

NORFOLK SAFEGUARDING ADULTS' BOARD

Mental Capacity Act Workshops

7-9 September 2022

Kate Brolly, Vickki Bunting and Walter Lloyd-Smith with Margaret Flynn¹

Introduction

These notes resulted from a series of five workshops spanning two and a half days in three locations: Great Yarmouth, Dereham and Fakenham. They involved over 50 professionals who were identified by a county-wide survey concerning practitioners' use of the MCA.² They were attended by 10, 12, 13, 14 and 17 people. These powerfully generative events involved social workers, hospital and community based nurses, physiotherapists, speech and language therapists, occupational therapists, dieticians, police, housing officers, the managers and staff of residential care and nursing homes, community based managers and support staff working for the private, voluntary sectors and the police supporting young people, people with mental health challenges, learning disabilities, autism, people with dementia, the victims of sexual abuse and domestic violence and people receiving palliative care.

The workshops were designed and facilitated by Kate Brolly, Vicki Bunting and Walter Lloyd-Smith – a speech and language therapist and safeguarding lead at the Norfolk and Waveney Integrated Care Board, a social worker and an occupational therapist/ Safeguarding Adults Board Manager respectively. Their overarching purpose was to identify ways of “better supporting practitioners.”

The Format of the Workshops

Each workshop began with reassurance that the five events were opportunities to have “honest conversations” about their experience of the MCA.

The workshops introduced two exercises. The first was entitled “The MCA Swimming Pool” which encouraged participants to identify where they were, that is: the deep end (where several claimed to be “not waving but drowning...treading water!”); the shallow end/ dipping toes in the water; on the diving board/ ready to jump in; on the viewing platform/ watching with interest; and outside the swimming pool/anxious about going in. Participants were encouraged to explain their location. This structured opportunity for people to share

¹ The Safeguarding Adults' Board (SAB) invited Margaret Flynn to contribute to the workshops and prepare a note for circulation within Norfolk and the National Mental Capacity Forum

² The survey arose from the SAB commitment to identifying support for all practitioners. Since the MCA is a recurring theme in Safeguarding Adult Reviews, the workshops were designed to assist the SAB to enable practitioners to craft different responses, perhaps in the form of approaches and guidance. Finally, the whole programme will be evaluated

progress and difficulties was followed by an invitation to take stock of their experience and state what as individual practitioners they wanted to START DOING, STOP DOING and CONTINUE DOING. Finally, participants were introduced to materials identified by the facilitators as helpful in the light of the challenges they had described. Once participants had left, the facilitators discussed the impressions gathered from the discussions.

Observations Arising from the Two Exercises

Within the five workshops it was possible to identify **the challenges arising from the diverse organisations in which people work**. Typically, professionals work in specialisms, they have peers, managers, employees and clients for whom they are primarily responsible.

- *In mental health services, we have people who can talk the talk without any understanding of what it means.*
- *Capacity comes up so frequently with dementia around people's care and their treatment.*
- *Occupational therapists do more assessments than physiotherapists, especially in COVID, and I'm not really comfortable with it.*
- *Parents are increasingly asking for "enclosed safety beds" and we're having to work with them. How do we explain mental capacity to these families if their 16-year old has been zipped into a bed all their life? Strapping children into chairs are Deprivation of Liberty Safeguards [DoLS] matters and yet some parents believe that they are their decisions.*
- *In the police there's this strong sense of "gut feeling." That sense that something is not quite right.*
- *It's when other professionals say "He's got capacity, he's fine" when you know he hasn't. For example, asking an older person whether they know when they want to go to the toilet and they say "yes" as they're peeing...*
- *It's the expectation of my role as the most senior hospital nurse and yet I'm not that experienced.*
- *I'm not confident working with people under 65 years.*
- *You want people to have capacity if there's a lot at stake. Being accountable for assessing someone as having no capacity – putting your name on it – when it means that they can't go home...*
- *Beat officers don't have training in mental capacity. They take people in crisis to hospital. We rely on colleagues to assess mental capacity if we think that someone is being exploited financially. We might do a joint visit if it is around sexual offences. Our decision-making comes on the back of whether someone has mental capacity.*
- *My relative's service was told that they had to get the consent of everyone to use their photos in recruitment drives. It was done with the parents' consent. Now they can't get the consent of people who use the service. From never having a recruitment problem, they have one now. How can you demonstrate that was in their best interests when there aren't enough staff?*

- *Capacity assessments are seen as transferable from a single decision.*
- *We didn't have the greatest of training about the MCA. It was all online and skimpy.*

Necessarily **organisations are subject to change and workforce churn**. The employees of organisations engage in expectation-driven behaviours which their managers tend not to see because they are distant from them.

