

An update on mental capacity: a conversation with Alex Ruck Keene Wednesday 16 December 2020

Despite the world around us changing over the past nine months, the MCA remains unchanged. There have been enormous challenges faced, eg remote assessment for DoLS. There are lots of examples across different settings where people thought that the MCA was no longer applicable or isn't being used anymore. The person's best interests must be at the forefront of your mind. The MCA can handle the situation, albeit it is creaking at the seams.

There are many challenges when supporting somebody to comply with Covid guidance. There's a lack of clarity as to what is law. For example, it is guidance trying to get somebody to socially distance but, if they're refusing to self isolate when directed to so by NHS Test and Trace, then it is in principle a criminal offence.

The MCA poses real challenges, especially outside the court setting, to take into account the interests of others. In terms of the Covid vaccine, these challenges do not at present appear to arise, because it is not obvious that the vaccine prevents the spread of Covid to others, so it is about the interests of the person.

It is not always obvious that Covid testing is in the best interests of a person. If there is any suggestion that you might need to restrain an individual then you are on the very edge of what the MCA allows you to do, if the reason is to secure against the risk of harm to others. Generally it is not a good idea to test somebody if an element of restraining is involved. If it really is necessary then it needs to be in proportion to the risk of harm to others and, strictly speaking, you will need to get authority from the court.

The green vaccination handbook is out of date because it does not properly address questions of capacity. Alex's chambers have some [up-to-date guidance to use with the roll out of the Covid vaccine](#), and whether or not implied consent is acceptable, written consent is being required in care homes, primarily because this is a novel vaccine and an audit trail is needed. It is not possible, however, to have a consent form completed by somebody who doesn't know what they're doing, as it would not show anything meaningful. If a person cannot provide consent, what steps are being taken to draw up a plan to consider their best interests?

Aside from the vaccine, there is a need to ensure that people are planning/consulting and thinking properly in terms of DNACPR notices and advance planning generally. It's important to ensure that there is a proper plan in place so it is ready at a point when it might be needed, ie with a heart attack. The plan should be put in place with the person or with somebody who is interested in their welfare. There have been too many occasions where a blanket arrangement is in place, rather than being looked at on an individual basis.

If an advance decision to refuse a vaccination pre-dates the Covid era then it won't relate to the covid vaccine. However, if it was an advance decision that they won't accept *any* vaccinations (and was made with capacity) then it would be difficult to see why it wouldn't apply to the Covid vaccine. It is not obvious that a decision to refuse a vaccination is to refuse life sustaining treatment, which means it would not need to be in writing, be signed and witnessed (but how would anyone know that the person has actually made it?).

An **inherent jurisdiction** is the power of the High Court to do things to protect people who have capacity but are vulnerable. After the MCA came into being, the courts were uncomfortable differentiating between those with and those without capacity so they invented this jurisdiction for the vulnerable, especially those subject to coercive behaviour. The jurisdiction can be used if you're concerned about the exploitation of a person and you want to target the abuser. It is much less obvious it can properly be used where the intention is to move the victim away from the abuser.

Liberty Protection Safeguards (to replace DoLS from April 2022) means that it is no longer the responsibility of the local authority alone to take responsibility. The responsibility will lie with the body that is providing the care, so it could be the local authority or, if a person is being CHC funded, then it is the responsibility of the CCG. In any event, implementation of the LPS is a collective responsibility, and this is where safeguarding adults boards and local safeguarding children boards can play a very important.

There is debate around whether the LPS will be further delayed however the government has made it very clear that it wants implementation from **April 2022**, if it is possible to be ready by then. All situations where people are being unlawfully deprived of their liberty do need an application to court otherwise you are breaking the law. Making community deprivation of liberty applications are also the best preparation and training for LPS because they are requiring the same evidence; it is simply that it is routed to the court, not an internal review body.

Summary notes provided by the Norfolk Safeguarding Adults Board norfolksafeguardingadultsboard.info @NorfolkSAB

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