



Department
of Health

A CPD curriculum guide for social workers on the application of the Mental Capacity Act 2005

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Introduction

The Mental Capacity Act 2005 (MCA) is of principal concern to social workers working with adults. The implementation of the Act transformed the landscape of work with adults and has continued to do so due to case law rulings. This curriculum guide is intended for practitioners, employers, commissioners and educators to support them in working with the law and how it needs to be implemented. It includes curriculum content in terms of the knowledge required to practise safely and effectively and it also identifies the capabilities required to implement the legislation while working within its principles.

The principles of the Mental Capacity Act 2005 are described by Mark Neary (2014: 32) as: 'transformative when applied correctly and genuinely in P's best interests'. This is the starting point for this curriculum guide. To quote at length from the House of Lords post legislative scrutiny:

The Mental Capacity Act was a visionary piece of legislation for its time, which marked a turning point in the statutory rights of people who may lack capacity... The Mental Capacity Act placed the individual at the heart of decision making... The Act signified a step change in the legal rights afforded to those who may lack capacity, with the potential to transform the lives of many. (House of Lords Post Legislative Scrutiny 2014).

Social workers are key players in the implementation of the MCA 2005 at all levels; be they pre-qualified social work students at the stage of a first placement or Directors of Services with key roles in commissioning. However, the Post Legislative Scrutiny identified that the implementation of the MCA 2005 has not been adequate. There is a very clear understanding from the highest level of the judiciary and the government that tangible improvements need to be made to enable this empowering piece of legislation to be effective.

The Chief Social Worker held a summit on the MCA in March 2015 bringing together social workers from across England with representatives of other disciplines and sectors including: NHS providers, NHS commissioners, high street banks, high street solicitors, third sector organisations and the police. The aim was to consider how social workers might link up with these organisations in joint working, to better implement the MCA for the benefit of service users. The seminar made a number of recommendations, key among them the need to work in partnership with others.

This curriculum guide will focus on identifying and meeting learning and development needs to equip social workers to implement the MCA at all levels of the Professional Capabilities Framework; from initial training to strategic level. Learning outcomes will draw on the curriculum content.

Intended learning outcomes of the curriculum guide

1. To provide a sound knowledge base of the Mental Capacity Act 2005 in relation to all stages of social work: Pre-qualifying, Assessed and Supported Year in Employment (ASYE), Social Worker, Experienced Social Worker, Advanced Social Worker and Strategic Social Worker.
2. To provide a guide for all social workers in relation to what they need to know at each stage of their career in relation to the MCA and how to incorporate that into Continuing Professional Development.
3. To provide a link to the domains of the Professional Capabilities Framework (PCF) and enable adult social workers to work clearly within the principles and spirit of the Mental Capacity Act 2005.

The curriculum guide and the PCF

We have set out the specific sections of the guide where the PCF domains can be found with some overlaps:

- Values, Rights and Ethics: this relates to Professionalism, Values and Ethics, Diversity, Rights and Justice.
- Knowledge and Legal Context: this relates to Knowledge, Intervention and Skills.
- The MCA Everyday Processes: this relates to Professionalism, Knowledge, Rights and Justice.
- The Statutory Principles: this relates to Knowledge, Intervention and Skills, and Critical Reflection.
- The Assessment of Capacity: this relates to Professionalism, Knowledge, Intervention and Skills, Values and Ethics, and Contexts and Organisations.
- The Assessment of Best Interest: this relates to all nine domains.
- Acting in the person's Best Interests: this relates to all nine domains.
- The MCA/DoLS Interface: this relates to Knowledge, Critical Reflection and Intervention and Skills.
- Theory Research and Case Law: this relates to Professionalism, Knowledge, Intervention and Skills.

The Care Act 2014 and the knowledge and skills statement for adult social workers

It is imperative that the MCA Curriculum Guide is understood within the context of the Care Act 2014 and the Knowledge and Skills Statement for Adult Social Workers. The Care Act places a duty on local authorities to promote wellbeing. The definition of wellbeing as set out in the Act (Chapter 1.4) is entirely in keeping with the principles of the MCA, in terms of promoting the wishes of the individual to live their life optimally. The professional practice of the social worker is placed at the heart of adult social care by the Care Act and this curriculum guide can be used to support and improve this practice. It is clear from case law that, in issues of mental capacity, social workers need to adhere to the highest standards of professional practice and work carefully at the interface of different legislations and policies.

