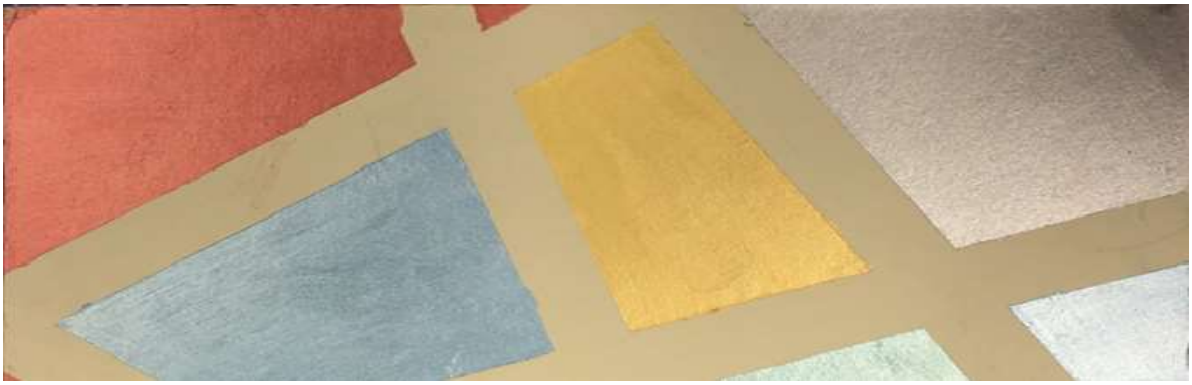
RAPID RESPONSE GUIDANCE NOTE: COVID-19, SOCIAL DISTANCING AND MENTAL CAPACITY

31 March 2020



A: Introduction

1. This is the first in what we anticipate will be a series of Rapid Response Guidance Notes relating to COVID-19 and the MCA 2005. An overview of some of the key issues (as they stood at 25 March 2020) can be found in this article written by Alex and Rosie Scott, and resources relating to the MCA 2005 and COVID-19 have been gathered by Alex here.

2. The Court of Protection team have been asked to advise on a number of occasions since 17 March 2020 as to the legal position where a person ("P") lives in the community and declines to practice social distancing in circumstances where P does not (or may not) have capacity to make decisions about social contact in the circumstances of COVID-19. Clearly the consequences of P going into the community, as she ordinarily would, are (a) that she is at risk of contracting COVID-19, (b) that she may infect others, if she has the virus, and (c) that she may be in breach of the new police powers which have come into effect.

3. What follows is a general discussion, as opposed to legal advice on the facts of individual cases, which the team can provide. This document cannot take the place of legal advice.

B: What is a local social services authority to do?

4. Note, the question is about what adult social care should do. What the police can do is another matter, discussed here.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

5. Detention under the Mental Health Act 1983 may be a possibility if P has a diagnosis of dementia (for example) or, where P has a learning disability and it is considered that her behaviour amounts to seriously irresponsible conduct for the purposes of s.1 Mental Health Act 1983. However, this seems both disproportionate and contrary to the public interest given the shortage of mental health beds and the already overwhelming pressure on the health service.

6. The practical solution is for P to be prevented by those she lives with and/ or who care for her from going out. If the placement is in the community, a DoLS authorisation is not an available option.

C: Court of Protection?

7. The question is whether this is a community DoL, capable of being authorised by the Court of Protection under the Re X procedure (as to which see our Guidance Note here.

8. This means asking, first, whether it is even a deprivation of liberty to prevent P from leaving her home in these circumstances? I.e. is she subject to a confinement in a restricted space for a non-negligible period of time to which she cannot (or will not consent), and does either the state know or ought it to know of the situation.

9. On the face of it, P would appear to be confined. But the position may not be quite so simple.

10. One might ask whether all those in England and Wales are not now confined by operation of the Health Protection (Coronavirus, Restrictions) England Regulations (and their counterpart in Wales). However, the Regulations do not entirely prevent individuals from leaving their homes, only preventing them leaving without a reasonable excuse (and then giving a non-exhaustive list of such excuses). Furthermore, the Regulations do not give rise to the additional element of continuous supervision and control required to satisfy the 'acid test.' Finally, many (if certainly not all) individuals are doing more than merely acquiescing to the injunction to stay at home, but are capacitously and voluntarily agreeing to do so.

11. It would be necessary in each case to see whether P, in fact, satisfied the acid test. This would include examining the extent to which she was supported to leave the home for purposes of (e.g.) taking exercise, and also the extent to which she is under supervision and control whilst at home and in the community. We anticipate that in many cases P will, indeed, satisfy the acid test: in reality, the majority of such Ps probably already did, given the expansive scope of that test, even if adult social services authorities had yet to be in a position to secure authorisation for their position from the Court of Protection.

12. If P is confined, then an assessment of P's capacity would be required,[3] including identifying that all practicable steps have been taken to support her to make the decision in issue (MCA 2005, s.1(3)). While the decision may be regarded as an urgent one, being made on a daily basis, the

[3] See our guidance note here.

likely duration of the restrictions might suggest otherwise, and that education could assist P to be able to make the decision for herself. But of course that will not resolve the immediate issue. And the steps that are practicable in the era of overstretched health services and social distancing are limited.

13. If P lacks capacity to decide to remain at home (and, if there are practical steps being put in place to stop her leaving, to consent to those steps) then the court will undoubtedly have jurisdiction. However, whether it **should** exercise that jurisdiction is a different question.

