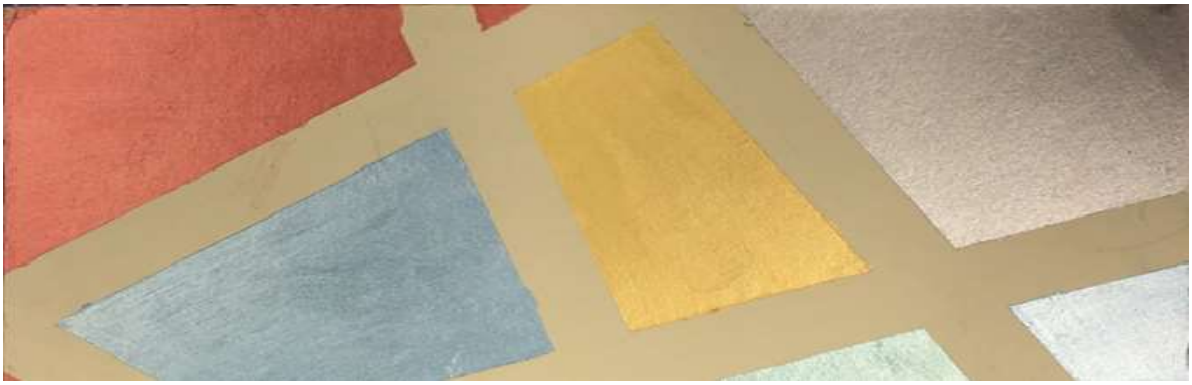
RAPID RESPONSE GUIDANCE NOTE: COVID-19, SOCIAL DISTANCING, SELF-ISOLATION AND MENTAL CAPACITY

October 2020



A: Introduction

1. This is part of a series of Rapid Response Guidance Notes relating to COVID-19 and the MCA 2005. Chambers maintains a COVID-19 page, 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 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. A further important iteration of this scenario is where P has either tested positive or is a close contact of a person who has tested positive.

3. In these situations, 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, (c) she may be in breach of the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, or (d) she may be in breach of regulations relating to gatherings and/or face-coverings.

4. 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. It is also primarily concerned with the position in England because the different nations of the United Kingdom are taking such different courses to navigating the pandemic.

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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. There are three overlapping areas where those involved in supporting a person with impaired decision-making capacity will have to be particularly alert:

   (1) Meeting others: the relevant Regulations in England[3] no longer restrict someone from going out. The primary focus is on the so-called "rule of six," outlawing gatherings of more than 6 people who are not from the same household or from "linked households" in most settings and for most purposes. They are discussed in more detail in this note by Alex;

   (2) Compliance with the requirement to wear a face-covering in shops and public transport, (the hyperlinks being to notes by Alex);

   (3) Compliance with the self-isolation requirements that arise where a person has been notified by specific people that they have either had a positive test result or are a close contact of someone. These are discussed in this note by Alex.

6. None of the relevant regulations specifically address the position of those impaired decision-making capacity. This gives rise to a number of legal complexities, but for our part we emphasise the need for principled pragmatism. Against the backdrop of the Regulations and government guidance, we envisage that the practical solution is likely in most cases to be for:

   (1) steps to be taken within the framework of the MCA 2005 to maximise P's ability to understand the viral risk and the importance of keeping a safe distance from other people. If the person is clinically extremely vulnerable then the higher risk of severe illness is relevant information;

   (2) if P lacks capacity to decide on social community contact, families and carers will need to weigh up the risks and benefits of P going out and, crucially, how the viral risk might be mitigated (e.g. in terms of where they go, with whom they go, and any PPE);

   (3) if going out is not considered to be in P's best interests, restraint can only be used if it is necessary and proportionate to the likelihood and seriousness of the risk of harm to P.

7. What we would emphasise 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 if her needs required it.

8. 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, going out to less busy places. It may be that adult social

[3] In England, The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020. Note, helpfully, the Legislation.gov.uk website seeks to maintain these Regulations in their current form, because they are regularly updated.

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 remaining at home (e.g. phone contact with a volunteer).

9. It might also in some cases be possible to explore whether it would be possible for P join a 'bubble' with another household,[4] although it is perhaps important to note that given the living arrangements for many individuals with impaired decision-making capacity, it is unlikely that they will satisfy the entry criterion of being a person living in a single adult[5] household.

10. Where P lacks capacity to understand what they are to do when they have been informed either of a positive test result or that they are a close contact of a person who has a positive test result, particular care, it is likely - at a minimum - that those supporting those individuals to want to keep the individuals under a potentially greater degree of supervision and control than previously, and to prevent them leaving the place where they should be self-isolating, such that it is more likely that they will be confined. If they cannot consent to that confinement, then consideration will have to be given as to how to ensure that deprivation of liberty is lawful. For our part, it seems to us unlikely that the Self-Isolation Regulations provide sufficient legal authority for these purposes, such that the steps set out in the next section will have to be considered.