The Knowledge and Skills statements set out a national framework for the assessment of newly qualified social workers at the end of their first year in practice and requires them to 'have a thorough knowledge and understanding of the Mental Capacity Act (MCA) and Code of Practice and be able to apply these in practice'.

Values, Rights and Ethics

Values, Rights, and Ethics must be entirely underpinned by the five Statutory Principles of the Mental Capacity Act:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done or decision made under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

These principles are fundamental to everyone working with people who may lack capacity. In issues of working with mental capacity social workers will also need to have due regard to the first 10 sections of the Care Act 2014. These are:

1. Promoting individual wellbeing.
2. Preventing needs for care and support.
3. Integration of care and support within health services.
4. Providing information and advice.
5. Promoting diversity and quality in provision of services.
6. Co-operating generally.
7. Co-operating in specific cases.
8. How to meet needs.
9. Assessment of an adults needs for care and support.
10. Assessment of a carer's needs for support.

Further guidance can be found in the CPD Curriculum Guide on the Care Act:

http://www.thinklocalactpersonal.org.uk/library/Newsletter/TCSW_CARE_ACT_CURRICULUM_GUIDE_2015.pdf

Knowledge and legal context

This section considers the key areas that have to be embedded knowledge for safe and effective social work practice. The Mental Capacity Act 2005 was implemented in 2007. The Act marked the outcome of 20 years of efforts to clarify the law in relation to mentally incapacitated adults (Hale 2014). The Act emphasised autonomy while clarifying the need to reconcile the 'best interests' principle with having regard for less restrictive interventions.

However, in 2014, seven years after the Act passed into statute, the House of Lords Select Committee published the Post Legislative Scrutiny Report regarding the implementation of the MCA. This report acknowledged the 'progressive' ethos of the Act while also being highly critical of its implementation into practice. This criticism focused on the poor knowledge of the key processes, especially the assessment of capacity and assessment of best interests by health and social care professionals. The professional cultures of paternalism and aversion to risk were considered to have undermined the intended empowering ethos of the Act.

Concurrent to the introduction of the MCA, the European Court of Human Rights judgment in *HL v Bournewood* 2004 necessitated the need to introduce further legislation to provide safeguards for adults lacking capacity who may be 'detained' residents or patients according to Article 5. This led to the introduction of the Deprivation of Liberty Safeguards (DoLS) in 2009. The Lord's Post Scrutiny Report notes that this piece of legislation was poorly drafted, bureaucratic and poorly implemented. Additionally, the DoLS regime has created significant confusion relating to the interface between the Safeguards and the Mental Health Act 1983. Commentators who had previously been positive, such as Richard Jones (2014), now remarked that the safeguards have rendered mental health law to be so complex that 'even judges have difficulty understanding it'. The Lords concluded that DoLS is 'not fit for purpose' and the Department of Health has subsequently tasked the Law Commission to review and develop proposals to replace DoLS.

The Lords made specific recommendations as a 'matter of urgency' regarding the need to raise awareness of the Act among professionals (Recommendation 1). In particular, this should focus on the 'empowering ethos' enshrined in the everyday processes of the assessment of capacity and the Best Interests assessment (Recommendation 18).

Theory, research and case law

Overall, social workers at all levels need to take a critical analytical approach to research, policy and online resources, in relation to:

- Application of the principles of the legislation to practice.
- Application of current case law to practice.
- Identification of mental capacity law as a dynamic and iterative process.
- Awareness of the complexities involved in the assessment of a person's capacity.
- The utilisation of the balance sheet approach to best interest determinations.
- Optimising decision making through empowering practice.
- Maximising decision-making capabilities through participation and consultation, particularly with family and carers.
- Recording of a clear rationale for decisions made.
- Application of correct legal principles to safeguarding practice.
- Thresholds for intervention: and identification of restraint and deprivation of liberty.

Specific learning outcomes related to the levels of the PCF

Set out below are the knowledge, skills and interventions that social workers would be expected to demonstrate and record as evidence of their ability of capability at each particular level of practice.

Skills and interventions

It is essential that all skills and interventions are underpinned by a thorough knowledge base. This must also be integrated with a sound value base and expressed through the following skills and interventions.

It is essential that many of the skills that are required to be effective, safe and person centred are learned and then honed within the early part of the social work career. These are then consolidated, with some issues being extremely specific to social work at the strategic level.

Pre-qualifying levels of the PCF

The expectation is that education and placement providers will work together to ensure an incremental approach to the learning specific to each programme. This is to ensure that at completion of the qualifying programme and commensurate with the levels required, the following will have been incorporated into learning and be demonstrable.