14. Were P to be in a care home or hospital, it might be difficult to justify the grant of a DoLS authorisation solely to ensure that P maintained social distancing. DoLS is clearly tied to the risk of harm to the person (the requirement being that the deprivation of liberty is in the person's best interests and that it is necessary and proportionate to the likelihood and seriousness of harm to them). If P were at particular risk if she contracted COVID-19, such would undoubtedly give an entry point to justify the grant of a DoLS authorisation, especially if P was unable to understand how to practice social distancing so as to minimise the risk to her. In terms of the risk to others, it might be said that P would be at risk from others in the community who perceive her to be placing them at risk by failing to practice social distancing. However, this rather intangible risk would have to be balanced against the very likely detriment to P from being denied the community access she enjoys (and in all likelihood benefits from in terms of her mental well-being).

15. The court, however is in a different position, having the ability to interpret 'best interests' more broadly so as to encompass a risk of harm to others (see e.g. *Birmingham City Council v SR* [2019] EWCOP 28), including by way of ensuring that P is not subject to criminal prosecution. Here it might be said that a reason preventing P leaving would be to ensure that she was at no risk of prosecution for any offence under the Health Protection Regulations, even if (as discussed in Alex's blog) the risk of such prosecution for a person with impaired decision-making capacity must be minimal).

16. If the person's situation is **already** before the Court of Protection, then these matters can be raised in the context of the existing proceedings. However, in all other cases, there is the very important **practical** problem that the Court of Protection is unlikely to be able to grant any order within a rapid timeframe so as to be able to authorise any deprivation of liberty to which the position gives rise.

17. Putting in an application to the Court of Protection would give 'cover' under s.4B MCA 2005 for those who are doing the actual acts . However, s.4B only gives authority to deprive a person of their liberty where the actions are being taken in the context of either providing life-sustaining treatment or preventing a serious deterioration in the person's condition. It is not obvious that preventing transmission of illness to others could fall within this. However, again, if P were at particular risk if she caught COVID-19, then it could perhaps be argued that the restrictions were necessary to prevent a serious deterioration in her condition.

D: Inherent jurisdiction?

18. Again the situation does not sit comfortably with the role of the High Court under this jurisdiction being limited to adults who are "vulnerable" (see our guidance note on the inherent jurisdiction). There is, in general, a requirement that P be prevented by some factor or combination of factors from making the decision for himself, with the focus of the exercise of the jurisdiction being upon removing the source of the inability to make decisions so as to enable P to exercise free will.

19. The factor affecting P's decision making in the present situation is the virus, and it is difficult to see how an order could be made putting P in a better position to protect herself and others from it. A draconian order depriving P of her liberty under this jurisdiction seems highly unlikely as disproportionate to the risk which, as noted above, is in any event difficult to quantify and to a large extent a risk to others.

E: Pragmatism

20. If and when guidance is issued by the DHSC addressing this precise position, then such guidance should be followed. Until then, however, and reiterating that this is not legal advice, we suggest what seems to us to be the 'least bad' option here.

21. In the circumstances, and against the backdrop of the Regulations, we envisage that the practical solution is likely in most cases to be for:

    (1) families and carers to prevent P from going out in the circumstances this note addresses;

    (2) steps to be taken to seek to explain to P why not going out is of importance, and to support her decision-making capacity in this context;

    (3) steps to be taken within the framework of the MCA 2005 to maximise P's autonomy within the constraints applied to her.

22. This is unsatisfactory as there is undoubtedly an interference with rights, a need to balance that interference with risk, and (in many cases) an absence of oversight as to how this balance is being struck.

23. However, it is important to recognise that this is not, now, a position entirely governed by considerations of the MCA. On one view, it might be said that the Health Protection Regulations, themselves, provide sufficient authority to deprive P of her liberty (albeit for reasons entirely unrelated to her impaired decision-making capacity), because they impose a requirement on all people to remain at home absent reasonable excuse. The Regulations do not provide authority to anyone to keep the person at home. However, they do provide authority for specified individuals to return a person to the place where they are living if they are absent from there without reasonable excuse, including by the use of reasonable force if necessary.

24. We are certainly not saying that this is a position where adult social services should not consider matters further in light of the Health Protection Regulations, but rather that they are having either to make decisions themselves (or oversee decisions being made by family members) in a context in which all individuals, irrespective of their capacity, are being subject to restrictions.

25. What we would emphasise, however, is that the tighter the restrictions are upon P – in particular, the more limited her opportunities are to be supported outside her home – the more problematic the position, and the more closely adult social care departments will have to monitor the circumstances. Problems would arise not just under the Human Rights Act 1998 but also the Equality Act 2010 if a person in P's situation were to be given no support to leave her home for purposes of exercise.

26. It may be that creative and flexible thought is required to support P to maintain well-being in light of all the identified factors: for example, to leave her home for exercise in circumstances which minimise risk - so, for example, looking at the location and timing of P leaving home for exercise, or opportunities for P to exercise and maintain social contact remotely within the home.

27. It may be that adult social care departments are able to make use of some aspects of the NHS volunteer responder scheme which may be capable of reducing the impact upon P's well-being of being required to remain at home (e.g. phone contact with a volunteer).

F: Useful resources

28. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.

- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better. It has a specific page of resources relating to COVID-19 and the MCA 2005.

- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.

- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA.

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