- *I was responsible for a mature, established team until four people retired. So it's all new to me and it's left a huge gap in the experience of the team.*
- *Some people are new to the profession but are inexperienced. Some staff require very basic training and others require refresher training. Maybe it's always going to be like this?*
- *It takes time to do an assessment properly and well. I'm not sure that this is fully understood. You need time to understand someone's communication, and the baseline.*
- *There are people you can turn to like Speech and Language Therapists and psychologists if they have the time.*
- *There's a strong case for management training in the MCA [for people whose professional training pre-dated the introduction of the MCA] across all sectors.*
- *It should be part of induction.*

Such contextual information highlighted the key factor of **engaging with other professionals**, generic and specialist. This is not consistently associated with mutual assistance:

- *It's when people want to self-discharge [from acute hospital settings] and I ask "has he got the mental capacity to self-discharge?" and the consultant says "Yes" without having undertaken an assessment.*
- *When the CPS get involved about people giving evidence in court, it's messy. It's my view that a client is not able to give evidence if they're telling me "I just want to kill myself – I'll slit my wrists if I have to go to court."*
- *We have tenants with complex needs, perhaps mental health and substance misuse. Do they have the capacity to understand what we're telling them about the prospect of losing their tenancy? We say we don't think they have capacity and the social worker disagrees.*
- *Some tenants have high risk lifestyles but it's as though the threshold is too high for getting non-housing professionals to work with us.*
- *In Housing we feel less confident when it comes to deciding whether a person should be living independently. We have less of a say. We're not trained in the same way. If we do a capacity assessment, all others trump ours. It's a real problem for housing officers.*
- *There's a hierarchy of trumping. The GP writes one line and my five sides of A4 are ignored.*

- *Continuing Health Care is so stretched having to do capacity assessments creates a huge amount of work for us.*
- *There are unaccompanied people who come into A&E from care homes and we don't know if they can consent to an examination.*
- *There are people who become agitated because they are being moved around the hospital. It's from the point of entry that people's [immediate] health needs travel with them, rather than a full holistic view of their needs. We all have information on different forms and systems. It's like we don't speak English.*
- *The CPS hate uncertainty. To say, "this person's got fluctuating capacity/ it's a grey area about whether to interview them," is tricky for the CPS.*
- *The interface with the courts is challenging. There was a son who ripped his parents off. His mother had capacity and agreed that their son had ripped them off. By the time of his trial his mother had ceased to have capacity and the CJS didn't seem to get it.*
- *Children's services don't ever seem to do mental capacity assessments. In spite of doing loads of assessments on children they don't do mental capacity. It's a necessary skill-set but not one they've taken on.*
- *Neither solicitors nor GPs want to do mental capacity assessments and yet there's an expectation that GPs will do them.*
- *Some people have LPAs but don't know how it's in place. You have to question how they came about.*
- *We're in danger of losing sight of the person at the centre, some of whom wait for an unreasonable amount of time and we forget to get back to them.*
- *There's such disparity between the recording expectations of different agencies e.g. "This person has capacity" vs carefully evidenced accounts. Fear of litigation kicks in.*
- *It would be good to be taken seriously by other professionals.*

The task of **introducing the MCA to the parents of teenagers with support needs and to the families of adults with support needs**, for example, occurs in the context of contrasting lay and professional relationships, families' histories of providing support, their "biographical knowledge" of their relatives' support needs, and the topic of greatest current relevance to families. Most typically, professionals seek to maintain family carers in their roles, implicitly using them as resources as they offer and provide instrumental services. The task of giving family carers the necessary information about, *inter alia*, the MCA, is an ambition that remains to be achieved.

- *There are families who do not understand why they cannot carry on making decisions on behalf of their 16 year olds.*
- *It's hard for parents to let go, even scary when they have led everything.*
- *Some parents have been told "our assessments will trump mental capacity."*
- *It's a case of having to navigate with families at transition.*
- *Some staff are bullied and coerced by families and that opens a can of worms.*

- *Some families say that they have a power of attorney and they don't. We have learned to ask for evidence.*
- *A lot of the situations we're dealing with aren't covered in training – or fairy-tale "case studies."*

Decisions based on professional hierarchy exercised each workshop. This concerns horizontal linkages across disciplines as well as vertical connections between tiers of managers. Co-working with a view to achieving shared goals appears constrained by interpersonal trust as well as different disciplinary and organisational contexts.

