A whistle stop tour through equality, human rights, mental health and mental capacity legislation

Camilla Parker & Jo Honigmann
Partners, Just Equality
July 2012
Mr L...

- Has learning disabilities & has developed an irregular heartbeat - been prescribed medication for this, but is anxious about having regular blood tests to check his medication levels. His Dr gives Mr L a leaflet to explain:
  - The reason for the tests
  - What a blood test involves
  - The risks in having or not having the tests, and
  - That he has the right to decide whether or not to have the test.

- The leaflet uses simple language and photographs to explain these things. Mr L’s carer helps him to read the leaflet over the next few days, and checks that he understands it.

- MCA Code page 47
Jessica…

Aged 25, began dressing as a woman a few months ago. She has been receiving support from her local Adult Mental Health Services (AMHS) for depression, largely caused by her family’s lack of acceptance of her wish to transition. Despite her family’s hostility, Jessica has explained to the AMHS service that she would like to be known as Jessica from now on. However, her family’s attitude continues to have a detrimental effect on her and during one appointment she says to her psychiatrist, Dr Jones, that she would like to end her life. Dr Jones is so concerned that he liaises with an Approved Mental Health Professional who assesses her and with support from two medical recommendations arranges for her to be admitted to hospital under s2 of the Mental Health Act. Jessica’s mother is contacted as the nearest relative and gives her support to the detention saying she hopes it ‘will sort Joseph out’. When Jessica arrives at the hospital, the hospital staff call her ‘Joseph’, transfer her on to a male ward and insist she wear men’s clothes. Jessica’s condition deteriorates.
Mr L - Key Issues

- Treating Mr L with respect
- Giving Mr L time to decide
- Consent to treatment
- Capacity to decide
- Provision of accessible information
Jessica - Key Issues

- Treating Jessica with respect
- On what basis has she been detained under the MHA?
- Is the provision of care appropriate?
- What rights does she have?
### Human Rights Act 1998

<table>
<thead>
<tr>
<th>Overview</th>
<th>Impact</th>
<th>Claims</th>
</tr>
</thead>
</table>
| • Incorporates the rights set out in the European Convention on Human Rights (ECHR)  
• Individuals may take legal action before the national courts if they think their rights infringed by a public body | • Legislation to be interpreted in accordance with ECHR (so far as possible)  
• Courts and tribunals to take ECHR into account  
• Public authorities must not act incompatibly with ECHR | • By a ‘victim’ (i.e. directly affected by the public body’s action or relatives if victim deceased/lacks capacity)  
• If court finds breach it can grant ‘just and appropriate’ remedy, including damages |
## Equality Act 2010 and the provision of services

### Overview
- Discrimination law now in one Act
- Prohibits discrimination & harassment (of those with ‘protected characteristics’)
- Victimisation is also unlawful
- Public sector equality duty
  - general duty for listed public bodies and anyone carrying out a public function
  - specific duties for some public bodies
- Positive action

### Application
- **Duties to individual service users (Part 3)**
  - In the provision of services and when exercising a public function (e.g. acting as an AMHP)
- **Public Sector Equality Duty**
  - General and specific duties apply to NHS bodies and local authorities

### Claims
- **By individuals:** about service provision and exercise of public functions - range of remedies e.g. injunctions & damages
- **By individuals, groups & EHRC:** about public sector equality duty (judicial review)
- **EHRC:** range of additional enforcement powers
Specific Roles affected by the Equality Act 2010

<table>
<thead>
<tr>
<th>Role</th>
<th>Affected Categories</th>
</tr>
</thead>
</table>
| NHS Body/FT/LSSA | - Public body  
| | - Service provider  
| | - Employer |
| Nurse/social worker/OT/psychologist | - Service provider  
| | - Employee |
| AMHP | - Exercises public functions in personal capacity |
Equality Act 2010 - duties when providing services

A service provider must not discriminate against a service user (or someone seeking to use a service) on the basis of a protected characteristic:

- by not providing that person with a service
- in relation to the terms on which it provides the service
- by terminating the provision of the service
- by subjecting the user to any other detriment

- ‘Detriment’ is not defined in the Act and has a broad meaning. The Services Code (para 9.7) explains that while it does not need to have any physical or economic consequences, it should amount to something a service user ‘might reasonably consider changed their position for the worse or put them at a disadvantage’.

