

Coronavirus – new legislation and guidance relevant to practitioners working with the Mental Health Act and the Mental Capacity Act

We are seeing an unprecedented situation in the Mental Health Act and the Mental Capacity Act, which central Government, the NHS and courts are responding to with speed.

24 March 2020

Please note: the information contained in this legal update is correct as of the original date of publication

We are seeing an unprecedented situation, which central Government, the NHS and courts are responding to with speed. Some of the key aspects of the Health Protection (Coronavirus) Regulations 2020 (the Regulations) and the Coronavirus Bill (the latter currently going through Parliament) are set out below, as well as information and guidance we have seen relating regarding the operation of the Mental Capacity Act and Mental Health Act. We do not summarise here the extensive regulatory changes being made for the emergency registration of medical and social care practitioners, nor the changes to registration of deaths.

Needless to say, at the moment with the ever-changing picture any update may soon be out of date, so please do contact us directly with your questions and queries if you need to. The Bill has already had its first reading, with the second reading taking place on 23 March. Needless to say, it is expected to be passed into law quickly.

The Health Protection (Coronavirus) Regulations 2020

Where a person is infected, and poses a risk to others the new Coronavirus Regulations include powers of detention 'for the purposes of screening, assessment and the imposition of any restrictions or requirements under regulation 5' where 'the Secretary of State or a registered public health consultant has reasonable grounds to believe that P is, or may be, infected or contaminated with Coronavirus' and 'the Secretary of State or a registered public health consultant considers that there is a risk that P might infect or contaminate others.' Restrictions under 'regulation 5' include measures that 'a registered public health consultant considers necessary for the purposes of removing or reducing the risk'. Under the regulations, those who 'without reasonable excuse' fail to comply with a restriction have committed an offence (s15).

A "registered public health consultant" in the Coronavirus Legislation (which can be [found here](#)), this is not any registered Doctor. The "registered public health consultant" means a professionally registered public health consultant working within Public Health England. They are specialists who hold a post as a Consultant. Each region has a team of Consultants who can be contacted.

There is some useful information on the Public Health England website and below are the general links for the emergency contacts, and below the one specifically for our region for you to get in touch with. You'll see there are specific Coronavirus help pages on their website.

[Public Health England Emergency Contact:](#)

Healthcare professionals who wish to discuss or obtain advice on a general health protection or public health matter, report a local notifiable disease, outbreak of infection or have a vaccination enquiry out of office hours, should contact their local Public Health England team.

There is also a page of guidance for clinical settings, the booklets of which can be [found here](#): who can be a Public Health consultant and the length of time a person can be detained is being extended by the Coronavirus Bill currently before Parliament.

Mental Health Tribunal guidance

Pilot Practice Direction; Health, Education and Social Care Chamber of the First Tier Tribunal (Mental Health) 20/3/20

This guidance confirms that during the Covid-19 pandemic, it may be necessary for tribunals to adjust their ways of working to limit the spread of the virus and manage their workloads appropriately. The Practice Direction has been issued on a pilot basis for a period of six months initially at which point it will be reviewed.

Composition of Tribunal panel

While this Pilot Practice Direction remains in force, the provisions of the Composition Statement that apply to mental health cases shall be amended so that a judge alone shall make every decision (including decisions that dispose of proceedings) unless the Chamber President, Deputy Chamber President or such other salaried judge as may be authorised by the Chamber President or Deputy Chamber President, considers it to be inappropriate in a particular case, in which event a two or three person Panel may make the decision.

Hearings on the papers

In cases where a reference has been made under section 68 of the Mental Health Act 1983 or the patient is a community patient aged 18 or over, patients and representatives will be encouraged to consider agreeing to the proceedings being dealt with on the papers, unless, having regard to the overriding objective, this is considered to be inappropriate.

Pre-hearing Assessments

During the Covid-19 pandemic it will not be 'practicable' under rule 34 of the 2008 Rules for any PHE examinations to take place, due to the health risk such examinations present. Therefore, all PHEs will be suspended.

Involvement of Non-Legal Members not on a panel

The tribunal Judge may seek the advice of one or more non-legal members to assist with its decision-making, provided the advice is recorded and disclosed to the parties.