- *I feel I have to shut up. I think an assessment is needed and I'm told "No." So the appointee says of this man who has made a total hash of his money, who the social worker agrees hasn't a clue, "He's fine!" They're not dealing the consequences of unpaid bills and him turning up wanting money. It's so frustrating!*
- *In terms of professional status, we may be at the lower end of knowledge but we do know our tenants because we are working with them.*
- *I've had battles around people with dementia and the assumptions that are made about them. In the face of a DNACPR I have argued that a person is physically well only to be told it's not my decision. It's the same with people with learning disabilities.*
- *It's crazy. GPs are overstretched so what they do is meet someone for five minutes and if the client is good at masking, they come out with 100% capacity.*
- *For the tenants who self-neglect, for whom there is an accumulation of knowledge, there's no recognition of how they're living. Assessors are ignoring the people at the centre.*
- *I spent five months assessing the capacity of a person who was hoarding. I did it with another, experienced social worker. The response of the Court of Protection³ judge was to request the "expert opinion" of a psychiatrist. That opinion cost the LA £2.5k.*
- *I did a DoLS assessment and received positive feedback but was advised that it still needed an external expert, i.e. a psychiatrist who didn't know the person.*
- *I challenge to the best of my ability but I have the council telling me that I don't need DoLS for all residents and the CQC telling me that I must have them for all residents. Because they won't meet to discuss it, it is unresolved and has gone on for four years. It puts me and my home in an impossible position.*
- *A nurse colleague gave CPR to a man with a learning disability for 40 minutes. He was taken to hospital where he was placed on a DNACPR.*

³ The Court of Protection appears to be struggling to manage the volume of applications. Observations included: *The process for application is unduly onerous and the forms don't work. They lock when you are writing; the forms need a wet signature so have to be scanned and returned. We have no printing facilities; it doesn't recognise how difficult it is to get a Rule 1.2 representative since it can no longer be a parent; once an application is submitted it can take six to nine months which means the information is out of date and the Best Interests has to be redone; there's meant to be a care plan setting out DoLS arrangements. If the person has a Personal Health Budget, the family may not have the skills to write one so it goes to the ICB to write, even though it may not know the person; it feels as though the Court doesn't understand the logistics; have we created a system to service the needs of an overstretched Court of Protection?*

Participants described **specific circumstances which inhibit effective practice concerning the MCA.**

- *It's the hierarchy of professionals who act as though they're in charge - psychiatrists and GPs are at the top and the rest of us are way down the list// There is no regard for people who know a person best, whoever is supporting them // one GP was going to charge £50.00 to do one so it didn't get done// Our organisation paid for a GP to do one.*
- *You still hear "He or she's got capacity!" There has to be clarity about the decision we are expecting people to think about and make.*
- *Other professionals/ organisations do not trust our mental capacity assessments.*
- *The pressure to discharge patients from acute hospitals is resulting in poor practices. There are no longer social workers based in the hospitals and if the consultants say they're medically fit for discharge...*
- *There's such a demand on hospital beds. One person had five admissions in six months. What is that history telling us?*
- *It's been used as a delaying tactic for us at times, e.g. there's a fine line over behaviour over which a tenant has control and anti-social behaviour. If they have capacity, we'll take enforcement action.*
- *Some tenants have high risk lifestyles but because they have a roof they're not seen as a priority. They have to be desperately poorly. The threshold for health is too high.*
- *A woman who took an overdose discharged herself from A&E. There are no questions asked about mental capacity in these cases.*
- *A residential home in the north of England rang to say that it was in a [temporary] resident's "Best interests" to stay with us!*
- *There are some really poor capacity assessments.*
- *It's clear that some people have made a judgement before the assessment.*
- *Colleagues don't turn up to multi-disciplinary meetings.*
- *There are clinicians who assert that a person doesn't have capacity because they have dementia or a learning disability.*
- *Encounters with alleged victims require you to ask "What is their understanding? Do they know what a statement is?" When I asked a woman with learning disabilities about the police she said, "The police are so cool. You arrest people and put them over cars." // The language of the CJS does not help.*
- *We spend so much time with the clients, sharing our fact-finding with the police, advocating for the victims (of sexual assault) only to be told "No Further Action." Unless you can demonstrate a major difference between the first video interview and later ones...*
- *The assumption that people who are traumatised and in terrible distress have capacity?*
- *It's the responsibility of it. What if I get it wrong?*
- *I'm not comfortable with "unwise decisions."*
- *What are the right questions to ask about "unwise decisions"?*

