the confidence to enact such decisions (power-from-within), working in conjunction with other people (power-with).

How a leader or a manager operates in relation to legal frameworks and the values of law thus communicates much about an organisation, and themselves as a person. These frameworks and values condition the dynamics of practice and the provision of services to clients and users. By exploring some of the relationships between law, management and leadership in health and social care, this chapter will build your understanding about personal conduct, professional responsibilities, and the legal frameworks that structure practice, organisations and institutions.



Try to identify three ways in which law works through you if you are, or have been, a manager.

Do we like this info box in the grey box? (extract tag).

Please note: you should *not* read this chapter as a detailed guide to specific legislation or refer to it as such a guide. There are more detailed, specific and appropriate forms of legal guidance available to managers in health and social care. Managers should identify these sources and be prepared to familiarise themselves with primary legislation and the accompanying specific guidance documents relevant to their occupational context. These can vary according to the devolved (and evolving) multinational character of the UK. Both Scotland and Northern Ireland and, to a lesser but still significant extent, Wales, have independent legislatures that can amend or originate laws and legal procedures.

If you are concerned about a legal matter, or about the legal implications of any policy, practice or decision, you should always seek professional legal advice. Your organisation or employer should be able to assist you in this respect.

19.3 Frameworks of the law

If you work in health or social care, you will be aware of the presence of law shaping your working environment. For example, if you work in children's social care, you will be aware of the significance of the Children Act 1989, the Acts that preceded it and remain relevant, and those that came after it to amend, refine or rescind its provisions. Table 19.1 lists just a few examples of specific legislation and the kind of frameworks they establish for practice.

Table 19.1 Examples of the variety of laws

Example of legislation	Area of law
Chronically Sick and Disabled Persons Act 1970	Gives authorities duties or powers to provide services and makes people eligible to receive services
Local Authority Social Services Act (LASSA) 1970	Gives authorities powers to intervene in people's private lives
Health and Safety at Work, etc. Act 1974	Sets conditions and terms of reference for employment and working conditions
Local Government Act 1993	Establishes the terms for setting up contracts for services and procedures for tendering
Data Protection Act 1998	Confidentiality and data protection
Freedom of Information Act 2005	Access to data and the sharing of information
Human Rights Act 1998	A person's civil and human rights
Care Standards Act 2000	Establishes minimum standards and inspection regimes for care providers
Equality Act 2010	Anti-discriminatory practice and prejudice
Public Financial Management Act 1999	Public financial management

Charities Act 2011	Charities or companies delivering services
Health and Social Care Act 2012	Establishes a novel financial basis for sustaining the National Health Service

As these examples show, laws establish a dense framework for health and social care practice, covering almost every aspect of human experience, and according to your area of practice, a range of further legal frameworks will also apply. For example, if you work in probation services or youth offending teams, some aspects of management will fall directly under the jurisdiction of the criminal courts and be determined by various features of the criminal law as it relates to sentencing and other features of criminal procedure. In certain specified circumstances, work with young children and some vulnerable adults who are deemed to be not legally competent will be determined by the Court of Protection in England and Wales, the Office of the Public Guardian in Scotland, or the Office of Care and Protection in Northern Ireland.

Managers may also need to be familiar with aspects of civil law concerning slander or defamation, for example, and they must remain mindful of the need to express themselves more carefully in their professional capacities than they might on a strictly personal basis. However, managers are not legal experts, and they are not expected to fulfil such a role. Managers should understand some of the general characteristics of law and how it operates in health and social care. These general characteristics are summarised in Table 19.2.

Table 19.2 Components of law

Component	Example
Statute law – legislation passed by parliament	Children Act 1989
Case law refers to rulings made by higher courts that are binding on lower courts. It is sometimes referred to as ‘common law’.	<i>R. v. Avon County Council parte ‘M’</i> [1994] 2 FLR 1006 – this case involved the recognition of the residential needs and entitlements of a young man, ‘M’, with learning difficulties (see below).

