



Challenging Social Care Decisions in Scotland: A legal guide

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About this Guide

A short disclaimer

This guide cannot be a complete guide to the law. It cannot address the particular issues that will be raised by each individual case. And, whilst it is written by a qualified legal professional working in public law, the way the law is applied to an individual case is determined by what the court says in that case, not the view of any individual lawyer.

This guide was written on the basis of the law in May 2018 and the law will also sometimes develop as new laws are passed or the courts encounter new situations or review older decisions when issues are raised again.

Anyone who thinks they may wish to take forward a legal challenge is very strongly recommended to obtain legal advice on the particular circumstances of their case from a suitably qualified advisor **as soon as possible**.

This guide does not attempt to cover social care provision for children or offenders. It does not cover specialist provision or interventions for people suffering from addictions, or those with mental health difficulties (other than learning disabilities or conditions related to dementia) – although they may also access general social care services. Asylum seekers are not supported by local authorities but by the National Asylum Support Service (part of the Home Office); this guide does not address the situation of asylum seekers.

Local authorities and health and social care partnerships

Adult social care in Scotland is now being delivered in the name of **health and social care partnerships**, sometimes known as **integration joint boards** or **integration authorities**. These are public bodies created to integrate the services and budgets of local authorities and health boards.

These partnerships may have additional legal duties and powers. However, the existing powers and duties placed on local authorities remain, even if the actual work of delivering the services are delegated to these new partnerships.

Wherever this guide refers to local authorities, it can be assumed that this includes health and social care partnerships where they carry out these functions. But because most of the laws about social care still place the duties on the local authorities, it is most likely that a legal challenge would be against the local authority, even where there is a health and social care partnership in place. This would be a question a legal advisor would consider when you discuss your case with them.

The author

This guide is written by Tim Haddow, Advocate. Advocates are independent legal professionals specialising in dealing with complex, difficult and high-value disputes. Advocates can be involved in providing advice from the earliest stages of a case and are specially appointed by the courts to provide representation for people involved in legal disputes in hearings before the highest courts in Scotland and internationally.

Occasionally, advocates will provide specialist or in-depth advice even before any dispute becomes apparent. For more information on advocates, please see the Faculty of Advocates' website: www.advocates.org.uk.

Advocates do not provide advice direct to members of the public but will become involved in a case where a solicitor or other similar advisor recommends the assistance of an advocate would help. Some suggestions for the right places to start when looking for legal advice are at the end of this guide.

The author is grateful for review comments and assistance from Suzanne Munday and Jennifer Paton of MECOPP and the members of the MECOPP *3 R's Project* Advisory Group.

About this guide

This guide has been commissioned by MECOPP, an Edinburgh based charity supporting Black and Minority Ethnic carers and carers from other marginalised communities access health, social work and social care services.

MECOPP is particularly grateful to the Life Changes Trust and the Baring Foundation who jointly fund the *3 R's Project*, MECOPP's Self-Directed Support Legal Rights Project. One of the aims of the *3 R's Project* is to build the capacity of third sector organisations which provide support to individuals who are entitled to self-directed support under the Social Care (Self-directed Support) (Scotland) Act 2013. This guide is part of that work.

For more information, please see:

The *3 R's Project*: <http://www.mecopp.org.uk> (click on Services / *3 R's Project*).

The Life Changes Trust: <http://www.lifechangestrust.org.uk/>

The Baring Foundation: <http://baringfoundation.org.uk/>

Feedback on this guide

MECOPP welcomes feedback and comments on this guide. In particular, if there are specific examples of cases which could be used as illustrations, or which highlight issues which this guide does not address, then it may be possible for this to be covered in subsequent editions (or updates to the web-based version) of this guide.

Any feedback should be sent to the *3 R's Project*, MECOPP, Maritime House, 8 The Shore, Edinburgh EH6 6QN or via info@mecopp.org.uk.

Aim of this Guide

The aim of this guide is to help explain when decisions made about social care can be challenged using the law; and how to go about doing it.

The need for this guide emerged from attempting to answer the simple questions: “is there a legal duty to provide social care; and is there a legal route for service users to enforce that duty?”

The basic answer is “Yes”. And legal action (or the threat of it) can be a powerful tool for individuals, their families and campaigners.

But the answer to that question, as with many legal questions, is not straightforward. There are many legal and practical technicalities that may mean legal action is not able to assist even when it might seem that it should.

The aim of this guide is to equip the reader to begin to understand some of the legal factors that may influence any decision on whether or not the law can help them hold the authorities to account or challenge decisions with which they disagree. But, as already emphasised, it is no substitute for individual legal advice; and such advice should always be sought at the earliest possible stage.

The guide:

- Introduces key legal concepts.
- Discusses the legal definition of social care and whether the law gives a legal right to social care.
- Describes the way in which decisions of public authorities, including local authorities, can be challenged in the courts.
- Outlines where social care decisions relating to individuals might be open to challenge.
- Highlights the relevant parts of human rights law, showing how these could apply to social care decisions.
- Looks at how other, more general, decisions relating to social care could be challenged and shows how the Equality Act 2010 might be relevant in these challenges.

Who this guide is for

This guide is written for staff and/or volunteers who provide advice and information to supported people and/or their carers who use social care services and have an entitlement to self-directed support. This guide may also be of interest to independent advocacy workers.

What this guide will not do

This guide will not tell you whether a specific decision can or cannot be challenged. The chance of challenging any particular decision will depend on the features of that decision and the individual circumstances of the people affected by the decision. Sometimes, the way in which a decision is reached and how it has been justified is just as important as the actual outcome.

But, hopefully, this guide will give you enough understanding of the key legal principles to know whether the law **may** be able to help you.

What to do if you want to take things further?

At the end of the guide, there are some suggested places for you to go for further advice if you think a legal challenge may be appropriate for you.

Legal action, and sometimes even just the prospect of legal action, can be tremendously powerful in persuading a public authority to look again at a decision. But raising a case before the courts is never something to be done without careful thought. Only once a suitably qualified advisor has looked at your case in detail, will they be able to help you decide whether a challenge is worthwhile.

However, strict (and quite short) time limits apply to making these challenges, so don't delay if you think you may have a case – seek advice as soon as possible.

Introduction to the Relevant Legal Concepts

The rule of law

The basic principle behind all public law is known as the **rule of law**. This simply means that the law doesn't just apply to individuals; it applies equally to public authorities, including local authorities and the government itself.

The rule of law also depends on individuals being able to enforce their legal rights by bringing an action in court against a public authority or even the government. And if there is a dispute over what a law means in any individual situation, it is the courts, not officials, public authorities or even governments, who have the final say.

"The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based"

Lord Hope (then Deputy President of the Supreme Court, in a 2011 case)

Where the law comes from

The most important laws are those made by Parliament and known as **Acts of Parliament**; or, for the Scottish Parliament, **Acts of the Scottish Parliament**. These are sometimes called **primary legislation**. Since 1997, health and social care in Scotland has been the responsibility of the Scottish Parliament; although even before then, Scotland's health and social care has always been a separate system to that in the rest of the UK and was often governed by different primary legislation.