Just Equality: Linking Law to Life
Equality Act 2010 - duties when exercising a public function

- A service provider must not discriminate, harass or victimise anyone when exercising a public function.

- The interpretation of this is broad. The Services Code (para 11.26) explains that ‘refusing to allow someone to benefit from the exercise of a function, or treating someone in a worse manner in the exercise of a function’ are examples of the types of discrimination that would be covered by this provision.
Equality Act 2010 - duties towards individual service users

Protected Characteristics

• **Age** (for those aged 18 and above for Part 3 and in force from 1 October 2012)
• **Disability** – (a physical or mental impairment that has a long term and substantial adverse effect on a person’s ability to carry out normal day-to-day activities)
• **Gender reassignment** - (no requirement for someone to have undergone medical treatment; there are exceptions in relation to the provision of separate and single-sex services)
• **Pregnancy and maternity** (there are some exceptions relating to health and safety for pregnant women)
• **Race** (including colour, nationality and ethnic or national origins)
• **Religion or belief** (including any religious or philosophical belief and also any lack of any such religion or belief)
• **Sex** (there are exceptions allowing separate and single-sex only services in certain situations)
• **Sexual Orientation**
Equality Act 2010 - duties towards individual service users

Types of discrimination

- Direct discrimination (including by association and perception)
- Indirect discrimination
- Pregnancy and maternity discrimination
- Discrimination arising from disability (for disabled people only)
- Failure to provide a reasonable adjustment (for disabled people only)

Also unlawful to harass someone because of a protected characteristic or to victimise anyone
Equality Act 2010 - planning from within – the Public Sector Equality Duty

NHS bodies and local authorities are public bodies and are subject to both the general and the specific duties.

**General Duty (in force since 5/4/11)**

In the exercise of their public functions a public body or anyone exercising public functions must have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act
- advance equality of opportunity between people who share a protected characteristic and those who do not.
- foster good relations between people who share a protected characteristic and those who do not.

The three parts of this duty apply to all the protected characteristics except marriage and civil partnership (not a protected characteristic for Part 3) which is only covered by the 1st part.
Equality Act 2010 - General Public Sector Equality Duty

The Act explains that the second part of the general duty - **Advancing equality of opportunity** - involves having due regard to the need to:

- remove or minimise disadvantages suffered by people due to their protected characteristics
- take steps to meet the needs of people from protected groups where these are different from the needs of other people
- encourage people from protected groups to participate in public life or in other activities where their participation is disproportionately low.
Equality Act 2010 - the specific equality duties

• came into force in England on 10 September 2011
• stated purpose is to ‘ensure better performance by the public authorities concerned of the duty to have regard to’ the three aims of the general duty
• most public authorities in England including NHS Trusts and local authorities had to publish sufficient information to demonstrate compliance with the three aims of the general equality duty no later than 31 January 2012 and publish equality objectives by 6th April 2012 and will have to do so at least every four years.
Equality Act 2010 - going the extra mile – positive action

- The positive action provisions in the Act allow service providers to take action (which would otherwise be unlawful) to redress the past or present disadvantage or discrimination faced by service users with protected characteristics.
- Such action will **only** be lawful if it meets the conditions set out in the Act.
- Positive action is not the same as positive discrimination which is unlawful.
- Irony of positive action – has potential to bring about great change but is voluntary.
- Service providers are permitted under the Equality Act 2010 to treat a disabled person more favourably than a non-disabled person for a reason relating to their disability and therefore could lawfully choose to restrict services to disabled people, for example.
Equality Act 2010 Positive action (continued)

