

TRANSFORMING SOCIAL WORK PRACTICE



Mental Health & Mental Capacity Law for Social Workers

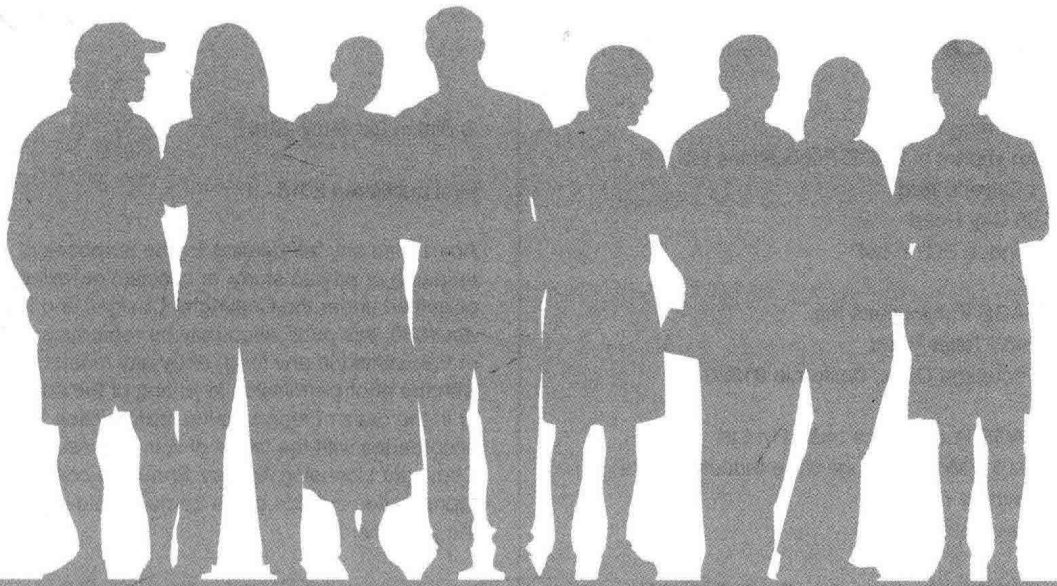
An Introduction

Simon Godefroy

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Simon Godefroy

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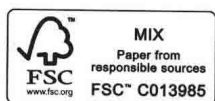
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Mental Health & Mental Capacity Law for Social Workers



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In memory of
Hazel Irene Patterson
11 August 1941–2 November 2012

About the author

Simon Godefroy is the Programme Director of the London and Thames Valley Approved Mental Health Professional (AMHP) Programmes for Bournemouth University. Having started out as a probation officer and substance misuse social worker, Simon qualified as an approved social worker in 2000, and is currently practising as a locum social worker, AMHP and best interests assessor. Until August 2012 he was employed by Wokingham Borough Council as the AMHP and Forensic Lead. Simon is a Mental Health Act Reviewer for the Care Quality Commission. He is also an independent trainer and consultant specialising in various aspects of working with mentally disordered offenders and working with the Mental Capacity Act 2005 as well as providing AMHP and BIA supervision. He publishes a monthly digest on social work, mental health and related law on Twitter.

Acknowledgements

This book is dedicated to the memory of my mother who died from bowel cancer at the age of 71. If it were not for her efforts to ensure I received a proper education, this book would not have been written. I was born partially deaf, something my mother really began to notice when my sister came along a couple of years later and started to learn to speak. However, she could not get doctors to listen to her concerns, and it was not until the age of four that I was diagnosed and fitted with ugly body-worn hearing aids. My parents were warned that I would leave school with no qualifications, something that was not acceptable to my mother. I was sent to a special school for deaf children at the age of five but by the age of eight, whilst I was able to speak, I did not know what the alphabet was. I was summarily transferred into mainstream education and my mother made me read a book a week for several years to bring my reading skills to the level of my peers. When I reached my teenage years she arranged for me to see a speech therapist for several years to ensure that I could communicate clearly in readiness for the world of work. I eventually managed to obtain two degrees and I am in the final stages of my third. If it was not for the determination of my late mother, I would not be where I am today and for that I owe her my eternal gratitude.

I have been inspired as a social worker and as an approved social worker/approved mental health professional by having the privilege to work as part of some dedicated and passionate mental health and social care teams in my career. Professionals in mental health and in social care rarely get the sort of acknowledgement they deserve. I want to thank all the staff of the Wokingham Community Mental Health Team which I have been proud to be a part of for ten years. Also to the staff of the Berkshire Emergency Duty Service who strive to provide a high-quality, integrated social work and social care service out of hours: thank you.