Acts of Parliament cannot easily be changed. This makes them unsuitable for creating technical rules or for detail that may need to be updated regularly. Often, Acts of Parliament will give government ministers the power to create the detailed rules through **Statutory Instruments** (or **Scottish Statutory Instruments**). These instruments are called **secondary legislation**, and are often given names including the words **Order** or **Regulations**.

Examples

The **Community Care and Health (Scotland) Act 2002** is an Act of the Scottish Parliament. It introduced the current system of free personal care for older people in Scotland. For those living in care homes, the Act said that a portion of the care home fees were to be treated as being for personal care (rather than accommodation) and are not payable by the individual. But the detail of this was left to be defined in secondary legislation.

The **Community Care (Personal Care and Nursing Care) (Scotland) Regulations 2002** is the Scottish Statutory Instrument created to fill in the detail left out of the 2002 Act. This sets out exactly how much of a care home weekly fee was to be treated as personal and nursing care. As inflation and other costs change, this is updated each year by a new Scottish Statutory Instrument, most recently the **Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2018**, so that the legislation keeps pace with reality.

Hundreds of Scottish Statutory Instruments are approved by the Scottish Parliament each year, compared to around 20 Acts of the Scottish Parliament. But this does not mean secondary legislation is any less important as law, or that it can be treated any differently by those who have to follow it.

The other important source of law is the courts themselves. The courts will always try and apply the law consistently. This means they will often look back at previous decisions to help decide new cases. The courts will try and identify principles that govern the way previous courts have applied the law. These principles can then become part of the law itself, because future courts will use them unless a higher court over-turns them; or new laws are introduced that change things.

Duties, powers and discretion

The legal relationship between public authorities, including local authorities and social workers, and individual members of the public is often expressed in terms of **duties** and **powers**.

A **duty** is something a public authority **must** do. It is unlawful for a public authority not to do something they have a legal duty to do.

A **power** is the legal authority for a public authority to do something. It is unlawful for a public authority to do something they don't have the power to do. If a public authority has a **duty** to do something, they also have the **power** to do it. But it does not work the other way around.

A **power** to do something does not mean there is a **duty** to do it. Whether or not to do that thing is then a matter of **discretion**.

Discretion is the legal word for choice. The whole point of public authorities is that they have the power and, hopefully, the expertise, to make the right choices. This might include the choice about *how* to do something they have a duty to do. It might also include the choice about *whether* to do something they have the power to do. Depending on the circumstances, the amount of discretion left to a public authority will vary. Especially where government or local authorities make decisions that are essentially political decisions about priorities or policy, they will normally have a very wide discretion. Where individual social workers make decisions about applying rules or policy to an individual case, they may have less discretion. So bad decisions may be easier to challenge.

Decision makers may also have to take **policy** into account when making decisions. This could be policy formally adopted by the Scottish Government or policy set locally at a local authority level. Policy is not law, so it is not usually legally binding. But a decision can be challenged if departure from an accepted policy is not properly justified by the circumstances.

Examples

Section 12(1) of the Social Work (Scotland) Act 1968 says:

“It shall be the duty of every local authority to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate, and such assistance may... be given in kind or in cash to, or in respect of, any relevant person.”

There is a **duty** to “promote social welfare by making available advice, guidance and assistance” and “to make arrangements and to provide or secure the provision of facilities”. Local authorities must do this and it would be unlawful of them to refuse to do so.

But significant **discretion** is created in the way in which this is to be done. In carrying out this duty they must do so “on such a scale as may be appropriate for their area” and “as they may consider suitable and adequate”.

The section also creates a **power** to provide assistance in kind or in cash. They are not required to do this but, if this power was not created, it would be unlawful for a local authority to make cash payments to an individual rather than simply arrange facilities or services that could be used by those individuals.

Where do rights come in?

Duties and powers say what a public authority must or may do, focussing on the public authority itself. **Rights** constrain what a public authority may or may not do by looking at situations from the individual's perspective.

Some rights have been developed historically by the courts. Others have been created by new laws. But not all rights are equal. Some have been made a full part of the legal system and are enforceable by the courts. These include individuals' rights under the European Convention of Human Rights (for more on these, see p27). Others are not directly part of the law but may, in some circumstances, be taken into account by the court. There are also some rights which have been created in law but are specifically *not* enforceable in the courts; for example, the rights created by the **Patient Rights (Scotland) Act 2011**. Because you can't go to court to enforce these rights, they are arguably not really rights at all. Where this guide talks about rights, it will mean legally enforceable rights.

Enforceable rights can be powerful. But they are often less powerful than people think. Almost all rights are **qualified** to some extent. That means that an individual's rights can be lawfully breached where other priorities require it. However, where public authorities do breach rights, they must be able to **justify** it in line with well-understood legal principles. And courts will be the final judge of whether any breach is justified. More detail on this is provided on p17.

What is the Legal Definition of Social Care and is There a Duty to Provide It?

Challenging decisions on social care would be much simpler if the legal framework contained a simple definition setting out what social care was, and then stated that local authorities had a duty to provide it. Or that a local authority had a duty to provide services to meet the needs of the individual concerned. But this is not the way, in general, that the legislation works.

Another complicating factor is that the legal framework is made up of a series of different laws introduced at different times. Some of these overlap with each other and refer to each other; some are general in application, whilst others are focussed on particular groups of people.

Three of the most important pieces of legislation are the **Social Work (Scotland) Act 1968**, the **Chronically Sick and Disabled Persons Act 1970** and the **Mental Health (Care and Treatment) (Scotland) Act 2003**. The **Community Care and Health (Scotland) Act 2002** also has an important role in defining which aspects of social care count as personal care for the purposes of the free personal care regime.

A very brief summary of the scope of social care under each of these laws is provided below. Exactly which applies in any particular situation may not always be immediately clear. And whilst the overall theme of the different legislation is similar, some of the details may make a difference. If it is unclear which law (or laws) apply to a specific set of circumstances, then you should obtain legal advice to provide an answer that takes all the relevant factors into account.

Social Work (Scotland) Act 1968

The Social Work (Scotland) Act 1968 is the main law governing the social work responsibilities of local authorities, apart from those to do with children and young people. It has the broadest scope and many of the other laws either overlap with it or refer back to it. Unhelpfully, it is also the vaguest of the laws in terms of setting out the duties for social care and in defining social care (or **community care services**, as the 1968 Act calls them).

Social Work (Scotland) Act 1968 section 12(1)

*“It shall be the duty of every local authority to **promote social welfare** by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate.” (emphasis added)*

The local authority's duty is expressed in terms of an overall objective at a community level: the duty to “*promote social welfare*”. There is no detail requiring this to be achieved in any particular way, only some very general outlines; for instance, through making available advice, guidance and assistance, and providing facilities. This leaves the maximum amount of room for local authorities to make their own judgements on what is required and avoids the need

to repeatedly amend the law when views change of best practice in social care. But it does not make it easy to pin down a local authority's duty in any particular case; and the needs of barriers are not central to the structure of the legislation. This provides some significant obstacles to bringing challenges against local authorities in specific cases.