D: Authorising deprivation of liberty: the community setting

5. Outside the care home or hospital setting, the first question is the situation is a community DoL, requiring the authorisation of the Court of Protection under the *Re X* procedure (as to which see our Guidance Note here).

6. This means asking, first, whether it is even a deprivation of liberty to prevent P from leaving her home? 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?

7. On the face of it, in the situations covered by this guidance where steps are being taken to support P to maintain social distancing, P would appear to be confined. But the position may not be quite so simple. 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 of residential care, P will, indeed, satisfy the acid test: in reality, the majority of such Ps probably already did, given the expansive

[4] Under (in England) Regulation 5ZA of the The Health Protection (Coronavirus, Restrictions) (England)(No 2) Regulations 2020.
[5] Technically, a single adult household, as they could have any number of children present.

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.

8. The position may be more complicated when restricting or preventing someone going out is taking place within the family home. For example, if one spouse is shielding and the other lacks capacity to make decisions as to social contact, it may well be that the individual with impaired decision-making capacity is confined by the shielding spouse. It is important to recall that the fact the confinement is at the hands of a private individual does not take the situation out of the scope of deprivation of liberty if the state knows or ought to know of the position.[6] Practitioners may be assisted by chapter 8 of the (pre-Covid) Law Society guidance on deprivations of liberty at home.

9. As noted above, it is likely that in any situation where the Self-Isolation Regulations are in play, the threshold of confinement will be crossed.

10. If P is confined, then an assessment of P's capacity will be required,[7] 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 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 social distancing are limited.

11. If P lacks capacity to decide to remain at home in the community setting (and, if there are practical steps being put in place to stop her leaving, to consent to those steps) then an application should be made to the Court of Protection to authorise the deprivation of liberty.

12. 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 may not be able to respond immediately to be to authorise a deprivation of liberty. Putting in the application might give 'cover' under s.4B MCA 2005. 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 are necessary to prevent a serious deterioration in her condition.

[6] *Re D (A Child)* [2019] UKSC 42 containing the most recent reminder of this at paragraph 43: "it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, at least if it knew or ought to have known of this."
[7] See our guidance note here.

E: Authorising deprivation of liberty: the care home/hospital setting

13. Although the primary focus of this note is about the community setting, we also note that, if P is in a care home or hospital, it might be difficult to justify the grant of a DoLS authorisation (or the review of such an authorisation to include a provision) solely to ensure that P maintains social distancing or to comply with a self-isolation requirement:

    (1) 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 practise social distancing so as to minimise the risk to her;

    (2) 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 practise 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). Similar considerations arise in relation to compliance with the Self-Isolation Regulations, and the (possibly illusory) risk that they may be prosecuted for breaching them.[8]

14. The Court of Protection, however, is able to interpret 'best interests' broadly so as to encompass a risk of harm to others and also to seek to prevent P from potentially being subject to criminal prosecution (see e.g. *Birmingham City Council v SR* [2019] EWCOP 28). It would therefore be possible for an application to be made even where the person is subject to a DOLS authorisation so to provide authority for deprivation of liberty which is solely to prevent risk of harm to others.

F: Impractical solutions

15. We flag here two solutions that are, in reality, impracticable.

16. The first is that detention under the Mental Health Act 1983 may be a theoretical 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 inappropriate, disproportionate and contrary to the public interest given

[8] We say illusory because it is in practice rather difficult to see how a person with impaired decision-making capacity could appropriately be subject to criminal prosecution, especially as it is not immediately obvious that they can actually be bound by the requirements imposed under the Self-Isolation Regulations if they cannot understand what they are being required to do.

the shortage of mental health beds. There is also a real possibility that detaining P in a hospital could give rise to a risk that P will contract COVID-19.

17. The second is recourse to the provisions of Schedule 21 to the Coronavirus Act 2020, which gives powers (described here) to public health officers to require a person to isolate themselves where they have, or are suspected to have, COVID-19. The DHSC makes clear in their additional Emergency MCA/DOLS guidance that recourse to these powers should be a last resort in any situation in which they may apply. An additional point, not mentioned in the guidance, is that whilst breach of a direction made by a public health officer is a criminal offence, they otherwise have only very limited enforcement powers: indeed, a direction can only be enforced (if P does not cooperate) by a police officer. In practice, therefore, even if recourse to Schedule 21 may regularise the position in the sense of making P's confinement lawful, in many cases it seems unlikely that it would, in fact, offer a practical solution to ensure that P remains in isolation.

G: Useful resources

18. 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.
- www.lpslaw.co.uk – website set up by Neil with resources about the Liberty Protection Safeguards and much more related to the MCA 2005.
- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA. SCIE has also got extensive resources relating to COVID-19.

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