<p>Regulations are made by the Secretary of State for the enforcement of a particular area of policy and carry the full force of law. In Scotland, they are made by the appropriate minister in the Scottish Parliament.</p>	<p>Management of Health and Safety at Work Regulations 1999 (the Management Regulations) make more explicit what employers are required to do to manage health and safety under the Health and Safety at Work, etc. Act 1994. Like the Act, they apply to every work activity.</p>
<p>Guidance sets out expectations about the way the legislation should be implemented to bring about the intended purpose of the law.</p>	<p>'Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children' (HM Government, 2010) provides definitions of child abuse and neglect and guidance on what action agencies must take to protect children. It includes information about roles and responsibilities, local safeguarding children boards and Serious Case Reviews (conducted after the death or serious injury of a child). Some chapters form statutory guidance while other chapters form 'non-statutory practice guidance'.</p>
<p>Directions can be issued by a Secretary of State in order to place further duties on local authorities.</p>	<p>Section 7 of the LASSA 1970 (see Table 19.1) provides for the Secretary of State to produce directions for the exercise of social services functions.</p>
<p>Policies and Procedures are developed by individual agencies and reflect their particular ethos and practices; they must fall within what has been laid down by law.</p>	<p>Often included in Guidance to cover aspects of practice, e.g. complaints procedures and child protection or safeguarding procedures.</p>
<p>Codes of Practice are advisory and interpret specific legislation to make it more intelligible to practitioners and actual areas of practice.</p>	<p>The Nursing and Midwifery Council (NMC) Code of Conduct 2011 is a set of standards for practice that apply to registered nurses and midwives.</p>

<p>Occupational Standards are similar to Codes of Practice.</p>	<p>The National Occupational Standards for Social Work are organised around areas of competence, or key roles of social workers. For each of the key roles, there is a requirement to ‘understand, critically analyse, evaluate, and apply ... knowledge’ of the legal, social, economic and ecological context of social work practice, country, UK, EU legislation, statutory codes, standards, frameworks and guidance relevant to social work practice and related fields, including multidisciplinary and multiorganisational practice, data protection and confidentiality of information.</p>
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Operating in a framework

The words of a statute commonly include a variety of terms that qualify the actions of the law along the lines of various interpretations that have to be resolved in action. For example, a statute may say ‘so far as is reasonably possible’, ‘if it is in the best interest of ...’ or ‘as may be appropriate’. In doing so, the statute defers, to some extent, to the authority of circumstance and the need for judgment to be exercised ‘on the ground’ and close to specific contexts and realities. This element of discretion is vital, literally, in that it gives life to the law; it is how law works through people rather than simply telling them what to do. But it also makes it complicated. For example, a local authority will have a measure of discretion in defining who, according to various locally determined characteristics, is deemed to be ‘a child in need’ under the statutory provisions of the Children Act 1989, the Children (Scotland) Act 1995, or the Children (Northern Ireland) Order 1995. Equally, the definition of ‘aftercare services’ provided by statute in the Mental Health Act 1983 are not specified in the Act and have evolved through practice and precedent. For example, questions of mental capacity in Northern Ireland are not prescribed by law as they are in Scotland (the Adults with Incapacity (Scotland) Act 2000) and England and Wales (the Mental Capacity Act 2005).

Managers may determine who is entitled to a service, and how such access and such services can be delivered, according to national, regional and local frameworks which will vary considerably. The

challenges that then arise, and are successfully or unsuccessfully met, provide for the evolution of services and the recognition of leadership. But this process of justifying and accounting for decisions occurs within clearly established frameworks that specify the parameters for discretion. Managers must appreciate these parameters to operate within the law. The following terms used in legislation set some of these parameters.

- *Duty* – something an agency must do under law.
- *Powers* – those things an agency may do, but with a discretionary element that allows for choice, depending on circumstances.
- *Responsibility* – workers' responsibility to carry out their work in accordance with agency policy and professional values.
- *Remedies* – used to enforce rights or ensure powers are properly used.

Professionals have a duty of care and can be deemed negligent if there is a dereliction of that duty.

The procedures for deciding how services are provided, who is entitled to them and how they are delivered often involve extensive consultation. Skills for Health (the Skills Council for the Health Sector in the UK) canvassed widely for the views and experiences of health workers to produce more appropriate guidance and training materials for the manual handling of patients. It obliges employers to ensure staff are appropriately trained for lifting, to comply with Health and Safety at Work legislation, and delivers better care for patients, to comply with Care Standards legislation.