Social care (or community care services) is defined; but not by describing what they are. Instead the 1968 Act works backwards and defines community care services as whatever is satisfied in pursuit of the overall objective of social welfare.

Social Work (Scotland) Act 1968 section 12A(8)

“Community care services” means services...which a local authority is under a duty or has a power to provide, or to secure the provision of, under... Part 2 of this Act...”

[The reference back to Part 2 of the 1968 Act is simply a reference to the duty to promote social welfare under section 12(1) quoted above.]

Similarly, the needs of any individual only come into the equation after the local authority decides what is needed to fulfil the overall duty to promote social care. In particular, the general duty is to assess the needs of an individual for the **services that are available**; not to provide the services that an individual needs. There will, of course, be significant overlap between the services needed by individuals within the community and the services appropriate for the promotion of social welfare generally but, clearly, these are not the same thing.

Social Work (Scotland) Act 1968 section 12A(1)

“...where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority

(a) shall make an assessment of the needs of that person for those services; and

(b) shall then decide...whether the needs of the person being assessed call for the provision of any such services”

However, even within the 1968 Act, there are a number of examples of specific services the local authority are required to provide. As with the general duty, it is left to the local authority to determine what represents adequate provision of these services in the circumstances. The specific duties are in sections 13A(1), 14, 59 and 94 and can be summarised as:

- ▶ To provide and maintain; or make such arrangements as they consider appropriate and adequate for the provision of suitable residential accommodation where nursing is provided.
- ▶ To provide or arrange for domiciliary services necessary for the purpose of enabling a person to maintain as independent an existence as is practicable in his home.

Chronically Sick and Disabled Persons Act 1970

Many, but not all, of those in need of social care will also find that they fall within the definitions of chronically sick, disabled or having a mental disorder (which, significantly, includes dementia and learning disabilities).

People in these categories are also within the scope of the Chronically Sick and Disabled Persons Act 1970. This includes a more specific list of services which it is the duty of the local authority to provide where the local authority is satisfied that it is necessary to meet the needs of the person. This provides a much clearer link between the services and the person's need than is created by the 1968 Act.

Chronically Sick and Disabled Persons Act 1970 section 2(1)

"...Where a local authority...[is]...satisfied that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely—

- (a) the provision of practical assistance for that person in his home;*
- (b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;*
- (c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;*
- (d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services...*
- (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;*
- (f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;*
- (g) the provision of meals for that person whether in his home or elsewhere;*
- (h) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,*

Then...it shall be the duty of that authority to make those arrangements in exercise of their functions..."

Mental Health (Care and Treatment) (Scotland) Act 2003

This guide does not attempt to cover the full scope of the 2003 Act. This is a very large piece of legislation that deals with many aspects of care and treatment for those with mental disorders. Dementia and learning disability are both currently within the definition of mental disorder.

Mental Health (Care and Treatment) (Scotland) Act 2003 sections 25 to 26

For “persons who are not in hospital and who have or have had a mental disorder” a local authority shall provide care and support services designed to:

“(a) minimise the effect of the mental disorder on such persons; and

(b) give such persons the opportunity to lead lives which are as normal as possible.

...[which includes]... (i) residential accommodation; and (ii) personal care and personal support...”

[“personal care” means care which relates to the day to day physical tasks and needs of the person cared for (as for example... eating and washing) and to mental processes related to those tasks and needs (as for example, but without prejudice to that generality, to remembering to eat and wash); and “personal support” means counselling, or other help, provided as part of a planned programme of care.]

“A local authority shall...[also]... provide services which are designed to promote the well-being and social development of those persons...[which includes]...”

(a) social, cultural and recreational activities;

(b) training...; and (c) assistance...in obtaining and in undertaking employment.”

A local authority is also required to assist with travel to enable these services to be used.

Community Care and Health (Scotland) Act 2002

One aspect of social care that is described in detail is personal care. This is to allow it to be as clear as possible what aspects of social care are covered by the free personal care regime. These are set out in those sections of the Community Care and Health (Scotland) Act 2002 that define what services local authorities may charge for and which they may not charge for. However, it should be noted that this Act does not place any legal obligation on local authorities to provide any of the services listed; only that they may not charge for them if they do. The legal obligation to provide them in the first place comes from the other pieces of legislation already discussed above.

Community Care and Health (Scotland) Act 2002 section 1 and schedule 1

Non-chargeable social care means:

- ▶ **Personal Care.** Care which relates to the day to day physical tasks and needs of the person cared for (for example, eating and washing) and to mental processes related to those tasks and needs (for example, remembering to eat and wash).
- ▶ **Personal Support.** Counselling, or other help, provided as part of a planned programme of care.

And any specific care in this list:

As regards the personal hygiene of the person cared for—

- ▶ shaving; cleaning teeth (whether or not they are artificial) by means of a brush or dental floss and (in the case of artificial teeth) by means of soaking; providing assistance in rinsing the mouth; keeping finger nails and toe nails trimmed; assisting the person with going to the toilet or with using a bedpan or other receptacle;
- ▶ where the person is fitted with a catheter or stoma, providing such assistance as is requisite to ensure cleanliness and that the skin is kept in a favourable hygienic condition;
- ▶ where the person is incontinent, the consequential making of the person's bed and consequential changing and laundering of the person's bedding and clothing; and caring for the person's skin to ensure that it is not adversely affected.

As regards eating requirements, the preparation of, or the provision of any assistance with the preparation of, the person's food including—

- ▶ defrosting, washing, peeling, cutting, chopping, pureeing, mixing or combining, cooking, heating or re-heating, or otherwise preparing food or ingredients; cooking, heating or re-heating pre-prepared fresh or frozen food;
- ▶ portioning or serving food; cutting up, pureeing or otherwise processing food to assist with eating it; advising on food preparation; and assisting in the fulfilment of special dietary needs,
- ▶ but not the supply of food (whether in the form of a pre-prepared meal or ingredients for a meal) to, or the obtaining of food for, the person, or the preparation of food prior to the point of supply to the person.

If the person is immobile or substantially immobile, dealing with the problems of that immobility.

If the person requires medical treatment, assisting with medication, as for example by applying creams or lotions; administering eye drops; applying dressings in cases where this can be done without the physical involvement of a registered nurse or of a medical practitioner; assisting with the administration of oxygen as part of a course of therapy.

With regard to the person's general well-being assisting with getting dressed; assisting with surgical appliances, prosthesis and mechanical and manual equipment; assisting with getting up and with going to bed; the provision of devices to help memory and of safety devices; behaviour management and psychological support.

Summary: what is social care and is there a duty to provide it?

The simplistic answer is “Yes”. There is a duty to provide social care.

