

# Legal update: the MHA/MCA interface

June 2019

## Alex Ruck Keene

Barrister, 39 Essex Chambers

Wellcome Research Fellow and Visiting Lecturer 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](mailto:alex.ruckkeene@39essex.com)

@capacitylaw

# The dread MCA/MHA interface

P is eligible for DOLS under MCA 2005 unless:

- He is detained under MHA ss 2, 4, 3, 35, 36, 37, 38, 44, 45A, 47, 48, or 51 (Case A); OR
- He is subject to s.17 leave or conditional discharge (Case B), or CTO (Case C), or guardianship (Case D), and DOLS detention would be incompatible with a MHA requirement; OR
- He could be detained under MHA ss2 or 3 and is an “objecting” “mental health patient” (Case E).
- Some examples...

# Case A

- Subject to ‘hospital treatment regime’ (MHA ss 2, 4, 3, 35, 36, 37, 38, 44, 45A, 47, 48, 51) and detained
- Cannot use DOLS
- *A NHS Trust v Dr A* [2013] EWHC 2442 (COP): Deprivation of liberty of detained patient for treatment of physical disorder

# Case B

- Subject to, but not detained under, 'hospital treatment regime' (MHA ss 2, 4, 3, 35, 36, 37, 38, 44, 45A, 47, 48, 51)
- Eg section 17 leave; conditional discharge
- Query whether can use DOLS if not incompatible with MHA, if so perverse incentive to find lack of capacity?  
*Secretary of State for Justice v MM* [2018] UKSC 60
- HM Prison and Probation Service, 'Mental Health Casework Section: Guidance: Discharge conditions that amount to deprivation of liberty' (January 2019)

# Case B – s.17 leave

- Responsible clinician may direct that the patient must remain in custody etc. But if patient lacks capacity and will be deprived of liberty in a care home, a DOLS authorisation must be obtained or COPDOL11 application in other situations
- A DOLS authorisation might also be required if leave is granted to a hospital for treatment of a physical disorder:  
*Re A* [2015] EWCOP 71

# Case C

- Subject to ‘community treatment regime’ (ie CTO)
- *Welsh Ministers v PJ* [2018] UKSC 66: no power in MHA to impose conditions on CTO amounting to confinement
- Can use DOLS if not incompatible with MHA – not addressed by Supreme Court so ? Survives but case before Hayden J at the moment

# Case D

- Subject to guardianship regime
- Can use DOLS if not incompatible with MHA: *KD v A Borough Council & Ors* [2015] UKUT 251 (AAC) (18 May 2015)

# Case E – within the scope of the MCA

1. A person with capacity cannot be detained unless under the MHA.
2. A person lacking capacity can be subject to DoLS if:
  - (a) They are detained for physical treatment (whether they object or not) *GJ v Foundation Trust* [2009] EWHC 2972; or
  - (b) They are detained for psychiatric treatment and “could” be ‘sectioned’ but do not object (or, if they do, a donee/deputy consents to what they object to) – in which case a “genuine choice” as to which is least restrictive: *AM v SLAM* [2013] UKUT 365
3. A person without capacity cannot be subject to DoLS if they are detained for psychiatric treatment, could be ‘sectioned’, and are ‘objecting’



# The Mental Capacity (Amendment) Act 2019 in one slide

- Body of the Act:
  - Revised s.4B – court approval, replacement for urgent DOLS and emergency
  - Provisions relating to Court of Protection
- Schedule AA1: The Liberty Protection Safeguards
  - Setting neutral and more than one setting
  - From age 16
  - Authorisation by responsible body – NHS for CCG/hospitals, LA for all other cases (including self-funders and independent hospitals). Potential for delegation of some tasks to care home managers in some cases
  - Conditions: capacity, mental disorder and necessity and proportionality
  - Additional scrutiny by AMCP in ‘objection’ cases (and independent hospitals)
  - Representation and support by appropriate person/advocate (but latter on ‘all reasonable steps’ basis)
  - Provisions for variation, review and renewal (1 year, 1 year then up to 3 years)
  - (Broadly) the same division between the MCA and MHA as under DOLS

# Interface

- LPS **cannot** be used for
  - “Mental health arrangements” for in-patient treatment for mental disorder to which person objects (as with DoLS) (para 47) (but subject to LD exception)
  - Arrangements which conflict with “Mental Health Requirements” (e.g. s17 leave, guardianship, CTO, conditional discharge)
- LPS **could be used** for in-patient admission where patient does not object or where LD exception in MHA applies
- **New:** could have LPS alongside MH detention for additional deprivation of liberty to which patient subject for physical health treatment – e.g. *Dr A* case.

# Where next?

- Best understanding that implementation by no earlier than autumn 2020
- Regulations required – e.g. as to knowledge and experience required for assessors
- Code of Practice – in parallel or as part of new single Code (main Code also under review)
- Transition arrangements

# MHA interface

- Independent Review of MHA reported December 2018
  - Recommended that only LPS could be used where no objection to admission and person lacking capacity (but only if LPS also enabled deprivation of liberty on basis of risk of harm to others)
  - Also ‘confidence tests’ for move towards fusion of MCA and MCA
- Government committed to legislation –
  - Definite ‘yes’ to advance choice documents and replacement of nearest relative with nominated person
  - Response to other recommendations awaited

# Keeping yourself up-to-date

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