• The three conditions:

  1. A service provider *reasonably thinks* a group of service users sharing a protected characteristic:
     • experience a disadvantage as a result of that characteristic
     • have different needs or
     • have a disproportionately low participation rate in an activity

  2. The service provider takes action which aims to:
     • enable or encourage that group of service users to remove or reduce the disadvantage
     • meet their different needs or
     • enable or encourage increase participation

  3. The action is a *proportionate* means of achieving a *legitimate* aim.
Equality Act 2010 Positive action (continued)

• Example: A community mental health team believes that the local Traveller population are under-represented amongst their service users. It reviews its user records and realises that only two traveller families have accessed the service in the last 2 years even though there are a significant number of traveller families within its catchment area. It contacts the Travellers’ Health visitor to better understand the Travellers’ needs and as a result sets up an onsite service which improves take up of services. Despite complaints from other groups that this special service for Travellers is unfair, this onsite service is likely to be a proportionate means of achieving the legitimate aim of encouraging participation of this ethnic group and satisfy the positive action provisions.

• Importance of regular reviews and monitoring – positive action measures may not remain lawful

• Importance of paper trails
Back to Mr L and Jessica....
Mr L – issues arising

Consent to Treatment

• Can L authorise the proposed treatment?
• If not, on what basis can the treatment be given?
• Article 8 ECHR (right to private and family life):
  • ‘the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention’ (Pretty v UK)
• Note MHA – treatment for mental disorder
Mr L issues arising (continued)

Mental Capacity Act 2005

• Framework for decision making in relation to individuals aged 16 or over who lack capacity to consent
• Presumption of capacity
• Decision specific – relates to particular decisions at particular times
• If a person lacks capacity (defined in the MCA 2005) to consent to care and treatment it can be provided if this is in the person’s best interests
• Limits on this; e.g. restriction of liberty (deprivation of liberty safeguards), advance decisions
Mr L - issues arising (continued)

Mental Capacity and Non-discrimination

- Do not assume, due to L’s age, appearance, condition or aspect of behaviour that he lacks capacity (section 2 MCA 2005)

Human rights

- Article 14 ECHR

Respect

- MHA Code – respect principle: recognition of diversity, consider person’s views, wishes & feelings & follow them wherever practicable. No unlawful discrimination
Mr L - issues arising (continued)

Equality Act 2010

- Reasonable adjustments duty under the Equality Act 2010
- See next slide for three parts of the duty
- Anticipatory and continuing duty
- A failure to make a reasonable adjustment cannot be justified – the question is whether the adjustment is a ‘reasonable’ one to make
- A service user cannot be charged for the costs of making a reasonable adjustment for them
Mr L – issues arising (continued)

- The **reasonable adjustment duty** requires service providers to take reasonable steps to:
  - avoid substantial disadvantage where a practice, provision or criterion puts disabled service users at a substantial disadvantage;
  - avoid substantial disadvantage where a physical feature puts disabled service users at a substantial disadvantage; this covers removing the feature in question, altering it or providing a reasonable means of avoiding it;
  - provide an auxiliary aid or service where a failure to do so would put a disabled service user at a substantial disadvantage.
- If the provision, practice or criterion or the auxiliary aid or service involves the provision of information, the steps it is reasonable to take include taking steps to ensure the information is provided in an accessible format.
Mr L - issues arising (continued)

- **Reasonable adjustments duty** reinforces provisions in other legal frameworks:
  - L not to be regarded as unable to understand the information relevant to this decision if he is able to understand an explanation that is appropriate to his circumstances – using simple language, visual aids etc (s3 MCA 2005)
  - Every effort must be made to provide information in a way that is most appropriate to help the person understand (MCA Code 4.16)
  - Effective communication is essential in ensuring appropriate care and respect for patient’s rights (MHA Code 2.2)
Jessica – issues arising