But, unfortunately, what that duty means in practical terms is harder to pin down. The duty does not necessarily mean that a local authority must provide a particular service in a particular way, or to a particular person (or group of people).

Often the most effective way of assessing the limits of the duty will be to look at surrounding circumstances. For instance, if a service has historically been provided, then that is strong support for saying it was a necessary part of a local authority’s duty to have provided it. If it is now proposed to remove it, then a number of questions arise: is anything replacing it; if not, why not; what consultation has there been; can the local authority demonstrate it has considered the impact on its duties of the removal of that service? None of this guarantees, or even raises a presumption, that the withdrawal of an existing service breaches the local authority’s duties. But these are easier routes to a challenge than arguing directly from the legislation that a duty to provide that service exists.

Challenging Decisions: Where to Start

As explained earlier, the aim of this guide is to help explain when decisions made about social care can be challenged using the law; and how to go about doing it.

A fundamental part of the legal framework is that decisions can only be challenged by those affected (or potentially affected) by them. This can be individuals affected by a decision about their social care, or a Guardian or Attorney acting on their behalf. Or it might be a service provider affected by a decision to exclude their services from the range offered by a local authority to service users. In some limited cases, it is possible for a campaign group or charity to directly raise a challenge on behalf of its members or beneficiaries. However, it would be more normal for such groups to work alongside and support individuals directly affected by the decisions.

Once the person or organisation affected has been identified, there are a number of important points to be considered when thinking about bringing a challenge.

First, there must be a decision to challenge

For the law to be able to help, there must be some sort of decision by a local authority or a health and social care partnership. This may be a decision about what care needs a person has (perhaps after an assessment). It may be a decision about how to meet a person's care needs. Or it may be a wider decision affecting a group of people, such as to close a particular service. But there must be something definite that a court can examine.

This does not mean that a challenge must wait until the very end of a process. If a local authority decides to move a service user from one service to another, a challenge could be made as soon as the decision is made. It does not have to wait until a move is about to happen or has taken place. But if something is still being discussed or is merely one of a number of options, it is probably too early for a legal challenge.

However, if you are unsure, then the sooner you seek legal advice the better. Sometimes, if a local authority knows that a decision may be challenged, they may think more carefully before reaching a conclusion. But threats of legal action should never be made lightly, or in anger. Depending on the people involved and the issues at stake, such threats can backfire if they cause a negotiated solution to break down.

If your concern is about **how** something is being done (for example, if the services being provided are poor quality, rather than that wrong or inappropriate services are being provided), then legal challenge is only likely to help in extreme circumstances. Complaints through the normal complaints process or to the **Care Inspectorate**¹ may be better routes.

¹ The Care Inspectorate was previously known as **Social Care and Social Work Improvement Scotland (SCSWIS)**. This remains its official legal title but for all practical purposes it uses its new name.

Second, a legal challenge must be the last option

In Scotland (and the rest of the UK), the courts have always had the ability to review decisions made by bodies such as local authorities and government departments and the power to step-in and force decisions to be made again. This is known as **judicial review**.

However, it is almost always better (and often cheaper) if problems are solved without involving lawyers and courts. For this reason, a judge will refuse to get involved if there are other ways of dealing with the problem. And, by law, every local authority (and health and social care partnership) must have a complaints process capable of dealing with complaints about social care decisions. These processes are designed to be quick and efficient way of resolving problems. And since May 2017, all complaints can now be taken to the independent **Scottish Public Services Ombudsman (SPSO)**, if they are not resolved by the normal complaints process.

If a complaints process or the SPSO can look into a problem and take effective action to resolve it, the courts will not generally interfere whilst this happens; and will not usually get involved if a person has not, or refuses to, follow the normal complaints process. In principle, there is now no part of a social care decision that cannot be looked at by the complaints process or SPSO. The SPSO also has the ability to order local authorities to look again at decisions; and even to make local authorities change decisions.

However, the increased powers of the SPSO are a relatively new and untested factor. The courts are yet to definitively rule on how the availability of the SPSO process interacts with the willingness of the court to hear challenges to social care decisions. For this reason, it is recommended that legal advice is sought **as soon as possible and before pursuing a case to the SPSO**. Whilst it is likely that the advice will be to go ahead with an SPSO complaint, there is a danger that if things are left until after the SPSO has dealt with the case, it may be too late to challenge the original decision in the courts.

There is one other important reason that early legal advice is important. The courts have one very significant power that the SPSO does not have: the power to stop decisions being carried out whilst any challenge is resolved.

For example, if a local authority makes a decision to stop a service, then a complaint will probably not mean the authority carries on providing the service until the complaint is resolved. Similarly, the SPSO cannot make a local authority maintain a service whilst they consider a complaint. Complex complaints may take months to resolve, so a person may be left with the results of a bad decision for a long time. Similarly, a decision to uproot a person from a setting in which they are settled cannot be undone once it has happened without causing further disruption. If a local authority is unwilling to delay putting a decision into practice whilst a complaint is dealt with, only a court can order them to stop. In a case like this, then the courts will get involved, as there is no other way of a person achieving this.

.....

This is the most likely situation in which a legal challenge may be required. In legal terms, orders which aim to keep things as they are until a final decision can be made are called **interim orders**. These orders, which can include orders such as **interdicts**, (which are sometimes called by the name of their equivalents in English and Welsh law: **injunctions**) can be sought on their own or as part of other court proceedings (such as a judicial review).

There may be other circumstances where the complaints process, or the SPSO, are unable or unwilling to provide the solution needed, or there is undue delay or some other problem with the process. In these cases, the courts will be able to get involved through judicial review.

Alternatively, if the complaints process is completed all the way to a decision by the SPSO and the problem is still not resolved, then the courts have a role as the final judge of whether a decision has been made lawfully. By this final stage, it may be that the challenge is against the SPSO's refusal to uphold a complaint, rather than against the original decision.

Thirdly, legal challenges are limited in what they can achieve

Judges are not social workers. And lawyers (generally) have no experience of dealing with people with complex care needs and all that this involves. For this reason, judicial reviews do not involve a judge putting himself or herself in the place of the social worker and trying to make the decision they had to make. Instead, the judge will ask three questions:

- ▶ Was the decision made in accordance with the legal framework governing the duties and powers of the local authority? This is known as the test of **legality**. If a decision results in a breach of legal duty, then it will automatically be illegal.
- ▶ Does the decision make sense in the circumstances of the case? This is known as the test of **rationality** or **reasonableness**. There must be more than simple disagreement; often the courts will describe a decision as needing to be so unreasonable as to be “perverse”. Rationality also requires having a proper approach to decision-making, such as considering all relevant factors; and treating evidence properly.
- ▶ Was the decision-making process fair? This is known as the test of **procedural fairness**. This is more about the way a decision is made; for instance, if the views of the service users are central, were they actually given adequate opportunity to contribute to the decision.

