

Covid-19, the MCA, DoLS and Best Interests: RAPID READ

The DHSC guidance on the application of the MCA and DoLS during Covid-19 states that the principles of the MCA, and the safeguards provided by DoLS, still apply in full. You should continue to apply the Five Principles of the MCA in making care and treatment decisions for those people who lack the mental capacity to do so for themselves.

In all instances, respect and reasonableness should be used as the fundamental, underpinning principles that guide planning and support judgments.

Considerations Around Life-Saving Treatment

These remain unchanged, as follows:

- Where life-saving treatment is being provided, including for Covid-19, the person will not be deprived of liberty as long as their treatment is the same as would normally be given to any person without a mental disorder
- If a person has advance care planning arrangements in place, these should be considered, and any wishes expressed in them taken into account
- Life-saving treatment cannot be given if it is contrary to a person's valid and applicable advance decision to refuse treatment
- An attorney appointed under a Lasting Power of Attorney for health and welfare can only give consent or refuse life-saving treatment on behalf of the donor if the instrument specifically states that the attorney should have this authority

Matters of Judgment: Being Proportionate

During Covid-19, it may be necessary to change the usual care and treatment arrangements of someone who lacks the mental capacity to consent to such changes, for example by:

- imposing social distancing, including through the use of appropriate measures
- restricting movement and imposing isolation

This will not usually constitute a deprivation of liberty, and a DoLS application will not be needed. The Annex A Flowchart can help you determine if a DoLS is needed; if an application *is* necessary, use the shortened urgent authorisation form (see 'Useful Resources' for links).

If measures are needed beyond those that would be imposed for a person without a mental disorder, the 'acid test' may need to be considered.

Making Best Interests Decisions During Covid-19

Best interests decisions will need to be made in a number of situations, including:

- Patient discharge settings: Options are currently reduced, so you must make a best interests decision considering the available options
- Self-isolation and social distancing: Decisions must be based on the person's individual circumstances

In deciding whether to test for Covid-19, you should consider all relevant factors, including:

- the person's wishes, beliefs and values, and the views of their family
- that targeted treatment can improve or save lives
- that testing an asymptomatic patient at risk of infection can identify infection earlier and improve outcomes

Alternatives to Face-to-Face Contact

The DHSC guidance states that a DoLS assessor should not visit a care setting unless a face-to-face visit is essential, and that previous assessments can be used to inform new ones.

An assessment carried out within the last 12 months may be relied upon without a further assessment, provided the supervisory body is satisfied that there is no reason why that assessment may no longer be valid. Bear in mind that:

- great care should be taken in using previous assessments: this should not be done routinely, or without considering all other available options
- an assessment carried out over 12 months ago can be used to inform a new assessment, although the older the existing assessment, the less likely it is to be valid
- it may not be appropriate to use previous best interests or capacity assessments again, because they can be more time and context-specific than the others

The Social Care Institute for Excellence (SCIE) has published practical guidance to help assessors to work at distance, and to use alternative sources of information when face-to-face opportunities are limited. It emphasises the need to:

- set review dates
- make a note in the assessment of the restrictions on visiting the person
- keep a record of how information was obtained, and assessments completed
- record cases where an older assessment (within the previous 12 months) is being relied upon instead of a new assessment being carried out

The Right to Appeal

Coronavirus Act 2020 restrictions on potentially infectious individuals will rarely need to be applied when someone lacks relevant mental capacity: the MCA (and in some cases the MHA) provide a legal basis for decision making on Covid-19 testing and movement restrictions for anyone who has, or is suspected to have, the virus.

If the restrictions of the Act *are* applied, the person affected may appeal to a magistrates' court. If they lack capacity, an appeal may need to be made on their behalf, even if the person is not objecting or does not appear to understand that they can make a challenge.

A Final Word

The DHSC guidance on caring for people during the pandemic states that: "... as long as providers can demonstrate that they are providing good quality care and/or treatment for individuals, and they are following the principles of the MCA and Code of Practice, then they have done everything that can be reasonably expected in the circumstances to protect the person's human rights."

