



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. 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 (moveable feast) of The Health Protection (Coronavirus, Restrictions) (No 2) Regulations 2020.¹
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. It is also primarily concerned with the position in England

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

4. Note, the question is about what adult social services should do. What the **police** can do is another matter, discussed [here](#).

¹ Note, different Regulations apply in England, Wales and Scotland. They also change on almost weekly basis, the current versions being [here](#).

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Disclaimer: This document is based upon the law as it stands as at July 2020; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

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. Otherwise, there is a choice: (1) let P go out alone with the risk of 'social closeness;' (2) to go out with someone who is able to maintain social distancing, (3) not to let P go out. We cannot advise as to where the balance of risks and benefits lie in each case, but we can offer some thoughts as to the legal framework within which the decision must be taken.

C: Pragmatism

6. The relevant Regulations in England³ no longer restrict someone from going out and the government [guidance](#) has been relaxed since 4 July 2020. Whilst people can socialise more, physical distancing from those not in your household or "support bubble" (see below) remains imperative. This is especially the case for those who are clinically vulnerable. Moreover, public transport requires a face covering, albeit with exemptions, with separate guidance [here](#) (and discussed by Alex [here](#)) The 'Staying alert and safe' [guidance](#) states you should:

- only gather indoors with members of up to two households (your support bubble counts as one household) - this includes when dining out or going to the pub
- only gather outdoors in a group of more than six people from different households or in larger groups if everyone is from up to two households only
- only gather in slightly larger groups of up to 30 for major life events, such as weddings
- only gather in groups of more than 30 for specific set of circumstances that will be set out in law
- only visit businesses and venues in groups of up to two households (your support bubble counts as one household) or with a group of six people from different households if outdoors
- not interact socially with anyone outside the group you are attending these places with even if you see other people you know, for example, in a restaurant, community centre or place of worship
- try to limit the number of people you see, especially over short periods of time, to keep you and them safe, and save lives - the more people you have interactions with, the more chances we give the virus to spread
- not hold or attend celebrations (such as parties) where it is difficult to maintain social distancing when gathering in the group sizes advised
- only stay overnight away from your home in groups of up to two households (your support bubble counts as one household)

³ In England, [The Health Protection \(Coronavirus, Restrictions\) \(No. 2\) \(England\) Regulations 2020](#).

- when asked, provide your contact details to a business so that you can be contacted as needed by the NHS Test and Trace programme
7. We need to 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 (and therefore shielding) 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.
 8. 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.
 9. 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 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).
 10. 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 an adult living in a single person⁵ household.

⁴ Under (in England) [Regulation 7A of the The Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#).

⁵ Technically, a single adult household, as they could have any number of children present.

D: Court of Protection?

5. The question is whether this 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 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?
7. On the face of it, 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 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. If P **is** confined, then an assessment of P's capacity would 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.
10. 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.

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](#).

11. 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 practise social distancing so as to minimise the risk to her.
12. 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). The court, however, is able to interpret 'best interests' broadly so as to encompass a risk of harm to others (see e.g. *Birmingham City Council v SR* [2019] EWCOP 28).
13. 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.
14. 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 were necessary to prevent a serious deterioration in her condition.

E: Inherent jurisdiction?

15. 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.
16. 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 it is 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: Impractical solutions

17. We flag here two solutions that are, in reality, impracticable.
18. 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 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-19.⁸
19. 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 . 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.

F: Useful resources

20. 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.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.

⁸ The Joint Committee on Human Rights has recently published a hard-hitting [report](#) on the impact of COVID-19 in the context of young people with learning disability and/or autism detained in mental health settings.

- 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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