Example

An elderly lady with dementia was exceptionally well cared-for with 24-hour one-to-one care in her own home. The local authority assessed that her needs could be met by 24 hour care in a residential setting where one-to-one care would not be available. That decision was challenged by judicial review. The challenge was supported by expert reports which strongly supported the view that 24-hour one-to-one care was required. The family also claimed their views had not been sufficiently taken into account.

The court noted that:

“... it is not for the court to take a decision which Parliament has empowered to a local authority. It is only if the local authority has acted outwith its powers, failed to take into account a relevant matter, omitted to take into account a relevant matter or the decision was ... unreasonable that the court can intervene. Even if there has been an error in law it will be for the local authority to remake the decision, possibly under the guidance of the court, not for the court to remake it. Secondly local authorities have finite resources and the court has to recognise that it is for the local authority to determine where resources should be spent and in what manner.”

The court found that, notwithstanding the expert opinions supporting the claim, the local authority’s decision was reasonably arrived at by appropriate professionals applying their judgement and experience. It also found those making the decision had taken the family’s views into account – they just hadn’t agreed with them. Accordingly, the challenge failed.

PQ (as attorney of Mrs Q) v Glasgow City Council [2016] CSOH 137

In some cases, especially those involving **human rights**, a judge may also consider the balance between the rights of an individual and other considerations, such as the cost or difficulty of alternatives. This is the test of **proportionality**. For more details, see page 28

Very occasionally, the question of **legitimate expectation** may also arise. Where an individual may have relied on a promise or expectation that a local authority would behave in a certain way, a court will prevent the local authority taking a different approach as this would be unfair to the individual. The circumstances where this may occur will be quite limited as the courts will not be quick to find that a local authority’s future decisions are limited by past events, but they can occur.

Example

A severely disabled adult was resident in a nursing home. She had been moved there after being a long-term patient in a hospital setting for around 22 years. The move to the nursing home had been consented to by the adult after receiving an explicit and clear promise that the nursing home would be their “home for life”. Three years later, the NHS Health Authority responsible for the home decided to close the home and that alternative placements would need to be found for its residents.

The court had no hesitation in concluding that the decision to move the adult against her will and in breach of the Health Authority’s own promise was so unfair as to be an abuse of power. There was no overriding public interest which justified it.

R (Coughlan) v North and East Devon Health Authority [2001] QB 213

However, in any judicial review the question is not whether a judge agrees with a decision. Even if a judge instinctively disagrees with a decision, they will not overturn it unless it clearly fails one of the tests of lawfulness, rationality or fairness. Judges are only interested in preventing injustice; not in re-making decisions which appropriately qualified professionals are in the best position to make.

This limit to judicial review means that complaints processes may, in many circumstances, be more likely to give a desired outcome. These processes should involve the decisions themselves being carefully checked by those who are well qualified and empowered to correct matters that are simply poor professional judgement but which fall short of failing the judicial review tests.

However, despite this, legal challenges can be very powerful, even if the case does not run all the way to its conclusion. This is because local authorities are often keen to avoid a court deciding they have acted unlawfully. It is sometimes easier for them to compromise in one case, rather than risk losing in court – which may dramatically affect their future approach in many other cases. The next chapter will look at some specific examples of where a legal challenge may be possible.

Example

Glasgow City Council decided to reduce the 24/7 care provision previously provided to a 79 year-old lady with cerebral palsy by up to 3 hours a day. The reduction in provision was to be made up by putting in place a “tele-care” remote monitoring system. There was evidence that, in fact, the person’s care needs had increased.

With the assistance of the **Govan Law Centre**, a judicial review challenge was raised. At the first court hearing, the council agreed they would not implement the decision. The legal challenge had achieved the aim and was then withdrawn without having to run its full course.

From <http://govanlc.blogspot.co.uk/2017/06/challenging-decisions-to-reduce-social.html>

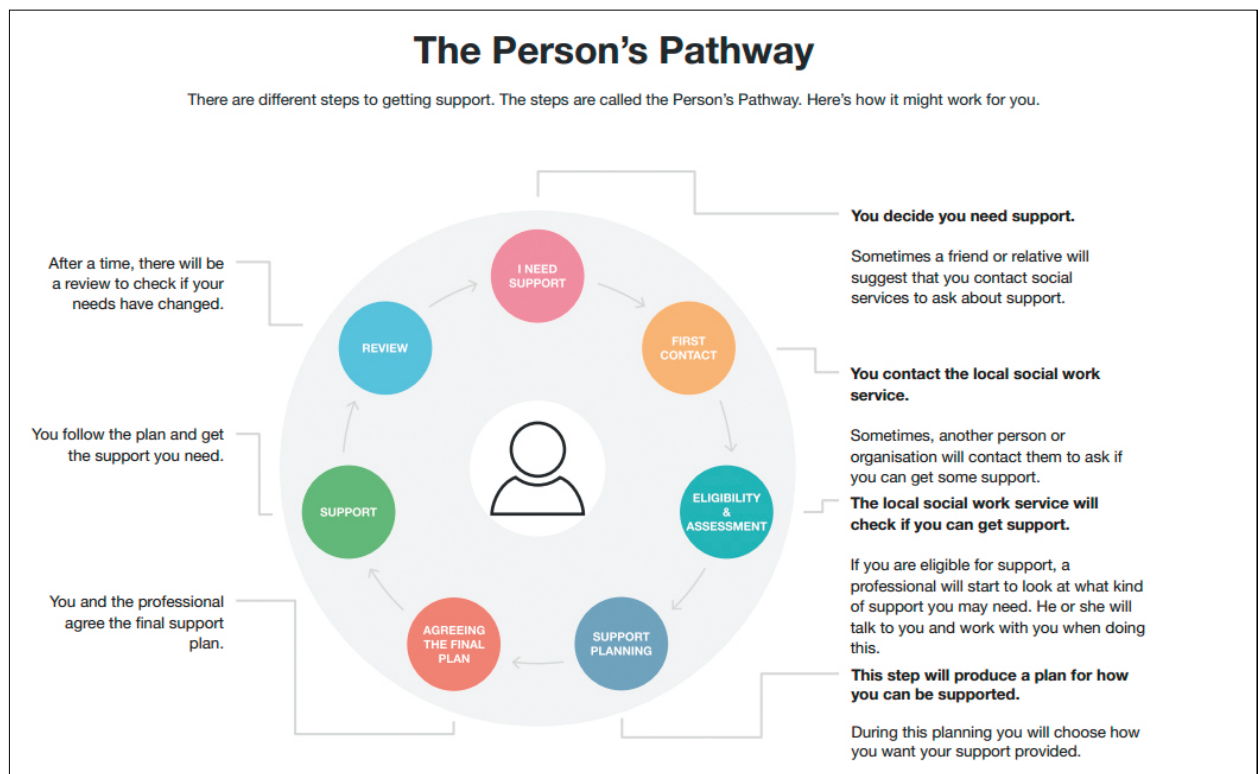


Challenging Individual Social Care Decisions

This section of the guide will highlight where a complaint or a legal challenge may be appropriate. The Social Care (Self-directed Support) (Scotland) Act 2013 came in to force on 1 April 2014. It creates new rights for individuals, and places new duties on local authorities delivering social care. It is now the primary way in which social care is delivered, so is the reference point for any detailed analysis of social care decisions.