At the level of first placement it is essential that social work students are able to recognise that issues of mental capacity are crucial to safe and effective social work practice with adults. The HEI needs to provide core teaching on capacity that outlines the pertinent legislative and policy issues that are the parameters within which social workers operate.

Pre-qualifying social workers need to recognise how to be safe within their practice. In this context this means that they must recognise when issues of mental capacity are impinging on an individual's ability to make decisions, live optimally and independently and when they are in need of support. It is essential that at this stage student social workers are given shadowing opportunities to see assessments where decisions are taken as to whether someone has capacity; and that if they do not, what is the process that needs to be undertaken to ensure that their needs are being met and how. It is absolutely crucial that from the earliest possible opportunity the principles of the MCA are incorporated into practice alongside a clear and thorough understanding of how adults in communities are being safeguarded. To ensure that student social workers have this opportunity it is essential that practice educators are experienced in issues of dealing with capacity.

At the pre-qualifying level it is expected that student social workers will be confident alerters. They will know whether an adult is being safeguarded or requires support for their decisions and they will be able to direct and divert to appropriate services.

At this level student social workers will have learned the ability to recognise where safeguarding and capacity issues overlap and where they are of distinct difference. They will know that an assessment of capacity is, or can be, a crucial element of safeguarding but that this does not signal the end of the safeguarding process. They will integrate the principles of 'Making Safeguarding Personal' (2013) and put the person at the centre of the process. It is essential that student social workers understand that MCA affects a much wider group of people than those who are at risk of abuse or neglect.

At the pre-qualifying level they require the opportunity to learn, observe and shadow experienced practitioners to enable them to integrate knowledge and theory into the practice sphere. Specifically, at this stage they must have a clear understanding of safeguarding and how to promote the principles of the MCA.

Students at the pre-qualifying level must have a clear understanding of the following:

- There is a duty to assist persons in making their own decisions wherever possible.
- The two-stage test of capacity and how capacity is determined.
- The need for practice to be compliant with the Human Rights Act, and in particular Article 2 Right to Life, Article 3 Prohibition of Torture, Article 5 Right to Liberty and Security, and Article 8 Right to Respect for Private and Family Life.
- The need for communication to be clear, transparent and explicit in terms of issues of capacity.
- The understanding that in issues of capacity and interventions the least restrictive option must always be sought.
- The interface with the Mental Health Act and The Children Act.
- The ability to assess whether safeguarding principles are being adhered to and how to alert services if they are not.
- Knowledge of who is the decision maker in issues of mental capacity and where the responsibility lies.
- Understanding of the importance of advocacy in issues of working with mental capacity in adult social work.
- Understanding the role of the wider multidisciplinary team and multi-professional team.
- Understanding of who is involved with the person and what their role is; including the family, carers (if applicable) and friends.
- A good knowledge of what constitutes deprivation of liberty and the process that is required to ensure that deprivation of liberty safeguards are in place when necessary.
- A good knowledge is required of the interface between the MCA and criminal offences, in particular wilful neglect and ill treatment.

It is crucial that each social work student understands and embeds the notion that the assessment of capacity is *decision specific*. A safe and thorough assessment of capacity will incorporate this understanding and appreciate that capacity cannot be assessed globally.

PCF levels ASYE to experienced social workers

At this stage it is the responsibility of the social worker in managing their own professional development that the following knowledge, skills and interventions are required to demonstrate that they are functioning appropriately within each role specific to working with the MCA.

Assessed and Supported Year in Employment

At the level of Assessed and Supported Year in Employment (ASYE) a social worker working with adults should – with appropriate mentoring and support – be able to:

- Identify concerns and where appropriate undertake a capacity assessment.
- Implement the principles of supported decision making.
- Carry out a best interest determination assessment with mentoring, support and supervision.

At this stage, social workers should have a sound knowledge of the MCA and begin to apply specifics of the legislation as issues of excellent practice. In particular they should work with people using all practicable skills to facilitate communication to ensure desires and wishes about a person's own life are prioritised. This will include a sound knowledge of resources available, and must be exhaustive.

Social workers must know when to involve other professionals in order to enhance and assist communication with people who have communication needs. It is essential that a multidisciplinary approach is taken to ensure that all practicable means are employed to ensure that a comprehensive assessment is carried out. Social workers at this level should be able to implement practical skills into their interventions such as ensuring hearing aids are working for hearing aid users, and using interpreters where necessary. At this stage social workers should be recording their interventions carefully and detailing the steps that they have taken to ensure that accurate and meaningful communication is taking place.