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Simon Godefroy
March 2015

Introduction

This book aims to provide an introductory text for social workers, students on qualifying courses (as well as those on post-qualifying programmes) and other professionals on mental health and mental capacity law. Students, qualified social workers and other professionals can struggle with the complexities of mental health and mental capacity law (and law in general) and introductory textbooks are thin on the ground. There are books aimed at qualified and experienced mental health professionals as part of approved mental health professional and best interests assessor training but few for people starting out in this area of law.

This book will focus on the application of law to social work practice with adults. It aims to provide a good level of understanding of mental health and mental capacity law as required for social work practice at qualifying level. It is written to be readable and accessible. Do not make the mistake of thinking that this area of law is interesting for social workers to know about, but does not have any real application until you undertake further training. Whatever area of social work or health/social care you work in, you will encounter people in mental distress and/or those who may lack capacity to make decisions about their care. To be effective in caring for these people you will need a good working understanding of mental health and mental capacity law and the situations to which it may apply.

The focus of the book is about the practical application of the law in situations you will face as a social worker, so there are exercises and case studies to enable you to think about how you will apply the law in practice. The book starts with an introduction to law by asking the question, 'what is the law?' We will move on to consider the historical basis to mental health, mental capacity and human rights law and how it has developed to what we have now. Consideration will be given to the complexities of the definition of mental disorder including an exploration of a range of models of mental disorder. It will then explore in more depth core aspects of the law and practice issues with application of principles and values as a central thread.

This book is organised in three parts. Chapters 1 to 3 provide an introduction to mental health and the law. Chapters 4 to 7 focus on applying the law within social work practice. Chapters 8 to 10 examine provisions with regard to mentally disordered offenders, the Deprivation of Liberty Safeguards and safeguards for people who come within the provisions of the Mental Health Act 1983 and the Mental Capacity Act 2005.

Part I: Introduction to mental health and the law

Chapter 1: What is the law?

This chapter introduces the key legal concepts that we will be considering throughout the book and provides a foundation for your understanding of this area of law.

We explore how law is made and the different types of law from primary legislation and secondary legislation through to common law and case law. It briefly introduces the idea of 'the rule of law' as it applies to social workers and then goes on to introduce the European Convention on Human Rights (ECHR) and the Human Rights Act 1998.

Chapter 2: Historical perspectives

In order to understand the current issues in mental health law, it is important we briefly consider the historical context. This chapter also explores the development of a range of models of mental disorder as well as charting the development of the legal understanding of mental capacity through case law and statute. This includes the development of the law around 'valid consent'.

Chapter 3: Introduction to the Mental Health Act 1983 and the Mental Capacity Act 2005

This chapter provides an overview of the Mental Health Act 1983 (MHA) and the Mental Capacity Act 2005 (MCA) as well as later amendments. It examines in detail section 1 of the Mental Health Act and the definition of mental disorder as well as the aims and function of this Act. It also introduces the definition of mental incapacity in section 2 of the Mental Capacity Act and how this is assessed in section 3. This will enable you to understand the gateways into these two pieces of legislation so that you will understand how people come within their provisions. We introduce the role of the three statutory Codes of Practice which apply to these Acts. This chapter concludes with an outline of the key roles within these two pieces of legislation and commonly used abbreviations.

Part II: Application to practice

Chapter 4: Principles and values

The principles that underpin the application of these two Acts will be introduced, linking them both to the ECHR and social work professional standards. We introduce some key ethical dilemmas that arise within mental health law including the key tension between 'care and control'. Connections are made in this chapter between the application of mental health law and the social work value base. Promoting the rights and full participation of people who have a mental disorder and/or lack capacity to make decisions regarding their care is essential within this area of law but raises some very key challenges.

Chapter 5: Assessment

How people are assessed under these two Acts and the processes involved (except under the Deprivation of Liberty Safeguards, which is left to Chapter 9) forms the focus of this chapter. The process of the Mental Health Act assessment and the key roles are explored with a focus on sections 2, 3, 4, 135, 136, 6 and 13. We also revisit how mental capacity to make a specific decision is assessed under the Mental Capacity Act.

Chapter 6: Providing care

Here we focus on the provision of care as authorised under the Mental Health Act and Mental Capacity Act. The provision of 'medical treatment' under the MHA is explored with a focus on the Mental Health Act guiding principles. What treatment

can be provided under the MHA and what cannot be provided under this Act is examined. The role of independent mental health advocate (IMHA) is explored.

We then go on to explore best interest decision making under the MCA and examine the protection for those making decisions under the MCA. We consider the legal basis for the use of restraint under the MCA. Advance decisions are also discussed. The chapter ends by introducing the role of the independent mental capacity advocate (IMCA).