Procedures for consultation are sometimes spelled out as a 'duty' – the highest level of obligation – but all consultations provide for a process that should be as important as the decisions that emerge from them. Poor consultations lead to poor decisions and are commonly grounds for subsequent challenge.

What makes some consultations better than others? Consider how you have been consulted in decisions and/or how you have consulted others in arriving at decisions. How does consultation intersect with leadership?



Increasingly, legislation in health and social care is accompanied by specific, and sometimes quite voluminous, guidance. Managers are usually expected to be familiar with the guidance that applies to their area of practice or service. Guidance documents interpret how the

intentions of legislation are expected to be translated into practice and service delivery. They are issued as laws emerge from the parliamentary process but do not stop with their implementation. As practice and procedures develop, they generate new knowledge, encounter obstacles, and meet resistance and other kinds of practical difficulty. Guidance may be revised or updated and some legislation will include the power of substantial modification without recourse to parliament. This is an iterative process involving cycles of ‘doing’, ‘undoing’ and learning.

As a leader, it is not just your actions that matter; it is also the language you use. The language of leadership can be as important as your actions as a leader.

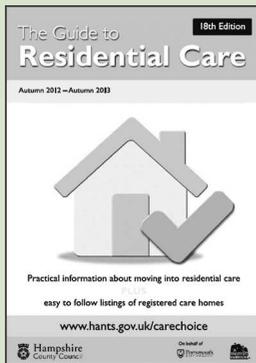
The guidance around child protection is an example of this process in which combinations of research, case law, policy crisis and institutional response generate the basis for the revision of guidance. The pendulum-swings between the terminology of ‘protection’ and ‘safeguarding’ demonstrate how language is implicated in this process. Managers need to remain alert to the sometimes subtle evolutions of this terminology in law, and its accompanying guidance, because of its significance for leadership as well as practice (see Featherstone et al., 2012).

Negotiating frameworks – balancing the law, agency policy and personal practice

Clearly, the laws that govern the provision of health and social care services form part of a complex framework. The manager’s role is to negotiate this framework by recognising how the components interact to shape services and practice. Managers are not (usually) trained lawyers and will not have spent years in legal practice. They are more likely to be conversant with national guidance and, more specifically, how this is expressed in the agency’s policy and procedure manuals. These manuals select and distil the most significant elements of legislation and its corresponding guidance as they are understood to apply to the agency’s role or service. They may have been contested through the courts and modified according to various findings because the courts are the ultimate decision-making body when interpreting the boundaries of practice and the reach of policy.

The following case study examines how law, policy guidance and judicial procedure interact in setting the parameters for management practice. The scenario involves responsibilities for providing accommodation but corresponding procedures are likely to apply in many areas of health and social care.

Case study 19.1: The cost of living



Mr Bogdan has been assessed as needing residential care. For a variety of reasons he prefers to reside at Gladevale, a privately run home, rather than the local authority's residential care home at PhoenixPark. The National Assistance Act 1948 and the guidance issued by the Department of Health (Choice of Accommodation) Directions 1992 combine to provide for an individual to seek a placement in what is called 'preferred accommodation'. This specifies that a service user's choice is limited only in that the accommodation has to be available on the local authority's usual terms and conditions. As long as Gladevale meets those criteria, Mr Bogdan is entitled to expect that he can live there. If the local authority or anyone acting on its behalf insisted that Mr Bogdan takes a place at its own PhoenixPark, it would be in breach of its duty not just to provide accommodation but also to allow a choice of accommodation.

Before 1992, Mr Bogdan may have been compelled to accept the local authority placement because his preferences had no force in law. Now they do. The commitment by the post-war national government to provide for people who are unable to provide for themselves has moved through several iterations, most notably for this scenario, the National Health Service and Community Care Act 1990. This law gave effect to the vocabulary of 'choice' and the principles of markets in social care. The endorsement in law of 'user choice' in the provision of health and social care presents managers with a further set of dynamics that must be incorporated into their practice. Even though the cost of accommodation must not be more than the authority would usually expect to pay, this is subject to the *overriding* requirement that the provision should meet

the user's individually assessed needs. Significantly, in such a case as Mr Bogdan's, the local authority has a duty to provide suitable accommodation and this *legal duty* overrides any question of resources.