ASYEs should be able to:

- Integrate knowledge and theory at a lower level of practice.
- Be clear about the decision making process and be held accountable.
- Implement the principles of 'Making Safeguarding Personal'.
- Implement the principles of the MCA.
- Carry an independent caseload about which they can make informed decisions.
- Have a working knowledge of the section 4 Best Interest Checklist and have the ability to implement it.
- Implement interventions which are based on the principles of the least restrictive option.
- Be a fully functioning member of the multidisciplinary team who is able to advise relevant others on issues pertaining to the MCA.

- Be able to carry out comprehensive risk assessments that will then inform their decision making as how best to safeguard people while ensuring the principles of the MCA are being fully adhered to.
- Be confident of the stage when specific legal advice is required to consider whether an application should be made to the Court of Protection.
- Know how to involve incapacitated persons in decision making.
- Have a sound knowledge of restraint. They should know what the criteria are for the use of restraint and knowledge of the difference between restraint and a deprivation of liberty.
- Have knowledge of Lasting Powers of Attorney and deputyship and their respective powers.
- Have the ability to demonstrate how they have reached the decisions that they have made and know how to document this appropriately and comprehensively.

Social workers

At this stage in accordance with the PCF level descriptors social workers should be able to:

- Exercise higher quality judgements, in situations of increasing complexity, risk, uncertainty and challenge.
- Expect and anticipate, but not prejudge, the issues that may develop.
- Have greater confidence and independence (while accessing support when needed), and use their initiative to broaden their repertoire of responses.
- Have expertise in one or more areas of practice, be familiar with local resource networks and be recognised by peers as a source of reliable knowledge and advice.

In terms of working with the MCA this would mean that a social worker:

- Should be able to consolidate all of the above and specifically.
- Would regularly engage in best interest assessments, and be able to advise other colleagues in issues of the MCA.
- Would develop skills in preparing reports for court and court skills more generally.

Experienced social workers

At this stage in accordance with the PCF level descriptors, experienced social workers should be able to:

- Be more autonomous in their role.
- Demonstrate expert and effective practice in complex situations, assessing and managing higher levels of risk.
- Be able to strike a balance between support and control; liaising with a wide range of professionals, including those at more senior levels.
- Manage complex caseloads, and offer expert opinion within the organisation and to others.
- Chair a range of meetings, offer expert support to case conferences, and produce high quality assessments and reports for a range of functions.
- Model good practice, setting standards for others.
- Start to take responsibility and be accountable for the practice of others; mentoring newly qualified social workers, and supervising the work of junior staff.

In terms of the MCA, all of the above would be encompassed in the role of the Best Interest Assessor (BIA); a role which the social worker should undertake following completion of BIA training. Once consolidated in that role, an experienced social worker would regularly chair Best Interest Meetings. They would be confident in knowing when to refer to the Court of Protection and would regularly undertake such work.

PCF levels advanced to strategic

These are the skills and interventions specific to the MCA that are commensurate with the final two levels of social work.

Advanced social workers

At this stage, in accordance with the PCF level descriptors, advanced social workers should be able to:

- Have their practice recognised as exemplary, and provide leadership and professional wisdom to their colleagues and other professionals for work in situations of high complexity.
- Continue to work directly with people who use services, and those who care for them, as well as families and communities.
- Provide constructive challenge to enhance practice, procedures and policies, promote innovation, and introduce new ways of working from recognised sites of excellence.
- Contribute to the development of knowledge and promotion of excellence in their field using evidence-informed practice.

In terms of working with the MCA this would translate into the following tasks and roles:

- Have a supervisory or line management role specific to issues to do with MCA.
- Be able to scrutinise documentation from colleagues and be able to have an auditing role.
- Be able to offer clear, expert advice and have a nuanced understanding of the differences between safeguarding and MCA.
- Train as, and maintain capability as a Best Interest Assessor and its successor roles (ie AMCP role under Law Commission proposals).
- Act as MCA and DoLS Leads for their agencies.

Strategic social workers

At this level, strategic social workers need to ensure that all of the above is implemented and that services are run in compliance with the principles of the MCA embedded and integrated at every level. These social workers will be commissioners of services and will be able to:

- Differentiate between MCA issues, safeguarding issues and issues that arise as a result of poor commissioning.

- Authorise Deprivation of Liberty safeguards.
- Represent their agencies within the Court of Protection.
- Operate at a national level (for example, representing their organisation on Association of Directors of Adult Social Services working groups or being part of the Adult Principal Social Worker network).
- Ensure that there is appropriate support for social workers; including specialist legal advice.