Since the introduction of Self-directed Support, service users and carers will follow the **Person's Pathway**. This is described in the following diagram, which is taken from the Scottish Governments's Self-directed support website:

<http://www.selfdirectedsupportscotland.org.uk/>.



Values and principles

In addition, all social care decisions must respect the following principles:¹

- ▶ **Involvement.** A person must have as much involvement as the person wishes in relation to both assessments and the provision of support.
- ▶ **Collaboration.** Assessment and the provision of services must be a collaborative effort between the person and the local authority.
- ▶ **Informed choice.** A person must have any assistance they reasonably require to express their views and make an informed choice.
- ▶ **Participation and Dignity.** A person has a right to dignity and to participate in the life of the community. A local authority must take “reasonable steps” to facilitate the respect of these rights which form core aspects of independent living.

These principles are spelled out in the law and must be taken into account in making decisions. They apply to all stages of the Person’s Pathway. If a decision does not respect these principles it is unlawful.

These are very high-level principles and a local authority need only demonstrate that they have “had regard” to these principles. This may make it difficult to pin down exactly what they mean in any given case. But if a person can show where a local authority has failed to apply these principles, a complaint or legal challenge is likely to succeed.

Example (theoretical)

Mrs X is an elderly widow. Due to her failing eyesight, she has not properly read or understood the various letters sent by the local authority informing her that, after review, her care services are being reduced. The local authority has made no effort to check that Mrs X understands what is proposed. They have assumed that her lack of reply means she accepts the decision. This is a failure of the local authority to respect the principle of informed choice. This comes to light only after Mrs X’s care workers stop coming in the afternoons to assist with evening meals.

A complaint should be submitted immediately using the local authority process. If the local authority refuse, or delay, in restoring the services whilst they investigate, legal action for an interim order to restore the service may be the right course of action.

¹ Social Care (Self-directed Support) (Scotland) Act 2013 s1 and s2.

Entitlement to an assessment



A local authority **must** make an assessment where it appears a person may be in need of social care services.² The duty is also extended to making an assessment of the needs of carers as of 1 April 2018 with the commencement of the Carers (Scotland) Act 2016.

Assessments can be requested by individuals, family members or carers. It is unlikely a local authority would simply refuse to carry out an assessment where there is any suggestion that there may be care needs. But there may be room for dispute as to whether circumstances have changed enough to justify an assessment being carried out where a previous assessment did not find there were significant needs. Where local authorities refuse to carry out an assessment of need, this may in itself be grounds for a legal challenge.

Carrying out an assessment



The first stage in identifying any need for social care support is the **assessment of need**. The legislation makes quite clear that this is an assessment of **needs** for services and must be done **before** deciding whether, or what, services should be provided to meet those needs.³

It is not lawful or rational for a local authority to make a decision about the provision of services unless there is an assessment in place (except in cases of great urgency).⁴

Example (a case from England)

JF was a 24 year-old man with complex needs due to his Autistic Spectrum Disorder and severe learning difficulties. The local authority decided to move him from one residential setting to a different setting. The alternative setting was significantly cheaper for the local authority but was said to be able to meet his needs.

In a judicial review, the court decided that the decision that the alternative placement was suitable for JF was unlawful as it had been made **before** an assessment of need had been made under the applicable equivalent English legislation.

R(JF) v London Borough of Merton [2017] EWHC 1519 (Admin)

² The Social Work (Scotland) Act 1968 s12A (or, for carers, s6 of the Carers (Scotland) Act 2016). The Mental Health (Care and Treatment) (Scotland) Act 2003 s227 and s228 introduce an alternative and more convoluted route for people suffering from mental disorders (and their carers) which appears to provide for an assessment request to be refused but it is not clear what practical difference this makes.

³ The Social Work (Scotland) Act 1968 s12A(1)(a) and (b).

⁴ The power to provide services without an assessment in these cases is in the Social Work (Scotland) Act 1968 s12A(5) and (6).

If it appears that this stage of an assessment has been influenced by the availability (or cost) of services, rather than simply the needs of the person, then this would also be unlawful.

The second stage of this process is to decide whether the person's needs require a service. This is sometimes referred to as the decision on **eligibility**. All local authorities base their assessment of eligibility on a 2007 National Eligibility Framework developed jointly by the Scottish Government and the Scottish local authorities.

National Eligibility Framework

Critical Risk: Indicates that there are major risks to an individual's independent living or health and well-being and likely to call for the immediate or imminent provision of social care services.

Substantial Risk: Indicates that there are significant risks to an individual's independence or health and wellbeing and likely to call for the immediate or imminent provision of social care services.

Moderate Risk: Indicates that there are some risks to an individual's independence or health and wellbeing. These may call for the provision of some social care services managed and prioritised on an on-going basis or they may simply be manageable over the foreseeable future without service provision, with appropriate arrangements for review.

Low Risk: Indicates that there may be some quality of life issues, but low risks to an individual's independence or health and wellbeing with very limited, if any, requirement for the provision of social care services. There may be some need for alternative support or advice and appropriate arrangements for review over the foreseeable future or longer term.

This eligibility decision is probably both the most critical part and also the most difficult to challenge.

It is the most critical because, generally, those assessed as having critical or substantial risk will be eligible for the provision of services; those at moderate or low risk will not. It is difficult to challenge because the assessment of risk is a matter of professional judgement for the social worker (or other professional) making the decision. Factors such as "risk" and "well-being" are also, to at least some degree, subjective. The courts will be very reluctant to interfere with these professional judgements unless it is clear that something has gone wrong.

The most likely ways in which an eligibility decision can be challenged are:

- ▶ If there are relevant factors that are left out of account. For instance, if medical information or views of the person and/or their carer have been ignored or misunderstood. Where nursing care is likely to be required, there **must** be information from a medical practitioner.⁵
- ▶ If unreasonable assumptions have been made about the circumstances of the individual or other care options which may be available.

⁵ The Social Work (Scotland) Act 1968 s12A(2).

- ▶ If irrelevant factors have been taken into account. This might include where issues of the cost of services have been included in an assessment of the risks faced by a person.
- ▶ If the reasons given for a decision do not adequately explain why a decision has been reached, then this – by itself – is a valid ground for a legal challenge.

Example (theoretical)

Ms Y is a young woman who has been diagnosed with an autistic spectrum disorder. She lives independently but, unless prompted, will routinely forget to undertake routine self-care such as showering, changing into clean clothes, eating regular meals or maintaining a regular daily routine of waking and sleeping.

