

# Covid and the law webinar

## 13<sup>th</sup> November 2020



Learning Disability England

**Sam Clark**

What we are hearing from our members and partners

Questions and tricky issues



**Alex Ruck Keene**

Barrister and lecturer

What does the law mean we should do or think about?

# Learning Disability England exists to make life better for and with people with Learning Disabilities and their families.

## How we work

1. Membership – for people and organisations creating stronger links together
2. Influence and campaigning – speaking up and sharing others important work
3. Solving problems together & sharing what works
4. Share information and build networks so we learn together



Learning Disability England



# What we are hearing from people



Everyone is telling us it is hard to understand the difference between what is the law and what is guidance



How do you know what decisions you can take yourself?

What happens if someone cannot make that decision?

# What we are hearing from people



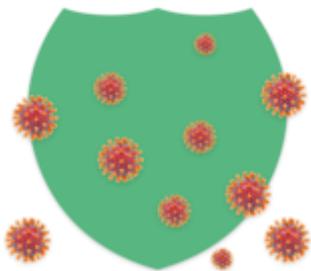
Questions people and families have asked us

Who decides if someone leaves their residential care home?



What if someone cannot self isolate because it will make them very distressed?

How can people balance the stress of not doing something with the infection risk of doing it (including football & the joy of crowds)



Must adults with Down Syndrome who are healthy otherwise stop all their work or going out?

# What we are hearing from people



Questions paid supporters have asked us

Lots of dilemmas about shared living settings -

- What if someone will not agree to a test?
- What if someone cannot make that decision on a test?
- What are the laws or guidance we must follow to help people see their family and friends?
  - If someone lives in their home
  - If someone has a tenancy in a shared house
  - If someone lives in residential care

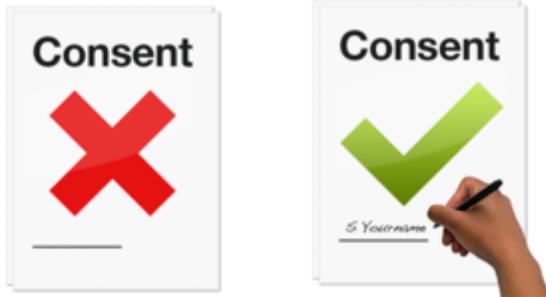
# What we are hearing from people



Lots of worry about Do Not Resuscitate (DNR) decisions

Who makes decisions on treatment?

How can we get ready for if hard decisions are needed?



# Some of the resources or places that might help

**Learning Disability England Corona hub is a collation of trusted sources from across the community**

<https://www.learningdisabilityengland.org.uk/what-we-do/keeping-informed-and-in-touch-during-coronavirus/>

**Right 2 Visit has an on line tool on visiting rights**

<https://right2visit.info/>

**Alex Ruck Keene's website has a lot of information on mental capacity law and more**

<https://www.mentalcapacitylawandpolicy.org.uk/>

**Access Charity has some open source resources for support providers on the guidance**

<https://www.accesscharity.org.uk/resources-1>

**Down Syndrome Association has information and resources for people, their families and supporters**

<https://www.downs-syndrome.org.uk/news/new-government-guidance-for-people-on-the-clinically-extremely-vulnerable-list/>

**Challenging Behaviour Foundation resources including information from the legal panel**

<https://www.challengingbehaviour.org.uk/>



Web: [www.learningdisabilityengland.org.uk/](http://www.learningdisabilityengland.org.uk/)

E mail: [info@LDEngland.org.uk](mailto:info@LDEngland.org.uk)

Twitter: @learningDisEng

Facebook: <https://www.facebook.com/learningdisabilityengland/>

# COVID-19 and the law

November 2020

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# What I can't cover

- The law in each part of the United Kingdom
- The position in relation to those under 18

## The law: remember what has NOT changed

- The Human Rights Act:
  - Human rights as a balancing act:
  - <https://knowyourhumanrights.co.uk/>
- The Equality Act
- The Mental Capacity Act
- Advocacy duties – IMCA, IMHA, Care Act

## 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 lockdown regulations and 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 and the ‘shielding’ guidance

## 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.

## Complying with guidance

- Where the person has capacity to make their own decisions, it is for them to decide what to do:
  - But e.g. the shielding guidance is there for a reason, so it means it when it says in relation to clinically extremely vulnerable people (now including adults with Down’s syndrome) “you are strongly advised to work from home. If you cannot work from home, you should not attend work for this period of restrictions.” - there may be an entitlement to support
- 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
  - And the risk to others

## 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
  - And the risk to others
  - 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

## Visiting

- Care homes and hospitals
  - Lawful under lockdown regulations (unless care home closed to visitors by Director of Public Health)
  - Care home and hospital needs to follow guidance in deciding whether to allow visitors – increasing recognition of importance of visitors
- Anywhere else
  - No specific exception to lockdown regulations in relation to visiting, in particular in relation to seeing the person inside
  - But in an outdoor public place, ban on more than 2 people being together does not count up to two carers “for a person with a disability who needs continuous care, provided that there are no more than two people present in that capacity.”

# Testing

- Basis for testing
  - Capacitous consent
  - Best interests
    - No blanket decisions
    - The responsible citizen
    - Harm to others
    - And caution where any suggestion that restraint might be required
  - Coronavirus Act or Public Health (Control of Disease) Act 1984

## Advance planning in relation to medical treatment

- Where the person currently has capacity to make decisions/participate:
  - Advance decisions to refuse treatment
  - Advance statements
  - Appointment of attorney
- Where person currently lacks capacity to make decisions/participate
  - Identification of wishes, feelings, beliefs and values
- Critical points:
  - Advance planning, including thinking about whether CPR would be appropriate, is to be done **with** not **to** the person
  - Any blanket decisions are automatically going to be unlawful
- And a ceiling of treatment does not mean a ceiling of care

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>
- <http://lpslaw.co.uk>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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