Chapter 7: Care outside of hospital

The focus is now on moving care away from the hospital setting to the community with an examination of guardianship, section 17 leave and community treatment orders and the provision of aftercare. We continue to be focused on the application of principles and social work values to ensure that you are able to understand the key tensions between promoting independence and autonomy whilst keeping people safe.

Part III: Other provisions and safeguards

Chapter 8: Mentally disordered offenders

People who are in mental distress at times come into contact with the criminal justice system. This chapter explores the concept of diversion and the role of mental health and medical professionals in dealing with people in police custody. It outlines the key provisions of Part III MHA with regard to mentally disordered offenders. This chapter aims to better inform professionals who support people within the criminal justice system.

Chapter 9: Deprivation of Liberty Safeguards (DOLS)

This chapter introduces the DOLS, what is a deprivation of liberty, the key roles within DOLS and the six qualifying assessments. This chapter aims to provide a basic introduction to this complicated and sometimes difficult to understand area of law. The purpose of this is to raise awareness of what might constitute a deprivation of liberty so that you can take the appropriate action.

Chapter 10: Safeguards

There are key safeguards for people who come within the provisions of the MHA and the MCA. This chapter explains what rights people have and how they can exercise those rights. These include the role of the nearest relative, the hospital managers, the Mental Health Tribunal and the Care Quality Commission for those under the MHA. It also considers the Lasting Power of Attorney, the role of Court of Protection appointed deputies, the relevant person's representative, and the Court of Protection for those under the MCA.

This book has incorporated the recently implemented (April 2015) Mental Health Act Code of Practice and its Reference Guide. At the same time a major legislative change in the provision of social care services in the form of the Care Act 2014 was implemented. This Act has combined a range of social care provisions going back to the National Assistance Act 1948 into one overarching Act of Parliament for the first time. Its impact on the provision of social services is profound. However, this book does not explore this

Act in any detail except where there are specific changes to the Mental Health Act and how its provisions fit within existing mental health and mental capacity law.

This book has been carefully mapped to the Professional Capabilities Framework for Social Workers in England and will help you to develop the appropriate standards at the right level. These standards are:

- **Professionalism**
Identify and behave as a professional social worker committed to professional development.
- **Values and ethics**
Apply social work ethical principles and values to guide professional practice.
- **Diversity**
Recognise diversity and apply anti-discriminatory and anti-oppressive principles in practice.
- **Rights, justice and economic well-being**
Advance human rights and promote social justice and economic well-being.
- **Knowledge**
Apply knowledge of social sciences, law and social work practice theory.
- **Critical reflection and analysis**
Apply critical reflection and analysis to inform and provide a rationale for professional decision-making.
- **Intervention and skills**
Use judgement and authority to intervene with individuals, families and communities to promote independence, provide support and prevent harm, neglect and abuse.
- **Contexts and organisations**
Engage with, inform, and adapt to changing contexts that shape practice. Operate effectively within your own organisational frameworks and contribute to the development of services and organisations. Operate effectively within multi-agency and inter-professional settings.
- **Professional leadership**
Take responsibility for the professional learning and development of others through supervision, mentoring, assessing, research, teaching, leadership and management.

References to these standards will be made throughout the text and you will find a diagram of the Professional Capabilities Framework in an appendix on page 161.

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Part I

Introduction to mental health and the law

Chapter 1

What is the law?

ACHIEVING A SOCIAL WORK DEGREE

This chapter will help you to develop the following capabilities from the Professional Capabilities Framework:

- **Professionalism**
Identify and behave as a professional social worker committed to professional development.
- **Values and ethics**
Apply social work ethical principles and values to guide professional practice.
- **Rights, justice and economic well-being**
Advance human rights and promote social justice and economic well-being.
- **Knowledge**
Apply the knowledge of social sciences, law and social work practice theory.
- **Intervention and skills**
Use judgement and authority to intervene with individuals, families and communities to promote independence, provide support and prevent harm, neglect and abuse.

It will also help you develop the following National Occupational Standards for Social Work in Wales:

- **Maintain professional accountability**
SW 1: Maintain an up-to-date knowledge and evidence base for social work practice.
- **Practise professional social work**
SW 4: Exercise professional judgement in social work.
- **Promote engagement and participation**
SW 9: Engage people in social work practice.
SW 10: Support people to participate in decision-making processes.
SW 11: Advocate on behalf of people.

Introduction

The study and understanding of the law can create anxieties for even the most experienced social worker. For student social workers it can be difficult to know where to start. Most law books start from the expectation that their readers will have a basic grounding in law, and as a result they are not always easy for social workers to read and understand. Law books that are written from a social work perspective are usually aimed at experienced social workers who are undertaking specialist training in this area, and as a result they are not always easily accessible for student and newly