(Based on McDonald and Henderson, 2003)

'Choice would be a fine thing!' Giving people choices sounds great but it can be deceptively complex. Which choices? Whose choices? How often can choices be made or changed? These are all questions that a manager may have to answer.

Today, the priority given to the consideration of specific personal circumstances, and the tensions it can generate, present managers with decisions that may be more open to challenge through the courts. One such influential case in establishing this priority was *R. v. Avon County Council parte 'M'* [1994] 2 FLR 1006. The local authority's preference was for M, the applicant, to be accommodated in one of their own residential homes. M, a young man with learning difficulties, was able to establish that only a placement in his preferred, and more expensive, accommodation with the Home Farm Trust would meet his psychological needs. The claim proceeded through the authority's complaints procedure and subsequently a full judicial review which affirmed that his needs were consistent with his preferences and thus took precedence over the authority's (McDonald and Henderson, 2003).

In many areas of health and social care, the assessment of needs is recognised as an independent service in its own right. Reconciling the satisfaction of these revealed needs with the resources available is subject to several procedures designed to ensure that, at each stage, critical decisions can be both identified and justified. In a significant ruling on balancing the availability of resources with meeting needs, the House of Lords ruled in 1997 on a dispute involving Gloucestershire Council (*R. v. Gloucestershire County Council, ex parte Barry* [1997] 2 All ER 1). They ruled that, while local authorities can take resources into account, they cannot assume they take precedence. The ruling established that rigid criteria on eligibility cannot 'trump' revealed needs. Decision-making procedures must demonstrate their capacity to be flexible enough to accommodate extraordinary circumstances. This places a responsibility on those involved in making decisions to justify their decisions. This justification may be challenged and end up in court where the ultimate ruling will be made.

Recruiting law for fair opportunities

Although the law and its corresponding guidelines provide a framework for management practice, this framework requires constant negotiation.

It is tempting to assume that, because it is written in law, it is set in stone but that is not quite how law works. The ambiguities and contingencies of social life remain an equally determining feature of actual practice. It is managers, though, who are frequently called upon to act decisively to clarify the fuzzy borders and intersecting logics of law and health or social care practice. Strong leadership is often required to do this effectively.

Tables 19.1 and 19.2 set out the basic characteristics of the framework and individual managers will identify the more prominent features of law that apply to their role. By looking at one relatively common area of management practice – the selection and recruitment of staff – you can see how leadership and management operate in, and give life to, these legal frameworks.

Staff recruitment has become a heavily regulated area of practice because research has revealed the extent and impact of discriminatory practice and unfair outcomes that disadvantage, for example, women, people with disabilities, and people in minority ethnic groups. Legislation and guidance in this area has thus become quite comprehensive. Most organisations will ensure that people who take part in shortlisting and interviewing applicants have attended fair selection training to give them some familiarity with the law, its associated guidance, their responsibilities and their agency's procedures. Even so, effective leadership may involve taking further action and developing practice. For example, the mental health charity Mind has issued detailed briefings on how disability discrimination is addressed in the Equality Act 2010. They include advice on how managers can lead changes in recruitment practice (see the website at www.mind.org.uk).

Research published in October 2009 by the Department for Work and Pensions showed that substantial discrimination in recruitment still exists towards minority ethnic people, despite efforts to remove some of the most blatant forms of discrimination (Wood et al., 2009). The study showed that, for those job applicants with a name suggesting they were from a minority ethnic group, rather than a name associated with the majority white heritage, there was clear evidence of unwarranted discrimination. For every nine applications sent by an 'apparently white' applicant, an equally good applicant with a minority ethnic name had to send 16 to obtain a positive response. For example, someone named Ofra Diouf was much less likely to be shortlisted for interview than someone named Helen Smith, despite having an otherwise identical CV.

Research on the psychological characteristics of prejudice indicates that some significant discriminatory behaviour operates below the level of routine consciousness – that is, people are unaware of the way it influences their behaviour. Some organisations have been forced to confront this issue of ‘implicit bias’ because of the persistence of unfair outcomes, despite extensive policies and training in addressing them (Taylor, 2012). The law (the Equality Act 2010) obliges them to do so but how it is done is down to the managers. It is often a sensitive issue because no one (almost without exception) likes to think of themselves as racist, or acting on the basis of prejudice. Managers can provide models of behaviour and practice that give staff better ways of dealing with prejudice, as indicated in the next case study.