Ms Y's local authority have assessed her as being at low risk on the basis that her elder brother, who lives nearby and has previously visited and phoned regularly, can provide sufficient support to ensure she can continue to live independently. However, the local authority have failed to take into account that Ms Y's brother has recently started working offshore in the oil industry and is often away or abroad for weeks at a time.

The local authority have left relevant factors out of account and have made unreasonable assumptions about the support Ms Y's brother could provide. Their decision could be challenged.

A final, but quite possible, situation is where the local authority conducts a review of a person's needs and the review decides a person who was previously "substantial risk" is now only a "moderate risk". As a result, the local authority proposes to stop the services they have been receiving. Challenges may be easier in this situation as there will be a previous assessment to look at. There will need to be clear reasons given explaining what has changed from the previous assessment that now means risk is considered to be lower. These reasons will need to be backed up by evidence that the individual's circumstances have improved.

The support plan

SUPPORT
PLANNING

AGREEING
THE FINAL
PLAN

At this stage, the local authority must offer the supported person the opportunity to choose one of the options for self-directed support. In most cases, the supported person will be given the opportunity to choose from the following four options:

Option 1: You receive a direct payment, which you use to pay for your own support.

Option 2: You choose your support, and the local authority or another organisation arranges the support.

Option 3: The Local Authority chooses and arranges the support

Option 4: A mix of Options 1, 2 and 3.

The Person's Pathway stipulates that the final plan should be "agreed". But it is not legally necessary, or practically possible, that plans will always be "agreed".

What the law requires is that local authorities "*take account, in so far as it is reasonable and practicable to do so*" the views of the person being assessed and of their carer(s). The values and principles described at the start of this section must also be respected.⁶

So, where a person or their carer disagrees with the proposed support plan, it does not necessarily mean a legal challenge will be possible (although a complaint can and should always be made). But if a decision shows that the views of those involved have been ignored or misunderstood by the professionals, then a challenge may be possible.

Delivering the planned services

SUPPORT

As previously described, problems with the **quality** of services will generally not be sufficient to support a legal challenge. The complaints process will normally be the only option.

However, there may be extreme cases where the quality of service is causing real problems and the complaints process is simply not resolving the problem, or dealing with it in a quick or satisfactory way. In these cases, legal challenges may be possible.

Example (theoretical)

Mr Z is physically disabled. He requires support to get up in the mornings. Otherwise, he lives a relatively independent life, including working in a part-time job. However, the care provision from the service he uses has become very unreliable. Care workers have been turning up late and sometimes not at all. As a result, Mr Z is in danger of losing his job and is missing out on many of the social activities that keep him engaged in the community.

Mr Z has complained to the local authority and the Care Inspectorate. The local authority say they are working with the provider to improve things but nothing seems to change. They will not increase his funding to cover the costs of a different provider as this would be more expensive.

Mr Z may have grounds for a legal challenge. He has tried the normal procedures and they are not giving a satisfactory outcome to protect his right to be involved in the community.

⁶ The Social Work (Scotland) Act 1968 s12A(1)(b)(ii) and the Social Care (Self-directed Support) (Scotland) Act 2013 s1 and s2.

Human Rights and Social Care Decisions

The UK has been signed up to the **European Convention of Human Rights (ECHR)** since its beginning in 1950. And, since the introduction of the **Human Rights Act 1998**, the main rights in the convention have become an integral part of law in the UK, where they are referred to as **convention rights**. This Act means that any public authority – including local authorities making decisions related to social care – must not breach anyone’s human rights.

The key provision is:

The Human Rights Act 1998 section 6(1)

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right”

If a court finds that a decision or act of a public authority has breached (or would breach) a person’s human rights, that decision or act is unlawful. As described earlier in this guide, this means a court will intervene to prevent the breach and, where decisions are concerned, require the decision to be taken again in such a way as does not breach human rights. Courts are also required to uphold human rights when they interpret what the law says and, in some cases, can even declare that laws which result in human rights breaches are invalid.¹

The main rights

The two convention rights that are most likely to arise in social care situations are:

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority 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.”

¹ The Human Rights Act s3 says: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Section 29 of the Scotland Act 1998 (which governs the powers of the Scottish Parliament and Scottish Government) means that any legislation passed by the Scottish Parliament is “not law” if it breaches human rights. The same applies to all secondary legislation.

Article 3 ECHR

The Article 3 right is one of the **unqualified rights**. There can be no reason why a public authority's decisions or actions can lawfully subject a person to inhuman or degrading treatment. In very extreme cases, a failure to provide adequate social care could cause "inhuman or degrading treatment" so as to breach Article 3 of the ECHR by leaving a person in intolerably poor conditions.

The severity of conditions required to breach this right are very high. Although there are examples of where it has been argued that Article 3 is breached in a social care setting, there do not appear to be any examples of social care cases where a court has found that Article 3 convention rights were breached.

Examples (not social care)

In a case taken by prisoners, the courts held that requiring prisoners to live in cells without toilet facilities and where they had to "slop out" constituted inhuman or degrading treatment that breached Article 3, especially when combined with over-crowding and a regime that left prisoners locked in their cells for 23 hours a day.

Napier v Scottish Ministers 2005 1 SC 229

The Home Office refused to provide support to asylum seekers who had, in their view, delayed making their claim. As asylum seekers could not work and had no other entitlement to benefits or support, asylum seekers in these circumstances were left on the streets, seriously hungry and without the ability to satisfy basic hygiene needs. The House of Lords found that this met the Article 3 threshold.

R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66

Article 8 ECHR

Article 8 refers to "private and family life". At first, it is not obvious how this relates to social care. But decisions of the European Court of Human Rights and UK courts have confirmed that this phrase has a very wide meaning. It extends to the dignity and autonomy of individuals, so this means that social care decisions for individuals who are dependent on that social care can interfere with this right. Article 8 also explicitly refers to respect for a person's home. This has a particular relevance for those who may be in a residential setting.

But, unlike Article 3, Article 8 is a **qualified right**. This can be seen by the terms of the second sub-paragraph of Article 8 which allows "*interference*" with the right when it is justified by one of a number of considerations when they are "*in accordance with the law*" and "*necessary in a democratic society*". This means that, if there is a good reason (sometimes called a **legitimate aim**) a public authority can quite legitimately take decisions that impact on an individual's autonomy and dignity. The courts have also made clear that the interference in the right must be **proportionate** to the achieving the legitimate aim.

Proportionate interference with rights requires that:²

- ▶ The reason for making the decision is sufficiently important to justify interfering with the fundamental right in question.
- ▶ The way in which the right is interfered with is rational, fair and not arbitrary.
- ▶ The decision interferes with the right as minimally as is reasonably possible.

Inevitably, the cost of social care and the resource constraints under which many local authorities find themselves mean a local authority will often be able to justify their decisions in light of the need to ensure a fair allocation of limited resources between all those for whom they have a responsibility.

However, there may be circumstances where poorly made or reasoned decisions could be challenged on the basis that the local authority has failed to properly justify a decision which has a sufficiently serious impact on a person as to be considered a breach of Article 8.