USEFUL RESOURCES

Chelle Farnan's Bite-Size presentation offers a very useful overview of the issues around MCA and DoLS during the Covid-19 pandemic: <https://www.youtube.com/watch?v=y0ghfCPSOr0>

The *National Mental Capacity Forum* also has a series of useful webinar recordings: <https://autonomy.essex.ac.uk/covid-19/>

The *Beyond Words* series of books and videos is invaluable, and covers many very difficult topics in an accessible pictorial format, especially useful for supporting Principle 2 of the MCA: <https://booksbeyondwords.co.uk/coping-with-coronavirus>

Alex Ruck Keene and Camilla Parker have written useful practice guidance on deprivation of liberty and 16-17-year olds. Published by Research in Practice, it is free to access:

https://www.researchinpractice.org.uk/media/4006/joint_deprivation-of-liberty-and-young-people_web.pdf

Alex and Camilla have also produced a useful walk-through of the above guidance:

<https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-and-16-17-year-olds-shedinar/>

There are also some excellent MCA resources on *FutureNHS*. If you need the link, please email: england.safeguarding@nhs.net

Government Publications

Key Issues and Sources for Health and Social Care

This *Commons Library Briefing* provides an overview of the key issues facing the NHS and social care services during the Covid-19 outbreak. It contains links to official UK and international guidance and data, and lists other reliable sources of information in the health and social care sector: <https://commonslibrary.parliament.uk/research-briefings/cbp-8887/>

The DHSC's *The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) during the coronavirus (Covid-19) pandemic* has information on best interests decisions and life-saving treatment: <https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic>

The Office of the Public Guardian helps people stay in control of decisions about their health and finances, and make important decisions for others who cannot make them for themselves. Their website includes lots of links to useful information about lasting powers of attorney:

<https://www.gov.uk/government/organisations/office-of-the-public-guardian>

Adult Social Care

Coronavirus (Covid-19): reducing risk in adult social care provides a framework for employers in adult social care, aimed at reducing risk to their workforce during the pandemic: <https://www.gov.uk/government/publications/coronavirus-covid-19-reducing-risk-in-adult-social-care>

The DHSC'S *Responding to Covid-19, The Ethical Framework for Adult Social Care* offers a planning and organisation framework for strategic policy makers at local, regional and national level:

<https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care>

Providing Home Care

Coronavirus (COVID-19): providing home care provides guidance for those who support and deliver care to people living in their own homes: https://www.gov.uk/government/publications/coronavirus-covid-19-providing-home-care?utm_source=ccac70cb-8dfd-4f27-a013-aa369a4ff844&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

DoLS Applications

The Annex A decision-making flowchart helps decision-makers determine whether a DoLS application is necessary: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895702/annex-a-decision-making-flowchart.pdf

The DoLS Urgent Authorisation Form can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892408/Annex_B_DoLS_urgent_authorisation_form_Covid19.odt

Social Care Institute for Excellence

The SCIE's *Covid-19 resource and best practice hub* includes practice guidance and examples, learning resources, webinars, curated research, policy and official guidance: <https://www.scie.org.uk/care-providers/coronavirus-covid-19/hub/search>

Coronavirus (COVID-19) advice for social care emphasises the need for keeping excellent written records: <https://www.scie.org.uk/care-providers/coronavirus-covid-19/mca>

There is also a webpage on best interests decisions: <https://www.scie.org.uk/care-providers/coronavirus-covid-19/mca/best-interests-decisions>

Care Quality Commission

Working within the Mental Capacity Act during the coronavirus pandemic gives an overview of coronavirus restrictions and the impact of the Coronavirus Act 2020: <https://www.cqc.org.uk/guidance-providers/all-services/working-within-mental-capacity-act-during-coronavirus-pandemic>

Deprivation of Liberty Safeguards (DoLS) during Covid-19 provides an overview of how the CQC is monitoring the MCA and people subject to DoLS during Covid-19: <https://medium.com/@CareQualityComm/deprivation-of-liberty-safeguards-dols-during-covid-19-b30b8463afac>

Innovation and inspiration: how providers are responding to coronavirus (Covid-19) shares examples from health and care providers from all sectors showing how they have innovated and adapted their working practices to respond to the challenges of dealing with Covid-19: <https://www.cqc.org.uk/publications/innovation-inspiration-examples-how-providers-are-responding-coronavirus-covid-19>

Advice on applying social distancing and the use of sedative medicines to enforce: <https://www.cqc.org.uk/guidance-providers/adult-social-care/inappropriate-use-sedative-medicines-enforce-social-distancing>

Sources of Support

Shout is the UK's first 24/7 crisis text service. It is free on all major mobile networks, to anyone in crisis who needs immediate support. Social care staff who are struggling to cope and need support can send a message with 'FRONTLINE' to 85258 to start a conversation: <https://www.giveusashout.org/>

The new CARE Workforce app has been developed to support the adult social care workforce during the Covid-19 pandemic. Developed by NHSX and NHS Business Services Authority, it acts as a single digital hub to provide social care workers with updates, guidance, support and discounts: <https://www.gov.uk/government/news/dedicated-app-for-social-care-workers-launched>