Admission to Hospital and the MHA 1983

- Informal admission (s131)
- Admission for assessment (s2): 28 days – cannot be renewed
- Admission for assessment (emergencies) (s4): 72 hours
- Admission for treatment (s3): can be renewed if criteria met (see s20): 6 months + 6 months, thereafter 12 months
- Holding powers (s5) (6 hours/72 hours)
- Role of Nearest Relative (information & consultation)
Jessica – issues arising (continued)

Gateway to MHA 1983: Mental Disorder

- “mental disorder” means any disorder or disability of the mind…’ with no further categories
- Excludes of dependence on drugs or alcohol
- Fact that someone has a mental disorder is never sufficient grounds for any compulsory measure to be taken under the MHA (Code 3.4)
Jessica – issues arising (continued)

Human Rights and Admission to hospital

- Article 5 – right to liberty
- Article 8 – right to private and family life
- Article 14 – right to non-discrimination
Mental Health Act 1983 context

- Provides for the circumstances in which individuals can be treated for their mental disorder without their consent
- That is not to say the person’s wishes are not relevant: ‘Although the Mental Health Act permits some medical treatment for mental disorder to be given without consent, the patient’s consent should be sought before treatment is given, wherever practicable’ (MHA Code 23.37)
Jessica - issues arising (continued)

Human Rights – MHA Code and Article 8

• Privacy and safety are ‘important constituents of the therapeutic environment.’ (16.2)

• Separate facilities for men and women: ‘All sleeping areas...must be segregated, and members of one sex should not have to walk through an area occupied by the other sex to reach toilets or bathrooms...If in an emergency it is necessary to treat a patient in an environment intended for the opposite sex, senior management should be informed, steps should be taken to rectify the situation as soon as possible, and staff should protect the patient’s privacy against intrusions...Consideration should be given to the particular needs of transgender patients’ (16.9)
Overview of the MHA 1983

- Admission to hospital
  - Civil admission
  - Admission via the courts
- Care and treatment in hospital
  - Consent to treatment
  - Leave of absence
  - AWOL
  - Renewal of detention
  - Hospital Managers
  - IMHAs
  - MHAC/Care Quality Commission

- Discharge from hospital
  - Responsible Clinician
  - Nearest Relative
  - Hospital Managers
  - Tribunal

- After discharge
  - Section 117
  - Care Programme Approach
  - Guardianship
  - Supervised Community Treatment
Jessica – issues arising (continued)

Equality Act 2010

• What protection, if any, does the Act give her?
• Has she been discriminated against?
  • Exceptions
  • Proportionality
• Any other forms of prohibited conduct?
• If so, who is responsible?
Key Principles for Intervention

- Fair, non-arbitrary, non-discriminatory
- Lawful
- Proportionate (no more than necessary to achieve the intended objective (legitimate aim) – is less intrusive option available?)
- Balancing rights of individuals against those of others
- Clear decision-making process, clearly recorded, clearly explained.
References: Equality Act 2010

Statutory guidance

• Services, public functions and associations Statutory Code of Practice; Equality and Human Rights Commission; (2011)

References: Equality Act 2010

Non-statutory guidance

- Non-statutory guidance for the public sector equality duty
- Public Sector Equality Duty Code of Practice (Equality and Human Rights Commission); (expected 2012 – was to be statutory guidance but will now be non-statutory)
  and

- Guidance on matters to be taken into account in determining questions relating to the definition of disability; Office for Disability Issues; (May 2011)


- Mental Capacity Act 2005

- Human Rights Act 1998
  - General information on human rights is available at: Ministry of Justice: [www.justice.gov.uk/whatwedo/humanrights.htm](http://www.justice.gov.uk/whatwedo/humanrights.htm)

- Mental Health Act 1983
  - Richard Jones, Mental Health Act Manual, 14th edition, Sweet & Maxwell, 2009
Camilla Parker & Jo Honigmann
Partners, *Just Equality*

camilla@justequality.co.uk

jo@justequality.co.uk

www.justequality.co.uk