Case law

Ms McDonald was a former prima ballerina who, at a relatively young age, had been rendered immobile by a stroke and subsequent falls. She required to use the toilet two or three times a night but could not use a commode without assistance from a night-time carer. In November 2008, the local authority decided to withdraw her night-time carer on the basis that this element of her care package cost £22,000. It was considered that Ms McDonald could use incontinence pads or absorbent sheets instead. This conclusion was formalised in a review of her care plan undertaken in November 2009.

Ms McDonald challenged this decision in the courts. The case ended up in the European Court of Human Rights. It disagreed with the UK's Supreme Court decision that the situation was not serious enough to trigger Article 8. In contrast, it found that where Ms McDonald "*believed that the level of care offered by the local authority would have undignified and distressing consequences*" she was faced with the possibility of living in a manner which "*conflicted with [her] strongly held ideas of self and personal identity*". This was enough to have an "*impact on her enjoyment of her right to respect for private life as guaranteed under Article 8(1) of the Convention*".

However, the court found that the interference was justified under Article 8(2) from the point at which this decision was supported by a revised care plan. As a result, her human rights were only breached in the period from November 2008 to November 2009 as, for this period, the interference was not "*in accordance with the law*" as it was not supported by the care assessment the law required.

Nonetheless, this was an important case that showed that Article 8 considerations could go further than the UK Supreme Court had been willing to allow.

McDonald v United Kingdom (2015) 60 EHRR 1

² Adapted from Lord Hope's summary in *AS (Somalia) v Secretary of State for the Home Department [2009] UKHL 32*.



Challenging General Social Care Decisions

So far, this guide has focused mainly on decisions made in relation to the assessment and services provided to individuals. However, local authorities may make other, more general, decisions which directly or indirectly affect the social care received by individuals. These might include decisions to close or reconfigure services; or to cut certain types of provision altogether.

In principle, any general decision can be challenged on the same judicial review and human rights grounds applicable to decisions in individual cases (that is, legality, rationality and procedural fairness).

Example

A local authority, facing significant costs, decided to alter the structure by which it paid for care placements in residential homes. The overall result would be a significant reduction in fee levels.

The decision was challenged by the local care home owners' association. They complained that the financial model adopted by the local authority to justify the revised fee levels was flawed and failed to reflect accurately the actual cost of providing care.

The court agreed the care home providers' complaints were correct and quashed the decision to introduce the new fee structure.

R (South Tyneside CHOA) v South Tyneside Council [2013] EWHC 1827 (Admin)

There are some additional factors which are more likely to be relevant in the challenge to a general decision. These are discussed below.

The Equality Act 2010

The **Equality Act 2010** replaced and consolidated a range of earlier legislation targeted at specific types of discrimination. One important part of this legislation is the **Public Sector Equality Duty**.

The Equality Act 2010 section 149

"A public authority must, in the exercise of its functions, have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

[Under the Equality Act, the protected characteristics are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation].

These are very general principles. However, the courts have been quick to stress that the duty to “*have due regard*” to the public sector equality duty means any public authority, including local authorities, must clearly understand and consider the impact any decisions may have on different groups of people; including those with disabilities and older adults.

In practice, this means that before a local authority can take a decision to close or make major changes to a service, it must show it has gathered evidence on the likely impact. Often this gives rise to a need to **consult** with users of the existing service. Similarly, the need to show the issues have been properly considered is most often satisfied through production of an **Equality Impact Assessment**.

Consultations

Even before the introduction of the Equality Act 2010, the courts have made clear that consultation with service users will almost always be needed if a decision to close or withdraw a service is to be made fairly. The creation of the Public Sector Equality Duty strengthens this legal principle even further.

For a consultation to be effective, the following principles should be followed:¹

- ▶ The consultation must be whilst proposals are still at a formative stage.
- ▶ The consultation must give sufficient information to allow intelligent consideration and response.
- ▶ Adequate time must be given for consideration and response.
- ▶ The product of consultation must be conscientiously taken into account in finalising proposals.

If consultations fail to meet these requirements, the decisions based on them will probably be unlawful.

Case law

As part of the move to greater personalisation of day services, Shropshire Council decided to close a particular day centre which was used by LH, an adult with learning disabilities.

The court found that the council had consulted extensively over the possibility that there would be changes to day services which would lead to closures of council-run day centres. However, it had failed to consult service users when moving to the stage of deciding to close the particular day centre attended by LH. Its decision to close the centre was declared to have been unlawful.

R (LH) v Shropshire Council [2014] EWCA Civ 404

¹ *R v Brent LBC (ex p Gunning) (1985) 84 LGR 168*

Equality impact assessments

As with consultations, Equality Impact Assessments are not an explicit requirement of the law. But, if a challenge is brought where one has not been completed, a court will need a very good explanation as to why one was not done and how the Public Sector Equality Duty was met without it.

As the Public Sector Equality Duty has been in existence for some time, it is likely that an Equality Impact Assessment will have been completed in all but the most unusual cases. A first stage in challenging the decision will be to obtain a copy (which should be provided on request if not already published openly). This can be carefully scrutinised for any areas where it could be challenged if it has arguably failed to take account of relevant factors, or dealt irrationally with any of the evidence that has been provided. If the Equality Impact Assessment can be shown to be flawed, it may well mean the whole decision is undermined.

Example

Two English local authorities decided to make very significant cuts to its provision of library services. These included removing funding from around a third of their libraries (which would close unless taken on by volunteers); reducing or completely withdrawing their mobile library services; and a general reduction in opening hours.

A judicial review was brought by three library users: an unemployed single mother, an unemployed man and a woman with reading disabilities.

Although Equality Impact Assessments had been completed, the court found they were inadequate. They did not gather or analyse evidence of the closure on particular groups (including disabled users, women, and the elderly) and failed to consider the impact of a number of aspects of the proposals which could easily have disproportionate impact on those groups. The decisions to close the libraries were quashed and the local authorities were ordered to restore the previous levels of provision pending any further review of services.

R (Green) v Gloucestershire County Council [2011] EWHC 2687 (Admin)



Appendix: Key Contacts

The Scottish Public Services Ombudsman

The SPSO deals with complaints which have not been resolved by the local authority. They have a website with specific information about social work complaints, including a downloadable leaflet.

Website: <https://www.spsso.org.uk/how-complain-about-public-service>

Citizens' Advice Scotland

Website: <http://www.cas.org.uk/>

Legal Advice

Most advice agencies may be able to refer you on for legal advice. Alternatively, you can approach a solicitor directly. Law centres specialise in providing advice for those who may not be able to afford a solicitor (although you may need a referral).

Law Society of Scotland's "Find a Solicitor" service:

<https://www.lawscot.org.uk/find-a-solicitor/>

Civil Legal Assistance Office: <http://www.clao.org.uk/home>

Govan Law Centre: <http://govanlawcentre.org/about-us/contact-us/>

Legal Services Agency: <http://www.lsa.org.uk/>

Notes

Notes



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