

The MCA and the pandemic

December 2021

Alex Ruck Keene

Barrister, 39 Essex Chambers

Wellcome Research Fellow and Visiting Professor King's College London

Visiting Senior Lecturer, Institute of Psychiatry, Psychology and Neuroscience,
King's College London

Research Affiliate, Essex Autonomy Project, University of Essex

alex.ruckkeene@39essex.com

[@capacitylaw](#)

The law and guidance

- The law:
 - You **have** to follow it, and if you do not you may be committing a criminal offence
 - Examples of the law: the self-isolation regulations
 - But the law (in most cases) does not prevent visits in care homes and hospitals

- Guidance
 - You **should** follow it
 - If an organisation does not follow it, then they may not be able to say that they are making the right sort of decisions
 - Examples of guidance: the visiting guidance for care homes and hospitals

Decision-making for those over 18

- The person should be supported to make their own decisions
 - E.g. testing, flu vaccination, self-isolation
- If they cannot make their own decision, how to make a decision? The Mental Capacity Act 2005
 - If it is a medical treatment decision they might have made an advance decision to refuse treatment
 - Attorney/deputy
 - Otherwise, collaborative process to identify best interests and accountability
 - **Nb: there is no such thing as next of kin in the context of the MCA**
- But you can't always get what you want, whether or not you can make your own decisions
- If there is a DoLS authorisation in place for the person at the care home, need to be careful as to what you do – and for the care home to be careful as to what they say that they can do.

Self-isolation

- Where the person has capacity to make their own decisions:
 - If they decide not to comply with self-isolation guidance then that is their choice
 - But they will be breaking the law if they have been told to do so by NHS Test and Trace or by a Public Health Officer
- Where the person does not have capacity then decision-making will have to take place on their behalf
 - Always balancing the risk to the person of non-compliance against the risk to the person of compliance
 - Will it be a deprivation of liberty? And if it is, how to authorise?
 - The DHSC's Emergency MCA DoLS Guidance recognised that it may not be in a person's best interests to be required to comply with self-isolation regulations in some cases – now withdrawn, but approach must still apply

Vaccination

- Basis for vaccination
 - Capacitous consent
 - Best interests
 - No blanket decisions
 - The responsible citizen?
 - Harm to others?
 - And caution where any suggestion that restraint might be required
- Involving the courts:
 - In best interests: *Re E (Vaccine)* [2021] EWCOP 7; *SD v Royal Borough of Kensington & Chelsea* [2021] EWCOP 14; *Re CR* [2021] EWCOP 19; *Re A (Covid-19 vaccination)* [2021] EWCOP 47 (but not booster ‘at this time’)
 - Not in best interests; *SS v London Borough of Richmond Upon Thames & Anor* [2021] EWCOP 31

Self-isolation

- Where the person has capacity to make their own decisions:
 - If they decide not to comply with self-isolation guidance then that is their choice
 - But they will be breaking the law if they have been told to do so by NHS Test and Trace or by a Public Health Officer
- Where the person does not have capacity then decision-making will have to take place on their behalf
 - Always balancing the risk to the person of non-compliance against the risk to the person
 - Will it be a deprivation of liberty? And if it is, how to authorise?
 - The DHSC's Emergency MCA DoLS Guidance recognises that it may not be in a person's best interests to be required to comply with self-isolation regulations in some cases

Care home visiting

- Lawful unless care home closed to visitors by Director of Public Health
- Care homes following guidance
- Remember consumer law: Competition and Markets Authority: [“UK care home providers for older people – advice on consumer law.”](#)

Assessments

- DHSC emergency MCA/DOLS guidance now withdrawn but it never changed the law:
 - It is, and has always been lawful to assess remotely (**unlike the MHA**)
 - It is for you to decide whether you have enough evidence
 - If you can't access the person meaningfully, do you have any other evidence upon which you can draw to make the determination?
 - In all cases, need to be clear as to the basis upon which you have reached your conclusion
 - And if adopted the 'least worst' approach more likely to mean that will have to keep under review
- If you are not seeing them in person to consider their capacity are you complying with s.1(3) MCA 2005?
- Making use of older material

Key messages

- The MCA still applies, and the principles are your moral compass
- Need to consider revisiting BI decisions made on the basis of scarce resources in due course
- And advance care planning about admission to / treatment in hospital – keep a VERY wary eye out to make sure it is being done **with** not **to** the person

Resources

- [39 Essex Chambers | Mental Capacity Law](https://www.39essex.com/resources/mental-capacity-law) | [39 Essex Chambers | Barristers' Chambers](https://www.39essex.com/resources/barristers-chambers)
- [Mental Health & Justice | \(mhj.org.uk\)](https://www.mhj.org.uk)
- [Mental Capacity Law and Policy](https://www.mentalcapacitylaw.com)
- [MCA Directory | SCIE](https://www.mca-directory.com)
- [Mental Health Law Online](https://www.mentalhealthlawonline.com)

@capacitylaw