Case study 19.2: Mahzarin Banaji and ordinary prejudice

Earlier this year, Mahzarin Banaji was in a shop when she saw a young woman dressed in what she describes as a Goth outfit. The young woman was covered in tattoos and had a number of facial piercings. Banaji turned away in distaste. Then she checked herself. She remembered her resolution to engage with people she might otherwise have avoided. She turned back. She made eye contact. She smiled, and initiated a conversation.

The reason Mahzarin Banaji talks to strangers is because in 1995, while working at Harvard University, she developed a test to measure unconscious racism (Banaji et al., 2003). Except she doesn’t call it unconscious racism. Others use that term about her work, but she doesn’t. She calls it ‘ordinary prejudice’, and it is that ordinary prejudice that she has resolved to overcome in her everyday life – anyway she can – sometimes by smiling and talking to complete strangers. Because having created the test, she took the test herself; and she didn’t like what she found. In fact she couldn’t believe it. She found she had unconscious bias – what others might call racism. Banaji says, ‘Being in a minority myself, I didn’t feel I would have any biases ... I was shocked and humbled ... and I was deeply embarrassed’.

(Wotton, 2012, p. 15)

Mahzarin Banaji's actions demonstrate her commitment to leading by example.

Equality laws establish a variety of expectations about how people should behave but understanding why people do or don't behave in certain ways is also important. Do you think it provides opportunities for leadership or problems for management?



19.4 Understanding statutory responsibilities

The law establishes that various agencies and organisations have statutory responsibilities that they must fulfil to comply with the law. For example, the Children Act 1989 establishes a statutory responsibility for local authorities to investigate whether a child is suffering or likely to come to significant harm. The Mental Health Act 1983 (England and Wales) requires an assessment of whether a patient has a mental disorder of sufficient magnitude to warrant their detention in the interests of their own health or welfare, or to protect other people.

Voluntary sector organisations are also vested with statutory responsibilities and must ensure staff are equipped to fulfil them. For example, the manager of a crisis telephone service has a duty to ensure that staff understand how their agency expects them to respond to suspicions or allegations of child abuse. They must also be aware of how these duties intersect with both partner and external agencies. They need to know that, once social services or the police are notified, these agencies will have a duty to investigate which will override any organisational policy on caller confidentiality, for example.

The idea of statutory responsibility is helpful in setting out for managers the boundaries of their field of action. It will determine where their agency's legal strategic responsibilities begin and end. The idea is so important it has become a distinctive area of administrative law defined by the concept of 'ultra vires', which you encountered in Section 19.2. If an action falls outside the statutory responsibility threshold, it may not be legal. Deciding what actions may or may not fall within the statutory responsibilities set out within any particular

piece of legislation has become a much more active area of law than when it was invoked by Lord Denning in his landmark ruling of 1977. Administrative discretion in the interpretation of statutory decision-making powers is guided by, and tested on, the assumption that a decision can be shown to be rational. This means that no reasonable person, or properly constituted official body, properly advised and informed, would be expected to reach another conclusion.

Culture and rights: the Human Rights Act 1998

The Human Rights Act (HRA) 1998 adopts into UK law most of the rights contained in the European Convention on Human Rights (1953). It means the relevant protocols of the Convention are directly enforceable in UK domestic courts. As a result, claimants no longer have to go all the way to the European Court of Human Rights (ECHR) in Strasbourg to obtain legal redress for a breach of the rights established by a Convention to which the UK is a signatory. One of the most significant effects of the HRA was to take the protection of these rights beyond the principles of ‘negative freedom’ (that is, ‘freedom from oppression’) to a wider conception of liberty based on ‘positive rights’ (that is, ‘freedom to live in certain ways that must be respected and protected’). This shift in emphasis means that the HRA is widely recognised as a statute of major constitutional significance (Klug, 2006), but one that remains poorly understood and underappreciated.