- *Being told that you are risk-averse is a very powerful silencer.*

Participants described what they would find helpful as professionals and members of teams. Having set out the contexts within which they invoke the MCA and undertake mental capacity assessments, **they are not seeking a single type of competence but something more comprehensive.** It was suggested that catastrophizing the outcome paralyses the activity. They would like: interdisciplinary problem-solving to address the challenges they have encountered, (e.g. “since we disagree, may we do the assessment jointly?”); their realities to be acknowledged (e.g. “we are all using different forms!”); and certain complex decision-making realms to provide practitioners with effective ways of working:

- *I want to be confident on my skills and knowledge.*
- *The confidence to insist to other professionals that it's best if the assessor knows the person.*
- *I'm rusty. I haven't done one for a while.*
- *Am I completing the assessment robotically?*
- *It's a relief to know that others are having similar problems!*
- *We all want our experience to be valued – but some people's is more valued.*
- *I am afraid that I'll get it wrong...if I do will I be backed?*
- *I get that there's no quick-fix but I really worry about getting it wrong...Am I going to end up in a hearing and lose my registration?*
- *It's that feeling that you are depriving a person of choice, especially if you get it wrong// I don't want to be afraid to ask for a second opinion*
- *Advocate for clients, see them in different environments and link with other agencies and families to serve our clients better.*
- *To expand the team's experience so we can help the people we support.*
- *I want to confidently question colleagues across sectors.*
- *I want to get a culture going around mental capacity – learning from each other and supporting each other.*
- *Some patients think that you're tricking them when you ask questions [checking whether they are retaining information, for example] and they get agitated. They don't understand that you're encouraging them to talk – not make them fail.*
- *I want to be positive with colleagues about mental capacity – keep the conversation open.*
- *I want to build my knowledge...be a good judge of what a good assessment is.*
- *How can I communicate as best I can?*
- *I want someone to demonstrate and afterwards, talk through what they did. That would be helpful – especially with the more complicated decisions.*
- *Explicit conversations about putting training into practice.*
- *Being able to apply the MCA in other settings and with people with different support needs.*
- *An early-help hub where you can ask for help and advice – especially for the “grey” areas like fluctuating capacity.*

- *Credible professional training – like today.*
- *Sometimes I think we're in danger of over-complicating it.*
- *We can always learn and grow// regular workshops, round table discussions and reflective practice sessions.*
- *We should be building knowledge through our teams and liaising with other professionals.*
- *Some real examples of complex decisions where it seems there's an infinite number of possibilities e.g. wanting a relationship, moving home, and end of life care.*
- *We have to start educating young people, everyone we support to make decisions.*
- *Sharing and talking about best practice examples// briefing about some of the Court of Protection decisions.*
- *Audits of assessments for different professionals e.g. would anyone rate "X lacks capacity" but I see these!*

Some useful resources

Participants were encouraged to check out the following websites:

<https://alcoholchange.org.uk/> (accessed 5 October 2022) has several factsheets concerning mental capacity and considers fluctuating capacity

<https://www.mencap.org.uk/> (accessed 5 October 2022) has a resource pack for families and carers

<https://www.btfm.org.uk/scholarship-stories-mental-capacity-act-guidance-during-covid-19-and-beyond/> (accessed 5 October 2022)

<https://www.bma.org.uk/advice-and-support/ethics/adults-who-lack-capacity/mental-capacity-act-toolkit> (accessed 5 October 2022)

Tim Farmer's book *Grandpa on a Skateboard: The practicalities of assessing mental capacity and unwise decisions*

Additional tips included: check out when an assessment was done and, if appropriate, question its ongoing relevance; if it is determined that there will be no mental capacity assessment, set out the reasons for this; "tell me, show me" is a useful way of understanding whether a person's claims are consistent with what they do; when documenting a mental capacity assessment, use quotation marks to indicate exactly what the person said; for people with fluctuating capacity, it is helpful to do three assessments; in the County Council all assessments are authorised by a manager – it is designed to be deliberate and supportive; give yourself time to do it well and start a conversation; the more complex the decision, the more background information you require; an assessment is not an event; the diagnostic test isn't a diagnosis; and it is helpful to put numerical values on your assessments.

Finally

Participants at the five workshops expressed gratitude for the opportunity and space to share their perspectives and experiences. They appreciated its rationale and expressed interest in future opportunities addressing specific elements of the MCA, such as the LPS:

- *This [workshop] is a really valuable opportunity to network and strengthen practice.*
- *It's helpful – trying to understand how to do it better.*
- *I'm thinking about how to address the huge gap concerning a person's background and history for A&E staff.*
- *It was helpful to learn that retaining information is not a memory test...and that assessment is about supporting people.*
- *It's the best face to face training I've had in a long time.*

13 October 2022