Delivery of this CPD curriculum

The Mental Capacity Act curriculum is designed to be delivered by a range of providers. However, we strongly recommend that it includes teaching from qualified law professionals.

It is essential that the mode of delivery is tailored to fit the learning needs of the specific audience. This could include: interactive lectures; small group work; case discussions; workshops; role play; and blended learning in the form of online course materials and virtual learning environments such as Blackboard. We strongly recommend that the course includes a hands-on practical session where participants complete a balance sheet exercise. It is also crucial that up-to-date case law materials are used.

Learning outcomes and assessment will need to be tailored to meet the learning needs of each specific audience.

Resources

Statutory Guidance

Mental Capacity Act 2005:

<http://www.legislation.gov.uk/ukpga/2005/9/contents>

Making Safeguarding Personal:

http://www.local.gov.uk/c/document_library/get_file?uuid=8313fec0-348e-43ec-ab89-09694c990584&groupId=10180

MCA Code of Practice:

<https://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act>

DH Guidance on 2014 Supreme Court Rulings Cheshire West & Chester and Surrey County Council:

<http://www.mentalcapacitylawandpolicy.org.uk/resources-2/cheshire-west-resources/>

Books

Jones, R. (2014). Mental Capacity Act Manual. London: Sweet and Maxwell.

Barber, P. et al. (2010). Mental Health Law in England and Wales – A Guide for Mental Health Professionals. Exeter: Learning Matters Ltd.

Brown, R. (2013). The Approved Mental Health Professionals Guide to Mental Health Law. (3rd ed). London: Sage.

Brown et al (2009) (2nd Ed) The Mental Capacity Act 2005: A Guide for Practice. Essex: Learning Matters.

Online resources

SCIE Guide 42: Good Practice Guidance on Accessing The Court of Protection:

<http://www.scie.org.uk/mca-directory/>

SCIE Guide 32: Practice Guidance on the involvement of Independent Mental Capacity Advocates (IMCAs) in safeguarding adults:

<http://www.scie.org.uk/mca-directory/>

ADASS: Safeguarding Adults – A national Framework of Standards for Good Practice and Outcomes in Adult Protection Work:

<http://www.adass.org.uk/adassmedia/stories/Publications/Guidance/safeguarding.pdf>

CQC Briefing on 2014 Supreme Court Rulings Cheshire West etc:

<http://www.mentalcapacitylawandpolicy.org.uk/resources-2/cheshire-west-resources/>

Mental Capacity Act Directory – a variety of MCA support materials

<http://www.scie.org.uk/mca-directory/>

MIND Guide to the Mental Capacity Act:

<http://www.mind.org.uk/information-support/legal-rights/mental-capacity-act-2005/>

Mental Health Foundation:

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

Essex Autonomy Project:

<http://autonomy.essex.ac.uk/>

SCIE:

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

<http://www.mind.org.uk/information-support/legal-rights/mental-capacity-act-2005/>

<http://www.scie.org.uk/mca-directory/>

Mental Law Online:

http://www.mentalhealthlaw.co.uk/Main_Page

Alex Ruck Keene's blog:

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

39 Essex St:

http://www.39essex.com/court_of_protection/

Court of Protection: Government website:

<https://www.gov.uk/court-of-protection>

Guide to the Court of Protection:

<http://sites.cardiff.ac.uk/wccop/>

This website accompanies a useful book about the Court of Protection:

<http://courtofprotectionhandbook.com/>

Lucy Series blog:

<http://thesmallplaces.wordpress.com>

Journal articles

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Dunn, M.C., Clare, I.C.H. and Holland, A.J. (2010). Living 'a life like ours': support workers' accounts of substitute decision-making in residential care homes for adults with intellectual disabilities. *Journal of Intellectual Disability Research*, 54(2), 144-160.

Dwyer, S. (2010). The Deprivation of Liberty Safeguards and People with Dementia: Implications for Social Workers. *British Journal of Social Work*, 40(5), 1503-1516.

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Herissone-Kelly, P. (2010). Capacity and Consent in England and Wales: The Mental Capacity Act under Scrutiny. *Cambridge Quarterly of Healthcare Ethics*, 19, 344-352.

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McDonald, A. (2010). The Impact of the 2005 Mental Capacity Act on Social Workers' Decision Making and Approaches to the Assessment of Risk. *British Journal of Social Work*, 40(4), 1229-1246.

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