The HRA may be regarded by some people as a rather remote technical intervention: a matter for lawyers and judges rather than managers. However, nothing could be further from its intentions. The success, perhaps even survival, of the HRA rests on an, as yet unrealised, cultural shift that depends on the establishment of a ‘human rights culture’ (Gies, 2011, p. 169). This involves recognising that ‘individual men and women should understand that they enjoy certain rights as a matter of right, as an affirmation of their equal worth, and not as a contingent gift of the state’ (Joint Committee on Human Rights, 2003, p. 5). This sense of absolute, universal entitlement, and the protections and possibilities it provides, has been slow to emerge or manifest itself in public life (Klug, 2007; Ministry of Justice, 2008; Kaur-Ballagan et al., 2009). Instead it has animated in some parts of the media, for example, a regressive concern about an interfering ‘nanny’ state, or undeserving ‘victims’ sheltering under its protection, and even that it operates as ‘a villains’ charter’ (Gies, 2011).

Leaders and managers in health and social care may encounter a degree of scepticism towards the HRA, general ignorance about its intentions, or even hostility to the wider arena of equality and human rights. Understanding the dangers of the cultures of resentment and suspicion (see Gilroy, 2004) that frequently accompany such sentiments can help managers resist their socially corrosive effects. A robust and coherent advocacy of human rights is likely to be central to a manager's capacity to offer effective leadership around principles of equality and entitlement.

How would you recognise evidence of a human rights culture developing in your workplace? How could you encourage one?



Privacy and transparency: conflicts and tensions

The Data Protection Act 1998 was introduced in the UK in compliance with the European Convention's requirement to establish a clear right to privacy in domestic law. The Act establishes explicit rights in terms of access to files and provides a statutory basis for the protection of confidentiality. Because of these provisions, records have to be kept and maintained according to certain protocols. Under Section 14 of the Act, an individual can apply for the rectification or destruction of erroneous data. But establishing what is erroneous or inaccurate may be far from straightforward. Consider the example of an application for a care order that has been unsuccessful but still exists on a local authority's records. Can an individual ask for it to be destroyed because it constitutes inaccurate information about them? The application may have been dismissed but does that mean the information behind it was false, or simply that it failed to meet the threshold for such an intervention? Such are the tensions and dilemmas between providing rights and fulfilling responsibilities.

The boundaries between a duty of care that may intrude on certain rights to privacy are rarely clear cut or simple to negotiate (see Edwards, 2004). In England and Wales, the legal process attempts to strike a balance through involving legal advisers and guidance specific to certain professions or occupational settings. Managers should become familiar with their local arrangements for legal advice on matters pertaining to the Data Protection Act 1998, the Freedom of Information Act 2005 and the Environmental Information

Regulations 2004 They will be regularly amended and updated according to practice and precedence. As in all areas of practice, the law speaks more than once and managers are expected to remain conversant with the amendments and revisions that occur.

Given the intricate web of statutory requirements, regulations, guidance, standards and codes of practice that are in place, you might assume that the resulting legal context provides a foolproof system for ensuring good practice in the health and social care sector. Unfortunately, this is not always the case, as the next section on whistleblowing reveals.

19.5 Facing challenges, blowing whistles

On 31 May 2011, the BBC broadcast the *Panorama* film ‘Undercover Care: The Abuse Exposed’. The widespread public outrage that greeted the revelations of the abuse of vulnerable adults in care was matched only by the disbelief that it was apparently conducted under the noses of management and regulators. An earlier undercover investigation by *Panorama* on the medical ward of a failing hospital, aired by the BBC in 2005, led to the whistleblowing nurse Margaret Haywood being struck off the NMC’s register of nurses. The programme exposed the neglect of elderly and terminally ill patients. The nurse was eventually reinstated with a caution, after considerable pressure by the Royal College of Nursing and the public.

Public Concern at Work (2011) launched a report on the care sector, detailing its concerns about the non-exposure of abusive practice. The research included the following headlines.

- Over 15% of all whistleblowing concerns to Public Concern at Work’s helpline came from the care sector.
- Half are concerns about abuse in care.
- In 40% of cases whistleblowers’ concerns were either ignored or denied by management.
- In half of all cases where other staff knew about a risk they were either too scared or felt unable to speak up.
- Over 80% of the whistleblowers had already raised their concern before calling for advice. The majority said they wish they had sought advice from Public Concern at Work before taking action.

- Few care workers knew of or used their whistleblowing policy.