Court of Protection Guidance

The Vice President of the Court of Protection, Mr Justice Hayden has published some guidance for Court of Protection users which highlights the following measures to address the current issues:

- Hearings with time estimates of two hours or less will be conducted by telephone – those with a time estimate of more than two hours will in principle proceed
- The likelihood is there will be an increase in the number of hearings conducted remotely either in whole or in part
- Assessments of capacity in principle could be undertaken by video and otherwise older assessments could be relied upon
- An "invigorated determination" to ensure directions are agreed wherever possible
- Provisions for accepting electronic signatures on court documentation

The Coronavirus Bill

The Coronavirus Bill, to be laid before Parliament on 23 March, will enable action in five key areas including increasing the available health and social care workforce and easing the burden on frontline staff.

You can access the full bill at the [following link](#).

It will also allow NHS providers (at s.13 of the Bill) to delay undertaking assessment process for NHS continuing healthcare for individuals being discharged from hospital.

Sch 7 makes amendments to the Mental Health Act. There is no amendment to Mental Capacity legislation in England and Wales at the current time.

Sch 7, s3(1) Existing mental health legislation will be amended to enable the detention and treatment of patients who need urgent treatment for a mental health disorder under s.2 or 3 MHA, to be implemented using just one doctor's opinion (rather than two at present). However, there is a requirement that "the professional considers that compliance with the requirement under that section for the recommendations of two practitioners is impractical or would involve undesirable delay" and must be supported by a statement to that effect (s3(3)).

The Bill will also seek to temporarily allow extension or removal of time limits in mental health legislation to allow for greater flexibility:

Sch 7, 4 (2) S.5(2) detention extended to 120 from 72 hours

Sch 7, 4(3) S.5(4) detention extended to 12 hours from 6.

Sch 7, 5 Sections 35(7) (period of remand to hospital for report on mental condition) and 36(6) (period of remand to hospital for treatment) have effect as if the words "or for more than 12 weeks in all" were omitted.

Sch 7, 6 Powers of the courts to remand are also extended to allow reliance on one medical opinion rather than 2. There are also longer transfer periods permitted for arriving in hospital.

Sch 7.9A doctor will no longer need a SOAD to agree before continuing to authorise treatment that a patient does not consent to.

Sch 7, 10 s.135 and 136 extended to 36 hours from 24.

Although there are no explicit provisions in relation to the Mental Capacity Act, Schedule 20 of the Bill (which effectively subsumes The Health Protection (Coronavirus) Regulations 2020 referred to above which will be revoked when the Bill becomes law) allows for 'detention' for assessment, screening and isolation in order to address the coronavirus outbreak and as such would be expected to fall under ECHR Article 5(1)(e), i.e. lawful detention "for the prevention of spreading infectious diseases".

There of course remains the challenge of making arrangements for the care and support of people who lack capacity who display symptoms and so should self-isolate or in dealing with a shortage of carers who have fallen ill and themselves are having to self-isolate. Likewise, it isn't yet clear whether where patients detained under the MHA are forced to self-isolate, there can be a departure from the guidance on seclusion.

Summary

The Coronavirus Bill and the above guidance has been understandably brought in with haste to, among other things, help the health and social care sector deal with the coronavirus crisis. It is important to remember that the Bill is a temporary legislative measure which lasts only 2 years (which some MPs are arguing should be reduced to 1 year) and has been drafted in order to protect public safety in the short-term.

The Tribunal and Court of Protection guidance recognises the pressures not only on the court but also on those working in the health and social care sector themselves. The crucial issue being to maximising staff available and to support the NHS's core and frontline services.

More broadly, practical issues are bound to arise in circumstances where someone who may lack capacity and is living in a care home or supported living environment needs to self-isolate, but at the same time requires extensive levels of support for their day to day activities. Needless to say, every case will need to be considered on a case by case basis. However, in terms of associated issues around seclusion and deprivation of liberty, the Bill in essence provides a public health basis on which an individual's Article 5 rights can be interfered with. It goes without saying that practitioners should ensure that any decisions taken in relation to assessment, isolation or treatment of someone who does or may have coronavirus should be very carefully recorded and discussed with the person themselves and all those with an interest in their welfare if they may lack capacity.

Our team of MHA, MCA and Court of Protection specialists can advise on the wide range of issues that may arise in this challenging landscape.

Contact

Mark Barnett

Partner

mark.barnett@brownejacobson.com

+44 (0)330 045 2515

Related expertise

Deprivation of liberty