(James, 2011)

In a statement released after the programme in 2011, Cathy James, Chief Executive of Public Concern at Work, asked:

How much more of a wake-up call do our regulatory bodies, and particularly local authorities and the Care Quality Commission, need before they understand that they can learn more about the culture of a care home from information they receive from a concerned member of staff than they will ever receive from a planned inspection.

(James, 2011)

Both Lord Nolan in 2001 (CTS, 2001) and Cathy James in 2011 identified that the role of an occupational or organisational culture in sustaining or exposing malpractice is profound. The effects of organisational cultures are explored more fully in Chapter 12, but they will be painfully familiar to anyone who followed the revelations of the Leveson Inquiry in 2012 into the *News of the World* phone-hacking scandal. And it is not a problem confined to the cultures of the public sector. For example, organisational culture has been implicated in the collapse of Enron in 2001, WorldCom in 2002 and Lehman's Bank in 2008. It cost the CEO of Barclays Bank, Bob Diamond, his job in 2012. The slack standards that so rightly exercised Lord Nolan are writ large across corporate culture but it is the responsibility of managers in health and social care to demonstrate leadership by offering an alternative that fosters more transparent, accountable and ethical practice (see Chapter 16).

The Public Interest Disclosure Act 1999 sets out a simple framework to promote responsible whistleblowing by:

- reassuring workers that silence is not the only safe option
- providing strong protection for workers who raise concerns internally
- reinforcing and protecting the right to report concerns to the regulator

- protecting more public disclosures, provided there is a valid reason for going wider and that the particular disclosure is reasonable
- helping to ensure that organisations respond by addressing the message rather than the messenger and resisting the temptation to cover up serious malpractice.

Managers can facilitate a culture that tolerates whistleblowing by acknowledging legitimate conflicts and providing mechanisms for venting tensions and difficulties. Sometimes this may involve appraisal procedures, reviewing staff training needs, and seeking independent legal advice. It may involve encouraging regular surveys of service users and their families to establish their views. Managers are as likely – perhaps more likely – to have to wrestle with the competing pressures for disclosure, loyalty and discretion. They can be expected, by law, to both support staff and expose them, and will not be excluded from, or immune to, such procedures themselves. Coping with the intense and conflicting pressures that exposure and external inquiries generate is one of the most daunting tasks of the management role.

19.6 Conclusion



Figure 19.3 Monument to the signing of the Magna Carta in 1215 at Runnymede, Surrey

This chapter began with the words of an 18th-century legal scholar: ‘Be you never so high, the law is above you.’ This sentiment can be both reassuring and worrying. Reflecting on this helps us to understand something of the egalitarian promise and the fearful power of law. It helps us appreciate law’s ambivalences and paradoxes. However, as also suggested in the Introduction, the law does not simply sit above us looking down; it works through us. Our actions give it life.

This chapter aimed to convey an image of law that ‘lives’ through the practice of managers in health and social care. This organic image of law invokes its involvement with living people rather than its abstract presence and symbolic power. In England, 15 June 2015 is the 800th anniversary of the signing of the Magna Carta, demonstrating the longevity of this complex and continuing relationship (Figure 19.3). Questions remain however, and they are: Can law operate without the weight of authoritarian influence? What does it achieve with the power

The Magna Carta established the principle that no one, not even the monarch, is above the law. It reminds us that nothing is beyond criticism – not even the law.

vested in it? Similar questions apply to management and leadership. Reflecting on these questions leads the law out of books and statutes and into practice, management life, the actions of leaders, and the whole future of health and social care.

Key points

- The provision of health and social care services is governed by complex legal frameworks that are subject to change and review.
- Laws applicable to health and social care are very often written to protect vulnerable people.
- It is essential for leaders and managers to have some understanding of both the principles of law and the specific legislation relevant to health and social care.
- Understanding the authority of law and demonstrating an appreciation of legal procedures provides resources and opportunities for leadership.
- Managers and leaders must use their organisation's and profession's guidance on policies and procedures to implement legislation and guide practice.
- Managers must have a thorough knowledge of their organisation's statutory responsibilities and procedures.
- Law is as much about the individuals and cultures which enact it as it is about what is written down in Acts, guidance and codes of practice.

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